

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

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TO: Commissioners and Alternates
FROM: Lawrence J. Goldzband, Executive Director (415/352-3653 lgoldzband@bcdc.ca.gov)
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SUBJECT: Staff Summary Report and Preliminary Recommendation for Certification of the Solano County Component of the Suisun Marsh Local Protection Component
(For Commission consideration on December 6, 2012)

Preliminary Staff Recommendation Summary

The staff preliminarily recommends that the Commission:

1. Certify the amended Solano County Component of the Suisun Marsh Local Protection Program Component (LPP); and
2. Direct the staff and Commissioner Strategic Planning Working Group to consider as part of the upcoming BCDC strategic plan a comprehensive review of the Suisun Marsh Protection Plan to address the wide variety of emerging issues in the Marsh including, but not limited to, energy, jurisdictional issues and transportation development.

Background

History of the Solano County LPP. On November 4, 1982, BCDC certified the Solano County Component of the LPP. On February 2, 1999, the Commission certified an amendment to the County's LPP component in connection with the Montezuma Wetlands project.

The current Solano County LPP is comprised of portions of the County's General Plan and Solano County Code, including the Zoning Code (Chapter 28), Drainage and Flood Control (Chapter 9), and Grading and Erosion Control (Chapter 31), as these existed in 1982 or 1999. However, in 2007, the County repealed Chapter 9 of the Solano County Code and consolidated the provisions of that chapter into a revised Chapter 31 (Grading, Drainage, Land Leveling, and Erosion Control) of the County Code. This change was not submitted to BCDC for certification so it is not part of the County's LPP component.

In 2008, the County adopted a comprehensive update to the Solano County General Plan, superseding most elements of the prior General Plan. Further, in February 2012, the County adopted a comprehensive update to Chapter 28 of the County Code, repealing the prior version of that chapter. BCDC Staff worked with the County staff during 2008 to determine the consistency of proposed General Plan policies with the *Suisun Marsh Preservation Act* (Marsh Act) and the *Suisun Marsh Protection Plan* (Marsh Plan). Some changes were made. The new General Plan included both new policies for the Primary and Secondary Management Areas of the Suisun Marsh, and the previously certified LPP Component. The General Plan included a policy stating that any inconsistencies between new policies and certified policies would be resolved in favor of the certified LPP policies. Following adoption of the General Plan, the County worked with BCDC staff to amend the *San Francisco Bay Plan* (Bay Plan) and *Suisun Marsh Protection Plan* to reduce the size of the water-related industry priority use area at Collinsville, to craft zoning ordinances to implement the General Plan, and to modify recently adopted General Plan policies so that the LPP policies would be consistent with the Marsh Act and Marsh Plan.



Making San Francisco Bay Better

BCDC contracted with the County to cover its costs of amending the Bay Plan and Marsh Plan and for its analysis and certification of the amended LPP component. On July 7, 2011, the Commission adopted Bay Plan Amendment 1-10 amending Bay Plan Map 3, the Marsh Plan findings and policies regarding water-related industry, the Marsh Plan maps, and the Resolution 16 boundaries of the water-related industrial priority use designation at Collinsville. The amendment ensured that County and BCDC policies on the location and size of the water-related industrial priority use area at Collinsville were consistent.

Staff Summary

Procedural History and Content of 2012 Amendment. On August 28, 2012, the Solano County Board of Supervisors adopted an amendment to the County's LPP Component. This 2012 LPP Amendment incorporates the 2008 General Plan update and the adoption of Zoning Code text amendments addressing Definitions, Limited Agriculture District, Residential Traditional Community District, Commercial Recreation District, Water Dependent Industrial District, and Land Use Regulations; amends Chapter 31 addressing grading, drainage, land leveling and erosion control; replaces Chapter 6.4 of the County Code regulating sewage disposal systems with revisions to County policy regulating sewage disposal systems within the Suisun Marsh; and amends the Zoning maps relating to the Water Related Industrial Reserve Area around Collinsville and in the secondary management area consistent with the 2008 General Plan.

The County circulated the Draft 2012 Amendment for public comment prior to the June 21, 2012 Solano County Planning Commission meeting. Following a public comment period, the Planning Commission held a public hearing and forwarded its recommendation to the Board of Supervisors on the amendment. The Solano County Board of Supervisors adopted the amended LPP on August 28, 2012, and submitted it to BCDC for certification on September 28, 2012. On October 5, 2012, BCDC staff circulated copies of the County's LPP component amendments to all Commissioners, Alternates, interested parties, and pursuant to Commission Regulation 11202, requested comments regarding the proposed amendments and their consistency with the Marsh Act, Marsh Plan and Bay Plan.

Issues Raised. BCDC staff has identified two outstanding issues, which staff believes to be inconsistent with the Suisun Marsh Protection Plan, including policies that allow wireless communication facilities and commercial wind development.

Wireless Communication Facilities. BCDC expressed concerns to Solano County about the LPP policy that would allow additional cellphone towers in the Secondary Management area. The "Table of Allowed Uses" for the Suisun Marsh Agricultural District contained in the 2012 Amendment to the LPP categorizes towers for a wireless communication facility as an allowed use. Staff believes that additional towers would be inconsistent with the Marsh Act and Plan; specifically with Environment Finding 9 and Policy 3, Utilities and Facilities Policy 1(b), and Land Use Finding 10 and Policy 10 because the findings and policies state that the upland areas adjacent to the Marsh function as a buffer and are also critical to its protection, that these areas should be protected and enhanced where possible, and thus should not be developed. These policies call for the land to be maintained in agricultural and existing uses, and that their function as a buffer should not be compromised by further development. Moreover, it is inconsistent with policies contained within the local component itself: Utilities, Facilities and Transportation Policy SM.P-26(b) of the local component is identical to the Utilities and Facilities Policy 1(b) of the Marsh Plan, and reads in relevant part as follows:

Urban utilities and public services (e.g. natural gas lines, electric lines for local power distribution, domestic water mains and sewers) should be allowed to extend into the Suisun Marsh and the adjacent upland area necessary to protect the marsh, only to serve existing uses and other uses consistent with protection of the Marsh, such as agriculture.

These policies clearly state that new utilities for uses outside of the Marsh are not appropriate within the Marsh. BCDC therefore encouraged removal of this policy, because cellphone towers have already degraded the visual character of the Marsh and further towers would only continue to degrade the views and visual characteristics of the Marsh. The County, in turn, proposed that the policy be retained because the LPP provides adequate protections to preserve the visual characteristics of the Marsh.

Cellphone towers and other wireless communication facilities did not exist when the Marsh Plan was written and the LPP was first certified, so these types of uses were not contemplated by the Marsh Plan or the LPP. In addition, the people living, working and recreating in the Marsh are all now cellphone users, so on that basis the addition of certain wireless communication facilities to serve this existing use could be consistent with the Marsh Plan, so long as the County implements its policies and ordinances in a way that protects marsh wildlife and aesthetics.

The policies in the LPP place sufficient emphasis on the unique visual nature of the Marsh, and if properly applied should adequately protect the visual characteristics of the Marsh. For example, SM.P-48 states “[e]xisting habitats should be protected from encroachment due to their own visual value and their role in maintaining the marsh ecosystem and its overall scenic value.” Given this emphasis on the value inherent in maintaining the visual character of the Marsh, staff believes that any inconsistencies created by the wireless communication facilities policies have been resolved.

Commercial Wind Energy Policy. The 1982 LPP contains Utilities, Facilities and Transportation policy 10 which allows for wind energy development in the Secondary Management Area of the Marsh. As explained in detail above, the County prepared a draft amendment to its LPP component and released it for public review in May 2010. In the 2010 draft, the County proposed changes to the wind energy policy, including changing the location identified as the primary wind resource area in the County, and clarifying that wind energy development is inappropriate in the Primary Management Area of the Suisun Marsh. These changes triggered a BCDC staff consultation with the California Department of Fish and Game (Department), the US Fish and Wildlife Service (FWS), the Suisun Resource Conservation District (SRCD), and the California Natural Resources Agency, pursuant to the requirements of the Marsh Act and Marsh Plan.

Initially, BCDC staff sought direction from the Department on ways to strengthen the existing policy that allows development of commercial wind energy facilities in the Marsh under certain conditions. Since the Commission certified the policy 30 years ago, in 1982, considerable new scientific information about the impacts of commercial power windmills on wildlife has been published. However, the Department recommended that the LPP be amended to preclude wind development in the Secondary Management Area of the Marsh. In its letter transmitted directly to the County, the Department objected to wind development in the Marsh because, in part, it “could alter the use and migration patterns of both migratory and resident bird species and bats.”

Based on various scientific studies of wind developments in the Montezuma Hills of Solano County, the Department concluded that “if commercial wind energy was allowed to be developed in any portion of the Secondary Areas surrounding the Suisun Marsh, the number of water bird and waterfowl strikes would likely increase to levels higher than in the wind farms in the adjacent Montezuma Hills.” The US Fish and Wildlife Service expressed similar concerns, and noted that permits were not currently available for “taking” of migratory birds under the Migratory Bird Treaty Act. From consultations with the SRCD staff, BCDC learned that they would be recommending that the SRCD Board oppose retention of the wind energy policy in the LPP. Despite the State of California’s goal of reaching 33 percent renewable energy by 2020, the state Natural Resources Agency, in consultation with the California Energy Commission and the Governor’s office, supported the determination of the Department opposing wind development in the Marsh.

Recent studies and reports indicate that the Suisun Marsh continues to provide uniquely valuable wildlife habitat used by an array of species. The Marsh provides essential habitat for more than 221 bird species, 45 animal species, 16 different reptilian and amphibian species, and more than 40 fish species (Interagency Ecological Program of California 2011). The mix of freshwater and brackish marsh habitats enables the Marsh to support nearly every wetland bird species that occurs in the region.

The *California Guidelines for Reducing Impacts to Birds and Bats from Wind Energy Development* (California Guidelines) were produced by the California Department of Fish and Game and the California Energy Commission in 2007 to encourage the development of wind energy in the state while minimizing impacts to birds and bats. The California Guidelines state, in part:

Californians have...high expectations for protection of the state’s diverse bird and bat populations. Optimal development of the state’s wind energy resources requires adequate measures to avoid, minimize, and mitigate potential impacts to these populations.

The FWS also has developed voluntary *Land-based Wind Energy Guidelines* (FWS Guidelines) to address risks to species of concern. FWS is charged with implementing statutes, including the Endangered Species Act, Migratory Bird Treaty Act, and Bald and Golden Eagle Protection Act. These statutes prohibit taking of federally listed species, unless otherwise authorized. The Migratory Bird Treaty Act has no provision for killing birds.

The Guidelines state that project sites with high or uncertain potential for wildlife impacts include the following:

- Known avian migration stopover destinations such as water bodies within or immediately adjacent to the project;
- Special-status species occurring on or adjacent to a proposed site;
- High concentrations of wintering and/or breeding raptors; and
- Sites near or contiguous to wind projects that have experienced high bird or bat fatalities that cannot be avoided or minimized.

The Marsh is well known as a location that meets these criteria.

- **Avian Migration Stopover.** As a key waterfowl wintering area in the Pacific Flyway, the Suisun Marsh supports, on average (1953-1995), approximately 215,000 waterfowl throughout the winter (Suisun Ecological Workgroup 2001).
- **Special Status Species.** Special-status bird species that may use managed wetlands of the Suisun Marsh are California black rail, Suisun song sparrow, and salt marsh common yellowthroat (U.S. Bureau of Reclamation et al. 2010). The number of California black rails in the Suisun Marsh and in the adjacent Carquinez Strait rivals that of San Pablo Bay to the west, which holds about half the global population of the taxon (Evens and Nur, in press). The endemic Suisun song sparrow has essentially its entire global population (c. 20-50,000 individuals) within the Suisun Marsh, and it is believed to be the only area in the world where the salt marsh common yellowthroat, another Bay-Area endemic, is common (Nur et al. 1997).
- **Wintering or Breeding Raptors.** Raptors, including northern harrier, short-eared owl, white-tailed kite, Swainson's hawk, and western burrowing owl, are known to breed in suitable habitats in the Suisun Marsh (U.S. Bureau of Reclamation et al. 2010). Golden eagles have nested recently in the Potrero Hills north of Grizzly Island (National Audubon Society 2011).
- **High Impacts at Nearby Wind Projects.** The Suisun Marsh is also located "near or contiguous to wind projects that have experienced high bird or bat fatalities that cannot be avoided or minimized." The California Energy Commission reports, "In Solano County, the large wind turbines are killing birds at a high rate and studies have shown that bat carcasses are being observed at a much higher rate previously not seen in California" (Dorin and Spiegel 2005). A recent report found that the Sacramento Municipal Utility District (SMUD) wind farm, located east of the Suisun Marsh in the Montezuma Hills near Rio Vista, had the second highest raptor mortality rate of 28 North American projects reviewed (National Wind Coordinating Collaborative, 2010). In addition, the High Winds project, also located in the Montezuma Hills near Rio Vista, had higher than average bat mortality rates (Barclay et al., 2007).

For all of the above reasons, BCDC staff recommended that the County consider removing the existing wind policy from the LPP. Moreover, if the County chose to amend the wind policy in the LPP, BCDC argued that they would need to prepare an EIR.

As noted above, the Solano County LPP has included a policy addressing wind energy development in the Secondary Management Area for almost 30 years. After considering all the input from BCDC staff, the Department, the SRCD and stakeholders, as well as Marsh landowners who support retaining the policy, the County decided to retain the policy in the LPP unaltered. Pursuant to the Marsh Act, BCDC cannot require any modification of any previously certified LPP policy, without ratification by the Legislature.

The procedure in place for the Commission to induce a change in the LPP is codified in Public Resources Code Section 29202, wherein the Commission is given the authority to amend the protection plan by resolution¹. The County must then be notified of any changes they must make to their LPP in order to be in compliance with the updated Marsh Plan. If the County agrees to comply with the amendment, the County is then given one year to bring their LPP into conformity with the amended protection plan. If the County objects to the amendment to the plan, then the Commission can go to the legislature for approval of the amendment². The County will then have to bring their LPP into compliance.

Staff recommends that the Commission certify the LPP as submitted, but then undertake a comprehensive amendment to the Marsh Plan to address a number of emerging issues, and to consider excluding commercial wind development in the Suisun Marsh.

Status of the Marsh Plan. The *Suisun Marsh Protection Plan* has not undergone a comprehensive review since its adoption 35 years ago by the Legislature. The Commission has undertaken targeted amendments to address specific issues, such as the 2007 update to the managed wetlands policies. Over time, changes in state law, technology and environmental conditions have created a need for a comprehensive update to the Marsh Plan.

The recent legislation creating the Delta Stewardship Council (Council) gave the Council jurisdiction over the Delta and defined the Delta as including the Suisun Marsh. The Council is preparing the Delta Stewardship Plan, a comprehensive management plan for the Sacramento-San Joaquin Delta. This Delta Plan will guide state and local agencies to help achieve the coequal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem, including the Marsh. The Delta Plan will also guide protection and enhancement of the unique resources, culture, and values of the Delta as an evolving place. The Commission and its staff have been tracking and commenting on the evolving drafts of the Delta Plan, and the draft plan includes provisions that call for the Commission to update the Marsh Plan to address climate change.

The US Fish and Wildlife Service, NOAA's National Marine Fisheries Service, the Department, the SRCD, the US Bureau of Reclamation and the California Department of Water Resources have completed the *Suisun Marsh Habitat Management, Preservation, and Restoration Plan* (SMHMPPR) to address resource agency concerns about environmental impacts from ongoing management activities of duck clubs in the Marsh. The SMHMPPR includes provisions that constrain the management activities of duck clubs beyond that which is provided for in the Marsh Plan. The Commission staff and the SRCD are currently working on a comprehensive update to the SRCD's LPP component based on the SMHMPPR, which will require Commission certification. Similarly, the USFWS plans to submit a consistency determination for the SMHMPPR to the Commission early in 2013.

As discussed in detail above, the current commercial wind energy development policy in the County's LPP raises serious concerns about the consistency of such development with the fundamental policy objectives of the *Suisun Marsh Preservation Act* and the Marsh Plan. This along with the issues discussed above create the need for a comprehensive evaluation and update to the Marsh Plan. The staff recommends that the Commission integrate such an effort into its new Strategic Plan.

Summary of Environmental Documentation Prepared by County. Solano County prepared an Environmental Impact Report for the 2008 General Plan update and issued a Negative Declaration for the 2012 Amendment to the Local Protection Program.

The Environmental Impact Report for the 2008 General Plan update can be found on the Solano County website here: http://www.co.solano.ca.us/depts/rm/planning/general_plan.asp

¹ Public Resources Code Section 29202(a) states "Consistent with this division, the commission may amend the protection plan. Such amendments shall be made by resolution of the commission adopted after a public hearing on the proposed change, of which adequate descriptive notice shall be given. Such descriptive notice shall include a general description of the changes, if any, that would be required in the certified local protection program."

² Public Resources Code Section 29202(c) states that "[n]o amendment to the policies of the protection plan that will require a change in the local protection program as it applies to the marsh...shall be effective until approved by the Legislature by statute if, within the 90-day period provided in subdivision (a), the local government having jurisdiction over any such area objects to such amendment in writing to the commission."

The Final Environmental Impact Report (FEIR) for the Solano County General Plan 2008 Update stated that the development and establishment of wind turbines in Solano County “could cause significant mortality of special-status bats and raptors as well as other migratory and resident birds.” The General Plan FEIR found that this impact would be less than significant with mitigation measures.

However, the 2011 Draft EIR for the Shiloh IV Wind Energy Project (Solano County, 2011), which evaluates the cumulative impact of over 500 commercial wind turbines operating in the Montezuma Hills Wind Resource Area region adjacent to the eastern border of the Suisun Marsh, concludes that the project would have significant cumulative impacts related to special-status birds, raptors and bats that could not be mitigated.

BCDC staff believes that the impacts of wind energy projects in the Marsh would be even more difficult to mitigate because the Marsh contains unusually valuable habitat and hosts large populations of a wide range of species, including birds protected under the state and federal endangered species acts, and the federal Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act. As the wind energy projects proliferate in the designated Montezuma Hills Wind Resource Area, conservation of the secondary management area has become increasingly important, particularly to ensure conservation of migratory birds and raptors, such as nesting golden eagles. As stated above, the Migratory Bird Treaty Act and the Bald and Golden Eagle Protection Act have no provisions for “take.”

The documents relating to the Negative Declaration for the 2012 Amendment to the Local Protection Program can be found on the Solano County website here: http://www.co.solano.ca.us/depts/rm/planning/suisun_marsh_local_protection_program/default.asp

The County concluded that most of the proposed changes to the Solano LPP would have no significant environmental impact, and therefore issued a Negative Declaration.

The Commission staff agreed with the County’s conclusion, for the most part. However, the staff alerted the County of its belief that the prioritization of commercial wind energy development in the portion of the secondary management area of the Marsh located within the Collinsville-Montezuma Hills Wind Resource Area, including “commercial wind turbine generators” as an allowed use in the secondary management area, could result in significant adverse environmental effects. Moreover, BCDC argued that a full assessment of the effects of wind turbines on the primary and secondary management areas, as well as a description of alternatives and mitigation measures, would need to be submitted to BCDC as part of the County’s application in order for the Commission to determine if the LPP amendments were consistent with the Marsh Act and Plan. However, given that the County did not alter the wind energy development policies in the LPP, BCDC determined that further assessment of the effects of wind turbines could not be required at this time.

Action Taken by County. Once the Commission approved the amendments to the San Francisco Bay Plan and Suisun Marsh Protection Plan in July 2011, a Draft 2012 Amendment to the Solano County LPP was prepared and distributed by the Department of Resource Management for public review and comment. The Solano County Planning Commission conducted a noticed public hearing on the Draft 2012 amendment on June 21, 2012.

The Planning Commission recommended that the Board of Supervisors adopt the Draft 2012 Amendment as prepared by the Department, except that the existing County LPP policy for commercial wind energy development in the Suisun Marsh, which was adopted by the Board on August 3, 1982 and was certified as part of the County LPP by BCDC on November 4, 1982, should be included as Policy SM-P 35 of Chapter 12 of the General Plan and retained as an existing policy of the County LPP without amendment.

The Board of Supervisors conducted a public hearing on the Draft 2012 Amendment on August 28, 2012. At that hearing, the Board adopted the 2012 Amendment of the Solano County Component of the Suisun Marsh Local Protection Program as recommended by the Planning Commission. The County submitted the 2012 Amendment to BCDC for certification on September 28, 2012.

Summary of Comments and Response. On October 5, 2012, BCDC staff circulated copies of the County's LPP component amendments to all Commissioners, Alternates, interested parties, and pursuant to Commission Regulation 11202, requested comments regarding the proposed amendments and their consistency with the Marsh Act, Marsh Plan and Bay Plan by November 19, 2012. No comments have been received.

Preliminary Staff Recommendation

BCDC staff recommends certifying the 2012 Amendment to the Solano County's Component of the Suisun Marsh Local Protection Program. As detailed above, staff recommends that the Commission find that the new and modified policies contained within the LPP are consistent with Public Resources Code Sections 29000 through 29612, the policies of the *Suisun Marsh Protection Plan*, and the *San Francisco Bay Plan* and therefore, the Commission should certify the proposed Amendment.

However, there are several emerging issues in the Marsh that staff believes generate the need to take a comprehensive look at the Marsh Protection Plan. First, given the resource agencies' concerns over the wind energy policies that remain part of the County LPP, and the inability to influence this policy under the process mandated in the Marsh Act, BCDC staff also recommends that the Commissioner Strategic Planning Working Group consider addressing the issue of energy development in the Marsh and whether changes to the Marsh Plan are needed. If the Commission amended the Plan to clarify its policies on energy development in the Marsh, under the process provided for in the Marsh Act, BCDC could then request that Solano County amend its policies to be in line with BCDC's amended Plan. If the County is not willing to amend its policies to be consistent with the amendments, BCDC would be able to seek legislative authorization to integrate the change into the County's LPP.

The creation of the Delta Stewardship Council and its jurisdiction over the Marsh, as well as some of the initiatives in the draft Delta Plan and the new SMHMPPR elevates the importance of assessing the Marsh Plan. For all these reasons, staff recommends that the Commissioner Strategic Planning Working Group consider as part of the upcoming BCDC strategic plan a comprehensive review of the *Suisun Marsh Protection Plan* to address these emerging issues in the Marsh including, but not limited to, energy, jurisdictional issues and transportation development.