

JULY 2021

Public Hearing Regarding Appeals of the Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202105)



**Delta
Stewardship
Council**

A CALIFORNIA STATE AGENCY

Overview

Staff presenters

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- Covered action authority and process
- Summary of staff report and Proposed Determination
- Staff analysis and draft recommendation
 - *Staff recommends that the Council adopt the Proposed Determination, which contains findings remanding the matter, in part, and denying the appeals, in part.*

The Council's Covered Actions Authority

2009 Delta Reform Act

- Established the coequal goals
- Established the Council and authorized the Council to develop and implement the Delta Plan
- Granted Council regulatory and appellate authority over covered actions
- Regulatory policies must meet objectives the Legislature said were inherent in the coequal goals
- State and local agencies must demonstrate consistency with Delta Plan policies when carrying out, approving, or funding covered actions, prior to implementation

Certifications and Appeals

2009 Delta Reform Act

Certification of Consistency

- State or local public agency determines if a project is a covered action
- Covered actions require written certification with detailed findings as to whether the covered action is consistent with the Delta Plan

Appeals

- Any person who claims a covered action is inconsistent with the Delta Plan may file an appeal within 30 days
- Appeal must include specific factual allegations

Certifications and Appeals Noticed and Listed on Council Website

- <https://coveredactions.deltacouncil.ca.gov>

Hearings and Determination

2009 Delta Reform Act

- Council must conduct a hearing on the appeals within 60 days of filing
- Council must make a decision regarding appeals within 60 days of the hearing
- Determination options:
 - *Deny the appeals* – the certifying agency may proceed with implementation
 - *Remand the matter for reconsideration* – if the certifying agency decides to proceed with the action, as modified to respond to the findings of the Council, the agency shall file a revised Certification of Consistency addressing the Council's findings prior to proceeding with the action.
- Council or Executive Officer may also dismiss appeals that raise non-appealable issues, are outside the Council's jurisdiction, or that fail to provide required specificity to support the appellant's claims

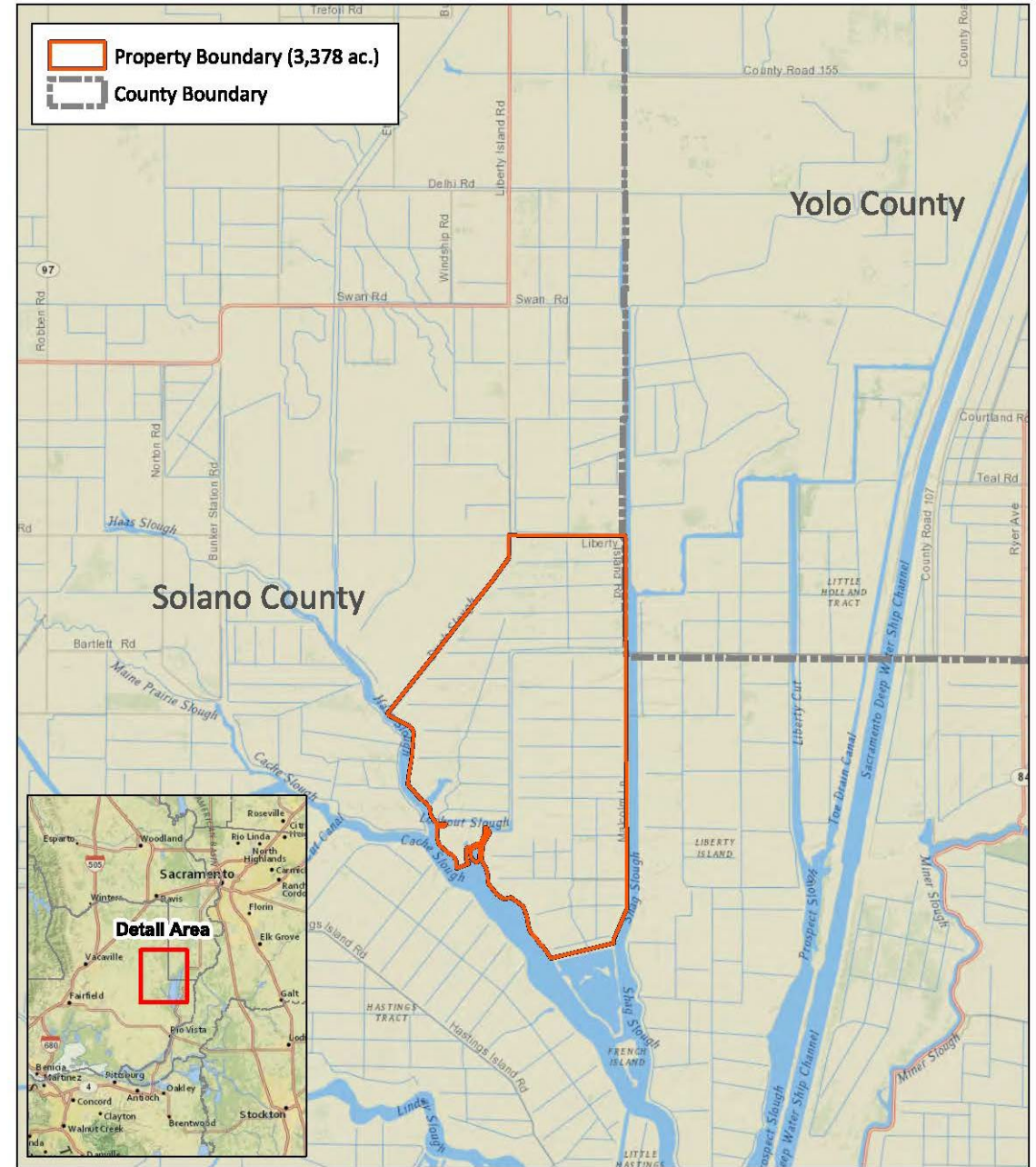
Substantial Evidence

Standard of Review

- The Council must make specific written findings either denying the appeal or remanding the matter to the state or local public agency for reconsideration based on the finding that the certification of consistency is not supported by substantial evidence in the record before the agency that filed the certification. (Wat. Code, § 85225.25.)
- Substantial evidence means evidence that is reasonable in nature, credible, and of solid value, and includes facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. Speculation or conjecture alone is not substantial evidence.
- The Council reviews a certification of consistency to determine whether it is supported by the administrative record, rather than simply reviewing it for error. The entire record will be reviewed, including evidence detracting from the decision. The Council does not substitute its own findings or inferences for the Department's.
- Appellant carries the burden of demonstrating that the administrative record does not contain sufficient evidence to support the Department's findings.

Covered Action Description

- Lead agency for the Covered Action: Department of Water Resources (Department)
- Restoration of 3,165 acres of tidal wetland habitat
- Creation of 40,000 acre-feet of transitory flood storage in the Cache Slough Complex



Certification Summary

Date Submitted

February 22, 2021

Delta Plan Policies

The Department's finding for each Delta Plan policy is summarized in the table:

Delta Plan Policies	Consistent	Not Applicable
G P1(b)(1) – Coequal Goals		X
G P1(b)(2) – Mitigation Measures	X	
G P1(b)(3) – Best Available Science	X	
G P1(b)(4) – Adaptive Management	X	
WR P1 - Reduce Reliance		X
WR P2 - Transparency in Water Contracting		X
ER P1 - Delta Flow Objectives		X
ER P2 - Restore Habitats at Appropriate Elevations	X	
ER P3 – Protect Opportunities to Restore Habitat	X	
ER P4 – Expand Floodplains and Riparian Habitat in Levee Projects	X	
ER P5 - Avoid Invasive Nonnative Species		X
DP P1 – Locate New Urban Development Wisely		X
DP P2 - Respect Local Land Use	X	
RR P1 - Prioritization of Levee Investments	X	
RR P2 – Require Flood Protection in Residential and Rural Areas		X
RR P3 – Protect Floodplain	X	
RR P4 – Floodplain Protection	X	

Appeals Summary

Appellants

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

Date Filed

- March 24, 2021

Appeals Summary

Appealed Policies (Short Title)	Appealed By			
	LIA	SCWA	Districts	CDWA
G P1(b)(1) – Coequal Goals		X	X	
G P(1)(b)(2) – Mitigation Measures	X	X	X	
G P(1)(b)(3) – Best Available Science	X	X	X	X
G P1(b)(4) – Adaptive Management		X	X	
WR P1 - Reduce Reliance				X
WR P2 - Transparency in Water Contracting		X		
ER P1 - Delta Flow Objectives				X
ER P2 - Restore Habitats at Appropriate Elevations				X
ER P5 - Avoid Invasive Nonnative Species		X	X	X
DP P2 - Respect Local Land Use	X	X	X	X
RR P1 - Prioritization of Levee Investments		X	X	X

Timeline

- **February 22, 2021** – Department filed Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project
- **March 24, 2021** – Appeals deemed filed
- **April 8, 2021** – Department certified the record as full and complete
- **May 20-21, 2021** – Council held a hearing on the appeals
- **June 18, 2021** – Council released Staff Draft Determination for 10-day public review and comment period
- **June 23, 2021** – Council provided notice of today's hearing
- **June 28, 2021** – Council received comments on Staff Draft Determination from parties and interested persons
- **July 2, 2021** – Council released Proposed Determination for public review and discussion at today's hearing

Evidentiary Requests

The Council or its Executive Officer may:

- Supplement the record with additional information that was before the agency prior to the date of Certification (Appeals Procedures § 10)
- Take official notice of any generally accepted technical or scientific matter within the Council's jurisdiction, and of any fact that may be judicially noticed by the courts of this State. (Appeals Procedures § 29.)

Proposed Determination

- Exhibit A : items added under Appeals Procedures section 10
- Exhibit B: items added under Appeals Procedures section 29
- Exhibit C: items not admitted into the record

Types of recommended findings

- *Dismiss* non-appealable issues, issues outside the Council's jurisdiction, and issues where Appellants failed to provide the required specificity
- *Deny* appeals based on policies that do not apply to the covered action
- *Remand* the matter, in part, to the Department because Appellants showed that the Certification is not supported by substantial evidence in the record
- *Deny* the appeals, in part, because Appellants failed to show that the Certification is not supported by substantial evidence in the record

Issues for which staff recommends the Council dismiss the appeals

Non-appealable Issues and Issues Outside the Council's Jurisdiction

- DP P2 & RR P1: Allocation of Proposition 1 funds
- DP P2: Disproportionate impacts and demographic considerations
- DP P2: Delta Plan Recommendation DP R11
- DP P2: Davis-Dolwig Act
- ER P2: Alternate Sea Level Rise Projections
- ER P2: Propagation of Predatory Fish Species
- RR P1: Lack of a detailed funding plan

Appellants failed to provide the required specificity to support their claims

- G P1(b)(4): O&M, third party verification, O&M of the Duck Slough Setback levee, funding to provide OMRR&R, design and maintenance of the Cache and Hass Slough levee

**Policies for which
staff recommends
the Council deny the
appeals because the
Policies do not apply
to the covered
action**

- **G P1(b)(1)** (Cal. Code Regs., tit. 23, § 5002, subd. (b)(1)): Coequal Goals
- **WR P1** (Cal. Code Regs., tit. 23, § 5003): Reduce Reliance on the Delta Through Improved Regional Water Self-Reliance
- **WR P2** (Cal. Code Regs., tit. 23, § 5004): Transparency in Water Contracting
- **ER P1** (Cal. Code Regs., tit. 23, § 5005): Delta Flow Objectives

Issues for which staff recommends the Council remand the matter to the Department

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

G P1(b)(3) – Best Available Science

Methods to estimate recreational use

- **Appellant:** LIA (C20215-A1)
- **Appeal Issue:** LIA contends that the analysis used in the Draft EIR to calculate recreational use relies on “a one-hour driving radius from the Project site[, which] includes far more than the single census tract considered in their calculation”, therefore, the methods do not meet the Best Available Science criterion for Inclusiveness
- **Staff Analysis:**
 - The Inclusiveness criterion requires that scientific information used shall incorporate a thorough review of relevant information and analyses across relevant disciplines.
 - The methods selected by the Department used to support its finding of a less-than-significant impact on recreation may have underestimated the number of existing recreational users of the Lookout Slough Project site
 - With regard to methods to estimate recreational use, LIA showed that the Certification is not supported by substantial evidence in the record as it relates to the Inclusiveness criterion of G P1(b)(3)
- **Staff recommendation:** *remand the matter to the Department for reconsideration of the issue.*

DP P2 - Respect Local Land Use

Existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER

- **Appellant:** LIA (C20215-A1)
- **Appeal Issue:** Appellant alleges that the Project was not sited to avoid or reduce conflicts with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, or Liberty Island Ecological Reserve (LIER)
- **Staff Analysis:**
 - Appellant LIA showed that the Certification is not supported by substantial evidence in the record that recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER do not constitute existing uses;
 - LIA showed that the Certification is not supported by substantial evidence in the record that the Covered Action would not conflict with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER; and
 - LIA showed that the Certification is not supported by substantial evidence in the record that the Department avoided or reduced conflicts with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Lookout Slough Project.
 - We did not reach a conclusion regarding the issue of whether siting the Lookout Slough Project to avoid or reduce conflicts with existing uses was feasible because the Certification is not supported by substantial evidence in the record that the Department considered existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER, or analyzed whether there is a conflict with such uses, or whether the project was sited to avoid or reduce conflicts with such uses.
- **Staff recommendation:** *remand the matter to the Department for reconsideration of the issue.*

Issues for which staff recommends the Council deny the appeals (continued next slide)

- **G P1(b)(2)** (Cal. Code Regs., tit. 23, § 5002, subd. (b)(2).): Mitigation Measures
- **ER P2** (Cal. Code Regs., tit. 23, § 5006): Restore Habitats at Appropriate Elevations
- **G P1(b)(3)** (Cal. Code Regs., tit. 23, § 5002, subd. (b)(3)): Best Available Science, as to all other issues
- **G P1(b)(4)** (Cal. Code Regs., tit. 23, § 5002, subd. (b)(4)): Adaptive Management

Issues for which staff recommends the Council deny the appeals (continued)

- **ER P5** (Cal. Code Regs., tit. 23, § 5009): Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species
- **DP P2** (Cal. Code Regs., tit. 23, § 5011): Respect Local Land Use When Siting Water or Flood Facilities or Restoration Habitats, as to all other issues
- **RR P1** (Cal. Code Regs., tit. 23, § 5012): Prioritization of State Investments in Delta Levees and Risk Reduction

G P1(b)(2) – Mitigation Measures

- Appellants: LIA (C20215-A1), SCWA (C20215-A2), Districts (C20215-A3)
- Appeal Issues:
 - Appellants allege that the Department failed to include applicable mitigation measures; failed to include mitigation measures that are equally or more effective than applicable Delta Plan Mitigation Measures
 - Appellants appealed Project Mitigation Measures corresponding to the following Delta Plan Mitigation Measures:
 - 3-1: Water Resources
 - 4-1 through 4-3: Biological Resources
 - 5-1, 5-4, and 5-5: Delta Flood Risk
 - 7-1: Agriculture and Forestry Resources
 - 18-1 and 18-2: Recreation
 - 19-1: Traffic and Transportation

G P1(b)(2) – Mitigation Measures

- Staff Analysis:
 - For Delta Plan Mitigation Measures 18-1 and 18-2, Appellant LIA does not identify a significant impact to a designated recreational facility as a result of the Lookout Slough Project; Appellant LIA has failed to show that Project Mitigation Measures 18-1 and 18-2 are applicable to the Lookout Slough Project.
 - For Delta Plan Mitigation Measure 19-1, there is substantial evidence in the record to show that there are no impacts to traffic or circulation that require mitigation, and thus, Delta Plan Mitigation Measure 19-1 is not applicable
 - Appellants have failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(2)
- Staff recommendation: *deny the appeals as to these issues*

ER P2 - Restore Habitats at Appropriate Elevations

- **Appealed by:** CDWA (C20215-A4)
- **Appeal Issues:**
 - CDWA alleges that the site would:
 - (1) be inundated with sea level rise, and
 - (2) not be completely within intertidal habitat range.
- **Staff Analysis:**
 - Department has cited to evidence in the record that the Project is at appropriate elevations
 - ER P2 specifies that habitat restoration must be consistent with Delta Plan Appendix 3; Appendix 4 should be used as a guide
 - CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with ER P2
- **Staff recommendation:** *deny the appeal as to these issues*

G P1(b)(3) – Best Available Science

- **Appellants:** LIA (C20215-A1), SCWA (C20215-A2), Districts (C20215-A3), CDWA (C20215-A4)
- **Appeal issues:**
 - methods to estimate recreational use (with respect to Objectivity and Relevance)
 - the years the Department selected for water quality modeling
 - predictive, transparent, and open water quality modeling
 - cumulative water quality impacts
 - peer review of water quality analysis
 - water quality impacts to municipal and agricultural diverters
- **Staff Analysis:**
 - With regard to methods to estimate recreational use, LIA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(3) as it relates to the best available science criteria of Objectivity and Relevance.
 - With regard to issues of modeling years selected for water quality analysis; predictive, transparent, and open water quality modeling; cumulative impacts; peer review of water quality analysis; and water quality impacts to municipal and agricultural diverters, Appellants failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(3).
- **Staff recommendation:** *deny the appeal as to these issues*

G P1(b)(4) – Adaptive Management

- **Appellant:** SCWA (C20215-A2)
- **Appeal Issues:** SCWA alleges that the Department failed to provide documentation of adequate resources and delineated authority to implement adaptive management
- **Staff Analysis**
 - Department provided substantial evidence documenting adequate resources through the Fish Restoration Program Agreement (FRPA) contract terms specifying that the State Water Project is financially responsible for adaptive management.
 - Adaptive Management and Monitoring Plan (AMMP) and the FRPA describe the Department's delineated authority to implement adaptive management.
 - Appellants have failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is not consistent with G P1(b)(4).
- **Staff recommendation:**
 - *deny the appeals* as to these issues

ER P5 - Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species

- **Appellants:** SCWA (C20215-A2), Districts (C20215-A3), CDWA (C20215-A4)
- **Appeal Issues:**
 - Whether ER P5 Applies to the Covered Action
 - Introduction of and Providing Habitat for Nonnative Species
 - Striped bass and other nonnative fish
 - Aquatic vegetation
 - Funding for Invasive Species Management
- **Staff Analysis:**
 - Appellants showed the Certification is not supported by substantial evidence in the record that ER P5 does not apply to the Covered Action;
 - Appellants failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with ER P5.
- **Staff recommendation:** *deny the appeals as to these issues*

DP P2 - Respect Local Land Use

- **Appellants:** SCWA (C20215-A2), Districts (C20215-A3), CDWA (C20215-A4)
- **Appeal Issues:** Appellants allege that the Project was not sited to avoid or reduce conflicts with,
 - existing agricultural uses
 - existing infrastructure
 - existing water intakes and beneficial uses of water
 - existing water intakes and diversions related to endangered species presence
 - the Solano County General Plan
 - the Solano County Climate Action Plan
- **Staff Analysis:**
 - Appellants have failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2 with regard to these issues
- **Staff recommendation:** *deny the appeals as to these issues*

RR P1 - Prioritization of Levee Investments

Goal	Localized Flood Protection	Levee Network	Ecosystem Conservation
1	Protect existing urban and adjacent urbanizing areas by providing 200-year flood protection.	Protect water quality and water supply conveyance in the Delta, especially levees that protect freshwater aqueducts and the primary channels that carry fresh water through the Delta.	Protect existing and provide for a net increase in channel-margin habitat.
2	Protect small communities and critical infrastructure of statewide importance (located outside urban areas).	Protect floodwater conveyance in and through the Delta to a level consistent with the State Plan of Flood Control for project levees.	Protect existing and provide for net enhancement of floodplain habitat.
3	Protect agriculture and local working landscapes.	Protect cultural, historical aesthetic, and recreational resources (Delta as Place)	Protect existing and provide for net enhancement of wetlands

RR P1 - Prioritization of Levee Investments

- **Appealed by:** CDWA (C20215-A4)
- **Appeal Issue:** CDWA alleges that the flood protection benefits provided by this Covered Action are not sufficient to demonstrate consistency
- **Staff Analysis:**
 - No Appellant disputes the Covered Action's consistency with the goals listed under the Ecosystem Conservation or Levee Network Improvements categories
 - RR P1 does not require each covered action to address every goal and objective identified in the policy
 - Appellants failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with RR P1.
- **Staff recommendation:** *deny the appeal as to this issue.*

Staff Recommendation

Based on the analysis and findings in the Proposed Determination staff recommends that the Council:

1. **Adopt the Proposed Determination** and the findings contained therein; and
2. **Remand the matter**, in part, to the Department for reconsideration on the issues identified for remand under Delta Plan policies **G P1(b)(3)** and **DP P2** as set forth in the Proposed Determination because the Certification was not supported by substantial evidence in the record pursuant to Water Code section 85225.25; and
3. **Deny the appeals**, in part, on the issues recommended for denial as set forth in the Proposed Determination pursuant to Water Code section 85225.25; and
4. **Dismiss the appeals** on the issues recommended for dismissal as set forth in the Proposed Determination pursuant to Water Code section 85225.10(c) and Appeals Procedures sections 6(e) and (f) and 15(c) .

A large concrete bridge with multiple pillars spans a body of water. The sky is filled with dramatic, dark clouds. The foreground shows some dry grass. The text "THANK YOU" is overlaid in the center.

THANK YOU