

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

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TO: Commissioners and Alternates

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SUBJECT: Staff Report and Recommendation on Whether Appeal No. 1-13 Raises a Substantial Issue; Solano County Extension No. Six to Marsh Development Permit No. MD 82-12 Issued to Lois Tonnesen for the Continued Operation of A Pet Cemetery
(For Commission consideration on January 16, 2014)

Summary and Recommendation

On November 26, 2013, Solano County issued a five-year time extension for Marsh Development Permit No. MD 82-12 (and Use Permit U-82-12) to allow for the continued operation of a pet cemetery by Lois Tonnesen at 3700 Scally Road, in the City of Suisun City, Solano County. The 20-acre site is within the secondary management area of the Suisun Marsh, for which Solano County has the authority to issue marsh development permits (Exhibits A and B).

The Commission has received an appeal of Solano County's action (Exhibit F). Prior to taking action on the appeal, the Suisun Marsh Preservation Act (SMPA) provides that the Commission must first determine whether or not the appeal raises a substantial issue as to the conformity of the proposed project with the SMPA, the Suisun Marsh Protection Plan (SMPP), and the Solano County component of the Suisun Marsh Local Protection Program (LPP). If the Commission determines that the appeal does not raise a substantial issue, the appeal shall be dismissed and the Solano County decision on Extension No. Six to Marsh Development Permit No. MD 82-12 becomes final. If the Commission determines that the appeal raises a substantial issue, then it must hold a hearing *de novo* on the project.

As described in this staff report, the staff recommends that the Commission determine that the appeal of Solano County Extension No. Six to Marsh Development Permit No. MD 82-12 *does not* raise a substantial issue as to the conformity of the proposed project with the Suisun Marsh Preservation Act, the Suisun Marsh Protection Plan, and the Solano County component of the Suisun Marsh Local Protection Program.



Staff Report

Background. The Solano County Board of Supervisors conditionally approved the creation of the subject pet cemetery in 1980. Subsequently, the County's decision was appealed to the Commission, which denied Marsh Development Permit No. MD 82-12 in 1981 due to concerns that the project would establish a precedent for class II disposal sites in the secondary management area of the Suisun Marsh. In 1982, Solano County adopted the Suisun Marsh Local Protection Plan (LPP), which limited the types of uses in the Suisun Marsh. The same year, the Commission certified the LPP as consistent with the Suisun Marsh Preservation Act. The County subsequently found the pet cemetery to be an allowable use under the newly adopted LPP, and approved Marsh Development Permit No. MD 82-12 in August of 1982. The LPP grants an exception to the pet cemetery and allows for its operation, with conditions.

The County's use permit has been extended by the County on five previous occasions: In 1987, 1992, 1997, 2002 and 2008. The last time extension, approved by Solano County on August 5, 2008, was appealed to BCDC. On November 6, 2008, the Commission considered the appeal and found that the appeal did not raise a substantial issue as to the conformity of the proposed project with the SMPA, the SMPP, and the LPP, and dismissed the appeal.

The pet cemetery, as originally authorized in 1982, was the subject of a Negative Declaration. The County staff report states that Extension No. Six to Marsh Development Permit No. MD 82-12 is a ministerial action that will not result in additional impacts or increases in the severity of previously identified impacts, and, therefore, no further environmental review is necessary. Final Notice of County approval of the project was received at the Commission's office on December 9, 2013 (Exhibit C).

Summary of the Project on Appeal. Extension No. Six to Marsh Development Permit No. MD 82-12 authorizes the continued use of the subject property for the burial of deceased animals in common graves. The 20-acre pet cemetery parcel is located on the east side of Scally Road, approximately 3,300 feet south of Highway 12, and is divided into three sub-parcels, referred to as Phases I, II and III (Exhibits A and B). Pursuant to the original authorization, the phases are to be used successively during the operation of the pet cemetery. According to the County, Phase I is in the process of closing and the operator has begun burial in Phase II. The property is located in an area that is zoned for Limited Agricultural (AL 160), and the General Plan Land Use Designation for the area is Extensive Agriculture and Secondary Marsh. Current uses of the area include a single-family residence and the pet cemetery. The pet cemetery is not a typical type of pet cemetery operation in that pet owners cannot visit the site. Animal remains from veterinarian offices, animal shelters and crematoriums are brought to the site by truck and buried. Currently, 90 percent of the animal remains buried are ash.

Extension No. Six to Marsh Development Permit MD 82-12 contains conditions which require the permittee to: (1) minimize physical and visual disturbance by limiting the area disturbed by burial disposal to six pits at any time; (2) cover, recontour, and revegetate each burial site prior to excavating a new burial site; (3) screen each burial site to eliminate dust and visual impacts during burial operation; (4) protect groundwater quality by complying with the requirements of the San Francisco Regional Water Quality Control Board (RWQCB) and the County Division of Environmental Health regarding standards for covering and capping burial pits, excavating burial pits no deeper than 10 feet and not below the groundwater level, and (5) reporting the number of animals buried each month to the County Health Department on a quarterly basis. The permit is limited to a five-year period unless an additional extension of time is applied for and granted.

On April 8, 2009, the San Francisco Regional Water Quality Control Board (RWQCB) determined that the pet cemetery is an animal waste disposal facility best classified under Title 27 regulations as a non-municipal solid waste, Class III non-hazardous waste disposal facility, and adopted Waste Discharge Requirements (WDRs) for the facility (Exhibit E). The WDRs contain a

detailed discussion of the RWQCB's rationale in classifying the pet cemetery as a waste disposal facility, establish new best management practices for Phase II disposal operations, and revises the facility's groundwater monitoring program to expand monitoring into the Phase II area. According to the WDRs, the facility is not permitted to receive typical municipal solid wastes, and the disposal of laboratory animals, or other animals that may be contaminated with radioactive or hazardous constituents, is prohibited. The WDRs found no confirmed impacts to groundwater or surface quality from disposal operations at the facility. Although coliform bacteria and low levels of certain volatile organic compounds (VOCs) were detected in site groundwater monitoring wells, the WDRs concluded that these contaminants do not appear to be coming from the facility.

In response to the RWQCB's classification, the California Department of Resources Recycling and Recovery (CalRecycle) (formerly the Integrated Waste Management Board) staff determined that they must also regulate the pet cemetery as a solid waste disposal facility. CalRecycle directed the Solano County Department of Resource Management, the Local Enforcement Agency (LEA) to require the operator (Tonnesen Pet Cemetery) to apply to the LEA for a solid waste facility permit (SWFP) for the facility. The operator is still in the process of obtaining a SWFP from the LEA.

Appeal Procedures. Public Resource Code Sections 29522 through 29524 of the SMPA and Sections 11400 through 11452 of the Commission's regulations outline the procedures the Commission must follow in considering an appeal of a marsh development permit. The SMPA provides that a local action on a marsh development permit may be appealed to the Commission by an aggrieved person or by two Commissioners.

On December 13, 2013, the Commission received and filed an appeal by Ms. June Guidotti for the County's action on Extension No. Six to Marsh Development Permit MD 82-12 (Exhibit F). Ms. Guidotti is an "aggrieved person" under Section 29117(b) of the SMPA, which states, "'Aggrieved person' means any person who, in person or through a representative, appeared at a public hearing of the local government in connection with the decision made or action appealed; or who, by other appropriate means prior to a hearing, informed the local government of the nature of his or her concerns; or who for good cause was unable to do either of the foregoing."

When considering the appeal, the Commission must first determine whether the appeal raises a substantial issue with respect to the consistency of the County's approval with the SMPA, the SMPP, and the LPP. At its January 16, 2014 meeting, the Commission will hold a public hearing on the substantial issue question. Sections 11450(b) and 11450(c) of the Commission's regulations set out the process to consider an appeal, as follows:

- "(b) The Commission shall determine whether the appeal does not raise any substantial issues only after the staff has presented a recommendation...
- (c) Unless the Commission determines by a majority vote of those present and voting that the appeal does not raise any substantial issue, the Commission shall proceed to hear the appeal. If the Commission determines that the appeal does not raise any substantial issue, it shall dismiss the appeal."

After public testimony is presented, the Commission may question the various parties and the Commission staff. The staff will then present its recommendation and the Commission will vote on whether the appeal raises a substantial issue.

If the Commission determines that the appeal does not raise a substantial issue then the appeal would be dismissed and the County's marsh development permit would stand.

If the Commission determines the appeal does raise a substantial issue, it must then consider the project *de novo* (that is, the Commission must notice, schedule and hold a public hearing on the entire project and act on the time extension application) to determine whether the project is consistent with the applicable policies of the LPP.

Exhibits. Attached and incorporated into this recommendation are the following: (A) a vicinity map; (B) a site map; (C) the Solano County Extension No. Six to Marsh Development Permit No. MD 82-12; (D) a letter dated January 20, 2011, from the RWQCB to the appellant explaining the regulation of the Tonnesen Pet Cemetery; (E) the WDRs issued by the RWQCB dated April 8, 2009, for the project; and (F) a copy of the appeal dated December 9, 2013.

Analysis of Appeal. The appeal, which incorporates by reference the appeal submitted to the Solano County Planning Commission, raises five appealable points which have been grouped into two broad areas of concern. Many of the concerns raised have been condensed because they contain overlapping issues. In order to focus the Commission's analysis of the substantial issue question, the Commission staff has evaluated the appeal points and identified those pertaining to an applicable policy, ordinance or regulation found in the SMPA, the SMPP or the LPP.

In evaluating whether an appeal point raises a "substantial issue," the staff believes the Commission should consider whether: (1) the point raises a legitimate question as to the conformity of the project with the SMPA, the SMPP, or the LPP; and (2) there is sufficient information to enable the Commission to determine that a particular aspect of the project is not in conformance with the SMPA, the SMPP, or the LPP.

Five issues raised by the appellant are appealable and are evaluated below.

A. Appealable Points

1. **Ecological Impacts to the Marsh.** The appellant raises concerns that the subject time extension (i.e., continued operation) of the pet cemetery may have significant adverse ecological impacts on the Marsh. The LPP refers to the importance of the upland grasslands in the secondary management area in the Suisun Marsh and the importance of protecting these habitats for wildlife, as noted in the following policies:

Policy No. 1 of the Agricultural and Open Space Land Use section of the LPP (page 10) states, "[t]he County shall preserve and enhance wherever possible the diversity of wildlife and aquatic habitats found in the Suisun Marsh and surrounding upland areas to maintain these unique wildlife resources."

Policy No. 3 of the Agricultural and Open Space Land Use of the LPP (page 10) states, "...[w]here feasible, the value of the upland grasslands and cultivated lands as habitats for marsh-related wildlife should be enhanced."

Policy No. 8 of the Utilities, Facilities and Transportation section of the LPP (page 26) states that "[t]he proliferation of sites for the disposal of special wastes could have significant adverse impacts upon the preservation of marsh upland areas. The animal burial ground on Scally Road under County Use Permit should be allowed to operate as conditioned. The creation of additional disposal sites of a special nature shall be prohibited."

The appellant cites the above LPP policies and raises the following concerns:

- a. **Appeal Point 1.** The appellant states that the pet cemetery is located in an area zoned for Limited Agriculture in Solano County's General Plan and, according to the appellant, should not be used as a solid waste/commercial burial site for animals. The appellant also alleges that the RWQCB's classification of the facility as a waste disposal facility represents a change that is inconsistent with the general plan and not allowed under the LPP.

Response to Appeal Point 1. While the LPP prescribes certain uses and establishes policies to protect and enhance wildlife and habitat in the project area, Policy No. 8 of the Utilities, Facilities and Transportation of the LPP specifically authorizes this particular pet cemetery as an allowable facility within the secondary management area that can continue to operate provided it will not adversely impact the Marsh and the conditions of the applicable County use and marsh development permits are met. Nothing in the County's authorization has changed since the prior time extension granted in 2008 and found by the Commission at that time to not raise a substantial issue with respect to the consistency of the County's approval with the SMPA, the SMPP, and the LPP.

The RWQCB's classification of the site as a waste disposal facility and the requirement by the LEA for a solid waste facility permit does not change the original authorization granted to the operator under the County's marsh development permit. Instead, the new classification adds additional oversight and regulation by these agencies with respect to water quality and solid waste disposal activities. As stated by the RWQCB in its letter, "[o]ur classification of the Tonnesen Pet Cemetery as a waste disposal facility does not open the door to the disposal of municipal solid waste at this facility." Instead, they state "[w]e have chosen to continue to regulate the facility as a solid waste disposal facility so that we may better protect water quality under the authority of California's water code" and "...neither our WDRs nor the proposed SWFP authorize any change in the use of the facility or expansion of the acceptable waste stream beyond animal remains" (Exhibit D).

Commission staff, therefore, believes that this appeal point does not raise a substantial issue.

- b. **Appeal Point 2.** The appellant alleges that the project contributes to significant degradation of the waters of the United States that results in the loss of fish and wildlife habitat, and more specifically, the loss of critical habitat for the California Tiger Salamander.

Response to Appeal Point 2. The project is a time extension of an existing marsh development permit. There are no changes to the project and no new environmental impacts or proposed mitigation measures associated with the extension. The Solano County Department of Resource Management is the lead agency under CEQA and has determined that further environmental review is unnecessary given that Extension No. Six to Marsh Development Permit MD 82-12 -- like the previously authorized time extensions -- does not involve a change in use or expansion of the pet cemetery and that the operation of the pet cemetery will not have any environmental impact on species of concern or surrounding habitat. Commission staff is not aware of any information that the California Tiger Salamander would be adversely impacted by continued operation of the pet cemetery. Commission staff, therefore, believes that this appeal point does not raise a substantial issue.

- c. **Appeal Point 3.** The appellant states that the pet cemetery has changed the poles of the power lines in violation of Policy 1(b) of the Utilities, Facilities and Transportation that states, “urban utilities and public services should be allowed to extend into the Suisun Marsh and the adjacent upland necessary to protect the Marsh, only to serve existing uses and other uses consistent with protection of the Marsh, such as agriculture.”

Response to Appeal Point 3. According to the County, the pet cemetery does not utilize electrical power and it is not aware of any work done to the power lines in conjunction with this project.

2. **Impacts to Water Quality in the Marsh.** The appellant contends that the continued operation of the pet cemetery will adversely affect groundwater supplies and water quality. The LPP refers to the importance of protecting water quality in the Suisun Marsh, as noted in the following policy:

Policy No. 5 of the Water Quality section of the LPP (page 19) states, in part, that “[a]ny development in the Suisun Marsh watershed or secondary management area proposed for areas that have poor soil conditions for construction or that are seismically active, should be controlled to prevent or minimize earth disturbance, erosion, water pollution, and hazards to public safety....”

The appellant raises the following concerns:

- a. **Appeal Point 4.** The appellant states that the permitted use violates the LPP policy on water quality because it does not have a lining to keep run-off from adversely affecting the Marsh.

Response to Appeal Point 4. The RWQCB analyzed the potential need for a liner and determined that it is preferable to not require a liner at the site since a liner would promote the formation and accumulation of fluids and inhibit the rapid biodegradation of animal remains that typically occurs due to microbial activity in the soil. The WDRs issued for the project states that, “[c]onsistent with the facility’s classification as a non-MSW [municipal solid waste], Class III Nonhazardous Solid Waste Disposal Facility (Finding 5), the composite liner and leachate collection system requirements for MSW landfills do not apply at this site. The facility’s long operational history with no indication of water quality impacts...coupled with a new requirement for improved operational practices to reduce the potential for leachate formation...indicate that a composite liner and a leachate collection system are not necessary to protect water quality at this site.” (Exhibit D, p. 3).

- b. **Appeal Point 5.** The appellant alleges that the project does not address frozen animals with pharmaceutical drugs or radiation for contamination of groundwater leaking or the watershed runoff from the Potrero Hills, into Hill Slough from the Tonnesen site. Also, that the RWQCB must issue revised Waste Discharge requirements for the facility.

Response to Appeal Point 5. According to the WDRs for the project, the facility is not permitted to receive typical municipal solid wastes, and the disposal of laboratory animals, or other animals that may be contaminated with radioactive or hazardous constituents, is prohibited (Exhibit E, p. 8). The RWQCB has stated that the 2009 WDRs are current and applicable to the project.

B. Non-Appealable Points

The following five points raised by the appellant have been determined by the Commission staff to raise non-appealable matters since they do not address inconsistencies with the provisions of the SMPA, the SMPP or the LPP:

1. The Mitigated Negative Declaration originally prepared for the project in 1982 is inadequate.
2. A second opinion on water quality must be obtained since water testing was reported verbally by Brian West, P.E. and Mr. West has a conflict of interest as he was on the Citizen's Advisory Board involved in the planning decisions affecting the permit extension.
3. The Solano County Planning Commission did not clarify for the Board of Supervisors and the public that CEQA must be done.
4. The Lois Tonnesen project is a non-water dependent project; and the appellant states that, "it is assumed that there are less damaging alternatives and the burden is on the applicant to demonstrate otherwise."
5. Commission staff infers that the appellant is concerned about recent spraying for mosquito abatement as an example of detriment to the California Tiger Salamander.

Staff Recommendation. The staff recommends that the Commission find, based on the above discussion, that the points raised by the appellant's appeal do not raise a substantial issue with regard to the conformity of the proposed project with the SMPA, the SMPP, and the LPP.

The staff recommends that the Commission vote **YES** on the following motion:

I move that, based on findings set forth in the staff recommendation, the Commission determines that Appeal No. 1-13 raises **NO** substantial issue as to the conformity of Extension No. Six to Marsh Development Permit No. MD 82-12 with the Suisun Marsh Preservation Act, the Suisun Marsh Protection Plan and the Solano County component of the Suisun Marsh Local Protection Program, and that the Commission dismiss the appeal.