

STAFF REPORT

DATE: May 22, 2008

TO: Arne Simonsen, Chair
Members of the Delta Protection Commission

FROM: Linda Fiack, Executive Director

SUBJECT: Findings and Analysis of the Delta Protection Commission (Commission) Concerning Appeals Filed on November 3, 2007 by (1) Natural Resources Defense Counsel and (2) The Concerned Citizens of Clarksburg, et al.

RECOMMENDED ACTIONS

Adopt the findings and analysis set forth below. The findings and analysis explain the basis for the Commission's determination that the Clarksburg Old Sugar Mill Specific Plan and related documents (OSMSP), as approved by the Yolo County Board of Supervisors (County) on October 24, 2006 and subsequently on March 11, 2008 are consistent or not consistent with the following two policies of the Commission's Land Use and Resource Management Plan for the Primary Zone of the Delta (Resource Management Plan) and related provisions in the Delta Protection Act (Act):

Consistent: Land Use Policy 3.

Not Consistent: Levees Policy 3.

RECOMMENDED MOTION

"I move to adopt the Findings and Analysis set forth in the May 22, 2008 staff report concerning Land Use Policy 3 and Levees Policy 3."

REASON FOR RECOMMENDED ACTIONS

The recommended actions would assure the Commission's compliance with its regulations and the Act by fulfilling its role as an appeal body when an action taken by a local entity on a development project in the Primary Zone of the Delta is appealed to the Commission by a third party.

FINDINGS AND ANALYSIS OF THE DELTA PROTECTION COMMISSION CONCERNING APPEALS FILED ON NOVEMBER 3, 2006 BY (1) THE NATURAL RESOURCES DEFENSE COUNSEL AND (2) THE CONCERNED CITIZENS OF CLARKSBURG, ET AL.

Introduction

Upon adoption by the Commission, this document shall constitute the Land Use Policy 3 and Levees Policy 3 findings and analysis of the Commission concerning two appeals

challenging the October 24, 2006 decision of the County to approve the OSMSP. Both appeals were filed with the Commission on November 3, 2006. One appeal was filed by the Natural Resources Defense Council; the other was filed by the Concerned Citizens of Clarksburg and other parties.

Pursuant to the Commission's applicable regulation (Cal. Code Regs., tit. 14, Sec. 20008), the appeals were heard in two phases.

First, it held a hearing on November 16, 2006, its first available meeting following the filing of the appeals to determine whether the appeals fall within the Commission's jurisdiction and raise an appealable issue. At that hearing, the Commission determined that the appeals do fall within the Commission's jurisdiction because the OSMSP would constitute "development" within the "primary zone" of the Delta pursuant to the Act. The Commission further determined that the appeals each raise at least one appealable issue under the Act.

The Commission therefore proceeded to the second hearing phase and heard the merits of the appeals on January 25, 2007, its next regularly-scheduled meeting. At that meeting, the Commission determined that the challenged actions of the County were inconsistent with three policies in the Commission's Resource Management Plan, and related policies in the Act.

The Commission directed staff to prepare written findings, consistent with its determination, and to present the findings to the Commission on February 22, 2007, its next regularly-scheduled meeting. The findings and analysis were adopted at that time and the project was remanded back to the County.

After the remand, the applicant asked Yolo County to consider a revised OSMSP. The County approved a revised OSMSP on March 11, 2008, and then resubmitted the matter to the Commission for its review.

On March 27, 2008, the Commission conducted a public hearing on the revised OSMSP and considered staff's recommended Findings and Analysis that the project is inconsistent with Land Use Policies 3 and 4, and Levees Policy 3. Pursuant to the Commission's discussion and consideration of the matter, staff was directed to return on May 22, 2008 with formal findings and analysis for adoption that the revised OSMSP is consistent with Land Use Policy 3 and not consistent with Levees Policy 3. As to Land Use Policy 4, staff was directed to return to the Commission with additional information to address questions posed during the discussion.

Background

The Primary Zone of the Sacramento-San Joaquin Delta includes approximately 500,000 acres of waterways, levees and farmed lands extending over portions of five counties: Solano, Yolo, Sacramento, San Joaquin and Contra Costa. This area supports a strong agricultural economy along with open space and habitat values. Recognizing the threats to the Primary Zone of the Delta from potential urban and suburban encroachment, and

the need to protect the area for agriculture, wildlife habitat, and recreation uses, the California Legislature passed, and the Governor signed into law on September 23, 1992, the Delta Protection Act of 1992 (SB 1866).

The Act finds and declares in part that “(t)he delta is an agricultural region of great value to the state and nation...” and that “...the continued dedication and retention of that delta land in agricultural production contributes to the preservation and enhancement of open space and habitat values.” (Pub. Resources Code, Section 29703, subd.(a), (b).) The Legislature finds in part that “...the delta is inherently a flood prone area wherein the most appropriate land uses are agriculture, wildlife habitat, and, where specifically provided, recreational activities...” (Pub. Resources Code, Section 29704.) “In order to protect regional, state, and national interests in the long-term agricultural productivity, economic vitality, and ecological health of delta resources, it is important that there be coordination and integration of activities by the various agencies whose land use activities and decisions cumulatively impact the delta.” (Pub. Resources Code, Section 29709, Subd. (b).)

The policies of the Act are implemented in part through the Legislature’s determination that “(r)egulation of land use and related activities that threaten the integrity of the delta’s resources can best be advanced through *comprehensive regional land use planning* implemented through reliance on local government in its local land use planning procedures and enforcement.” (Pub. Resources Code, Section 29709, Subd. (b) (italics added).) Therefore, the statute establishes a 23-member Delta Protection Commission, and directs the Commission to adopt “...a comprehensive long-term resource management plan for land uses within the primary zone of the delta...” (Pub. Resources Code, Sections 29735, 29760, subd. (a).)

The Commission adopted the statutorily required plan, “Land Use and Resource Management Plan for the Primary Zone of the Delta,” on February 23, 1995. (Cal. Code Regs., tit. 14 Section 20000 et seq.) The Act requires that local governments listed in the Act, including the County, may approve “development” in the “primary zone” of the delta only if it is consistent with the Resource Management Plan and the Act. (See Pub. Resources Code, Sections 29763.5, 29765, 29770, subd. (a), 29771.) The Act further provides that “(a)ny person who is aggrieved by any action taken by a local government or other local agency in implementing the Resource Management Plan, or otherwise taken pursuant to this division, may file an appeal with the Commission. (Id., Section 29770.(a).)

Jurisdiction and Appealability

On November 16, 2006, the Commission conducted a hearing, pursuant to California Code of Regulations, title 14, section 20008, and determined that it has jurisdiction over this matter because (1) the project location is in the Primary Zone of the Delta (unanimous) and (2) the project constitutes “development” (15 for/1 opposed). It also determined that both of the appeals include appealable issues (unanimous). The Commission’s determination of jurisdiction and appealability is based on the record, including submission of staff and of the parties, testimony, and other evidence presented

at the public hearing. The analytical basis for the Commission's determination is set forth in the November 7, 2006 letter (staff report) from Supervising Deputy Attorney General Daniel L. Siegel to the Commission. The letter was provided to the parties to the appeals and made available to the public prior to the hearing, and the Commission incorporated that letter into the findings adopted on February 22, 2007.

Merits

Based upon the evidence presented during its public hearing on January 25, 2007, including all communications, reports, staff memoranda and other materials that were made part of the hearing record, the Commission adopted findings on February 22, 2007 as to whether the County's actions regarding the OSMSP were consistent, or not consistent, with the following specific policies of the Resource Management Plan and related provisions of the Act: Agriculture Policy 4; Land Use Policies 2, 3, 4 and 7; Utilities and Infrastructure Policy 3; and Levees Policies 1, 2, 3, 4 and 5. The OSMSP was found to be inconsistent with Land Use Policies 3 and 4, and Levees Policy 3.

A revised OSMSP was approved by Yolo County on March 11, 2008 and heard by the Commission on March 27, 2008 as to whether the revised OSMSP is consistent or not consistent with the policies of the Commission's Resource Management Plan, specifically Land Use Policies 3 and 4, and Levees Policy 3. Based upon the evidence presented during its public hearing on March 27, 2008, including all communications, reports, staff memoranda and other materials that were made part of the hearing record, the Commission makes the following findings as to whether the County's actions regarding the revised OSMSP are, or are not, consistent with the following specific policies of the Resource Management Plan and related provisions in the Act. For each finding, the policy is first quoted in full, followed by the finding and then the basis for finding.

Land Use Policy 3: New residential, recreational, commercial, or industrial development shall ensure that appropriate buffer areas are provided by those proposing new development to prevent conflicts between any proposed use and existing agricultural use. Buffers shall adequately protect integrity of land for existing and future agricultural uses. Buffers may include berms and vegetation, as well as setbacks of 500 to 1,000 feet. (Cal. Code Regs., tit. 14, Section 20060, subd. (c).)

Finding: Consistent.

Basis of Finding:

Staff initially recommended that the Commission find that the revised OSMSP is still inconsistent with Land Use Policy 3. Staff based that recommendation on the fact that the 300-foot proposed buffer is significantly less than the 500-foot to 1,000-foot buffer recommended in Land Use Policy 3 and there would be the potential for inadequate separation between urban and "future" agricultural uses.

After weighing the evidence, especially the expert testimony of the Yolo County Agricultural Commissioner, the Commission determined that, on balance, the evidence established that the project provides an adequate buffer as noted below.

The revised OSMSP provides for the 300-foot buffer between urban and agricultural uses to be measured from the edge of the County's right-of-way rather than the first row of vines on the adjacent agricultural parcel (effectively east toward the project site by 15 to 25 feet). Thus, no portion of the buffer would cover any farmland capable of cultivation. Furthermore, the revised buffer would prevent any conflict between the project and the ground application of regulation substances or other agricultural related activities. Additionally, the revised OSMSP provides for a berm and hedgerow to provide a visual screen which will further the effective separation between agricultural practices and urban uses.

Levees Policy 3: Through flood ordinances based on Flood Emergency Management Act model ordinances, developed by the International Conference of Building Officials and included in the Uniform Building Code, local governments shall carefully and prudently carry out their responsibilities to regulate new construction within flood hazard areas to protect public health, safety, and welfare. Increased flood protection shall not result in densities beyond those allowed under zoning and general plan designations in place on January 1, 1992 for lands in the Primary Zone. (Cal. Code Regs., tit. 14, Section 20100, subd. (c).)

Finding: Not Consistent.

Basis of Finding:

This policy should be read in harmony with Public Resources Code sections 29763.5 and 29765. Although those sections are not literally applicable, the first lists findings that the Commission must make before determining that proposed general plan amendments are consistent with the Act, and they express legislative intent as to the purposes of the Act, the Management Plan and conforming local general plan provisions. One of the findings required by section 29763.5 is as follows: "(g) The general plan, and any development approved or proposed that is consistent with the general plan, will not expose the public to increased flood hazard." Similarly, section 29765 lists findings that a local government must make where the Commission has adopted its Management Plan or amendments to that Plan, but (1) a local government has not yet, pursuant to section 29763, submitted to the Commission general plan amendments that would bring their plans into conformity with the Commission's Plan or (2) a local government has submitted those amendments to the Commission, but the Commission has not approved the amendments. (The Commission adopted its Management Plan on February 23, 1995. It has only adopted one amendment; that amendment became operative on February 27, 1997.) Section 29765 findings include the following: "(f) The development will not expose the public to increased flood hazards."

As will be seen, the Commission concludes that (1) there is a substantial risk that, absent increased flood protection, this project will expose the public to greater flood hazards, and 2) that increased flood protection would result in greater densities than were allowed under zoning and general plan designations in place on January 1, 1992.

The Commission continues to conclude, as was the case with the OSMSP approved by Yolo County on October 24, 2006, that residences, albeit fewer, may be constructed even though levee (infrastructure) improvements that may be required to provide adequate flood protection may not occur due to infeasibility (from the perspective of the Yolo County Board of Supervisors). Yolo County's Deputy County Counsel has explained that the project "includes preparation of a geotechnical study and, if appropriate, a Flood Protection Plan and the implementation of feasible mitigation." That means, however, that needed mitigation may not occur. If studies indicate a need for improvements that Yolo County determines are infeasible – for example, because they are too costly for the developer and federal and state agencies decide to focus their flood protection efforts on armoring urban areas – the improvements presumably will not be implemented.

Yolo County's inclusion of requirements that residences be elevated is an acknowledgement of potential flood risks of this development. Although the height requirements could potentially reduce the immediate risk to occupants, they would not address hazards such as the potential inability to evacuate the area. It is also worth noting that requirements that the developer pay for flood insurance have been reduced from that required in the October 24, 2006 County approval.

Moreover, the uncertainties that were raised at the Commission's February 22, 2007 hearing concerning potential flood hazard impacts to public health and safety along the Sacramento River, including at Clarksburg, continue to exist. Sources confirming these uncertainties include the California Department of Water Resources, U. S. Army Corps of Engineers, and the California Central Valley Flood Protection Board. Uncertainties are also reflected in recent legislation that includes Senate Bill 5 (Machado – Flood Management) and Assembly Bill 5 (Wolk – Flood Management).

The potential loss of FEMA accreditation for the area protected by the levees at the project site, which Commission staff learned about from staff of the Department of Water Resources, affirms that increased development without first addressing levee integrity has significant potential to put public health and safety at risk.

Given this flood hazard uncertainty, and its potential threat to public health and safety in flood prone areas, the revised OSMSP should but does not address infrastructure inadequacy, overtopping (flood stage), under seepage, or influences such as climate change and sea level rise.¹

¹ Yolo County appears to assert that an interim trial court ruling, issued subsequent to the Commission's remand of this matter to the County, calls into question the use of global warming concerns in evaluating flood risks of the OSMSP. (See p. 13 of the findings attached to the County's March 11, 2008, resubmission of this matter to the Commission.) Specifically, the County cites an April 30, 2007, decision issued by the

Examples of seepage from the water side of the levees in the Delta to the landside of the levees are found throughout the Delta. Earlier this month, Commission staff viewed 2 deep sink holes on Grand Island with water flowing. They were located hundreds of feet from the landside of the levee, and we were informed that they have been there for years. In another example observed by Commission staff, there was water flowing in a deep farm ditch before the irrigation season started. The ditch was parallel to and approximately 400 feet away from the levee. In a third example, a large swath of cattails (which are wetland plants) were observed by staff in a farm field hundreds of feet behind the levee along Steamboat Slough. All of these are examples of river water seeping through or under Delta levees.

In addition, in reaching its finding, the Commission has given significant weight to Yolo County's acknowledgments of flood dangers. The Environmental Impact Report Addendum for the revised OSMSP, certified by the Yolo County Board of Supervisors on March 11, 2008, finds that the project will expose people and structures to potentially significant and unavoidable risk from flooding. Specifically, it describes "Impact 4.7.7" as follows:

Levee Failure—Implementation of the project may expose people and new structures to a significant risk of loss, injury, or death from deep flooding as a result of a potential levee failure. This impact is potentially significant and unavoidable.

(Old Sugar Mill Specific Plan EIR Addendum, p. 16 [citing previously identified impacts in the OSMSP Final EIR].)

The Addendum goes on to describe the new elevation requirement for residential units, and then concludes:

Sacramento County Superior Court in *Natural Resources Defense Council v. Reclamation Board*. (Because the case settled, the decision never became an official judgment.) That case included the question of whether, under the California Environmental Quality Act (CEQA), new global warming information required the Reclamation Board to revise a particular environmental impact report. The trial court concluded that the Reclamation Board could use the report because it already took climate change into account. The trial court found that, given the deference the court was required to give the Board, NRDC failed to meet its high burden of proving that new global warming information was sufficient to require additional environmental review. The court did not conclude that climate change should be excluded from consideration in evaluating a project's environmental impacts. It emphasized that "[t]his ruling is a narrow one, and is not a ruling that the effects of potential changes in climate are not a proper subject for consideration under CEQA."

A copy of the written tentative decision in that case, which was not subsequently altered, has been included in the administrative record.

Despite the foregoing, uncertainty continues to surround the issue of levee stability and related flood risks. Accordingly, while the revisions to Mitigation Measure 4.7.7a increase the safety of future Project structures and residents, the County conservatively continues to consider this impact significant and unavoidable.

(Old Sugar Mill Specific Plan EIR Addendum, p. 19.)

The Addendum also concludes that another “potentially significant” impact of the project is its “potential for adverse effect . . . on the adjacent levees.”² (Old Sugar Mill Specific Plan EIR Addendum, p. 16 [citing previously identified impacts in the OSMSP Final EIR].) It goes on to state that “certain changes . . . provide further assurance that any geotechnical evaluation” will be adequate, but it does not withdraw the “potentially significant” impacts conclusion. (Old Sugar Mill Specific Plan EIR Addendum, p. 20.)

Further, to the extent that the project does require increased flood protection – through enhanced levees and/or elevated residences – that increased flood protection would be resulting in greater densities, in direct conflict with Levees Policy 3. The revised OSMSP includes a change in zoning from heavy industrial to a residential use that would result in a density significantly greater than the existing community and greater than the standard density for Yolo County for this type of area, thus reducing the level of public health and safety by inducing growth in the area. Allowing 123 residences to be built within an area that may be subject to flood hazards would increase the number of people at risk of flooding.

Yolo County has nevertheless asserted that the term “densities” should apply to all uses, not just residential uses. It further asserted, in essence, that the Old Sugar Mill site was zoned for industrial uses on January 1, 1992, and that those uses were dense. The term “densities,” however, is best read as applying to residential uses. The general plan for Clarksburg that was in place on January 1, 1992, for example, refers to densities as residential units per acre. (See Clarksburg General Plan adopted by the Yolo County Board of Supervisors on August 24, 1982, p.5; see also Table 1, p. 1 of that Plan, referring to “Low Density Residential” and “Residential High Density.”). In contrast, that plan does not use the term densities in discussing uses of industrial areas. Rather, in describing industrial uses, it refers to the intensity of uses by classifying zones as either “Light Industrial” or “Heavy Industrial.” Likewise, Yolo County’s Zoning Ordinance uses the term “density” in connection with residential concentration, but not in connection with industrial or commercial uses. The Management Plan, however, only applies to “density,” not “intensity.” (Unlike the Management Plan, the Act’s definition of “development” includes both terms, indicating that they are different. Public

² The full statement is as follows:

Impact 4.7.8 Levee Encroachment—Implementation of the project may impede or preclude the ability to properly maintain and improve the levees, and may impede or preclude the ability to respond in a flood emergency. The potential for adverse effect from the project on the adjacent levees is potentially significant.

Resources Code section 29723's definition provides that development means, among other things, "change in the density or intensity of use of land.").

Also, as previously discussed, there is a substantial risk that this project will expose the public to greater flood hazards. A large number of residential units would expose the public to greater dangers from floods compared to the exposure of industrial workers. While industrial workers would be at the site for limited periods of time, would likely be able to quickly spread the word about imminent danger, and would be, for the most part, mobile, those residing in the proposed residential units would be less likely to receive timely notice of sudden events and would have limited mobility. For example, inhabitants would be exposed to flooding while they are sleeping, and therefore would be less likely to learn about imminent danger. Residential inhabitants would not only have to escape themselves, they would also have material items and family members for which they would be held responsible for evacuating, in addition to simply themselves.

The Commission therefore concludes that increased flood protection would result in greater densities than were allowed in 1992. Moreover, absent adequate protection, there is a significant risk that the project will expose the public to greater flood hazards. For these reasons, the revised OSMSP as approved by Yolo County on March 11, 2008 is inconsistent with Levees Policy 3.

Attachments:

- A: [January 25, 2007 Commission Staff Report.](#)
- B. [March 27, 2008 Commission Staff Report](#)