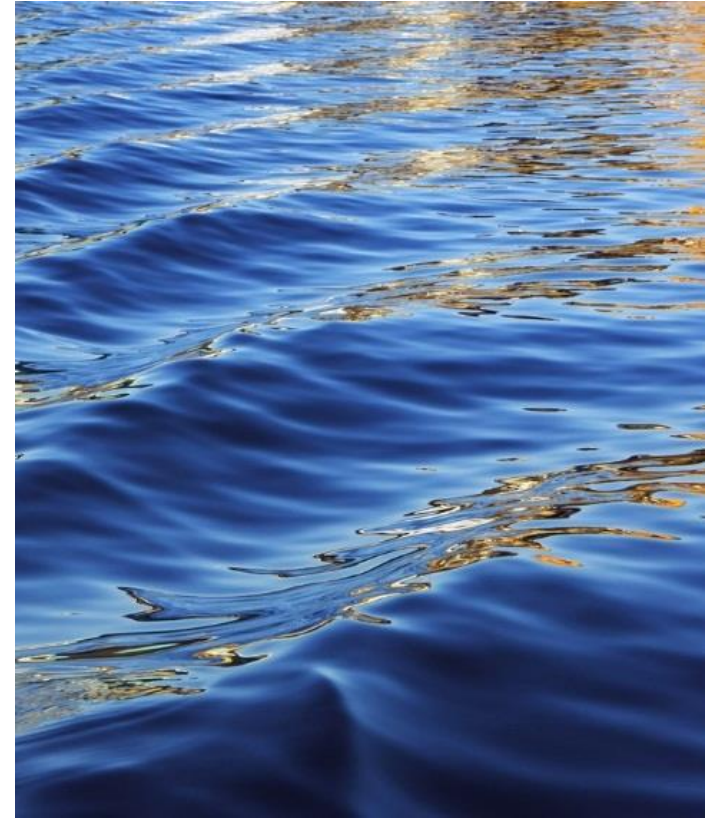




# Central Delta Water Agency Consistency Appeal

Lookout Slough Consistency Appeal  
(Cert. ID: C20215)  
May 20-21, 2021



# Standard of Review: “SUBSTANTIAL EVIDENCE” is **NOT A “RUBBER STAMP” STANDARD**

**“Substantial Evidence” must be of ponderable legal significance, reasonable, credible, and of solid value.** (*Kuhn v. Dept. of General Services* (1994) 22 Cal.App.4th 1627, 1633.)

**Substantial Evidence is not the same as *any* evidence, but “substantial proof of the essentials which the law requires”** (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal. App. 3d 864, 871.)

**“Substantial Evidence” review focuses on the quality, rather than the quantity, of the evidence.** (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal. App. 3d 864, 871.)

**Speculation and conjecture are not substantial evidence.** (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.)

**Inferences may constitute substantial evidence *only* if they are the product of logic and reason.** (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651.)

**An absence of evidence is not the equivalent of substantial evidence.** (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 655.)

## Standard of Review “**SUBSTANTIAL EVIDENCE**” Applies Only to Disputed *Fact* Issues

“Substantial Evidence” Standard of review applies only to disputed questions of fact. (*Winograd v. American Broadcasting Co.* (1998) Cal.App.4th 624, 632.)

Interpreting the Delta Reform Act and the Delta Plan involves questions of law that are reviewed “De Novo” under the Independent Standard of Review, without deference to DWR. (*People ex rel. Lockyer v. Shamrock Foods Co.* (2000) 24 Cal.4th 415, 432; See *PG & E Corp. v. Public Util. Comm’n* (2004) 118 Cal.App.4th 1174, 1194.)

The DSC, *not* DWR, is the agency charged with implementation of the Delta Reform Act, including creation of the Delta Plan. (See Water Code § 85059.)

# DWR Failed to Use BAS (G P1 (b)(3))

**Six criteria:**

**relevance**

**inclusiveness**

**objectivity**

**transparency and openness**

**timeliness**

**peer review**

(23 CCR, § 5001, subd. (f).)

# DWR Failed to Use BAS (G P1 (b)(3))

Model Claims to be predictive but is not. Model only replicates EC variance at “some locations”.

Lookout Slough Tidal Habitat Restoration and Flood Improvement Project: Modeling EC Impacts

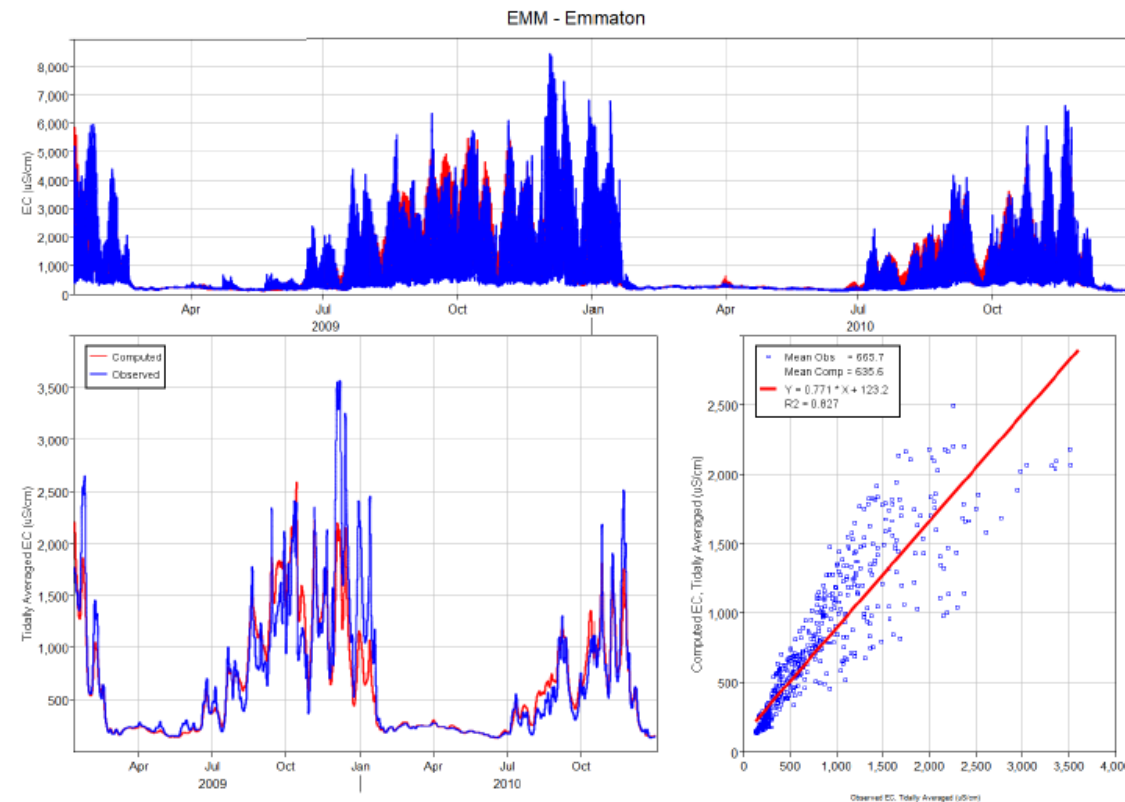
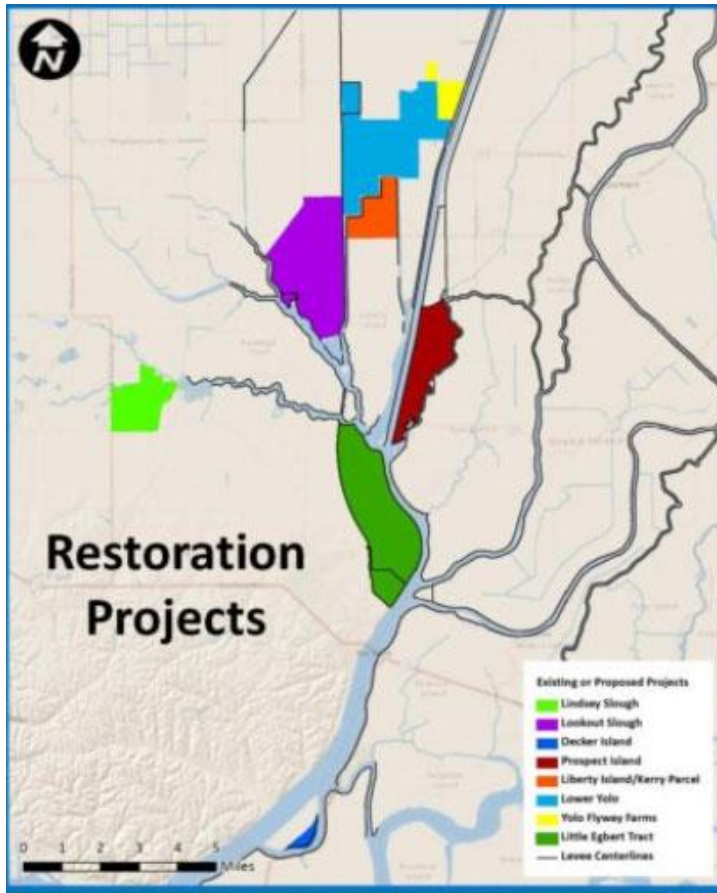


Figure 115 Comparison of modeled and observed EC at EMM, the Sacramento R at Emmaton 2009 - 2010.

# G P1 (b)(3) (cont.)

Analysis does not include cumulative restoration



DWR has failed to provide substantial evidence that the Project is consistent with G P1 (b)(3).



# DWR Failed to Reduce Reliance on the Delta (WR P1)



## Project: Lookout Slough Levee Setback

**Description:** Per Governors Water Action Plan (CWAP), increase flood protection in the Delta and Statewide. The Lookout Slough Levee Setback (LSLS) Project is a 3-mile long flood risk reduction portion of a multi-benefit project known as the Lookout Slough Tidal Habitat Restoration and Flood Improvement (LSTHRFI) Project to restore delta smelt habitat in the lower Yolo Bypass. The LSLS portion of the project will be funded by Proposition 1 and 68. The remaining portion of the LSTHRFI project will be funded by the DWR Fish Restoration Program associated with the operation of the State Water Project (SWP), in accordance with USFWS 2008 Delta Smelt Biological Opinion. The SWP portion of the LSTHRFI project will include constructing the levee setback to the current authorized height known as the 1957 Water Surface Elevation (WSE). The Proposition 1 and 68 funds will construct additional levee height to raise the level of flood protection to the higher 100-year plus 1 foot WSE, to meet the objectives of the Central Valley Flood Protection Plan. In addition, the Lookout Slough Levee Setback project will construct alterations to the existing levee system to facilitate additional flood routing capability through the Lower Yolo Bypass out to Suisun Bay. The LSLS project will have a budget of \$23,900,000. Total project budget includes State support costs for project implementation.

**Reference Number:** 3860-PM-167

**Implemented By:** Department of Water Resources

**Objective:**

**Type:** Infrastructure Improvement, Other

**Total Cost:** \$23,900,000.00

# WR P1 (cont.)

★ SUPPLEMENTAL ★  
**CALIFORNIA**  
**GENERAL**  
**ELECTION**  
**TUESDAY, NOVEMBER 4, 2014**

This guide is a supplement to the first Official Voter Information Guide.  
It contains information about Proposition 1, which was added to the ballot after the first voter guide was printed.

★ OFFICIAL VOTER INFORMATION GUIDE ★

*Certificate of Correctness*

I, Debra Bowen, Secretary of State of the State of California,  
hereby certify that this guide has been prepared in accordance with the law.

Witness my hand and the Great Seal of the State in Sacramento, California, this 12th day of September, 2014.



*Debra Bowen*



Debra Bowen  
Secretary of State

★ SUPPLEMENTAL ★



# WR P1 (cont.)

Prop 1 Water Bond. Funding for Water Quality, Supply, Treatment, and Storage Projects.

1

## Text of Proposed Law

### CHAPTER 11. FLOOD MANAGEMENT

79780. The sum of three hundred ninety-five million dollars (\$395,000,000) shall be available, upon appropriation by the Legislature from the fund, to the Department of Water Resources and the Central Valley Flood Protection Board for the purpose of statewide flood management projects and activities. Funds shall be allocated to multibenefit projects that achieve public safety and include fish and wildlife habitat enhancement. The Department of Water Resources shall make its best effort to coordinate this funding with proceeds from Propositions 84 and 1E.

79781. Of the funds authorized by Section 79780, two hundred ninety-five million dollars (\$295,000,000) shall be available to reduce the risk of levee failure and flood in the Delta for any of the following:

(a) Local assistance under the Delta levee maintenance subventions program pursuant to Part 9 (commencing with Section 12980) of Division 6, as that part may be amended.

(b) Special flood protection projects pursuant to Chapter 2 (commencing with Section 12310) of Part 4.8 of Division 6, as that chapter may be amended.

(c) Levee improvement projects that increase the resiliency of levees within the Delta to withstand earthquake, flooding, or sea level rise.

(d) Emergency response and repair projects.

### Analysis by the Legislative Analyst

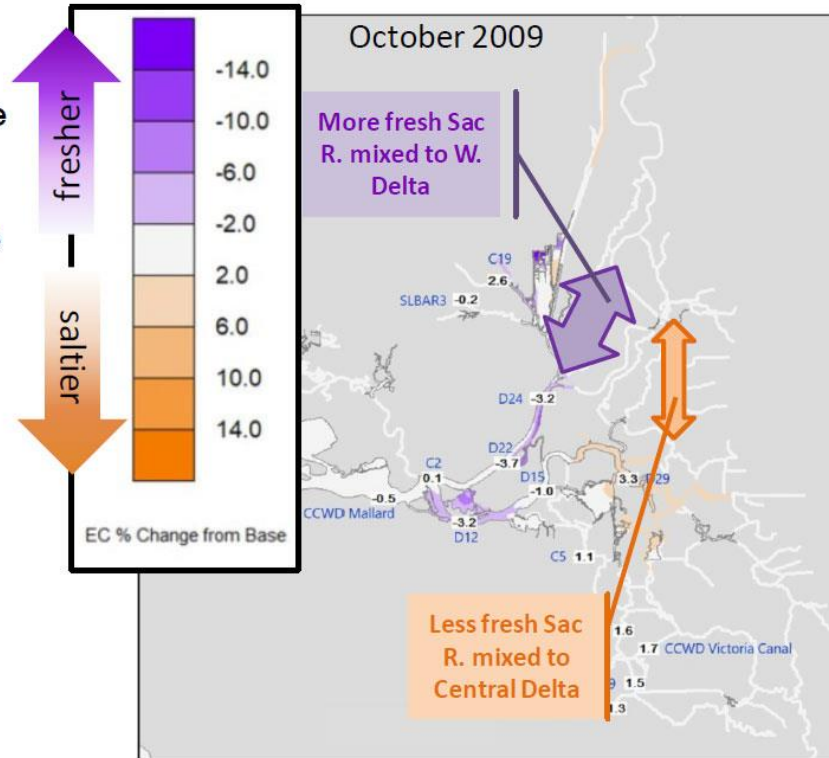
could be spent on flood control projects anywhere in the state, \$295 million is set aside to improve levees or respond to flood emergencies in the Delta.

DWR has failed to provide substantial evidence that the Project is consistent with ER P2

# DWR Failed to Follow Delta Flow Objectives(ER P1)

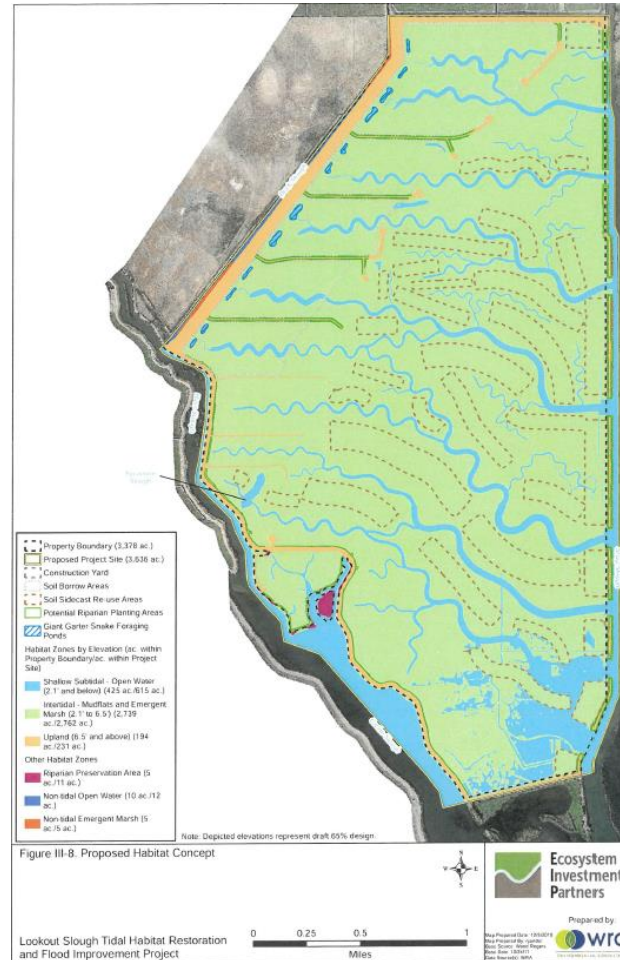
## Predicted Percentage Change in EC

- Modeling results of % change in EC between Base and Proposed Project shown as Delta-wide maps for all three years in July and October
- Delta-wide mapping shows potential EC changes for agricultural users within the Delta



DWR has failed to provide substantial evidence that the Project is consistent with ER P1

# DWR Failed to Restore Habitats at Appropriate Elevations (ER P<sub>2</sub>)



DWR has failed to provide substantial evidence that the Project is consistent with ER P<sub>2</sub>

# DWR Failed to Avoid Introduction of and Habitat for Nonnative Species (ER P5)

## **Response 10-8:**

See Master Response 3, *Local Water Diversions and Special-status Fish Species*.

The Draft EIR analyzes direct and indirect impacts to biological resources, including fish predation by a variety of species, in Draft EIR Section IV.D, *Biological Resources* (pages IV.D-1 through IV.D-90); cumulative impacts are analyzed in Section V.3.c (page V-8 through V-11). On page IV.D-85 of the Draft EIR, it was noted that the increase in wetland habitat was expected to increase native fish growth rates, thereby helping native fish grow past the “mouth gape” size of non-native predators. Additionally, page IV.D-84 of the Draft EIR states that the Project has been designed to favor native fish species while discouraging establishment and colonization by non-native species, which could prey on the special-status fish. While it was noted that the new habitat would also provide foraging areas for wildlife species that consume fish such as egrets, herons, and otters, page IV.D-85 of the Draft EIR concluded that the Proposed Project would have an overall benefit to native fish, and less-than-significant impacts to special-status fish species.

The Draft EIR Appendix H, *Fish Study Restoration Basis of Design*, includes a Project-specific study that discusses how the Proposed Project was designed and analyzed to provide the greatest potential benefit for native fish. Currently there is no accepted or workable approach in the region that would fully exclude

harmful invasive and predatory species while still allowing Delta Smelt open access (Appendix H, page 6). While complete control and exclusion of harmful invasive species and non-native predators is not feasible, the best available science states that high levels of hydrologic connectivity and habitat heterogeneity should be targeted to promote native fish species (Moyle et al 2010; Appendix H, page 7). To help assure habitat connectivity and heterogeneity in accordance with the best available science, nine large breaches are designed along the Shag Slough Levee, ranging in width up to approximately 575 feet. Such large breaches allow water to slowly enter and exit the site. Numerous, enlarged breaches avoid creating high velocity funnels that can disorient fish as they enter or exit the site. Such channel geometry also favors native fish species with dendritic channels. Constructed channels have been designed to be large and allow for tidal exchange, maximizing primary productivity while minimizing the potential for non-native species establishment (page IV.D-85). Therefore, the best available science as well as the input from the area’s leading scholars and agency staff have been consulted in order to assure the design is as beneficial as possible to native fish populations (Appendix H, page 2).

The information and analysis in the Sommer article were considered in the preparation of the Draft EIR: Footnote 37 on Draft EIR page IV.D-85 and Footnote 50 on page IV.D-88 cite this article, and a full reference for it is provided in Draft EIR Chapter IX, *References* (page IX-7). The Vogel article is not cited in the Draft EIR but was reviewed but not considered as relevant as the other studies cited since it contains results for a different geographic area and restored habitat.



## ER P<sub>5</sub> (cont.)

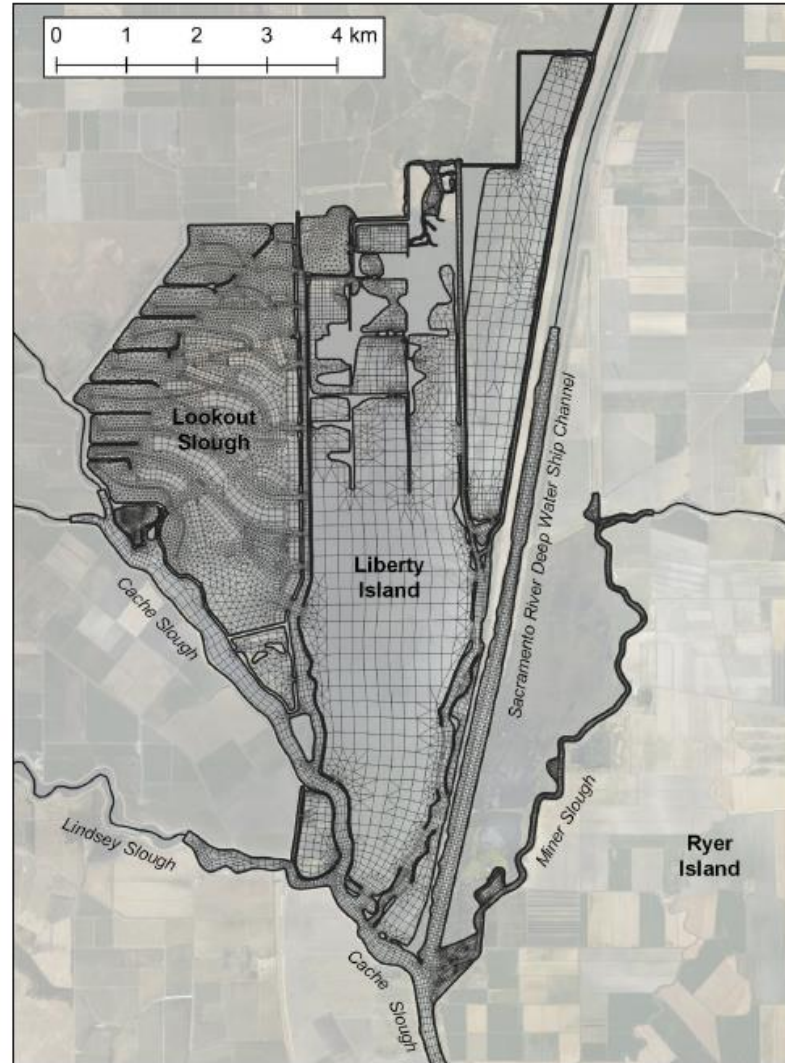
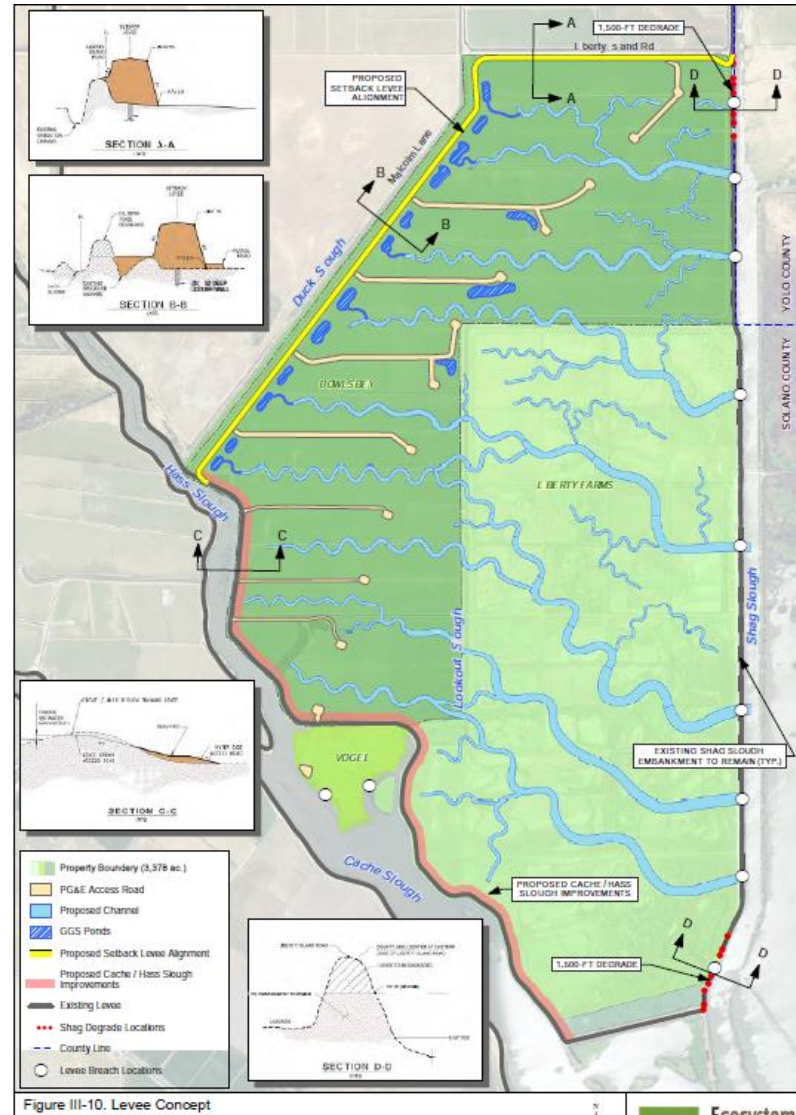


Figure 3 Detail view of the model configuration with Lookout Slough restoration.

# ER P5 (cont.)



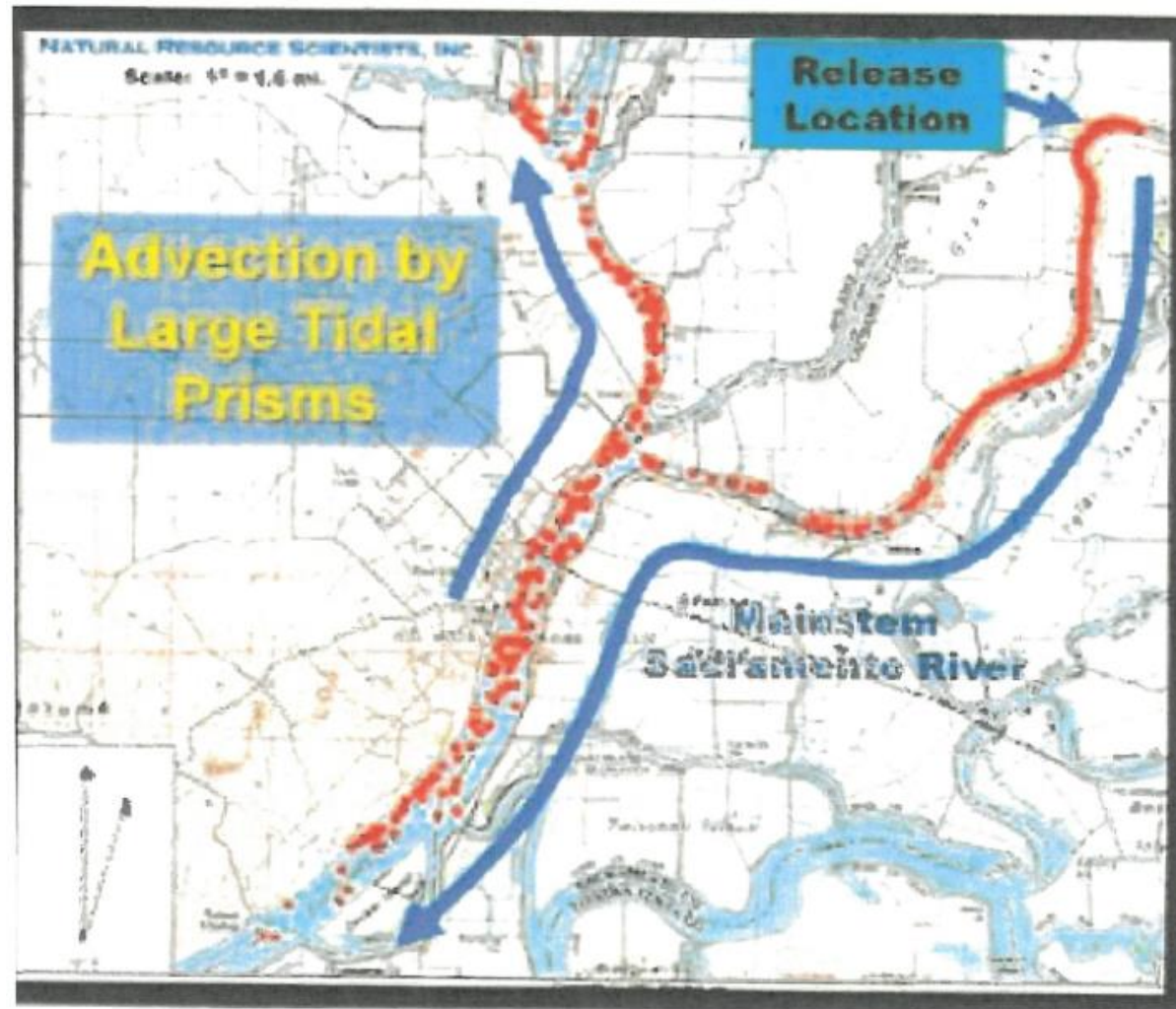


## ER P5 (cont.)



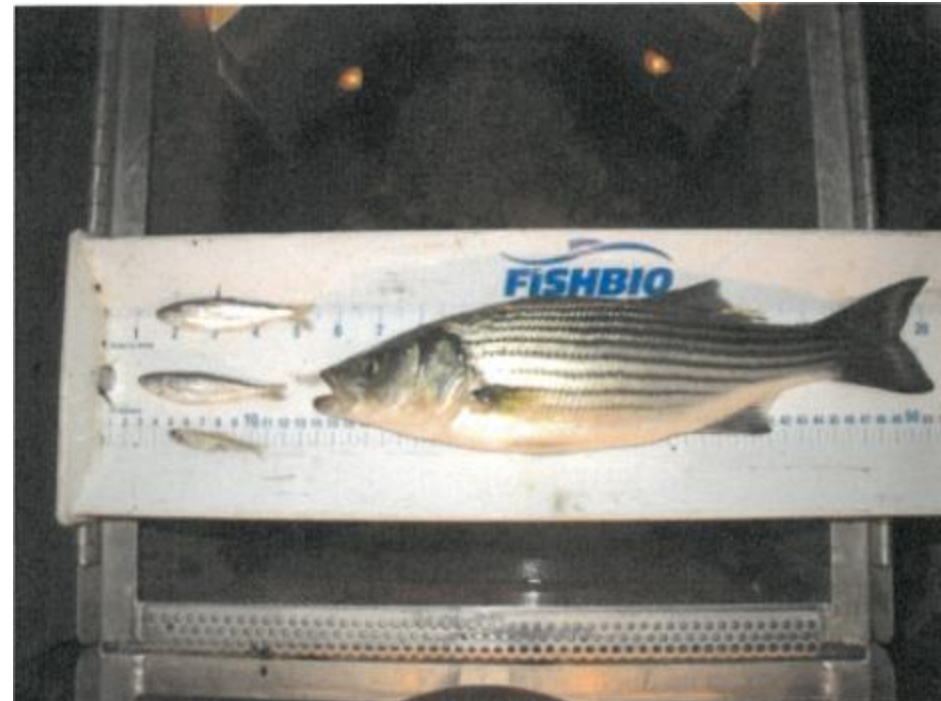
re 41. Sacramento pikeminnow (4 pounds) on left (photo by Dave Vogel), striped bass (38 pounds) in 1 to by Matt Manuel), and largemouth bass (8.9 pounds) on right (photo by Dave Vogel).

## ER P5 (cont.)

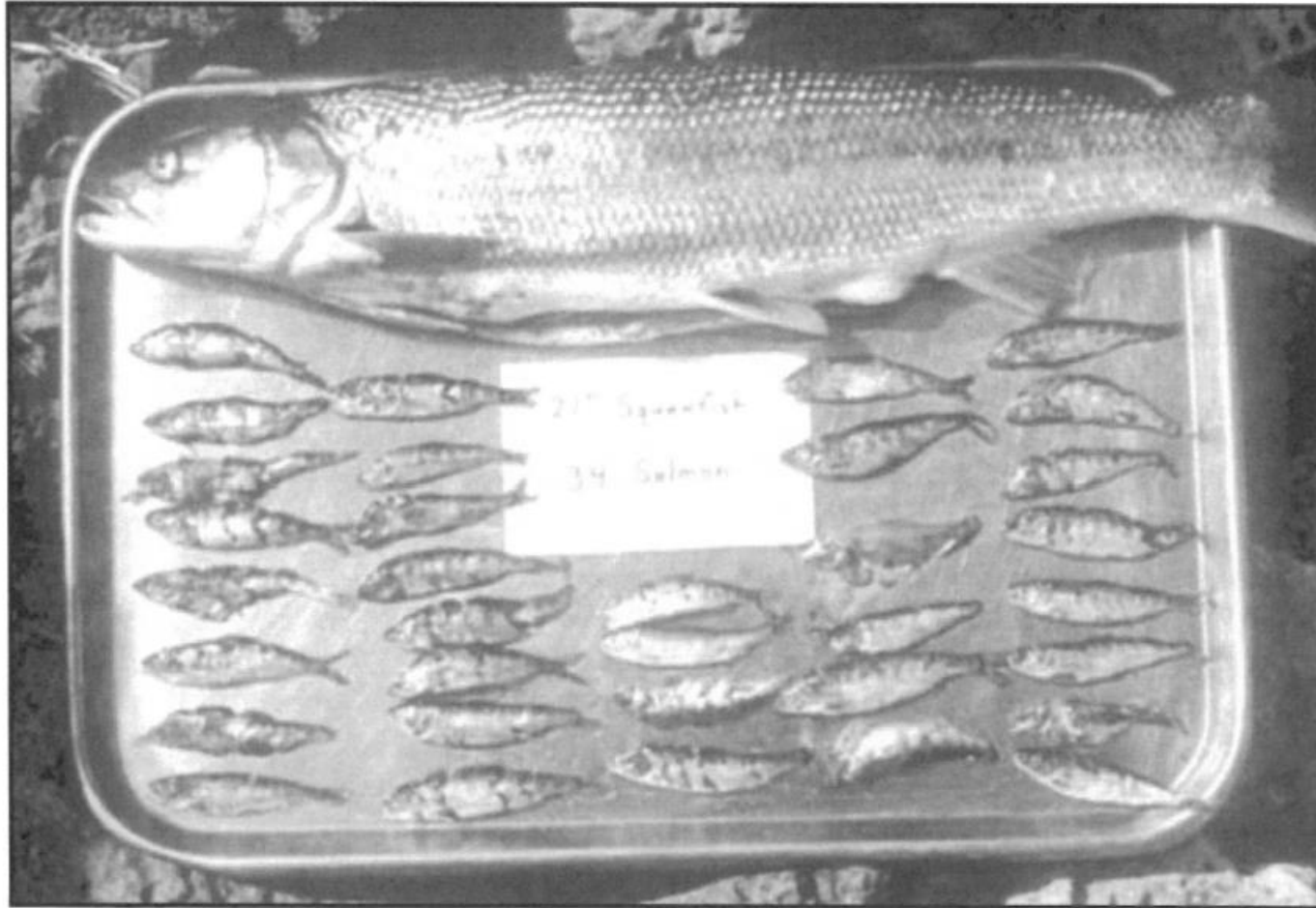




## ER P<sub>5</sub> (cont.)



## ER P5 (cont.)



A 21-inch long Sacramento River pikeminnow (previously called squawfish) captured off Diversion Dam and 34 juvenile salmon removed from its stomach. Photo by Dave V.

## ER P<sub>5</sub> (cont.)

The survival data from the study is as follows:

Release Group	1998 (53,000)	1999 (105,000)	2000 (55,000)
Yolo Bypass	75	136	27
Sacramento River	35	138	47
Survival Ratio	2.14	0.99	0.57

Ted R. Sommer, William C. Harrell and Matthew L. Nobriga, Habitat use and Stranding Risk of Juvenile Chinook Salmon on a Seasonal Floodplain, 2005.

**DWR has failed to provide substantial evidence that the Project is consistent with ER P<sub>5</sub>**

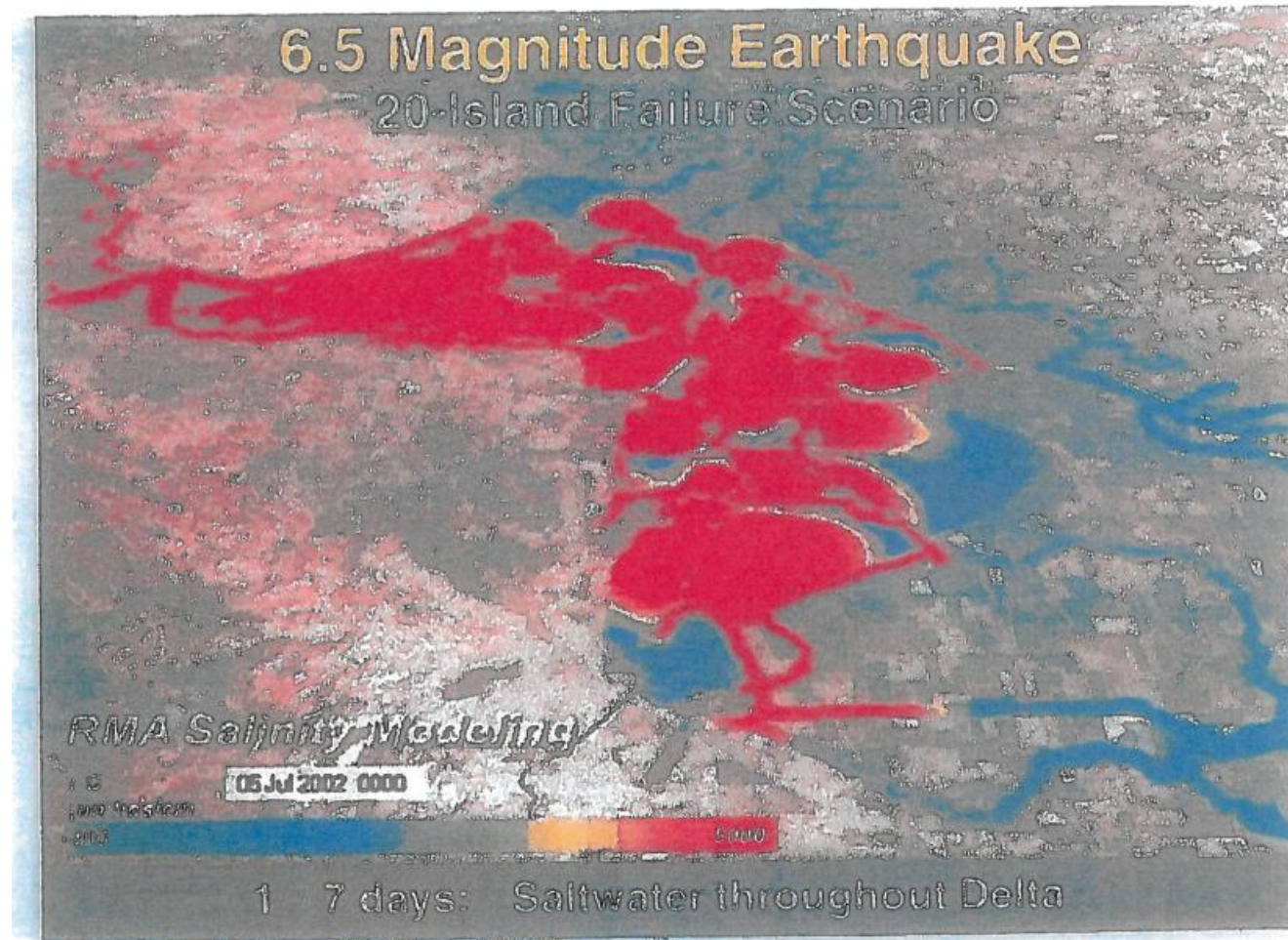
## DWR Failed to Respect Local Land Uses (DP P2)

- Water Quality Degradation is inconsistent with Respecting Local Land Uses
- Use of limited Flood Funding to meet Biological Opinion requirements is inconsistent with Respecting Local Land Uses

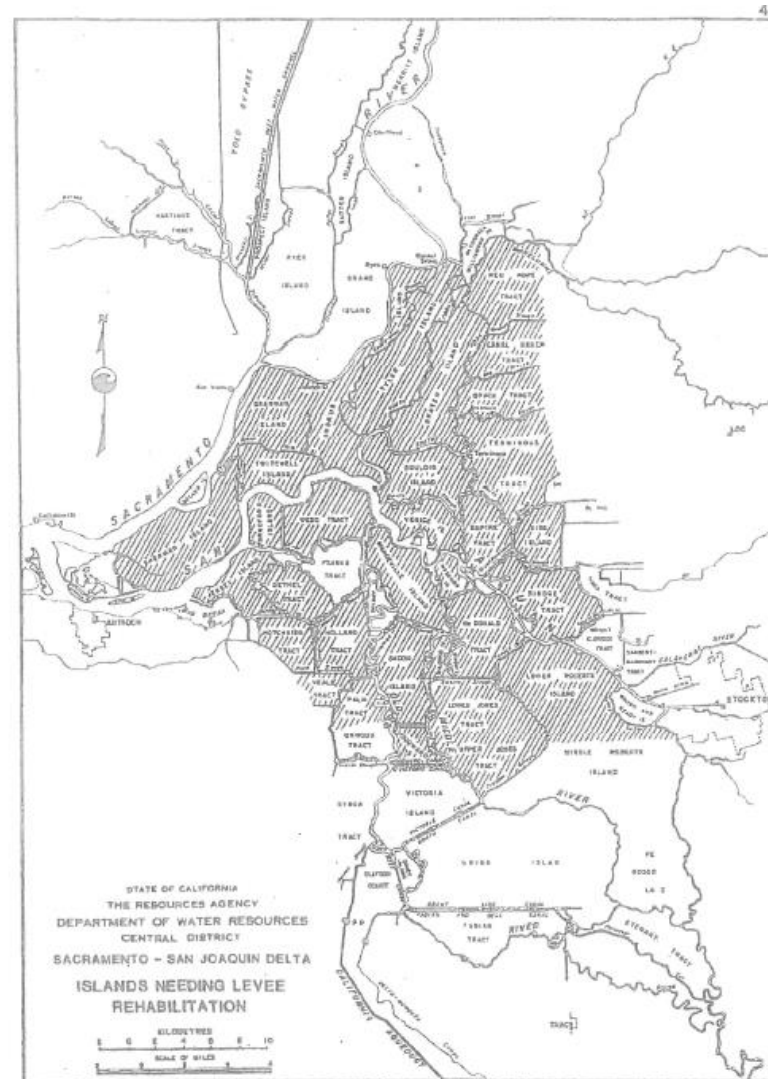
DWR has failed to provide substantial evidence that the Project is consistent with DP P2



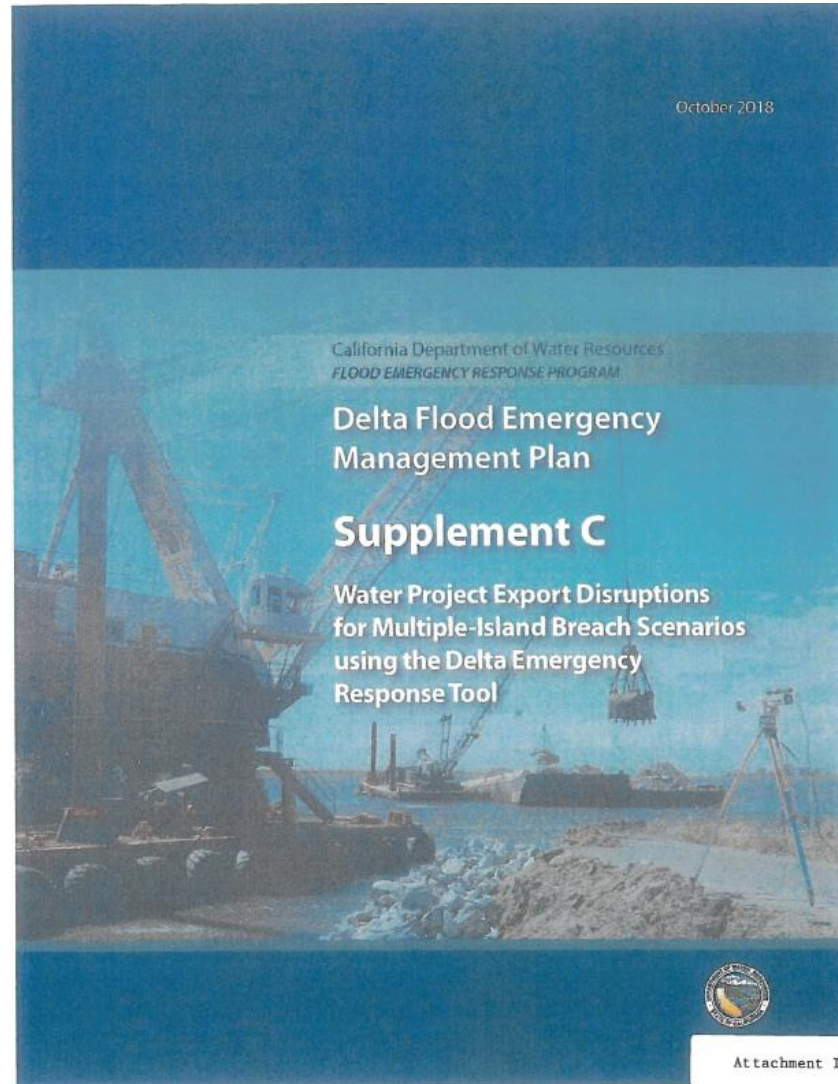
# DWR Failed to Properly Prioritize State Investments in Delta Levees (RR P1)



## RR P1 (cont.)



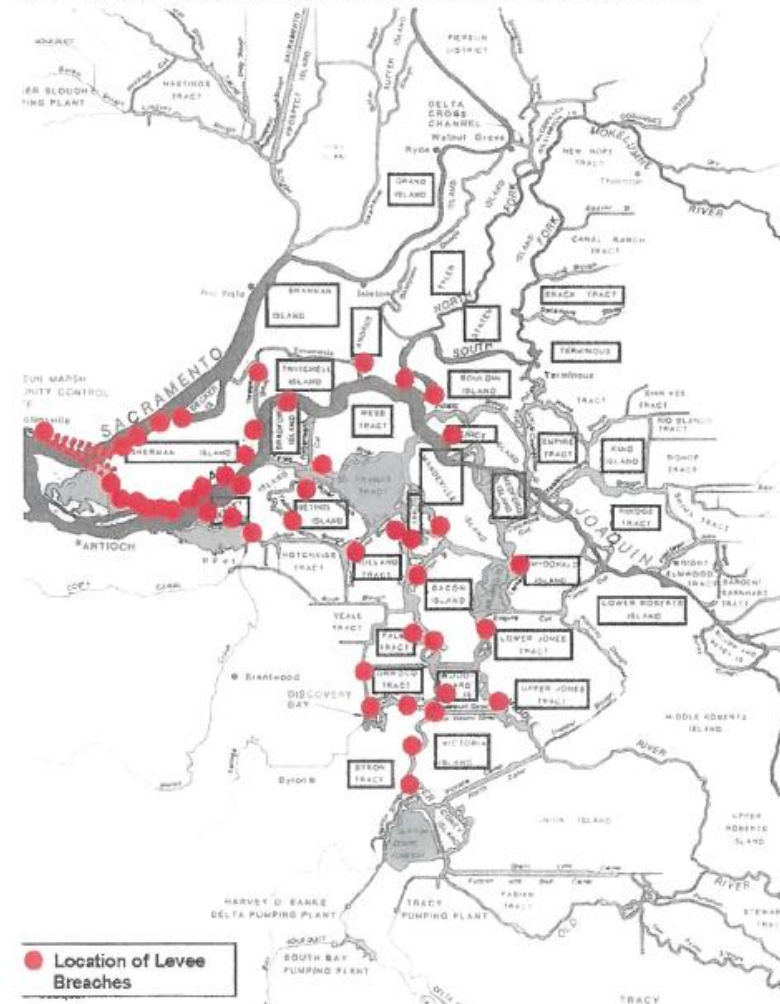
## RR P1 (cont.)





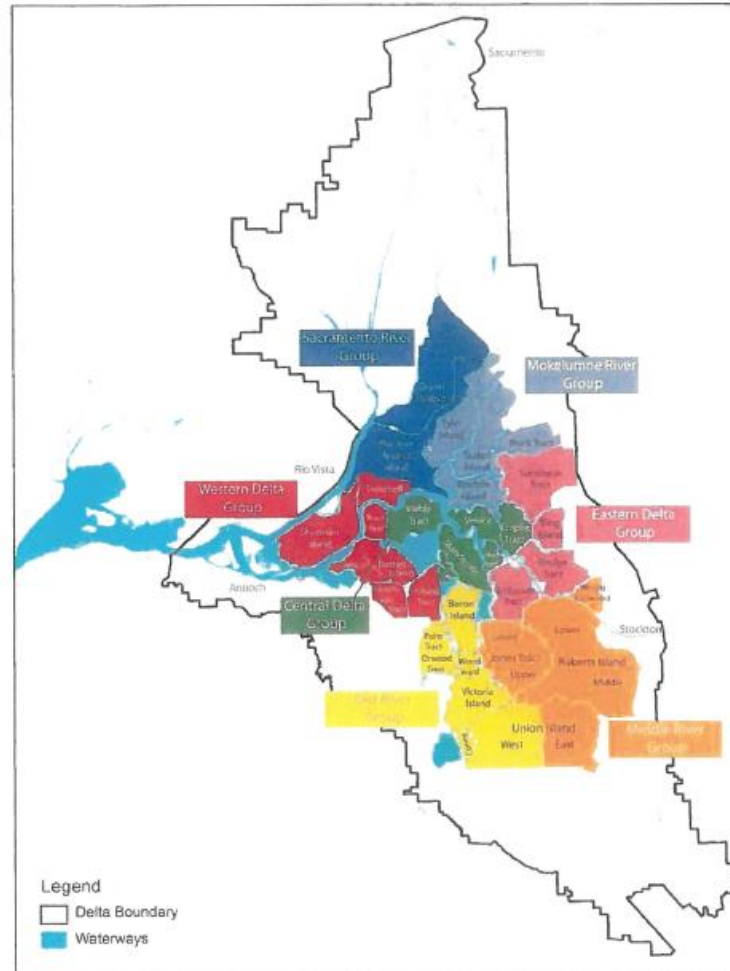
## RR P1 (cont.)

Figure 1: Scenario 1 - 20 Island/ 50 Breach Scenario - Levee Breach Locations (JBA et al., 2005)



## RR P1 (cont.)

Figure 5: Island Groupings used for Scenarios 5 - 11



**DWR has failed to provide substantial evidence that the Project is consistent with RR P1**



# Questions?

Lookout Slough Consistency Appeal  
(Cert. ID: C20215)  
May 20-21, 2021

