

San Francisco Bay Conservation and Development Commission

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December 15, 2022

Jayme Ohlhaber, Project Manager
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SUBJECT: Concurrence with Submitted Consistency Determination for USACE Reissuance of Regional General Permit 3 for Suisun Marsh Managed Wetlands O&M Project; BCDC Consistency Determination No. C2022.010.00

Dear Jayme:

I am sending this letter on behalf of the San Francisco Bay Conservation and Development Commission ("BCDC" or "Commission") pursuant to the Commission's authority under the federal Coastal Zone Management Act ("CZMA"), codified at 16 USC §§ 1451 *et seq.* The purpose of this letter is to concur, pursuant to the CZMA, with the consistency determination submitted by the United States Army Corps of Engineers ("USACE") on September 14, 2022 for USACE's proposed reissuance of Regional General Permit 3 that would authorize certain annual maintenance activities conducted by landowners of managed wetlands in Suisun Marsh ("RGP3").¹

As you know, proposed reissuance of RGP3 is specifically for operations and maintenance work that is currently authorized under the existing RGP3 reissued by USACE in 2018 and occurring within the area deemed the Primary Management Area ("PMA") of Suisun Marsh under the Suisun Marsh Preservation Act ("SMPA"), a state law enforced by BCDC and part of our certified Coastal Management Program for purposes of the CZMA ("CCMP").²

As we have consistently communicated to USACE in the past regarding prior reissuances of RGP3, certain activities which are authorized under RGP3 may still require an individual Marsh

¹ In providing this concurrence to USACE's September 14, 2022 consistency determination, BCDC staff acknowledges that our concurrence has been provided beyond the 75-day review period as specified in BCDC's letter to Mr. William Connor dated September 28, 2022.

² The SMPA is codified at California Public Resources Code sections 29000 *et seq.*



Development Permit (MDP) pursuant to the SMPA, to be obtained by the applicable property owner, subject to two exceptions:

- (1) If the activity falls within a category of development deemed not to require an MDP per California Public Resources Code section 29508³; and
- (2) within the PMA of Suisun Marsh, including within “managed wetlands” (as that term is defined under the SMPA), any development specified in the component of the Local Protection Program (“LPP”) prepared by the Suisun Resource Conservation District (“SRCD”) and certified by the Commission under section 29501.5.

Regarding the second exception category, as has been pointed out to USACE previously, please note that the SRCD’s component of the LPP was recently amended and certified by the Commission on March 17, 2022.⁴ The amendment updated the Individual Water Management Program element of SRCD’s component, resulting in 124 new Individual Ownership Adaptive Habitat Management Plans (“IOAHMP”) for the water management of each managed wetland in private ownership within the PMA of Suisun Marsh.

However, the amendment did not change the scope of development activities specified in the SRCD’s certified component of the LPP (which would be exempt from the MDP requirement). In that regard, the IOAHMPs states in relevant part:

If wetland management is being implemented based on a certified Plan, landowners do not need a San Francisco Bay Conservation and Development (BCDC) Marsh Development Permit for routine maintenance of existing managed wetlands or maintenance of existing water management facilities. However, new managed wetland water management facilities such as exterior drain pipes, rip rap, bulkhead walls, or pump platforms, or an activity that meets the BCDC definition of “development” [that is not otherwise exempt per Public Resources Code section 29508] will require a BCDC MDP.⁵

For the avoidance of doubt, and as previously communicated to USACE, the following activities require an MDP from BCDC:

- Installation of new drain pumps and platforms on exterior levees.
- Placement of new riprap in areas that are not presently riprapped, on either interior or exterior levees.

³ All further statutory references are to the California Public Resources Code, unless otherwise specified.

⁴ See materials associated with March 17, 2022 Commission Meeting, agenda item no. 9 at <https://bcdc.ca.gov/cm/2022/03-17-agenda.html>.

⁵ See, e.g., <https://bcdc.ca.gov/cm/2022/03-17-IndividualOwnershipAdaptiveHabitatManagementPlans.pdf> at p. 4.

- Installation of a new pipe or dual-purpose gate in exterior levees to flood or drain managed wetlands.
- Installation of new bulkheads.
- Installation of new fish screen facilities.
- Installation of new salinity monitoring stations or relocation of any existing salinity monitoring station.

The following activities may require an MDP from BCDC, depending on site-specific circumstances:

- Installation of alternative bank protection such as brush boxes, brush bundles, ballast buckets, and vegetation on exterior and interior levees.
- Installation of new blinds.

Considering the above, in past instances of reissuance of RGP3 by USACE, we have consistently requested that USACE include a special condition that limits a permittee's ability to exercise RGP3 until an MDP is first obtained for applicable activities otherwise authorized under RGP3.⁶ In response, we appreciate that in your consistency determination submittal dated September 14, 2022 USACE stated that it intends to include a similar special condition as Special Condition 21 of the 2018 reissuance of RGP3, which states:

If a proposed activity requires or may require a permit from the San Francisco Bay Conservation and Development Commission ("BCDC"), authorization under this permit will not become effective until that permit is obtained, fully executed, and returned to BCDC or until BCDC has provided a written determination that no permit from BCDC is required for the activity. Activities that require a BCDC permit in the Suisun Marsh are those activities that constitute "development" (as defined in Cal. Pub. Res. Code § 29114(a)) and that are not exempt from the need to obtain a BCDC permit under the Suisun Marsh Preservation Act, which include: (1) "repair, replacement, reconstruction, or maintenance that does not result in an addition to, or enlargement or expansion of, the object of such repair, replacement, reconstruction or maintenance" (*Id.* § 29508(b)); and (2) any development specified in the component of the Suisun Marsh Local Protection Program prepared by the Suisun Resource Conservation District, which includes the certified individual management plans for managed wetlands. (*Id.* § 29501.5.)

⁶ The SRCD, California Department of Fish and Wildlife, California Department of Water Resources, and United States Bureau of Reclamation are the applicants and would be the permittees for reissuance of RGP3.



Please update the reference at the end of this condition language from "individual management plans" to "Individual Ownership Adaptive Habitat Management Plans" (IOAHMPs) as described above.

Furthermore, the consistency determination submittal also states that "the activities authorized under the proposed reissued RGP3 would include only activities currently authorized and implemented under the existing 2018 RGP3" for which USACE submitted a consistency determination on December 20, 2017 and BCDC conditionally concurred (subject to the aforementioned Special Condition 21) on January 24, 2018.

Based on USACE's commitments that reissuance of RGP3 will (1) limit authorization to only activities currently authorized and implemented under the 2018 reissued RGP3 and (2) include a special condition substantially similar to Special Condition 21 of the 2018 reissued RGP3, then BCDC concurs, unconditionally, with USACE's consistency determination submittal dated September 14, 2022 that USACE's proposed reissuance of RGP3 is consistent to the maximum extent practicable with the Commission's enforceable State laws and policies as reflected in its CCMP.

Sincerely,

DocuSigned by:

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MICHAEL NG
Senior Staff Attorney

cc: William Connor, USACE
Steve Chappell, SRCD
Greg Martinelli, CDFW
Rhiannon Klingonsmith, DWR
Agnes Farres, RWQCB