

In The Matter Of:

*Public Hearing & Consideration of Proposed Findings Re:
Appeal For The Smith Canal Gate Project*

*Agenda Item 3
March 21, 2019*

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DELTA STEWARDSHIP COUNCIL

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PUBLIC HEARING

CONSIDERATION OF PROPOSED FINDINGS

REGARDING THE APPEAL

OF THE

CERTIFICATION OF CONSISTENCY FOR THE SMITH CANAL GATE

Agenda Item 3

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THURSDAY, MARCH 21, 2019

UNIVERSITY PLAZA HOTEL

110 W. Fremont Street

Stockton, California

10:00 a.m. - 11:31 a.m

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L.J. HART & ASSOCIATES, INC.

BARRON & RICH

Certified Shorthand Reporters

Reported by: LINDA J. HART, CSR License 4357, RMR/CRR

A P P E A R A N C E S
DELTA STEWARDSHIP COUNCIL

Vice Chair Council Member Randy Fiorini

Council Member Ken Weinberg

Council Member Assemblyman Michael Gatto

Council Member Judge Frank C. Damrell, Jr.

Council Member Oscar Villegas

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Jeff Henderson, Deputy Executive Officer

Erin Mullin, Senior Water Resources Engineer

Maggie Christman

Avery Livengood

Jessica Pearson, Executive Director

Lita Brydie, Staff

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10:00:22 1 VICE CHAIR COUNCIL MEMBER FIORINI: Good
10:00:23 2 morning. I am Randy Fiorini, the Vice Chair of the
10:00:23 3 Delta Stewardship Council, and I would like to welcome
10:00:27 4 each and every one of you to this morning's meeting.
10:00:31 5 I officially call this meeting to order and
10:00:33 6 begin with establishing a quorum, beginning with the far
10:00:37 7 right.
10:00:37 8 COUNCIL MEMBER WEINBERG: Weinberg, present.
10:00:40 9 COUNCIL MEMBER ASSEMBLYMAN GATTO: Gatto,
10:00:41 10 present.
10:00:41 11 COUNCIL MEMBER JUDGE DAMRELL: Damrell,
10:00:42 12 present.
10:00:43 13 VICE CHAIR COUNCIL MEMBER FIORINI: Fiorini,
10:00:44 14 here.
10:00:45 15 COUNCIL MEMBER VILLEGAS: Villegas, here.
10:00:46 16 VICE CHAIR COUNCIL MEMBER FIORINI: Very good.
10:00:47 17 We have a quorum.
10:00:48 18 The first item on the agenda today is a public
10:00:53 19 hearing and consideration of proposed findings regarding
10:00:56 20 the appeal of the certification of consistency for the
10:01:00 21 Smith Canal Gate Project.
10:01:03 22 Let the record reflect that it is 10:03 on
10:01:09 23 Thursday, March 21st, 2019, and we are here today at the
10:01:14 24 University Plaza Waterfront Hotel at 110 West Fremont
10:01:19 25 Street, in Stockton, California.

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10:01:22 1 We are here for a public hearing to receive
10:01:24 2 comments on the determination, which contains findings
10:01:27 3 regarding the appeal of the certification of consistency
10:01:30 4 for the Smith Canal Gate Project.

10:01:33 5 Following this hearing, we anticipate adopting
10:01:37 6 a determination with findings that either deny the
10:01:39 7 appeal or remand the certification of consistency for
10:01:43 8 the Smith Canal Gate Project back to the San Joaquin
10:01:49 9 Area Flood Control Agency for reconsideration.

10:01:50 10 Before we begin, I have a few general
10:01:55 11 announcements.

10:01:55 12 First, please look around now and identify the
10:01:58 13 exits closest to you. Should an alarm sound, we will be
10:02:03 14 required to evacuate this room immediately. In that
10:02:06 15 event, please take your valuables with you.

10:02:08 16 Second, the bathrooms are located out the
10:02:10 17 doors and down the hallway to the left.

10:02:13 18 And last, please silence your cell phones or
10:02:22 19 other devices now. I'll now ask council's staff to
10:02:26 20 provide a staff report for this item. Following the
10:02:27 21 staff report, I will provide additional information
10:02:29 22 regarding how the parties and the public may address
10:02:32 23 Council on this item.

10:02:46 24 MR. JEFF HENDERSON: All right. Thank you,
10:02:49 25 Vice Chair Fiorini.

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10:02:51 1 My name is Jeff Henderson. I am the deputy
10:02:55 2 executive officer for planning for the Council and I'll
10:02:57 3 be joined this morning by Erin Mullin, Maggie Christman
10:03:03 4 and Avery Livengood to present the staff presentation on
10:03:04 5 the Smith Canal.

10:03:05 6 May we have the PowerPoint, please? Thank
10:03:23 7 you.

10:03:24 8 By way of presentation this morning, we'll
10:03:30 9 outline the counsel's covered action authority and
10:03:33 10 process and how that originates from the Delta Reform
10:03:36 11 Act.

10:03:37 12 We'll then summarize the staff report that's
10:03:39 13 been presented to the Council and the proposed
10:03:42 14 determination regarding the appeal certification of
10:03:44 15 consistency for the Smith Canal Gate Project.

10:03:48 16 We'll then summarize our staff analysis and
10:03:50 17 recommendations to the Council, and at the conclusion of
10:03:54 18 the presentation staff will recommend that the Council
10:03:57 19 adopt the proposed determination and the proposed
10:04:00 20 determination contains findings that would deny the
10:04:03 21 appeal.

10:04:04 22 With regard to the Council's covered action
10:04:07 23 authority, the statutory authority for the Council to
10:04:12 24 review covered actions originates from the 2009 Delta
10:04:18 25 Reform Act, which is the State of California's policy

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10:04:20 1 describing how the state would like to achieve the
10:04:24 2 coequal goals that are established for the Delta;
10:04:28 3 namely, providing water supply reliability, providing
10:04:30 4 for ecosystem restoration and doing both in a manner
10:04:34 5 that enhances the Delta as a place.

10:04:37 6 The Delta Plan is then the document that
10:04:41 7 establishes the Council's regulatory policies to meet
10:04:44 8 the objectives of the Legislature identified were
10:04:49 9 inherent in the coequal goals for the Delta.

10:04:51 10 And the covered action authority is also
10:04:53 11 granted to the Council via the Delta Reform Act and
10:04:57 12 under that authority, state and local agencies are
10:04:59 13 required to demonstrate consistency with the Delta
10:05:02 14 Plan's regulatory policies when they propose to carry
10:05:06 15 out, to approve or to fund covered actions prior to
10:05:12 16 implementation.

10:05:12 17 When an agency identifies that a project
10:05:17 18 they're pursuing is a covered action, the means to
10:05:21 19 identify consistency with the Delta Plan is through
10:05:23 20 filing of a certification of consistency with the
10:05:27 21 Council, and in its certification a proponent would
10:05:30 22 determine first if a project is a covered action and
10:05:33 23 then would submit that certification to the Council.

10:05:36 24 Upon receipt, the Council publicly notices the
10:05:39 25 receipt of that certification and then reviews written

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10:05:43 1 certification that's been provided by the project
10:05:46 2 proponent presenting detailed findings concerning the
10:05:51 3 consistency certification.

10:05:53 4 In its certification, a proponent typically
10:05:56 5 will provide background, descriptive information about
10:05:58 6 the project, will offer findings related to each Delta
10:06:03 7 Plan policy that is implicated by the certification,
10:06:06 8 will cite to portions of the record provided as
10:06:09 9 substantial evidence to support the certification, and
10:06:12 10 again, we make all of the certifications of consistency
10:06:16 11 received by the Council available on the Council's
10:06:19 12 website.

10:06:20 13 Following a certification, any person who
10:06:23 14 claims that a covered action would be inconsistent with
10:06:27 15 the Delta Plan has the ability to file an appeal within
10:06:30 16 30 days of certification. That appeal must include
10:06:33 17 specific factual allegations describing the alleged
10:06:39 18 inconsistency and those specific factual allegations are
10:06:43 19 what define how the Council considers the appeal.

10:06:47 20 Certifications and appeals are both again
10:06:49 21 publicly noticed and available and listed on the
10:06:52 22 Council's website.

10:06:53 23 Once an appeal is received, the Council then
10:06:56 24 must conduct a hearing on an appeal within 60 days of
10:07:00 25 filing, and you may recall that the Council conducted a

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10:07:03 1 hearing on this matter at its January 2019 meeting.

10:07:08 2 Following the hearing, the Council must make a
10:07:10 3 decision regarding the appeal within 60 days of the
10:07:13 4 hearing; thus, our presence at the March meeting to
10:07:16 5 consider the proposed determination.

10:07:18 6 And again, as indicated in Vice Chair
10:07:24 7 Fiorini's opening comments, the Council essentially has
10:07:26 8 two options under Water Code Section 85225.25; 1) to
10:07:31 9 deny the appeal under which case the project may proceed
10:07:34 10 or; 2) to remand the project back to the proponent for
10:07:38 11 reconsideration.

10:07:40 12 And it should be noted on appeal, failure on
10:07:43 13 one policy, failure to demonstrate consistency on one
10:07:46 14 policy would result in a remand for the full project.

10:07:50 15 Under review, the Council's scope of review is
10:07:55 16 governed by the substantial evidence standard, and thus
10:07:58 17 the Council's scope of review is whether or not the
10:08:02 18 certification filed by the proponent is supported by
10:08:05 19 substantial evidence in the record.

10:08:08 20 And substantial evidence consists essentially
10:08:10 21 of facts, reasonable assumptions based upon facts and
10:08:15 22 expert opinions supported by facts.

10:08:17 23 The Council does not independently review the
10:08:19 24 project to determine if it's consistent with the Delta
10:08:25 25 Plan. There is a fairly precise frame for the Council's

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10:08:27 1 analysis and findings, based on the project as it's
10:08:31 2 submitted by the proponent, issues that are raised on
10:08:35 3 the appeal and substantial evidence in the record.

10:08:39 4 Now I am going to turn it over to Erin, who is
10:08:42 5 going to summarize the project description for you.

10:08:49 6 MS. ERIN MULLIN: Thank you, Jeff.

10:08:50 7 I have a little bit of a cold this morning so
10:08:51 8 I hope that I can be legible as I speak.

10:08:54 9 I am going to start with a brief project
10:08:58 10 description. The proposed project consists of a
10:09:01 11 fixed -- of a fixed wall and gate structure at the mouth
10:09:04 12 of Smith Canal and Atherton Cove along the San Joaquin
10:09:08 13 River across from the Deep Water Ship Channel in
10:09:11 14 Stockton, California. Thank you.

10:09:16 15 According to the certification, the project is
10:09:19 16 required for flood protection. The certification can be
10:09:23 17 found on the Council's website.

10:09:26 18 As described in the certification, the purpose
10:09:30 19 of the project is to provide 100 year level of flood
10:09:33 20 protection for an urbanized area of Stockton shown here
10:09:37 21 on the left in gray. SJAFCA is also working towards
10:09:42 22 providing a larger area with 200 year flood protection
10:09:45 23 shown on the right in red. Next slide.

10:09:46 24 This slide is an illustration of the proposed
10:09:52 25 project. You can see Atherton Cove at the top and Smith

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10:09:56 1 Canal extends back into the right. The proposed project
10:09:59 2 would consist of a fixed cellular sheet pile wall seen
10:10:04 3 here in green with a 50 foot wide deep structure shown
10:10:07 4 here in blue. Next slide.

10:10:10 5 The Delta Plan has 17 regulatory policies, 14
10:10:16 6 stand alone and G P1 has four parts.

10:10:20 7 In SJAFCFA certification, it found that five of
10:10:24 8 the 17 policies were consistent, and 11 of the policies
10:10:28 9 were not applicable for the project. Next slide.

10:10:30 10 The sole appeal received before the cutoff
10:10:36 11 date was submitted by Atherton Cove Property Owners
10:10:39 12 Association or ACPOA.

10:10:42 13 The appeal contends that SJAFCFA failed to
10:10:45 14 demonstrate substantial evidence within the record to
10:10:48 15 support consistency with aspects of G P1 (b)(2),
10:10:54 16 mitigation measures, G P1 (b)(3), best available
10:10:59 17 science, G P1 (b)(4), adaptive management, and ER P-5,
10:11:05 18 invasive, invasive non-native species.

10:11:09 19 The appeal is also available on the Council's
10:11:12 20 website. Next slide.

10:11:15 21 I am going to go over the timeline, basically
10:11:18 22 kind of outline what has brought us here today.

10:11:21 23 On November 2nd, 2018, the Council received
10:11:25 24 certification of consistency for the Smith Canal Gate
10:11:29 25 Project from SJAFCFA.

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10:11:30 1 On December 3rd, 2018, an appeal was filed by
10:11:34 2 ACPOA.

10:11:35 3 On December 13th, 2018, SJAFCA certified the
10:11:40 4 record as full and complete.

10:11:42 5 On January 24th, 2019, the Council held the
10:11:46 6 first of two hearings on this project.

10:11:50 7 On February 21st, 2019, the Council provided
10:11:55 8 notice of today's hearing, the second of two hearings,
10:11:59 9 and released the staff prepared draft determination for
10:12:01 10 public review.

10:12:02 11 On February 28th, 2019, the Council received
10:12:08 12 comments from -- on the staff prepared draft
10:12:12 13 determination from the parties and interested persons.

10:12:14 14 And on March 14th, 2019, the Council released
10:12:19 15 the proposed determination for review and discussion at
10:12:22 16 today's hearing.

10:12:26 17 This slide shows the summary of the staff
10:12:30 18 proposed determination. Please note that they are
10:12:34 19 presented in slightly different order by outcome than
10:12:38 20 they are in your staff report.

10:12:39 21 Staff recommends that the Council find that
10:12:44 22 one policy does not apply, and that for the other three
10:12:47 23 policies, staff recommends denying the appeals.

10:12:50 24 Staff recommends that the appellant failed to
10:12:54 25 demonstrate lack of substantial evidence in the record

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10:12:57 1 to support SJAFCA certification.

10:13:00 2 And with that, I am going to hand it over to
10:13:01 3 Jeff and we'll discuss the proposed findings in more
10:13:04 4 detail.

10:13:06 5 MR. JEFF HENDERSON: Thank you, Erin.

10:13:07 6 So for each of the balance of our presentation
10:13:09 7 for each policy we'll describe SJAFCA certification, key
10:13:13 8 appeal issues, the staff analysis, and staff's
10:13:16 9 recommended, conclusion or finding.

10:13:18 10 The first of these policies is policy G P1
10:13:22 11 (b)(4), which is one of the four detailed findings all
10:13:25 12 covered actions must comply with.

10:13:30 13 The issue regarding G P1 (b)(4) is that the
10:13:33 14 appellant contends that because the project would alter
10:13:36 15 water flows, hydrology, invasive species or other
10:13:40 16 factors that would affect aquatic habitat within the
10:13:44 17 Delta, it falls within the definition of a water
10:13:46 18 management project.

10:13:47 19 And why that's potentially important is
10:13:48 20 because both water management projects and ecosystem
10:13:52 21 restoration projects are required to prepare an adaptive
10:13:56 22 management plan in order to comply with G P1 (b)(4).

10:14:00 23 The staff analysis on this issue consisted of
10:14:05 24 an extensive review of the Delta Reform Act and the
10:14:07 25 Delta Plan Regulations, and in looking at those

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10:14:10 1 two pieces of information it's clear that flood control
10:14:15 2 projects were identified as a discreet or separate
10:14:19 3 project category in the development of the Delta Reform
10:14:23 4 Act, in the development of the Delta Plan, and thus
10:14:26 5 based on those pieces of information are inherently
10:14:31 6 separate project categories, and policy G P1 (b)(4) does
10:14:36 7 not apply to flood control projects.

10:14:39 8 And so, based on this determination and
10:14:42 9 analysis, staff's recommended conclusion is that the
10:14:45 10 Council need not consider the applicability of G P1
10:14:49 11 (b)(4) to the Smith Canal Gate Project, because the
10:14:52 12 Smith Canal Gate Project is a flood control project
10:14:55 13 rather than a water management project.

10:14:58 14 I'll now turn it over to Avery to summarize
10:15:01 15 our approach to G P1 (b)(2).

10:15:04 16 MS. AVERY LIVENGOOD: Thank you, Jeff.

10:15:07 17 So Policy G P1 (b)(2) requires that covered
10:15:10 18 actions that are subject to CEQA include applicable
10:15:13 19 mitigation measures from the Delta Plan program EIR or
10:15:17 20 substitute equivalent measures.

10:15:21 21 Where the facts of the covered actions show
10:15:22 22 that a project will be designed, constructed and
10:15:26 23 operated such that significant environmental impact
10:15:29 24 would not occur, there is no obligation to mitigate and
10:15:32 25 therefore the corresponding Delta mitigation measures

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10:15:35 1 are not applicable.

10:15:36 2 Delta Plan Mitigation Measure 4-1 requires an
10:15:40 3 invasive species management plan for projects that could
10:15:42 4 introduce or facilitate invasive species establishment.

10:15:47 5 SJAFCA proposes a water hyacinth control
10:15:52 6 program as a part of the Smith Canal Gate Project as a
10:15:54 7 project element.

10:15:55 8 The appellant contends that the water hyacinth
10:15:58 9 control program is not equally or more effective than
10:16:01 10 Delta Plan mitigation measure 4-1.

10:16:04 11 The staff analysis finds that Delta Plan
10:16:07 12 measure, Delta Plan mitigation measure 4-1 does not
10:16:10 13 apply to the water hyacinth impacts of the project,
10:16:13 14 because the Final EIR did not identify any significant
10:16:17 15 water hyacinth impacts.

10:16:19 16 Therefore, we conclude that the appellant
10:16:21 17 failed to show that there is not substantial evidence to
10:16:24 18 support the certification with regard to Delta Plan
10:16:27 19 mitigation measure 4-1.

10:16:30 20 Turning to mitigation measures 4-2 and 4-3,
10:16:34 21 the appellant contends that SJAFCA fails to avoid or
10:16:38 22 mitigate operational impacts to special status fish
10:16:41 23 species from increased predation that could result from
10:16:44 24 altered flows as a result -- as required by Delta Plan
10:16:48 25 Mitigation Measure 4-2.

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10:16:50 1 The appellant also contends that SJAFCA fails
10:16:53 2 to avoid or mitigate operational impacts to fish habitat
10:16:59 3 as required by Delta Plan Mitigation Measure 4-3. Once
10:17:02 4 again, where the facts of the specific covered action
10:17:05 5 show that the project will be designed, constructed and
10:17:08 6 operated such that significant environmental impacts
10:17:11 7 will not occur.

10:17:13 8 There is no obligation to mitigate and the
10:17:14 9 corresponding Delta Plan measures are not applicable, so
10:17:17 10 the staff analysis finds that Delta Plan Mitigation
10:17:22 11 Measure 4-2 does not apply to the project because the
10:17:25 12 Final EIR does not identify potentially significant
10:17:29 13 operational impacts on special status fish species.

10:17:32 14 And similarly, Delta Plan measure, Delta Plan
10:17:35 15 Mitigation Measure 4-3 does not apply to the project
10:17:39 16 because the EIR does not identify potentially
10:17:42 17 significant operational impacts to fish habitat.

10:17:46 18 We conclude that the appellant failed to show
10:17:48 19 that there is not substantial evidence to support the
10:17:50 20 certification with regard to mitigation measures 4-2 and
10:17:54 21 4-3.

10:17:55 22 And so the proposed determination recommends
10:17:59 23 denying the appeal with regard to sub-policy G P1
10:18:04 24 (b)(2).

10:18:04 25 Maggie Christman will now present on policies

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10:18:04 1 G P1 (b)(3) and ER P-5.

10:18:04 2 MS. MAGGIE CHRISTMAN: Thank you, Avery.

10:18:13 3 Policy G P1 (b)(3) requires all covered
10:18:15 4 actions to document the use of best available science as
10:18:18 5 relevant to the purpose and nature of the project.

10:18:21 6 Delta Plan Appendix 1A provides guidance and
10:18:24 7 descriptions for six criteria of best available science.
10:18:29 8 These include relevance, inclusiveness, objectivity,
10:18:32 9 transparency and openness, timeliness and peer review.

10:18:36 10 The appellant here contends that SJAFCA failed
10:18:41 11 to demonstrate compliance with G P1 (b)(3)'s best
10:18:43 12 available science criteria of relevance and
10:18:47 13 inclusiveness on two issues.

10:18:48 14 In this context, "Relevance" means scientific
10:18:51 15 information should be pertinent to the Delta ecosystem
10:18:54 16 or other components and processes affected by proposed
10:18:54 17 decisions.

10:18:58 18 "Inclusiveness" means scientific information
10:19:00 19 should incorporate a thorough review of relevant
10:19:04 20 information and analyses across disciplines.

10:19:06 21 The appellant contends that SJAFCA improperly
10:19:09 22 relies on residence time to analyze water quality
10:19:12 23 impacts, and that they failed to analyze cyanobacteria
10:19:12 24 proliferation.

10:19:18 25 The staff analysis finds that the appellant

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10:19:21 1 fails to explain how SJAFCA does not meet these
10:19:26 2 criteria.

10:19:26 3 With respect to the issue of residence time
10:19:27 4 and modeling, the appellant does not explain why
10:19:30 5 limitations of hydrodynamic modeling, such as residence
10:19:34 6 time, such as using residence time as a surrogate for
10:19:36 7 water quality parameters and the use of mid-channel
10:19:39 8 locations and the modeling make the analysis
10:19:43 9 inconsistent with the relevance and inclusiveness
10:19:43 10 criteria.

10:19:43 11 For the issue of cyanobacteria proliferation,
10:19:52 12 the appellant does not explain how arguments provided in
10:19:53 13 the appeal demonstrate SJAFCA's failure to meet
10:19:56 14 relevance and inclusiveness criteria.

10:19:58 15 So, in conclusion, the appellant fails to show
10:20:01 16 that there is not substantial evidence to support SJAFCA
10:20:04 17 certification, and the proposed determination recommends
10:20:07 18 denying the appeal related to G P1 (b)(3).

10:20:11 19 For policy ER P-5, the requirement is that
10:20:19 20 potential introductions of or improved habitat
10:20:21 21 conditions for invasive nonnative species be fully
10:20:24 22 considered and avoided or mitigated in a way that
10:20:27 23 appropriately protects the ecosystem.

10:20:29 24 The appellant contends that SJAFCA did not
10:20:31 25 fully consider and avoid or mitigate the potential for

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10:20:37 1 new introductions of or improved habitat conditions for
10:20:38 2 water hyacinth and invasive predatory fish species.

10:20:41 3 The staff analysis finds that the appellant
10:20:44 4 fails to demonstrate that SJAFCFA does not fully consider
10:20:46 5 and avoid improved habitat conditions for water
10:20:51 6 hyacinth. The project includes a water hyacinth control
10:20:51 7 program with identified performance standards to
10:20:51 8 maintain existing conditions.

10:20:51 9 The appellant also fails to demonstrate that
10:20:51 10 SJAFCFA does not fully consider the potential for the
10:21:05 11 project to increase habitat for invasive fish.

10:21:05 12 For example, project design changes and
10:21:05 13 potential effects of altered flows are included in the
10:21:05 14 analysis of predation impacts to special status species,
10:21:05 15 and they are described in the CEQA addendum.

10:21:15 16 In conclusion, the appellant fails to show
10:21:17 17 that there is not substantial evidence to support SJAFCFA
10:21:20 18 certification, and the proposed determination recommends
10:21:23 19 denying the appeal related to ER P-5.

10:21:28 20 MR. JEFF HENDERSON: Thank you, Maggie.

10:21:29 21 And so by way of conclusion, the staff, staff
10:21:33 22 analysis in the proposed determination identifies that
10:21:36 23 the appellant fails to show that there is not
10:21:38 24 substantial evidence in the record to support the
10:21:41 25 certification with respect to four policies: G P1

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10:21:45 1 (b)(2), detailed findings for mitigation measures, G P1
10:21:49 2 (b)(3), detailed findings related to best available
10:21:52 3 science, and ER P-5, nonnative invasive species.

10:21:57 4 Additionally, staff recommends a determination
10:22:01 5 that policy G P1 (b)(4), detailed findings related to
10:22:05 6 adaptive management, does not apply to the project; and
10:22:09 7 for these four reasons, staff recommends that the
10:22:12 8 Council deny the appeal pursuant to Water Code Section
10:22:21 9 85225.25, as described in the attached or in the
10:22:21 10 proposed determination attached to your staff report.

10:22:25 11 Staff also recommends Council adoption of that
10:22:29 12 determination.

10:22:29 13 That concludes the staff report and we are
10:22:31 14 happy to respond to any questions.

10:22:34 15 VICE CHAIR COUNCIL MEMBER FIORINI: Jeff,
10:22:36 16 Erin, Avery, Maggie, thank you.

10:22:39 17 To those representing SJAFCFA, the appellant
10:22:43 18 homeowners group, and members of the public here today
10:22:46 19 to comment on the Smith Canal Gate Project, here are
10:22:51 20 some important instructions.

10:22:53 21 Commenters speaking today will not be sworn
10:22:55 22 in. This entire hearing will be recorded by a certified
10:22:58 23 court reporter. The rough transcript of the hearing and
10:23:02 24 all written materials presented during the hearing will
10:23:05 25 be shared with the list -- the service list and posted

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10:23:09 1 on the Council's Smith Canal website in approximately
10:23:13 2 two weeks.

10:23:14 3 If you're interested in purchasing final
10:23:16 4 transcripts from the reporters in the interim, please
10:23:20 5 coordinate with them directly. Our court reporter is
10:23:23 6 seated here to your right. The company name and contact
10:23:27 7 information is L.J. Hart and Associates, Incorporated,
10:23:31 8 at 916-922-9001.

10:23:37 9 We will hear first from SJAFCA, followed by
10:23:41 10 the appellant. Each of the parties will be allowed a
10:23:46 11 total of 20 minutes for oral presentation.

10:23:48 12 Upon completion of all presentations, we will
10:23:50 13 then commence with public comment.

10:23:53 14 Council Members, I would encourage you to hold
10:23:56 15 your questions for the parties speaking until the
10:23:58 16 conclusion of each presentation.

10:24:01 17 At that point, I will announce the opportunity
10:24:04 18 for Council Member questions before proceeding on to the
10:24:07 19 next party.

10:24:09 20 Once party presentations have ended, any
10:24:12 21 members of the public who want to provide public comment
10:24:16 22 will be allowed three minutes for oral presentation.
10:24:19 23 Additional time will be allowed for questions by the
10:24:23 24 Council Members or Council's staff.

10:24:27 25 If you want to provide public comment and are

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10:24:29 1 not a speaker on behalf of SJAFCA or the appellant, we
10:24:33 2 ask that you fill out a blue speaker card. You can find
10:24:36 3 that at the staff table to your right. These public
10:24:38 4 comments will be heard in the order we receive the
10:24:41 5 completed blue speaker cards.

10:24:44 6 In order to allow everyone an opportunity to
10:24:46 7 speak, we may shorten the time limit for speakers during
10:24:51 8 the public comment portion of the hearing. And if we do
10:24:53 9 so, I will announce it prior to the beginning of the
10:24:55 10 portion of the hearing.

10:24:56 11 After we hear from everyone who has filled out
10:24:58 12 a blue speaker card, we will close the public comment
10:25:02 13 portion of this hearing.

10:25:04 14 Finally, when you come to speak, we ask that
10:25:07 15 you do a couple of things so that the Council, audience
10:25:10 16 and the court reporter may hear you so that your
10:25:14 17 comments are entered into the record and can be
10:25:16 18 responded to appropriately.

10:25:18 19 First, speak into the microphone; and, second,
10:25:24 20 please begin by stating your name and identifying the
10:25:27 21 organization you represent, if any.

10:25:30 22 We will now begin with the party
10:25:33 23 presentations, beginning with the San Joaquin Area Flood
10:25:39 24 Control Agency. Looks like we have a question.

10:25:43 25 THE PUBLIC: Can the public ask questions of

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10:25:45 1 the staff prior to the presentations?

10:25:47 2 VICE CHAIR COUNCIL MEMBER FIORINI: You'll be
10:25:48 3 provided an opportunity. Fill out a blue speaker card
10:25:51 4 and --

10:25:52 5 THE PUBLIC: Can we ask questions or is that
10:25:53 6 part of our three minutes?

10:25:55 7 VICE CHAIR COUNCIL MEMBER FIORINI: That will
10:25:55 8 by part of your three minutes.

10:25:57 9 THE PUBLIC: But they'll answer the questions
10:25:59 10 during the three minute portion?

10:26:00 11 VICE CHAIR COUNCIL MEMBER FIORINI: If they
10:26:01 12 feel like it, yes.

10:26:02 13 THE PUBLIC: Okay. Thanks.

10:26:14 14 VICE CHAIR COUNCIL MEMBER FIORINI: Bethany,
10:26:16 15 I'll keep track of it. Welcome.

10:26:19 16 MS. KATHRYN L. OEHLSCHLAGER: Thank you. Good
10:26:20 17 morning. My name is Katherine Oehlschlager. I am here
10:26:23 18 on behalf of SJAFCA. I will be brief.

10:26:27 19 I wanted to thank staff for what was obviously
10:26:30 20 an incredible amount of work in a very short period of
10:26:32 21 time to put together the draft determination. I don't
10:26:36 22 really think there's anything for me to add at this
10:26:38 23 point, given the detail in that document and my
10:26:40 24 presentation at the prior meeting.

10:26:42 25 But I did want to offer the opportunity for

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10:26:44 1 Council to ask me questions. I also have my technical
10:26:47 2 team here if there are questions on the engineering or
10:26:50 3 environmental issues. All right.

10:26:59 4 VICE CHAIR COUNCIL MEMBER FIORINI: It
10:26:59 5 appears --

10:27:01 6 COUNCIL MEMBER VILLEGAS: I do have a
10:27:03 7 question, if I could, Mr. Chair. Just at the last
10:27:05 8 public hearing that we had, one of the questions that
10:27:07 9 surfaced for me was in terms of just the public being
10:27:11 10 able to understand how the noninvasive species -- what's
10:27:16 11 the reference, monitoring plan that's going to be rolled
10:27:19 12 out or how folks can access it or view or see what it
10:27:22 13 looks like, because that's a concern that I think was
10:27:25 14 expressed.

10:27:26 15 What, how, what's the process for that or what
10:27:29 16 should folks expect who are unfamiliar with a lot of the
10:27:32 17 systems that are in place to manage it, but the
10:27:35 18 layperson who wants to understand it a little bit more.

10:27:38 19 MS. KATHRYN L. OEHLISCHLAGER: Sure. So I
10:27:39 20 think you're referring to the water hyacinth management
10:27:41 21 program --

10:27:42 22 COUNCIL MEMBER VILLEGAS: Correct.

10:27:42 23 MS. KATHRYN L. OEHLISCHLAGER: -- that will be
10:27:43 24 developed. You know, that is part of the operations and
10:27:46 25 maintenance program for the gate, which is under

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10:27:48 1 development now.

10:27:49 2 The EIR did include benchmarks that laid out
10:27:52 3 essentially what will be done. There will be visual
10:27:55 4 inspection conducted and that was a publicly circulated
10:27:59 5 document, visual inspection and monitoring, and then
10:28:01 6 mechanical removal on regular intervals.

10:28:04 7 In terms of the operations and maintenance
10:28:06 8 program, that will likely be adopted at a public
10:28:08 9 meeting, but I might present that to our staff, whether
10:28:11 10 that will be something that is noticed on an agenda for
10:28:14 11 SJAFCA.

10:28:15 12 This is Chris Elias, the executive director of
10:28:19 13 SJAFCA, just confirming that that document will be
10:28:22 14 subject to a publicly noticed meeting at SJAFCA's board.

10:28:22 15 COUNCIL MEMBER VILLEGAS: All right. Thank
10:28:26 16 you.

10:28:26 17 VICE-CHAIR MEMBER FIORINI: Thank you.

10:28:29 18 MS. KATHRYN L. OEHSCHLAGER: All right. Well,
10:28:29 19 thank you very much. Hearing nothing else, we'll rest.
10:28:33 20 Thank you.

10:28:33 21 VICE-CHAIR MEMBER FIORINI: Great. Thank you
10:28:34 22 very much.

10:28:35 23 So next up is the appellant, the Atherton Cove
10:28:39 24 Homeowners Association, represented by Mr. Soluri.
10:28:44 25 Good morning.

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10:28:46 1 MR. PATRICK M. SOLURI: Good morning all.
10:28:52 2 Patrick Soluri. Ms. Oehlschlager finished a lot quicker
10:28:57 3 than I was expecting, so I need to set up a little bit,
10:28:58 4 if that's okay.

10:28:58 5 So I will actually be much more brief also
10:29:02 6 than the prior presentation, and I am really -- oh,
10:29:06 7 pardon me. I am sorry.

10:29:06 8 I am Patrick Soluri on behalf of the
10:29:08 9 appellant, Atherton Cove Property Owners Association,
10:29:12 10 ACPOA.

10:29:15 11 So I am going to focus pretty much on just on
10:29:19 12 the water hyacinth issue and specifically the Policy G
10:29:25 13 P1 (b)(2) which requires any covered action to be
10:29:29 14 equally or more effective than the Delta Plan's
10:29:33 15 mitigations.

10:29:35 16 And the relevant portion of the mitigation
10:29:40 17 measure, Delta Plan mitigation measures that we're
10:29:42 18 talking about is mitigation measure 4-1, and it's just a
10:29:47 19 portion of that that deals with invasive species, and I
10:29:52 20 am just going to read a few passages from it.

10:29:56 21 It says: "The plan, the invasive species
10:30:01 22 plan, the plan shall be based on best available science
10:30:04 23 and developed in consultation with Department of Fish
10:30:09 24 and Wildlife and local experts."

10:30:10 25 So that right there, that's a substantive

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10:30:13 1 requirement for the plan to be developed in consultation
10:30:17 2 with these folks.

10:30:18 3 Now you saw the presentation back in January
10:30:21 4 where it was generally described in the Final EIR as
10:30:25 5 having this 20 percent cover trigger due to visual,
10:30:31 6 visual inspections, but nowhere in the record is there
10:30:35 7 any attempt to suggest that any of this plan which,
10:30:42 8 again, hasn't actually been developed yet, and SJAFCA
10:30:45 9 concedes that at this point and even the staff findings
10:30:49 10 suggest that, nowhere is there any indication that any
10:30:51 11 of these components were actually based upon
10:30:55 12 consultation with experts. Right?

10:30:58 13 And then let's just go on. It says, "The
10:31:01 14 invasive species management plan will include the
10:31:04 15 following methods: Nonnative species eradication
10:31:08 16 methods, if eradication is feasible."

10:31:10 17 No discussion whether eradication is feasible
10:31:14 18 within Atherton Cove.

10:31:15 19 "Nonnative species management methods,
10:31:19 20 including early detection methods." What are the early
10:31:22 21 detection methods here? And how is that done in
10:31:24 22 consultation?

10:31:26 23 There's -- again, there's nothing in the
10:31:28 24 record that indicates any of these bullet points from
10:31:34 25 mitigation measure 4-1 were actually satisfied by the

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10:31:42 1 general discussion in the Final EIR.

10:31:45 2 So as a result of the fact that there's really
10:31:47 3 no facts supporting compliance with mitigation measure
10:31:51 4 4.1, the draft findings essentially, essentially come up
10:31:57 5 with two purely legal arguments: 1) That the entire
10:32:05 6 policy itself, G P1 (b)(2), isn't even applicable to
10:32:12 7 water hyacinth, because this yet-to-be-developed plan
10:32:17 8 isn't actually a mitigation measure, it is a design
10:32:21 9 feature of the project.

10:32:22 10 And then, secondly, there's a suggestion that,
10:32:26 11 well, there's actually nothing requiring the development
10:32:29 12 of the plan before this consistency determination.

10:32:32 13 So, again, both of those are just a purely
10:32:35 14 legal attempt to sidestep the factual requirements of,
10:32:42 15 of the policy requiring compliance with the Delta Plan,
10:32:46 16 and I'm going to take each one in fairly close detail.

10:32:57 17 So with respect to this issue of whether the
10:33:03 18 invasive species, the water hyacinth plan is mitigation
10:33:07 19 or element of the project, the CEQA law, and again we're
10:33:15 20 talking about CEQA here. I looked, even again last
10:33:18 21 night, I looked to see if mitigation measures were
10:33:21 22 defined in either the Delta Plan, the Delta Plan
10:33:24 23 Regulations or the Delta Reform Act, and it's not. So,
10:33:27 24 unfortunately, while, you know, because we talk in terms
10:33:30 25 of mitigation, we need to actually look at CEQA law for

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10:33:33 1 what's mitigation.

10:33:35 2 And there's a case directly on point and it's
10:33:38 3 Lotus versus Department of Transportation, which we've
10:33:41 4 cited repeatedly. And it says, "Invasive plant removal
10:33:47 5 is 'plainly a mitigation measure and not a part of the
10:33:51 6 project itself.'"

10:33:52 7 So, again, we have to look at CEQA law on this
10:33:56 8 issue of project component versus mitigation. The
10:34:00 9 published case law is unequivocal. Nobody suggests
10:34:04 10 Lotus is wrongly decided. There's no other cases that
10:34:07 11 directly address this issue. Lotus is not addressed in
10:34:10 12 the findings.

10:34:11 13 Now, in the most recent version of the
10:34:13 14 findings, which were released a week ago -- and again
10:34:16 15 I'll just take a step back.

10:34:18 16 We provided a comment letter on February 28th
10:34:21 17 in response to the draft preliminary findings and then
10:34:25 18 in response to our February 28th letter a week ago, a
10:34:31 19 subsequent redline set of findings.

10:34:34 20 And in redlining, the findings state the
10:34:38 21 following -- and, again, I am going to quote --
10:34:40 22 "Mitigation also is not required if measures are
10:34:45 23 included in the project to reduce significant impacts."

10:34:51 24 And then it cites CEQA guidelines 15126.4.
10:34:55 25 That is just absolutely an incorrect statement of the

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10:34:59 1 law. And so I have actually got my little handy-dandy
10:35:02 2 CEQA book here, and the reference -- so again, the staff
10:35:06 3 findings say, "Mitigation is also not required if
10:35:08 4 measures -- is not required if measures are included in
10:35:12 5 the project to reduce significant impacts."

10:35:14 6 What the reference section actually says is,
10:35:17 7 again, in a section entitled, "Mitigation measures," it
10:35:21 8 says, "The discussion of mitigation measures shall
10:35:26 9 distinguish between the measures which are proposed by
10:35:29 10 project proponents to be included in the project and
10:35:33 11 other measures proposed by the lead responsible or
10:35:37 12 trustee agency or other persons which are not included
10:35:40 13 in the -- but the lead agency determines could be
10:35:47 14 reasonably expected to reduce adverse impacts. This
10:35:47 15 discussion shall identify mitigation measures for each
10:35:50 16 significant environmental impact."

10:35:51 17 So it simply does not support staff's
10:35:56 18 characterization. What it does support is they're all
10:35:59 19 mitigation measures. Whether they are mitigation
10:36:02 20 measures proposed by the project applicant, here SJAFCA,
10:36:06 21 or whether they're mitigation measures proposed by a
10:36:09 22 lead agency, a responsible agency or trustee agency,
10:36:12 23 whatever.

10:36:12 24 They're all mitigation measures and they all
10:36:15 25 require discussion. And if there was any question about

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10:36:17 1 this interpretation, subdivision A-2 of that same CEQA
10:36:23 2 guideline states, "Mitigation measures can be
10:36:28 3 incorporated into the plan, policy, regulation or
10:36:32 4 project design."

10:36:35 5 So to somehow suggest that this invasive
10:36:44 6 species plan is not mitigation because it's a part of
10:36:48 7 the project is just contrary to CEQA law, which is what
10:36:53 8 we have to look at here. But it also has an incredibly,
10:37:00 9 I think, harmful effect on this body's authority to
10:37:06 10 review projects, because if this is the -- I think the
10:37:12 11 very, or the second hearing, and there's going to be
10:37:16 12 further projects, there's going to be further
10:37:19 13 consistency determinations.

10:37:20 14 If this Council decides that G P1 (b)(2) is
10:37:29 15 completely inapplicable just because the agency
10:37:34 16 characterizes their actions as a design feature of the
10:37:38 17 project and not mitigation measure, that is going to
10:37:41 18 create an exception that swallows the whole, and this
10:37:46 19 body will not -- there may be projects coming before
10:37:50 20 this body that are more sympathetic than maybe a flood
10:37:54 21 control project, but because the mitigation measures
10:37:57 22 have been incorporated into the project design, this
10:38:01 23 decision sets a precedent that, hey, we cannot enforce
10:38:09 24 the Delta Plan mitigation measures which are actually
10:38:12 25 pretty good. They're pretty strong, they're pretty

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10:38:15 1 effective, but they are totally obviated all because the
10:38:19 2 agency simply is recharacterizing mitigation as a design
10:38:23 3 feature of the project, and that's just a very troubling
10:38:27 4 policy perspective.

10:38:29 5 Now the findings also go on to say, and this
10:38:40 6 is page 11 of the, again, redline findings, talking
10:38:44 7 about the water hyacinth control plan and again the fact
10:38:48 8 that there's no facts to support consistency with
10:38:50 9 mitigation 4-1.

10:38:53 10 Again, I am just going to read this, this is a
10:38:55 11 new section, again redlined a week ago. "But the
10:38:59 12 appellant has not identified any provision of G P1
10:39:02 13 (b)(2) or the associated Delta Plan measures that
10:39:06 14 prohibit the formulation of the water hyacinth control
10:39:11 15 program at a later date."

10:39:14 16 "Delta Plan measures 4-1 require the
10:39:16 17 development and implementation of an invasive species
10:39:19 18 management plan before construction or operation of the
10:39:23 19 project but does not otherwise specify a timeframe for
10:39:28 20 development of the plan."

10:39:31 21 So not only is that legally incorrect, but
10:39:34 22 it's logically, it's just, it's just not logical. The
10:39:39 23 requirement to have the plan prior to the consistency
10:39:44 24 determination is built into the requirement for
10:39:48 25 substantial evidence review. If there's no plan,

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10:39:53 1 there's nothing in the record for this body to determine
10:39:57 2 that it's consistent with mitigation measure 4-1. It's
10:40:01 3 like asking a teacher to give me an "A" on my essay but
10:40:05 4 saying, well, teacher, you know, nothing said that I was
10:40:07 5 supposed to actually submit the essay before you give me
10:40:11 6 the A. It's built into the framework. If there is no
10:40:14 7 plan, and again this is -- this is an alternative
10:40:18 8 argument. This is a new alternative argument which
10:40:21 9 assumes that G P1 (b)(2) applies. It says, well, that
10:40:26 10 can be deferred after, after the consistency
10:40:29 11 determination is made.

10:40:30 12 How is it possible for this body to determine
10:40:35 13 that the invasive species management plan satisfies all
10:40:39 14 of the substantive factual requirements in mitigation
10:40:42 15 measure 4-1 if it doesn't have the plan before it?

10:40:47 16 But, again, so legally, I mean, just legally
10:40:50 17 and logically it doesn't make sense. But, again, it
10:40:53 18 also sets up another huge problem for this body's
10:40:58 19 authority looking forward.

10:41:01 20 Future project applicants will simply say,
10:41:03 21 hey, you know what, that's deferred into the future,
10:41:05 22 we'll take care of it, don't worry, and there's now
10:41:08 23 precedent from this body which now indicates that's
10:41:11 24 okay. So both of these completely legal, kind of
10:41:22 25 concocted legal arguments to avoid the factual argument

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10:41:27 1 of whether the nonexistent invasive species program
10:41:31 2 complies with mitigation measure 4-1, these completely
10:41:36 3 legal arguments are setting up this Council for real
10:41:41 4 problems going forward.

10:41:42 5 And there's a way to avoid it. Right? I
10:41:46 6 mean, you know, there's been extensive litigation over,
10:41:49 7 over the Delta Plan, that my firm has been involved in,
10:41:53 8 and one of the consistent themes is that the Delta Plan
10:41:56 9 is not, it's not strong enough to actually protect the
10:41:58 10 Delta.

10:41:59 11 Well, one of the, one of the real policies
10:42:02 12 that are actually one of the stronger policies and
10:42:04 13 really effective is the requirement to be equally or
10:42:08 14 more effective than the Delta Plan's mitigation
10:42:13 15 measures, and by adopting these draft findings this body
10:42:20 16 is, it's simply eliminating that as a viable regulatory
10:42:27 17 oversight tool for this body.

10:42:30 18 So it's taking away another one of the arrows
10:42:33 19 in your quiver to actually protect the Delta, you know,
10:42:38 20 and so what are we talking about here? We're talking
10:42:40 21 about an invasive species management plan. It can be
10:42:44 22 done. Right?

10:42:45 23 If this body determines, as I would ask it to
10:42:49 24 do, that these legal arguments should not be made that
10:42:54 25 this body should actually consider whether the

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10:43:00 1 nonexistent, presently nonexistent plan satisfies
10:43:04 2 mitigation measure 4-1.

10:43:06 3 It should conclude the plan doesn't yet exist.
10:43:10 4 We need the plan to exist before we can make it to
10:43:13 5 consistency determination, so remand it back to SJAFCA
10:43:18 6 to prepare the plan. I have no doubt that
10:43:21 7 Ms. Oehlschlager would move heaven and earth to get that
10:43:26 8 plan prepared in a month or two months, that SJAFCA
10:43:30 9 could turn around, send it right back to this body for a
10:43:33 10 consistency determination.

10:43:36 11 We are not talking about setting aside this
10:43:38 12 flood control project. We're simply talking about
10:43:41 13 making sure that the project actually mitigates its
10:43:44 14 impacts and provides the information to this body
10:43:48 15 necessary for it to feel comfortable that it actually
10:43:51 16 complies with the Delta Plan. That can be done very
10:43:57 17 timely.

10:43:57 18 It doesn't require setting the project aside
10:44:01 19 in its entirety and it's a very modest request, and that
10:44:07 20 is, that is my ask of you.

10:44:09 21 With that, I'm happy to be quiet and listen to
10:44:12 22 any questions that you may have.

10:44:15 23 VICE CHAIR COUNCIL MEMBER FIORINI: Thank you.
10:44:16 24 Questions?

10:44:21 25 COUNCIL MEMBER WEINBERG: Thank you, Vice

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10:44:23 1 Chair Fiorini. Mr. Soluri (Indicating his tie)? Pretty
10:44:31 2 close? Yeah.

10:44:32 3 You know, your comment that the legal argument
10:44:35 4 should not be made, you know, that's hard for us to
10:44:40 5 agree with, because we are talking about compliance with
10:44:43 6 a regulation, which the basis is legal. I am not a
10:44:45 7 lawyer. I don't even pretend to play one on TV.
10:44:49 8 There's my more learned colleagues here.

10:44:52 9 But I have spent most of my career not as a
10:44:55 10 CEQA expert but being involved in CEQA, and as a
10:44:59 11 practitioners. You know, CEQA requires mitigation
10:45:03 12 measures to mitigate a significant impact below a
10:45:08 13 threshold of significance.

10:45:09 14 So we talked about this at the January hearing
10:45:13 15 and that, you know, kind of gets to what's the baseline
10:45:18 16 for, for impacts and are they worsening the hyacinth
10:45:25 17 problem beyond what is the baseline for CEQA, and I
10:45:29 18 think the answer that we got back then was no, they're
10:45:33 19 not.

10:45:34 20 But as a feature of the project, they're
10:45:38 21 including this, you know, hyacinth removal plan, which
10:45:42 22 we completely understand has not been prepared yet, but
10:45:48 23 requiring it. I think what my question is: Why would
10:45:52 24 you expect a mitigation measure to be required if the
10:45:55 25 project is not resulting in an impact below -- above

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10:46:01 1 whatever the level, the threshold of significance is?

10:46:04 2 MR. SOLURI: Sure. That's a good question.

10:46:06 3 So the answer is the EIR in several places actually
10:46:11 4 acknowledges that the presence of the wall with this 50
10:46:18 5 foot wide gate will actually exacerbate, and that's the
10:46:22 6 language of the Final EIR or Draft EIR, Final EIR. It
10:46:25 7 will exacerbate the presence of water hyacinth within
10:46:29 8 Atherton Cove, specifically, because presently the water
10:46:33 9 hyacinth floats in and out with the tide, but what will
10:46:37 10 happen with the 50 foot gate is the water, the water
10:46:41 11 hyacinth will float in and then it will expand and it
10:46:44 12 will become too big and it will not be able to float
10:46:46 13 out, and as a result it will be trapped inside there.

10:46:52 14 And water hyacinth grows very, very quickly
10:46:54 15 and so it will be trapped back there, and so while under
10:46:57 16 baseline conditions it would be able to float back out
10:47:00 17 because the mouth is 600 feet wide, it will be trapped
10:47:03 18 in there.

10:47:04 19 So to answer your question, the EIR itself
10:47:08 20 acknowledges as a factual matter that this project will
10:47:11 21 exacerbate water hyacinth within Atherton Cove, and the
10:47:17 22 only reason that it says there will be no impact is
10:47:19 23 because of this idea that it's going to mitigate that
10:47:22 24 impact by developing this program but simply not calling
10:47:28 25 it mitigation and calling it a design feature of the

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10:47:31 1 project.

10:47:31 2 That is exactly what the Lotus case deals
10:47:35 3 with, is if it's mitigation you should call it
10:47:38 4 mitigation. You should include it in your MMRP and it
10:47:42 5 should be enforceable and not have the situation here
10:47:44 6 where three years later your mitigation is
10:47:49 7 mischaracterized as a design feature of the project and
10:47:53 8 it still hasn't been done.

10:47:55 9 COUNCIL MEMBER WEINBERG: So maybe we can ask
10:47:57 10 staff to sort of, because this seems to be sort of the
10:48:01 11 key point of the appellant with everything else sort of,
10:48:05 12 you know, we've kind of dealt with, you've chosen to
10:48:10 13 focus on this.

10:48:11 14 So are we talking about equivalents here that
10:48:14 15 the project design feature, because I thought I asked
10:48:18 16 the question of SJAFCA whether, you know, we had some
10:48:22 17 sense of where, you know, what baseline was and that
10:48:26 18 they weren't impacting the hyacinth growth beyond the
10:48:30 19 baseline.

10:48:31 20 So is that because of the inclusion of the
10:48:35 21 project that the feature, the plan as a feature of the
10:48:39 22 project, or is there no significant -- you know, what
10:48:44 23 was the threshold of significance and, you know, we're
10:48:49 24 not there and --

10:48:52 25 MS. PANE: I think that might be a more

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10:48:54 1 appropriate question for SJAFCA to answer, but I want to
10:48:58 2 just caution, this is moving into CEQA territory and
10:49:01 3 we're focusing here on the Delta Plan, so these are CEQA
10:49:04 4 related arguments that would be litigated.

10:49:07 5 COUNCIL MEMBER WEINBERG: (Nodding head.)

10:49:08 6 MS. PANE: And then we take, the Council takes
10:49:11 7 before it the record presented to it and the record
10:49:15 8 presented to it is a Final EIR that contains the water
10:49:20 9 hyacinth program as part of the project.

10:49:21 10 So it, the Delta Plan doesn't second guess
10:49:24 11 whether mitigation should exist or not, that's a CEQA
10:49:28 12 argument for the courts.

10:49:30 13 The issue before the Council is, is the record
10:49:32 14 consistent with the Delta Plan? And because there was
10:49:35 15 not a mitigation measure here, staff's recommendation is
10:49:39 16 in this case G P1 (b)(2) doesn't apply; and the Lotus
10:49:43 17 case I'm reviewing that right now, but the Lotus case,
10:49:46 18 it seems to me that Caltrans didn't analyze the impact
10:49:49 19 at all, and I don't think that's the argument being made
10:49:53 20 here.

10:49:53 21 The issue is whether it should have been a
10:49:56 22 mitigation measure or a project element, and the project
10:50:00 23 proponent wrote its EIR with it as a project document
10:50:04 24 element, so we have to accept that as presented to the
10:50:08 25 Council, but the baseline and thresholds of

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10:50:12 1 significance, I think are more appropriate for SJAFCA to
10:50:14 2 answer than staff.

10:50:15 3 COUNCIL MEMBER WEINBERG: And the CEQA issues
10:50:16 4 have been litigated and, you know, went through the
10:50:19 5 process and adjudicated?

10:50:22 6 MS. PANE: I believe, Erin can correct me if I
10:50:26 7 am wrong, we have some of the record before us, before
10:50:28 8 the Council that some litigation proceeded and then
10:50:30 9 staff's recommendation is to take official notice of an
10:50:33 10 Appellate Court decision that came down after the
10:50:35 11 certification of consistency, because that would be a
10:50:39 12 judicially noticeable fact, but the staff analysis does
10:50:42 13 not rely on any of the conclusions reached in
10:50:46 14 litigation.

10:50:46 15 COUNCIL MEMBER WEINBERG: Okay. Thank you.

10:50:51 16 MS. PANE: Do you need Ms. Oehlschlager to
10:50:55 17 come up to answer your CEQA questions?

10:50:57 18 COUNCIL MEMBER WEINBERG: I think we should
10:50:58 19 hear their thinking on this.

10:51:09 20 MS. KATHRYN L. OEHLISCHLAGER: Thank you. Yes.
10:51:10 21 So just to be clear, I think I understand the question,
10:51:14 22 which is how the project treated the water hyacinth
10:51:17 23 control program.

10:51:18 24 And it's true, it was considered an element of
10:51:21 25 the project because as part of normal operations and

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10:51:23 1 maintenance for this type of facility, removal of debris
10:51:27 2 that's collected behind the gate would need to be
10:51:29 3 conducted, and Mr. Soluri accurately characterized what
10:51:34 4 the EIR concluded, which was there was the possibility
10:51:37 5 that some material could become trapped behind the gate,
10:51:40 6 including hyacinth, but that with normal removal
10:51:42 7 operations there would be no significant impact.

10:51:45 8 And to address Ms. Pane's comment, these are
10:51:49 9 CEQA issues. Whether something is properly
10:51:51 10 characterized as project component or mitigation
10:51:54 11 measure, the Lotus case is a key case on this. There
10:51:57 12 was also a case over the Warriors stadium.

10:52:00 13 We litigated those issues in the courts and we
10:52:02 14 received a Court of Appeal opinion coming from the Third
10:52:05 15 District in favor of SJAFCA on that issue. So not only
10:52:08 16 is it a CEQA issue and not Delta Plan issue, but it is a
10:52:12 17 CEQA issue that has been finally resolved by the courts.

10:52:15 18 COUNCIL MEMBER WEINBERG: Thank you.

10:52:19 19 VICE CHAIR COUNCIL MEMBER FIORINI: Any other
10:52:20 20 questions?

10:52:22 21 Then, Mr. Soluri, thank you. We will now
10:52:26 22 proceed to public comment.

10:52:28 23 THE PUBLIC: Question, question out here.

10:52:29 24 VICE CHAIR COUNCIL MEMBER FIORINI: We are
10:52:31 25 going to -- just hold your horses. If you filled out a

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10:52:34 1 blue card, we are going to proceed to public comment
10:52:36 2 now, and each person requesting the opportunity to
10:52:40 3 address the Council will be provided three minutes.
10:52:45 4 We'll take them in the order that they're submitted.
10:52:53 5 And, again, I'll ask you to provide us your name and
10:52:55 6 affiliation.

10:53:00 7 First up, Sean Brooks. And just for your
10:53:12 8 help, the timer is over there, just to help you keep
10:53:15 9 track.

10:53:16 10 MR. SEAN BROOKS: Okay. And do you want to
10:53:17 11 post the .pdf?

10:53:20 12 MS. LITA BRYDIE: Yes. Give him a second.

10:53:32 13 MR. SEAN BROOKS: Hello. My name is Sean
10:53:33 14 Brooks. I live at 2001 Carlin. I am a resident off of
10:53:36 15 the Smith Canal.

10:53:38 16 My house is located upon the levees, one of
10:53:42 17 the -- on the Smith Canal itself.

10:53:47 18 I had approached the SJAFCA meeting back in
10:53:51 19 2017 discussing what I believed would be impacts on the
10:53:56 20 water levels by putting the gate, how it's going to
10:53:59 21 raise the water levels in the levee.

10:54:01 22 I prepared an exhibit that shows, we are
10:54:06 23 assuming that 100 year flood level is 9.4 -- just want
10:54:11 24 to go over this real quick.

10:54:12 25 Assuming the gate shuts down at elevation

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10:54:14 1 five, the difference is about 4.4 feet.

10:54:17 2 By restricting this gate and not allowing the
10:54:20 3 waters in during the flood scenario and by closing the
10:54:24 4 gates, that additional storage of Smith Canal water
10:54:27 5 would be impacted onto, onto the main canal and within
10:54:31 6 the Delta pole system.

10:54:35 7 Running the calculations, we -- I assumed that
10:54:37 8 approximately by taking 86 acres of the Smith Canal and
10:54:42 9 multiplying by 4.4 feet is 378 acre feet of water that
10:54:47 10 will be stored into, into the rivers which could have an
10:54:51 11 impact and raise the river levels 3.14 feet.

10:54:55 12 At that time, analogy was stated by Roger
10:55:01 13 Churchwell, that it's a drop of water in the overall
10:55:04 14 system, that it doesn't have enough to have a study
10:55:07 15 performed.

10:55:08 16 With my experience, I am an engineer,
10:55:12 17 graduated from the University of the Pacific, that
10:55:16 18 didn't sound right for me. Any impacts needed to be
10:55:19 19 fully studied and analyzed in order to meet that, no
10:55:24 20 matter what kind of encroachments they are, down to a
10:55:27 21 pile in the river needs to be analyzed on that system on
10:55:31 22 how that pile is going to impact the flows.

10:55:33 23 At that time, the SJAFCA came back, Roger said
10:55:36 24 no study would need to be performed because it's such a
10:55:40 25 minor amount overall in the Delta pole.

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10:55:43 1 Now, I went ahead and attended the seminar
10:55:46 2 group on November 17, 2017, and I asked Richard Simmons,
10:55:51 3 which is the theme of flood mapping, works for FEMA
10:55:56 4 flood mapping, pretty much the point in question: If we
10:55:59 5 put in this gate or use the gate as an example, would a
10:56:02 6 full study have to be performed by the impact on what it
10:56:05 7 has on the floodplain? And he clearly stated in that
10:56:09 8 seminar, yes, yes, that would be correct, that an impact
10:56:13 9 would have to be studied on that.

10:56:15 10 And I have not seen any study. I have read a
10:56:19 11 comment, but it's not a study, I have not seen a study
10:56:24 12 that has analyzed this scenario. There was comment that
10:56:27 13 was made that it's only going to raise it by analyzing
10:56:30 14 the whole Delta short of the Suisun Bay, but to me
10:56:34 15 that's not correct. You can't analyze the whole system
10:56:38 16 as a whole.

10:56:39 17 You have to take the parts that's going to
10:56:41 18 reflect into. There's got to be an area that's within
10:56:44 19 it that's it's not going to affect all the way down to
10:56:44 20 San Francisco obviously with the tides. That's not how
10:56:45 21 our Delta system works. It's not a flat body of water.
10:56:55 22 It's not a lake. It's a moving system.

10:56:56 23 So as the tides come in, we're going to get
10:57:00 24 different levels of waters at different places in the
10:57:01 25 Delta. So it's going to -- by closing this off is it's

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10:57:04 1 going to be affecting the water on this end of the levee
10:57:07 2 -- of this system, the overall Delta system.

10:57:11 3 So I have a concern with that, that that has
10:57:13 4 not been met, my understanding that's a requirement that
10:57:19 5 a study needs to be performed on that.

10:57:22 6 VICE CHAIR COUNCIL MEMBER FIORINI: Thank you
10:57:23 7 for your comments.

10:57:28 8 MR. SEAN BROOKS: Any questions?

10:57:29 9 VICE CHAIR COUNCIL MEMBER FIORINI: Next up,
10:57:32 10 Ernest Tufft, resident of Smith Canal.

10:57:42 11 MR. ERNEST TUFFT: Thank you for having the
10:57:43 12 meeting here today.

10:57:44 13 I was surprised. Actually, I didn't know. I
10:57:47 14 was assuming it was going to be decided in Sacramento
10:57:49 15 last month what was going to happen here in Stockton, so
10:57:54 16 thank you for postponing the decision until you had a
10:57:58 17 Stockton meeting.

10:57:59 18 The city is largely unfamiliar with the
10:58:02 19 Country Club neighborhood issue, most residents, among
10:58:06 20 many local politicians, and even Mayor Tubbs haven't
10:58:10 21 really followed, as far as I can tell, the technical
10:58:12 22 details of the gate project and tend to defer to SJAFCA
10:58:17 23 based on the fears of FEMA.

10:58:19 24 FEMA is constantly used in SJAFCA's sales
10:58:23 25 pitch for this gate during the time that they put up the

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10:58:26 1 vote, a vote which was dominated in terms of the
10:58:33 2 electorate on the west side of the I-5 where the FEMA
10:58:39 3 insurance issues are much more dire.

10:58:41 4 Those of us who are on the east side who have
10:58:46 5 a -- most of the Smith Canal had very little power to do
10:58:50 6 anything. We had no vote. We voted, but our votes
10:58:54 7 weren't worth anything because of the way the floodplain
10:58:57 8 was.

10:58:58 9 So on our side, first, it's a good idea to
10:59:03 10 take a boat ride along the historic 2.5 mile long clam
10:59:09 11 shell dug navigational channel. It's one of the oldest
10:59:12 12 in the state.

10:59:13 13 The Delta Stewardship Council has organized as
10:59:17 14 far as I can tell in part because it's dangerous to
10:59:20 15 allow flood control agencies to alone determine the
10:59:22 16 value of state waterways.

10:59:24 17 The Smith Canal is a beautiful waterway that
10:59:27 18 deserves preservation.

10:59:29 19 The canal has thrived from neglect requiring
10:59:32 20 no extra dredging for over its 100 year history because
10:59:36 21 of a twice daily tide exchange that conveys silt towards
10:59:40 22 the San Joaquin River reducing the mouth of the canal
10:59:42 23 from 800 feet to 50 feet. Fifty feet is the open gate
10:59:47 24 will more significantly disturb the tide exchange,
10:59:50 25 according to hydrological simulations, SJAFCA itself

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10:59:50 1 complied.

10:59:56 2 They make decisions of no significant impact
10:59:58 3 after showing something that even a child could look at
11:00:01 4 and say, wow, something is going on here. Look at how
11:00:05 5 fast that water is flowing through that narrow straw
11:00:08 6 that they have got for a gate.

11:00:09 7 So the gate project is not really scientific,
11:00:14 8 at least as far as I can tell, because it's basically
11:00:17 9 just a larger version of the seawalls, weirs, gates,
11:00:21 10 dams designed to block the tide flow in the Stockton
11:00:24 11 Delta.

11:00:26 12 So now it's not likely that the gate will
11:00:31 13 fail. Maybe it would mechanically. I had a trucking
11:00:34 14 company, and I know that equipment can fail when you
11:00:36 15 need it the most, but mostly it would be a problem of an
11:00:42 16 insidious siltation of the canal making it increasingly
11:00:46 17 useless for navigation, recreational boating and even
11:00:51 18 storm water drainage.

11:00:52 19 But now the cost of a retrofit along the levee
11:00:57 20 walls would be much less than the gate cost and would
11:01:01 21 certainly be more satisfying in terms of water quality
11:01:04 22 and long-term urban development benefits.

11:01:08 23 Plus, as SJAFCA will help you understand, even
11:01:13 24 with the gate, the levees have to be improved not as a
11:01:16 25 secondary defense but as a primary defense against tidal

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11:01:21 1 erosion and flooding. Those levees have to be in some
11:01:24 2 cases stronger than they were before, because the gate,
11:01:26 3 the water could fill up in the Smith Canal itself when
11:01:29 4 the gate is closed at a high tide period.

11:01:33 5 So now one of the problems that they, is
11:01:39 6 constantly talked about by the engineers at SJAFCA is
11:01:42 7 this problem of encroachment on the levees themselves,
11:01:47 8 there's dilapidated homes and so forth built on the
11:01:48 9 levees. It's very difficult for them to understand how
11:01:54 10 to deal with the public on this.

11:01:56 11 SJAFCA is not -- is only in law a public
11:01:59 12 agency, but it hides out and has maybe one or two
11:02:03 13 members of the public coming to their meetings, and then
11:02:07 14 they make big decisions that impact people. And they
11:02:12 15 have not come -- in my 20 years of living on the canal,
11:02:16 16 I have never had that them come and knock on my door and
11:02:19 17 say, let's take a look at the land side of your levee
11:02:22 18 and see how it looks. You know, is it safe?

11:02:26 19 They have generally depended upon homeowners
11:02:28 20 to come and report any kind of damage. But we have a
11:02:32 21 long list of homeowners that have wanted to have their
11:02:35 22 levees repaired and then they'll turn around and say,
11:02:39 23 well, and this is the levee districts and SJAFCA kind of
11:02:42 24 combined. They work together. They have the same
11:02:44 25 contractors working in both places.

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11:02:47 1 Then they'll say, well, you're one of a long
11:02:49 2 list of people, you know, as tiresome as it is, we can't
11:02:52 3 get to your part of the levee yet, unless of course a
11:02:55 4 beaver puts a hole in it, then they're forced to do
11:02:59 5 that. Okay?

11:02:59 6 And at that point they come in and do a big
11:03:02 7 rock job, looks like something you would see in Los
11:03:05 8 Angeles. And I know you're going to cut me off here in
11:03:07 9 a minute --

11:03:07 10 VICE CHAIR COUNCIL MEMBER FIORINI: Yeah. I
11:03:08 11 think you've covered the issue. We understand your
11:03:12 12 concern.

11:03:12 13 MR. ERNEST TUFFT: But I'd like to finish
11:03:13 14 though my remarks, if you don't mind. Is that okay with
11:03:16 15 you?

11:03:16 16 VICE CHAIR COUNCIL MEMBER FIORINI: Your time
11:03:17 17 is up.

11:03:18 18 MR. ERNEST TUFFT: Okay.

11:03:19 19 VICE CHAIR COUNCIL MEMBER FIORINI: Can you be
11:03:20 20 very brief?

11:03:21 21 MR. ERNEST TUFFT: Yes, I will. I'll finish
11:03:22 22 it up. Very good. Actually, I think, I can see --
11:03:27 23 okay.

11:03:28 24 So the gate will degrade the fish habitat and
11:03:31 25 the recreational potential and I believe SJAFCA should

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11:03:37 1 be, you know, that the Delta Stewardship Council should
11:03:41 2 turn this back to them and say, please, let's look at
11:03:43 3 something that's more modern, more scientific. We're
11:03:47 4 not talking about going back in time.

11:03:50 5 The gate is not -- this is a 1950's, 1960's
11:03:55 6 solution that even the Dutch wouldn't put in today.
11:03:57 7 Thank you for your time.

11:03:58 8 VICE CHAIR COUNCIL MEMBER FIORINI: Thank you
11:03:59 9 very much. Next up, Dominick Gulli. I think I
11:04:05 10 pronounced the last name correctly.

11:04:12 11 MR. DOMINICK GULLI: Yeah. I requested to be
11:04:13 12 last. Are there anymore speakers behind me?

11:04:16 13 VICE CHAIR COUNCIL MEMBER FIORINI: Yes.

11:04:18 14 MR. DOMINICK GULLI: Could I be the last
11:04:18 15 speaker, please?

11:04:19 16 VICE CHAIR COUNCIL MEMBER FIORINI: Just
11:04:21 17 proceed. It's not going to make any difference whether
11:04:23 18 you're first or last. We are going to consider all of
11:04:25 19 the comments as we get them.

11:04:26 20 MR. DOMINICK GULLI: So I had some questions
11:04:27 21 for the staff on some of the comments that they made.
11:04:31 22 Could I ask those first, prior to starting my
11:04:32 23 presentation?

11:04:32 24 VICE CHAIR COUNCIL MEMBER FIORINI: Why don't
11:04:33 25 you state your positions first and then if staff or the

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11:04:37 1 Council have questions to pursue --

11:04:40 2 MR. DOMINICK GULLI: I have questions for
11:04:41 3 staff.

11:04:41 4 VICE CHAIR COUNCIL MEMBER FIORINI: Uh-huh.

11:04:41 5 MR. DOMINICK GULLI: I am going to ask you for
11:04:43 6 questions. I had some staff -- they made some comments
11:04:44 7 in there I'd like to -- and they had a map up there.
11:04:46 8 I'd like to clarify some things on it.

11:04:48 9 VICE CHAIR COUNCIL MEMBER FIORINI: That's
11:04:48 10 fine. That's what you have three minutes for.

11:04:50 11 MR. DOMINICK GULLI: I have public comments,
11:04:53 12 but rather than using my public comments to ask
11:04:56 13 questions, I would like to use them to make my comments
11:04:59 14 and ask the questions separate, if I could.

11:05:01 15 VICE CHAIR COUNCIL MEMBER FIORINI: Please,
11:05:02 16 make your comments.

11:05:05 17 MR. DOMINICK GULLI: Okay. So the question
11:05:06 18 for staff is, is the Fish and Wildlife ex parte
11:05:11 19 communication that was received during the thing, is
11:05:14 20 that part of the -- is that -- oh, you're timing me?
11:05:18 21 Huh. Okay. Three minutes. Huh?

11:05:23 22 Anyways, there's the Fish and Wildlife.

11:05:25 23 To be clear, my name is Dominick Gulli. Okay?
11:05:28 24 And I have tried to help SJAFCA for many years.

11:05:31 25 I submitted an alternate solution to the

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11:05:34 1 problem fixing the levees, just like Ernie talked about
11:05:36 2 along the levees, about half the price and it does meet
11:05:39 3 the urban levee design criteria.

11:05:42 4 SJAFCFA's ignored it.

11:05:44 5 The Fish and Wildlife letter that's in there
11:05:47 6 relative to Patrick's case states that they, they're
11:05:53 7 going to require another residence time analysis, and
11:05:56 8 they want a water -- as far as the hyacinth treatment
11:06:00 9 they want to know what chemicals are going to be used,
11:06:02 10 what rate of application is going to be used, how
11:06:04 11 they're going to measure dissolved oxygen, and fish and
11:06:06 12 -- the letter that's in the ex parte communication was a
11:06:09 13 response to Mr. Elias's application for incidental take
11:06:13 14 permit, which was sent back.

11:06:17 15 So the permit has been rejected back to SJAFCFA
11:06:22 16 to resubmit, which includes the residence time analysis
11:06:26 17 and the water quality and the hyacinth plan.

11:06:28 18 I submitted numerous comments throughout this
11:06:31 19 whole process. I did not know about the appeal process.
11:06:35 20 I was not notified. SJAFCFA didn't have a meeting
11:06:38 21 regarding this.

11:06:39 22 And then, but I think that you guys should
11:06:42 23 consider -- by the way, thank you for coming down to
11:06:48 24 Stockton. That's a very good thing to do.

11:06:51 25 If I sound mad, it's not against you guys,

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11:06:52 1 it's more against the San Joaquin Area Flood Control
11:06:55 2 Agency.

11:06:55 3 And, again, I am a Pro Per acting as the
11:06:58 4 district attorney or attorney general in the State of
11:07:01 5 California and CEQA, so this case has not been approved
11:07:05 6 by CEQA. I'm submitting my brief here shortly and I
11:07:10 7 have, hyacinth isn't even one of my issues. My issue is
11:07:13 8 boater safety, water flow, aesthetic impacts, right of
11:07:20 9 way.

11:07:21 10 Erin here said that the project is next to the
11:07:24 11 Stockton Deep Water Ship Channel. It is, in fact,
11:07:27 12 within the Deep Water Ship Channel.

11:07:29 13 Dad's Point recreational area shown on the
11:07:32 14 map, they didn't show the flood walls that were on there
11:07:35 15 and if you go to the Louis Point boat ramp, this
11:07:39 16 project also includes a single sheet pile flood wall
11:07:42 17 with a concrete cap located at that point greater than
11:07:45 18 five feet high.

11:07:46 19 So the view just right there you will not be
11:07:49 20 able to see the San Joaquin River from Dad's Point
11:07:53 21 because of the view.

11:07:54 22 The defective administrative record is one of
11:07:58 23 my CEQA appeal items. The record is completely
11:08:02 24 defective. They do not include stuff. The -- down, the
11:08:07 25 attorney paid for the record, which is illegal,

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11:08:10 1 according to Black Historical Society case that says
11:08:17 2 that the agency should, it spent over \$120,000 preparing
11:08:21 3 the administrative record such that myself and Patrick
11:08:25 4 would not see some of the things.

11:08:27 5 They've redacted things left and right.

11:08:29 6 So my case is still alive. There's many
11:08:31 7 administrative remedies available to me in the future,
11:08:35 8 specifically the State Lands Commission has to give them
11:08:39 9 a lease, which is problematic, because the Stockton Deep
11:08:42 10 Water Ship Channel was conveyed, was bought by the
11:08:46 11 people and sold to the State Lands, and then the State
11:08:49 12 Lands has the right-of-way for the public trust
11:08:57 13 doctrine, recreation, commerce, navigation, not flood
11:09:00 14 control.

11:09:02 15 So and then to Mr. Villegas's --

11:09:10 16 Ms. Oehlschlager gave a different answer today. He
11:09:13 17 asked about how are they going to enforce the monitoring
11:09:15 18 of the water hyacinth.

11:09:17 19 I'll read out of the transcript from agenda
11:09:19 20 item 13. "Mr. Villegas: So the issue of legally
11:09:22 21 enforceable, there is a monitoring plan, and legally
11:09:26 22 enforceable, what does that look like? What is legally
11:09:29 23 enforceable?"

11:09:29 24 Ms. Oehlschlager states: "So CEQA is a
11:09:33 25 self-enforcing statute in a sense. Right? So when the

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11:09:36 1 agency is tasked, when the agency is doing a project on
11:09:38 2 its own, it sort of has to monitor itself in terms of
11:09:41 3 complying with the conditions."

11:09:43 4 That's the case of the state agency or local
11:09:46 5 agency moving forward with that.

11:09:50 6 If it is a private project, the agency who
11:09:51 7 approved the project is responsible for making sure that
11:09:53 8 that private entity does what it has to do and going to
11:09:56 9 do.

11:09:56 10 And that's the case whether something is an
11:09:59 11 element of the project or a mitigation measure, which
11:10:01 12 would be typically, but it's enforceable by members of
11:10:05 13 the public. Right?

11:10:06 14 "The public can take a writ of mandamus
11:10:10 15 against an agency. You have to start at the
11:10:11 16 administrative level, but essentially if SJAFCA is not
11:10:15 17 doing their job, by taking the hyacinth out in a timely
11:10:20 18 manner, someone from the public can go in and say, you
11:10:23 19 are abusing your discretion by moving forward, by not
11:10:25 20 following through on the project that you, you said you
11:10:28 21 were going to do and so you're going to build, so it's
11:10:32 22 essentially a publicly enforceable obligation."

11:10:35 23 She goes onto say --

11:10:37 24 VICE CHAIR COUNCIL MEMBER FIORINI: Mr. Gulli,
11:10:38 25 you have exhausted your time.

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11:10:40 1 Do you have any quick points, other additional
11:10:41 2 points you'd like to make?

11:10:44 3 MR. DOMINICK GULLI: Yeah, I would.

11:10:45 4 I used the four point system for making a
11:10:49 5 decision.

11:10:49 6 What's the best thing that can happen if you
11:10:50 7 go along with the staff's recommendations? Not much.
11:10:54 8 The gate moves on.

11:10:55 9 What's the worst thing that can happen if you
11:10:57 10 approve the staff's recommendations? The worst thing is
11:11:00 11 that the final letter of map revision for the gate
11:11:03 12 cannot be obtained, the U.S. Coast Guard doesn't approve
11:11:07 13 this project to which according to the record there's no
11:11:10 14 correspondence with the Coast Guard.

11:11:12 15 The State Lands Commission doesn't issue the
11:11:14 16 lease, or the funding is not obtained. In short, your
11:11:18 17 credibility is going to be tarnished if you approve this
11:11:20 18 and then someone else shoots it down or if I win in
11:11:22 19 court. Trust and believe in me.

11:11:24 20 What's the best thing that can happen if you
11:11:27 21 request for SJAFC A to redo the certification and have
11:11:30 22 the board make the determine in front of the public,
11:11:33 23 these people, and then resubmit?

11:11:36 24 Your credibility is maintained and your
11:11:39 25 decision is based on best available science and proper

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11:11:43 1 administrative procedures are adhered to.

11:11:46 2 Adaptive management, they declined to do it,
11:11:50 3 but when a project gets so expensive, right, as it is
11:11:54 4 right now and so convoluted, and so hard to get the
11:11:57 5 permits for, you have got to adapt.

11:11:59 6 And I included some slides for this program
11:12:02 7 and obviously in three minutes I couldn't do it, but I
11:12:04 8 trust that you have all reviewed those slides and
11:12:07 9 understand the engineering issues.

11:12:10 10 Mr. Sean Brooks works for me, by the way. He
11:12:13 11 is a great employee and he's absolutely right, because
11:12:16 12 when water is moving up, the law of inertia, Newton's
11:12:21 13 Law of Inertia says when an object is in motion it will
11:12:24 14 stay in motion until acted upon by an equal and opposite
11:12:28 15 force.

11:12:28 16 When it's coming up the river and hits the
11:12:30 17 Smith Canal Gate it's not going to turn around and go to
11:12:34 18 Rio Vista. It's going to keep going up because right
11:12:35 19 there where the Smith Canal Gate, the current
11:12:38 20 floodplain, the flood stage elevation has what's known
11:12:41 21 as a hydraulic jump. That hydraulic jump is going to
11:12:45 22 jump higher.

11:12:45 23 VICE CHAIR COUNCIL MEMBER FIORINI: Thank you.

11:12:47 24 MR. DOMINICK GULLI: Thank you all. Thank you
11:12:49 25 Stewards of the Delta. Please defer this thing. It is

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11:12:51 1 not ripe and ready. They've got a lot to do in order
11:12:55 2 to -- there's no sense wasting everybody's time and
11:12:58 3 money, when Mr. Soluri sues you again or sues you and
11:13:01 4 SJAFCFA again, it will be a shame. Thank you.

11:13:04 5 VICE CHAIR COUNCIL MEMBER FIORINI: Thank you.
11:13:06 6 Robert Kavanaugh.

11:13:16 7 MR. ROBERT KAVANAUGH: All right if I use this
11:13:17 8 one?

11:13:17 9 VICE-CHAIR COUNCIL MEMBER FIORINI: Yes,
11:13:18 10 that's fine.

11:13:18 11 MR. ROBERT KAVANAUGH: I am Robert Kavanaugh.
11:13:19 12 I live on Atherton Island. I live within 100 yards of
11:13:23 13 where this gate is going and I have been a proponent for
11:13:26 14 the gate for a long time. I got excited when I heard it
11:13:28 15 was going to be built, and I am really disappointed in
11:13:31 16 how long it's taken in the courts, and I guess that's
11:13:33 17 not your concern at this point in time.

11:13:35 18 But I see the gate as a break water. I served
11:13:41 19 on the Port Commission for 10 years and I've tried to
11:13:44 20 get the port director to put a five mile zone from Rough
11:13:48 21 and Ready Island all the way to the head of the channel,
11:13:50 22 but that doesn't go.

11:13:51 23 Large boats come up. We get a wake up against
11:13:54 24 the island and, of course, the erosion that's going on
11:13:59 25 both on the point, at the park and the rest. It's a

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11:14:03 1 little frightening.

11:14:04 2 I have got spots on my property that's slowly
11:14:07 3 leaning into the river. We have a launch ramp right
11:14:11 4 there at the mouth of the Smith and, needless to say,
11:14:14 5 the folks blowing in and out of there, this is going to
11:14:19 6 slow them down. So and then I heard something about
11:14:22 7 hyacinth, and I have been fighting with hyacinth for a
11:14:26 8 long, long time, but where does it come from?

11:14:27 9 It comes out of the main channel and it
11:14:30 10 washes in and then it goes up to the launch ramp around
11:14:33 11 our docks and into the cove.

11:14:35 12 Now, yeah, they're going to -- some of it's
11:14:37 13 going to get trapped in there but it's going to be one
11:14:40 14 heck of a lot less in there as a result of the gate. So
11:14:43 15 the gate is a win-win from my perspective and that's it.

11:14:48 16 Anybody got any questions?

11:14:49 17 If you want to go boating, give me a call.

11:14:51 18 VICE CHAIR COUNCIL MEMBER FIORINI: Thank you
11:14:52 19 very much. The last request I have is from Martina
11:14:52 20 Gulli.

11:15:04 21 MS. MARTINA GULLI: Hello.

11:15:05 22 VICE CHAIR COUNCIL MEMBER FIORINI: Good
11:15:05 23 morning.

11:15:05 24 MS. MARTINA GULLI: Hi there. Good morning.
11:15:07 25 I'd like to start off by thanking you for coming to

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11:15:10 1 Stockton today.

11:15:12 2 My name is Martina. I grew up here in
11:15:15 3 Stockton. I went to St. Mary's High School. I
11:15:17 4 currently work in Pleasanton, so I commute to the East
11:15:20 5 Bay every day on the 580 corridor. I am an account
11:15:25 6 recruiting manager for a construction staffing company.
11:15:27 7 I took the day off to be here to speak on behalf as a
11:15:30 8 resident of Stockton.

11:15:32 9 There was a great point that was brought up at
11:15:35 10 the November meeting, the SJAFCA meeting back in
11:15:39 11 November, and the concern was that the effect that the
11:15:42 12 gate will have on -- on the Port of Stockton. There's
11:15:47 13 been plans for the Army Corps of Engineers to deepen our
11:15:50 14 channel so that we can have our port be comparable to
11:15:54 15 the Oakland Port to bring in, you know, these large
11:15:58 16 cargo ships.

11:15:59 17 Right now driving on 580, there's lot of, you
11:16:03 18 know, semi-trucks that makes traffic really bad and I
11:16:06 19 think, you know, if as Stockton if we were able to
11:16:10 20 deepen our channel, we could bring in, you know, the
11:16:14 21 large cargo ships and not have issues with traffic.

11:16:17 22 You know, it would bring more jobs to our
11:16:19 23 community, more money, make Stockton a more desirable
11:16:23 24 place to live. There's a map here for the future plans
11:16:28 25 for the Army Corps of Engineers of what they want to do

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11:16:32 1 in regards to making Stockton a deeper channel.

11:16:35 2 And if we, you know, were to build the gate,
11:16:39 3 you know, with the levee, that wouldn't allow us to
11:16:41 4 deepen it or widen the channel to make that effective
11:16:45 5 and follow through with those plans.

11:16:46 6 So that's, that's one of the points I wanted
11:16:50 7 to bring up today.

11:16:51 8 Another is just the recreation piece of it.
11:16:54 9 You know, growing up in Stockton, playing softball at
11:16:57 10 the Louis Park, we used to have tournaments there and as
11:17:01 11 a young girl, you know, we would go to the Dad's Point
11:17:04 12 and, you know, use that as a place to go swimming and
11:17:07 13 barbecue.

11:17:08 14 And if we were to, you know, build the gate
11:17:11 15 and the levee, that would take away just another fun
11:17:14 16 recreation piece of that Stockton has to offer.

11:17:17 17 And I think that, you know, as a community we
11:17:20 18 really need to focus on what's going to be beneficial to
11:17:23 19 make Stockton a more desirable place to live and not,
11:17:26 20 you know, take away from it.

11:17:28 21 In addition it's, you know, expensive, it's
11:17:31 22 not -- there are some alternative solutions that we
11:17:36 23 could utilize that are going to be more cost effective.

11:17:38 24 I think that, you know, we should really
11:17:40 25 consider, you know, the cheaper solutions and what's

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11:17:42 1 going to be in Stockton's best interests for our future
11:17:45 2 here.

11:17:46 3 So thank you again for coming out today and I
11:17:51 4 appreciate you being here.

11:17:52 5 VICE CHAIR COUNCIL MEMBER FIORINI: Thank you
11:17:52 6 for taking the time to come.

11:17:55 7 MS. MARTINA GULLI: Thank you.

11:17:55 8 VICE CHAIR COUNCIL MEMBER FIORINI: Appreciate
11:17:56 9 your comments. Next up, Shelly Gulli.

11:18:03 10 MS. SHELLY GULLI: Hi. I am a Stockton
11:18:04 11 resident, Shelly Gulli.

11:18:08 12 You guys, this is a boondoggle. This whole
11:18:12 13 thing on this gate is a boondoggle. The same people
11:18:15 14 that want to put this gate in are the same people that
11:18:18 15 have worked on Stockton all their lives, and no one else
11:18:23 16 can get their foot in the door as far as an engineer
11:18:27 17 goes. It's a boon-doggle.

11:18:29 18 There are so many cheaper ways to do this,
11:18:32 19 People, and there are ideas.

11:18:35 20 My husband has created an idea and they
11:18:38 21 wouldn't, they didn't even read it. They did not read
11:18:41 22 it. My husband spent six months to come up with an
11:18:43 23 idea, wrote a book, a plan, and they didn't even read
11:18:47 24 it. Do you know why?

11:18:48 25 Because they already had it set in motion that

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11:18:50 1 we are going to build this gate, and you're not going to
11:18:53 2 stop it, we're building it, and they are the same --
11:18:56 3 they want to load their pockets, People. It's all about
11:18:59 4 loading their pockets. It's a boondoggle.

11:19:02 5 We do not need a \$1 million gate in Stockton.
11:19:06 6 We don't need it. I grew up in Stockton. I have lived
11:19:10 7 here all my life. There are ways, better ways to do it
11:19:14 8 and they are lying to the people. They are lying to
11:19:19 9 their residents and it's just we don't need it. There's
11:19:22 10 way more effective ways to do it.

11:19:24 11 And as I said, when my husband presented his,
11:19:28 12 his book or the plan for what he had, they did not read
11:19:32 13 it. They already had in motion who they were going to
11:19:36 14 pick.

11:19:37 15 Yes, I don't want to mention the engineering
11:19:40 16 firm, you probably already know who it is. They said,
11:19:45 17 "We are giving the job to them, they're going to do it."

11:19:48 18 He has a hard time getting his foot in the
11:19:50 19 door. He is single. He's moved here from
11:19:52 20 Massachusetts. Nobody knows him. Very educated man and
11:19:57 21 worth listening to. He's got more character and honesty
11:20:01 22 than anybody I know and he has tried to tell the truth
11:20:05 23 to these people and say, hey, let's do this, but they
11:20:07 24 don't want to hear it. They don't want a better idea.
11:20:10 25 Why? Why do they not want a better idea? Because they

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11:20:13 1 want to load their pockets like they have been loading
11:20:16 2 them, and no one has ever checked their work.

11:20:19 3 All their work that they have done all this
11:20:21 4 time, no one has ever checked their work. They send out
11:20:25 5 experts. Oh, send an expert here, send an expert there.
11:20:29 6 Oh, we'll just send our expert out and costing, you
11:20:32 7 know, millions of dollars.

11:20:34 8 So that's all I want to say. Thank you for
11:20:35 9 coming.

11:20:36 10 VICE CHAIR COUNCIL MEMBER FIORINI: Yeah.
11:20:36 11 Thank you.

11:20:40 12 MS. SHELLY GULLI: Oh, and I forgot to say
11:20:42 13 that, that where the gate they want to put up, it's
11:20:45 14 going to be really ugly. It's not -- aesthetically,
11:20:48 15 it's ugly. It's big and it's ugly.

11:20:50 16 And there's a beach there and it's a beautiful
11:20:56 17 beach for -- I see a lot of the less fortunate people
11:21:00 18 coming and that's where they like to swim. That is
11:21:03 19 their swimming area. They don't have pools and that's
11:21:06 20 their place to go swimming.

11:21:08 21 We can't do that. There's just better ways.
11:21:12 22 Just look into some other opportunities, that's all I'm
11:21:15 23 asking, is look into other options. Thank you again.
11:21:18 24 Bye.

11:21:19 25 VICE CHAIR COUNCIL MEMBER FIORINI: Thank you.

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11:21:21 1 Do I have any others who wish to address the Council?

11:21:21 2 (No response.)

11:21:27 3 VICE CHAIR COUNCIL MEMBER FIORINI: Okay.

11:21:28 4 Hearing no further requests, we will now close
11:21:30 5 the public comment portion of this hearing.

11:21:35 6 We'll now hear from any Council Members who
11:21:38 7 wish to speak on proposed findings. Any Council Members
11:21:41 8 wish to speak?

11:21:41 9 (No response.)

11:21:50 10 VICE CHAIR COUNCIL MEMBER FIORINI: Okay.

11:21:51 11 Thank you, Members.

11:21:51 12 Do I have a motion to adopt the proposed
11:21:55 13 determination, recommended by staff?

11:21:58 14 COUNCIL MEMBER JUDGE DAMRELL: Submitted.

11:22:01 15 COUNCIL MEMBER WEINBERG: Second.

11:22:02 16 VICE-CHAIR COUNCIL MEMBER FIORINI: Okay. We
11:22:02 17 have a motion and a second. Any discussion on the
11:22:04 18 motion?

11:22:06 19 COUNCIL MEMBER JUDGE DAMRELL: Looking at --

11:22:10 20 VICE CHAIR COUNCIL MEMBER FIORINI: Mike?

11:22:12 21 COUNCIL MEMBER JUDGE DAMRELL: Thank you. We
11:22:15 22 are not a free agency as an appellate body, this is a
11:22:19 23 quasi, quasi-judicial body at this point, and we are
11:22:24 24 constrained by the law that the Delta Reform Act, and
11:22:28 25 that is paramount, and as a result we're not here to

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11:22:34 1 determine if this project is the best project or if it's
11:22:38 2 right or wrong, but it doesn't actually, is it actually
11:22:43 3 consistent with the Delta Reform Act? That's what our
11:22:46 4 job is.

11:22:47 5 So I think that's very important that we keep
11:22:49 6 our eye on the ball here with that respect. I have
11:22:53 7 nothing further to add.

11:22:55 8 COUNCIL MEMBER ASSEMBLYMAN GATTO: Everybody,
11:22:57 9 it's terrific to be here in Stockton.

11:23:00 10 My mother-in-law grew up in Stockton, but I
11:23:02 11 won't hold that against the city. And both my
11:23:09 12 mother-in-law and father-in-law are graduates of UOP, so
11:23:10 13 it's wonderful to be here.

11:23:11 14 And it was great seeing the city again today
11:23:14 15 and last night, and I want to thank all of the members
11:23:17 16 of the public who came here, because we are a government
11:23:19 17 body and even on something like this, where we have a
11:23:23 18 narrow focus and a narrow vote before us, it's really
11:23:26 19 important to hear from all of you.

11:23:27 20 Mr. Gulli, you made some really good points
11:23:30 21 and just terrific points and your family did too and I
11:23:33 22 just want to thank you for all of the effort you put
11:23:35 23 into this, because I think your knowledge of the
11:23:37 24 situation is really profound and I think it helps inform
11:23:42 25 the government a lot better, and I hope the agency does

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11:23:44 1 consider your proposal and for this or maybe future
11:23:47 2 projects or something, I do hope they look into it.

11:23:50 3 And Mr. Meserve, you made, or Mr. Soluri, you
11:23:53 4 made some really fascinating legal points. I am going
11:23:57 5 to read that case that, that Lotus case. Even though I
11:24:03 6 am going to be taking the advice of our counsel that,
11:24:06 7 you know, I don't think we're making a CEQA
11:24:08 8 determination today, I understand your point that it's
11:24:10 9 analogous, it's an analogous part of the law, but, but
11:24:15 10 this is a, I think this is a rather tough decision, but
11:24:20 11 I think the staff did a very thorough job as well
11:24:23 12 briefing us and I want to thank you as well for doing
11:24:25 13 that.

11:24:25 14 And, again, thanks to everybody who came out
11:24:27 15 today.

11:24:29 16 VICE CHAIR COUNCIL MEMBER FIORINI: Any other
11:24:32 17 comments? Then let's proceed to the vote.

11:24:36 18 The vote would be to adopt the proposed
11:24:40 19 determination recommended by staff.

11:24:43 20 COUNCIL MEMBER WEINBERG: Weinberg, aye.

11:24:45 21 COUNCIL MEMBER ASSEMBLYMAN GATTO: Gatto, aye.

11:24:46 22 COUNCIL MEMBER JUDGE DAMRELL: Damrell, aye.

11:24:48 23 VICE CHAIR COUNCIL MEMBER FIORINI: Fiorini,
11:24:50 24 aye.

11:24:50 25 COUNCIL MEMBER VILLEGAS: Villegas, aye.

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11:24:53 1 CHAIR FIORINI: Okay. We have a five-zero
11:24:54 2 vote. The Council has denied the appeal.

11:24:57 3 SJAFCA may proceed with the Smith Canal Gate
11:25:01 4 Project and the ex parte communication restriction
11:25:04 5 surrounding this appeal is lifted. The parties with
11:25:08 6 respect to administrative next steps, our clerk will
11:25:11 7 certify the Council's official determination.

11:25:14 8 Once that is done, Executive Officer Jessica
11:25:18 9 Pearson will transmit the certified determination to you
11:25:22 10 via the service list and we'll also post it on the
11:25:24 11 Council's web page for the specific covered action
11:25:27 12 appeal.

11:25:28 13 As I mentioned earlier today, once we have the
11:25:30 14 rough transcript, we'll share it with you via the
11:25:33 15 service list and post it on our web page in
11:25:36 16 approximately two weeks.

11:25:39 17 I want to thank all of the participants and
11:25:41 18 the attendees. This hearing is now adjourned and we'll
11:25:46 19 take a ten minute recess.

11:31:42 20 (Whereupon the proceedings were
11:31:42 21 concluded at 11:31 a.m.)

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CERTIFICATE OF CERTIFIED SHORTHAND REPORTER

I, LINDA J. HART, a Certified Shorthand Reporter, licensed by the State of California, being empowered to administer oaths and affirmations pursuant to Section 2093(b) of the Code of Civil Procedure, do hereby certify:

That the said proceeding was taken before me in shorthand writing, and was thereafter transcribed, under my direction, by computer-assisted transcription;

That the foregoing transcript constitutes a full, true and correct record of the proceedings which then and there took place;

That I am a disinterested person to the said action;

IN WITNESS WHEREOF, I have hereunto subscribed my signature on this 27th day of March, 2019.



LINDA J. HART, RMR/CRR
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March 27, 2019

Job No. 19-8316 ljh

DELTA STEWARDSHIP COUNCIL
ATTN: ERIN MULLIN
980 Ninth Street, Suite 1500
Sacramento, California 95814

--o0o

Re: PUBLIC HEARING, Consideration of Proposed Findings
Regarding the Appeal of the Certification of Consistency
for the Smith Canal Gate Project
Date taken: March 21, 2019

--o0o--

Dear Ms. Mullin:

We wish to inform you of the disposition of this
original transcript. The following procedure is being
taken by our office.

X The sealed original is being
forwarded to your office.

Sincerely,

L.J. HART & ASSOCIATES, INC.
BARRON & RICH
Certified Shorthand Reporters

cc: ERIN MULLIN

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