

PUBLIC HEARING ITEM

Public Hearing, Consideration of Proposed Determination, and Adoption of Findings Pursuant to Water Code section 85225.25 on the Appeals of the California Department of Water Resources' Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project

(Certification Number C20215)

Summary: The Council will conduct a public hearing regarding the appeals received on the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project Certification of Consistency. Following the public hearing, the Council will consider the determination prepared by staff (Proposed Determination) (Attachment 1 to this staff report) and will adopt findings pursuant to Water Code section 85225.25.

BACKGROUND

The Delta Stewardship Council (Council) will conduct a public hearing at its July 15-16, 2021 meeting to receive information from staff, presentations from parties, and public comment regarding the Proposed Determination of recommended findings prepared by staff at the direction of the Council, for the Council's consideration, on the appeals received for the California Department of Water Resources' (Department) Certification of Consistency with the Delta Plan (Certification or Certification of Consistency) for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Lookout Slough Project or Covered Action) (Certification Number C20215). A copy of the Proposed Determination is provided as Attachment 1 to this report. The Proposed Determination includes revisions based upon comments received from the parties and the public on the Staff Draft Determination published on June 18, 2021.¹ A redlined version of the Proposed Determination showing changes made from the Staff Draft Determination that was issued for public comment is provided as Attachment 2 to this staff report.

Water Code section 85225.25 requires that "[a]fter a hearing on an appealed action, the Council shall make specific written findings either denying the appeal or remanding the matter to the state or local public agency for reconsideration of the covered action based on the finding that the certification of consistency is not supported by substantial evidence in the record before the state or local public agency that filed the certification." (Water Code § 85225.25.) As summarized below in the conclusion section of this report

¹ Comments considered in the Proposed Determination are those received by noon on Monday, June 28, 2021, as specified in the Staff Draft Determination notice of publication for public comment.

and set forth in detail in the attached Proposed Determination, *staff recommends that, pursuant to Water Code section 85225.25, the Council:*

1. *Adopt the Proposed Determination and the findings contained therein; and*
2. *remand the matter, in part, to the Department for reconsideration on the issues recommended for remand under Delta Plan policies **G P1(b)(3)** and **DP P2** as set forth in the Proposed Determination; and*
3. *deny the appeals, in part, on the issues recommended for denial as set forth in the Proposed Determination; and*
4. *dismiss the appeals on the issues recommended for dismissal as set forth in the Proposed Determination.*

The Council may make the findings required by Water Code Section 85225.25 by taking action to adopt the Proposed Determination as presented or as modified by the Council following the hearing, or by not adopting the Proposed Determination and making separate findings. The Proposed Determination recommends denying or dismissing the appeals on most issues. The Proposed Determination recommends remand on certain G P1(b)(3) and DP P2 issues related to recreation. If, upon remand, the Department chooses to proceed with the Covered Action as modified to respond to the findings of the Council, the Department would be required to submit a revised certification of consistency to address the findings identified for remand by the Council, prior to proceeding with the action.

This report provides an overview of the Council's covered action authority and the certification and appeals process. It then summarizes the Covered Action, the process and analysis completed by Council staff that led to the staff recommendations in the Proposed Determination, and the issues and findings discussed in the Proposed Determination.

DELTA REFORM ACT, DELTA PLAN, AND COVERED ACTION AUTHORITY

The Delta Reform Act of 2009 charges the Delta Stewardship Council (Council) with implementing the Delta Plan. (Water Code section 85204.) As part of this charge, the Council has appellate authority to ensure that certain agency actions ("covered actions") in the Sacramento-San Joaquin River Delta and Suisun Marsh (Delta) are consistent with the Delta Plan. (Water Code section 85225.10.) An agency undertaking a covered action in the Delta (defined in Water Code section 85057.5) must submit to the Council a written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan. (Water Code section 85225.)

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 appeal the certification of consistency no later than 30 days after the submission of a certification of consistency to the Council. (Water Code sections 85225.10 and 85225.15.)

CERTIFICATION AND APPEALS TIMELINE

The Delta Reform Act establishes a process for State and local public agencies to follow when determining whether a project is a covered action, as well as a process for submitting a certification of consistency with detailed findings to the Council. As part of this process, Department and Council staff conducted early consultation meetings for the Lookout Slough Project. (See Water Code section 85225.5.) On February 11, 2021, the Department ended the early consultation process and posted a draft copy of the Certification on its website for a 10-day public review period. On February 22, 2021, the Department electronically submitted the Certification to the Council on its covered actions website. The Council notified interested parties on its listserv that the Certification was submitted and posted a copy of the notice on its webpage.

The Council received four appeals of the Lookout Slough Project Certification, which staff deemed filed on March 24, 2021. (See Council Administrative Procedures Governing Appeals [Appeals Procedures] section 7.) The Council established ex parte communication restrictions on the same day. The Department submitted its record for these proceedings and certified the record as complete on April 5, 2021. (Appeals Procedures section 4(b).)

Water Code section 85225.20 requires the Council to conduct a hearing on appeals within 60 days of the date of filing and to make a decision on the appeals within 60 days of the hearing. The Council issued a Notice of Public Hearing on April 8, 2021. On April 19, 2021, the Council issued a Supplement to the Notice of Public Hearing, containing questions to the Department and parties submitting appeals (Appellants). The questions were intended to help the parties focus on specific substantial evidence in the record supporting their arguments, as required by the Council's Appeals Procedures. The Council then conducted a two-day noticed public hearing on the appeals during its regular meeting on May 20 - 21, 2021.

At the hearing, the Department, Appellants, and the Delta Protection Commission (Commission) made presentations to the Council, and members of the public provided written and/or oral statements regarding the Certification and appeals and responded to questions from Councilmembers and Council staff. Oral statements at the hearing and written responses received by June 1, 2021, were considered and incorporated as applicable in the Staff Draft Determination released on June 18, 2021, for comments from the parties and the public. Input received on the Staff Draft Determination in

written comments from the parties and the public² has been considered and incorporated as applicable in the Proposed Determination (Attachment 1) presented for Council consideration and action following today's hearing. Attachment 2 to this staff report is a redlined version of the Proposed Determination that shows changes from the Staff Draft Determination released on June 18, 2021.

All comments on the Staff Draft Determination received by noon, Monday, June 28, 2021, as specified in the June 18, 2021 publication notice for the Staff Draft Determination, were considered in preparation of the Proposed Determination. Ensuing revisions are part of the Proposed Determination and shown as tracked changes in the redline version included as Attachment 2 to this staff report. Comments not addressed in the Proposed Determination were considered but would not alter the analysis or findings.

PROJECT PURPOSE AND DESCRIPTION

According to the Certification, the Lookout Slough Project is a proposed multi-benefit covered action that would restore approximately 3,165 acres of tidal wetland habitat and create over 40,000 acre-feet of transitory flood storage in the Cache Slough Complex within Solano County adjacent to the Yolo Bypass (See Figure 1).

The Certification states that the tidal wetland habitat restoration is intended to provide rearing habitat for Delta Smelt and salmonids, provide potential spawning habitat for Delta Smelt, create habitat conditions for other aquatic and terrestrial wetland-dependent species, and increase food availability for Delta Smelt and other "Target Protected Fish Species" (Certification, p. 2).

In addition, the Certification states that the covered action is intended to increase flood storage and conveyance, increase the resilience of levees and reduce flood risk in a manner "consistent with the Central Valley Flood Protection Plan, which calls for multi-benefit projects that expand the Yolo Bypass while incorporating ecosystem-enhancing features" (Certification, p. 2).

² Comments considered in the Proposed Determination are those received by noon, Monday, June 28, 2021, as specified in the June 18, 2021 publication notice for the Staff Draft Determination.

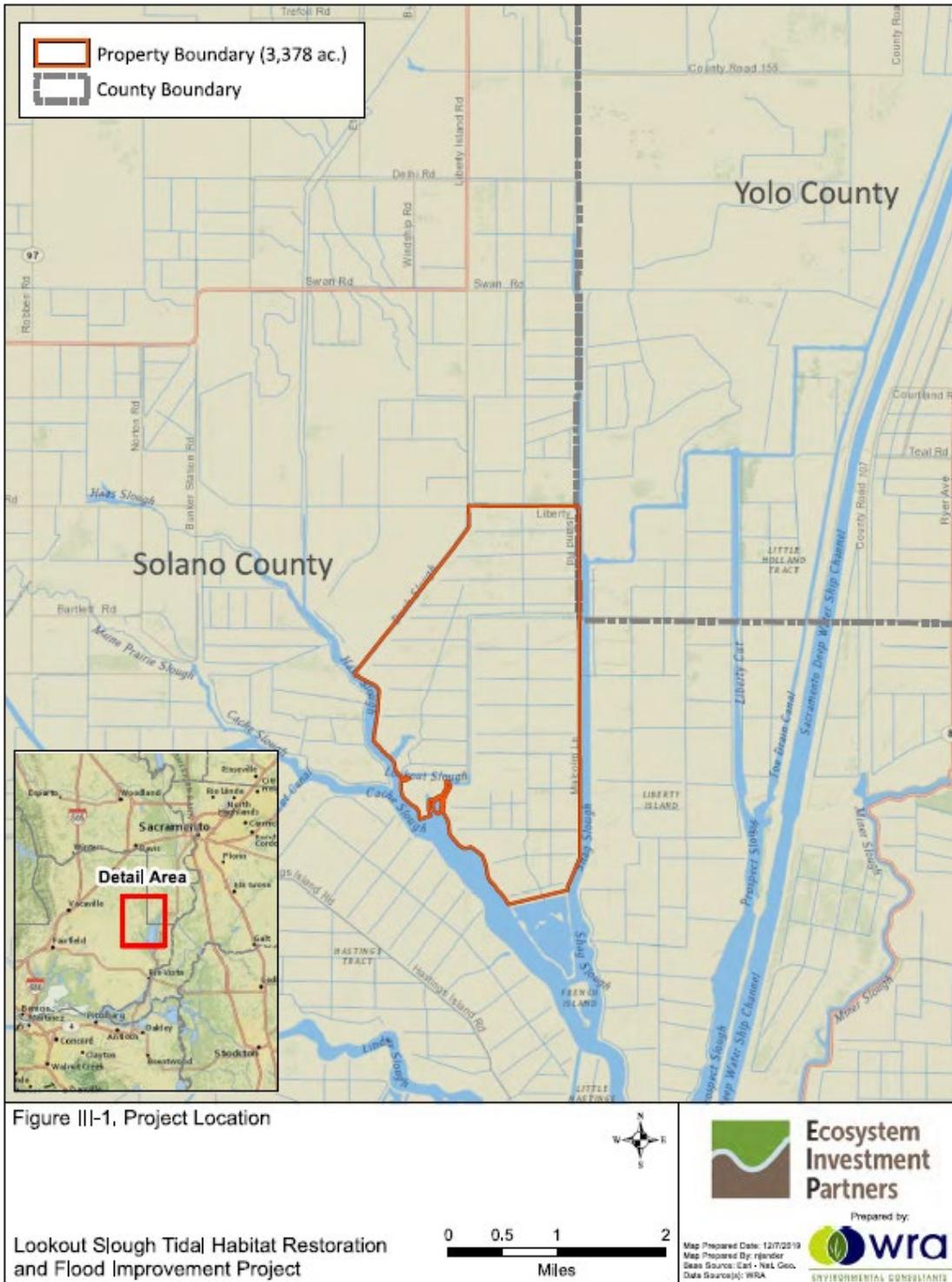


FIGURE 1: COVERED ACTION LOCATION

Source: Draft EIR, Certification Record LOS.4.00001, p. III-4

According to the Certification, the covered action is necessary to partially fulfill tidal habitat restoration requirements under the 2008 U.S. Fish and Wildlife Service (USFWS) Delta Smelt Biological Opinion on the Coordinated Operations of the federal Central

Valley Project and the State Water Project (2008 USFWS BiOp), the 2009 National Marine Fisheries Service (NMFS) Biological Opinion and Conference Opinion on the Long-Term Operation of the Central Valley Project and the State Water Project (2009 NMFS BiOp), and Condition 9.1.1 of the Incidental Take Permit for Long-Term Operation of the State Water Project in the Sacramento-San Joaquin Delta (2020 LTO ITP) (Certification, pp. 2-3).

The covered action site is located on three properties: the Bowsbey Property, the Liberty Farms Property, and the Vogel Property (Certification, p. 3). These properties are currently used for irrigated pasture, recreation, and seasonal grazing respectively.

According to the Certification, the covered action would include a variety of levee modifications at the edges of the site and grading of the topography on the landside of the levees. (See Figure 2) The Shag Slough Levee would be breached to allow for tidal inundation of the site, to create the conditions necessary for tidal wetland restoration (Certification, p. 2). The Shag Slough levee is currently part of the State Plan of Flood Control (SPFC) and the Yolo Bypass West levee system (Certification, p. 3). Under the covered action, the Shag Slough levee would be lowered at two locations to allow for tidal inundation and for floodwaters from the Yolo Bypass to be conveyed and stored on the site (Certification, p. 2). A new setback levee would be constructed at the western edge of the covered action site, along Duck Slough, using borrow material from site regrading and levee degradation (Certification, p. 2). The Duck Slough Setback Levee would become part of the SPFC and the Yolo Bypass West Levee System (Certification, p. 3).

According to the Certification, the covered action would modify the levee on the northeast bank of Cache Slough and Haas Slough to prevent high-flow events that inundate the site from raising water surface elevations in Cache Slough (Certification, p. 3). The post-project condition is referred to as the Cache/Hass Slough Training Levee. The modifications would include lowering the height of the levee to reduce subsidence, widening the base and crown of the levee to increase slope stability and improve maintenance access, and installing rock and vegetation on the slopes for erosion protection (Certification Attachment 17 – Draft Environmental Impact Report [EIR], Chapter 3, p. III-39). The Vogel levee would be breached to allow for tidal inundation on the Vogel Property (Certification, p. 2).

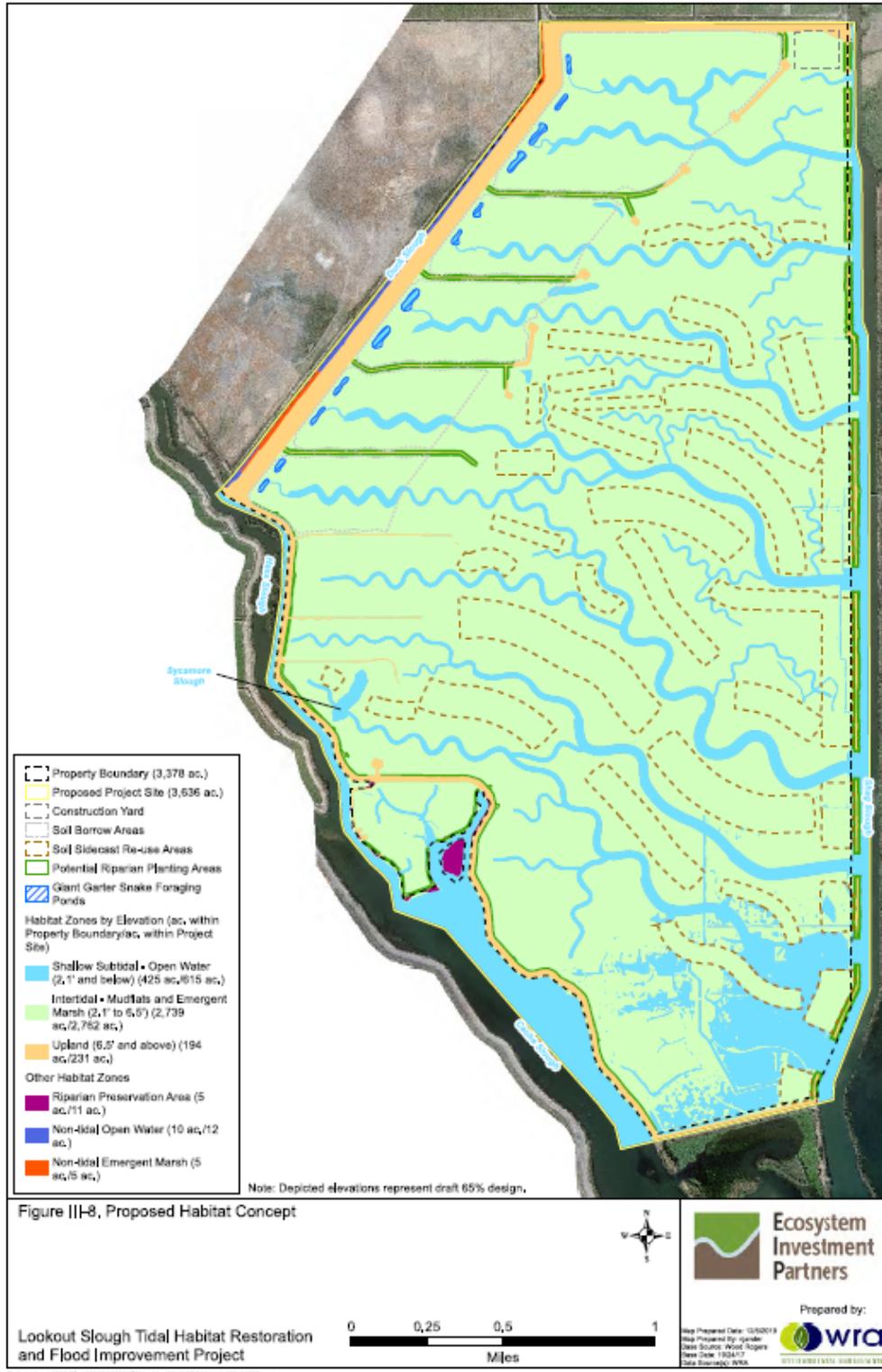


FIGURE 2. PROPOSED HABITAT CONCEPT

Source: Draft EIR, Certification Record LOS.4.00001, p. III-31

The Department anticipates completing the covered action by April 2024. The total estimated cost is \$120,000,000 (Certification, p. 3).

CERTIFICATION OF CONSISTENCY

The Department submitted the Certification to the Council via its online system on February 22, 2021, where it remains publicly posted:

https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=ba3c59bf-e359-49f7-b866-60fa781325d0

The Department’s Certification provides background and descriptive information about the project and offers an overview of the Department’s detailed findings pertaining to the consistency of the Lookout Slough Project with the Delta Plan. In the Certification, the Department made findings regarding consistency with the Delta Plan regulatory policies as identified in Table 1. The Certification cites portions of the record that the Department offers as demonstrating substantial evidence in support of the Certification.

TABLE 1: DEPARTMENT OF WATER RESOURCES’ CONSISTENCY FINDINGS BY DELTA PLAN REGULATORY POLICY

Delta Plan Policy	Policy Title	Department’s Finding
G P1 (b)(1) (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(1))	Detailed Findings to Establish Consistency with the Delta Plan (Coequal Goals)	Not Applicable
G P1 (b)(2) (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(2))	Detailed Findings to Establish Consistency with the Delta Plan (Mitigation Measures)	Consistent
G P1 (b)(3) (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(3))	Detailed Findings to Establish Consistency with the Delta Plan (Best Available Science)	Consistent
G P1 (b)(4) (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(4))	Detailed Findings to Establish Consistency with the Delta Plan (Adaptive Management)	Consistent
WR P1 (Cal. Code Regs., tit. 23, § 5003)	Reduce Reliance on the Delta through Improved Regional Water Self-Reliance	Not Applicable
WR P2 (Cal. Code Regs., tit. 23, § 5004)	Transparency in Water Contracting	Not Applicable
ER P1 (Cal. Code Regs., tit. 23, § 5005)	Delta Flow Objectives	Not Applicable
ER P2 (Cal. Code Regs., tit. 23, § 5006)	Restore Habitats at Appropriate Elevations	Consistent
ER P3 (Cal. Code Regs., tit. 23, § 5007)	Protect Opportunities to Restore Habitat	Consistent

Delta Plan Policy	Policy Title	Department's Finding
ER P4 (Cal. Code Regs., tit. 23, § 5008)	Expand Floodplains and Riparian Habitats in Levee Projects	Consistent
ER P5 (Cal. Code Regs., tit. 23, § 5009)	Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species	Not Applicable
DP P1 (Cal. Code Regs., tit. 23, § 5010)	Locate New Urban Development Wisely	Not Applicable
DP P2 (Cal. Code Regs., tit. 23, § 5011)	Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats	Consistent
RR P1 (Cal. Code Regs., tit. 23, § 5012)	Prioritization of State Investments in Delta Levees and Risk Reduction	Consistent
RR P2 (Cal. Code Regs., tit. 23, § 5013)	Require Flood Protection for Residential Development in Rural Areas	Not Applicable
RR P3 (Cal. Code Regs., tit. 23, § 5014)	Protect Floodways	Consistent
RR P4 (Cal. Code Regs., tit. 23, § 5015)	Floodplain Protection	Consistent

APPEALS

The Council received four timely³ appeals from the following parties:

- C20215-A1 - Liberty Island Access (LIA)
- C20215-A2 - Solano County Water Agency (SCWA)
- C20215-A3 - Reclamation Districts 2060 & 2068 (Districts)
- C20215-A4 - Central Delta Water Agency (CDWA)

Table 2 identifies the Delta Plan policies substantively appealed by the Appellants, one of which, **G P1(b)**, has four subdivisions. For clarity of analysis, the challenges under the four G P1 subdivisions are treated as individual Delta Plan policy challenges (i.e., as if a total of 11, rather than eight, Delta Plan policies are implicated). To the extent possible, Council staff have consolidated similar issues and contentions presented by Appellants.

³ The appeals were deemed filed on March 24, 2021, pursuant to Section 7 of the Council's Administrative Procedures Governing Appeals available at <https://deltacouncil.ca.gov/pdf/delta-plan/regulations/2020-05-08-appeals-procedures.pdf>

TABLE 2: APPELLANTS AND DELTA PLAN POLICIES APPEALED

Appealed Policies	LIA	SCWA	Districts	CDWA
G P1(b)(1) (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(1)) Coequal Goals		X	X	
G P1(b)(2) (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(2)) Mitigation Measures	X	X	X	
G P1(b)(3) (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(3)) Best Available Science	X	X	X	X
G P1(b)(4) (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(4)) Adaptive Management		X	X	
WR P1 (Cal. Code Regs., tit. 23, § 5003) Reduce Reliance on the Delta through Improved Regional Water Self-Reliance				X
WR P2 (Cal. Code Regs., tit. 23, § 5004) Transparency in Water Contracting		X		
ER P1 (Cal. Code Regs., tit. 23, § 5005) Delta Flow Objectives				X
ER P2 (Cal. Code Regs., tit. 23, § 5006) Restore Habitats at Appropriate Elevations				X
ER P5 (Cal. Code Regs., tit. 23, § 5009) Avoid Introductions of and Habitat for Invasive Nonnative Species		X	X	X
DP P2 (Cal. Code Regs., tit. 23, § 5011) Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats	X	X	X	X
RR P1 (Cal. Code Regs., tit. 23, § 5012) Prioritization of State Investments in Delta Levees and Risk Reduction		X	X	X

The appeals are available on the Council’s website at:

https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=ba3c59bf-e359-49f7-b866-60fa781325d0.

Standard of Review

In a covered action appeal, the question before the Council is whether an appellant has shown that the certification of consistency is not supported by substantial evidence in the record. (Water Code section 85225.25.)

In the Proposed Determination, substantial evidence means evidence that is reasonable in nature, credible, and of solid value. It includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. Speculation or conjecture alone is not substantial evidence. The Council must decide whether there is enough relevant information and reasonable inferences so that a fair argument can be made to support the Department's conclusions, even though other conclusions may also be reached.

The Council reviews a certification of consistency to determine whether it is supported by the administrative record, rather than simply reviewing it for error. The entire record is reviewed, including evidence detracting from the decision. However, the Council does not substitute its own findings or inferences for the Department's. In some instances, evaluating the Certification requires interpretation of the Delta Plan and documents incorporated therein. The Council, as drafter and administrator of the Delta Plan, interprets the Plan pursuant to its expertise. The Council will consider interpretations that the parties offer but will ultimately arrive at an independent determination reflecting its expertise.

In arguing that certain Certification findings are not based upon substantial evidence, the Appellant carries the burden of demonstrating that the administrative record does not contain sufficient evidence to support the Department's findings. Thus, if an appellant fails to set forth specific facts showing that a finding is not supported by substantial evidence in the record, its claim must be dismissed. (Appeals Procedures, sections 6 (e), 6(f), and 15). The Council is not required to search the record to ascertain whether it contains support for the Appellant's contentions.

The scope of the Council's review of consistency is limited to the regulatory policies identified in the Delta Plan. The Council's authority related to covered actions does not extend to Delta Plan narrative, recommendations, or performance measures, as none of these has a regulatory effect.

The Council, or the Executive Officer, may dismiss issues if: 1) the appellant has failed to provide information in the appellant's possession or control within the time requested ; or 2) the issue raised is not within the Council's jurisdiction or fails to raise an appealable issue. (Water Code sections 85225.10 and 85225.20; Appeals Procedures section 15(c).)

Record

The Department certified the record for these proceedings as full and complete on April 5, 2021. (Appeals Procedures section 4(b).) The record consists of documents that were before the Department when it made its Certification. The documents provided in the Department's record are identified in a record index available on the Council's website at the following link, where the record has been available to the public since submission: <https://coveredactions.deltacouncil.ca.gov/services/download.ashx?u=f1662db1-642c-44f1-a007-01ffbba0929a>

The Council may request additional information from an appellant necessary to clarify, amplify, correct, or otherwise supplement the information submitted with an appeal within a reasonable period, and may dismiss an appeal for failure of an appellant to provide information requested by the Council within the period provided, if the information requested is in the possession or under the control of the appellant. (Water Code section 85225.10(b-c).) Under the Appeals Procedures, the Council or Executive Officer may supplement the record submitted by the Department if either determines that the additional information was part of the record before the Department, but was not included in the Department's record. (Appeals Procedures section 10.) The Council may also take official notice of any generally accepted technical or scientific matter within the Council's jurisdiction, and of any fact that may be judicially noticed by California courts. (Appeals Procedures section 29.)

The Council has evaluated whether to admit this additional information to the record pursuant to Appeals Procedures, section 10 and/or section 29. Information considered for admission to the record and the recommendations regarding admission are listed in Exhibits A through C to the Proposed Determination. Information recommended for admission under Section 10 is listed in Exhibit A, information recommended for admission under Section 29 is listed in Exhibit B, and information not recommended for admission is listed in Exhibit C. Not all information considered for admission and listed in the Exhibits was relied upon in the Proposed Determination.

Role of the Delta Protection Commission

As described in Section D of the Proposed Determination, the Commission has a unique and important role in representing the interests of Delta communities. (Water Code sections 85085(a), 85200 (b)(1), and 85301.) The architecture of the Delta Reform Act reflects this role and establishes a process for the Commission to provide recommendations to the Council on various issues. That process requires the Council to adopt a recommendation if, in its discretion, the Council determines it to be feasible. (Public Resources Code section 29773(b).) The Delta Reform Act provides that "[a]ny 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 no later than 30 days after a certification of consistency is submitted to the Council. (Wat. Code, §§ 85225.10(a) and 85225.15.)

Out of respect for both the Commission and the spirit of the Delta Reform Act, the Council's Appeals Procedures expressly encourage the Commission to provide testimony and comment "regarding an appeal." (Appeals Procedures section 11.) On May 11, 2021, the Commission submitted written comments on the appeals of G

P1(b)(2), G P1(b)(3), DP P2, and RR P1. On May 20-21, 2021, the Executive Director of the Commission provided oral comments at the hearing. On June 28, 2021, the Commission submitted written comments on the June 18, 2021 staff draft Determination. Both Commission letters are available on the Council's website at:
<https://coveredactions.deltacouncil.ca.gov/services/download.ashx?u=4d9f4300-3c15-4141-b013-7b307dd00af3>.

Per the Appeals Procedures and the hearing notice, the Council may only consider comments and testimony from the Commission "regarding an appeal." Certain of the appeals filed against the Lookout Slough Project raise G P1(b)(2), G P1(b)(3), DP P2, and RR P1; thus, the Council considers the Commission's arguments in the Proposed Determination addressing those policies.⁴

MAY 20-21 HEARING

The Council must hold the first hearing on an appeal within 60 days of the date of the filing of the appeal. (Water Code section 85225.20.) On April 8, 2021, the Council issued a Notice of Public Hearing regarding the appeals for a hearing to be held virtually on May 20 – 21, 2021. The Notice included a statement that the Council may issue additional guidance prior to the hearing in order to assist the parties in focusing their written and oral hearing presentations. On April 19, 2021, the Council issued a Supplement to the Notice of Public Hearing to the Department and Appellants, requesting written responses to address certain questions identified by staff in its initial review of the appeals, in preparation for the hearing. The Department and Appellants provided written responses to those questions between May 3, 2021, and June 1, 2021. The responses are available on the Council's website at:
https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=ba3c59bf-e359-49f7-b866-60fa781325d0.

The Council also received numerous comment letters in advance of and following the hearing, both in favor of and in opposition to the Covered Action. These letters are available on the Council's website at:
https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=ba3c59bf-e359-49f7-b866-60fa781325d0.

At the hearing, the Department, Appellants, and the Commission made presentations to the Council, and members of the public provided written and/or oral statements

⁴ It should be noted, however, that the Council may only take into consideration the recommendations of the Commission regarding arguments raised by appellants. The reason for this is out of fairness to the certifying party. An appeal may be filed by any person and is required to be filed no later than 30 days after the submission of the certification of consistency. (Wat. Code sections 85225.10 and 85225.15; Appeals Procedures, paragraph 5). If the Council were to take into consideration arguments outside of the requisite 30-day time frame that were not raised by an appellant, the certifying party would be prejudiced.

regarding the Certification and appeals. Written comments received with a request that the comment be read at the hearing were read during the public comment period at the hearing by the Council Clerk. Transcripts of the hearing are available on the Council's website at:

https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=ba3c59bf-e359-49f7-b866-60fa781325d0. Video of the hearing is available at: <https://cal-span.org/static/meetings-DSC.php>.

STAFF DRAFT DETERMINATION

At the conclusion of the hearing, Presiding Officer Chair Susan Tatayon directed Council staff to prepare draft findings regarding the appeals based on the record and comments received. The Council released a Staff Draft Determination for public review and comment on June 18, 2021, requesting that written comments be provided by noon on Monday, June 28, 2021, to be considered for revisions to the Proposed Determination. Written comments submitted on the Staff Draft Determination are available on the Council's website at:

https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=ba3c59bf-e359-49f7-b866-60fa781325d0.

On June 23, 2021, the Council issued a *Notice of Public Hearing and Adoption Meeting* for today's public hearing regarding the proposed Determination. A notice with a detailed agenda of Council meeting, including the hearing, pursuant to Bagley-Keene Act requirements was issued on July 2, 2021. The Proposed Determination was released along with the detailed agenda on July 2, 2021.

PROPOSED DETERMINATION

In preparation of the Proposed Determination, for each substantive issue identified on appeal, staff has reviewed and considered the Department's Certification, the relevant appeals, the record, parties' and the Commission's written submittals, oral presentations and statements made by the parties and the Commission at the May 20-21 hearing, and public comments (oral and written) on the Staff Draft Determination received by the Council prior to June 28, 2021. Applying the substantial evidence standard of review, the Proposed Determination presents recommended findings for the challenges to the Certification raised on appeal.

The Proposed Determination (Attachment 1) incorporates changes to the Staff Draft Determination in response to comments from the parties, the Commission, and the public received by noon on Monday, June 28, 2021 (the revisions are tracked as redline changes in Attachment 2). Most changes to the Staff Draft Determination provide clarifications, including in a few cases, refinement of the wording of findings and conclusions, and reorganization of conclusions for a number of issues where staff recommends that the Council dismiss issues on appeal. None of the revisions resulted in substantive changes to the recommended findings.

Key changes to the Staff Draft Determination include revisions to the following policies:

- **GP 1(b)(2) Best Available Science:** The Council takes official notice of US Census data under section 29 of the Appeals Procedures to identify the population of cities located within a 20-60 minute drive of the Lookout Slough Project, and identifies that the recommended remand issue concerning methods to estimate recreational use is limited to the Best Available Science criterion of Inclusiveness (i.e., the remand does not extend to the Objectivity and Relevance criteria).
- **DP P2 Respect Local Land Use When Siting Water or Flood Facilities or Restoration Habitats:** The Proposed Determination clarifies references to access restrictions along Liberty Island Road and on the Shag Slough Bridge, and includes a number of additional footnotes addressing the Department's June 28, 2021 letter regarding public access to the proposed public agency boat dock and the feasibility of reducing or avoiding the conflict with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and Liberty Island Ecological Reserve (LIER).

SUMMARY OF ISSUES AND RECOMMENDED FINDINGS IN THE PROPOSED DETERMINATION

The recommended findings in the Proposed Determination for the Delta Plan policies implicated by the appeals are summarized as follows:

1. The following issues are *dismissed* as not raising appealable issues and/or not being within the Council's jurisdiction:
 - **DP P2** (Cal. Code Regs., tit. 23, § 5011) and **RR P1** (Cal. Code Regs., tit. 23, § 5012): Allocation of Proposition 1 funds;
 - **DP P2** (Cal. Code Regs., tit. 23, § 5011): Disproportionate impacts and demographic considerations;
 - **DP P2** (Cal. Code Regs., tit. 23, § 5011): Consistency with Delta Plan Recommendation 11;
 - **DP P2** (Cal. Code Regs., tit. 23, § 5011): Compliance with Davis-Dolwig Act;
 - **ER P2** (Cal. Code Regs., tit. 23, § 5006): Alternate Sea Level Rise Projections;
 - **ER P2** (Cal. Code Regs., tit. 23, § 5006): Propagation of Predatory Fish Species; and
 - **RR P1** (Cal. Code Regs., tit. 23, § 5012): Lack of a Detailed Funding plan for Operation and Maintenance, Capital Funding, and On-site Personnel to Ensure Facility Maintenance and Manage Flood Risk.
2. The following issues are *remanded* to the Department for reconsideration as Appellant LIA showed that the Department's Certification of Consistency is not

supported by substantial evidence in the record, as detailed in the analysis and findings in the Proposed Determination, with respect to:

- **G P1(b)(3)** (Cal. Code Regs., tit. 23, § 5002, subd. (b)(3)): Best Available Science, on the Best Available Science criterion of Inclusiveness as to the issue of methods to estimate recreational use; and
- **DP P2** (Cal. Code Regs., tit. 23, § 5011): Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats, as to issues related to recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER, described in more detail below.

3. The appeals are *denied* on the following issues are denied Appellants failed to show that the Department's Certification of Consistency is not supported by substantial evidence in the record with respect to:

- **G P1(b)(2)** (Cal. Code Regs., tit. 23, § 5002, subd. (b)(2).): Detailed Findings to Establish Consistency with the Delta Plan Mitigation Measures;
- **G P1(b)(3)** (Cal. Code Regs., tit. 23, § 5002, subd. (b)(3)): Best Available Science, as to the issues of methods to estimate recreational use in regard to the Best Available Science criteria of Objectivity and Relevance; salinity and water quality modeling; water quality modeling; cumulative impacts; peer review of water quality analysis; and water quality impacts to municipal and agricultural diverters;
- **G P1(b)(4)** (Cal. Code Regs., tit. 23, § 5002, subd. (b)(4)): Adaptive Management as to the issues of adequate resources to ensure implementation of the Adaptive Management and Monitoring Plan, delineated authority to implement adaptive management, and success of project implementation and oversight;
- **ER P2** (Cal. Code Regs., tit. 23, § 5006): Restore Habitats at Appropriate Elevations as to the issues of permanent inundation with sea level rise and intertidal habitat range;
- **ER P5** (Cal. Code Regs., tit. 23, § 5009): Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species;
- **DP P2** (Cal. Code Regs., tit. 23, § 5011): Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats, as to the issues of conflicts with existing agricultural uses, conflicts with existing infrastructure, conflicts with the use of existing water intakes and beneficial uses of water, conflicts with the use of existing water intakes and diversions related to endangered species presence, conflicts with the Solano County General Plan, and conflicts with the Solano County Climate Action Plan; and

- **RR P1** (Cal. Code Regs., tit. 23, § 5012): Prioritization of State Investments in Delta Levees and Risk Reduction as to the issue of priorities and goals for flood protection.
4. The appeals are *denied* as to the following Delta Plan policies because they do not apply to the Covered Action:
- **G P1(b)(1)** (Cal. Code Regs., tit. 23, § 5002, subd. (b)(1)): Coequal Goals;
 - **WR P1** (Cal. Code Regs., tit. 23, § 5003): Reduce Reliance on the Delta Through Improved Regional Water Self-Reliance;
 - **WR P2** (Cal. Code Regs., tit. 23, § 5004): Transparency in Water Contracting; and
 - **ER P1** (Cal. Code Regs., tit. 23, § 5005): Delta Flow Objectives.
5. The appeals are *dismissed* as to the following issues because Appellants failed to provide the required specificity for policies on the following specified issues:
- **G P1(b)(4)** (Cal. Code Regs., tit. 23, § 5002, subd. (b)(4)): Adaptive Management, as to the issues of funding for operations and maintenance and third party verification, operations and maintenance of the Duck Slough Setback Levee, funding to perform operations, maintenance, repair, rehabilitation and reconstruction (OMRR&R), and design aspects and maintenance facilitation of the Cache and Haas Slough levee.

The following section summarizes the issues and recommended findings within the Proposed Determination for each appealed Delta Plan policy.

G P1 (b)(1) (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(1)): Coequal Goals

Summary of Issues: The Department states that **G P1(b)(1)** does not apply to the Covered Action. SCWA and the Districts argue that because the Covered Action is not consistent with all Delta Plan policies, the Department should have demonstrated that the Action is consistent with the coequal goals. **G P1(b)(1)** requires that a covered action be consistent with each Delta Plan policy that it implicates, but also recognizes an exception that in some cases, based upon the nature of the covered action, full consistency with all relevant regulatory policies may not be feasible. In those cases, the certifying agency may nevertheless determine that the covered action is consistent with the Delta Plan because, on whole, that action is consistent with the coequal goals. That determination must include clear identification of areas where consistency with relevant regulatory policies is not feasible, an explanation of the reasons why it is not feasible, and an explanation of how the covered action nevertheless, on whole, is consistent with the coequal goals. The Department contends that the Covered Action is consistent with all Delta Plan policies and makes no attempt to show a clear identification of areas where consistency with relevant regulatory policies is not feasible, an explanation of the

reasons why it is not feasible, and an explanation of how the covered action nevertheless, on whole, is consistent with the coequal goals, as required by **GP 1(b)(1)**. Because the Department has not met the requirements to rely upon the exception set forth in **GP 1(b)(1)**, Appellants' arguments are moot.

Summary of Recommended Finding: Appellants SCWA and the Districts have failed to show that the Certification is not supported by substantial evidence in the record that **G P1(b)(1)** does not apply to the Covered Action. *Staff recommends that the Council deny the appeals.*

G P1 (b)(2) (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(2)): Mitigation Measures

Summary of Issues: The Department certifies that the Covered Action is consistent with **G P1(b)(2)**. LIA, SCWA, and the Districts raise substantive arguments that it is not, including arguments that specific Lookout Slough Project mitigation measures are applicable but are not equally or more effective than applicable mitigation measures adopted and incorporated into the Delta Plan. Appellants identify 11 Delta Plan Mitigation Measures in their appeals of this policy. The Department has identified Project Mitigation Measures that it finds are applicable to the Covered Action. For these applicable measures, the Department has cited to evidence in the record as support that its Project Mitigation Measures, or equivalent actions, are equally or more effective than corresponding Delta Plan mitigation measures. The Department also provides evidence that a number of Delta Plan Mitigation Measures are not applicable because no impact or a less-than-significant impact has been identified by the Department for the applicable environmental resource or threshold in the Lookout Slough Project's Environmental Impact Report.

Summary of Recommended Finding: Appellants failed to show that the Certification of Consistency is not supported by substantial evidence in the record that the Covered Action is consistent with **G P1(b)(2)**. *Staff recommends that the Council deny the appeals.*

G P1 (b)(3) (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(3)): Best Available Science

Summary of Issues: The Department certifies that the Lookout Slough Project is consistent with **G P1(b)(3)**. All four Appellants raise substantive arguments that it is not. Appellants identify Best Available Science issues related to methods the Department used to estimate recreational use, years the Department selected for water quality modeling, cumulative water quality impacts, peer review of water quality analysis, and water quality impacts to municipal and agricultural diverters. Review of the record shows that for recreational use, the methods selected by the Department may have underestimated the number of existing recreational users of the Lookout Slough Project site, and that the methods do not meet the Best Available Science criterion for Inclusiveness. For other appeal issues, Appellants have not shown that the Department's methods to analyze, model, and review water quality impacts do not meet the Best

Available Science criteria of Relevance, Inclusiveness, Objectivity, Transparency and Openness, and Peer Review.

Summary of Recommended Findings: With regard to methods to estimate recreational use, LIA showed that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with **G P1(b)(3)** in regard to the Best Available Science criterion of Inclusiveness. *Staff recommends that the Council remand the matter to the Department for reconsideration of this issue.*

With regard to methods to estimate recreational use, LIA failed to show that the Certification is not supported by substantial evidence in regard to the best available science criteria of Objectivity and Relevance. *Staff recommends that the Council deny the appeal as to this issue.*

With regard to modeling years selected for water quality analysis; predictive, transparent, and open water quality modeling; cumulative impacts; peer review of water quality analysis; and water quality impacts to municipal and agricultural diverters, SCWA, the Districts, and CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with **G P1(b)(3)**. *Staff recommends that the Council deny the appeals as to these issues.*

G P1 (b)(4) (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(4)): Adaptive Management

Summary of Issues: The Department certifies that the Lookout Slough Project is consistent with **G P1(b)(4)**. SCWA and the Districts raise substantive arguments that it is not. The appeals allege that the Certification does not meet requirements for documentation of adequate resources to implement adaptive management, and lacks documentation of delineated authority to implement adaptive management as required by **G P1(b)(4)**. The Department's Adaptive Management and Monitoring Plan (AMMP) provides substantial evidence of adequate resources to implement adaptive management through Fish Restoration Program Agreement (FRPA) contract terms specifying that the State Water Project (SWP) is financially responsible for adaptive management and monitoring of the covered action. The AMMP and the FRPA also describe the Department's delineated authority to implement adaptive management. Parties with specific monitoring and adaptive management tasks include the Department, the California Department of Fish and Wildlife (CDFW) Fish Restoration Program (FRP) monitoring and implementation groups, a contracting lab, and consultants.

Summary of Recommended Findings: With regard to adequate resources to ensure implementation of adaptive management, delineated authority to ensure implementation of adaptive management, and success of project implementation and oversight, SCWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with **G P1(b)(4)**. *Staff recommends that the Council deny the appeals as to these issues.*

With regard to funding for operations and maintenance and third-party verification; operations and maintenance of the Duck Slough Setback Levee; funding to perform operation, maintenance, repair, replacement, and rehabilitation (OMRR&R); and design aspects and maintenance facilitation of the Cache and Haas Slough levee; SCWA and the Districts failed to provide the required specificity to support their claims. *Staff recommends that the Council dismiss the appeals as to these issues.*

WR P1 (Cal. Code Regs., tit. 23, § 5003): Reduce Reliance on the Delta through Improved Regional Water Self-Reliance

Summary of Issues: The Department states that **WR P1** does not apply to the Covered Action. CDWA argues that it does apply and that the Department should have demonstrated that the Covered Action is consistent with **WR P1**. CDWA asserts that this specific Covered Action is necessary for the continued operations of the SWP and Central Valley Project (CVP) as it fulfills one of the Reasonable and Prudent Alternative provisions (RPAs) of the 2008 USFWS BiOp and 2009 NMFS BiOp. CDWA also contends that since the Lookout Slough Project is one of the conditions for continued diversion from the Delta by the SWP and CVP, the Covered Action would allow water suppliers to continue to receive exported water from the Delta. In this instance, the Department has developed a project to restore tidal marsh that would partially meet the goal identified in the RPAs, but the Department was not directly mandated to develop this specific Covered Action, and could have proposed alternative projects to fulfill these obligations. The Covered Action also would not result in the receipt of water by one or more water suppliers.

Summary of Recommended Finding: CDWA failed to show that the Certification is not supported by substantial evidence in the record that **WR P1** does not apply to the Covered Action. *Staff recommends that the Council deny the appeal.*

WR P2 (Cal. Code Regs., tit. 23, § 5004): Transparency in Water Contracting

Summary of Issues: The Department states that **WR P2** does not apply to the Covered Action. SCWA argues that it does apply and that the Department should have demonstrated that the Covered Action is consistent with **WR P2**. **WR P2** concerns the formation process for water contracts for the SWP or CVP and requires that these contracts be formed, amended, or otherwise altered in a publicly transparent manner consistent with applicable policies of the Department and the Bureau of Reclamation. SCWA states that **WR P2** is applicable because the Covered Action is a *de facto* amendment to the SWP Water Supply Contract. By anticipating violations of water quality standards specified in the contract, SCWA asserts the Department is not taking reasonable measures to meet water quality standards and the implied covenant of good faith and dealing to fulfill the contract, thus altering the terms of the contract in a manner that should be transparent. However, **WR P2** does not regulate the *performance* of contracts for water from SWP or CVP. The Department would not enter into a water

supply or water transfer contract or amend a water supply or water transfer contract as part of the Covered Action.

Summary of Recommended Finding: SCWA failed to show that the Certification is not supported by substantial evidence in the record that **WR P2** does not apply to the Covered Action. *Staff recommends that the Council deny the appeal.*

ER P1 (Cal. Code Regs., tit. 23, § 5005): Delta Flow Objectives

Summary of Issues: The Department states that **ER P1** does not apply to the Covered Action. **ER P1** “covers a proposed action that could significantly affect flow in the Delta.” (Cal. Code Regs., tit. 23, § 5005, subdiv. (b)) CDWA argues that the Covered Action would significantly affect flow in the Delta, resulting in more flow going through the Yolo Bypass rather than down the Sacramento River and through the Delta Cross Channel. CDWA also asserts that the Covered Action would increase the loss of freshwater through evaporation from water surfaces, wetland vegetation, and conversion of rangeland to irrigated agriculture. The Department states that the Covered Action does not significantly affect flow in the Delta, citing to evidence in the record including content from the Draft EIR, Final EIR, and a hydrologic and hydraulic system analysis. These documents in the record provide substantial evidence that the Covered Action would not, on its own, significantly affect flow in the Delta or result in violations of current Bay-Delta Water Quality Control Plan flow objectives.

Summary of Recommended Finding: CDWA failed to show that the Certification is not supported by substantial evidence in the record that **ER P1** does not apply to the Covered Action. *Staff recommends that the Council deny the appeal.*

ER P2 (Cal. Code Regs., tit. 23, § 5006): Restore Habitats at Appropriate Elevations

Summary of Issues: The Department states that the Lookout Slough Project is consistent with **ER P2**. CDWA asserts two primary inconsistencies, that the Lookout Slough Project would: (a) become permanently inundated with sea level rise, and (b) not be located completely within the intertidal habitat range. The Department has cited to evidence in the record that the project site ranges from approximately 3 to 8 feet in elevation, is appropriate for tidal marsh restoration, and provides capacity for tidal marsh to migrate as sea level increases. The Department provides evidence in the record that approximately 82 percent of the site would be intertidal emergent marsh and mud flats and approximately 18 percent of the site would be shallow subtidal including tidal sloughs and tidal channels. Intertidal emergent marsh and mud flats are appropriate activities for the project site under **ER P2**.

Summary of Recommended Findings: With regard to permanent inundation with sea level rise and intertidal habitat range, CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with **ER P2**. *Staff recommends that the Council deny the appeal as to these issues.*

ER P5 (Cal. Code Regs., tit. 23, § 5009): Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species

Summary of Issues: The Department states that **ER P5** does not apply to the Covered Action. SCWA, the Districts, and CDWA argue that it does apply, and that the Department should have demonstrated that the Covered Action is consistent with **ER P5**. **ER P5** covers a proposed action that has the reasonable probability of introducing, or improving habitat conditions for, nonnative invasive species. Substantial evidence in the record shows that the Covered Action does have a reasonable probability of introducing, or improving habitat conditions for, nonnative invasive species.

SCWA, the Districts, and CDWA further claim the Covered Action is inconsistent with **ER P5** due to failure to adequately analyze and avoid or mitigate possible introductions of or improved habitat conditions for nonnative invasive species. SCWA and CDWA also claim that there is inadequate funding available to manage invasive species at the project site. The record shows that the Department has designed the project to minimize the risk of introducing or improving habitat conditions for invasive species and also provided a plan to monitor, control and mitigate invasions at the project site, pursued in partnership with the California Department of Parks and Recreation, Department of Boating and Waterways (DBW) as the sole entity permitted to conduct chemical or mechanical invasive plant control methods in the region.

Summary of Recommended Findings: SCWA, the Districts, and CDWA showed that the Certification is not supported by substantial evidence in the record that **ER P5** does not apply to the Covered Action.

SCWA, the Districts, and CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with **ER P5**. *Staff recommends that the Council deny the appeals.*

DP P2 (Cal. Code Regs., tit. 23, § 5011): Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats

Summary of Issues: The Department certifies that the Lookout Slough Project is consistent with **DP P2**. All four Appellants raise substantive arguments that it is not. Appellants identify issues related to conflicts with existing recreational uses of Liberty Island Road, Shag Slough Bridge, and Liberty Island Ecological Reserve; conflicts with existing agricultural uses; conflicts with existing infrastructure; conflicts with use of existing water intakes and beneficial uses of water; conflicts with use of existing water intakes and diversions related to endangered species presence; conflicts with the Solano County General Plan; and conflicts with the Solano County Climate Action Plan.

With regard to recreational use, the record contains evidence that there are existing recreational uses of Liberty Island Road, Shag Slough Bridge, and Liberty Island Ecological Reserve (e.g., bank fishing, hand-launching of kayaks). The record lacks evidence that the Lookout Slough Project would not conflict with these existing uses

with removal of the existing land-based access route to the Liberty Island Ecological Reserve. The record also lacks evidence showing that the Department avoided or reduced conflicts with these existing uses. The Council does not reach a conclusion regarding the feasibility of avoiding a potential conflict with existing uses, because the Certification is not supported by substantial evidence that the Covered Action was sited to avoid or reduce conflicts with existing uses of Liberty Island Road, the Shag Slough Bridge, and LIER.

With regard to all other DP P2 considerations, evidence exists within the record to support the Department's findings of consistency with the Delta Plan.

Summary of Recommended Findings: With regard to recreational issues, LIA has shown that the Certification is not supported by substantial evidence in the record as to the consistency of the Covered Action with DP P2 on the following issues: (a) that recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER do not constitute existing uses; (b) that the Lookout Slough Project would not conflict with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER; and (c) that the Department avoided or reduced conflicts with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Lookout Slough Project. *Staff recommends that the Council remand the matter to the Department for reconsideration of these issues.*

In regard to all other issues, SCWA, the Districts, and CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with **DP P2** as to as to conflicts with existing agricultural uses, conflicts with existing infrastructure, conflicts with use of existing water intakes and beneficial uses of water, conflicts with use of existing water intakes and diversions related to endangered species presence, conflicts with the Solano County General Plan, and conflicts with the Solano County Climate Action Plan. *Staff recommends that the Council deny the appeals as to these issues.*

RR P1 (23 CCR section 5012): Prioritization of State Investments in Delta Levees and Risk Reduction

Summary of Issues: The Certification states that the Covered Action is consistent with **RR P1** because it is consistent with the following **RR P1** Priorities for State Investment in Delta Integrated Flood Management: Levee Network, Localized Flood Protection, and Ecosystem Conservation. CDWA, the Districts, and SCWA raise substantive arguments that the Covered Action is not consistent with the **RR P1** priorities and goals, and that demonstrating consistency is not possible without a detailed levee funding plan. While Appellants assert that the flood protection benefits provided by this Covered Action are not sufficient to demonstrate consistency, no Appellant disputes the Covered Action's consistency with the goals listed under the Ecosystem Conservation or Levee Network

Improvements categories. **RR P1** does not require each covered action to address every goal and objective identified in the policy.

Summary of Recommended Findings: CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with **RR P1**. *Staff recommends that the Council deny appeals.*

Staff Recommendation

Conduct Public Hearing

Today's hearing provides an opportunity for Councilmembers, all parties, and the public to provide comments prior to Council action on the Proposed Determination. At the hearing, Council staff will briefly summarize the Certification and appeals process for the Lookout Slough Project and review the findings described above. Following the staff presentation, the Department, the Commission, each Appellant, and the public will have an opportunity to address the Council and answer questions from Councilmembers and Council staff.

Staff will be available to answer Council questions about the proposed findings and discuss any potential modifications to the Determination prior to Council action.

Consider Adoption of Proposed Determination

Having completed the process required by Water Code section 85225 et seq. for the appeals, the Council is required to make findings on the appeals pursuant to Water Code section 85225.25. In making the required findings, the Council may consider adopting the Proposed Determination for the Lookout Slough Project following conclusion of the public hearing.

Staff recommends that the Council adopt the Proposed Determination (Attachment 1) and the findings contained therein regarding appeals of the Department's Certification of Consistency for the Lookout Slough Project (Certification Number C20215), inclusive of any modifications directed by the Council that may be read into the record of today's proceedings. The Council may make the findings required by Section 85225.25 by taking action to adopt the Proposed Determination as presented or as modified by the Council following the hearing, or by not adopting the Proposed Determination and making separate findings.

Because the Department's Certification of Consistency for the Lookout Slough Project is not supported by substantial evidence in the record, in part, *staff recommends that, pursuant to Water Code section 85225.25, the Council:*

1. *Adopt the Proposed Determination and the findings contained therein; and*
2. *remand the matter, in part, to the Department for reconsideration on the issues recommended for remand under Delta Plan policies **G P1(b)(3)** and **DP P2** as set forth in the Proposed Determination; and*

3. *deny the appeals, in part, on the issues recommended for denial as set forth in the Proposed Determination; and*
4. *dismiss the appeals on the issues recommended for dismissal as set forth in the Proposed Determination.*

FISCAL INFORMATION

Not applicable.

LIST OF ATTACHMENTS

- Attachment 1: Proposed Determination Regarding Appeals of the Certification of Consistency by the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215)
- Attachment 2: Proposed Modifications to the June 18, 2021 Staff Draft Determination Regarding Appeals of the Certification of Consistency by the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215)

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