

San Francisco Bay Conservation and Development Commission

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March 1, 2019

TO: Commissioners and Alternates

FROM: Lawrence J. Goldzband, Executive Director (415/352-3653; larry.goldzband@bcdcc.ca.gov)
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SUBJECT: Recommendation on the Amendment to Solano County's Component of the Suisun Marsh Local Protection Program
(For Commission consideration on March 7, 2019)

Staff Recommendation

The staff recommends that the Commission adopt the resolution to certify the amended Solano County component of the Suisun Marsh Local Protection Program (LPP), that was adopted by the Solano County Board of Supervisors on October 2, 2018.

Staff further recommends that the Commission review each of the local protection program components, initiate an update to the *Suisun Marsh Protection Plan*, and consider whether changes are needed to the *Suisun Marsh Preservation Act* to address climate change, wind energy development, and other emerging issues.

Background and Commission Procedure

Suisun Marsh Preservation Act and Suisun Marsh Protection Plan. Pursuant to the Nejedly-Bagley-Z'berg Suisun Marsh Preservation Act of 1974, the Commission prepared and, in 1976, submitted to the Legislature the *Suisun Marsh Protection Plan* (Marsh Plan) to “preserve the integrity and assure continued wildlife use” of the Suisun Marsh. The Marsh Plan proposed, as described in the transmittal letter, the creation of:

“(1) a primary management area [PMA] encompassing the 89,000 acres of tidal marsh, managed wetlands, adjacent grasslands, and waterways over most of which BCDC now has jurisdiction [under the McAteer-Petris Act], and a secondary management area [SMA] of approximately 22,500 acres of significant buffer lands. Under specific guidelines in each area, Solano County would be responsible for preparing and administering a local protection program [LPP]. BCDC would represent the state's interest, serving as the land use permitting agency for major projects in the PMA, and as an appellate body with limited functions in the [SMA].”

One of the general recommendations of the Marsh Plan is to “give local governmental agencies with jurisdiction in the Marsh primary responsibility for carrying out the [Marsh Plan] through a Local Protection Program.” In 1977 the State Legislature enacted the Suisun Marsh Preservation Act (Marsh Act),¹ which put into statutory form many of the policies of the Marsh Plan and also codified the requirement for preparation of the Suisun Marsh Local Protection Program (LPP). The LPP is composed of multiple components for guiding the land use and zoning for the local governmental agencies, including Solano County, the City of Fairfield, the Solano County Local Agency Formation Commission, and the Suisun Mosquito Abatement District, among others. The Solano County component provides land use plan policies and zoning for properties in the SMA.

The Marsh Act directs the Commission to certify the LLP if it is consistent with the Marsh Act and the Marsh Plan and, subsequently, to certify or deny certification of any proposed amendments to the LPP. The Commission cannot require Solano County or any affected local agency to amend the previously certified LPP or any component thereof. However, the Commission may review the certified LPP, and each component thereof, to determine whether such program is being effectively implemented in conformity with the policies of the Marsh Act.² If the Commission finds that the certified LLP, or any component thereof, is not being carried out in conformity with the Marsh Act or the Marsh Plan, it is required to submit to the County or affected local agency recommendations of corrective action that should be taken, which may include recommended amendments to the LLP or any component thereof. Making any recommended changes to the LLP would then require that the County or affected local agency amend the LPP or components thereof to align with the Marsh Act and/or Marsh Plan, subject to an appeal process.

History of the Solano County LPP. On November 4, 1982, BCDC certified the Solano County component of the Suisun Marsh LPP, comprised of elements of both the Solano County General Plan and the Solano County Code. On June 17, 1999, the Commission certified an amendment to the County’s LPP component in connection with the Montezuma Wetlands project.³

In 2008, the County adopted a comprehensive update to the Solano County General Plan, and in 2012, the County adopted a comprehensive update to the County Code, superseding the prior versions of those documents. BCDC staff worked with the County staff during 2008 to analyze the consistency of proposed General Plan policies with the Marsh Act and the Marsh Plan. Some changes were made to the new General Plan that included both new policies for the PMA and SMA of the Suisun Marsh, and the previously certified Solano County component of the LPP.

¹ Cal. Pub. Res. Code (PRC) §§ 29000 – 29612.

² PRC § 29422(a).

³ 14 Cal. Code of Regulations (CCR) § 11990.

The County sought broad public participation to support updating the General Plan. Public workshops, the appointment of a citizen's advisory committee, public presentations to various agencies and groups, and workshops and public hearings before the Planning Commission and Board of Supervisors were used to solicit involvement. The public was invited to participate through the General Plan Web Site, Distribution List mailings, and Newsletters to residents. Community workshops included a Vision Fair, Special Study Area workshops, agricultural workshops and open houses. The County also actively consulted with the cities, special purpose agencies, and Native American groups⁴ in updating the General Plan.

Following adoption of the General Plan, the County worked with BCDC staff 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. In 2011, the Commission adopted Bay Plan Amendment 1-10 that revised Bay Plan Map 3 by updating the Map notes, policies, and suggestions pertaining to the water-related industrial designation at Collinsville.⁵ The Commission also made conforming amendments to the Marsh Plan. 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.

In 2012, the Solano County Board of Supervisors adopted an amendment to the County's LPP component. This amendment incorporated the 2008 General Plan update and the adoption of Zoning Code text amendments. The County's amendment to its LLP component also incorporated the County's amended Chapter 31 of the County Code addressing grading, drainage, land leveling and erosion control; replacement of 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 amended Zoning maps relating to the Water-Related Industrial Reserve Area around Collinsville and in the SMA consistent with the 2008 General Plan.

The County staff submitted these changes to BCDC for certification on September 28, 2012. BCDC staff prepared a Staff Summary Report and Preliminary Recommendation, held a public hearing on December 6, 2012, and prepared a staff recommendation in support of certification of the County's amended LLP component on January 17, 2013. Issues raised in the 2012 staff report were Wireless Communication Facilities, Commercial Wind Energy Policy, and the status of the Marsh Plan. However, the County withdrew the proposed amendments to its LPP component in order to reevaluate and further refine some of the proposed text in light of the public comments, and due to litigation regarding the Landfill, discussed below.

In 2015, County and BCDC staff renewed discussions regarding the amended Solano County LPP component; however, County staff did not formally apply to the Commission to certify the amended LPP component. During these discussions BCDC staff suggested additional edits to the amended LLP component including: (1) adding a clarification that wind energy development in

⁴ California Senate Bill (SB) 18 (2004) requires that local governments (cities and counties) consult with Native American groups to aid in the protection of traditional tribal cultural places through local land use planning.

⁵ 14 CCR § 11900(b)(21).

the Collinsville area currently is outside the Marsh; (2) refining text describing the operation and use of the Potrero Hills Landfill site; (3) adding a clarification that characterizes the restrictions on floating home communities and golf courses in the marsh in Commercial Recreation designations; and (4) adding clarification that no airports, schools, or other public/quasi-public uses are allowed in the Marsh.

Once the Commission approved the amendments to the San Francisco Bay Plan and Marsh Plan in July 2011, and following the events of the incomplete 2012 amendment process, a Draft 2018 Amendment to the Solano County component of 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 2018 Amendment on September 20, 2018.

The Planning Commission recommended that the Board of Supervisors adopt the Draft 2018 Amendment to the County's component of the LPP as prepared by the Department. The Board of Supervisors conducted a public hearing on the Draft 2018 Amendment on October 2, 2018. At that hearing, the Board adopted the 2018 Amendment of the Solano County component of the LPP as recommended by the Planning Commission. The County submitted the 2018 Amendment to BCDC for certification on October 29, 2018.

Potrero Hills Landfill Litigation and Resolution. As stated previously, in 2012, the County initiated an amendment to the LPP, but it was pulled in part due to the then pending litigation concerning the Potrero Hills Landfill, which was not finally resolved until April 2014. The Potrero Landfill is located in the SMA of the Suisun Marsh. In 2003, an expansion to the landfill was proposed to add 260 acres of adjoining property to the site. In September 2005, after preparing and certifying an Environmental Impact Report (EIR) for the landfill expansion project, Solano County issued a use permit and a marsh development permit for the project. In October 2005, a number of parties filed suit to challenge the adequacy of the EIR under the California Environmental Quality Act (CEQA). That same month, those parties challenging the EIR also filed administrative appeals of the marsh development permit with the Commission, as discussed further below. In September 2007, the Solano County Superior Court ruled that two findings in Solano County's EIR were not supported by substantial evidence. As a result of that ruling, Solano County revised, recirculated, and recertified the EIR, and in November 2009, after the County made additional revisions, the Superior Court found that the EIR was adequate, which resolved the CEQA litigation.

In October 2005, a number of parties opposed to the landfill expansion project filed administrative appeals of Solano County's marsh development permit with the Commission. In December 2005, the Commission concluded that the appeals raised substantial issues, triggering de novo review of the County's approval of the marsh development permit. In addition to considering Solano County's administrative record, the Commission undertook its own investigation of the project. As part of its investigation, the Commission requested that the landfill owner/operator consider reducing the size of the landfill expansion and after evaluating that alternative the Commission concluded that the reduced-size alternative was not economically reasonable. In October 2010, the Commission voted to reject the administrative

appeals and determined that the landfill expansion, as modified by the marsh development permit issued by the Commission, was consistent with the Marsh Act and the LPP. The Commission issued a marsh development permit for the Potrero Hills Landfill, 2010.003.00md, in 2010, that authorizes the expansion subject to the permit's terms and conditions. The current permit for the landfill is valid through 2051.⁶

Two months later, in December 2010, a number of parties filed another lawsuit challenging the Commission's approval of the marsh development permit. The case was filed in San Francisco Superior Court but was later transferred to Solano County Superior Court. In November 2012, it was ruled that the Commission's determination that the reduced-size alternative was not economically feasible and was not supported by substantial evidence. The Commission appealed, and April 2014, the Court of Appeal reversed the Superior Court's decision and held that substantial evidence supported the Commission's decision.⁷

Commission Certification Procedures. Public Resources Code 29400 requires the LPP and its components to be consistent with the Marsh Act and the policies of the Marsh Plan. Section 29418 of the Public Resources Code requires that an amendment to an LPP component be submitted to the Commission by the local government and Section 29415 of the Public Resources Code requires the Commission to certify the component if it finds that it, in all respects, is in conformity with the Marsh Act and the policies of the Marsh Plan. Commission Regulation 11212 provides that a proposed amendment to the LPP shall be processed in the same manner that the Commission certified the original LLP (Regulation Sections 11202 through 11208).

Specifically, BCDC has, pursuant to Commission Regulation Sections 11202 through 11208:

1. Circulated copies of the Solano County LPP component amendment to interested parties on November 15, 2018, and pursuant to Commission Regulation 11202, requested comments regarding the proposed amendment and their consistency with the Marsh Act and the Marsh Plan by January 14, 2019;
2. Published a notice of the availability of the LPP amendments for public inspection at the Commission office in a local newspaper, as required by Commission Regulation Section 11202(b);
3. Distributed the staff report and preliminary recommendation to all agencies, organizations, and individuals interested in the proposed amendments on January 25, 2019;
4. On February 7, 2019, held a public hearing on the proposed amendment, as required by Commission Regulation Section 11204; and

⁶ Permit 2010.03.00md, pg. 10.

⁷ *Sustainability, Parks, Recycling & Wildlife Legal Def. Fund v. S.F. Bay Conservation & Dev. Com.*, 226 Cal. App. 4th 905, 917-922 (2014).

5. Prepared this staff recommendation that: (1) responds to all comments; (2) recommends that the Commission certify the proposed amendments; and (3) includes a proposed resolution of certification. In addition, staff distributed this recommendation at least six days prior to the Commission meeting.

The text of the amended Solano County Component of the Suisun Marsh Local Protection Program is available online (<http://www.bcdc.ca.gov/cm/2019/0307Agenda.html>) and a hard copy is available at BCDC's office.

Staff Analysis

The 2018 LPP amendment to the County's component of the LPP incorporates the County's General Plan update, approved by the Board of Supervisors in 2008, and the Zoning Code text amendments, approved by the Board of Supervisors in 2012, and amends the Zoning maps for the Water Related Industrial Reserve Area around Collinsville, consistent with the 2008 General Plan. The amendment also addresses the Potrero Hills Landfill, as described previously. BCDC mailed a copy of the proposed LLP amendments to those listed in Regulation 11202(a) on November 15, 2018. BCDC did not receive any comments during the 60-day public comment period from any of the listed agencies.

The changes found in the amended text were either deemed beneficial or minor by staff. Many of them are clarifications or new definitions that provide better protections for habitats and marsh features. For example, Chapter 31 of the County Code now defines "Protected Channels", "Suisun Marsh", "Suisun Marsh Watershed", and "Top of Bank" to better align them with the definitions found in the Public Resources Code and other conforming language. Restoration projects are now directed to use dredged sediments. Zoning districts have been edited to read A-SM for Suisun Marsh Agricultural rather than simply AL for Agricultural-Limited with protections designed specifically for the Suisun Marsh. Policy numbers have been edited to match those found in the General Plan, and there are numerous grammatical, non-substantial changes throughout. Sentences have been moved from one paragraph to another or removed from one policy to be called out in a separate conforming policy.

With the exception of concerns regarding wireless communication facilities and wind energy development which is not included in the amendments, the issues raised in 2012 and 2015 have been resolved. The County has indicated that nonconforming uses such as golf courses, floating home communities, and airports are already precluded by planning and zoning.

As discussed above in the Background section. The litigation surrounding the Potrero Hills Landfill has been resolved. The proposed amendments to the LPP clarify that the landfill may only be operated as currently permitted, and only agricultural use may be allowed following closure of the landfill. The landfill will continue to operate, as permitted by BCDC, until it reaches capacity and is closed. At that time, the temporary zoning designation of public/quasi-public will be removed, and the site will have the permanent designation of Agriculture. The site will be remediated as described in the post-closure plans in BCDC permit 2010.003.00md, and no other uses will be allowed that are incompatible with the Agricultural Use designation. Any changes to the permit would require issuance of a permit amendment by BCDC.

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 2018 amendment to the LPP. The Environmental Impact Report for the 2008 General Plan update

can be found on the Solano County website here:

http://www.solanocounty.com/depts/rm/planning/general_plan.asp. Staff does not require revisions to the initial environmental assessment.

Initiation of Review of the Suisun Marsh Local Protection Program, an Update to the Suisun Marsh Protection Plan, and Consideration of Whether Changes are Needed to the Suisun Marsh Preservation Act. While the Commission has worked with the County on amendments to its component of the Local Protection Plan, and with the Suisun Resource Conservation District to update its component, the Commission has not undertaken a full review of the entire Local Protection Program, as directed pursuant to the Marsh Act. Further, the Marsh Plan was written in the mid-1970's and has never been comprehensively reviewed or updated. The Commission has undertaken some targeted updates to address policy changes for managed wetlands and water-related industry. New information about climate change, and other emerging issues, necessitate a comprehensive update. Moreover, staff believes the current LPP wind policy is inconsistent with the Marsh Plan because it could allow an introduction of a new urbanizing, non-agricultural use that could have significant adverse effects on the ecological and aesthetic resources of the Marsh; and it could allow construction of new roads and energy development to serve uses outside the Marsh. While some towers are needed to provide wireless communications, the full scope of the effects of cell towers on Marsh species should be further analyzed, and the Commission should be better prepared to make decisions regarding protecting the values and ecosystems of the Marsh moving forward. For all of these reasons, a comprehensive review and update of the Marsh Plan and the Marsh Act is timely.

The process for updating the Marsh Plan is codified in Public Resources Code Section 29202, wherein the Commission is given the authority to amend the Marsh Plan by resolution following a public hearing with adequate descriptive notice. The resolution adopting the amendment may not be voted upon less than 90 days following notice of hearing on the proposed change and shall require the affirmative vote of two-thirds of the commission members.

Within one year of any amendment to the Marsh Plan, the County and any local agency affected by such amendment are required to prepare and submit to the Commission any amendments to the LPP, or any component thereof, necessary to bring such program into conformity with the amended Marsh Plan. If the County or any local agency affected by an amendment to the LLP objects to the amendment, the amendment would not be effective until the Legislature approves the amendment by statute. If the Legislature enacts such a statute, the County or any local agency affected by the amendment would then have to bring their LPP into conformity with the Marsh Plan amendment.

The Marsh Plan currently includes policies related to Marsh and Upland Resource Use and Management, Recreation and Access, and Utilities, Facilities and Transportation, among others. Through an update process, staff would work with local governments and interested parties to identify which policies should be amended and if any additional policies need to be added to

appropriately address the emerging issues of concern. BCDC staff proposes to begin a scoping process to explore topics that could be addressed in the Marsh Plan amendment with local governments, affected agencies, and interested parties inside and adjacent to the Marsh.

Changes to the Marsh Act would require state legislation. Identifying potentially appropriate amendments to the Marsh Act will require collaboration with community groups, agencies, elected officials and residents in the Marsh. Potential amendments could address environmental justice issues, wind energy generation, and climate change.

Staff Recommendation

Because Solano County's amendment to its component of the LLP conforms to Public Resource Code Sections 29000 through 29612, the policies of the Marsh Plan and the *San Francisco Bay Plan*, staff recommends that the Commission certify the amendment to the Solano County's component of the LPP by adopting the attached resolution certifying the proposed amendments.

Staff further recommends that the Commission direct staff to work cooperatively with the County, affected local and state agencies, and other stakeholders, to fully review the Local Protection Program, initiate a comprehensive review of the Marsh Plan, and to consider whether changes are needed to the Marsh Act to address the wide variety of emerging issues in the Marsh including, but not limited to, wind energy, climate change, sea level rise, environmental justice, and other important issues.

Response to Comments

On November 15, 2018, BCDC staff circulated copies of the County's amendments to its component of the LPP to the parties listed in 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 January 14, 2019. Staff did not receive any written comments and no oral comments were presented at the public hearing. Staff did receive two phone calls; one from a generally concerned Marsh resident, and another from a representative of a property owner with question of impacts to property values.

San Francisco Bay Conservation and Development Commission

455 Golden Gate Avenue, Suite 10600, San Francisco, California 94102 tel 415 352 3600 fax 415 352 3606

Resolution No. 2019-03

Certification of Amendment of the Solano County Component of the Suisun Marsh Local Protection Program

Whereas, Public Resource Code Section 294118(a) states that “after certification by the commission, the local protection program, or any component thereof, may be amended by the appropriate local government or district... Any such amendment shall meet, in all respect, the requirements of, and be in conformity with, this division [Suisun Marsh Preservation Act] and the policies of the [Suisun Marsh] Protection Plan”; and

Whereas, on July 21, 2008, Solano County prepared a Final Environmental Impact Report for the updates to the 2008 Solano County General Plan, and the General Plan was adopted by the Solano County Board of Supervisors on August 5, 2008 and by the Solano County Voters on November 4, 2008; and

Whereas, on July 7, 2011, BCDC approved amendments to its *San Francisco Bay Plan* and *Suisun Marsh Protection Plan* to, in part, modify the boundaries of the water-related industrial priority use designation at Collinsville, thereby reconciling prior inconsistencies between BCDC’s *San Francisco Bay Plan* and *Suisun Marsh Protection Plan* and the County’s 2008 General Plan; and

Whereas, In August 2018, Solano county prepared and circulated a Negative Declaration for the proposed 2018 LPP amendments; and

Whereas, on October 2, 2018, the Solano County Board of Supervisors adopted an amendment to its Suisun Marsh Local Protection Program (LPP) Component to bring the component into conformance with the 2008 Solano County General Plan and Commission policies; and

Whereas, the amendment to Solano County’s LPP Component is consistent with the *Suisun Marsh Preservation Act* and the policies of the *Suisun Marsh Protection Plan* as required by Section 29418(a) of the Public Resource Code in that the amendment (1) reflects updated zoning, grading, and sewer policies designed to better protect the Marsh; and (2) includes additional protection for the watershed within the Marsh consistent with Public Resources Code Section 29401 and the Environment, Water Supply and Quality, and Land Use and Marsh Management policies of the *Suisun Marsh Protection Plan*; and

Whereas, the San Francisco Bay Conservation and Development Commission has evaluated the environmental impact of certifying the amended Solano County LPP Component of 2018 under the Commission’s certified functional equivalency regulatory program authorized by Public Resources Code Section 21080.5 and 14 C.C.R. section 15121(h), relying, in part, on information developed by the County in its General Plan EIR and LPP Negative Declaration, and hereby finds and determines that there will be no significant adverse impact on the environment brought about by the amendments; and

Whereas, the San Francisco Bay Conservation and Development Commission has, pursuant to Commission Regulation Sections 11202 through 11208 (14 C.C.R. section 11202 through 11208):

1. On November 15, 2018, copies were circulated to listed parties pursuant to Commission Regulation 11202, of the Solano County LPP Component amendment, comments were requested regarding the proposed amendment and their consistency with *Suisun Marsh Preservation Act* and *Suisun Marsh Protection Plan* by January 14, 2019;
2. Published a notice of the public hearing and availability of the local protection program amendments for public inspection at the Commission office in local newspapers, as required by Commission Regulation Section 11202(b);
3. Distributed the staff report and preliminary recommendation to all agencies, organizations and individuals interested in the proposed amendments on January 25, 2019;
4. On February 7, 2019, held a public hearing on the proposed amendment, as required by Commission Regulation Section 11204; and
5. Prepared a staff recommendation that: (1) responds to all comments; (2) recommends either to certify or refuse to certify the proposed amendments; and (3) includes a draft resolution of certification or a resolution of refusal to certify; and that the staff distributed the recommendation at least six days prior to the Commission meeting.

Now, Therefore, Be it Resolved That, the San Francisco Bay Conservation and Development Commission hereby certifies that the Solano County’s amendment of its component of the Suisun Marsh Local Protection Program described in Solano County Resolution No. 2018-188, conforms to California Public Resources Code Sections 29000 through 29612, and the *Suisun Marsh Protection Plan*.

Be it Further Resolved That, the San Francisco Bay Conservation and Development Commission authorizes the executive Director to make any necessary minor, non-substantive editorial changes to this resolution.

We certify that this resolution was adopted by a vote of ____ “yes” votes, ____ “no” votes and ____ abstentions at the Commission meeting held on March 7, 2019 at San Francisco, CA.

Executed on this ____ day of _____, 2019 at _____, California.

_____ R. ZACHARY WASSERMAN Chairman

_____ LAWRENCE J. GOLDZBAN Executive Director