



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: July 9, 2009

SUBJECT: A draft ordinance establishing limited County regulation of wetland habitat projects

RECOMMENDED ACTIONS

1. **RECEIVE** a staff presentation regarding the draft ordinance (**Attachment A**) regarding wetland restoration, creation, and enhancement projects;
2. **HOLD** a public hearing to receive comments from the public regarding the draft ordinance and any related issues; and
3. **RECOMMEND** that the Board of Supervisors (a) adopt the ordinance with any changes recommended by the Planning Commission, and (b) find that adoption of the ordinance is exempt from the California Environmental Quality Act pursuant to CEQA Guidelines §§ 15307 (actions by regulatory agencies for protection of natural resources), 15308 (actions by regulatory agencies for protection of the environment), and Public Resources Code § 15061(b)(3) (the “common sense” exemption).

REASONS FOR RECOMMENDED ACTIONS

As the Planning Commission is aware, the Board of Supervisors has directed the Office of the County Counsel to consider preparation of an ordinance authorizing County regulation of wetland restoration, creation, and enhancement projects (hereinafter, “wetland projects”). A proposed ordinance is attached hereto. The attached draft establishes a use permit requirement for certain wetland projects, describes the required contents of permit applications, identifies seven discrete criteria to govern permit approval, and provides for the Board of Supervisors to review the effectiveness of the ordinance at established intervals. Subject to certain exemptions, it would apply to all wetland projects within the County’s jurisdiction (i.e., all but those undertaken by the state or federal governments).

This office believes that the ordinance authorizes an appropriate level of County oversight of wetland projects that is consistent with the concerns and objectives of the Board of Supervisors. Accordingly, this office recommends that the Planning Commission take the actions described above.

BACKGROUND

As explained at the May 14, 2009 Planning Commission meeting, the Board of Supervisors considered potential County regulation of large-scale wetland projects during its October 28, 2008 meeting. At the end of that discussion, the Board of Supervisors asked this office to further consider the appropriate role of the County with regard to such projects, including whether to adopt an ordinance providing for limited County regulation.

This office has taken a number of steps in response. Those steps include:

- Meeting with other County staff, including the Agricultural Commissioner and staff in the Planning and Public Works Department, Parks and Resources Department, and County Administrator's office;
- Meeting with the Executive Director (Maria Wong) of the Yolo Natural Heritage Program, a county-wide Natural Communities Conservation Plan/Habitat Conservation Plan;
- Providing a summary of the matter to the Planning Commission at its May 14, 2009 meeting;
- Convening two meetings of a "stakeholder group" to discuss the appropriate regulatory role of the County, as well as a preliminary draft of the ordinance attached hereto; and
- Speaking with other interested parties, including Department of Fish and Game staff and various private organizations and landowners, regarding the appropriate regulatory role of the County.

The draft ordinance is the end result of this effort. The following section details why County regulation of wetland projects is appropriate and explains how the ordinance would serve this goal.

ANALYSIS

A. Wetlands in Yolo County—Past, Present, and Future.

Historically, large portions of the County consisted of diverse wetland and riparian habitats. Most of these natural wetland and riparian areas were converted over time to agricultural, urban, or other uses, and relatively little of these natural wetlands remain today.

In recent years, there have been many efforts to create, restore, enhance, and preserve wetland habitat in the County. One of the leading programs in this regard is the federal Wetland Reserve Program ("WRP"), implemented by the Natural Resources Conservation Service ("NRCS"). About 7,700 acres of land in the County—an area larger than the City of Davis—are currently part of the WRP. Most of that acreage consists of wetlands that have been restored or enhanced. The largest single WRP project is the Roosevelt Ranch, near Knight's Landing, which covers about 2,527 acres. Many smaller WRP projects are located in the southern portion of the 54,000-acre Yolo Bypass, west of Clarksburg.

In addition, other areas within the Yolo Bypass, including the Yolo Bypass Wildlife Area (about 16,000 acres), have also been the subject of extensive wetland restoration, enhancement, and preservation efforts. These projects have generally been carried out by (or with substantial funding from) the Department of Fish and Game (“DFG”) and the Wildlife Conservation Board (“WCB”), sometimes working with other groups such as Ducks Unlimited and the California Waterfowl Association as well as private landowners. Altogether, several thousand acres of wetland and other habitat types have been restored, enhanced, and preserved in the Bypass. These restored habitats have been integrated successfully with agricultural uses in some instances.

This trend appears certain to continue—and likely, accelerate—in the foreseeable future. The Board letter prepared in connection with the October 28, 2008 meeting identified a number of large wetland projects that are pending or reasonably foreseeable. Briefly, those projects included the following:¹

- **Liberty Island Conservation Bank**—A 165-acre project to preserve, restore, and enhance habitat for native fish species on Liberty Island, at the southern end of the Yolo Bypass. The project will create mitigation credits for sale to offset the loss of similar habitat elsewhere in the Delta. Other related potential future projects have also been identified by the project proponent: projects to restore 440 and 120 acres of similar habitat on other portions of Liberty Island; the “West Property” project, which would restore another 278 acres of property on the island; and a project to restore similar habitat on about 160 acres to the southwest in an area known as Little Hastings Island.
- **Ridge Cut Giant Garter Snake Conservation Bank**—A 185-acre conservation bank to restore giant garter snake habitat, including associated wetlands, on farmland located near Zamora. Like the Liberty Island Conservation Bank, this project will create mitigation credits for sale to offset the loss of giant garter snake habitat in other locations in the region.
- **Fremont Landing Conservation Bank**—A project to restore ___ acres of salmonid habitat near Knight’s Landing. This project will also create mitigation credits for sale to offset habitat losses elsewhere.
- **Putah Creek Mitigation Bank**—A project to restore vernal pools (72 acres) and a small amount of wetland and riparian habitat (4 acres) on a 437-acre site located south of Davis, near Grasslands Park, together with preservation of 318 acres of Swainson’s hawk habitat.
- **Yolo Ranch**—Immediately north of Liberty Island, the Yolo Ranch consists of approximately 3,400 acres intended to be restored to tidal wetlands and similar habitats for the Delta smelt and other fish species. Westlands Water District, a large water district that primarily serves agricultural users in Fresno County, owns the Ranch. It will likely partner with other water districts in carrying out habitat restoration projects on the Ranch. Specific project proposals are expected in the near future.

¹ The October 28 Board letter also mentioned a project on the Roosevelt Ranch, but it was later determined that this project involves a Swainson’s hawk conservation easement and, accordingly, farmland will be preserved rather than converted to wetlands habitat.

These projects are only part of what the near future appears to hold for the County. The October 28 Board letter mentions two major state planning efforts—Delta Vision and the Bay-Delta Conservation Plan (“BDCP”)—that propose the creation, restoration, and enhancement of tens of thousands of additional wetlands in the County. Each effort is in a relatively preliminary stage, but some specific proposals impacting Yolo County have emerged.

For example, the BDCP appears likely to include modifications to the Fremont Weir (at the northern end of the Yolo Bypass) to increase the frequency, extent, and duration of flood events in the Yolo Bypass to benefit various aquatic species. Flood events will probably vary from 3,000 to 6,000 cubic feet per second (cfs), which would inundate between 7,881 (3,000 cfs) and 18,371 acres (6,000 cfs) of the Yolo Bypass (out of 54,448 total acres in the Bypass) between January and April in certain years. Potential impacts on agricultural uses of such lands could be significant, and are currently under review.

This is only one anticipated component of BDCP. Other components of BDCP and similar state efforts are expected to lead eventually to additional wetland projects in the County. Together with projects undertaken by private mitigation bankers, local water districts, and others, in coming years the County will likely see a significant increase in total wetland acreage. It is thus appropriate to consider whether some County oversight of such projects is necessary, recognizing that even though the County cannot regulate projects undertaken directly by the state or federal government, there are still a large number of other wetland habitat projects—likely including all of those mentioned in the bullet points above—that are within its regulatory reach.

B. The Case For County Regulation.

In light of the scenario described above, there are many reasons to consider limited County oversight of wetland habitat projects. Some of the most compelling grounds are as follows.

To Ensure Appropriate Environmental Review

County oversight will ensure that such projects are properly reviewed under the California Environmental Quality Act (“CEQA”). This is important and it ties into many other potential benefits. Though not technically a “planning” statute, CEQA is thus integral to the planning process because it allows for potential environmental impacts to be identified and avoided (if feasible) through changes in project design, operation, and management. Where meaningful CEQA review does not occur, such impacts may not be properly addressed (or addressed at all) and interested agencies and members of the public lose an opportunity to raise their concerns for consideration.

Despite this, compliance with CEQA is a responsibility that various state agencies—in the context of wetland projects, mainly DFG and the WCB—tend to ignore. Consider the following examples with regard to DFG:

- In reviewing a mitigated negative declaration prepared by Reclamation District 2093 for the Liberty Island Conservation Bank, DFG failed to raise the loss of Swainson’s hawk foraging habitat as a concern. This office advised DFG of this shortcoming—pointing out that the MND described the project site as Swainson’s hawk foraging habitat and even mentioned observations of foraging hawks. We asked DFG to send an additional comment letter to RD

2093. It declined, failing to raise a straightforward habitat loss issue without any explanation. [Wildlands, Inc., the project applicant, later revised the project to preserve some Swainson's hawk foraging habitat on the project site.]

- In approving a permit for the Ridge Cut project, described above, DFG adopted a “notice of exemption” from CEQA review under CEQA Guidelines § 15313, relating to the preservation of wildlife habitat “in its natural condition.” But the Ridge Cut project does not do this. It converts farmland to wetland and associated habitats for the giant garter snake, which could be adversely affected during construction. [Wildlands is now cooperating with the County to ensure full CEQA review as part of its pending application for a County flood hazard development permit.]

And with regard to WCB, the situation is much the same. For instance, in May 2007, WCB agreed to fund the conversion of 350 acres of “existing rice fields” in the Yolo Bypass to semi-permanent and seasonal wetlands. No environmental review appears to have occurred. In August 2007, WCB funded the completion of a wetland restoration project in Yolo County that a landowner started but failed to complete. Again it conducted no environmental review, despite noting that the site was a “fallow field” (and thus potentially Swainson's hawk foraging habitat). It is not hard to find numerous other examples—WCB simply does not require the completion of any environmental review prior to funding habitat restoration and enhancement projects.

There are other examples with regard to both agencies, but these are sufficient to prove that the County cannot expect state agencies charged with safeguarding the environment to conduct appropriate environmental review of habitat projects. Perhaps this will change over time. Both agencies have lost lawsuits involving similar instances of disregard for CEQA in connection with wetland habitat projects—in fact, they lost one just last week involving a wetland restoration and enhancement project. *Friends of the Northern San Jacinto Valley v. California Department of Fish and Game*, 2009 Cal. App. Unpub. LEXIS 5226 (June 25, 2009). Various news reports indicate that, among other things, the *Friends* lawsuit was precipitated by the alleged burial of active burrowing owl nests during project construction. But on the same day that decision was released, a WCB representative explained to this office that WCB views habitat projects as an “even trade” for the environment and that no mitigation for impacted biological resources (or apparently, any environmental review) should be required.

This is not consistent with the law, and it is poor environmental policy. The County is in a good position to address this problem. It can do so adopting a use permit requirement for wetland projects, thus creating a clear legal basis for the County to conduct full CEQA review of such projects. This is one of the key reasons why County regulation is appropriate. And as noted above, it ties into some of the other sound reasons for County regulation.

To Protect Agriculture and the Agricultural Industry

Wetlands projects can greatly benefit the environment, and in some instances they have been successfully integrated with agricultural uses and activities. But wetland projects also have the potential to adversely affect agriculture in the County in a number of ways. Among those are the following:

- **The loss of farmland.** The loss of farmland is an obvious consequence of some wetland projects. The conversion of farmland to wetlands on a large scale is thus a significant resource issue.
- **Crop depredation.** The County Agricultural Commissioner has received many reports of crop losses to waterfowl drawn to an area by wetlands projects. DFG has received similar reports in connection with operation of the Yolo Bypass Wildlife Area.
- **Impacts on agricultural activities.** Many wetland projects can be successfully integrated with surrounding land uses. But there may be instances where a project could impact farm infrastructure (e.g., roads, irrigation facilities, drainage) or otherwise interfere with the ability of landowners to fully use or expand their agricultural operations.
- **Other impacts on the agricultural economy.** This issue was covered by the “is there a tipping point” discussion in the May 14 staff report for the Planning Commission. Generally, there is concern that the conversion of a significant amount of County farmland to wetlands could severely disrupt certain sectors of the agricultural industry, such as rice, and cause job losses and a large decline in annual production revenues.

These are all valid reasons for the County to establish some regulatory oversight of wetland projects. Simply assuring the performance of meaningful CEQA review will help identify whether some of these impacts may occur. A discretionary permitting process will also provide an avenue for concerned individuals (such as the Agricultural Commissioner) to raise questions—and offer solutions—regarding crop depredation and other matters.

In theory, other agencies could take steps to consider these issues and allow more County participation in project design and similar matters than in the past. But many of these concerns are local in nature, and there is no assurance that DFG, WCB, or other agencies (or private entities that support such projects) will give due weight to impacts on agriculture or other matters. The only way to guarantee that these concerns receive full attention is through County regulation. The same goes for other potential land use conflicts that do not directly involve farming, such as potential conflicts with other types of existing and planned development and infrastructure (e.g., wineries and other processing facilities).

To Protect Biological Resources

The existing biological resources of the County—including endangered, threatened, and rare species and their habitats—can also be adversely affected by wetland projects. This may not always be the case. But a recent study on potential effects of increasing flooding in the Yolo Bypass (as part of the BDCP) to create aquatic habitat identified the following estimated impacts to various habitats:

- At flows of 3,000 cfs through the Bypass (the lower end of the proposed range): The temporary conversion of 4,805 acres of farmland, 2,501 acres of riparian and wetland habitats, and 554 acres of grasslands; and

- At flows of 6,000 cfs through the Bypass (on the higher end of the proposed range): The temporary conversion of 11,391 acres of farmland (including 4,433 acres of rice fields), 5,207 acres of riparian and wetland habitats, and 1,659 acres of grasslands. In addition, at this rate of flow, the following species habitat types would be inundated: 31% of the black tern freshwater marsh complex habitat, 21% of the northern harrier primary breeding habitat, 22% of the short-eared owl suitable breeding habitat, 25% of the California black rail potential habitat, 30% of the least bittern primary habitat, 28% of the tricolored blackbird suitable breeding habitat, 30% of the yellow-headed blackbird suitable breeding habitat, and 27% of the delta tule pea potentially suitable habitat.

The study also documents a variety of potential impacts to the giant garter snake and Swainson's hawk, which are found in many locations throughout the County.

While this study is confined to the Yolo Bypass and a specific proposal included in the BDCP, it provides good evidence that wetland projects can significantly impact areas relied on by many endangered, threatened, and rare species. Such impacts deserve careful study and consideration. Not only is it good public policy, it is also integral to the timely completion and successful implementation of the Yolo Natural Heritage Program (as explained more fully in the October 28 Board letter, previously provided to the Planning Commission).

To Avoid Other Significant Conflicts with Public Health, Safety, or Welfare

While potential conflicts with agriculture and biological resources are perhaps the most likely complications of a wetland project, there is some chance that a wetland project could otherwise conflict with public health, safety, or welfare. Vector control issues are one concern, and potential impacts on flood protection and related matters of public safety are another. There may also be instances where the potential effects of climate change on a project deserve attention—such as instances where a relatively small change in sea level could result in habitat “migration” and related effects (as noted in many Delta Vision and BDCP documents) on surrounding lands. The County also has a legitimate interest in ensuring that adequate measures are in place to provide for the responsible management of a wetland project over time. A use permit process and CEQA review will position the County to take a meaningful role in regulating wetland projects to ensure that such issues are identified, considered, and resolved to the greatest feasible extent during the planning process.

C. The Draft Ordinance.

As noted, this office took several steps (as well as others not specifically mentioned) prior to drafting the ordinance that is attached for your review. In its current form, the ordinance creates a regulatory scheme with the following key components:

- **Requires a use permit for most wetland projects**—Most “wetland habitat projects,” as defined in the ordinance, must obtain a use permit prior to commencing work. (Draft at pp. 1 and 5.) This is critical because it triggers the application of CEQA and the need for environmental review.
- **Exempts some projects**—The ordinance exempts several types of wetland projects that are relatively modest in size (e.g., wetland restoration and enhancement projects of less than 40

acres), undertaken primarily for agricultural or flood control purposes, or that otherwise are unlikely to have a significant environmental impact. (Draft at pp. 5-6.)

- **Generally describes application contents and processing**—The ordinance identifies the documents that will constitute a complete application, leaving some room for flexibility depending on the characteristics of a particular project. Importantly, the ordinance requires the applicant to provide a proposed management plan that identifies how vector control issues will be addressed, how the project will be responsibly managed over time, and how crop depredation may be addressed to the extent it is a foreseeable consequence of the proposal. The ordinance also requires all permit applications to be referred to the Executive Director of the Yolo Natural Heritage Program to encourage coordination with the developing HCP/NCCP. (Draft at pp. 6-7.)
- **Identifies the decisionmaker**—The Zoning Administrator will be the “deciding authority” for projects under 40 acres, as with other minor use permits. The Planning Commission will be the decisionmaker for projects between 40 and 160 acres, as with other major use permits. For projects over 160 acres, and for projects of a smaller size that do not meet the “automatic” approval criteria mentioned below, the Board of Supervisors will be the deciding authority. (Draft at p. 8.)
- **Identifies permit approval criteria**—The ordinance identifies seven criteria that, if satisfied, assure approval of a use permit. Most of the criteria are closely related to the results of environmental review under CEQA. Projects larger than 160 acres, however, will only be eligible for “automatic” approval if there is substantial evidence that they will not have a significant adverse economic effect on the agricultural industry of the County or the region. If such evidence does not exist, or if any other criteria are not satisfied, the Board of Supervisors can nonetheless approve a use permit if it finds that doing so is consistent with the purposes of the ordinance. (Draft at pp. 8-9.)
- **Offers an extended permit term**—Most use permits expire automatically within one year of issuance if the use has not commenced (this may need to be clarified in the final version of the ordinance). The ordinance authorizes the deciding authority on a use permit to extend its term for up to four additional years, recognizing that wetland projects often require numerous agency approvals that take some time to acquire. (Draft at p. 9.)
- **Requires periodic review of the ordinance**—Like some other County ordinances, this ordinance includes a provision that commits the Board of Supervisors to review the effectiveness of the ordinance and related issues at certain intervals. The first such review will take place two years after the effective date of the ordinance or upon adoption of the Yolo Natural Heritage Program, whichever is sooner. Subsequent reviews will occur every five years thereafter. It may also be appropriate to tie the initial review to issuance of the final BDCP. (Draft at pp. 10-11.)

The development of this draft was particularly influenced by the discussion at two “stakeholder” meetings. Participants in those meetings included representatives of the following:

Natural Resources Conservation Service	Audubon California	Yolo Audubon Society
Ducks Unlimited	Wildlife Conservation Board	Department of Fish and Game
Yolo Basin Foundation	California Waterfowl Association	Westervelt Ecological Services
Yolo County Farm Bureau	Yolo Land Trust	Yolo Natural Heritage Program
Sierra Club (Yolano Group)	Cache Creek Conservancy	Yolo Land and Cattle Company
Tuleyome	B&L Properties	Yolo County Resource Conservation District
Yolo County Planning and Public Works Department	Yolo County Agriculture Department	Yolo County LAFCO
Yolo County Parks Dept.		

An earlier draft of the proposed ordinance was reviewed by the participants and discussed during a lengthy meeting. Several participants expressed concern about aspects of the earlier draft. Their comments focused in particular on the “decisionmaking criteria” included in that draft. In preparing the attached version of the ordinance for Planning Commission review, this office made two changes to that section of the ordinance in response.

First, we deleted most of the original decisionmaking criteria. The remaining criteria—and in particular, those relating to land use conflicts, biological resources, and agriculture—reflect the areas where meeting participants tended to agree that the County had a legitimate regulatory role. This is a substantial change, yet it preserves a sound regulatory role for the County.

Second, we changed the basic purpose of the remaining criteria. In the original draft, the criteria functioned merely as “considerations” for the deciding authority to balance in deciding whether to approve an application. This is no longer the case. If the criteria in this version of the ordinance are satisfied, the permit is to be approved. The end result of this approach is that regardless of the size of the project, it will be approved so long as the County concludes there is substantial evidence that it will not have a significant adverse affect on surrounding land uses, biological resources, flood safety, or other relevant considerations of public health, safety or welfare. Projects larger than 160 acres will also have to provide evidence relating to potential economic effects on the agricultural industry to qualify for “automatic” approval.

Even if these criteria cannot be satisfied, the application is referred to the Board of Supervisors for further consideration. It is not automatically denied. The Board may then decide whether to approve the project, taking into account whether issuance of the permit would be consistent with the purposes of the ordinance.

This broad discretion is appropriate in light of the complex task the Board will likely have before it on a project that fails to meet the criteria in the ordinance.

Altogether, this office believes that the ordinance provides for streamlined but effective County regulation of wetland projects. We welcome input from the Planning Commission on the ordinance, including any suggestions for improvement.

SUMMARY OF AGENCY COMMENTS

A preliminary version of the draft ordinance was reviewed by the Planning and Public Works Department, Parks and Resources Department, and Agricultural Commissioner, as well as the other public and private entities listed above. They provided extensive feedback regarding that draft and other issues, including whether the County should regulate wetland projects at all.

Representatives of some state agencies, including DFG and WCB, have discouraged any County regulation. These representatives were likely presenting their individual opinions, rather than offering the formal positions of their respective agencies. Representatives of organizations such as Ducks Unlimited, the California Waterfowl Association, and the Yolo Basin Foundation have also expressed a number of concerns about the added burden of County review and the basis for County regulatory oversight. This staff report addresses the basis for County regulation in response to those comments. Other concerns raised by these representatives will be addressed during the Planning Commission meeting.

ATTACHMENT

Attachment A—Draft Ordinance

DRAFT

ORDINANCE NO. __ - __

**An Ordinance Regulating Wetland Habitat Creation,
Restoration, and Enhancement Projects**

The Yolo County Board of Supervisors hereby ordains as follows:

Section One. Findings and Authority.

[Appropriate findings will be included in the draft submitted to the Board of Supervisors for consideration on August 4, 2009.]

Section Two. Definition of “Wetland Habitat Projects”. The following definition shall be added to Title 8 of the Yolo County Code:

Sec. 8-2.299.27.3. Wetland Habitat Projects

“Wetland habitat projects” shall mean projects to create, restore, or enhance wetlands, as those terms are defined in Title 10, Chapter 10 of this Code.

Section Three. Minor Use Permit Required. A minor use permit, as that term is defined in Yolo County Code Section 8-2.270.9, shall be required for any wetland habitat project of less than 40 acres. Accordingly, the following sections of the Yolo County Code shall be amended to include this requirement by adding an appropriately-lettered subsection followed by the words “Wetland habitat projects of less than 40 acres, subject to Title 10, Chapter 10 of this Code”:

- Section 8-2.404 (Agricultural Preserve)
- Section 8-2.504 (Agricultural Exclusive)
- Section 8-2.604 (Agricultural General)
- Section 8-2.614 (Agricultural Industry)
- Section 8-2.1914 (Public Open Space)
- Section 8-2.1922 (Open Space)

Section Four. Major Use Permit Required. A major use permit, as that term is defined in Yolo County Code Section 8-2.270.3, shall be required for any wetland habitat project of 40 acres or more. Accordingly, the following sections of the Yolo County Code shall be amended to include this requirement by adding an appropriately-lettered subsection followed by the words “Wetland habitat projects of 40 acres or more, subject to Title 10, Chapter 10 of this Code”:

- Section 8-2.404.5 (Agricultural Preserve)
- Section 8-2.504.5 (Agricultural Exclusive)
- Section 8-2.604.5 (Agricultural General)

In addition, the following sections shall be added to the Yolo County Code, shall be entitled “Major Use Permit,” and shall identify “Wetland habitat projects of 40 acres or more, subject to Title 10, Chapter 10 of this Code” as a major conditional use in subsection (a) or (b) thereof, as appropriate:

- Section 8-2.614.5 (Agricultural Industry)
- Section 8-2.1914.5 (Public Open Space)
- Section 8-2.1922.5 (Open Space)

Section Five. Addition of Chapter 10 to Title 10 of the Yolo County Code. The following Chapter is added to Title 10 of the Yolo County Code:

Chapter 10. Wetland Habitat Creation, Restoration and Enhancement Ordinance

Article 1. Title and Purposes.

Sec. 10-10.101. Title.

This Chapter shall be known as the “Wetland Habitat Creation, Restoration, and Enhancement Ordinance” of the County.

Sec. 10-10.102. Purposes.

In conjunction with the provisions of Title 8 of the Yolo County Code, this Chapter provides for limited County regulation of certain wetland habitat creation, restoration, and enhancement projects. Such projects are unique in many respects. Wetland habitat projects can provide important habitat areas for fish, wildlife, and plants. They can also help maintain and enhance water quality, facilitate groundwater recharge, mitigate flooding, and control erosion. Some wetland habitat projects can also provide educational, scientific study, and recreational opportunities. Such projects can thus be a significant asset to the environment and the general public.

To assure these benefits, however, careful planning is necessary. Attention to matters of design, construction, and long-term monitoring and management is essential. Particularly for larger projects, early consideration of ways to integrate appropriate educational, recreational, scientific, and other opportunities is also desirable. Finally, the potential local and regional environmental impact of wetland habitat projects—such as the conversion of farmland and existing species habitat, as well as conflicts with surrounding land uses and activities—deserves close attention and consideration.

Accordingly, this Chapter is intended to promote the foregoing objectives and to achieve the following purposes:

- (a) To ensure that wetland habitat projects are located, constructed, and managed in a manner that is consistent with the General Plan, compatible with surrounding land

uses to the extent feasible, and sensitive to the need for a strong agricultural industry, the protection of existing biological resources, flood protection, vector control, and other appropriate local and regional concerns.

- (b) To encourage the proponents of wetland habitat projects—particularly large wetland habitat projects—to design and implement projects that achieve multiple environmental and community objectives, and that include management plans or similar means of ensuring the responsible management of such projects over time.
- (c) To expand opportunities for citizens to participate in the process of reviewing wetland habitat projects by establishing public hearing requirements and other opportunities for public input.
- (d) To avoid creating new regulatory barriers to wildlife-friendly agricultural practices and modest wetland habitat projects with low potential to create significant environmental impacts or engender conflicts with surrounding land uses.

Nothing in this Chapter is intended to restrict or in any way affect or impair the agricultural use of land within the County.

Article 2. Definitions

For the purposes of this Chapter, the following terms shall have the meanings stated below:

Sec. 10-10.20(). Agriculture or Agricultural.

“Agriculture” or “agricultural” shall have the meaning set forth in Yolo County Code Section 8-2.208.

Sec. 10-10.20(). Applicant.

“Applicant” shall mean a person who files an application for a permit under this Chapter and who is either the owner of the site, a vendee of that person pursuant to a contract of sale for the site, or an authorized agent for either of those persons.

Sec. 10-10.20(). Create or Creation.

“Create” or “creation,” in the context of a wetland habitat project, shall mean to construct a new wetland, generally by excavating and/or flooding land not currently or historically occupied by a wetland.

Sec. 10-10.20(). Deciding Authority.

“Deciding Authority” shall mean the public official(s) or County employee with authority to decide an application for a permit under this Chapter.

Sec. 10-10.20(). Director.

“Director” shall mean the Director of the Planning and Public Works Department, or his or her designee or successor in function.

Sec. 10-10.20(). Enhance or Enhancement.

“Enhance” or “enhancement,” in the context of a wetland habitat project, shall mean to reclaim a degraded or disturbed natural wetland to bring back one or more functions that have been partially or completely lost due to natural causes or actions such as draining, grading, or other land uses and activities. Any project that changes the function of an existing wetland so that it more closely resembles the natural (i.e., prior to disturbance by human activities) condition of a site shall be considered a wetland enhancement project for the purposes of this Ordinance. Otherwise, it shall be considered a wetland creation project.

Sec. 10-10.20(). General Plan.

“General Plan” shall mean the adopted General Plan of Yolo County, as may be amended from time to time.

Sec. 10-10.20(). Grading.

“Grading” shall have the same meaning as in Appendix J of the California Building Code, 2007 edition, as may be amended from time to time.

Sec. 10-10.20(). Person.

“Person” shall mean an individual, firm, partnership or corporation, their successors or assigns, or the agent of any of the foregoing, and shall include any applicant or permit holder under this Chapter.

Sec. 10-10.20(). Project.

“Project” shall mean the whole of any activity or activities undertaken in connection with creating or restoring wetlands on a site, and shall be interpreted broadly to include all related activities such as grading, tree or vegetation removal, and the creation, restoration, or enhancement of associated riparian areas, uplands, and buffer areas.

Sec. 10-10.20(). Restore or Restoration.

“Restore” or “restoration,” in the context of a wetland habitat project, shall mean to restore a wetland, generally by excavating and/or flooding land that is not currently occupied by a wetland but which, based on soil characteristics or other factors, appears likely to have been historically occupied by a wetland.

Sec. 10-10.20(). Site.

“Site” shall mean all areas of real property that are within the boundaries of a proposed project, and may include more than one legal parcel.

Sec. 10-10.20(). Wetland or wetlands.

“Wetland” or “wetlands” shall include tidal and intertidal marshes, non-tidal marshes (such as vernal pools), floodplains inundated for non-agricultural purposes on an annual, semi-annual, or other regular basis, and any other area which meets one or more of the following criteria:

- (a) Lands that meet the definitions provided in any of the following sources: Title 14 of the California Code of Regulations at Section 13577; California Fish and Game Code Section 2785; Title 16 of the United States Code at Section 3801(a)(27); Title 33 of the Code of Federal Regulations at Section 328.3(b); Title 40 of the Code of Federal Regulations at Section 320.3(t); or
- (b) Any other lands that are inundated or saturated by water at a frequency and duration sufficient to support, and that under normal circumstances do support on at least a temporary basis, a prevalence of vegetation or other biota typically adapted for life in saturated soil conditions.

Article 3. Permits

Sec. 10-10.301. Permit Requirement; Exemptions.

No person shall engage in grading, clearing, or other land disturbance activities relating to a wetland habitat creation, restoration, or enhancement project without first applying for and receiving a use permit under this Chapter, together with any other approvals required by federal, state, or local law. The following activities shall be exempt from this permit requirement and the other provisions of this Chapter:

- (a) Projects that do not create more than 10 acres of wetland habitat.
- (b) Projects that do not enhance or restore more than 40 acres of wetland habitat. This exemption may not be combined with the exemption in subsection (a), above, to exempt any project that creates, enhances, or restores more than 40 acres of wetland habitat.
- (c) All activities undertaken in connection with, and in furtherance of, the agricultural use of land. This includes, but is not limited to, the construction and maintenance of stock ponds and small reservoirs, tail-water ponds, irrigation canals and sloughs, rice fields, and similar activities. Upon the request of the Director, the County Agricultural Commissioner shall provide a written opinion regarding whether an activity or activities are consistent with this exemption.

- (d) The winter flooding of agricultural fields for the primary purpose of creating temporary habitat for migratory waterfowl, provided such flooding does not occur in a time or manner that prevents or substantially interferes with the reasonable agricultural use of the site or surrounding lands. Upon the request of the Director, the County Agricultural Commissioner shall provide a written opinion regarding whether the flooding of a particular site is consistent with this exemption. This exemption shall not apply to any project or activity that includes the construction of new infrastructure for non-agricultural purposes and that requires a County grading permit or a flood hazard development permit.
- (e) Projects undertaken for the primary purpose of flood control, flood protection, or related matters of flood safety and the protection of life and property.
- (f) Riparian or upland creation, enhancement, or restoration projects, unless any such project includes a wetland habitat creation, enhancement, or restoration component that exceeds the acreage limits set forth in subsections (a) or (b), above.
- (g) Activities that require discretionary approval pursuant to Chapters 3, 4, or 5 of this Title 10.
- (h) Any project that received all necessary County approvals prior to the effective date of this Chapter, or for which a complete application for such approval(s) was submitted prior to effective date (for projects of 160 acres or less only).

Notwithstanding the foregoing, any expansion or other change to a project previously covered by one or more of these exemptions shall require a use permit if the proposed expansion or other change would remove the project, viewed as a whole, from the scope of these exemptions.

Sec. 10-10.302. Permit Contents, Processing, and Decisions

- (a) *Applications, generally.* Applications for a use permit under this Chapter shall be submitted to the Director, together with payment of all application fees established by the Board of Supervisors. Except as otherwise provided in this Chapter, all provisions of the Yolo County Code relating generally to use permits shall apply to the review, issuance, and amendment or revocation of permits covered hereunder.
- (b) *Applicant contents.* An application for a use permit shall include all of the following:
 - (i) A completed application for a permit under this Chapter, on a form provided by the County, together with payment of the application fee established by resolution of the Board of Supervisors.
 - (ii) Completed applications for any other required County approvals, such as a grading permit or Flood Hazard Development Permit, together with

payment of the application fee(s) established by resolution of the Board of Supervisors. In addition, both with the initial application and thereafter, the applicant shall provide copies of all completed applications for other federal, state, and local approvals associated with the proposed project to facilitate coordination between the County and other agencies.

- (iii) Appropriate site-specific technical reports, including but not limited to such documents as a biological resources analysis, a hydrology analysis, a geotechnical analysis, and an engineered excavation plan. The types of reports that may be required will vary from application to application, depending on the features of the proposed project and the characteristics of the project site and surrounding lands. Upon request, the Director will advise an applicant of the types of reports that should be submitted with a permit application. In some instances, the applicant may be able to satisfy this requirement by providing documents prepared in connection with applications to other federal, state, or local agencies relating to the project.
- (iv) A site plan showing property lines, assessor's parcel numbers, onsite and adjoining land uses, topography, access, and existing/proposed patterns of vegetation.
- (v) A proposed management plan that identifies how the project will be operated and managed over time, can be managed to respond to changing or unforeseen circumstances and events, will address vector control issues, and will otherwise be actively managed in perpetuity to ensure that its environmental and other benefits are realized on a continuous basis and that any unanticipated impacts to agriculture or other land uses are addressed if feasible. The proposed management plan shall also include measures to address crop depredation to the extent it is a reasonably foreseeable consequence of the proposed project.

In addition to the foregoing, the Director may require such other and further information relevant to the project as needed to perform appropriate environmental analysis, to determine whether the proposal may affect public health, safety, and welfare, and for other good cause as determined by the Director in his or her sole discretion.

- (c) *Yolo Natural Heritage Program.* All permit applications shall be promptly referred to the Executive Director of the Yolo Natural Heritage Program. The referral shall include a request for comments regarding whether the application is consistent with the Habitat Conservation Plan/Natural Communities Conservation Plan (HCP/NCCP) or, prior to its adoption, other matters of consistency with the developing HCP/NCCP. The purpose of this provision is to encourage coordination between applicants and the Executive Director, and inconsistency with any drafts or other preliminary versions of the HCP/NCCP is not a basis for denying a permit under this Chapter.

- (d) *Deciding Authority.* The Deciding Authority for permit applications shall be as follows:
- (i) For projects under 40 acres, the Zoning Administrator shall be the Deciding Authority.
 - (ii) For projects of 40 to 160 acres, the Planning Commission shall be the Deciding Authority. For projects that are over 160 acres, the Planning Commission shall act in an advisory capacity to the Board of Supervisors. Acting in such capacity, the Planning Commission shall hold at least one noticed public hearing on the project prior to making a recommendation to the Board of Supervisors. The recommendation of the Planning Commission shall be in writing and shall include a detailed statement of the grounds for the recommendation.
 - (iii) For projects that are over 160 acres, the Board of Supervisors shall be the deciding authority. The Board of Supervisors shall hold at least one noticed public hearing on the project prior to making a final decision on the application.
- (d) *Decision.* After considering the application materials and, if applicable, the recommendations of County staff and the Planning Commission, the Deciding Authority shall issue, conditionally issue, or deny the application by a written decision supported by findings that address the criteria set forth in Section 10-10.303, below. Due to the unique nature of projects covered by this Chapter, the general conditions that typically apply to the review and approval or denial of a use permit, set forth in Yolo County Code Section 8-2.2804, shall not apply.
- (e) *Costs and expenses.* The applicant shall reimburse all costs and expenses reasonably incurred by the County in reviewing applications under this Chapter, including but not limited to staff time and costs and expenses associated with environmental review. At the discretion of the Director, the applicant may be required to provide a reasonable deposit for such costs, enter into a reimbursement agreement with the County, or both.

Sec. 10-10.303. Decisionmaking Criteria

A permit applied for under this Chapter shall be approved if, taking all feasible mitigation measures, conditions of approval, and other relevant facts into account, the Deciding Authority makes all of the following determinations:

- (a) That the project applicant has substantially complied with the requirements of this Chapter, including but not limited to provisions addressing the submission and contents of a management plan;
- (b) That the project would not significantly conflict with surrounding land uses, including but not limited to surrounding agricultural uses;

- (c) That the project would not have a significant adverse effect on biological resources or, upon its adoption, the project would not conflict with the Yolo Natural Heritage Program;
- (d) That the project would not significantly compromise flood safety and the protection of life and property;
- (e) That the project would not have a significant adverse economic effect—either by itself or cumulatively—on the agricultural industry of the County or region. This factor shall only be considered for projects that convert more than 160 acres of farmland;
- (f) If the project site is subject to a Williamson Act contract, that the project is an “open space use” under Government Code Section 51201(o) or that it would not otherwise cause a material breach of the contract; and
- (g) That the project would not significantly conflict with other relevant considerations of public health, safety, or welfare, sufficient to require preparation of a statement of overriding considerations pursuant to the California Environmental Quality Act.

Written findings addressing each of these matters shall be prepared in connection with a decision on a permit application. Such findings shall be based on substantial evidence.

If the Deciding Authority (other than the Board of Supervisors) finds that a project cannot be approved because one or more of these determinations cannot be made, the permit shall be referred to the Board of Supervisors for consideration. The Board of Supervisors may approve a permit even if it finds that one or more of these determinations cannot be made (with the exception of finding (f), relating to the Williamson Act, which would mandate denial), provided it finds that issuance of the permit is consistent with the purposes of this Chapter. Any decision of the Board of Supervisors shall include written findings based on substantial evidence that address all of the matters set forth above, together with an explanation of any decision to approve or deny a permit.

Sec. 10-10.304. Permit Term; Amendments

- (a) *Term.* Because wetland habitat projects often require numerous federal, state, and local agency approvals that can take a long time to acquire, the Deciding Authority may extend the term of a use permit issued under this Chapter for up to an additional four years. Without limiting the discretionary authority of the Deciding Authority with regard to permit extension requests, the Deciding Authority may deny any request for an extension if, in its judgment, the extension would be in conflict with the original intent of the permit or if the applicant has failed to abide by the terms of the permit in any material way. Once issued, a permit shall be perpetual in term unless otherwise indicated.

- (b) *Amendments, generally.* An amendment to an existing permit issued under this Chapter shall be required for any significant change to an approved wetland habitat project. This shall include, but is not limited to, any change in the size or operation of an approved project that is reasonably likely to directly or indirectly impact other properties in the project vicinity or the environment generally. The Director shall have the discretion to determine whether an amendment to an existing permit is required.
- (c) *Applications for amendments; processing.* Applications for amendments to previously issued permits shall be submitted to the Director on forms provided by the County. An application to amend a previously issued permit shall also be accompanied by the appropriate fee, as established by resolution of the Board of Directors. In addition, the Director may require any or all of the additional information and documents described in Section 10-10.302(b), above, that may be reasonably necessary for consideration of the application. An application for an amendment shall be handled in the same manner as an original permit application, as described in Section 10-10.302(b)-(e), above.

Article 4. Appeals

Sec. 10-10.401. Appeal Procedure

Any decision made pursuant to this Chapter may be appealed pursuant to Yolo County Code Section 8-2.3301, which shall apply to all appeals arising under this Chapter.

Article 5. Violations

Sec. 10-10.501. Generally

Any violation of this Chapter shall be subject to the administrative code enforcement ordinance of the County, set forth in Chapter 5 of Title 1 of the Yolo County Code.

Sec. 10-10.502. Public Nuisance

Any activity in violation of this Chapter or any permit issued hereunder shall be considered a public nuisance. In his or her sole discretion, the Director may refer the public nuisance to the District attorney for civil or criminal action.

Article 6. Periodic Reviews

Sec. 10-10.601 Initial Review

Two years after this Chapter becomes effective or within sixty (60) days of the adoption of the Yolo Natural Heritage Program, whichever is sooner, the Board of Supervisors shall hold a public hearing for the purpose of considering its effectiveness at achieving the purposes set forth in Article 1 hereof. During such hearing, the Board of Supervisors may identify matters that require further consideration and provide appropriate direction to staff. In addition, the

Board of Supervisors may direct staff to prepare an ordinance amending, superseding, or deleting this Chapter, and it may take such other actions as may be necessary and appropriate.

Sec. 10-10.602 Future Reviews

Every five years after the initial review under Section 10-10.601, above, the Board of Supervisors shall review this Chapter at a public hearing for the reasons described in that Section, particularly to ensure its continued effectiveness in achieving the purposes described in Article 1.

Section Six. Severability.

If any section, subsection, sentence, clause or phrase of this Ordinance is held by court of competent jurisdiction to be invalid, such decision shall not affect the remaining portions of this ordinance. The Board of Supervisors hereby declares that it would have adopted this Ordinance and each section, sentence, clause or phrase thereof irrespective of the fact that one or more sections, subsections, sentences, clauses or phrases be declared invalid.

Section Seven. Effective Date.

This Ordinance shall take effect and be in force thirty (30) days following its adoption and, prior to the expiration of fifteen (15) days after its adoption, it shall be published once in the Daily Democrat, a newspaper of general circulation, printed and published in the County of Yolo, with the names of the Board members voting for and against the Ordinance.

PASSED AND ADOPTED by the Board of Supervisors of the County of Yolo, State of California, this __ day of _____, 2009, by the following vote:

- AYES:
- NOES:
- ABSENT:
- ABSTAIN:

By _____
Mike McGowan, Chair
Yolo County Board of Supervisors

Attest:
Ana Morales, Clerk
Board of Supervisors

Approved as to Form:
Robyn Truitt Drivon, County Counsel

By: _____
Deputy (Seal)

By: _____
Philip J. Pogledich, Senior Deputy