



## **Action Item**

### **Public Hearing Regarding Appeal of the California Department of Water Resources' Revised Certification of Consistency of the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project**

**(Certification Number C202110)**

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**Summary:** On March 24, 2022, the Council will conduct a public hearing and receive testimony from interested parties and the public regarding two appeals received on the Revised Certification C202110 for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project filed by the Department of Water Resources on December 30, 2021, to address the Council's previous findings on appeals of Certification of Consistency Number C20215. Following the hearing, the Council may take action to dismiss appeals that do not raise appealable issues.

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#### **BACKGROUND**

##### *Covered Action and Appeals before the Council*

On December 30, 2021, the Department of Water Resources (Department) submitted a revised Certification of Consistency Number C202110 (Certification C202110 or "Revised Certification") for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project ("Lookout Slough Project" or "Covered Action") to address the Council's findings on appeals of Certification of Consistency Number C20215. Certification C202110 is available at:

[https://coveredactions.deltacouncil.ca.gov/profile\\_summary.aspx?c=4c044a3a-d011-449e-a79e-502c8a191ce0](https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=4c044a3a-d011-449e-a79e-502c8a191ce0).

The Council received two timely<sup>1</sup> appeals from the following parties (referred to collectively hereafter as Appellants):

- C202110-A1 – Solano County Water Agency (SCWA)
- C202110-A2 – Liberty Island Access (LIA)

These appeals challenge the Revised Certification C202110 that the Department has submitted for the Lookout Slough Project to address the Council's findings on

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<sup>1</sup> The appeals were deemed filed on January 31, 2022, 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>

remanded issues in the Council's July 16, 2021, 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 for Certification Number C20215 (July 2021 Determination). The Department previously submitted Certification Number C20215 (Certification C20215) for this covered action on February 2, 2021. Certification C20215 was appealed by four parties, and the appeals were deemed filed on March 24, 2021.

The Council considered issues raised in the appeals and found that: appellants failed to show that Certification C20215, in part, was not supported by substantial evidence in the record to support the Department's finding that: 1) the Lookout Slough Project was consistent with the Delta Plan on select issues identified in the determination for Certification C20215; and 2) Appellant LIA showed that Certification C20215, in part, was not supported by substantial evidence in the record to support the Department's finding that the Lookout Slough Project was consistent with the Delta Plan on issues identified for remand related to Delta Plan Policies G P1(b)(3) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(3)) and DP P2 (Cal. Code Regs., tit. 23, § 5011). These findings are further described in Section A.2 of Attachment 2 to this staff report. The Council remanded the matter to the Department for reconsideration on the specific issues identified for remand in Section G of that Determination, pursuant to Water Code section 85225.25. (See Council's July 2021 Determination (<https://coveredactions.deltacouncil.ca.gov/services/download.ashx?u=733d4675-89d1-499c-a3ad-450cd72d5526>)). These issues are addressed in the Revised Certification C202110.

Certification C202110 states that "the Project has not changed in design, nor has any element of the Project changed" (Certification C202110 Attachment 1, p. 1, <https://coveredactions.deltacouncil.ca.gov/services/download.ashx?u=a42de348-a08f-4e1a-b379-6798890133c6>). The record for the Revised Certification C202110 incorporates the record for Certification C20215 and also contains additional information (Department Record, Certification C202110, February 10, 2022, <https://deltacouncil.app.box.com/s/ef2of4n4uo7xda2xmpb29xrlkix5qzrw>; Department Certification of Record, February 10, 2022, <https://coveredactions.deltacouncil.ca.gov/services/download.ashx?u=400b5505-6789-4f70-b23e-044014e04fdb>).

*Covered Action and Appeal Authority*

The Delta Reform Act of 2009 charges the Council with implementing the Delta Plan. (Water Code §85204.) As part of this charge, the Council has appellate

authority over certain actions 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 § 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 § 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<sup>2</sup> 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 §§ 85225.10 and 85225.15.)

#### *Appeals Process*

The Council must hold a hearing on an appeal within 60 days of the date of the filing of the appeal, unless it is determined that the issue raised on appeal is not within the council’s jurisdiction or does not raise an appealable issue. (Water Code § 85225.20).

The Council issued a Notice of Public Hearing on February 17, 2022. As part of the Notice, the Council included a list of questions to the Department and the Appellants. At the Hearing, the Council will hear presentations and public comment from the parties, the Delta Protection Commission, and the public. Following the Hearing, the Council will consider issues on appeal and may take action to dismiss appeals that do not raise an appealable issue and/or may direct staff to prepare findings on non-dismissed issues for consideration within 60 days of the hearing (Water Code 85225.20; Wat. Code § 85225.25).

After the hearing on an appeal, the Council must 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) The Council is required to make its decision on the appeal within 60 days of hearing the appeal. (Water Code § 85225.20)

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<sup>2</sup> ‘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. (Water Code § 85054.)

*Project Purpose and Description*

According to Certification C202110, 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 (Attachment 1, Proposed Project Conditions, Certification C202110, Attachment 4, p. 14,

<https://coveredactions.deltacouncil.ca.gov/services/download.ashx?u=e9f525d7-ef20-4917-9e6d-7deaf773f1c0>).

Certification C202110 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 C202110, 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 C202110, p. 2).

According to Certification C202110, 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, p. 2).

The covered action site is located on three properties: the Bowsbey Property, the Liberty Farms Property, and the Vogel Property (Attachment 1, Figure 1, Proposed Project Site Aerial with Property Boundaries) (Certification, p. 3). These properties are currently used for irrigated pasture, recreation, and seasonal grazing respectively.

According to Certification C202110, 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 (Attachment 1, Figure 3 Proposed Project Conditions). 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 (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 Certification C202110, the covered action would modify the levee on the northeast bank of Cache Slough and Haas Slough to prevent bypass flood 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 Vogel levee would be breached to allow for tidal inundation on the Vogel Property (Certification, p. 2).

The Department anticipates completing the covered action by April 2025. The total estimated cost is \$120,000,000 (Certification, p. 3).

In Certification C202110, the Department states that the Lookout Slough Project “has not changed in design, nor has any element of the Project changed or been updated” (Certification 202110 Attachment 1, p. 1, <https://coveredactions.deltacouncil.ca.gov/services/download.ashx?u=a42de348-a08f-4e1a-b379-6798890133c6>).

*Delta Plan Policies Subject to this Appeal*

The Appellants have appealed Certification C202110 on the following Delta Plan policies:

<b>Appealed Policies</b>	<b>LIA</b>	<b>SCWA</b>
G P(1)(b)(2) – Mitigation Measures	X	X
G P1(b)(4) - Adaptive Management		X
ER P5 - Avoid Introductions of and Habitat for Invasive Nonnative Species		X
DP P2 – Respect Local Land Use when Siting Water or Flood Facilities or Restoring Habitats	X	X

Certification C202110 and the appeals are available on the Council’s covered actions webpage at:

[https://coveredactions.deltacouncil.ca.gov/profile\\_summary.aspx?c=4c044a3a-d011-449e-a79e-502c8a191ce0](https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=4c044a3a-d011-449e-a79e-502c8a191ce0). Materials that are part of Certification C202110 and the appeals were previously distributed to councilmembers under separate cover. The materials distributed to councilmembers are also available for public review upon request by emailing [lookoutsloughproject@deltacouncil.ca.gov](mailto:lookoutsloughproject@deltacouncil.ca.gov) or calling (916) 798-9817. If you have any questions about these materials and what the councilmembers received, please contact [engage@deltacouncil.ca.gov](mailto:engage@deltacouncil.ca.gov).

### **PUBLIC HEARING**

After the presiding officer opens the hearing, Council staff will briefly summarize the appeal process and the covered action. Staff will also identify issues on appeal recommended for dismissal because they do not identify an appealable issue because the Council previously denied the issue in its July 2021 Determination on appeals of Certification C20215, and there have been no changes to the scope of the Lookout Slough Project described in Certification C202110, as is described in more detail below under "Staff Recommendation to Dismiss Issues on Appeal." (Wat. Code § 85225.20, Administrative Procedures Governing Appeals §§ 9 and 13(b)).

Following the staff presentation, the Delta Protection Commission, the Appellants, the Department, and other interested persons will have an opportunity to submit written and/or oral presentations at the hearing. The Council will have the opportunity to ask questions regarding after each presentation, and again after all presentations are completed.

The presentation order and time limits will be as follows:

- Delta Protection Commission (30 minutes)
- Solano County Water Agency (Appellant C202110-A1) (30 minutes)
- Liberty Island Access (Appellant C202110-A2) (30 minutes)
- Department of Water Resources (60 minutes)
- All Other Interested Persons (public comment) (3 minutes per person)

More information on the public hearing can be found in the February 17, 2022 Notice of Public Hearing at:

<https://coveredactions.deltacouncil.ca.gov/services/download.ashx?u=659cb80a-0140-4aba-8355-8711734ddf0f>.

Pursuant to Water Code section 85225.25, the scope of the Council's review is based on whether or not a certification for a covered action is supported by

substantial evidence in the record before the agency submitting the certification. All presentations and written statements should be based solely upon evidence in the record and legal argument and should only address whether substantial evidence in the record before the Department supports the conclusions in the Revised Certification.

Following the hearing, Council staff recommend that the Council dismiss the issues on appeal which the Council previously denied in its July 2021 Determination, as described below and set forth in Attachment 2.

#### **STAFF RECOMMENDATION TO DISMISS APPEAL ISSUES**

The Council may dismiss appeals because they do not raise appealable issues or issues within the Council's jurisdiction (Wat. Code, § 85225.20; Appeals Procedures § 13, subd. (b)). The issues raised on appeal described below are not appealable issues. The Council's findings in its July 2021 Determination (<https://coveredactions.deltacouncil.ca.gov/services/download.ashx?u=733d4675-89d1-499c-a3ad-450cd72d5526>) remanded narrow, specific issues to the Department for reconsideration, which are addressed in the Revised Certification, and denied issues on appeal under the policies or on the specific issues recommended for dismissal in this appeal (July 2021 Determination, pp. 9-11, <https://coveredactions.deltacouncil.ca.gov/services/download.ashx?u=733d4675-89d1-499c-a3ad-450cd72d5526>), and there have been no changes to the Lookout Slough Project since the July 2021 Determination (Certification C202110 Attachment 1, p. 1, <https://coveredactions.deltacouncil.ca.gov/services/download.ashx?u=a42de348-a08f-4e1a-b379-6798890133c6>). Therefore, the Council need not revisit, and staff recommends that the Council dismiss, the following issues, as set forth in Attachment 2 to this staff report titled *Dismissal of Issues on Appeal of the Certification of Consistency by the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Certification Number C202110)*:

1. G P1(b)(2)/Cal. Code Regs., tit. 23, § 5002, subd. (b)(2) ([https://govt.westlaw.com/calregs/Document/I7B187DE2730446A492AFBE884DD2703C?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/calregs/Document/I7B187DE2730446A492AFBE884DD2703C?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))) - Mitigation Measures:
  - a. Issues appealed by LIA related to recreation and offsite mitigation (Delta Plan Mitigation Measures 18-1 and 18-2).
  - b. Issues appealed by SCWA related to Mitigation Measure 4-1 and invasive species.

2. G P1(b)(4)/Cal. Code Regs., tit. 23, § 5002, subd. (b)(4)  
([https://govt.westlaw.com/calregs/Document/I7B187DE2730446A492AFBE884DD2703C?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/calregs/Document/I7B187DE2730446A492AFBE884DD2703C?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))) - Adaptive Management
  - a. Issues appealed by SCWA related to adaptive management, including documentation of adequate resources and clearly delineated authority.
3. ER P5 / Cal. Code Regs., tit. 23, § 5009  
([https://govt.westlaw.com/calregs/Document/I21C796D007AA11E39A73EBDA152904D8?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/calregs/Document/I21C796D007AA11E39A73EBDA152904D8?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))) - Avoid Introductions of and Habitat for Invasive Nonnative Species
  - a. Issues appealed by SCWA related to introductions of and habitat for invasive nonnative species, including specificity of the agency or entity that would manage invasive species issues.
4. DP P2 / Cal. Code Regs., tit. 23, § 5011  
([https://govt.westlaw.com/calregs/Document/I2228547007AA11E39A73EBDA152904D8?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=\(sc.Default\)](https://govt.westlaw.com/calregs/Document/I2228547007AA11E39A73EBDA152904D8?viewType=FullText&originationContext=documenttoc&transitionType=CategoryPageItem&contextData=(sc.Default))) - Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats
  - a. Issues appealed by SCWA related to potential impacts to existing uses, including municipal water intakes and local land use.

Therefore, staff recommends that the Council:

- a) Adopt Attachment 2 titled *"Dismissal of Issues on Appeal of the Certification of Consistency by the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Certification Number C202110)"* and the findings contained therein; and
- b) direct staff to prepare draft findings regarding non-dismissed issues on appeal of Revised Certification C202110, pursuant to the Delta Reform Act and the Council's Administrative Procedures Governing Appeals, for the Council's consideration at the April 28, 2022 Council meeting and issue such notices and take such steps as are necessary in carrying out the intent of this directive.

#### **NEXT STEPS**

The Council may direct staff to prepare draft findings regarding non-dismissed issues on appeal of Revised Certification C202110 for the Council's consideration within 60 days of the hearing as required by Water Code § 85225.20. Council staff

will release such findings for public review prior to consideration by the Council at a future publicly noticed meeting.

**FISCAL INFORMATION**

Not applicable.

**LIST OF ATTACHMENTS**

Attachment 1: Covered Action Maps

Attachment 2: *Dismissal of Issues on Appeal of the Certification of Consistency by the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Certification Number C202110)*

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ATTACHMENT 1: COVERED ACTION MAPS

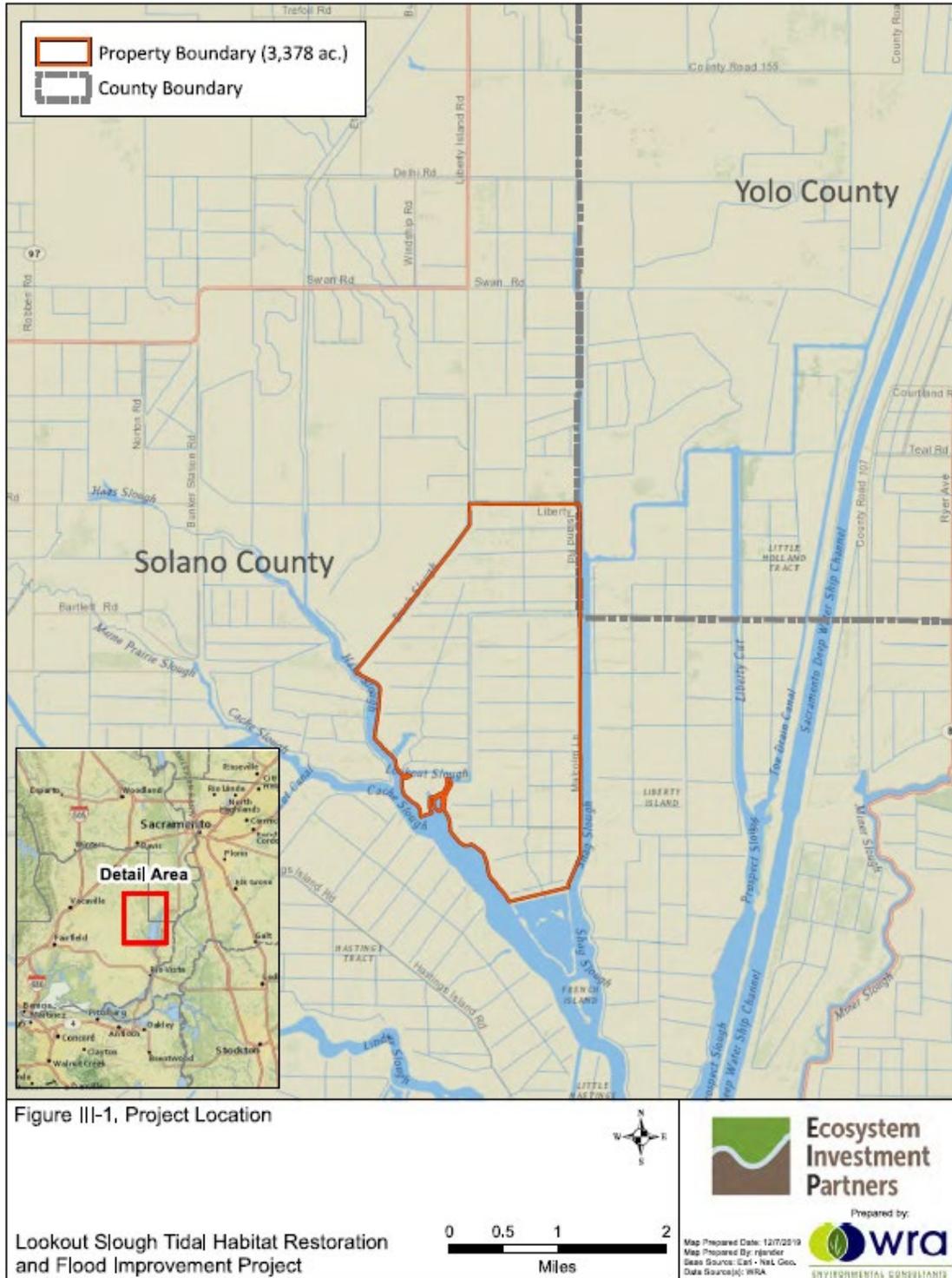


Figure 1. Location (Draft EIR, Certification Record LOS.4.00001, p. III-4, <https://coveredactions.deltacouncil.ca.gov/services/download.ashx?u=ea88d3d9-bf11-4036-b046-0d3cf3a37be4>)

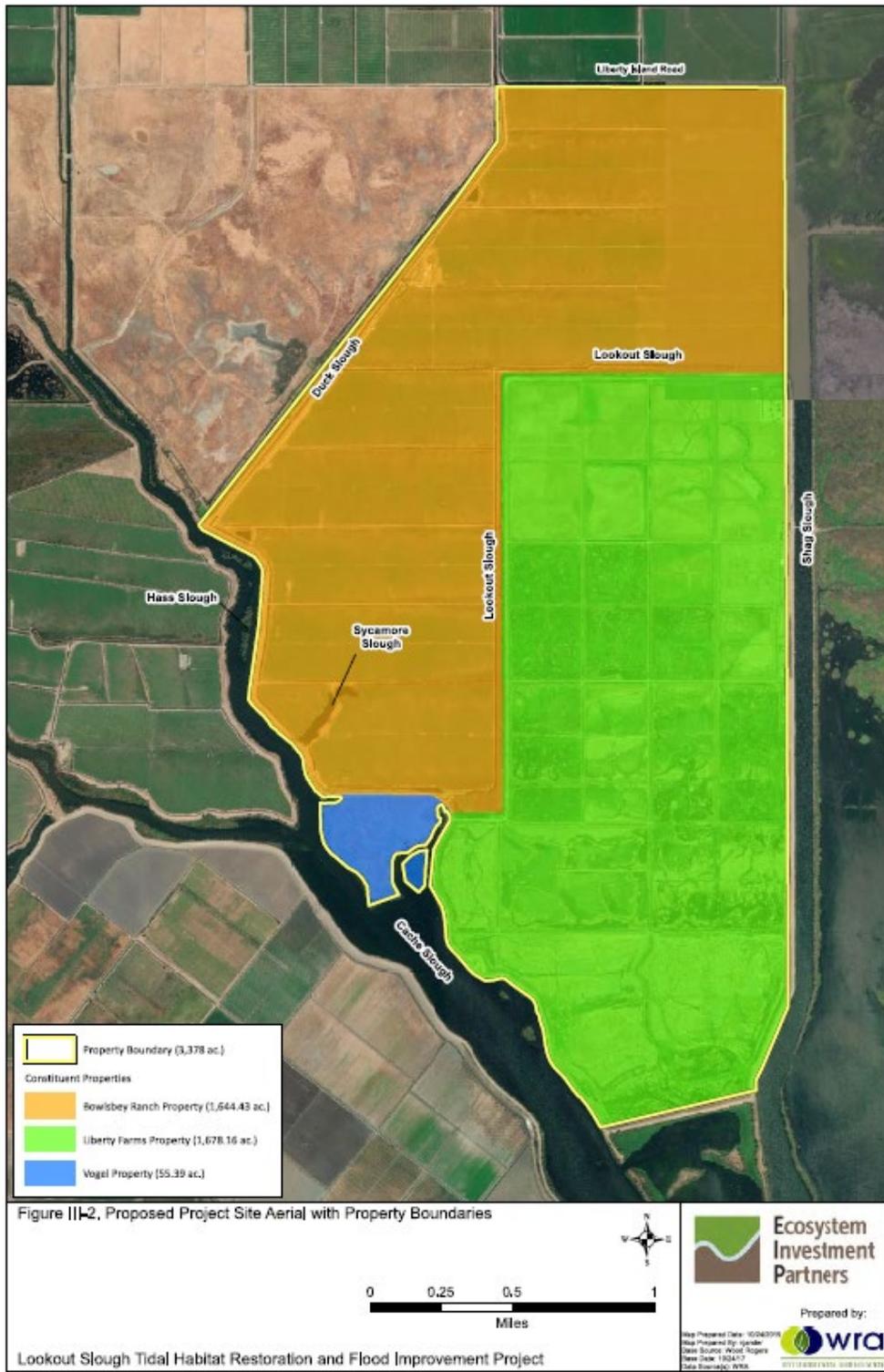


Figure 2. Site Aerial with Property Boundaries (Draft EIR, Certification Record LOS.4.00001, p. III-9, <https://coveredactions.deltacouncil.ca.gov/services/download.ashx?u=ea88d3d9-bf11-4036-b046-0d3cf3a37be4> )

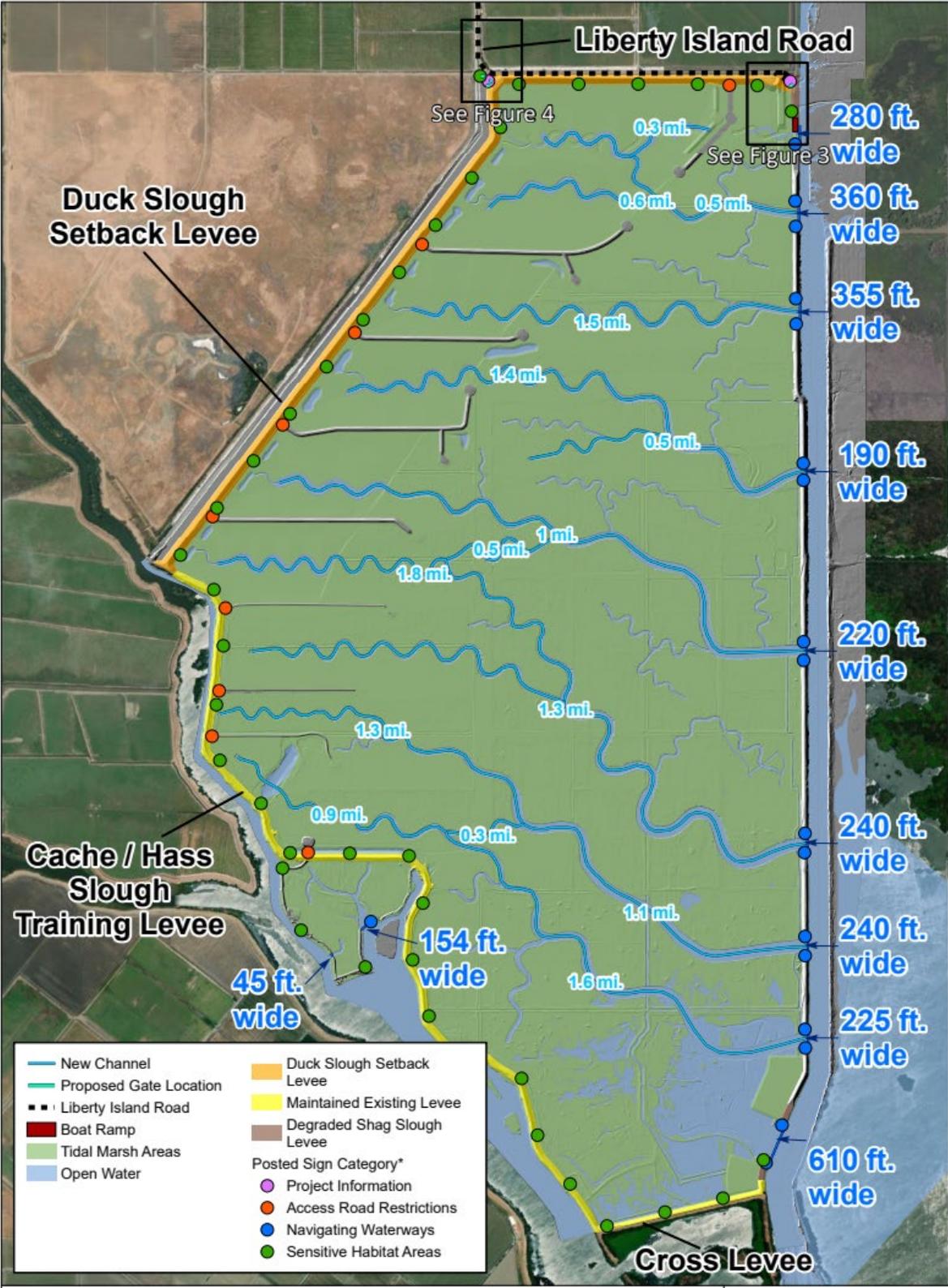


Figure 3. Proposed Project Conditions (Certification 202110 Attachment 4, p. 14, <https://coveredactions.deltacouncil.ca.gov/services/download.ashx?u=e9f525d7-ef20-4917-9e6d-7deaf773f1c0>)