

SAN FRANCISCO BAY CONSERVATION AND DEVELOPMENT COMMISSION

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TO: Commissioners and Alternates

FROM: Will Travis, Executive Director (415/352-3653, travis@bcdc.ca.gov)
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SUBJECT: Staff Report and Recommendation on Whether Appeal No. 1-07 Raises a Substantial Issue; Solano County Marsh Development Permit No. MD 07-01 Issued to Zentner & Zentner (Dittmer Ranch Seasonal Wetlands Project)
(For Commission consideration on October 4, 2007)

Summary and Recommendations

On August 14, 2007, Solano County issued Marsh Development Permit No. MD 07-01 to Zentner & Zentner to authorize the creation of 2.4 acres of seasonal wetlands and the enhancement of 1.6 acres of adjacent grasslands at a four-acre portion of the Dittmer Ranch property located one mile southeast of the City of Fairfield, in an unincorporated area of Solano County, just north of the Potrero Hills. Approximately 3.64 acres of the project are within the secondary management area of the Suisun Marsh, for which Solano County has the authority to issue marsh development permits, and 0.36 acres are within the primary management area, for which the Commission has the authority to issue marsh development permits.

The Commission has received an appeal of Solano County's action for the portion of the project within the secondary management area. The Suisun Marsh Preservation Act provides that the Commission must first determine whether the appeal raises a substantial issue as to the conformity of the proposed project with the Suisun Marsh Preservation Act (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, then the appeal shall be dismissed and the Solano County decision on MD 07-01 shall become final. If the Commission determines that the appeal raises a substantial issue, then it must hold a hearing *de novo* on the project. The October 4, 2007 hearing and vote will focus on the substantial issue question only.



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Based on a review of the appeal, the County's action and the SMPA, SMPP and LPP, the staff recommends that the Commission determine that the appeal of Solano County Marsh Development Permit No. MD 07-01 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, and recommends that the Commission dismiss the appeal and allow the Solano County decision on MD 07-01 to become final.

Staff Report

Background. In mid-November 2006, the Commission staff received reports of work occurring at a four-acre site on the Dittmer Ranch property within both the primary and secondary management areas. It was subsequently determined that none of the required approvals had been obtained. In response to these reports, the Commission staff advised the project manager, Mr. John Zentner, to stop all work and to submit an application for a marsh development permit for the project. Solano County issued a stop work order to Mr. Zentner on November 17, 2007.

On January 5, 2007, and January 25, 2007, Mr. Zentner submitted a permit application for the project to the Commission and Solano County, respectively. In early January and early March 2007, prior to the issuance of a permit from the Commission or the County, Mr. Zentner conducted additional work he considered necessary for erosion control. Staff members from BCDC, Solano County, and the California Department of Fish and Game (DFG) visited the site on March 9, 2007, to examine the work that had been conducted and to discuss the applicant's next steps. The applicant was asked to remove the unnecessary erosion control work that had been conducted on adjacent DFG property without authorization. In order to prevent further work from occurring prior to the issuance of a permit, the Commission's Executive Director issued a cease and desist order to Mr. Zentner and the property owner, Mr. Jeffrey Dittmer, on March 22, 2007.

Status of Environmental Review and Marsh Development Permits. Since the issuance of the Executive Director's cease and desist order, the applicant has been working with the Commission and Solano County to receive the necessary approvals for the project. On July 5, 2007, the Solano County Planning Commission approved the project and issued Marsh Development Permit No. MD 07-01. As lead agency, the County found the project categorically exempt from the provisions of the California Environmental Quality Act (CEQA). On July 13, 2007, Ms. June Guidotti filed an appeal of the Planning Commission's decision contending that the project should not be found categorically exempt from CEQA. The Solano County Board of Supervisors dismissed the appeal and upheld the Planning Commission's approval of the project on August 14, 2007.

BCDC Permit Application No. M07-1(M), which covers the 0.36-acre portion of the project within the Commission's primary management area, has been listed with the Commission for its October 4, 2007, hearing date for administrative approval. The staff has recommended approval of BCDC Permit Application No. M07-1(M).

Summary of the Project on Appeal. The project involves the creation of 2.4 acres of seasonal wetlands and the enhancement of 1.6 acres of adjacent grasslands with native grasses. Approximately 3.64 acres are within the secondary management area of the Suisun Marsh and 0.36 acres are within the primary management area. The proposed project is located in the Potrero Hills area, on a 293-acre parcel that is part of the Dittmer Ranch, owned by Mr. Jeff Dittmer. The project site is located approximately 450 feet west of Potrero Hills Lane and one mile southeast of the City of Fairfield. To the north of the project site are the Hill Slough tidal

marshes, owned by the DFG, and to the south are the Potrero Hills and the Potrero Hills Landfill.

The purpose of the project is to create self-sustaining seasonal wetlands and adjacent native grasslands that would enhance wildlife habitat and species diversity, and benefit grazing at this location. Prior to grading, the project site was covered by non-native annual grasslands. The project would convert these non-native grasslands to seasonal wetlands and native upland grasslands. The project has also been proposed to fulfill a condition of the San Francisco Regional Water Quality Control Board (RWQCB) that requires mitigation for wetland impacts from the Mariner's Walk development project outside of the Commission's jurisdiction in Pittsburg, California. The RWQCB approved the Dittmer Ranch site and the proposed project as mitigation for the Mariner's Walk project on August 8, 2007.

The proposed project involves the excavation of a series of basins approximately 6 to 14 inches deep and the planting of native plants and grasses. Approximately 1.6 acres of the project have already been constructed -- 0.36 acres within the primary management area and 1.24 acres within the secondary management area. The basins would be filled with water during the rainy season primarily through direct rainfall as well as surface and subsurface runoff from the adjacent hillsides. The resulting seasonal wetlands are expected to be dry outside the rainy season.

The four-acre project site area is currently fenced with 5-strand barbed wire. The fencing would remain in place for the first five years to prevent grazing in the area while wetlands and native grasses become established. During these five years, the site would be monitored and maintained in accordance with the Final Wetland Restoration and Upland Enhancement Plan approved by the RWQCB ("Restoration Plan"). The Restoration Plan establishes performance criteria for plant species coverage to be achieved at the end of the five-year period. Once the wetlands have successfully established, the area would be opened for grazing in accordance with the Grazing Management Plan approved by the RWQCB. A conservation easement would be placed over the four-acre site and dedicated to an appropriate land trust to ensure that it would be retained in its existing condition.

Appeal Procedures. Public Resource Code Sections 29522 through 29524 of the Suisun Marsh Preservation Act of 1977 (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 September 14, 2007, the Commission received and filed an appeal by Ms. June Guidotti of the County's action. Ms. Guidotti is an "aggrieved person" under Section 29117(b) of the SMPA because she appeared at hearings of the Solano County Planning Commission and the County Board of Supervisors on this matter and notified those agencies in writing of her concerns about the project.

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 Suisun Marsh Protection Plan (SMPP), and the certified Solano County component of the Suisun Marsh Local Protection Program (LPP). At its October 4, 2007 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 determine the appeal:

- "(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 on the substantial issue question and the Commission will vote on the following motion.

I move that, based on findings set forth in the staff recommendation, the Commission determine that Appeal No. 1-07 raises **NO** substantial issue as to the conformity of Marsh Development Permit No. MD 07-01 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.

The staff recommends a **YES** vote on this motion for the reasons explained below. If the Commission votes yes, then the appeal would be dismissed and the County’s marsh development permit would stand.

If the Commission does not approve the motion, it must then consider the project *de novo* (that is, the Commission will hold a public hearing on the entire project and act on the permit application) to determine whether the project is consistent with the applicable policies. At that hearing the Commission shall issue the marsh development permit if it finds that the proposed project is in conformity with the Suisun Marsh Local Protection Program. The applicant has waived the deadlines for holding the *de novo* hearing and has asked that if the Commission determines the appeal raises a substantial issue, that the *de novo* hearing be scheduled on November 1, 2007.

Attachments. Attached and incorporated into this recommendation are the following: (1) vicinity map; (2) map of the proposed project; (3) site map of the proposed project; (4) letter from the DFG dated May 25, 2007, regarding the project; (5) letter from the RWQCB, dated August 8, 2007, regarding the project; (6) the Solano County Marsh Development Permit No. MD 07-01; and (7) copy of Ms. Guidotti’s appeal.

Analysis of Appeal. The appeal filed by Ms. Guidotti raises six separate contentions (or points) regarding the proposed seasonal wetlands project. Three of the six points raised by Ms. Guidotti have been determined by the Commission staff to raise non-appealable matters by failing to raise any inconsistency of the project with the provisions of the SMPA, the SMPP or the LPP. Three of Ms. Guidotti’s points raise appealable issues, but the Commission staff believes these issues do not raise a substantial issue.

Non-Appealable Issues. The following points raised by Ms. Guidotti have been determined by the Commission staff to raise non-appealable matters.

Appeal Point 1. Ms. Guidotti contends that because the project was initiated prior to obtaining a marsh development permit from the County and BCDC, “the project created a physical change to the environment without evaluating the potentially significant impacts to the environment.”

Response to Appeal Point 1. This appeal point raises a non-appealable issue in that it does not raise any issue as to the project’s consistency with the SMPA, the SMPP and the LPP. Solano County is the lead agency for the project and has determined that the project is categorically exempt from the need to prepare an environmental document in accordance with CEQA. This determination was made based on the physical characteristics of the project itself and was

evaluated based on pre-existing site conditions, regardless of the after-the-fact nature of the permit.

Appeal Point 2. Ms. Guidotti contends that a categorical exemption for the project is not appropriate because the project is for mitigation of the Mariner's Walk Project, an off-site project in Pittsburg, CA.

Response to Appeal Point 2. This appeal point also raises a non-appealable issue in that it does not raise any issue as to the project's consistency with the SMPA, the SMPP and the LPP. The County and the Commission do not have jurisdiction to determine whether the project is appropriate mitigation for the Mariner's Walk Project. Accordingly, the County's CEQA determination focused only on the four-acre seasonal wetlands project in the Suisun Marsh and not on the Mariner's Walk Project.

Appeal Point 3. Ms. Guidotti contends that a mistake was made when various agencies, including the Commission, allowed Potrero Hills Lane, which provides access to the project site, to be constructed. Ms. Guidotti also contends that Mr. Jeffrey Dittmer is expanding the use of his easement to allow access to the project site by various parties, beyond the restrictions imposed in his easement.

Response to Appeal Point 3. This appeal point also raises a non-appealable issue in that it does not raise any issue as to the project's consistency with the SMPA, the SMPP and the LPP. First, the construction of Potrero Hills Lane was authorized by the Commission as part of Phase I of the Potrero Hills Landfill project, after considering an appeal of the project, and the time for challenging the permit's validity has passed. Second, the Commission staff has reviewed Mr. Jeffrey Dittmer's easement and believes there are no restrictions in the easement prohibiting its use by various parties for this limited project.

Appealable Issues. The following three points raised by Ms. Guidotti have been determined by the Commission staff to raise appealable issues. However, staff believes these issues do not raise a substantial issue that should be heard on appeal. 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 enough information provided to enable the Commission to determine that a particular aspect of the project in question is in conformance with the SMPA, the SMPP, or the LPP.

Appeal Point 4. Ms. Guidotti contends that Solano County, the lead agency responsible for environmental review of the project, did not disclose to the public that "the baseline condition at the project site is largely constructed" and, thus, did not allow the public to fully participate in the decisions affecting the Suisun Marsh, in accordance with SMPA Section 29007 which states:

"The Legislature further finds and declares that the public has a right to participate fully in governmental decisions affecting planning, conservation, and development of the Suisun Marsh; that achievement of sound protection of the marsh is dependent upon public understanding and support; and that continuing planning and implementation of programs for marsh protection should include the opportunity for public participation."

Response to Appeal Point 4. The Commission staff concludes that the facts do not support this appeal point. The public had several opportunities to comment on the project during both the Solano County Planning Commission and the Board of Supervisors hearings. In addition,

the Solano County Planning Commission staff report, which was mailed to the public prior to the Planning Commission hearing on the project, states that the project has been partially completed. Therefore, the Commission staff concludes that this appeal point does not raise a substantial issue.

Appeal Point 5. Ms. Guidotti contends that a letter from the DFG, dated May 25, 2007, expressed concerns about potential indirect effects to the Hill Slough Wildlife Area (HSWA), just north of the project site, which supports populations of salt marsh harvest mouse (SMHM), Suisun shrew, and soft bird's beak (*Cordylanthus mollis ssp mollis*), which are special status species. She contends that DFG's letter is in conflict with the following SMPP and LPP policies related to wildlife:

"The diversity of habitats in the Suisun Marsh and surrounding upland areas should be preserved and enhanced wherever possible to maintain the unique wildlife resource." (*Policy 1 of the Environment section of the SMPP and Policy 1 of the Wildlife Habitat Management and Preservation section of the LPP*)

"The Marsh waterways, managed wetlands, tidal marshes, seasonal marshes, and lowland grasslands are critical habitats for marsh-related wildlife and are essential to the integrity of the Suisun Marsh. Therefore, these habitats deserve special protection." (*Policy 2 of the Environment section of the SMPP and Policy 2 of the Wildlife Habitat Management and Preservation section of the LPP*)

"The County shall protect its marsh waterways, managed and natural wetlands, tidal marshes, seasonal marshes and lowland grasslands which are critical habitats for marsh-related wildlife." (*Policy 2 of the Agricultural and Open Space section of the LPP*)

Response to Appeal Point 5. The DFG owns and manages the HSWA and is therefore familiar with the ecological characteristics of the area. On April 12, 2007, staff from the DFG visited the site with Ms. Brenda Grewell, Ph.D., a plant and restoration ecologist from U.C. Davis, to analyze the possible impacts of the project on special status species. Ms. Grewell determined that it was unknown whether the project would have indirect impacts on the soft bird's beak population in the HSWA but that it was unlikely to have such effects. The DFG tentatively agreed that the project would not have adverse effects on tidal marsh species and, as manager of the HSWA, would continue to monitor the area as part of its regular oversight to determine whether any changes to species populations or habitat occurred that might be a result of the project construction. On August 8, 2007, the RWQCB approved the project and the Dittmer Ranch site as mitigation for the Mariner's Walk project and determined that "it is unlikely that the salinity regime and vegetation within the HSWA that provides habitat for the SMHM, the Suisun shrew, and the soft bird's beak will be impacted by the Dittmer Ranch Wetlands project."

The appellant has submitted no evidence to show that the project would have a significant impact on special status species. Therefore, the Commission staff believes it is appropriate to rely on the opinions of the responsible agencies, the DFG and the RWQCB, to find that the project is consistent with the SMPP and LPP policies on wildlife. Because the responsible agencies concluded that this project is unlikely to impact special status species, the Commission staff concludes that this appeal point does not raise a substantial issue.

Appeal Point 6. Ms. Guidotti contends that erosion and subsequent sediment from the project are potentially significant as erosion and runoff controls that were designed for the

project and placed without proper authorization were required to be removed by the DFG. She contends that the potential erosion impacts from the project are in conflict with the following LPP policy on erosion:

“The County shall ensure that development in the County occurs in a manner which minimizes impacts of earth disturbance, erosion and water pollution.”
(Policy 7 of the Agricultural and Open Space section of the LPP).

Response to Appeal Point 6. Mr. Zentner conducted certain erosion control work on the DFG’s property as well as on the four-acre project site without proper authorization. During a site visit on March 9, 2007, the DFG determined that the erosion control work located on its property, which consisted of hay bales and rebar, was not required and was, in fact, impeding natural tidal flow to the area. The DFG required Mr. Zentner to remove the structures and to restore the site to its former condition. There are currently erosion control measures at the four-acre project site that the Commission staff believes provide adequate erosion control measures

for the project. Therefore, because the appellant has shown no evidence that erosion will occur due to the removal of the hay bales, and because there are adequate erosion control measures on the project site itself, the Commission staff concludes that this appeal point does not raise a substantial issue.

Staff Recommendation. The staff recommends that the Commission find, based on the above discussion, that the points raised by Ms. Guidotti'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. Again, 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 determine that Appeal No. 1-07 raises **NO** substantial issue as to the conformity of Marsh Development Permit No. MD 07-01 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.