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DELTA STEWARDSHIP COUNCIL

A California State Agency

February 28, 2020

Chair
Susan Tatayon

Mike Kynett
Reclamation District No. 3
c/o MBK Engineers
455 University Avenue, Suite 100
Sacramento, CA 456-4400

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Sent via email: kynett@mbkengineers.com

RE: Comments on Reclamation District No. 3 Grand Island Levee Erosion Repair Project Initial Study/Mitigated Negative Declaration

Dear Mr. Kynett:

The Delta Stewardship Council (Council) appreciates the opportunity to comment on the Draft Initial Study/Mitigated Negative Declaration (IS/MND) for the Reclamation District No. 3 (RD 3) Grand Island Levee Erosion Repair Project (project). According to the IS/MND, the project will address critical erosion, bank loss, and waterside instability by placing rock on the waterside of the levee, and restore riparian habitat by establishing a waterside berm planted with native species (see IS/MND, p. 1).

The Council is an independent State of California agency established by the Sacramento-San Joaquin Delta Reform Act of 2009, codified in Division 35 of the California Water Code, sections 85000-85350 (Delta Reform Act). The Delta Reform Act charges the Council with furthering the State's coequal goals for the Sacramento-San Joaquin Delta (the Delta) of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. (Wat. Code, § 85054.) The coequal goals are to be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place. (Id.)

Pursuant to the Delta Reform Act, the Council has adopted the Delta Plan, a legally enforceable management framework for the Delta and Suisun Marsh for achieving the coequal goals. The Delta Reform Act grants the Council specific regulatory and appellate authority over certain actions that take place in whole or in part in the Delta and Suisun Marsh, referred to as "covered actions." (Wat. Code, §§ 85022(a) and 85057.5.) The Council exercises that authority through its regulatory policies (set forth in Title 23 of the California Code of Regulations, Sections 5001 through 5016) and recommendations incorporated into the Delta Plan. State

"Coequal goals" means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place."

– CA Water Code §85054

and local agencies are required to demonstrate consistency with the Delta Plan when carrying out, approving, or funding a covered action. (Wat. Code, §§ 85057.5 and 85225.)

Covered Action Determination and Certification of Consistency with the Delta Plan

Water Code section 85057.5(a) provides a multi-part test to define what activities would be considered covered actions. Based on the project location and scope described in the IS/MND, the project appears to meet the definition of a covered action because it:

1. Will occur in whole or in part within the boundaries of the Legal Delta (Wat. Code, § 12220) or Suisun Marsh (Pub. Resources Code, § 29101). The project would occur on approximately 1,700 feet of levee located on the southwest portion of Grand Island, located in part within the boundaries of the Legal Delta.
2. Will be carried out, approved, or funded by the State or a local public agency. RD 3, a local public agency, is the lead agency and would carry out, approve, and fund the project.
3. Will have a significant impact on the achievement of one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people, property, and State interests in the Delta. This multi-benefit project would have a significant impact on achievement of a government-sponsored flood control program by addressing current erosion, bank loss, and waterside instability along the south bank of Steamboat Slough (see IS/MND, p.4). The project also benefits ecosystem restoration goals by establishing a waterside berm planted with native species.
4. Is covered by one or more of the regulatory policies contained in the Delta Plan (Cal. Code Regs., tit. 23, §§ 5003-5015). Delta Plan regulatory policies that may apply to the project are discussed below.

The IS/MND concludes that the project would have “no impact” due to a conflict with any applicable land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental effect, and includes discussion regarding the Council, the Delta Plan, and the covered actions process (see IS/MND, p. 62). The IS/MND states that:

The Project will not be considered a “covered action” under the Delta Plan, since California Water Code section 85057.5(b)(5) states that a “covered action” does not include routine maintenance and operation of a facility located in the Delta that is owned or operated by a local public agency.

Water Code section 85057.5(b)(5) excludes from the definition of covered action “routine maintenance and operation of a facility located in whole, or in part, in the Delta, that is owned or operated by a local public agency.” While routine maintenance is excluded from the covered action definition, the IS/MND does not further explain why the project is considered routine maintenance or operation of a facility located within the Delta. According to the IS/MND, the project includes activities that would flatten the waterside levee slope, place rock on the waterside levee slope, and reconstruct a section of the bank with a soil planting berm and rock containment

berm (see IS/MND, p. 4). Based on Figure 1-3, it appears that the waterside features would expand the levee beyond its original footprint. Furthermore, the project would introduce a restoration component in the form of a planted waterside berm that was not part of the original levee. (see Figure 1-3, IS/MND, p. 4) For these reasons, the project does not appear to qualify for a routine maintenance exclusion under Water Code section 85057.5(b)(5).

It is the State or local agency approving, funding, or carrying out the project that must determine if that project is a covered action and, if so, file a Certification of Consistency with the Council prior to project implementation. (Wat. Code, § 85225; Cal. Code Regs., tit. 23, § 5001(j)(3).)

Comments Regarding Delta Plan Policies and Potential Consistency Certification

The following section describes regulatory Delta Plan policies that may apply to the project based on the available information in the IS/MND. This information is offered to assist RD 3 with the process of determining the covered action status of the project.

General Policy 1: Detailed Findings to Establish Consistency with the Delta Plan

Delta Plan Policy **G P1** (Cal. Code Regs., tit. 23, § 5002) specifies what must be addressed in a certification of consistency for a covered action. The following is a subset of Policy G P1 requirements that a project must meet to be considered consistent with the Delta Plan:

Mitigation Measures

Delta Plan Policy **G P1, subsection (b)(2)** (Cal. Code Regs., tit. 23, §5002(b)(2)) requires that actions not exempt from CEQA and subject to Delta Plan regulations must include all applicable feasible mitigation measures adopted and incorporated into the Delta Plan as amended April 26, 2018, or substitute mitigation measures that are equally or more effective. Mitigation measures in the Delta Plan's Mitigation Monitoring and Reporting Program (Delta Plan MMRP) are available at: <https://deltacouncil.ca.gov/pdf/delta-plan/2018-appendix-o-mitigation-monitoring-and-reporting-program.pdf>.

The IS/MND identifies potentially significant impacts on biological resources, hazards and hazardous materials, and hydrology and water quality. RD 3 proposes 13 conservation measures to be implemented as part of the project to help assure that the project will have no impact or a less-than-significant impact within these resource areas (IS/MND, pp. 9-13). Council staff recommend that RD 3 review the Delta Plan MMRP and implement applicable feasible mitigation measures identified in the Delta Plan or substitute mitigation measures that are equally or more effective.

Best Available Science

Delta Plan Policy **G P1, subsection (b)(3)** (Cal. Code Regs., tit. 23, § 5002(b)(3)) states that covered actions must document use of best available science as relevant to the purpose and nature of the project. The regulatory definition of "best available science" is

provided in Appendix 1A of the Delta Plan (<https://deltacouncil.ca.gov/pdf/delta-plan/2015-appendix-1a.pdf>). Best available science is defined in the Delta Plan as the best scientific information and data for informing management and policy decisions. Six criteria are used to define best available science: relevance, inclusiveness, objectivity, transparency and openness, timeliness, and peer review. (Cal. Code Regs., tit. 23, § 5001(f)) This policy generally requires that the lead agency clearly document and communicate the process for analyzing project alternatives, impacts, and mitigation measures of proposed projects, in order to foster improved understanding and decision making.

Ecosystem Restoration Policy 4: Expand Floodplains and Riparian Habitats in Levee Projects

Delta Plan Policy **ER P4** (Cal. Code Regs., tit. 23, § 5008) requires levee projects to evaluate and, where feasible, incorporate alternatives to increase floodplains and riparian habitats. This policy applies to the project because the project is a levee project.

The IS/MND describes how the project will mitigate for impacts to riparian and aquatic habitat by constructing and planting a waterside berm. As RD 3 finalizes specific waterside habitat bench designs, it should review the January 2016 Council report: “Improving Habitat along Delta Levees”.¹ This report summarizes which habitat designs along levees may provide greater benefits to target native species with an emphasis on salmon and riparian birds.

Ecosystem Restoration Policy 5: Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species

Delta Plan Policy **ER P5** (Cal. Code Regs., tit. 23, § 5009) calls for avoiding introduction and habitat improvements for invasive, nonnative species or mitigating these potential impacts in a manner that appropriately protects the ecosystem.

The IS/MND describes existing conditions at the project site including the distribution and extent of invasive non-native species, and discusses site preparation activities (IS/MND, pp. 1-5). However, the IS/MND does not specifically analyze the potential for introduction or habitat improvements for invasive, nonnative species, nor does it propose a conservation measure to address invasive non-native species control (pre-project) and/or management (post-project).

RD 3 should analyze how the project will avoid or mitigate for conditions that would lead to the habitat improvement for or establishment of, nonnative invasive species. In the event that mitigation is warranted, mitigation and minimization measures should be consistent with, and equally or more effective than, those identified in the Delta Plan MMRP:

<https://deltacouncil.ca.gov/pdf/delta-plan/2018-appendix-o-mitigation-monitoring-and-reporting-program.pdf>, including Delta Plan Mitigation Measure 4-1, which requires development and

¹ Available upon request by contacting accessibility@deltacouncil.ca.gov.

implementation of an invasive species management plan for any project whose construction or operation could lead to introduction or facilitation of invasive species establishment, and describes the required content of the management plan. Council staff recommend that RD 3 incorporate an additional conservation measure to address these requirements.

Risk Reduction Policy 1: Prioritization of State Investments in Delta Levees and Risk Reduction

Delta Plan Policy **RR P1** (Cal. Code Regs., tit. 23, § 5012) calls for the prioritization of State investments in Delta flood risk management, including levee operation, maintenance and improvements. Delta Plan Policy RR P1 provides interim priorities to guide discretionary State investments in Delta flood risk management, including levee operation, maintenance and improvements.

As described in the Draft IS/MND, the project includes levee bank protection designed to reduce the risk of levee failure on the southwest corner of Grand Island by addressing current erosion, bank loss, and waterside instability along the south bank of Steamboat Slough. (see IS/MND, p. 1) RD 3 should explain, and provide supporting documentation to demonstrate, how the project is consistent with the priorities outlined in Policy RR P1.

Closing Comments

The Council encourages RD 3 to engage in early consultation with Council staff to assist in the process of determining the covered action status of the project. Early consultation would provide opportunity to discuss the project's possible impacts on the coequal goals, and the Council's regulatory process. More information on covered actions, early consultation, and the certification process can be found on the Council website, <http://deltacouncil.ca.gov/covered-actions>. Please contact Erin Mullin at (916) 445- 5459, or Erin.Mullin@deltacouncil.ca.gov if you have any questions.

Sincerely,

Jeff Henderson, AICP
Deputy Executive Officer
Delta Stewardship Council