

# CALIFORNIA LAND USE<sup>TM</sup>

L A W & P O L I C Y

*Reporter*

## CONTENTS

### FEATURE ARTICLES

A Brave New World for Land Use Regulation in the Delta and along the San Francisco Bay Shoreline by Scott B. Birkey and Christian Cebrian, Cox, Castle & Nicholson, LLP, San Francisco, California. . . . . 161

California Senate Bill 481: A Safe Landing for Endangered Birds, but Not for Aircraft by Tom Roth, Esq., San Francisco, California . . . . . 169

### LAND USE NEWS

U.S. Senate Desert Conservation Bill Will Impact Renewable Energy Development . . . . . 173

### REGULATORY DEVELOPMENTS

State of California Adopts Mandatory 'Green' Building Standards—The Most Comprehensive 'Green' Building Code In the Nation . . . . . 175

### RECENT FEDERAL DECISIONS

#### *Circuit Court of Appeals:*

Ninth Circuit Denies Claims that U.S. Forest Service Unlawfully Permitted Motorized Use of a Trail in Hells Canyon Wilderness . . . . . 177  
*Hells Canyon Preservation Council v. U.S. Forest Service*, \_\_\_F.3d\_\_\_, Case No. 07-35456 (9th Cir. Jan. 25, 2010).

### RECENT CALIFORNIA DECISIONS

#### *Supreme Court:*

Supreme Court Rules 30-Day Statute of Limitations Applies where Agency Has Posted an NOD, Regardless of Nature of CEQA Violation Alleged . . 179  
*Committee for Green Foothills v. Santa Clara County Board of Supervisors*, \_\_\_ Cal.4th\_\_\_, Case No. S.163680(Feb. 11, 2010).

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*Continued on next page*



**District Court of Appeal:**

**Second District Finds a Prescriptive Easement in Water Pipeline from a Gravity-Fed Spring . . . . . 181**  
*Brezina v. Cooper*, Unpublished Op., Case No. B210125 (2nd Dist. Jan. 22, 2010).

**First District Rules Agency Cannot Delete a Previously Adopted Mitigation Measure Attached to an Expired Approval without Reviewing the Continuing Need for the Mitigation . . . . . 183**  
*Katzeff v. California Department of Forestry and Fire Protection*, \_\_\_Cal.App.4th\_\_\_, Case No. A122642 (1st Dist. Jan. 28, 2010).

**Second District Upholds Los Angeles' Redevelopment Design Guidelines for North Hollywood . . . . . 185**  
*PR/JSM Rivera LLC v. Community Redevelopment Agency of the City of Los Angeles*, \_\_\_Cal.App.4th\_\_\_, Case No. B213051 (2nd Dist. 2009).

**Second District Finds EIR Was Needed before Enactment of an Ordinance Prohibiting Certain Retail Stores from Providing Plastic Bags to Customers . . . . . 187**  
*Save the Plastic Bag Coalition v. City of Manhattan Beach*, \_\_\_Cal.App.4th\_\_\_, Case No. B215788 (2nd Dist. Jan. 27, 2010).

**Superior Court:**

**San Joaquin County Superior Court Upholds EIR for City of Stockton's 2035 General Plan . . . . . 189**  
*Morada Area Association v. City of Stockton*, Case No. CV034370 (San Joaquin Super. Ct. Jan. 4, 2010).

**LEGISLATIVE UPDATE . . . . . 191**

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FEATURE ARTICLES

A BRAVE NEW WORLD FOR LAND USE REGULATION IN THE DELTA AND ALONG THE SAN FRANCISCO BAY SHORELINE

By Scott B. Birkey and Christian Cebrian

Development in the Sacramento-San Joaquin Delta (Delta) and along the shoreline of the San Francisco Bay may be on the cusp of a new land use regulatory paradigm. Land use within these environmentally fragile, yet often densely populated, areas is already tightly regulated, but threats of declining ecological health in the Delta, statewide water shortages, and global climate change have prompted the California Legislature and state agencies to impose even more regulation on land use development within the Delta and along the San Francisco Bay shoreline. The historic water legislation passed late last year, for example, is expected to create just such additional land use regulatory hurdles. (See, Michael H. Zischke, R. Clark Morrison, and Scott B. Birkey, "It's Not Just About Water, and It's Not Just About the Delta: Land Use Regulation and the New Water Bills," 19 *Calif. Land Use L. & Pol'y Rptr.* 67 (Dec. 2009).) And while the legislature debated this package of water bills, staff for the San Francisco Bay Conservation and Development Commission (BCDC) worked on its own package of proposed policies targeting the ecological plight of the San Francisco Bay, particularly with respect to climate change and sea level rise. This article reviews these new and potential land use regulatory regimes for development in the Delta and along the shoreline of the San Francisco Bay.

**New Land Use Regulations Created by the Recent Package of Water Bills**

The recent water legislation package includes a broad suite of policy statements, regulatory controls, and funding obligations aimed at resolving—or at least addressing—California's growing water challenges. The key component of this package is Senate Bill

No. 1 (SBX7 1), which enacts the Sacramento-San Joaquin Delta Reform Act of 2009 (Pub. Res. Code § 85000 *et seq.*) (Reform Act). Signed by Governor Arnold Schwarzenegger on November 12, 2009, the Reform Act lays the foundation for additional oversight over the Delta. More specifically, the Reform Act and other elements of SBX7 1 establish a governance framework designed to enable the state to achieve the co-equal goals of providing a more reliable water supply to California and restoring and enhancing the Delta ecosystem.

**Purpose of the Delta Stewardship Council and Its Jurisdiction**

The goals of the Reform Act are ambitious. It is intended to address a wide sweep of concerns, including the sustainable management of the Delta ecosystem, the reliability of the state's water supply, and the enhancement and protection of the Delta's water quality. To implement these lofty goals, the act creates a new independent state agency to govern the Delta—the Delta Stewardship Council (Stewardship Council). The Stewardship Council will be comprised of seven appointed members and will be required to "possess diverse expertise and reflect a statewide perspective." The Reform Act gives the Stewardship Council a broad range of duties and responsibilities, and authorizes the Stewardship Council to adopt its own set of regulations or guidelines to implement those duties and responsibilities. These regulations may ultimately give the Stewardship Council the ability to impose penalties and generally assert a more proactive role in governing the Delta. Such abilities would be consistent with the intent of the Reform Act, particularly in light of the authority

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and objectives the Reform Act gives the Stewardship Council.

The Stewardship Council has jurisdiction over certain legislatively defined activities within the Delta and the Suisun Marsh. The geographic boundaries of the Delta and Suisun Marsh are defined in the Water Code and the Public Resources Code, respectively. Generally speaking, the Delta includes a swath of land stretching from Sacramento to Tracy on the west side of Interstate 5. A portion of the Delta (referred to as the Secondary Zone) reaches as far as the Bay Area cities of Pittsburg and Antioch. The Suisun Marsh comprises a smaller area to the west of the Delta. The Marsh's western boundary borders on the Bay Area cities of Benicia and Martinez. Maps can be downloaded from the Internet at [www.delta.ca.gov/plan/map.asp](http://www.delta.ca.gov/plan/map.asp) for the Delta and at [www.bcdc.ca.gov/jpg/smpp\\_protect.jpg](http://www.bcdc.ca.gov/jpg/smpp_protect.jpg) for the marsh.

Notably, the Reform Act authorizes the Stewardship Council to assume a more assertive role in governing land use within the Delta, as compared to the Delta Protection Commission. The Delta Protection Commission was created in 1992 pursuant to the Delta Protection Act. (Pub. Res. Code § 29700 *et seq.*) The Reform Act amends the Delta Protection Act by restructuring the Delta Protection Commission and tasking it with the adoption of an economic sustainability plan. The Delta Protection Commission remains obligated to maintain its resource management plan for land uses within the primary zone of the Delta, and local governments within the primary zone must ensure their general plans are consistent with that resource management plan. The Delta Protection Commission's consistency review function applies only at this planning level; it does not apply at a project-specific level. By contrast, under the Reform Act the Stewardship Council is authorized essentially to confirm that certain covered activities, which include most land use development projects, are consistent with the Stewardship Council's own governing plan—the Delta Plan.

### **Project Consistency with the Delta Plan**

The Reform Act requires the Stewardship Council to develop and implement a Delta Plan, which is a comprehensive, long-term management plan for the Delta. At its most basic level, the Delta Plan is intended to further the Reform Act's two co-equal goals of providing a more reliable water supply for

California and protecting, restoring, and enhancing the Delta ecosystem. The Delta Plan will serve as a regulatory tool for land use planning and development within the Delta, an intent the legislature made explicit in the Reform Act, which establishes six fundamental objectives for the management of land use in the Delta. These objectives cover the spectrum, from protecting the quality of the Delta environment, to maximizing public access to the Delta and ensuring the utilization of Delta resources after taking into account social and economic needs.

Land use actions identified as “covered actions” in the Reform Act must be consistent with the Delta Plan. Generally speaking, “covered actions” are defined as plans, programs, or projects as defined under the California Environmental Quality Act (CEQA), which includes agency projects, agency-funded projects, or agency-approved projects that are carried out in the Delta or the Suisun Marsh. The legislature carved out several categories of exceptions to the definition of “covered actions,” including two sets of grandfathering provisions. Given that the scope of covered actions broadly includes projects subject to CEQA, these exceptions may very well apply only to a relatively small subset of land use development in the Delta and Suisun Marsh.

The real measure of the Reform Act's land use regulatory reach is in its requirements for consistency of “covered actions” with the Delta Plan. Under the Reform Act, an agency that proposes to undertake a covered action must prepare a written “certification of consistency with detailed findings” as to whether the covered action is consistent with the Delta Plan. The agency must then submit the certification to the Stewardship Council. The Reform Act is silent as to whether the Stewardship Council has the authority to approve or reject a certification, but it does require the Stewardship Council to develop procedures for “early consultation.” These procedures presumably will set forth more specific detail on the requirements for consistency, which will effectively give the Stewardship Council a significant monitoring role to ensure development in the Delta and the Suisun Marsh is consistent with the Delta Plan.

In addition to its check on development by virtue of the Delta Plan, the Stewardship Council will have land use authority by virtue of the Reform Act's consistency appeal procedures. The threshold for bringing such an appeal is fairly broad, in terms of who can bring an appeal and the basis upon which that appeal

may be brought. According to the Reform Act,

Any person who claims that a proposed covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, the action will have a significant adverse impact on the achievement of one or both of the coequal goals or implementation of government-sponsored flood control programs to reduce risks to people and property in the Delta, may file an appeal with regard to certification of consistency submitted to the Stewardship Council. (Pub. Res. Code § 85225.10(a).)

The appeal must be filed within 30 days of the agency submitting the certification of consistency. The Stewardship Council may determine whether the issue raised on appeal is not within the Stewardship Council's jurisdiction or does not raise an appealable issue. If it finds the issue is within its jurisdiction and raises an appealable issue, the Stewardship Council must hear the appeal within 60 days of the date of the filing of the appeal. The Stewardship Council then has 60 days after hearing the appeal to make specific findings either denying the appeal or remanding the matter back to the agency for reconsideration of the covered action.

At this point in the appeal process, though, the extent to which the Stewardship Council is able to ultimately regulate covered actions on appeal is still somewhat—or, perhaps, even more—ambiguous. The Reform Act merely provides that:

...[u]pon remand, the state or local agency may determine whether to proceed with the covered action. If the agency decides to proceed with the action or with the action as modified to respond to the findings of the Stewardship Council, the agency shall, prior to proceeding with the action, file a revised certification of consistency that addresses each of the findings made by the Stewardship Council and file that revised certification with the Stewardship Council.

The Reform Act does not specify whether the Stewardship Council must then review the revised certification to determine whether the agency properly complied with the Stewardship Council's findings, nor does the Reform Act further specify whether the revised certification itself can be appealed yet again to the Stewardship Council. In the absence of any further guidance, project opponents still dissatisfied

with the consistency review presumably would seek relief in court.

In the end, agency staff, development interests, and the public will have to wait until the Stewardship Council adopts its administrative procedures governing its appeal process and consistency review before ascertaining the full measure of the Stewardship Council's regulatory reach. Even then, it is likely these procedures and the Reform Act itself will be subject to judicial scrutiny as projects begin to come under the aegis of the Stewardship Council.

### **BCDC's Proposed Amendments to the Bay Plan**

BCDC is currently considering a number of significant proposed amendments to its San Francisco Bay Plan (Bay Plan). The most dramatic of which is the proposed addition of a new climate change policy section to the Bay Plan. As currently drafted, this section would discourage development within BCDC's jurisdiction that would be at risk from sea-level rise.

### **BCDC's Purpose and Jurisdiction**

BCDC is a land use planning and regulatory agency that was established in 1965 pursuant to the McAteer-Petris Act (MP Act). (Gov. Code § 66600 *et seq.*) It consists of 27 members chosen from federal, state, and local government agencies and from the public. The purpose of BCDC is to regulate the shoreline and body of the San Francisco Bay "to the maximum extent possible" by issuing or denying permits for any proposed project that involves placing fill, extracting materials, or making any substantial change in the use of any water, land, or structure within BCDC's jurisdiction. BCDC is authorized to issue a permit for these projects provided it finds that the project is either (1) "necessary to the health, safety or welfare of the public in the entire bay area," or (2) consistent with the MP Act and the Bay Plan. BCDC also is authorized to impose reasonable terms and conditions on the construction and implementation of the projects. Some of these conditions are fairly standard, while others are tailored to the project and often require some form of public access or mitigation for impacts to the Bay. For an agency with a relatively narrow mission, BCDC's geographic jurisdiction is quite broad. BCDC has jurisdiction over all areas of the San Francisco Bay subject to tidal action,



a shoreline band extending 100 feet inland from the shoreline of the Bay, and certain waterways and water features around the fringes of the Bay.

### **The Bay Plan**

BCDC is guided by its Bay Plan. First adopted in 1969 and amended several times since, the Bay Plan is BCDC's long-term planning and regulatory document for the San Francisco Bay and its shoreline. The Bay Plan includes a variety of objectives, findings, and policies BCDC uses to evaluate permit applications and to make permitting decisions. For example, Part IV of the Bay Plan provides BCDC with regulatory guidance on protecting the shoreline, evaluating dredging activities in the Bay, and ensuring public access to the Bay. Other parts of the Bay Plan pertain to the public benefits that a project should provide, the types of mitigation measures that may be necessary for a project's impacts, and other matters that bear on whether BCDC should issue a permit. Like a city's "general plan," the Bay Plan is effectively BCDC's constitution, providing guidance in both principle and practice for regulating projects around the San Francisco Bay.

### **Proposed Bay Plan Amendments**

The genesis of the proposed Bay Plan amendments can be found in BCDC's direction to staff in October 2008 to "play an integral role in developing and implementing a regional proactive strategy for dealing with global climate change." This broad directive has resulted in a number of staff initiatives, including the effort to revise the Bay Plan to address BCDC's projections for sea level rise around the San Francisco Bay because of climate change. A year after receiving this direction, staff proposed to add a new climate change policy section to the Bay Plan. The four most significant proposed amendments found within this new policy section and appear below:

#### **Sea Level Rise Risk Assessment**

The proposed amendments would require permit applicants to analyze the potential impacts of sea level rise on proposed projects. The proposed amendment states:

When planning the shoreline, designing a shoreline project, or regulating a proposed proj-

ect along the shoreline, a risk assessment should be prepared based on the 100-year flood level that takes future sea level rise into account.

According to staff's analysis of this proposed policy, this amendment requires BCDC to consider sea level rise scenarios and risks in its permit review process. The "risk assessment" identified in this proposed policy may constitute an additional layer of environmental review beyond the review that is required under the California Environmental Quality Act (CEQA), the National Environmental Policy Act (NEPA), § 404 of the Clean Water Act, or other statutes and regulations requiring some form of environmental review. Presumably, the climate change analysis included in a CEQA or NEPA environmental review document, such as an environmental impact report or an environmental impact statement, should satisfy the requirement for a risk assessment, so long as that analysis addresses the potential for impacts from rising sea levels.

#### **Regional Climate Change Adaptation Strategy**

The proposed amendments would require BCDC to work with the Joint Policy Committee (the members of which are BCDC, the Association of Bay Area Governments, the Metropolitan Planning Commission, and the Bay Area Air Quality Management District), other regional, state and federal agencies, local governments, and the general public to formulate a Regional Climate Change Adaptation Strategy. This regional strategy would include maps of shoreline areas vulnerable to flooding based on sea level rise and shoreline flooding scenarios. The strategy also would identify:

...those areas where development should be protected, those areas where development should eventually be removed and those areas where the Bay should be allowed to migrate inland.

The proposed amendment does not further specify how these "areas" will be identified or what will constitute "development" suitable for protection and removal. As a practical matter, a consensus on these issues will be difficult, given the cross-section of stakeholders and interests BCDC is required to collaborate with under this proposed amendment.

### Interim Limitations on Certain Types of Development

The proposed amendments provide that, until the Regional Climate Change Adaptation Strategy can be completed, “any project larger than a minor repair of an existing facility . . . , whether within [BCDC’s] jurisdiction or in a low-lying inland area under the jurisdiction of other agencies, should be limited” to the following:

- a). infill developments within existing urbanized areas;
- b). natural resource restoration or enhancement projects;
- c). development that will provide significant regional benefits, such as transit oriented development projects; and (1) has an adaptation strategy for dealing with sea level rise; (2) includes measures to achieve ‘long-term environmental sustainability’; (3) establishes a permanent financial strategy to guarantee the public will not be burdened with the cost of protecting the project from sea level rise; and (4) does not require [b]ay fill for shoreline protection at any time during the life of the project;
- d). development that is set back from the edge of the shore above the 100-year flood level that takes sea level rise into account; or
- e). developments in undeveloped areas that will not require [b]ay fill for structural shoreline protection at any time during the life of the project.

### Protection of Certain Habitat Areas

The proposed amendments require the protection or enhancement of shoreline areas that currently sustain natural habitats or that possess conditions that make those shoreline areas especially suitable for natural resource enhancement. Staff’s analysis of this proposed amendment suggests that this policy is intended to apply to low-lying areas that might be subject to sea-level rise. Both the proposed amendment and staff’s analysis are silent, however, on the requisite quality of this habitat and whether varying

levels of habitat quality will or will not trigger protection or enhancement.

### Compliance with the Proposed Amendments: Mandatory or Discretionary?

These amendments clearly will require permit applicants to give serious consideration to sea level rise when designing their projects. But much has yet to be done to fine tune these proposed amendments. Several aspects of the amendments remain unclear. One of the most perplexing aspects is whether BCDC intends for these amendments to constitute binding permit requirements or project conditions of approval, or whether BCDC views them as mere exhortations for permit applicants to consider while the project is in design stage. BCDC staff use the word “should” throughout the proposed amendments. For example, the proposed amendments state that a “risk assessment *should* be prepared based on the 100-year flood level,” and that new development “*should* be limited” to certain categories of projects. (Emphasis added by the author). The Bay Plan, though, specifies that “[a]s used in this Plan, ‘should’ is mandatory.” (San Francisco Bay Plan at p.10.) Further, in their analyses of these amendments, BCDC staff themselves appear to intend the amendments to be enforceable. A portion of staff’s analysis characterizes certain elements of the proposals as “*authorizing* development.” (Emphasis added).

Further complicating this issue is the fact that the Bay Plan and its proposed amendments appear to use “should” in either a discretionary or a mandatory manner depending on the policy. For example, Port Policy 1 states that:

. . . port planning and development should be governed by the policies of the Seaport Plan and other applicable policies of the Bay Plan.

In context, the word “should” could be construed here to mean “must.” On the other hand, proposed Climate Change Policy 3 states in part that projects beyond BCDC’s jurisdiction and “under the jurisdiction of other agencies should be limited” to certain categories of activities. In this context, “should” cannot be construed as “must” because BCDC cannot perforce impose limitations on projects outside its jurisdiction.

As such, it remains unclear how BCDC will implement and enforce these new proposed climate change policies. If these policies are approved without clarification by BCDC or its staff as to which policies are mandatory and which are only to be encouraged or supported, then stakeholders for projects around the San Francisco Bay will struggle to determine whether and how these policies will apply.

### **Conclusion and Implications**

Development in the Delta, the Suisun Marsh, and along the shoreline of the Bay may be facing a brave new world of land use regulation. Legislation in the recent raft of water bills and BCDC's new proposed amendments to its Bay Plan reflect concerns over

how to strike a balance between ecological sustainability and economic sustainability. Pending the forthcoming administrative regulations, it may be too soon to tell exactly how far the Delta Stewardship Council's reach will be over projects in the Delta and the Suisun Marsh. Whatever those regulations may be, the appeal procedures built into the Reform Act itself will create yet another avenue for challenge against development. And with respect to the proposed amendments to the Bay Plan, their application—whether mandatory or discretionary—is unclear. If the policies are adopted and construed to be mandatory, they could result in significant constraints to development along the San Francisco Bay shoreline.

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