



County of Yolo

Office of the County Counsel

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**ROBYN TRUITT DRIVON
COUNTY COUNSEL**

TO: Chair Mary Kimball and Members, Yolo County Planning Commission

FROM: Robyn Truitt Drivon, County Counsel
Philip J. Pogledich, Senior Deputy County Counsel

DATE: May 14, 2009

SUBJECT: Potential County regulation of large-scale wetland habitat projects

RECOMMENDED ACTION

RECEIVE a staff presentation, accept public comments, and provide input regarding potential County regulation of wetland restoration, creation, and enhancement projects.

REASONS FOR RECOMMENDED ACTION

The Board of Supervisors has directed the Office of the County Counsel to consider preparation of an ordinance authorizing limited County regulation of large-scale wetland restoration, creation, and enhancement projects (hereinafter, "wetland projects"). An ordinance is currently under development. The purpose of this item is to provide the Planning Commission and members of the public with an introduction to the topic and an opportunity to comment thereon. This office expects to return to the Planning Commission in June 2009 with a draft ordinance for consideration.

BACKGROUND AND ANALYSIS

On October 28, 2008, this office provided a report to the Board of Supervisors regarding potential County regulation of large-scale wetland projects. A copy of the Board letter prepared in connection with that report is attached hereto. The Board letter introduces the topic and discusses the following issues:

- Large wetland projects that are pending or reasonably foreseeable (pp. 2-4);
- Potential impacts of such projects on the Yolo Natural Heritage Program, the Clarksburg agricultural district, and other land use planning efforts (including the 2030 Draft General Plan) (pp. 4-6);
- The shortcomings of existing County regulations (pp. 6-7);
- The shortcomings of state and federal oversight of wetland projects (pp. 7-9); and

- Potential regulatory and other approaches for County consideration (pp. 9-11).

Following the October 28, 2008 Board meeting, this office has carefully considered the best way to proceed. We currently intend to propose that the Board consider adopting an ordinance that provides for limited County regulation—through a use permit or similar discretionary approval process—of large-scale wetland projects. Such an approach would enable the County to review the environmental impacts, potential land use conflicts, and other aspects of proposed wetland projects in much the same way that it currently reviews other projects that permanently transform the landscape.

Some of the key areas where we welcome input from the Planning Commission and members of the public are as follows:

What matters? Many of the land use, environmental, and similar issues that wetland projects implicate are obvious. For example, many large wetlands projects will entail some degree of loss of farmland and/or existing species habitat, as well as create potential vector control issues. But other concerns, such as potential “habitat migration” due to future sea level rise, may be less obvious. The attached Board letter identifies various potential issues of concern (see p. 9). Do you see any other issues that should be considered in the process of drafting or implementing a County approval process?

What’s in, what’s out? As noted, the focus of any County ordinance regulating wetland projects will be squarely on large-scale projects. The Board of Supervisors has expressed no interest in regulating smaller projects, such as vegetated tailwater ponds. Where do you think the regulatory “line” should be drawn? Would you support an exemption for projects of less than 20 or 40 acres, or something greater or smaller? Should other exemptions based on qualitative (i.e., irrespective of project size) considerations also be evaluated? What about projects that are primarily developed for habitat, but which incorporate wildlife-friendly agriculture as well?

What type of approval is appropriate? As indicated, a use permit or similar permitting process is presently under consideration. Other discretionary approvals, either in lieu of or in addition to such a process, may also warrant some discussion. For example, the County could create a new land use designation in its general plan or a new zoning classification for large wetland projects. Such project would then require a general plan amendment and/or rezoning to proceed. Or should a more straightforward staff-level process—such as site plan approval—be given further consideration?

Who approves? Typically, use permits are categorized as minor or major. The zoning administrator (Planning and Public Works Director) issues minor use permits, while major use permits are considered by the Planning Commission. Should the County review process for wetland projects incorporate one of these approaches, or should the ultimate decision on such projects lie with the Board of Supervisors? If the Board of Supervisors is vested with authority to approve such projects, should the Planning Commission play an advisory role?

County enforcement authority? Many large wetland projects are expected to involve the sale of mitigation credits to offset the destruction of existing, natural wetlands in other locations in the

Delta. Such projects will include a conservation easement that provides, among other things, for the long-term monitoring and management of the artificial wetlands. But past history indicates that both state and federal agencies do a very poor job at ensuring that responsible parties—typically, a land trust or the project proponent—carry out such monitoring and management. Indeed, various agency-initiated audits demonstrate that agencies have not taken adequate steps to enforce easement requirements even though monitoring is often performed less frequently than required (or not at all), and that some habitat sites have even become illegal dumping grounds.

One approach for the County to consider—separate and apart from an ordinance regulating wetland projects—is to seek enforcement authority in conservation easements for such projects. Of course, any such arrangement would also preserve the ability of state and federal agencies to take enforcement action, and the County would have to ensure that easements provide funding and other resources for any County enforcement activities. Do you think this should be pursued, or should the County leave long-term monitoring and enforcement to federal and state agencies?

Is there a tipping point? Obviously, unless they can be implemented on a seasonal basis, wetland projects will replace agriculture in certain parts of the County. Some have expressed concern that such projects could indirectly affect agriculture by complicating the farming of lands adjacent to habitat areas. Over the long term, wetland habitat projects could also indirectly impact the local agricultural industry more broadly by, among other things, reducing the demand for local processing facilities. The Solano County Water Agency has even performed a study that indicates the conversion of 23,000 acres of land (including 14,500 acres of farmland) in that county to permanent wetland habitat over the next few decades could result in the loss of dozens of farm-related jobs and tens of millions of dollars in annual production revenue.

What is your perspective on these concerns? What should the County do if its goal is to strive for a balance between allowing some amount of wetland projects while also preserving a strong agricultural industry? How should we gather the information needed to evaluate the potential indirect effects of wetland projects on agriculture?

These are just some of the issues that we welcome additional input on. We will also continue to seek input from interested members of the public following the Planning Commission meeting, including at a meeting to be hosted by the Ag Futures Alliance later in May.

Finally, at the same time that we present a draft ordinance regulating wetland projects for your consideration, we also intend to propose two additional ordinances. These ordinances will amend provisions of the Yolo County Code relating to soil mining and floodplain development permits. As will be explained in more detail during the staff presentation, minor amendments to these provisions may be necessary to reduce existing regulatory barriers to wetland habitat projects.

SUMMARY OF AGENCY COMMENTS

This report was reviewed by the Planning and Public Works Department.

Mary Kimball, Chair and
Members of the Yolo County Planning Commission
May 14, 2009
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ATTACHMENT

October 10, 2008 Board letter regarding potential County regulation of wetland projects

ATTACHMENT

(Memo to the Board of Supervisors, October 28, 2008)



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**ROBYN TRUITT DRIVON
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TO: Duane Chamberlain, Chairman and Members of the Board of Supervisors

FROM: Philip J. Pogledich, Senior Deputy County Counsel

DATE: October 28, 2008

RE: County Regulation of Habitat Projects (No general fund impact)

RECOMMENDED ACTIONS

1. RECEIVE a report from staff regarding habitat restoration, creation, and enhancement projects in the County, as well as potential means of regulating such projects.
2. PROVIDE DIRECTION to staff regarding potential County regulation of habitat projects, including whether to prepare new or revised ordinances or other regulatory mechanisms for future consideration by the Board of Supervisors.

FISCAL IMPACT

The report and any direction provided by the Board of Supervisors will have no impact on the General Fund. Habitat restoration, creation, and enhancement projects could impact the General Fund in at least two ways. If the State acquires title to habitat lands, tax revenues may be replaced by payments in lieu of taxes; however, such payments have previously led to significant shortfalls in revenue. If such lands remain in private ownership, lower assessed values could result from the conversion of productive farmland to other uses. The loss of significant crop production may also impede future County economic development efforts to expand value-added processing and agricultural tourism opportunities.

REASONS FOR RECOMMENDED ACTIONS

The unincorporated area of the County is at the center of a number of proposals, by both public agencies (e.g., the State of California and various local water agencies) and private entities to restore, create, and enhance habitat for various species, often in conjunction with the establishment of mitigation banks serving a multi-county area. Many of the proposals focus on creating intertidal wetlands habitat for various fish species, potentially displacing agricultural operations and native species—including the Swainson's hawk—in various locations. The scale of certain proposals is unprecedented, and such proposals could impact the County and the Yolo Natural Heritage Program in several ways. Direction from the Board will help County staff

determine what steps, if any, should to be taken to protect and advance the County's interests as these proposals move forward.

BACKGROUND

This section is divided into five subsections that discuss: (A) pending habitat projects, ranging from projects under construction to projects that are merely under consideration, as well as those discussed in two parallel State planning processes—the Bay Delta Conservation Plan (“BDCP”) and Delta Vision (see **Attachment A** hereto); (B) the potential impact of such projects on the Yolo Natural Heritage Program, the Clarksburg Agricultural District, and the 2030 Draft General Plan; (C) existing County regulation of such projects; (D) state and federal oversight of habitat projects; and (E) additional steps the County could take to guide the location, design, and implementation of such projects, or to otherwise advance its interests.

At the outset, it is important to note that the following discussion is not intended to suggest that habitat projects are “good” or “bad.” Like virtually any land use proposal, with careful planning and implementation, projects that preserve, enhance, or create habitat can be highly beneficial in a number of ways. The County certainly benefits from projects previously undertaken by various public and private entities and individuals to implement wildlife-friendly farming practices, protect existing habitat, and enhance wetlands. Similarly, without appropriate coordinated planning, the creation of wetlands may impact infrastructure (e.g., roads, pipelines, and drainage facilities) and the ability of adjoining landowners to fully utilize or expand their agricultural operations. The purpose of the following discussion is instead intended to identify and explain relevant considerations to help the Board of Supervisors decide, as an initial matter, whether an exploration of additional County participation in such projects—through voluntary agreements, new regulations, or otherwise—is warranted at the present time.

Also, as the following discussion makes clear, the focus of this Board letter is on projects *that substantially change existing land uses on a large scale* (i.e., by converting significant farmland acreage to wetland habitat). Very small projects (e.g., restoration through SLEWS or EQIP programs) and those that are generally compatible with or ancillary to existing agricultural land uses are not specifically discussed. County staff do not believe that such projects necessarily conflict with County interests or require immediate regulatory attention.

A. Several Significant Habitat Projects are Currently Pending, and Many More are Reasonably Foreseeable.

County staff are aware of the following large wetlands (and similar) projects that are currently pending in the County. Some are in active construction, while others remain in the conceptual planning stage.

- Roosevelt Ranch mitigation bank near the Colusa Drain (construction complete; permits pending Department of Fish and Game (“DFG”) approval);
- Ridge Cut Giant Garter Snake mitigation bank near Zamora (under construction);

- Salmonid and Delta Smelt habitat restoration and creation project on 165 acres at the northern part of Liberty Island (pre-application submitted);
- Salmonid habitat restoration project near Knight's Landing (permits pending DFG approval); and
- Putah Creek Vernal Pool mitigation bank near Grasslands Park (permits pending United States Fish and Wildlife Service ("FWS") approval).

The approximate location of these projects is depicted on **Attachment B** hereto (except for the project near Liberty Island). Altogether, these projects will convert about 2,500 to 3,000 acres of farmland and open space to intertidal wetlands and other habitat types that, by and large, did not previously exist at the project sites. The projects that include mitigation banks may open the door to out-of-county mitigation. The Ridge Cut Giant Garter Snake project, for example, has a proposed service area that extends north into Tehama County.

Separate from these projects, there are two major state planning efforts presently underway: the Delta Vision Blue Ribbon Task Force and the BDCP. These efforts appear likely to propose a substantial amount of wetlands habitat restoration, enhancement, and creation in the Delta. Each is briefly summarized below.

Created by executive order, Delta Vision is concluding its "strategic plan" for the Delta. The plan outlines an ambitious scope of actions to restore the Delta ecosystem and provide a reliable water supply to various parts of the state dependent on Delta water resources. Once work by the task force is complete, the plan will be transmitted to the Delta Committee (consisting of four cabinet secretaries and the President of the Public Utilities Commission). The Delta Committee will provide the Governor with recommendations for implementing the plan by December 31, 2008.

While the numbers have changed many times during the process and are still uncertain, the restoration and creation of up to 100,000 acres of wetland habitat (over 50 years) has been frequently discussed. Of that, about 15,000 acres of wetlands projects would be located in the north Delta (i.e., Solano and Yolo counties). On top of these figures, certain Delta Vision documents describe the need to reserve an unknown quantity of lands adjacent to actual and potential habitat areas for habitat "migration" in response to sea level rise.

In addition, various state agencies (led by the Resources Agency) are presently developing the Bay-Delta Conservation Plan. The BDCP is intended to be an HCP/NCCP covering aquatic species—including various salmonids and the Delta smelt—historically found in the Delta. Through the effort of various work groups, the wetlands component of the BDCP is slowly gaining definition. The following are some of the proposals reflected in an October 17, 2008 BDCP staff report (many are also included in the Delta Vision Strategic Plan):

- *Modify the Fremont Weir and the Yolo Bypass to provide for a higher frequency and duration of inundation.* Design elements would include one or more canals (to convey water upstream of the new gate at Fremont Weir to the Tule Canal); the acquisition of fee title and conservation or flood easements on lands necessary for flood control or wetlands projects; changes to existing berms and levees, as well as the construction of new berms and levees, to enhance fish habitat and flood protection by changing how water moves

through the Yolo Bypass; and potential construction of a structure in the Sacramento River at the Fremont Weir to encourage the passage of juvenile salmonids.

- *Increase the extent of floodplain habitat within the Delta.* In Yolo County, this would be achieved by creating a Deep Water Ship Channel (“DWSC”) Bypass—an inundated floodplain of between 2,000 to 5,000 acres. Design elements would include the removal of levees at the south end of the DWSC to provide for flow connectivity with the Delta, possibly requiring in the discontinuance of agricultural activities in the affected area
- *Restore a mosaic of freshwater intertidal marsh, shallow subtidal aquatic and transitional grassland habitat within the Yolo Bypass/Cache Slough Complex.* Areas within the County that have been suggested for restoration include portions of Liberty Island, Little Holland, the Westlands Property (approximately 3,000 acres of Yolo Ranch), and Little Egbert Tract.

If implemented, these proposals appear likely to convert thousands of acres of land in the County to wetlands and related uses.

Land acquisitions for wetlands projects consistent with Delta Vision and BDCP—as well as certain pending litigation relating to operation of water conveyance facilities in the Delta—already appear to be underway. Westlands Water District recently purchased about 3,400 acres in the lower Yolo Bypass. This land is in close proximity to the proposed 165-acre salmonid and Delta Smelt habitat project on Liberty Island, mentioned above. Westlands has prepared conceptual plans for converting 1,000 or more acres of the 3,400-acre property to similar habitat types. (Such a project would be in addition to the 2,500 to 3,000 acre figure for pending projects set forth above.) Also, a private developer recently purchased other nearby lands, possibly for conversion to wetlands habitat. Additional land in this vicinity is now for sale.

B. Potential Impacts on the Yolo Natural Heritage Program, the Clarksburg Agricultural District, and Other Land Use Planning Efforts (Including the 2030 Draft General Plan).

The Yolo Natural Heritage Program

The Yolo Natural Heritage Program (HCP/NCCP) planning process will define areas that have high habitat value and will describe ways to maintain those values through land preservation, wildlife-friendly farming, and otherwise. The Habitat JPA is concerned that wetlands and other mitigation banking projects could move forward without any coordination with the developing conservation plan. This could adversely impact the final HCP/NCCP in at least two ways.

First, it could result in the conversion of habitat lands included in the developing HCP/NCCP to wetlands or other habitat types that are incompatible with the needs of existing sensitive species (e.g., the Swainson’s hawk). This would undermine ongoing efforts to identify and preserve such lands for species covered by the HCP/NCCP, potentially jeopardizing the timely completion of the planning effort. This is a real concern—at least one mitigation bank has already converted the habitat of one species covered by the HCP/NCCP to

habitat for another species. It could pose a particular problem in instances where specific habitats are limited or geographically constrained.

Second, it could hinder the implementation of the HCP/NCCP by directing funding and other resources for preservation to lands that are not included in the final plan. To the extent this occurs, it would be a lost opportunity to advance the implementation of the plan. Large mitigation bank service areas (discussed in the section on state and federal regulations, below) are a specific concern to the Habitat JPA because of their potential to skew the local market and, by increasing the number of eligible buyers of mitigation credits, drive up the costs of implementing the Yolo Natural Heritage Plan.

For at least these reasons, the successful completion and implementation of the HCP/NCCP depends on a high degree of coordination between all ongoing habitat restoration, enhancement, and creation efforts. Without such coordination, the integrity of the HCP/NCCP's conservation strategies could be compromised.

The Clarksburg Agricultural District

It is clear that the Yolo Bypass area, including surrounding lands in the vicinity of Clarksburg, is "ground zero" for habitat projects included in the Delta Vision and BDCP processes. The precise impact of such projects cannot be determined until more is known about their probable geographic scope and location. However, based on present information, the main way that such projects could adversely impact the Clarksburg Agricultural District is the loss of farmland that would result from the implementation of habitat projects. Other impacts could also occur, but they are largely the consequence of this habitat-related conversion of farmland.

If Delta Vision/BDCP are ever implemented to a significant degree, some amount of farmland in the Clarksburg Agricultural District will likely be converted to wetlands. Additional farmland could be converted to other habitat types or encumbered by flood protection facilities or easements. Further, consistent with the climate change-related "migration" of wetlands habitat discussed in Delta Vision documents, the State could reserve (by law or by easement) additional farmland in the Clarksburg Agricultural District to serve as future wetlands habitat. All of these actions will result in the loss of farmland—both immediately and over time.

Profitable farming requires sufficient productive and contiguous acreage. Large habitat projects could frustrate both of those requirements by removing productive lands from the agricultural land base, fragmenting land use and ownership patterns, and adversely impacting adjacent farmlands and drainage systems. Also, habitat projects could reduce the incentive for construction of processing facilities by diminishing the volume of local agricultural commodities. Particular in areas that are devoted to specialty crops, such as wine grapes in the Clarksburg region, the conversion of hundreds or even thousands of acres of viable farmland could have a significant local effect that diminishes the agricultural and tourism base of the region. This outcome is inconsistent with the County's intent in establishing the Clarksburg Agricultural District earlier this year.

The Draft 2030 General Plan

In general, many policies in the Draft 2030 General Plan are consistent with the basic concept of mitigation banking, wetlands projects, and related habitat proposals. Some examples include:

- *Land Use Policies 7.1-7.4:* These policies support participation in multi-agency (including SACOG) efforts to preserve habitat, and encourage compensation for any decrease in County tax revenues;
- *Agriculture Policies 2.9-2.10 and 2.12:* These policies encourage wildlife-friendly farming practices, encourage the protection of growers from new restrictions resulting from the introduction of new habitat; and identify the need to balance habitat uses in the Yolo Bypass with other uses (including agriculture).
- *Economic Development Policies 4.4, 4.8 and 4.15:* These policies promote ecotourism and recreational uses, including uses on private lands, as well as agricultural tourism and related activities in designated agricultural districts.
- *Open Space Policies (various):* Many policies in the Open Space Element encourage an expanded network of open space and related recreation opportunities, habitat preservation, and ecotourism. Policy CO-1.18 sets certain criteria for out-of-county mitigation, and Policies 9.4-9.7, 9.14, and 9.18 focus on habitat projects and the protection of certain County interests (including agriculture, flood protection, and transportation) in the event such projects are implemented.

Altogether, the main ways in which large-scale wetlands projects could impact implementation of the Draft General Plan are (a) by setting aside most or all of the Yolo Bypass for habitat and related projects, without any “balance” for agriculture, (b) by allowing certain projects to proceed without regard for County policies relating to out-of-county mitigation, and (c) by potentially undermining agricultural tourism efforts. But on the other hand, wetlands projects and related efforts could enhance ecotourism opportunities and create other benefits that help offset these potential drawbacks. Regardless, the prospect of a potentially significant conversion of farmland to wetlands and similar habitat warrants careful consideration.

C. Existing County Regulations Do Not Provide a Detailed Framework for Addressing Wetlands Projects or Mitigation Banks.

The following are the main components of the County’s existing regulatory framework for habitat projects.

Grading Permits

Projects that involve a significant amount of soil excavation and other earthwork will require a grading permit. The County currently regulates grading through the provisions of the California Building Code. These are ministerial permits, meaning that Planning and Public Works Department staff have no discretion and the

permit is granted—regardless of project size, location, or other features—so long as certain basic application requirements (primarily concerning slope stabilization and erosion control) are met.

Flood Hazard Development Permits

Projects located within a special flood hazard area (as indicated on floodplain maps prepared by FEMA) require a Flood Hazard Development Permit. This is a discretionary approval by the Planning and Public Works Director, and environmental review under CEQA must be completed before such permits can be granted. Projects that require a Flood Hazard Development Permit will likely require other federal and state approvals. It is possible to avoid the need for such federal and state approvals by demonstrating that the proposed work will not increase the level and/or extent of the “base flood,” in which case a County grading permit would be required.

Agricultural Surface Mining Permits

The County’s Agricultural Surface Mining Ordinance requires any person or entity proposing to mine soil from one parcel and use it on another non-contiguous parcel to obtain a permit, file a reclamation plan, and provide financial assurances (performance bond, etc.). Agricultural surface mining permits are discretionary, and compliance with CEQA is therefore part of the review process. The Planning Commission is authorized to act on agricultural surface mining permit applications. Among other things, it must consider general plan and zoning consistency prior to deciding an application. It can add conditions in approving a permit, and may adopt mitigation measures that are necessary to reduce or eliminate the environmental impacts of a project.

Williamson Act

Habitat projects that affect property covered by a Williamson Act contract will require additional review to determine whether the proposed habitat restoration or creation is “compatible” with and “incidental” to the agricultural, recreation, or open space use of the property. The Williamson Act requires the County to implement the local Williamson Act program in a manner that protects contracted lands—by legal action, if necessary—from the introduction of incompatible uses. Determinations are made on a case-by-case basis that takes the unique facts of each proposal into account. As a general rule, the Department of Conservation suggests that habitat projects that preclude continued agricultural use of more than *one-half* the acreage of a parcel or parcels subject to a Williamson Act contract should be considered inappropriate on contracted lands.

D. State and Federal Oversight of Habitat Projects Does Not Appear to Protect Local Interests, and Existing Laws and Policies Provide No Clear Opportunities for Meaningful County Participation.

To a large degree, in addition to consideration of the County’s existing regulatory framework, the need for additional County participation in habitat projects turns on whether existing state and federal regulation of such projects is sufficient to protect the interests of the County. The following paragraphs briefly review state and federal oversight of habitat projects, focusing (as with the discussion above) on large wetlands projects.

At the state level, the DFG occupies the lead role in overseeing private wetlands creation and banking projects. Its role is dictated in part by the Sacramento-San Joaquin Valley Wetlands Mitigation Bank Act of 1993, a state law intended to ensure “no net loss of wetland acreage or habitat values” in the Central Valley region, and to increase total wetlands acreage if feasible. This goal is to be achieved in part by private wetlands banks, which the Act encourages by:

- Requiring DFG to adopt standards and criteria for wetlands bank projects;
- Providing for a bank site and operator qualification process;
- Requiring a memorandum of understanding (“MOU”) between DFG, the bank operator (often the landowner), and various other agencies consenting to establishment of the bank, the size of the service area (up to 40 miles, but often less), and setting the endowment for perpetual management;
- If the bank site owner is a public entity, requiring payments in lieu of taxes to the county in which the property is located;
- Treating banking proposals as “projects” for the purposes of the California Environmental Quality Act (“CEQA”); and
- Requiring DFG to provide annual reports to the Legislature regarding each mitigation bank approved under the Act.

Consistent with the Act, the DFG has published a number of policy and procedural documents that govern all aspects of wetlands banking projects. Some of these documents reflect extensive coordination with other state and federal agencies. For local governments, however, neither the Act nor these policy and procedural documents appear to provide any meaningful role. There are no requirements for consultation with affected local jurisdictions, consistency with local general plans, or other measures that require consideration of local prerogatives. The Act does allow local governments to become signatories to MOUs, but it is not clear whether this would give participating local governments any say over siting, project design, or other important decisions. [To date, DFG advises that no county has adopted such an ordinance.]

Much the same is true at the federal level. The FWS has general oversight of wetlands banking efforts, working in concert at times with other federal agencies (such as the Natural Resources Conservation Service (“NRCS”) and the Army Corps of Engineers) and DFG. Federal agency involvement is guided by a 1995 policy document adopted jointly by FWS, NRCS, the Army Corps, and other agencies. This guidance document states that local governments should be invited to participate in the banking process if they have any approval authority (i.e., under a local ordinance). Regardless of such local involvement, the document mandates consideration of any existing habitat on the proposed site and, in apparent contrast to DFG policies and related state laws, it also requires an evaluation of compatibility with adjacent land uses.

Altogether, these regulatory schemes appear to have opened the door to a considerable array of private wetland banking efforts in California. The most recent DFG report to the Legislature lists 22 different wetlands banks

that have been approved by DFG (typically in coordination with FWS and other agencies). Most of these banks are “sold out”—meaning that all available mitigation credits have already been purchased. Approved banks tend to have a “service area” approved by DFG that encompasses a large geographic area, typically including part or all of several counties (thus allowing out-of-county mitigation).

Although not mentioned in the DFG report, it also appears that DFG typically does not subject banking proposals to close scrutiny under CEQA. Most banks are instead treated as exempt. The CEQA process, however, is often the best means for obtaining information needed to evaluate whether a wetlands project could (a) adversely impact habitat for other sensitive species, (b) be incompatible with surrounding agricultural and other land uses, or (c) otherwise result in significant environmental impacts. These are important issues in the context of County land use planning and the HCP/NCCP. The absence of such analysis by DFG tends to support enhanced County regulation or other oversight of wetlands projects. In fact, DFG staff have indicated their support for discretionary County review of wetlands projects to ensure that such an analysis is performed.

E. Additional Regulatory and Other Approaches for Potential Consideration.

County interests that could be impacted by large-scale wetlands projects are mentioned in various places above. A brief, non-exclusive “laundry list” of interests that could be impacted is as follows:

- **Agriculture:** Encouraging a strong agricultural industry, including preservation of farmland (particularly prime soils), water rights, and minimizing new direct and indirect impacts on farming practices and farmworker housing.
- **General Plan:** Consistency with polices included in the 2030 General Plan, including those relating to agriculture, economic development, open space and recreation.
- **Clarksburg Agricultural District:** Success of the Clarksburg Agricultural District, including increased tourism, acres planted with wine grapes, and processing facilities.
- **HCP/NCCP:** Timely completion and successful implementation of the HCP/NCCP.
- **Flood protection:** Maintaining and enhancing rural flood protection, particularly for community of Clarksburg.
- **Habitat preservation:** Avoiding the conversion of habitat for native species, including listed species such as the Swainson’s hawk.
- **Revenues:** Maintaining property tax revenues.
- **Health and Safety:** Maintaining fire protection and other emergency services, as well as vector control.

There are various regulatory and non-regulatory means of protecting these interests as proposals for large-scale wetlands projects move forward. These are summarized in the following paragraphs to give the Board a sense of possible options, if any action is desired. No specific recommendations are included at the present time.

Memoranda of Understanding

In lieu of (or in addition to) more conventional means of regulating wetlands projects, the County could seek to protect and promote local interests by entering into MOUs with the public and private parties involved in such projects. The County has previously entered into an MOU with the Sacramento Area Flood Control Agency relating to the Knaggs Ranch property. Through that process, the County was able to secure basic commitments to farmland preservation, flood protection, revenues, and other matters. A similar approach could also be useful in the lower Yolo Bypass and other areas of the County.

There are several potential benefits of County participation in wetlands projects through MOUs. First, MOUs can be negotiated on a case-by-case basis, thus helping ensure that the unique facts and circumstances of individual projects are considered. Second, MOUs may allow the County to achieve benefits that may not be possible by regulation alone—including commitments to public recreational access, County revenues, and future cooperation on matters of joint concern (such as flood protection and water rights). Third, MOUs can also include other parties (public and private) with an interest in habitat projects, helping to ensure that a broad range of interests is represented in the final outcome. Fourth and finally, MOUs can be negotiated with public entities that (like the State) are not subject to County regulation.

The downside to an MOU-based approach is obvious: participation is voluntary. This leaves open the possibility that a project could proceed without regard to County interests if negotiations fail.

Grading Ordinance

As noted, the County currently regulates grading through the provisions of the California Building Code. Those provisions treat grading permits much the same as building permits—once an application is properly completed, the approval is ministerial and CEQA does not apply. Many jurisdictions have adopted their own grading ordinances to supplement or replace their reliance on the California Building Code. (In response to prior Board direction, the Planning and Public Works Department is currently drafting a grading ordinance.) Through such an ordinance, the County could require a discretionary grading permit for projects that are of a particular size (e.g., affecting 40 acres or more) or that exceed a volume-based threshold (e.g., 15,000 cubic yards of soil)—thus exempting projects of less regulatory concern. The County could establish certain criteria for approval that are consistent with the County interests set forth above.

A grading ordinance could thus help ensure that projects move forward only if they satisfy criteria established by the Board of Supervisors, including criteria set forth in the 2030 General Plan upon its adoption. This could mean that some grading permits are approved subject to satisfaction of certain conditions relating to drainage and flood protection, among other things. CEQA review would likely be required for any discretionary grading permits, helping to ensure that all environmental impacts are properly addressed.

But like all other conventional means of regulating land uses and activities, conditions placed on grading permits (and mitigation measures) have to conform to certain legal requirements. Those requirements will not necessarily allow the County to address matters such as recreational access and water rights, or other matters with little or no connection to grading itself. State projects would not be subject to a grading ordinance.

Zoning Regulations—Including Use Permits and Changes in Zoning

There are at least two ways that the County could use its zoning power to regulate wetlands projects, mitigation banks, or both. First, the County could amend its zoning ordinances to make such activities a conditional use. Second, the County could amend its zoning ordinances to prohibit such activities in certain zones, and establish a new “habitat” or other zone—thus requiring a zoning change prior to the implementation of wetlands projects or mitigation banks. Either approach would give the County substantial control over the location, design, and implementation of such projects. It should be noted that the draft 2030 General Plan does not currently anticipate the creation of a “habitat” land use designation or zoning classification.

Like a grading ordinance, in taking either of these actions, the County can exempt small projects or even large projects that are unlikely to conflict with County interests. The approval of a use permit or rezoning would require CEQA review, allowing a full evaluation of environmental impacts and related mitigation measures. Also like a grading ordinance, these zoning approaches could help implement policies and programs included in the 2030 General Plan upon its adoption. On the other hand, as noted above, project conditions or mitigation measures must conform to certain legal requirements. And further, County zoning requirements can be time consuming to implement and would not apply to projects undertaken by the State or its agencies.

Moratorium Ordinance

A moratorium ordinance would be helpful if some time is needed to figure out whether to proceed with one of these options, or another option entirely, and there is a substantial concern that wetlands or mitigation banking projects will proceed in the interim. Under Government Code section 65858, the County has authority to adopt a moratorium ordinance on an urgency basis to preclude certain land uses that pose a risk to public health, safety, or welfare. Such an ordinance can only last up two years, and must be renewed twice by the Board of Supervisors to even last that long. Like other County ordinances, a moratorium would not apply to any activities by the State, however.

OTHER AGENCY INVOLVEMENT

The Office of the County Counsel prepared this letter in consultation with the Parks and Resources Department, the Yolo County Habitat Joint Powers Authority, the Planning and Public Works Department, and the County Administrator’s office. The California Department of Fish and Game and the Department of Conservation were also consulted.

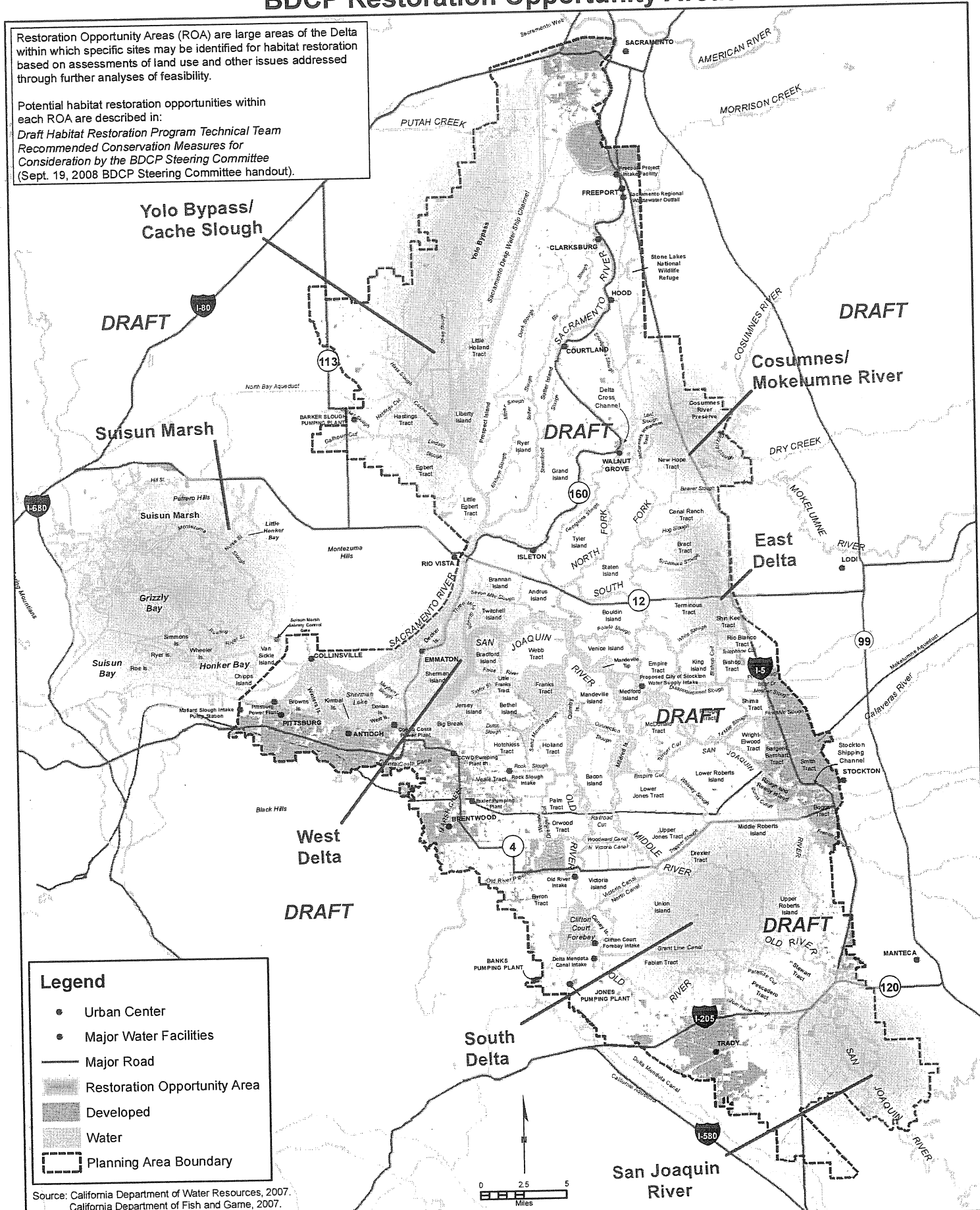
ATTACHMENTS

- A: BDCP Restoration Opportunity Areas
- B: Mitigation Banks in Yolo County

BDCP Restoration Opportunity Areas

Restoration Opportunity Areas (ROA) are large areas of the Delta within which specific sites may be identified for habitat restoration based on assessments of land use and other issues addressed through further analyses of feasibility.

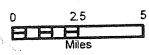
Potential habitat restoration opportunities within each ROA are described in:
Draft Habitat Restoration Program Technical Team Recommended Conservation Measures for Consideration by the BDCP Steering Committee
 (Sept. 19, 2008 BDCP Steering Committee handout).

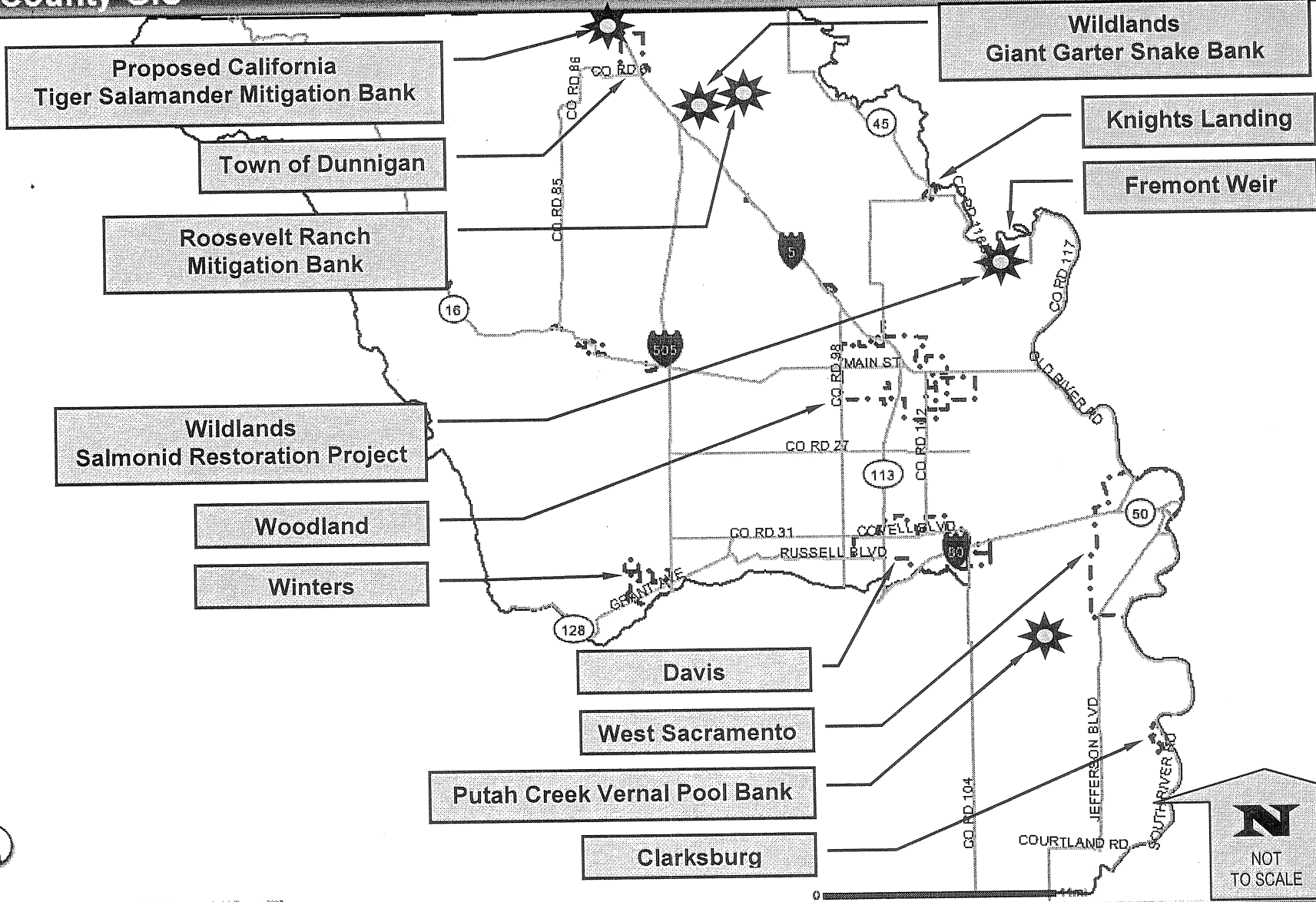


Legend

- Urban Center
- Major Water Facilities
- Major Road
- ▨ Restoration Opportunity Area
- ▨ Developed
- ▨ Water
- ▭ Planning Area Boundary

Source: California Department of Water Resources, 2007.
 California Department of Fish and Game, 2007.
 California Spatial Information Library, 2008.





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EXHIBIT B
MITIGATION BANKS IN YOLO COUNTY