



**\*REVISED April 27, 2022\***  
**ACTION ITEM**

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

(Revised Certification Number C202110)

---

**Summary:** Following comments from the parties and the public, the Council will consider the Proposed Determination (Attachment 3 to this staff report) and adoption of Resolution #2022-03 (Attachment 2 to this staff report) to make findings regarding the appeals received on the Revised Certification of Consistency 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, and may take action to make findings pursuant to Water Code section 85225.25 and adopt Resolution # 2022-03 (Attachment 2 to this staff report). Adopting the Resolution would dismiss or deny all remaining appeal issues that were not dismissed at the Council's March 24, 2022 public hearing.

---

#### BACKGROUND

The Delta Stewardship Council (Council) will receive information from staff, comments from parties, and public comment regarding a proposed Determination (Proposed Determination) containing 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) Revised Certification of Consistency with the Delta Plan (Revised Certification) for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Lookout Slough Project or Covered Action) Certification Number C202110 (Revised Certification C202110). The Proposed Determination also includes a section containing issues that were dismissed by the Council following the hearing on appeals on March 24, 2022; the dismissal of these issues has been adopted by the Council. They are included in the Proposed Determination for ease of reference and are not subject to renewed deliberation (see Section H of the Proposed Determination). A copy of the Proposed Determination is provided as Attachment 3 to this report.

Today's meeting provides an opportunity for the parties and the public to provide comments prior to Council consideration of and action on the Proposed

Determination. At the meeting, Council staff will briefly summarize the Revised Certification and appeals process for the Lookout Slough Project and review the findings described above. Following the staff presentation, each Appellant, the Department, and the public will have an opportunity to provide comments. Staff will be available to answer Council questions about the proposed findings and discuss any potential modifications to the Determination prior to Council action.

A Staff Draft Determination was published for comments on April 14, 2022. The Proposed Determination includes revisions based upon comments received from the parties and the public on the Staff Draft Determination. 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 4 to this staff report. (Attachment 4.)

Delta Reform Act 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.” (Cal. Wat. Code § 85225.25.)

*Staff recommends that, pursuant to Water Code section 85225.25, the Council approve Resolution # 2022-03 to adopt the Proposed Determination and the findings contained therein, which dismisses the appeals on the issues recommended for dismissal and denies the appeals on the issues recommended for denial.*

The Council may make the findings required by Section 85225.25 by taking action to approve Resolution #2022-03 and the Proposed Determination as presented or as modified by the Council, or by not adopting the Proposed Determination and making separate findings. This report provides an overview of the Council’s covered action authority and the certification and appeals process. It then discusses the Covered Action and the process and analysis completed by Council staff that led to the staff recommendations in the Proposed Determination.

#### DELTA REFORM ACT, DELTA PLAN AND COVERED ACTION AUTHORITY

The Delta Reform Act of 2009 charges the Council with implementing the Delta Plan. (Wat. Code § 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. (Wat. 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. (Wat. 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>1</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. (Wat. Code §§ 85225.10 and 85225.15)

#### REVISED CERTIFICATION C202110 AND APPEALS

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. On December 20, 2021, the Department posted a draft copy of the Revised Certification on its website for a 10-day public review period. On December 30, 2021, the Department submitted Revised Certification C202110 for Lookout Slough Project.<sup>2</sup> 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 two appeals that were deemed filed on January 31, 2022. The Department submitted its record for these proceedings, and certified the record as complete on February 10, 2022. (Appeals Procedures § 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 February 17, 2022, containing questions to the Department and Appellants. The Council then conducted a noticed public hearing on the appeals during its regular meeting on March 24, 2022.

---

<sup>1</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.)

<sup>2</sup> Revised 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).

At the March 24, 2022 hearing, the Department and Appellants made presentations to the Council, and members of the public provided written and oral statements regarding the Revised Certification and appeals and responded to questions from Councilmembers and Council staff. Written responses received prior to the hearing and oral statements at the hearing were considered and incorporated as applicable in the Staff Draft Determination released on April 14, 2022 for comments from the parties and the public. Input received on the Staff Draft Determination in written comments from the parties and the public has been incorporated as applicable in the Proposed Determination (Attachment 3) presented for Council consideration and action at today's meeting. Attachment 4 to this staff report is a redlined version of the Proposed Determination that shows changes from the Staff Draft Determination released on April 14, 2022. (Attachment 4.)

#### PROJECT PURPOSE AND DESCRIPTION

According to Revised 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, Revised [Certification C202110 Attachment 4](#), p. 14.)

Revised 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" (Revised 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" (Revised Certification C202110, p. 2).

According to Revised 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 Bowlsbey 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 Revised 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 Revised 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 Revised 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).

#### CERTIFICATION OF CONSISTENCY

The Department submitted the Revised Certification to the Council via the Council’s online system on December 30, 2021 (available here

[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 Department’s Revised Certification provides

background information and addresses the Council's findings on appeals of Certification of Consistency Number C20215 as summarized in in Table 1 below. The Revised 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
<b>G P1 (b)(1)</b> (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(1))	Detailed Findings to Establish Consistency with the Delta Plan (Coequal Goals)	Not Applicable
<b>G P1 (b)(2)</b> (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(2))	Detailed Findings to Establish Consistency with the Delta Plan (Mitigation Measures)	Not Applicable
<b>G P1 (b)(3)</b> (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(3))	Detailed Findings to Establish Consistency with the Delta Plan (Best Available Science)	Consistent
<b>G P1 (b)(4)</b> (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(4))	Detailed Findings to Establish Consistency with the Delta Plan (Adaptive Management)	Not Applicable
<b>WR P1</b> (Cal. Code Regs., tit. 23, § 5003)	Reduce Reliance on the Delta through Improved Regional Water Self-Reliance	Not Applicable
<b>WR P2</b> (Cal. Code Regs., tit. 23, § 5004)	Transparency in Water Contracting	Not Applicable
<b>ER P1</b> (Cal. Code Regs., tit. 23, § 5005)	Delta Flow Objectives	Not Applicable
<b>ER P2</b> (Cal. Code Regs., tit. 23, § 5006)	Restore Habitats at Appropriate Elevations	Not Applicable
<b>ER P3</b> (Cal. Code Regs., tit. 23, § 5007)	Protect Opportunities to Restore Habitat	Not Applicable
<b>ER P4</b> (Cal. Code Regs., tit. 23, § 5008)	Expand Floodplains and Riparian Habitats in Levee Projects	Not Applicable

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

#### APPEALS

The Council received two timely<sup>3</sup> appeals from the following parties:

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

Revised 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 Revised 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

<sup>3</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>



any questions about these materials and what the councilmembers received, please contact [engage@deltacouncil.ca.gov](mailto:engage@deltacouncil.ca.gov).

Table 2 identifies the Delta Plan policies substantively appealed by the Appellants. 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 four, rather than three, Delta Plan policies are implicated).

TABLE 2: APPELLANTS AND DELTA PLAN POLICIES APPEALED

Appealed Policies	LIA	SCWA
<b>G P1(b)(2)</b> (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(2)) Mitigation Measures	X	X
<b>G P1(b)(4)</b> (Cal. Code Regs., tit. 23, § 5002, subdiv. (b)(4)) Adaptive Management		X
<b>ER P5</b> (Cal. Code Regs., tit. 23, § 5009) Avoid Introductions of and Habitat for Invasive Nonnative Species		X
<b>DP P2</b> (Cal. Code Regs., tit. 23, § 5011) Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats	X	X

These appeals challenge Revised Certification C202110 that the Department has submitted for the Lookout Slough Project to address the Council's findings on 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). 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 16, 2021 determination ([July 2021 Determination](#))). These issues are addressed in the Revised Certification C202110.

Revised Certification C202110 states that "the Project has not changed in design, nor has any element of the Project changed" (Revised [Certification C202110 Attachment 1](#), p. 1). The record for the Revised Certification C202110 incorporates the record for Certification C20215 and also contains additional information ([Department Record, Revised Certification C202110](#), February 10, 2022; [Department Certification of Record](#), February 10, 2022).

*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 Revised Certification requires interpretation of the Delta Plan and documents incorporated therein. The Council, as drafter and administrator of the Delta Plan, interprets the Delta 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 Revised 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 February 10, 2022. (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 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 to the Proposed Determination, information recommended for admission under Section 29 is listed in Exhibit B to the Proposed Determination, and information not recommended for admission is listed in Exhibit C to the Proposed Determination. Not all information considered for admission and listed in the Exhibits was relied upon in the Proposed Determination.

#### MARCH 24, 2022 HEARING

The Council must hold a hearing on an appeal within 60 days of the date of the filing of the appeal. (Water Code section 85225.20.) On February 17, 2022, the Council issued a Notice of Public Hearing for March 24, 2022, to be held virtually, and 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, and the Council received numerous comment letters in advance of and following the hearing, both in favor of and in opposition to the Covered Action. These written responses and comment letters are available on the Council's website 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).

At the hearing, Appellants and the Department made presentations to the Council, and members of the public provided statements regarding the Revised Certification and appeals. Transcripts of the hearing are available on the Council's website 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). Video of the hearing is available at: <https://cal-span.org/static/meetings-DSC.php>.

#### PREVIOUS DISMISSAL OF NONAPPEALABLE ISSUES

Upon conclusion of the March 24, 2022, hearing, the Council dismissed the following appeal issues, summarized below and set forth in *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 (Revised Certification Number C202110)* (included as Section H of the Proposed Determination, Attachment 3) because the Council previously denied the issues 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 Revised Certification C202110. (Wat. Code § 85225.20, Administrative Procedures Governing Appeals §§ 9 and 13(b)):

- [G P1\(b\)\(2\)/Cal. Code Regs., tit. 23, § 5002, subd. \(b\)\(2\)](#) – Mitigation Measures:
  - Issues appealed by LIA related to recreation and offsite mitigation (Delta Plan Mitigation Measures 18-1 and 18-2).
  - Issues appealed by SCWA related to Delta Plan Mitigation Measure 4-1 and invasive species.
- [G P1\(b\)\(4\)/Cal. Code Regs., tit. 23, § 5002, subd. \(b\)\(4\)](#) – Adaptive Management:
  - Issues appealed by SCWA related to adaptive management, including documentation of adequate resources and clearly delineated authority.
- [ER P5 / Cal. Code Regs., tit. 23, § 5009](#) – Avoid Introductions of and Habitat for Invasive Nonnative Species
  - 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.
- [DP P2 / Cal. Code Regs., tit. 23, § 5011](#) – Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats
  - Issues appealed by SCWA related to potential impacts to existing uses, including municipal water intakes and local land use.

The Council also directed staff to prepare draft findings regarding non-dismissed issues in LIA's appeal of DP P2 for the Council's consideration within 60 days of the hearing as required by Water Code section 85225.20.

#### STAFF DRAFT DETERMINATION

The Council released a Staff Draft Determination for public review and comment on April 14, 2022, requesting written comments by 5:00pm on April 19, 2022, in order 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=4c044a3a-d011-449e-a79e-502c8a191ce0](https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=4c044a3a-d011-449e-a79e-502c8a191ce0)

On April 14, 2022, the Council issued a Notice of Public Meeting Regarding Appeals for today's agenda item regarding the proposed Determination. A notice with a detailed agenda of Council meeting, including this agenda item, pursuant to Bagley-

Keene Act requirements was issued on April 18, 2022. The Proposed Determination (Attachment 3) was released on April 2226, 2022.

The Proposed Determination (Attachment 3) incorporates revisions to the Staff Draft Determination in response to comments from the parties and the public received by April 1925, 2022 (the revisions are tracked as redline changes in Attachment 4). (Attachment 4.)

#### 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 were dismissed as not appealable at the conclusion of the March 24, 2022 hearing, as set forth in Section H of the Proposed Determination (they are part of the Proposed Determination for ease of reference and are not subject to renewed deliberation):

- [G P1\(b\)\(2\) / Cal. Code Regs., tit. 23, § 5002, subd. \(b\)\(2\)](#) - Mitigation Measures:
  - Issues appealed by LIA related to recreation and offsite mitigation (Delta Plan Mitigation Measures 18-1 and 18-2).
  - Issues appealed by SCWA related to Delta Plan Mitigation Measure 4-1 and invasive species.
- [G P1\(b\)\(4\) / Cal. Code Regs., tit. 23, § 5002, subd. \(b\)\(4\)](#) - Adaptive Management:
  - Issues appealed by SCWA related to adaptive management, including documentation of adequate resources and clearly delineated authority.
- [ER P5 / Cal. Code Regs., tit. 23, § 5009](#) - Avoid Introductions of and Habitat for Invasive Nonnative Species
  - 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.
- [DP P2 / Cal. Code Regs., tit. 23, § 5011](#) - Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats
  - Issues appealed by SCWA related to potential impacts to existing uses, including municipal water intakes and local land use.

~~2. In addition to the issues appealed by SCWA and LIA that were dismissed by the Council on March 24, 2022, the following issues are dismissed because LIA does~~

~~not raise an appealable issue or failed to provide the required specificity, as set forth in Section E of the Proposed Determination:~~

- ~~DP P2 / Cal. Code Regs., tit. 23, § 5011— Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats~~
  - ~~Issues appealed by LIA related to the range of design options evaluated for feasibility.~~

3. The appeals on the following issues are *denied* because LIA failed to show that there is not substantial evidence in the record to support the Department's Certification of Consistency, as set forth in Section F of the Proposed Determination:

- DP P2 / Cal. Code Regs., tit. 23, § 5011 – Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats
  - Issues appealed by LIA related to the range of design options evaluated for feasibility.
  - Issues appealed by LIA related to changes to the Project since Certification C20215.
  - Issues related to conflicting evidence cited by LIA and the substantial evidence standard of review.
  - Issues appealed by LIA related to the existence of recreation use of Liberty Island Road, the Shag Slough Bridge, and LIER.
  - Issues appealed by LIA related to the siting of the Lookout Slough Project and conflicts with existing recreational uses.
  - Issues appealed by LIA related to whether the Lookout Slough Project was sited to reduce conflicts with existing recreational uses where feasible.
  - Issues appealed by LIA related to whether there is a lack of substantial evidence in the Record to support the Department's findings regarding the feasibility of additional proposals to reduce recreational conflicts.

#### STAFF RECOMMENDATION

*Consider Approval of Resolution # 2022-03 and Adoption of Proposed Determination*  
Having completed the process required by Water Code section 85225 et seq. for the appeals of Revised Certification C202110, the Council is required to make specific written 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.

Staff recommends that the Council approve Resolution # 2022-03 (Attachment 2), adopting the Proposed Determination (Attachment 3) and the findings contained therein regarding appeals of the Department's Revised Certification of Consistency for the Lookout Slough Project (Revised Certification C202110), 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 approve the Resolution adopting the Proposed Determination as presented or as modified by the Council following the hearing, or by not approving the Resolution adopting the Proposed Determination and making separate findings.

*As summarized above, and set forth in the Proposed Determination, staff recommends that, pursuant to Water Code section 85225.25, the Council approve Resolution # 2022-03 to adopt the Proposed Determination and the findings contained therein, dismissing the appeals on the issues recommended for dismissal as set forth in the Proposed Determination and denying the appeals on the issues recommended for denial as set forth in the Proposed Determination.*

#### FISCAL INFORMATION

Not applicable.

#### LIST OF ATTACHMENTS

Attachment 1: Covered Action Maps

Attachment 2: Resolution # 2022-03: Delta Stewardship Council Findings on the Appeal of the Revised Certification of Consistency C202110 for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project

Attachment 3: Proposed Determination Regarding Appeals of the Revised Certification of Consistency Number C202110 of the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project  
(Revised Certification Number C202110)

Attachment 4: Redline Changes to the Staff Draft Determination on the Appeals of the Certification of Consistency by the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Revised Certification Number C202110) (Note: Attachment 4 will be available prior to the April 28 Council Meeting.)



CONTACT

Jeff Henderson, AICP  
Deputy Executive Officer

Daniel Constable  
Environmental Program Manager

[lookoutsloughproject@deltacouncil.ca.gov](mailto:lookoutsloughproject@deltacouncil.ca.gov)

ATTACHMENT 1: COVERED ACTION MAPS

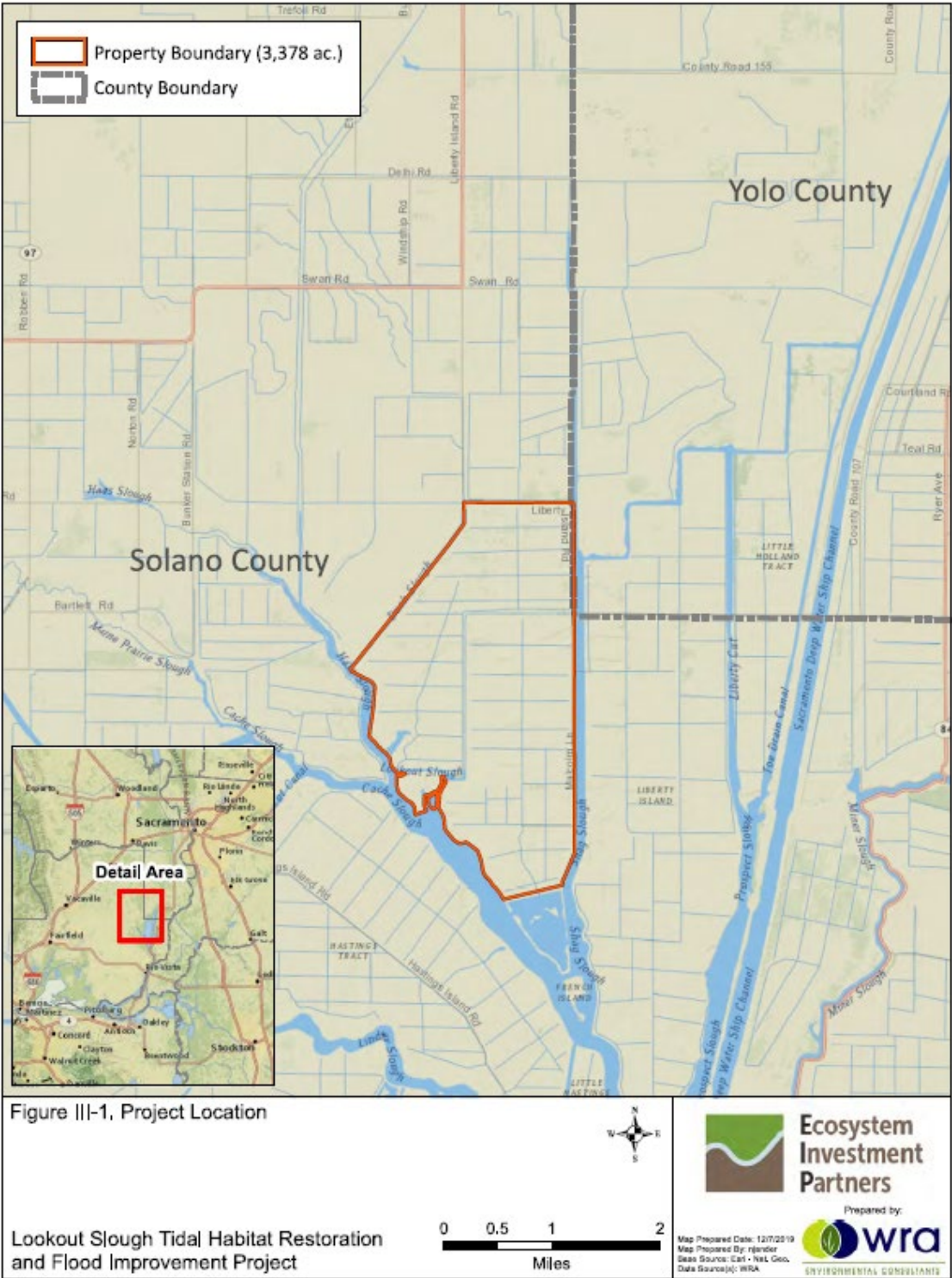


Figure 1. Location ([Draft EIR, Certification Record LOS.4.00001, p. III-4](#))

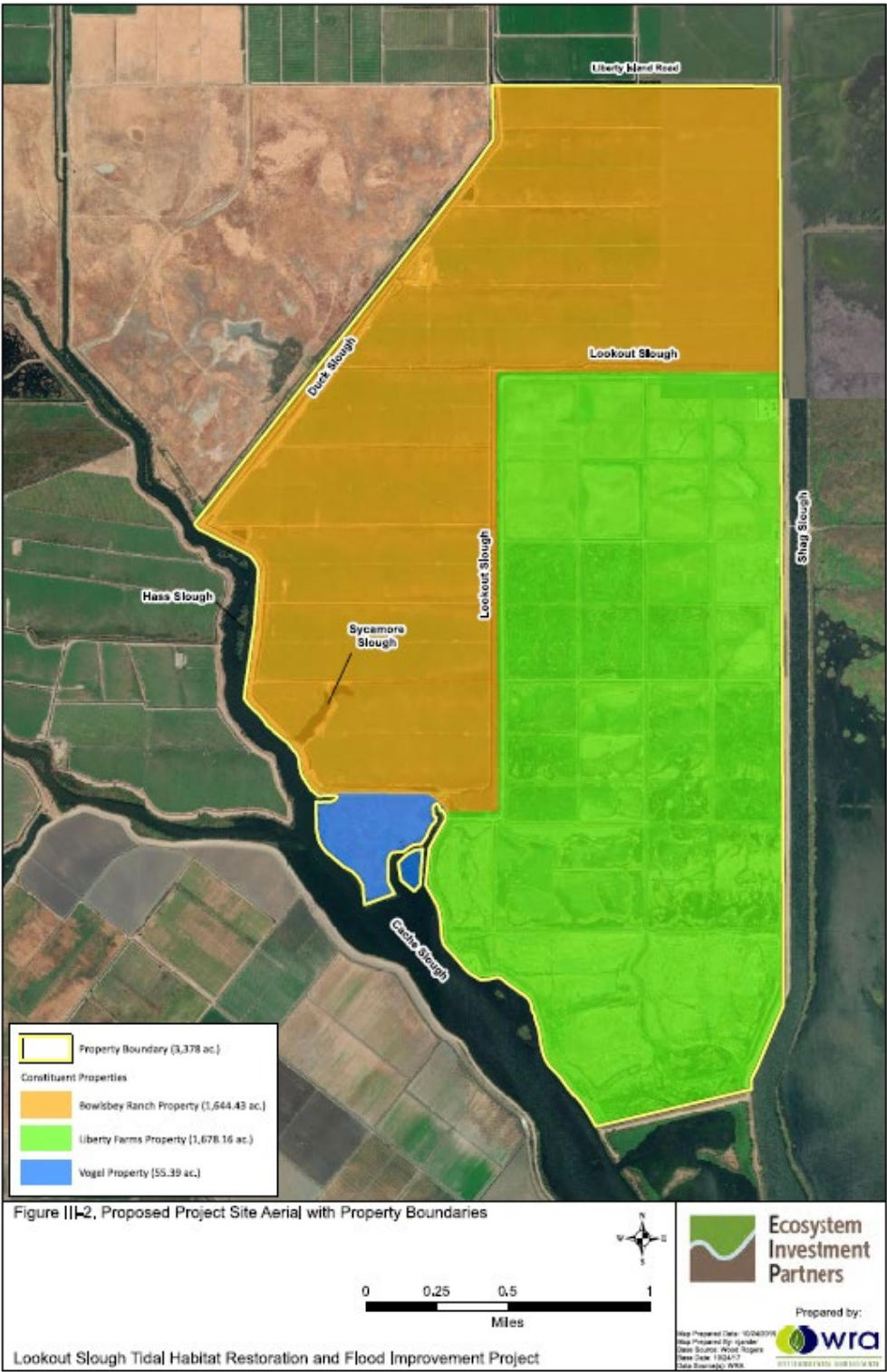


Figure 2. Site Aerial with Property Boundaries ([Draft EIR, Certification Record LOS.4.00001](#), p. III-9)



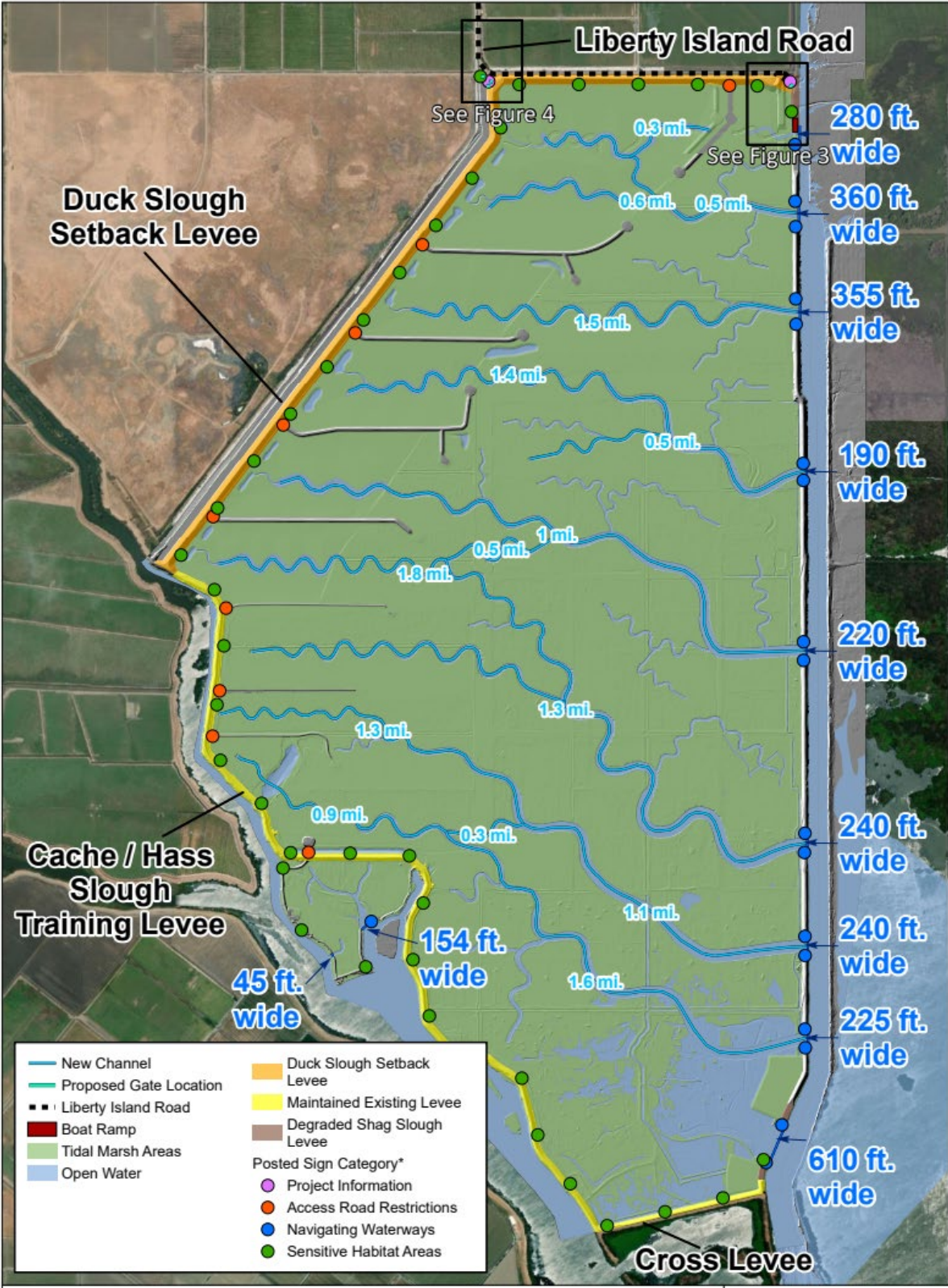


Figure 3. Proposed Project Conditions ([Certification 202110 Attachment 4, p. 14](#))