



DELTA STEWARDSHIP COUNCIL
A California State Agency

Determination Regarding Appeal of the Certification of Consistency
by San Joaquin Area Flood Control Agency for
Smith Canal Gate Project

Appealed by:

Atherton Cove Property Owners Association

In this Determination Regarding Appeal of the Certification of Consistency by the San Joaquin Area Flood Control Agency (“SJAFCA”) for the Smith Canal Gate Project (“Determination”), the Delta Stewardship Council (“Council”) finds that Atherton Cove Property Owners Association (“Appellant”) failed to show that substantial evidence does not exist in the record before us to support SJAFCA’s finding that the Smith Canal Gate Project is consistent with the Delta Plan. We therefore *deny* the Appellant’s appeal pursuant to Water Code section 85225.25.

I. BACKGROUND

A. Delta Reform Act of 2009 and Delta Plan

The Delta Reform Act of 2009 charges the Council with implementing the Delta Plan. (Wat. Code, § 85204.) The Delta Plan is a comprehensive resource management plan designed to further the "coequal goals" of (1) providing a more reliable water supply for California; and (2) protecting, restoring, and enhancing the Delta ecosystem. (Wat. Code, § 85054.) The coequal goals must be achieved in a manner that "protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place." (*Id.*) As part of this charge, we must ensure that agency actions in the Delta are consistent with the Delta Plan’s policies. (Wat. Code, § 85225.) The Delta Plan contains 14 regulatory policies and 73 recommendations. The 14 regulatory policies were approved as regulations (Cal. Code Regs, tit. 23, §§ 5001-5016) pursuant to the Administrative Procedure Act (Gov. Code, § 11340 et seq.), and took effect on September 1, 2013. An agency undertaking a qualifying action in the Delta—called a covered action¹—must certify to the Council that its action is consistent with the Delta Plan. (Wat. Code, § 85225.)

¹ Water Code section 85057.5 defines "covered action" as "a plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code that meets all of the following conditions: (1)

1 **B. Brief Description of Project**

2 The Smith Canal Gate Project (referred to hereinafter as “Smith Canal Gate Project” or
3 “Project”) is a covered action. On November 2, 2018, SJAFCA filed a Certification of
4 Consistency for the Smith Canal Gate Project covered action (“Certification” or “Certification of
5 Consistency”). (See [Certification.](#))

6
7 According to the Certification, SJAFCA is proposing to design and construct a gate
8 structure to be located at the mouth of Smith Canal and Atherton Cove, adjacent to the San
9 Joaquin River/Stockton Deep Water Ship Channel, in and adjacent to the City of Stockton. (See
10 [Certification Record, Figure 1, Project Location](#)).

11
12 **Figure 1. “Project Location”**

13 Source: ([Certification Record, Figure 1, Project Location](#))



14

Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh. (2) Will be carried out, approved, or funded by the state or a local public agency. (3) Is covered by one or more provisions of the Delta Plan. (4) Will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta." (Wat. Code, § 85057.5.)

1 According to the Certification, the Smith Canal Gate Project is necessary for flood
2 protection. ([Certification](#), p. 2.) Federal Emergency Management Agency (“FEMA”)
3 accreditation of existing levees along Smith Canal was revoked in 2009. As a result,
4 approximately 5,000 properties and approximately 15,000 residents in adjacent reclamation
5 districts were identified by FEMA as being within the Special Flood Hazard Area (also known as
6 the 100-year floodplain). (*Ibid.*)
7

8 SJAFCA is proposing the Project to isolate Smith Canal from the San Joaquin River,
9 which would remove the affected area from the 100- year floodplain, thereby improving the
10 FEMA rating. The Smith Canal Gate Project is also included in the Recommended Plan of the
11 Lower San Joaquin River Feasibility Study. The Project would contribute to a 200-year level of
12 flood protection for the Stockton area mandated by Senate Bill 5 (Stats. 2007, ch. 364.)
13 ([Certification](#), p. 2.)
14

15 The Smith Canal Gate Project would close off Smith Canal during high flow events to
16 facilitate 100-year and ultimately 200-year level of flood protection performance, allowing
17 existing Smith Canal levees to function as a secondary risk reduction measure. According to the
18 Certification, the flood wall and gate structure would conform to Federal and state flood
19 protection criteria, thereby reducing flood risk for approximately 8,000 properties behind the
20 existing Smith Canal levees. ([Certification](#), p. 2.)
21

22 The Smith Canal Gate Project would close off Smith Canal during high flow events using
23 a fixed cellular sheet pile wall, extending approximately 800 feet from Dad’s Point to the right
24 bank of the San Joaquin River at the Stockton Golf and Country Club. (See [Certification Record](#),
25 [Figure 2, Project Area and Features](#).) The fixed wall would include a 50-foot-wide gate to
26 maintain tidal circulation and boat access. Gate controls would be installed on Dad’s Point,
27 adjacent to the fixed wall tie-in. Other than as needed for flood control, testing, inspection, and
28 maintenance, the gate would be open to allow for tidal movement, navigation, and recreation in
29 Smith Canal. The gate would be closed during the lowest tide prior to high flow events, which
30 typically occur between November and April. SJAFCA anticipates that the typical duration of
31 such closures would be in six-to-eight hour time periods. ([Certification](#), pp. 2-3.)
32

33 **Figure 2. “Project Area and Features**

34 Source: ([Certification Record, Figure 2, Project Area and Features.](#))



1

2 According to the Certification, the Smith Canal Gate Project would also include
 3 approximately 1,660 linear feet of continuous floodwall and seismic stability wall along the
 4 eastern portion of Dad's Point. (Certification, p. 3.) Recreation facilities would be installed on
 5 Dad's Point to replace amenities affected by project construction, such as fishing, wildlife
 6 viewing, walking, biking, and running. (*Ibid.*)

7 **C. Brief Description of Appeals & Procedural History**

8 Any person who claims that a proposed covered action is inconsistent with the Delta
 9 Plan may file an appeal of the certification of consistency. (Wat. Code, § 85225.10, subd. (a).)
 10 An appeal must identify with specificity how the certification of consistency is not supported by
 11 substantial evidence in the record certified by the project proponent, and provide necessary
 12 factual support. (Wat. Code, § 85225.10, subd. (c); see also Appeals Procedures § 6 and subd.
 13 (e) and (f).) The Council may dismiss claims that fail to provide this specificity. (*Ibid.*) Parties
 14 have 30 days from the submission of the certification of consistency to file an appeal with the
 15 Council. (Wat. Code, § 85225.15.) We received one timely appeal to the Certification from the
 16 Appellant.

17 SJAFCA certified the administrative record in this matter on December 13, 2018.² We
 18 held a hearing on the appeal on January 24, 2019, in Sacramento, California, where: SJAFCA
 19 and the Appellant offered written and oral testimony; and we received public comments on the
 20 Certification and appeal.³

² The record in this matter is voluminous. For ease of reference, when citing documents in the record, our Determination also links to the record posted on our webpage.

³ Per the Appeals Procedures and the hearing notice, we may only consider comments and testimony “regarding an appeal.” (Appeals Procedures § 11.) We received public comments that raise arguments that the Project did not comply with Delta Plan Policies RR P1 and RR P3. Appellant did not appeal

1 Upon conclusion of the hearing, the Presiding Officer directed Council staff to prepare
2 draft findings regarding the appeal based on the record and comments received in the matter,
3 and to release that draft document to receive input on the draft findings. Staff’s proposed draft
4 findings for consideration were released for public review on February 21, 2019.

5 We also considered written comments on the draft findings, and issued final proposed
6 findings on March 14, 2019 for public comment.

7 The Delta Reform Act requires that we reach a determination either denying the appeals
8 or remanding the matter to SJAFCA within 60 days of the January 24, 2019 hearing. (Wat.
9 Code, § 85225.20.) We held a final hearing on the matter in Stockton, California, on March 21,
10 2019, where we received comments from SJAFCA, the Appellant and the public.

11 Having reviewed the entirety of the record in this matter, we make the findings set forth
12 below in Section V of this Determination (Analysis & Findings).⁴ (See Cal. Wat. Code, §§
13 85225.15, 85225.20.)

14 II. BRIEF SUMMARY OF FINDINGS

15 The Appellant substantively challenged the Certification’s findings of consistency with
16 two Delta Plan policies, one of which (G P1 (Cal. Code Regs., tit. 23, § 5002)), has four
17 subdivisions. The Appellant challenged SJAFCA’s Certification under three of those four G P1
18 subdivisions. For clarity of analysis in this Determination, we treat the challenges under the
19 three G P1 subdivisions as individual Delta Plan policy challenges (i.e., a total of four, rather
20 than two, Delta Plan policies are implicated).

21 In Section V. of this Determination (Analysis & Findings), the Council finds that:

- 22 1. The Appellant failed to show that there is not substantial evidence in the record
23 to support SJAFCA’s Certification of Consistency with respect to the following
24 three Delta Plan policies, and we therefore *deny* the portions of the appeal that
25 challenge the Certification on these grounds:

26 ■ G P1, subd. (b)(2) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(2).) (“G
27 P1(b)(2)”): Detailed Findings to Establish Consistency with the Delta Plan
28 Mitigation Measures;

29 ■ G P1, subd. (b)(3) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(3).) (“G
30 P1(b)(3)”): Best Available Science; and

31 ■ ER P5 (Cal. Code Regs., tit. 23, § 5009.) (“ER P5”): Avoid Introductions
32 of and Habitat Improvements for Invasive Nonnative Species.

SJAFCA’s certification of consistency with RR P1 or RR P3. Consequently, we must refrain from considering arguments related to those policies.

⁴ If a party’s comments, or public comments received, did not change the analysis set forth in the staff draft findings issued on February 21, 2019, those comments are not addressed in this Determination.

1 citation and quotation marks omitted].) Thus, if an appellant fails to set forth specific facts
2 showing that a finding is not supported by the evidence, it has failed to raise an appealable
3 issue, and its claim must be dismissed. (Administrative Procedures, § 6, subds. (e), (f), and 15,
4 subd. (c); *Salas v. Cal. Dept. of Transportation* (2011) 198 Cal.App.4th 1058, 1074 [the Council
5 is not required to search the record to ascertain whether it contains support for the Appellant's
6 contentions].)
7

8 We may grant the appeal and remand the matter to the agency if, after examining the
9 entirety of the record, a reasonable person could not have reached the agency's conclusion(s)
10 in its consistency determination. (See *Patterson Flying Serv. v. California Dept. of Pesticide*
11 *Regulation* (2008) 161 Cal.App.4th 411, 426.)
12

13 IV. ADMINISTRATIVE RECORD

14 SJAFCA certified the administrative record in this matter on December 13, 2018. The
15 Appellant, SJAFCA, and members of the public requested that additional documents be added
16 to the record because such documents are either: (a) part of the record before SJAFCA, but
17 were not included in SJAFCA's submission to the Council (see Appeals Procedures, § 10); or,
18 (b) generally accepted technical or scientific matter within the Council's jurisdiction (see Appeals
19 Procedures, § 29). Both the Appellant and SJAFCA have objected to certain of those requests
20 for admissions. Our rulings on these admissions requests are as follows: documents admitted
21 pursuant to section 10 are listed in Exhibit A attached hereto; documents admitted pursuant to
22 section 29 are listed in Exhibit B attached hereto; documents that we decline to admit into the
23 record are listed in Exhibit C attached hereto.
24

25 V. ANALYSIS & FINDINGS

26 Our analysis is organized by each Delta Plan policy raised by the Appellant.

27 A. Policy G P1(b)(2) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(2)): Detailed Findings 28 to Establish Consistency with the Delta Plan Mitigation Measures

29 SJAFCA certifies that the Project is consistent with G P1(b)(2). The Appellant raises
30 arguments that it is not. This analysis considers the Appellant's arguments that certain Smith
31 Canal Gate Project measures are not equally or more effective than the applicable Delta Plan
32 Program Environmental Impact Report ("PEIR") Mitigation Measures. For the reasons
33 discussed below in Section V.A.3, the Council finds that the Appellant failed to show that the
34 Certification of Consistency with G P1(b)(2) is not supported by substantial evidence in the
35 record. We therefore *deny* the appeal on these grounds.
36

37 1. Policy Requirements

38 G P1(b)(2) states:

39 "(b) Certifications of consistency must include detailed findings that address each
40 of the following requirements:

41 (2) Covered actions not exempt from [the California Environmental Quality Act
42 (CEQA)] must include *applicable* feasible mitigation measures identified in the
43 Delta Plan's Program EIR (unless the measure(s) are within the exclusive
44 jurisdiction of an agency other than the agency that files the certification of

1 consistency), or substitute mitigation measures that the agency that files the
2 certification of consistency finds are equally or more effective;” (Emphasis added)

3 In short, this regulation requires that, for any covered action subject to CEQA, the
4 covered action must include the *applicable* mitigation measures found in the Delta Plan PEIR or
5 substitute mitigation measures that are at least as effective. Because the Project is a covered
6 action subject to CEQA, it must comply with this requirement. SJAFCA has not included the
7 mitigation measures identified in the Delta Plan’s PEIR (“Delta Plan Measures”). Instead,
8 SJAFCA includes Smith Canal Gate Measures that SJAFCA certifies are equally or more
9 effective than the applicable Delta Plan Measures.⁵

10
11 As a threshold matter, G P1(b)(2) uses the term “applicable” to describe the mitigation
12 measures required to be included in a covered action. If a Delta Plan Measure is not factually
13 “applicable” to the specific covered action in question, then G P1(b)(2) does not require it to be
14 included.

15
16 For example, under CEQA, where an environmental analysis concludes that a project
17 has no potential significant impacts, CEQA does not require mitigation measures. (Pub. Res.
18 Code § 21081, subd. (a)(1); Kostka & Zischke, *Practice Under the Cal. Environmental Quality*
19 *Act* (Cont. Ed. Bar 2018) § 18.3.) In this example, for purposes of G P1(b)(2), mitigation would
20 not be “applicable,” because it was not required under CEQA. Mitigation also is not required if
21 measures are included in the project to reduce significant impacts. (See CEQA Guidelines §
22 15126.4(a)(1)(A) (Cal. Code Regs., tit. 14, § 15126.4(a)(1)(A)) (distinguishing between
23 mitigation measures and measures proposed to be included in the project.) Where the facts of
24 the specific covered action show that environmental impacts will not occur because the project
25 will be designed, constructed and/or operated in such a manner that no significant
26 environmental impact will occur, the Delta Plan Measures are not required and as a result are
27 not applicable to the project under G P1(b)(2).

28 29 **2. Certification**

30 In its Certification, SJAFCA references a “mitigation consistency” table, which identifies
31 each applicable Delta Plan Measure and identifies for each such measure the Smith Canal Gate
32 Measures that SJAFCA found to be equally or more effective. ([Certification GP1 Finding](#), p. 5;
33 [Certification Record SJA-DP-009003](#).)⁶

34 35 **3. Appeal and Analysis**

36 The Appellant contends that SJAFCA has failed to demonstrate that the Smith Canal
37 Gate Measures are equally or more effective than the Delta Plan Measures because the
38 mitigation consistency table provided with the Certification is insufficient, and is therefore
39 inconsistent with G P1(b)(2). ([Letter Attached to Appeal of Certification \(“Appeal Letter”\)](#), pp. 1-

⁵ SJAFCA includes both “Project elements” and mitigation measures. (See [Certification Record SJA-DP-009003](#).) This analysis refers to both as “Smith Canal Gate Measures” but uses specific measures’ full titles, where applicable.

⁶ The substance of the Smith Canal Gate Measures is provided throughout Chapter 3, *Environmental Setting and Impacts*, of the Smith Canal Gate Project Final EIR (“FEIR”) ([Certification Record SJA-CEQ-00989](#)). SJAFCA also identifies the Addendum to the Smith Canal Gate Project Final EIR (“Addendum”) ([Certification Record SJA-DP-007826](#)) and Addendum II to the Smith Canal Gate Project Final EIR (“Addendum II”) ([Certification Record SJA-DP-007844](#)) in its Certification.

1 2.) The Appellant states that the mitigation consistency table does not show which of the Smith
2 Canal Gate Measures are meant to correspond with specific Delta Plan PEIR Mitigation sub-
3 measures. (*Ibid.*) The Appellant also claims that SJAFCA does not provide additional
4 justification as to how measures are equally or more effective. (*Ibid.*) With the exception of the
5 specific arguments for four Delta Plan Measures discussed below (4-1, 4-2, 4-3 and 4-4), the
6 Appellant does not make any specific argument or direct the Council to any evidence to support
7 these arguments that the mitigation consistency table is insufficient and/or lacks information.
8 Therefore, we consider the consistency only of the four Delta Plan Measures that the Appellant
9 identifies and discusses specifically, and we *deny* the appeal as to the general insufficiency of
10 the mitigation consistency table.

11
12 Below, we consider the consistency of the four Delta Plan Measures that the Appellant
13 identifies specifically:

14
15 **a. Delta Plan Measure 4-1**

16 Delta Plan Measure 4-1 requires advanced mitigation planning for ecological restoration,
17 implementation of construction best management practices, and restoration of areas affected by
18 construction impacts, among other sub-measures. Delta Plan Measure 4-1 also states in part
19 that, “an invasive species management plan shall be developed and implemented for any
20 project whose construction could lead to introduction or facilitation of invasive species
21 establishment.” (Appendix O, *Mitigation and Monitoring Reporting Program*, Delta Plan, pp. 3 –
22 5.)

23
24 In the mitigation consistency table attached to its Certification, SJAFCA lists
25 approximately 20 mitigation measures that are “equally effective as, or more effective than,
26 Delta Plan Mitigation Measure 4-1, as applicable,” including measure *VEG-MM-7: Avoid and*
27 *Minimize Spread or Introduction of Invasive Plant Species*, which is described in Section 3.7 of
28 the FEIR, to avoid and minimize the spread or introduction of invasive plant species during
29 construction. ([Certification Record SJA-CEQ-01120.](#)) The Appellant does not raise specific
30 arguments in its appeal regarding the consistency of the listed mitigation measures with Delta
31 Plan Measure 4-1. SJAFCA’s Certification with Delta Plan Mitigation Measure 4-1 also relies on
32 implementing a water hyacinth control program as described in the FEIR Project Description.
33 ([Certification Record SJA-DP-009006–9009.](#)) SJAFCA lists the water hyacinth control program
34 as a Smith Canal Gate Project element. (*Ibid.*) The water hyacinth control program described in
35 the FEIR consists of the following actions to be taken once construction is underway: “regular
36 visual monitoring” to determine the rate of vegetation growth and accumulation, followed by
37 implementing a regular removal program that would be scheduled based on the results of this
38 visual monitoring and includes performance standards to “ensure that the cover of water
39 hyacinth in the project area does not increase beyond existing conditions,” with a trigger for
40 mechanical harvesting whenever the cover of water hyacinth reaches 20% in the most impacted
41 areas behind the sheet pile wall” as determined by visual inspection. ([Certification Record SJA-](#)
42 [CEQ-00976-977.](#))

43
44 The Appellant claims that SJAFCA’s water hyacinth control program project element
45 does not meet the standard of an invasive species management plan, as set out in Delta Plan
46 Measure 4-1. ([Appeal Letter](#), p. 2.) The Appellant raises four issues to support this argument: (i)
47 the water hyacinth control program should be classified as mitigation; (ii) the water hyacinth
48 control program is improperly deferred mitigation under CEQA; (iii) SJAFCA’s deferral of
49 developing the water hyacinth control program makes it “impossible for the Council to assess;”

1 and (iv) SJAFCA's measures are not equally or more effective than Delta Plan Mitigation
2 Measure 4-1. ([Appeal Letter](#), pp. 2-5.) Each issue is discussed below.

3
4 **i. Whether the Water Hyacinth Control Program Should be Classified**
5 **as a Mitigation Measure**
6

7 Referencing CEQA and CEQA caselaw, the Appellant contends that SJAFCA's water
8 hyacinth control program should be classified as a mitigation measure in its EIR, rather than
9 part of the Project. ([Appeal Letter](#), pp. 3-4.) The purpose of the present appeal is to consider
10 consistency with the Delta Plan regulations, not whether SJAFCA complied with CEQA. The
11 Council thus considers only whether substantial evidence supports SJAFCA's finding that Smith
12 Canal Gate Project mitigation measures are either applicable or equally or more effective than
13 Delta Plan Measure 4-1. Therefore, the Appellant has not raised an issue within the scope of
14 the Council's review, and we *deny* the appeal as to this issue. With regard to the consistency of
15 the Project, including the water hyacinth control program, with policy ER P5 (Cal. Code Regs.,
16 tit. 23, § 5009: Avoid Introductions of and Habitat Improvements for Invasive Nonnative
17 Species), please see Section V.D, below.

18
19 **ii. Whether the Water Hyacinth Control Program is Improperly Deferred**
20 **Mitigation**
21

22 The Appellant characterizes the water hyacinth control program as “deferred mitigation”
23 and contends that it is inconsistent with G P1(b)(2) on that basis. ([Appeal Letter](#), pp. 3-4.) But
24 rules regarding the appropriateness of “deferred mitigation” are part of the doctrine applying to
25 CEQA, as the Appellant recognizes. (Appeal Letter, p. 3 [“this inexplicable deferral of mitigation
26 is a procedural violation of CEQA.”]; [“setting aside the procedural violation of CEQA”].) As
27 discussed above in Section V.A.3.a.i., the purpose of the present appeal is to consider
28 consistency with the Delta Plan regulations, not compliance with CEQA. Therefore, the
29 Appellant has not raised an issue within the scope of the Council's review, and we *deny* the
30 appeal as to this issue.

31
32 **iii. Assessment of Water Hyacinth Control Program**
33

34 The Appellant claims that SJAFCA's deferral of developing the water hyacinth control
35 program makes it “impossible for the Council to: (i) predict this method's efficacy in mitigating
36 water hyacinth impacts, or (ii) assess potential environmental impacts of the harvesting program
37 itself.” ([Appeal Letter](#), p. 3.) But the Appellant has not identified any provision of G P1(b)(2) or
38 the associated Delta Plan Measures that prohibits the development of the water hyacinth control
39 program at a later date. Delta Plan Measure 4-1 requires the development and implementation
40 of an invasive species management plan before construction or operation of a project, but does
41 not otherwise specify a timeframe for development of the plan. (Appendix O, *Mitigation and*
42 *Monitoring Reporting Program*, Delta Plan, pp. 4 – 5). Thus, even if Delta Plan Measure 4-1 is
43 applicable and consistency with Delta Plan Measure 4-1 were required, the concerns raised
44 regarding the Council's evaluation of the program are not relevant to consistency with G
45 P1(b)(2). As the Appellant has not raised an issue within the scope of the Council's review, we
46 *deny* the appeal as to this issue.

47 **///**
48 **///**

1 **iv. Whether SJAFCA’s Measures are Equally or More Effective than the**
2 **Invasive Species Management Plan Requirements of Delta Plan**
3 **Measure 4-1**
4

5 Finally, the Appellant points to the text of Delta Plan Measure 4-1 and its
6 requirements for an invasive species management plan. ([Appeal Letter](#), p. 2; Appendix O,
7 *Mitigation and Monitoring Reporting Program*, Delta Plan, pp. 3 – 5.) Referencing the FEIR to
8 support the argument that the Project could facilitate water hyacinth establishment, the
9 Appellant asserts that SJAFCA is required to include an invasive species management plan or
10 demonstrate its Smith Canal Gate Measures are equally or more effective. ([Appeal Letter](#), p. 2,
11 citing [Certification Record SJA-CEQ-01015](#); [SJA-CEQ-01119–01120](#).)⁷ The Appellant further
12 asserts that the water hyacinth control program would not meet the substantive requirements of
13 an invasive species management plan. ([Appeal Letter](#), pp. 3-5.)
14

15 As explained above in Section V.A.1, where the facts of the specific covered action show
16 that environmental impacts will not occur because the project will be designed, constructed
17 and/or operated in such a manner that no significant environmental impact will occur, the Delta
18 Plan Measures are not required, and as a result are not applicable to the project under G
19 P1(b)(2). SJAFCA’s FEIR concluded that the construction and operation of the Project,
20 including the water hyacinth control program, would not increase the presence of water hyacinth
21 in the Project area beyond existing conditions. ([Certification Record SJA-CEQ-01015, and SJA-](#)
22 [CEQ-01120](#).) Impact VEG-7 describes impacts and mitigation measures associated with
23 invasive species. Impact VEG-7 considers invasive plant species as a whole and reaches a
24 conclusion that impacts due to project construction would be less than significant with
25 mitigation, while stating that there would be no impact due to the spread of water hyacinth
26 during project operation with implementation of the water hyacinth control program, which is a
27 part of the Project. The discussion as it pertains to water hyacinth states, “Under Alternative 1,
28 [the Project] would not result in an increase in water hyacinth in Atherton Cove and Smith Canal
29 due to water hyacinth removal maintenance activities described in Section 2.3.1.3, Operations
30 and Maintenance.” ([Certification Record SJA-CEQ-01120](#).) SJAFCA later states in its
31 Certification that project operation impacts would be avoided by, among other efforts,
32 implementation of the water hyacinth control program, and construction impacts would be
33 mitigated to a less-than-significant level by three mitigation measures including Mitigation
34 Measure VEG-MM-7. ([SJAFCA Certification](#), p. 20, see also [SJA-CEQ-01119](#).) The analysis
35 and findings described in Impact VEG-7 indicate that as a CEQA lead agency, SJAFCA found
36 that with implementation of the proposed water hyacinth control program, which SJAFCA
37 asserts is a legally binding part of the covered action ([SJAFCA Certification](#), p. 20⁸), the
38 operation of the Project would have no impact on water hyacinth prevalence. As a result,

⁷ The referenced sections of the FEIR discuss Impact WQ-5: Reduction in Water Quality Associated with Increase in Water Hyacinth Resulting from Presence of Fixed Dual Sheet Pile Walls (no impact). ([Certification Record SJA-CEQ-01015](#)) and Impact VEG-7: Spread of Invasive Plant Species (less than significant with mitigation). ([Certification Record SJA-CEQ-01119–01120](#).) Neither section supports the Appellant’s argument that the Project would exacerbate water hyacinth within Atherton Cove. Impact WQ-5 focuses on water quality, rather than invasive species, and found that by conducting regular water hyacinth removal activities as part of the water hyacinth control program, the Project would have no impact on water quality as result of water hyacinth growth and may improve the present baseline condition resulting in potentially beneficial effect. ([Certification Record SJA-CEQ-01015](#).) Impact VEG-7 is discussed in the next paragraph.

⁸ Discussed further in Section V.D.3.a.i.

1 SJAFCA is not required pursuant to G P1(b)(2) to include equally or more effective mitigation
2 measures for water hyacinth impacts.
3

4 The Appellant has therefore failed to show that there is not substantial evidence in the
5 record to support SJAFCA's finding of consistency with G P1(b)(2) as to Delta Plan Measure 4-
6 1, and we *deny* the appeal as to this issue.
7

8 **b. Delta Plan Measure 4-2**

9 Delta Plan Measure 4-2 requires project proponents to avoid habitats of special-status
10 species, to design project elements to avoid effects on such species “to the maximum extent
11 practicable,” and to implement specified construction best management practices. If impacts to
12 special-status species are unavoidable, Delta Plan Measure 4-2 requires the restoration or
13 preservation of compensatory habitat for the affected species. (Appendix O, *Mitigation and*
14 *Monitoring Reporting Program*, Delta Plan, p. 6.)
15

16 In the mitigation consistency table provided in its Certification, SJAFCA lists Smith Canal
17 Gate Measures that are “equally effective as, or more effective than, Delta Plan Mitigation
18 Measure 4-2, as applicable,” including four measures to minimize negative impacts and effects
19 on special-status fish species during construction: AQU-MM-1, AQU-MM-2a, AQU-MM-2b, and
20 AQU-MM-4. ([Certification Record SJA-DP-009009–9010.](#)) SJAFCA also provided the
21 Addendum and Addendum II to the FEIR in its Certification as evidence of consistency with G
22 P1(b)(2). ([Certification Record SJA-DP- 007826](#); [SJA-DP- 007844.](#)) The Addenda describe
23 design refinements to the Project and consequent changes to impacts originally described in the
24 FEIR. Impact AQU-5 in the November 2017 Addendum to the FEIR concludes that impacts due
25 to predation of special-status species during project operations would be less-than-significant.
26 ([Certification Record SJA-DP-006345-6346.](#))
27

28 The Appellant contends that SJAFCA failed to demonstrate that the Smith Canal Gate
29 Project includes any mitigation measures equal or more effective than Delta Plan Measure 4-2,
30 arguing specifically that (i) SJAFCA did not design the Project to avoid predation on special-
31 status fish species; and (ii) SJAFCA failed to include mitigation impacts to special-status fish
32 species from increased predation. ([Appeal Letter](#), pp. 5 – 6.)
33

34 **i. Whether SJAFCA Designed the Project to Avoid Increased Predation**
35 **of Special-Status Species**
36

37 Delta Plan Measure 4-2, requires in part, that project proponents design project
38 elements to avoid effects on special-status species “to the maximum extent practicable.”
39 ([Appeal Letter](#), p. 5.) The Appellant contends that “the Project was not designed with
40 consideration of increased predation of special-status fish species, despite the presence of
41 multiple special-status fish species in the Project area,” and “SJAFCA never considered the
42 Project’s facilitation of Striped Bass predation” in its design. ([Appeal Letter](#), p. 6.)
43

44 The Appellant cites the FEIR as evidence that special-status fish species, such as
45 salmon, steelhead, delta smelt and splittail, are present within the Project area. ([Appeal Letter](#),
46 p. 6, citing [Certification Record SJA-CEQ-01136.](#)) The cited page of the FEIR lists these
47 species, among others as, “special-status fish species that are *known to occur or have the*
48 *potential to occur* in the study area.” ([Certification Record SJA-CEQ-01136.](#)) (Emphasis added.)
49 The FEIR later states that “Atherton Cove and Smith Canal have low quality native fish habitat
50 (i.e. ripped banks, poor water quality)” and it is “unknown if native fish species occur in

1 Atherton Cove and Smith Canal.” ([Certification Record SJA-CEQ-01372.](#)) The FEIR also
2 indicates that 98 percent of the native species are predated before they make it through the
3 Delta to the Project site. ([Certification Record SJA-CEQ-01141- 1142](#) and [SJA-CEQ-02099.](#))
4

5 As evidence that the Project was not designed to avoid impacts to these species, the
6 Appellant cites comments by SJAFCA’s environmental consultant (ICF International) on the
7 draft results of the hydrodynamic modeling study prepared by its modeling consultant (Moffat
8 and Nichol). This study was conducted to analyze the hydrodynamic effects of the proposed
9 gate structure alignment, alternative alignments, and various gate widths.⁹ ([Certification Record](#)
10 [SJA-CEQ-12619.](#)) The comments on the draft model results state, in part, that, “the
11 concentration of flow through the gate opening is likely to attract predators (e.g., striped bass,
12 pikeminnow, largemouth bass).”¹⁰ ([Certification Record SJA-CEQ-18182.](#)) The Appellant
13 references these comments as evidence that the Project could impact special-status fish
14 species that may be present in the project area, and argues that SJAFCA failed to analyze “the
15 extent of this impact.” ([Appeal Letter](#), p. 5.)¹¹ The hydrodynamic modeling study was finalized
16 and is an appendix to the FEIR. ([Certification Record SJA-CEQ-12610.](#))¹² As stated above, the
17 issue of predation of special-status species during project operations was also analyzed in the
18 November 2017 Addendum in Impact-AQU-5, which included a discussion of alterations to
19 flows. ([Certification Record SJA-DP-006337.](#))
20

21 Predation is one of numerous potential impacts to special-status fish species evaluated
22 in the FEIR. ([Certification Record SJA-CEQ-01141- 1144.](#)) According to the evidence presented
23 by SJAFCA, a range of potential impacts was considered, and only construction-related impacts
24 required detailed analysis and findings of significance. ([Certification Record SJA-CEQ-01141-](#)
25 [1157.](#)) As evidence that the SJAFCA’s consulting team considered the potential for impacts to
26 special status fish species relating to predation, SJAFCA identifies a discussion in the FEIR of
27 the presence of special-status fish species, the identification of thresholds of significance for

⁹ The version of the FEIR submitted with the Certification on November 2, 2018 included the Hydrodynamic Modeling Alignment and Gate Width Evaluation Final Report as Appendix B, whereas the version of the FEIR submitted with the Administrative Record on December 13, 2018 contains a different, abbreviated version of the hydrodynamic modeling results as Appendix B. For clarity, we cite to the February 24, 2015 version of the Hydrodynamic Modeling Final Report from the Administrative Record that SJAFCA submitted on December 13, 2018. ([Certification Record SJA-CEQ-12610.](#))

¹⁰ The comments on the draft hydrodynamic model were submitted as part of a longer two-page memorandum from SJAFCA’s environmental consultant (ICF International) to its modeling consultant (Moffat and Nichol). The full memorandum provides a variety of comments, questions and feedback to the modeling consultant regarding the draft results of the hydrodynamic analysis. The memorandum also states that, “... there is little or no difference between baseline and proposed project flows and volumes into Smith Canal, meaning the project would not be expected to attract or entrain migrating salmonids through the gate structure or in Smith Canal at any higher rate than what might occur under baseline conditions.” ([Certification Record SJA-CEQ-18181.](#)) The bulk of the comments request formatting changes and clarification of the model results. ([Certification Record SJA-CEQ-18182.](#)) In response to Appellant’s claim, SJAFCA describes the context of the memorandum prepared by ICF International as a “supervisor’s review of the analysis that existed at the time, making suggestions for further analysis.” ([SJAFCA January 17, 2019 Letter](#), p. 24.) The hydrodynamic modeling study was finalized and is an appendix to the FEIR. ([Certification Record SJA-CEQ-12610.](#)) See Sections V.B.3.a, and V.D.3.b., below, further discussing the hydrodynamic modeling for the Project.

¹¹ The Appellant reiterated this argument in its written response to questions ([Appellant January 17, 2019 Letter](#), pp. 5-6) and at the public hearing ([Jan. Hearing Transcript](#), p. 63).

¹² See Section V.B.3.a, below, further discussing the hydrodynamic modeling for the Project.

1 impacts to special-status fish species, and the conclusion that “the Project’s only potentially
2 significant impacts on those species would be from construction.” ([SJAFCA January 17, 2019](#)
3 [Letter](#), p. 23.)¹³
4

5 Additionally, SJAFCA cites to evidence that it analyzed the impact of design changes to
6 the Project on predation of special-status species in the Addendum to the FEIR. ([SJAFCA](#)
7 [January 17, 2019 Letter](#), p. 24.) The Addendum describes changes to the Project that include
8 the addition of dolphin and fender piles on the river-side of the wall. ([Certification Record SJA-](#)
9 [DP-006337](#).) The Addendum includes **Impact AQU-5: Predation of Special-Status Fish**
10 **Species during Project Operations**, which analyzes the impact of the design change on
11 special-status fish species due to predation. The impact analysis states that the design change
12 would likely attract invasive fish species, such as bass, as well as the special-status fish species
13 that they prey on, such as juvenile salmonids and juvenile green sturgeon and includes a
14 discussion of alterations of flows. ([Certification Record SJA-DP-006345](#).)¹⁴ However, SJAFCA
15 finds that the impact would be less than significant because these special-status species would
16 be able to migrate along other portions of the San Joaquin River channel. ([Certification Record](#)
17 [SJA-DP-006346](#).)¹⁵
18

19 As explained above in Section V.A.1, where the facts of the specific covered action show
20 that environmental impacts will not occur because the project will be designed, constructed
21 and/or operated in such a manner that no significant environmental impact will occur, the Delta
22 Plan Measures are not required and as a result are not applicable to the project under G
23 P1(b)(2). SJAFCA has demonstrated that it considered the potential for the Project to increase
24 predation of special-status species in both the FEIR and the Addendum, concluding that the
25 operation of the Project will not result in significant impacts on predation of special-status fish
26 species. ([Certification Record SJA-CEQ-01141-1157](#) and [Certification Record SJA-DP-006337-](#)
27 [6345](#).) Based on this finding, no mitigation measures are necessary. Therefore, the Appellant
28 has failed to show that there is not substantial evidence in the record to support SJAFCA’s
29 finding of consistency with G P1(b)(2) as to Delta Plan Measure 4-2, and we *deny* the appeal as
30 to this issue.

31 ///
32 ///
33 ///
34 ///

¹³ See also discussion in Section V.D.3.b., discussing SJAFCA’s analysis of potential impacts of nonnative species.

¹⁴ The Appellant claims that the Addendum does not discuss the issue of increased flow velocity. ([Appellant February 28, 2019 Letter](#), p.4.) The Addendum is one of several pieces of evidence indicating that SJAFCA considered potential impacts to special-status fish species relating to predation, and included analyzing alteration of flows. ([Certification Record SJA-DP-006345](#).) Although the Appellant frames its arguments in its February 28, 2019 letter in terms of lack of evidence, as described in this section and in Section V.B.3.a, below, there is evidence in the record that SJAFCA *did* conduct hydrodynamic modeling, but found that the operation of the Project would have a less-than-significant impact due to predation of special-status fish. Therefore, Appellants’ burden is to show that this evidence is not substantial evidence, which it has failed to do.

¹⁵ The Appellant omitted this analysis from the evidence presented in the Appeal, and thus did not present all the evidence in the record on this matter. As discussed in Section III, Standard of Review, the Appellant has the burden to show that the evidence is insufficient to support the agency’s decision and must recite all the evidence in the record; not just the part of the evidence that supports the appellant’s position. (*State Water Res. Control Bd. Cases, supra*, 136 Cal.App.4th at pp. 749-750.)

1 **ii. Whether SJAFCA Failed to Mitigate Impacts to Special-Status**
2 **Species from Increased Predation**
3

4 In addition to avoiding effects on special-status species and fish and wildlife habitat
5 through project design, Delta Plan Measure 4-2 contains sub-measures relating to construction
6 activities and compensatory mitigation of habitat. The Appellant contends that “the only
7 mitigation measures for aquatic habitat SJAFCA included are construction related and have no
8 relation to the Project’s design or operation.” ([Appeal Letter](#), p. 6.) The Appellant cites the
9 mitigation consistency table that SJAFCA submitted with its Certification, which contains four
10 measures to minimize negative impacts and effects on fish during construction: AQU-MM-1,
11 AQU-MM-2a, AQU-MM-2b, and AQU-MM-4. ([Certification Record SJA-DP-009009–009010.](#))
12

13 The FEIR included construction-related mitigation measures for impacts to special-status
14 fish species and their habitat and did not find any operational impacts to special-status fish
15 species. ([Certification Record SJA-CEQ-01147–01157](#), [SJAFCA January 17, 2019 Letter](#), p.
16 23.) SJAFCA also identified a less-than-significant operational impact to special-status fish
17 species in the Addendum to the FEIR. ([Certification Record SJA-DP-006346.](#)) Because
18 SJAFCA did not find any significant operational impacts to special-status fish species, there is
19 no requirement to include mitigation measures for operation of the Project for special-status fish
20 species and their habitat. Therefore, the Appellant has failed to show that Delta Plan Measure
21 4-2 is applicable to the operational impacts of the Project, and the Appellant has failed to show
22 that there is not substantial evidence in the record to support SJAFCA’s finding of consistency
23 with G P1(b)(2) as to Delta Plan Measure 4-2 with regard to the construction impacts of the
24 Project, and we *deny* the appeal as to this issue.
25

26 **c. Delta Plan Measure 4-3**

27 Delta Plan Measure 4-3 requires the avoidance of impacts to fish and wildlife habitat
28 and, if such impacts are unavoidable, requires the restoration or preservation of compensatory
29 habitat. (Appendix O, *Mitigation and Monitoring Reporting Program*, Delta Plan, pp. 6-7.) The
30 Appellant contends that “the only mitigation measures for aquatic habitat SJAFCA included are
31 construction related and have no relation to the Project’s design or operation.” ([Appeal Letter](#), p.
32 6.) The Appellant cites the mitigation consistency table that SJAFCA submitted with its
33 Certification.
34

35 In the mitigation consistency table attached to its Certification, SJAFCA lists four Smith
36 Canal Gate Measures to minimize negative impacts and effects on fish during construction:
37 AQU-MM-1, AQU-MM-2a, AQU-MM-2b, and AQU-MM-4. Mitigation measure AQU-MM-1 is also
38 intended to minimize impacts on fish habitat by limiting in-water construction activity to certain
39 seasons when the relevant species are present.
40

41 The Appellant’s January 17, 2019, written statement cites to a report prepared by its
42 expert, BSK Associates (“BSK Report”), stating that “there is a direct loss of [critical] habitat by
43 acres, and access by narrowing of the channel.” ([Appellant January 17, 2019 Letter](#), pp. 6 - 7;
44 [Certification Record SJA-CEQ-02016.](#)) However, the BSK Report provides no evidence to
45 support that statement. Moreover, although special-status fish species have the potential to be
46 present in the Project area ([Certification Record SJA-CEQ-01136](#)), the FEIR found that “Smith
47 Canal does not provide ideal habitat for native fish species.” ([Certification Record SJA-CEQ-](#)
48 [01135.](#)) SJAFCA concluded that because Smith Canal does not provide ideal habitat for native
49 fish species, additional mitigation measures to avoid impacts to fish habitat were unnecessary.
50 (*Ibid.*)

1
2 As explained in the discussion of Delta Plan Measure 4-2 in Section V.A.3.b. above,
3 SJAFCA has only adopted construction-related mitigation measures for impacts to fish and fish
4 habitat. The FEIR did not find any operational impacts to fish species and fish habitat, and
5 concluded that no operational mitigation measures are required. So, too, with respect to the
6 Addendum and design impacts.
7

8 Therefore, the Appellant has failed to show that there is not substantial evidence in the
9 record to support SJAFCA's finding of consistency with G P1(b)(2) as to Delta Plan Measure 4-
10 3, and we *deny* the appeal as to this issue.
11

12 **d. Delta Plan Measure 4-4**

13 The Appellant contends that "SJAFCA's undeveloped invasive species management
14 plan is not consistent with ... MM 4-4." ([Appeal Letter](#), p. 2.) However, the Appellant does not
15 make any specific argument or direct the Council to any evidence regarding the Smith Canal
16 Gate Project Measures as they relate to Delta Plan Measure 4-4. We will consider the
17 consistency only of the measures that the Appellant identifies and discusses specifically.
18 Therefore, the Appellant has not raised an issue within the scope of the Council's review as to
19 Delta Plan Measure 4-4, and we *deny* the appeal as to this issue.
20

21 **4. Conclusion**

22 For the foregoing reasons, we conclude that the Appellant has failed to show that
23 there is not substantial evidence in the record to support SJAFCA's finding of consistency with
24 G P1(b)(2). Based upon that conclusion and the analysis set forth above in Section V.A.3., we
25 therefore *deny* the portion of the appeal challenging the Certification of Consistency with this
26 policy.
27

28 **B. Policy G P1(b)(3) (Cal. Code Regs., tit. 23, § 5002 subd. (b)(3)): Best Available
29 Science**

30 SJAFCA certifies that the Smith Canal Gate Project is consistent with G P1(b)(3). The
31 Appellant raises arguments that it is not. For the reasons discussed below in Section V.B.3., the
32 Council concludes that the Appellant failed to show that the Certification of Consistency with G
33 P1(b)(3) is not supported by substantial evidence in the record. We therefore *deny* the appeal
34 on these grounds.

35 **1. Policy Requirements**

36 G P1(b)(3) requires "as relevant to the purpose and nature of the project, all covered
37 actions must document use of best available science." Best available science is defined in the
38 Delta Plan as the best scientific information and data for informing management and policy
39 decisions. Best available science shall be consistent with the guidelines and criteria found in
40 Appendix 1A, which lists six criteria for best available science: relevance, inclusiveness,
41 objectivity, transparency and openness, timeliness, and peer review. (Cal. Code Regs, tit. 23, §
42 5001, subd. (f).) Best available science is further described in Delta Plan Appendix 1A, as
43 follows:

44 "The Delta Reform Act requires the Council to make use of best available science in
45 implementing the Delta Plan. Best available science is specific to the decision being

1 made at the time frame available for making that decision. Best available science is
2 developed and presented in a transparent manner consistent with the scientific process
3 (Sullivan et al. 2006), including clear statements of assumptions, the use of conceptual
4 models, description of methods used, and presentation of summary conclusions.
5 Sources of data used are cited and analytical tools used in analyses and syntheses are
6 defined. Best available science changes over time and decisions may need to be
7 revisited as new scientific information becomes available. Ultimately, best available
8 science requires scientists to use the best information and data to assist management
9 and policy decisions. The process used should be clearly documented and effectively
10 communicated to foster improved understanding and decision making.”

11 **2. Certification**

12 SJAFCA certifies that the Project is consistent with all six G P1(b)(3) criteria for best
13 available science. A brief summary of SJAFCA's finding for each of the six criteria is provided
14 below.

15 **a. Relevance**

16
17 SJAFCA certifies that the Project is consistent with the G P(1)(b)(3) best available
18 science criterion for Relevance, stating that it conducted site-specific testing and modeling to
19 inform the project location and design, providing specific citations to completed geotechnical
20 studies with site-specific boring logs, associated laboratory test data, and associated
21 engineering analyses ([Certification Record SJA-DP-003921](#); [SJA-DP-001280](#)), and
22 hydrodynamic analyses focusing on site-specific drainage in relation to flow ([Certification](#)
23 [Record SJA-DP-000013](#); [SJA-DP-000125](#); [SJA-DP-000128](#); [SJA-DP-000171](#)). In addition,
24 SJAFCA states that data and information applicable to conditions at the site informed the
25 environmental analyses, citing reference lists in Chapter 6 of the FEIR ([Certification Record](#)
26 [SJA-CEQ-01330-1352](#)) and discussion of use of listed references throughout the FEIR
27 ([Certification GP1 Finding](#), pp. 5-6.)
28

29 **b. Inclusiveness**

30
31 SJAFCA certifies that the Project is consistent with the G P1(b)(3) best available science
32 criterion for Inclusiveness based on coordination with the Federal Emergency Management
33 Agency (FEMA), U.S. Army Corps of Engineers (USACE), California Department of Fish and
34 Wildlife (CDFW), U.S. Fish and Wildlife Service (USFWS), and National Marine Fisheries
35 Service (NMFS) on the project planning and design. The Certification states that the Project
36 design was refined through repeated coordination with these agencies, as well as with scientists
37 and engineers who helped to identify operating constraints and parameters, and construction
38 constraints and requirements. In addition, SJAFCA states that data and information used in the
39 environmental analysis represents a range of disciplines, evidenced by the reference lists in
40 Chapter 6 of the FEIR. ([Certification Record SJA-CEQ-01330-1352](#); and discussion of those
41 reference materials throughout the FEIR [Certification GP1 Finding](#), p. 6.)
42

43 **c. Objectivity**

44
45 SJAFCA certifies that the Project is consistent with the G P1(b)(3) best available science
46 criterion for Objectivity, stating that “data collection and analyses meet the standards of the
47 scientific method and were free from nonscientific influences and considerations.” ([Certification](#)
48 [GP1 Finding](#), p. 6.) SJAFCA states that Project siting, design, and environmental review were

1 conducted by consultants with technical expertise on the subject matter such that objectivity of
2 the analysis was ensured. ([Certification GP1 Finding](#), p. 6.)

3
4 **d. Transparency and Openness**

5
6 SJAFCA certifies that the Project is consistent with the G P1(b)(3) best available
7 science criterion for Transparency and Openness, stating that the FEIR identifies the sources
8 and methods of environmental analysis, including analysis of potential alternatives to the
9 project, discussion of analysis limitations, and consideration of uncertainties. The Certification
10 identifies specific examples of uncertainties related to potential alternatives to the Project
11 ([Certification GP1 Finding](#), p. 6; [Certification Record SJA-CEQ-00960-988](#)), hydraulic
12 uncertainty ([Certification Record SJA-CEQ-00966](#)), uncertainties related to the local effects of
13 climate change ([Certification Record SJA-CEQ-01081-1084](#)), the uncertain contribution of
14 predation to fish mortality ([Certification Record SJA-CEQ-01144](#)), and a limitation on the
15 analysis of potential public health risks posed by exposure to toxic air contaminants
16 ([Certification Record SJA-CEQ-01048](#).) In addition, SJAFCA states that this analysis, along
17 with the technical analyses that informed siting and design, were subject to both public
18 comment and peer review. ([Certification GP1 Finding](#), p. 6.)

19
20 **e. Timeliness**

21
22 SJAFCA certifies that the Project is consistent with the G P1(b)(3) best available science
23 criterion for Timeliness. SJAFCA states that the timeframe for data collection and analysis was
24 guided by CEQA, and as such, “environmental analysis was based on scientific information that
25 was applicable to environmental conditions at the Project site as they existed as of the date of
26 the Notice of Preparation, June 19, 2014.” ([Certification GP1 Finding](#), p. 6.) The Certification
27 states that SJAFCA made adjustments to the Project design based on best available science,
28 and references the Addendum ([Certification Record SJA-DP-007826](#)) and Addendum II to the
29 FEIR ([Certification Record SJA-DP-007844](#).) SJAFCA states that Project facilities have been
30 designed to meet current structural and geotechnical engineering requirements set forth in six
31 geotechnical studies submitted as part of the record. ([Certification Record SJA-DP-003921](#);
32 [SJA-DP-001280](#), [SJA-DP-000013](#); [SJA-DP-000125](#); [SJA-DP-000128](#); [SJA-DP-000171](#).)
33 SJAFCA also states that where necessary, preliminary results from scientific studies and
34 monitoring were brought to SJAFCA’s attention before studies were complete, and the
35 uncertainties, limitations, and risks associated with such preliminary results were clearly
36 documented. ([Certification GP1 Finding](#), p. 6.)

37
38 **f. Peer Review**

39
40 SJAFCA certifies that the Project is consistent with the G P1(b)(3) best available science
41 criterion for Peer Review, stating that the environmental analysis completed to support the
42 Project was informed by quality control review of “Project-related studies, relevant scientific
43 information related to biological and physical resources in the Project area, and other pertinent
44 information.” ([SJAFCA Certification](#), p. 6.) SJAFCA also states that the Project is consistent
45 with this criterion because an independent panel of experts reviewed the engineering design at
46 multiple stages of design development. SJAFCA states that the independent panel of experts
47 “was coordinated by an entity independent from the design team; was done by independent,
48 external reviewers who had no conflicts of interest... and was performed during multiple stages
49 of the Project design.” ([SJAFCA Certification](#), pp. 6-7.)

1 **3. Appeal and Analysis**

2 The Appellant asserts that SJAFCA fails to demonstrate use of best available science in
3 its evaluation of Project water quality and biological impacts in Atherton Cove. ([Appeal Letter](#), p.
4 6.)¹⁶ The Appellant raises two issues: (a) improper reliance on residence time to analyze water
5 quality; and (b) failure to analyze cyanobacteria proliferation. Each is described below, with an
6 analysis of the issue related to consistency of the Project with G P1(b)(3).
7

8 **a. Whether use of residence time to analyze water quality impacts was**
9 **improper**

10 The Appellant contends that SJAFCA’s sole reliance on a hydrodynamic study of
11 residence time to analyze the water quality impacts of the Project is inadequate to meet the G
12 P1(b)(3) best available science criteria of Relevance and Inclusiveness. ([Appeal Letter](#), pp. 6-7.)
13 The Relevance criterion (Appendix 1A, *Best Available Science*, Delta Plan, Table 1A-1.)
14 requires that scientific information used should be germane to the Delta ecosystem and/or
15 biological and physical components (and/or processes) affected by the proposed decisions. The
16 Inclusiveness criterion requires that scientific information used shall incorporate a thorough
17 review of relevant information and analyses across relevant disciplines. (*Ibid.*)
18
19

20 The Appellant states that SJAFCA’s reliance on a hydrodynamic study of residence time
21 “fails to consider other important factors affecting water quality” ([Appeal Letter](#), p. 7; citing
22 [Certification Record SJA-CEQ-02013-2018](#).) The Appellant cites to a statement in the
23 Hydrodynamic Modeling Report in the FEIR, Appendix B¹⁷, which states that it was “not within
24 the scope of the [] modeling effort to provide a description of the full range of variables
25 attributing to water quality, but the two dimensional modeling effort does provide insight into two
26 of the primary variables affecting water quality related to flow dynamics, which are flow
27 velocities and flow exchange.” ([Appeal Letter](#), p. 7; citing [Certification Record SJA-CEQ-](#)
28 [12686](#).) The Appellant also contends that the hydrodynamic study of residence time itself is
29 inadequate for Atherton Cove, because it used mid-channel locations rather than lowest velocity
30 locations likely to experience the worst-case water quality impacts. ([Appeal Letter](#), pp. 9-10.)
31

32 The FEIR provides evidence that residence time modeling performed for the Project
33 includes flow velocities and flow exchange, which it identifies as two of the primary variables
34 affecting water quality related to flow dynamics. ([Certification Record SJA-CEQ-12686](#).) This
35 evidence identifies analysis assumptions that support use of residence time as an indicator of

¹⁶ The Appellant also claims that SJAFCA failed to demonstrate use of best available science in its evaluation of impacts due to invasive species. However, the Appellant does not make any specific argument or direct the Council to any evidence regarding best available science and SJAFCA’s evaluation of impacts to invasive species. We will only consider claims that the Appellant identifies and discusses specifically. Therefore, the Appellant has not raised and argued an issue on best available science and SJAFCA’s evaluation of impacts due to invasive species, and we *deny* the appeal as to this issue.

¹⁷ The version of the FEIR submitted with the Certification included the Hydrodynamic Modeling Alignment and Gate Width Evaluation Final Report as Appendix B, whereas the version of the FEIR submitted with the Administrative Record contains a different, abbreviated version of the hydrodynamic modeling results as Appendix B. For clarity, we cite to the February 24, 2015 version of the Hydrodynamic Modeling Final Report from the Administrative Record submitted on December 13, 2018. ([Certification Record SJA-CEQ-12610](#).)

1 overall water quality within the Project area. The Appellant has not met its burden of explaining
2 how the absence of additional modeling variables make SJAFCA's analysis inconsistent with G
3 P1(b)(3) best available science criteria of Relevance and Inclusiveness.
4

5 The Appellant also does not explain why the use of mid-channel locations to estimate
6 residence time is not consistent with best available science criteria of Relevance and
7 Inclusiveness. Without more information, it is not clear why SJAFCA would be required to
8 present the worst-case scenario for its analysis of impacts to demonstrate consistency with the
9 G P1(b)(3) best available science criteria of Relevance and Inclusiveness.
10

11 The Appellant also claims that the residence time analysis is inadequate to address the
12 Project's water quality impacts from water hyacinth, methylmercury, and dissolved oxygen,
13 which it asserts SJAFCA should have analyzed. ([Appeal Letter](#), p. 7, citing [Certification Record](#)
14 [SJA-CEQ-02013 - 02018](#).) While the BSK Report is cited as evidence by the Appellant, the
15 BSK Report does not cite scientific literature that support the Appellant's arguments, and the
16 Appellant does not explain the relevance of these statements to analyzing consistency with G
17 P1(b)(3) best available science criteria of Relevance and Inclusiveness.
18

19 Relevant to the Appellant's assertions, however, the FEIR describes why
20 SJAFCA performed hydrodynamic modeling and residence time analysis:
21

22 “[r]esidence time, or the average time a particle resides in a particular hydraulic
23 system, provides a measure of the rate at which waters in a particular hydraulic
24 system would be renewed. The residence time analysis, therefore, provides a
25 method for assessing the water quality of Smith Canal and Atherton Cove and
26 whether changes resulting from the proposed project, such as the fixed dual
27 sheet pile wall, would likely improve or degrade water quality in the system.”
28 ([Certification Record SJA-CEQ-01010](#).)
29

30 The Hydrodynamic Modeling Report in the FEIR, Appendix B, further states that water
31 quality of Smith Canal can be characterized using residence time modeling and that “residence
32 times provide a means for assessing the water quality of the hydraulic system, such as whether
33 changes to a hydraulic system are likely to improve or degrade water quality in the system.”
34 ([Certification Record SJA-CEQ-12686](#).) In addition, Appendix B to the FEIR states that, “[t]he
35 main purpose of the transport modeling is to predict whether there are significant changes to
36 residence times, and therefore to the water quality within Smith Canal with the proposed
37 project.” ([Certification Record SJA-CEQ-12688](#).)
38

39 Regarding other potential water quality impacts, the FEIR states that:
40

41 “[b]eneficial uses and water quality will be protected, and significant impacts on
42 water quality will be avoided, by precautionary construction measures (e.g., use
43 of cofferdams, vibratory hammers, and bag filters for dewatering), mitigation
44 measures to minimize water quality effects associated with construction
45 (Mitigation Measures WQMM-1a, WQ-MM-1b, and WQ-MM-1c), the debris
46 removal program, the water hyacinth control program, and a project design that
47 does not reduce tidal circulation within Smith Canal.” ([Certification Record SJA-](#)
48 [CEQ-01372](#).)
49

50 SJAFCA does not specifically analyze water quality constituents such as mercury or
51 methylmercury, but states that “[t]he methods used to minimize increases in turbidity (Impact

1 WQ-1) would minimize re-suspension of mercury or methylmercury.” ([Certification Record SJA-CEQ-01389](#).)¹⁸ The FEIR also notes that as part of a Section 401 water quality certification, the
2 Regional Water Board would determine if monitoring of mercury concentrations would be
3 necessary during project construction. (*Ibid.*)
4

5
6 Therefore, the Appellant fails to demonstrate that SJAFCA’s use of residence time
7 modeling, as related to the Relevance and Inclusiveness criteria, is not supported by substantial
8 evidence in the record, and we *deny* the appeal as to this issue.
9

10 **b. Cyanobacteria Proliferation**

11
12 SJAFCA finds that, “[i]n general, the project is not expected to cause an increase
13 in concentrations of chemicals, algae, eutrophication, or aquatic plants because the tidal
14 exchange (volume of water moving in and out of Smith Canal) would not be significantly
15 affected.” ([Certification Record SJA-CEQ-01434](#).) To support its finding, SJAFCA refers to the
16 Hydrodynamic Modeling Report in the FEIR, Appendix B. The report states “...residence times
17 provide a means for assessing the water quality of the hydraulic system, such as whether
18 changes to hydraulic system are likely to improve or degrade water quality in the system.”
19 ([Certification Record SJA-CEQ-12686](#).) The report further states, “The main purpose of
20 transport modeling is to predict whether there are significant changes due to residence times,
21 and, therefore, to the water quality within Smith Canal with the proposed closure structure
22 configurations.” (*Ibid.*)
23

24 The Appellant contends that SJAFCA failed to disclose or analyze the risk that
25 the Project may cause biological impacts associated with proliferation of cyanobacteria, and that
26 this failure conflicts with the G P1(b)(3) best available science criteria for Relevance and
27 Inclusiveness. ([Appeal Letter](#), p. 9.)
28

29 To support its claim that the record contains evidence that “demonstrates that the
30 Project may cause biological impacts by encouraging proliferation of cyanobacteria” the
31 Appellant cites to the BSK Report, which contains a list of references regarding cyanobacteria,
32 methylmercury, and water hyacinth. ([Appeal Letter](#), p. 8, citing [Certification Record SJA-CEQ-02018 - 02019](#).) However, the Appellant does not explain the relevance of the BSK Report to
33 analyzing consistency with G P1(b)(3) best available science criteria for Relevance and
34 Inclusiveness. It is also unclear how or whether the Appellant intends for the Council to
35 consider the report’s references to the best available science criteria for Relevance or
36 Inclusiveness. The Council nevertheless reviewed the references, and determined that: (i) some
37 of the references are not in the record before the Council, and (ii) without more explanation, it is
38 unclear how the references support the Appellant’s argument that the “Project may cause
39 biological impacts by encouraging proliferation of cyanobacteria” or that SJAFCA failed to meet
40 the best available science criteria of Relevance or Inclusiveness.¹⁹ ([Appeal Letter](#), p. 8.)
41

¹⁸ The Appellant claims, in its February 28, 2019 letter, that this reference to the FEIR “concedes that SJAFCA did not specifically analyze water quality constituents such as mercury or methylmercury.” ([Appellant February 28, 2019 Letter](#), p. 4.) The record contains substantial evidence showing that SJAFCA analyzed water residence time and velocity as surrogates for water quality. (See [Certification Record SJA-CEQ-12686](#).) The Appellant has not met its burden of explaining how the absence of specific analysis of additional water quality constituents make SJAFCA’s analysis inconsistent with G P1(b)(3) best available science criteria of Relevance and Inclusiveness.

¹⁹ Of the 17 references identified in the BSK Report, only eight were relevant to cyanobacteria generally. Some of the references were not submitted with the appeal, so it is unclear whether or not the Appellant

1
2 The Appellant further states that the Project would cause constriction at the
3 mouth of Atherton Cove which “would likely cause localized decreases in water flow, trapping
4 organic material and elevating nutrient levels, thereby creating conditions known to significantly
5 exacerbate cyanobacterial blooms.” As evidence, the Appellant refers to pages 4 and 6 in the
6 BSK Report. Page 4 refers to a “later analysis,” the location of which is unclear. ([Certification
7 Record SJA-CEQ-02012](#).) Page 4 also refers to the Toft (2003) study, which investigates the
8 food web effect of the invasive water hyacinth replacing the native pennywort. (*Ibid.*) Neither the
9 report nor the referenced journal article support the claim made by the Appellant that the Project
10 will create conditions known to exacerbate cyanobacterial blooms. The Appellant further
11 references the Boyer & Sutula (2015) report and the Cohen & Moyle (2004) report. ([Appeal
12 Letter, Exhibit L and Exhibit M.](#)) Boyer & Sutula 2015 is a technical report regarding submersed
13 and floating macrophytes. ([Appeal Letter, Exhibit L.](#)) The Council could not find any information
14 in this report to substantiate the Appellant’s claims regarding cyanobacteria. Similarly, the
15 Cohen & Moyle (2004) report was prepared for a State Water Resources Control Board report
16 on exotic species in the Delta, and does not include any mention of cyanobacteria. ([Appeal
17 Letter, Exhibit M.](#))
18

19 The Appellant also references the effects of toxic algal blooms on dissolved oxygen, as
20 well as the absorption of toxins by fish, birds, and mammals. However, these references do not
21 demonstrate that SJAFCA failed to meet best available science criteria of Relevance or
22 Inclusiveness. The Appellant claims that the FEIR fails to disclose the Project’s risk of
23 increasing these destructive blooms, but does not describe their potential biological impacts.
24 ([Appeal Letter](#), pp. 8-10.) The Appellant states that cyanobacteria is pervasive throughout the
25 Delta and cites numerous references to this effect (e.g., Sabalow 2015, Berg & Sutula 2015).
26 ([Appeal Letter](#), p. 9.)²⁰ While most of the references relate to cyanobacteria, they do not provide
27 evidence describing what type of analysis could be employed to predict harmful cyanobacteria
28 blooms or explain how SJAFCA failed to meet best available science criteria of Relevance or
29 Inclusiveness. In fact, Berg & Sutula (2015) state it is not possible to predict harmful
30 cyanobacteria blooms at this point, and recommend the development of an ecosystem model of
31 phytoplankton primary productivity and harmful algal blooms occurrences. ([Appeal Letter,
32 Exhibit C](#), p. 51.) Berg & Sutula (2015) identify temperature and flows as factors relating to
33 harmful cyanobacteria blooms, but also point out that “a number of other factors such as grazing
34 by higher trophic levels and exposure to toxic compounds such as herbicides and pesticides
35 may influence blooms.” ([Appeal Letter, Exhibit C](#), p. 33.) The report further states “the lack of
36 routine monitoring hindered the ability to summarize, with confidence, the status and trends of
37 harmful cyanobacteria blooms in the Delta and to what extent nutrients versus other factors
38 were controlling their occurrence.” ([Appeal Letter, Exhibit C](#), p. 50.)
39

40 The Appellant has not demonstrated that SJAFCA failed to meet best available science
41 criteria for Relevance and Inclusiveness to evaluate cyanobacteria in its decision to approve the
42 Project, and we *deny* the appeal as to this issue.
43

wanted to request the Council add those documents under Rule 10 or Rule 29 of the Appeals
Procedures. See Exhibit A, B, and C for the Council’s rulings on the Appellant’s requests. Finally, the
Spier et al reference is not in the record and it not publicly available.

²⁰ The *Berg & Sutula 2015* study states that in 2012, abundant *Microcystis* colonies, a cyanobacteria
species known to produce a harmful toxin, were observed in the South-East Delta region in the Turning
Basin of the Stockton Shipping Channel, citing to Spier et al. 2013. However, Spier et al. 2013 is not in
the record before the Council.

1 **4. Conclusion**

2 Under the substantial evidence standard of review, the Council does not substitute its
3 own findings or inferences for SJAFCA's. Further, what constitutes the best available scientific
4 data or assumptions is itself a scientific determination for which SJAFCA is owed deference,
5 provided its conclusions are fairly traceable to the record. (See *San Luis & Delta-Mendota*
6 *Water Authority v. Locke* (2014) 776 F.3d 971, 995-996.) Here, the Appellant submitted its own
7 expert report and other literature to demonstrate omissions in SJAFCA's analytical approach;
8 but a disagreement among experts considering the same facts in the record does not establish
9 a lack of substantial evidence in the record. The Appellant bears the burden of demonstrating
10 that the claimed omissions in the administrative record pertain to the outcome of the
11 Certification of Consistency regarding use of best available science, and that the record
12 therefore does not contain substantial evidence supporting the Certification on this issue. For
13 the reasons discussed in Section V.B. 3, we conclude that the Appellant has not demonstrated
14 that SJAFCA's Certification lacks substantial evidence supporting its finding of consistency with
15 the best available science criteria for Relevance and Inclusiveness. Therefore, we *deny* the
16 appeal as to these issues.

17
18 **C. Policy G P1(b)(4) (Cal. Code Regs., tit. 23, § 5002 subd. (b)(4)): Adaptive**
19 **Management**

20 SJAFCA maintains that G P1(b)(4) does not apply to the Smith Canal Gate Project. The
21 Appellant argues that it does apply, and that SJAFCA should have prepared an adaptive
22 management plan for the Project. For the reasons discussed below in Section V.C.3., the
23 Council finds that G P1(b)(4) does not apply to the Project, and so no adaptive management
24 plan is required. Accordingly, we *deny* the appeal as to this policy.

25 **1. Policy Requirement**

26 In the Delta Reform Act, the Legislature required the Council to include a formal adaptive
27 management strategy in the Delta Plan for ongoing water management and ecosystem
28 restoration decisions. (Wat. Code, § 85308, subd. (f).) Delta Plan Policy G P1(b)(4), which
29 implements this directive, requires that ecosystem restoration and water management covered
30 actions include "adequate provisions,...to assure continued implementation of adaptive
31 management." (Cal. Code Regs, tit. 23, § 5002, subd. (b)(4).) This requirement is satisfied
32 through an adaptive management plan. (*Ibid.*) Because this policy only applies to ecosystem
33 restoration and water management covered actions, for an adaptive management plan to be
34 required for the Smith Canal Gate Project, it must fall into either category.

35 **2. Certification**

36 SJAFCA certifies that, because the purpose of the Project is "to provide flood
37 protection," the project should be classified as a flood control project, rather than a water
38 management or ecosystem restoration project. ([Certification GP1 Finding](#), p. 7.) The
39 Certification states as follows:

40 "The Project purpose is to provide flood protection, as described in the Covered
41 Action Summary. Therefore, the Project would not include water management or
42 ecosystem restoration, and therefore the adaptive management of these
43 environmental resources (i.e., water supply and ecosystems) is not applicable
44 given the scope of this covered action. Regarding water management, the
45 Project does not include water management related to the provision of a more

1 reliable water supply for California. The Project does not involve ecosystem
2 restoration.” (*Ibid.*)

3
4 To SJAFCA, water management projects are limited to those that provide a more
5 reliable water supply. (*Ibid.*) Because the Project controls flooding, the adaptive
6 management requirement does not apply. (*Ibid.*)

7 8 **3. Appeal and Analysis**

9 The Appellant contends that, because the Project would also “alter water flows,
10 hydrology, invasive species, or other factors affecting aquatic habitat in the Delta,” it falls within
11 the definition of a “water management” project.²¹([Appeal Letter](#), p.11.) As a result, the Appellant
12 contends that it requires an adaptive management plan. (*Ibid.*)

13 At the heart of this issue lies the meaning of “water management” in G P1(b)(4) –
14 specifically, whether it includes flood control projects. Neither the Delta Plan regulations nor the
15 Delta Reform Act define “water management.” SJAFCA interprets the term “water management”
16 to be limited to projects that provide a reliable water supply; whereas, the Appellant more
17 broadly interprets it to also include any project that alters water flows, hydrology, invasive
18 species, or other factors affecting aquatic habitat in the Delta.

19 In interpreting this term in our regulations, we are guided by the same standards a court
20 would apply when interpreting a statute. (See *Consumer Cause, Inc. v. Weider Nutrition Int’l,*
21 *Inc.* (2001) 92 Cal.App.4th 363, 368.)

22 **i. “Water management” in G P1(b)(4)**

23 We first turn to the plain meaning. (*People v. Allegheny Casualty Co.* (2007) 41 Cal.4th
24 704, 709.) The parties offer conflicting interpretations of “water management.” Because the
25 meaning of “water management” is susceptible to both interpretations, the concept is
26 ambiguous, and we turn our analysis to the statutory and regulatory contexts, giving significance
27 where possible to every word or part, and harmonizing each part in the context of the whole.
28 (See *Moyer v. Work. Comp. App. Bd.* (1973) 10 Cal.3d 222, 232.)

29 **ii. “Water management” in the Delta Reform Act**

30
31 To the extent that G P1(b)(4) is ambiguous, we may look to its statutory and regulatory
32 context. (See *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34
33 Cal.4th 733, 737.)

34 The Delta Reform Act directs the Council to develop a Delta Plan “that furthers the
35 coequal goals.” (Wat. Code, § 85300, subd. (a).) Water Code section 85054 lays out the two
36 coequal goals at the heart of the Delta Reform Act: “providing a more reliable water supply” and
37 “protecting, restoring, and enhancing the Delta ecosystem.” (Wat. Code, § 85054.) The Delta
38 Reform Act distinguishes between “providing a more reliable water supply” and the other,
39 different coequal goal (ecosystem restoration). The coequal goals do not mention flood control.
40 (Wat. Code, § 85054.)

41 The Delta Reform Act defines a covered action as a project that will have a significant
42 impact on achievement of one or both of these coequal goals, or on implementation of a flood

²¹ Neither party asserts that the Smith Canal Gate Project covered action could be considered an ecosystem restoration project, and we do not address it.

1 control program. (Wat. Code, § 85057.5, subd. (a)(4) (“...will have a significant impact on
2 achievement of one or both of the coequal goals or the implementation of government-
3 sponsored flood control programs to reduce risks to people, property, and state interests in the
4 Delta.”)

5 If flood control fell within the coequal goals, the additional condition to implement flood
6 control programs would render the “flood control program” language surplusage, which must be
7 avoided.²² (*Carmack v. Reynolds* (2017) 2 Cal.5th 844, 850.)
8

9 The Delta Reform Act distinguishes between projects that provide a more reliable water
10 and projects that control flooding. For additional insight, we next turn to the regulatory context.
11 (See *Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733,
12 737.)
13

13 iii. “Water management” in the Delta Plan Regulations

14 The Delta Plan regulations similarly conceive of water management as a separate
15 category from flood control. G P1(b)(4) is limited to “water management” and “ecosystem
16 restoration” projects. Section 5011 subdivision (b) (Policy DP P2), on the other hand, refers to
17 “the siting of water management facilities, ecosystem restoration, and flood management
18 infrastructure.” If “flood management infrastructure” fell within water management, then the
19 mention of “flood management infrastructure” alongside “water management” in DP P2 would
20 be redundant. We must avoid an interpretation that conflates the two, and so the Delta Plan
21 Regulations suggest that water management and flood control are separate concepts.
22 (*Carmack v. Reynolds* (2017) 2 Cal.5th 844, 850 [“a construction making some words
23 surplusage is to be avoided”].)

24 The Appellant claims that the Project should be considered a water management project
25 under G P1(b)(4) because it “will admittedly alter water flows, hydrology, invasive species, and
26 other factors affecting aquatic habitat in the Delta.”²³ ([Appeal Letter](#), p.11.) In the Appellant’s
27 view, if a project may affect the waters of the Delta, it is a water management project. The
28 Appellant has provided no legal basis for its interpretation, nor do our regulations support it.

²² This distinction is reflected in the eight objectives of the Delta Reform Act, which also treats them separately. [Subd. (a) of section 85020 refers to “manag[ing] the Delta’s water and...water resources of the state.” Subdivisions (d), (e), and (f) also reference water management actions: water conservation and sustainable water use (subd. (d)), improved water quality (subd. (e)), and improved statewide conveyance (subd. (f).) Flood control is again discussed separately (subd. (g) (“investments in flood protection”).) (Wat. Code, § 85020.)] This distinction is also reflected in the sections of the Delta Reform Act establishing the Delta Plan, which translate this framework into the required contents of the Plan. The Act requires that the Delta Plan include measures to promote a more reliable water supply (Wat. Code § 85302, subd. (d)(1)-(3)); options for new and improved water conveyance and storage infrastructure and the operations of both (Wat. Code, § 85304); and water conservation and efficiency measures (Wat. Code, § 85303). These water-related provisions do not discuss flood control, which is addressed separately in sections 85305 (levee investments), 85306 (consultation with Central Valley Flood Protection Board); and 85307 (actions taken outside of the Delta to reduce Delta flood risks). (Wat. Code, §§ 85305, 85306, and 85307.)

²³ The Appellant also cites to a Delta Stewardship Council staff comment letter on the Smith Canal Gate Project DEIR as evidence that the Delta Plan requires this project include an adaptive management plan. The comment letter merely included information for policies possibly implicated by the project. ([Certification Record SJA-CEQ-01364](#).) It did not find that the project was a water management project nor directly address the issue. The letter is also discussed in Section V.D.3.b.

1 Naturally, flood control may affect water management and vice versa. The Delta Plan
2 acknowledges this overlap: “Delta flooding could interrupt the conveyance of water through the
3 Delta...” (Chapter 7, *Reduce Risk to People, Property, and State Interests in the Delta*, Delta
4 Plan, p. 5), “[l]evee failures in the Delta may interrupt water supplies to industry in San Diego”
5 (Chapter 3, *A More Reliable Water Supply for California*, Delta Plan, p. 67.), and “[improved
6 conveyance] will decrease the vulnerability of Delta water supplies to disruption by natural
7 disasters, such as ... levee failures.” (Chapter 3, *A More Reliable Water Supply for California*,
8 Delta Plan, p. 72.) That flood control, or lack thereof, affects water management does not make
9 a flood control project a water management project. If every flood control project, by virtue of
10 altering water flows, fell under the umbrella of a water management project, any distinction
11 could easily be rendered meaningless. (See *Mendoza v. Nordstrom, Inc.* (2017) 2 Cal.5th 1074,
12 1088.)

13 After considering how “water management” is used in the overall context of the Delta
14 Reform Act, and Delta Plan Regulations, we conclude that flood control projects are a separate
15 category from water management projects. Accordingly, Delta Plan Policy G P1(b)(4) does not
16 require an adaptive management plan for flood control projects.²⁴

17 **iv. Smith Gate Canal project**

18 SJAFCA’s stated purpose of the Smith Canal Gate Project is to provide flood control.
19 The project’s objective is “to isolate the Smith Canal from the San Joaquin River” in order to
20 “remove the affected area from the 100-year floodplain.” ([Certification](#), p. 2.) Its ultimate aim is
21 to “reduce flood risk for approximately 8,000 properties.” (*Ibid.*) As stated in the Certification,
22 the Project’s *only* purpose is to control flooding: “other than as needed for flood control
23 purposes...the gate would remain open.” ([Certification](#), p. 3.) The Project has no stated water
24 management purposes. The Smith Canal Gate Project is a flood control project, not a water
25 management project; therefore G P1(b)(4) does not apply.
26

27 Because the purpose of the project is to provide flood control, the Smith Canal Gate
28 Project is a flood control project and an adaptive management plan is not required pursuant to
29 Delta Plan Policy G P1(b)(4) for flood control projects.

30 **v. Consistency with G P1(b)(4)**

31 Because the Smith Canal Gate Project is neither a water management nor an
32 ecosystem restoration project, the Council need not consider whether the Smith Gate Canal
33 Project is consistent with G P1(b)(4).

34 **4. Conclusion**

35
36 For the foregoing reasons, we conclude that G P1(b)(4) does not apply to the Smith
37 Canal Gate Project. Based upon that conclusion and the analysis set forth above in Section
38 V.C.3, we therefore *deny* the appeal for this policy.
39

40 **D. Policy ER P5 (Cal. Code Regs., tit. 23, § 5009): Avoid Introductions of and Habitat** 41 **Improvements for Invasive Nonnative Species**

42 SJAFCA certifies that the Project is consistent with ER P5. The Appellant raises
43 arguments that it is not. For the reasons discussed below in Section V.D.3, the Council finds

²⁴ To show an adaptive management plan was required, the Appellant cites to the BSK Report, which recommended an adaptive management plan for this Project. However, the BSK Report does not discuss this question of regulatory interpretation, so the report is not relevant to this issue.

1 that the Appellant has failed to show that SJAFCA's Certification is not supported by substantial
2 evidence in the record. Thus, we *deny* the appeal on these grounds.

3 4 **1. Policy Requirements**

5 ER P5 states:

6 “(a) The potential for new introductions of, or improved habitat conditions for,
7 nonnative invasive species, striped bass, or bass must be fully considered and avoided or
8 mitigated in a way that appropriately protects the ecosystem.

9
10 (b) For purposes of Water Code Section 85057.5(a)(3) and Section
11 5001(j)(1)(E) of this Chapter, this policy covers a proposed action that has the reasonable
12 probability of introducing, or improving habitat conditions for, nonnative invasive species.”

13
14 The Delta Plan defines “nonnative invasive species” for purposes of section 5009 as
15 “species that establish and reproduce rapidly outside of their native range and may threaten the
16 diversity or abundance of native species through competition for resources, predation,
17 parasitism, hybridization with native populations, introduction of pathogens, or physical or
18 chemical alteration of the invaded habitat.” (Cal. Code Regs., tit. 23, § 5001, subd. (v).)

19 **2. Certification**

20 SJAFCA certifies that the Project is consistent with ER P5 because, “(t)he potential for
21 new introductions of or improved habitat conditions for nonnative invasive species, striped bass,
22 or bass due to Project implementation were fully considered and either avoided or mitigated... .”
23 ([Certification ER P5 Finding](#), p. 20.)²⁵

24
25 With regard to how the Project *fully considers the potential* for new introductions of, or
26 improved habitat conditions for nonnative invasive species, striped bass or bass, the
27 Certification states that, “The FEIR [...] evaluated potential impacts from nonnative invasive
28 species, striped bass, and bass, and determined that the Project would not favor such species.”
29 ([Certification ER P5 Finding](#), p. 20; citing [Certification Record SJA-CEQ-01133](#); [SJA-CEQ-](#)
30 [01390- 01391](#).) The Certification states that construction of the Project could spread or
31 introduce invasive plant species, and that once constructed, the Project could provide shelter to
32 nonnative fish species. ([Certification ER P5 Finding](#), p. 20.) However, SJAFCA states in its
33 Certification that these impacts would be avoided or mitigated by Project design, through
34 implementation of the water hyacinth control program, and through implementation of Mitigation
35 Measure VEG-MM-7.

36
37 With regard to how the Project *avoids or mitigates the potential* for new introductions of,
38 or improved habitat conditions for nonnative invasive plant species, the Certification references
39 Mitigation Measure VEG-MM-7, and reiterates the finding in the FEIR that potential Project
40 impacts with respect to invasive plant species were determined to be less than significant after
41 mitigation. ([Certification ER P5 Finding](#), p. 20; citing [Certification Record SJA-CEQ-00908](#).) The
42 Certification also describes various Project design elements, stating that:

²⁵ The Certification references the FEIR Section 3.7 Vegetation and Wetlands ([Certification Record SJA-CEQ-01099 - 01133](#)), Section 3.8 Fish and Aquatic Resources ([Certification Record SJA-CEQ-01134 01157](#)), and Appendix E Vegetation and Wetlands Technical Appendix. ([Certification Record SJA-CEQ-01783](#)).

1
2 “As part of Project operations and maintenance activities, watery [*sic*] hyacinth and
3 other debris that may accumulate behind the gate would be regularly removed. The
4 removal would be funded through SJAFCA’s operation and maintenance assessment.
5 SJAFCA as the CEQA lead agency, is legally obligated to carry out the project that is
6 approved in the EIR, including the water hyacinth removal component, and would be
7 subject to legal action if it did not conduct all activities set forth in the EIR. Therefore, the
8 water hyacinth removal is a legally enforceable part of the project, pursuant to the FEIR.”
9 ([Certification ER P5 Finding](#), p. 20.)

10
11 As described in the Certification, SJAFCA would remove water hyacinth from behind the
12 floodwall, “as needed, by hand and/or mechanical equipment in order to ensure that the cover of
13 water hyacinth does not increase beyond existing conditions.” ([Certification ER P5 Finding](#), p.
14 20.) In addition, during the growing season, the Certification states that SJAFCA would conduct
15 mechanical harvesting when cover of the species reaches “20% in the most impacted areas
16 behind the sheet pile wall” based on visual estimates conducted from the shoreline behind the
17 wall. (*Ibid.*) This process is documented in the FEIR in SJAFCA’s analysis of Impact VEG-7.
18 ([Certification Record SJA-CEQ-01119 –1120.](#))

19
20 SJAFCA also describes changes made to the original floodwall design to use a more
21 rounded, cellular layout, as opposed to using notched z-piles. ([Certification](#), p. 20.) This change
22 is intended to reduce areas that could be utilized by nonnative invasive predatory fish. This
23 design change is documented in Addendum II to the FEIR. ([Certification Record SJA-DP-](#)
24 [007854.](#)) Finally, SJAFCA states that regular removal of water hyacinth in conjunction with
25 implementation of Mitigation Measure VEG-MM-7 has the potential to decrease predatory fish
26 habitat relative to current conditions. ([Certification ER P5 Finding](#), p. 20.)

27 28 **3. Appeal and Analysis**

29 The Appellant argues that the Project is not consistent with ER P5 because SJAFCA did
30 not “fully consider” the potential for new introductions of, or improved habitat conditions for
31 nonnative invasive species (water hyacinth), striped bass or bass. ([Appeal Letter](#), pp. 12-13.)
32 Specifically, the Appellant alleges that SJAFCA did not fully consider, avoid, and/or mitigate the
33 “operational impacts” of the project on (a) increased presence of water hyacinth and (b)
34 improved habitat for striped bass and other nonnative, invasive predatory fish species. ([Appeal](#)
35 [Letter](#), pp. 12-13.) Each is described below, with an analysis of the issue related to consistency
36 of the Project with ER P5.

37 38 **a. Whether SJAFCA did not fully consider, avoid, and/or mitigate the** 39 **“operational impacts” of the Project on increased presence of water** 40 **hyacinth**

41 The Appellant asserts that the operation of the Project will result in increased presence
42 of water hyacinth. ([Appeal Letter](#), p. 13.) As evidence, the Appellant states that the FEIR admits
43 the natural flushing of Atherton Cove would be “virtually eliminated” thereby trapping mats of
44 water hyacinth behind the fixed wall due to the constricted opening.²⁶ ([Appeal Letter](#), p. 13;

²⁶ With regard to this issue, the FEIR states that “presence of the fixed wall would substantially decrease the width of the area where water hyacinth washes back out to the San Joaquin River and downstream... without maintenance there could be significant accumulation of hyacinth behind the walls in areas that are currently open water...” ([Certification Record SJA-CEQ-01119-01120.](#))

1 citing FEIR, Chapter 3, p. 3.2-16.)²⁷ The Appellant claims that SJAFCA has not “fully
2 considered” or “mitigated” this impact because SJAFCA did not analyze the amount of water
3 hyacinth proliferation expected without mitigation; support its mitigation strategy with science; or
4 consider effects of increased water hyacinth on dissolved oxygen, water temperature,
5 methylmercury, or cyanobacteria blooms. ([Appeal Letter](#), p. 13.) The Appellant claims that
6 because the water hyacinth control program has not been developed, its effectiveness to
7 mitigate the Project effects cannot be ascertained. ([Appeal Letter](#), pp. 13-14.) Finally, the
8 Appellant asserts that an alternative design (to construct the floodwall within the existing levees)
9 would have avoided the impact of water hyacinth, and that SJAFCA, by not considering it, failed
10 to avoid water hyacinth impacts. ([Appeal Letter](#), p. 14.)

11
12 Not all of the points the Appellant raises are relevant to the requirements of ER
13 P5. We address each of the Appellant’s arguments below:

14
15 **i. The Appellant claims operation of the Project will increase**
16 **hyacinth proliferation**

17 The Appellant asserts that the operation of the Project will result in increased presence
18 of water hyacinth and that SJAFCA failed to fully consider and avoid, or mitigate this potential,
19 inconsistent with ER P5. ([Appeal Letter](#), p. 13.) Pursuant to ER P5, SJAFCA is required to
20 determine whether there is the potential for the Project to *introduce or improve habitat*
21 *conditions* for *nonnative species* such as water hyacinth and to fully consider and avoid or
22 mitigate that potential in a way that appropriately protects the ecosystem. As discussed below,
23 Appellant has not demonstrated that SJAFCA’s finding that the Project would not introduce or
24 improve habitat conditions for water hyacinth is not supported by substantial evidence.

25
26 SJAFCA has acknowledged in the Certification, throughout the appeal process, and in
27 the record that water hyacinth is already present in the Project area, including Atherton Cove
28 and Smith Canal, and states that this is evidence that the Project will not introduce water
29 hyacinth in the Project area. ([Certification ER P5 Finding](#), p. 20, [Certification Record SJA-CEQ-](#)
30 [01107](#); [SJA-CEQ-01119 –1120](#), [SJA-CEQ-01514-1515](#); [SJAFCA January 17, 2019 Letter](#), p.
31 40, [Jan. Hearing Transcript](#), p. 28.) SJAFCA identifies hydrodynamic modeling as evidence that
32 the Project would not increase the presence of water hyacinth in the Project area because the
33 Project would not decrease flows into Atherton Cove. ([Certification Record SJA-CEQ-01015](#).)
34 The Certification also cites to evidence in the record showing that the Project, with
35 implementation of water hyacinth control program, would not cause proliferation or spread of
36 water hyacinth. ([Certification ER P5 Finding](#), p. 20, [Certification Record SJA-CEQ-01015](#); [SJA-](#)
37 [CEQ-01120](#).) As described in the Certification, SJAFCA states that it is “legally obligated to
38 carry out the project that is approved in the EIR, including the water hyacinth removal
39 component,” and “water hyacinth removal is a legally enforceable part of the project, pursuant to
40 the FEIR.” ([Certification ER P5 Finding](#), p. 20, [Certification Record SJA-CEQ-00976-977](#); [SJA-](#)
41 [CEQ-01119 –1120](#).)

42
43 We interpret SJAFCA’s statement that it is “legally obligated to carry out the project that
44 is approved in the EIR” to refer to the requirement to conduct further environmental analysis for
45 changes to the Project under CEQA. The Appellant has not raised this issue on appeal;
46 however, the Council assumes that the description of the covered action is as described by

²⁷ In its letter, the Appellant provided a longer quote, referencing the sections of the FEIR. ([Appeal Letter](#), p. 13.) The Council reviewed the referenced pages and did not find the referenced language provided by the Appellant.

1 SJAFCA unless the Appellant has appealed the accuracy of the description of the covered
2 action and shown that it is not supported by substantial evidence. The water hyacinth control
3 program described in the FEIR project description consists of the following actions to be taken
4 once construction is underway: “regular visual monitoring” to determine the “rate of vegetation
5 growth and accumulation;” followed by implementing a “regular removal program” that would be
6 scheduled based on the results of this visual monitoring; and includes performance standards to
7 “ensure that the cover of water hyacinth in the project area does not increase beyond existing
8 conditions,” with a trigger for mechanical harvesting whenever the cover of water hyacinth
9 reaches 20% in the most impacted areas behind the sheet pile wall” as determined by visual
10 inspection. ([Certification ER P5 Finding](#), p. 20; [Certification Record SJA-CEQ-00976-977](#).) The
11 FEIR further concluded that the Project’s water hyacinth removal, conducted as part of standard
12 operations and maintenance, could have a potentially beneficial effect on water quality and
13 control of invasive species in Atherton Cove and Smith Canal. ([Certification Record SJA-CEQ-
14 01015](#).)

15
16 Thus, the Appellant fails to show that there is not substantial evidence in the record
17 supporting SJAFCA’s finding of consistency with ER P5 on this basis, and we *deny* the appeal
18 as to this issue.

19
20 **ii. The Appellant claims SJAFCA should have analyzed the**
21 **amount of water hyacinth proliferation expected without**
22 **mitigation**

23
24 The Appellant claims that SJAFCA has not “fully considered” or “mitigated” water
25 hyacinth proliferation because SJAFCA did not assess how much water hyacinth proliferation
26 that is expected without mitigation. ([Appeal Letter](#), p. 13.) However, the Project, as described
27 by SJAFCA, includes components to prevent water hyacinth proliferation, as described in
28 Section V.D.3.a. i. above, and the Council’s role is to consider the covered action as described
29 by SJAFCA. Quantifying the *amount of proliferation* of an invasive species is not required to
30 demonstrate consistency with ER P5. Thus, the Appellant fails to show that there is not
31 substantial evidence in the record supporting SJAFCA’s finding of consistency with ER P5 on
32 this basis, and we *deny* the appeal as to this issue.

33
34 **iii. The Appellant claims that the mitigation strategy not**
35 **supported by science**

36
37 The Appellant argues that the “proposed mitigation strategy” – that is, the water
38 hyacinth control plan – is not supported by “any science.” ([Appeal Letter](#), p. 13.) However, the
39 Appellant does not cite evidence supporting this argument, and does not explain the relevance
40 of the statement to analyzing consistency with ER P5 under the substantial evidence standard.
41 The Appellant also did not raise this claim under the G P1(b)(3) best available science portion of
42 the appeal. Thus, the Appellant fails to show that there is not substantial evidence in the record
43 supporting SJAFCA’s finding of consistency with ER P5 on this basis, and we *deny* the appeal
44 as to this issue.

45
46 **iv. The Appellant claims SJAFCA should have considered the**
47 **effects of increased water hyacinth on water quality in**
48 **Atherton Cove**

49
50 The Appellant asserts that SJAFCA did not consider the “consequential impact

1 of... increased water hyacinth on dissolved oxygen, water temperature, methylmercury, or
2 cyanobacteria blooms” in Atherton Cove. ([Appeal Letter](#), p. 13.) However, these indirect effects
3 of water hyacinth on the Project area are not the subject of ER P5. Pursuant to ER P5,
4 SJAFCA is required in part to determine whether there is the potential for the Project to
5 introduce nonnative invasive species, such as water hyacinth, or for the Project to improve
6 habitat conditions for nonnative invasive species. As discussed above in Section V.D.3.a.,
7 SJAFCA’s record contains substantial evidence that the Project would not introduce or improve
8 habitat conditions for water hyacinth. ([Certification Record SJA-CEQ-01119–1120.](#)) Thus, the
9 Appellant fails to show that there is not substantial evidence in the record supporting SJAFCA’s
10 finding of consistency with ER P5 on this basis, and we *deny* the appeal as to this issue.

11
12 **v. The Appellant claims the effectiveness of the water hyacinth**
13 **control program cannot be determined**
14

15 The Appellant claims that because the water hyacinth control program has not been
16 developed, “there is no evidence of its effectiveness.” ([Appeal Letter](#), p. 13.)
17

18 ER P5 requires that the potential for new introductions of, or improved habitat conditions
19 for, nonnative invasive species, striped bass, or bass be fully considered and avoided or
20 mitigated in a way that appropriately protects the ecosystem. The Appellant has not identified
21 any provision of ER P5 that prohibits the final development of the water hyacinth control
22 program once construction has started, as described in the FEIR. (See [Certification Record](#)
23 [SJA-CEQ-00976-977.](#))
24

25 The evidence in the record about the water hyacinth control program is as follows. First,
26 the record addresses whether the Project’s water hyacinth control program would create the
27 potential for the proliferation or spread of water hyacinth in the Project area. (*Compare*
28 [Appellant February 28, 2019 Letter](#), pp. 5-6 [arguing an absence of evidence] *with* [Certification](#)
29 [Record SJA-CEQ-01015](#) [identifying hydrodynamic modeling as evidence that the Project would
30 not increase the presence of water hyacinth in the Project area] *and* [Certification Record SJA-](#)
31 [CEQ-01015; SJA-CEQ-01120](#) [Project, which includes implementation of the water hyacinth
32 control program, would not cause proliferation or spread of water hyacinth].) Second, as
33 discussed more thoroughly in Section V.D.3.a.i. above, the water hyacinth control program
34 includes monitoring and removal activities that will be taken once construction is underway.
35 ([See Certification Record SJA-CEQ-00976-977.](#)) The FEIR indicates that the water hyacinth
36 control program will be developed after the start of construction of the Project so that pertinent
37 information about the effects of the Project can be gathered through visual monitoring in order to
38 develop the required removal schedule to achieve the performance measure. ([Certification](#)
39 [Record SJA-CEQ-00976-977](#) (emphasis added) [“The frequency of water hyacinth removal
40 would depend on the rate of vegetation growth and accumulation, to be determined by regular
41 visual monitoring of the site. *Based on the information gathered*, SJAFCA would schedule and
42 implement a regular removal program . . .”].)
43

44 The Appellant’s burden is to show that this evidence is not substantial evidence
45 supporting a finding of consistency with the ER P5 requirement that the potential for new
46 introductions of, or improved habitat conditions for, nonnative invasive species, striped bass, or
47 bass be fully considered and avoided or mitigated. It has not done so. Therefore, the Appellant
48 has not shown that there is not substantial evidence in the record supporting SJAFCA’s finding
49 of consistency with ER P5 on this basis, and we *deny* the appeal as to this issue.
50

1
2 **b. Whether SJAFCA did not fully consider, avoid, and/or mitigate the**
3 **“operational impacts” of the Project on improved habitat conditions**
4 **for striped bass and other invasive predators**
5

6 The Appellant claims that SJAFCA failed to “fully consider, avoid and mitigate the
7 Project’s operational impact of improving habitat for striped bass and other nonnative species
8 that prey on salmon, steelhead delta smelt and spittail [sic].” ([Appeal Letter](#), p. 13.) The
9 Appellant asserts that SJAFCA did not “fully consider” whether the “altered flows resulting from
10 the constricted opening to Atherton Cove would enhance habitat and predation by striped bass
11 and other nonnative invasive predatory fish species;” and that “SJAFCA cannot point to any
12 evidence in the record establishing it ‘fully considered’ whether increased flow velocities...would
13 improve habitat for...invasive predators.”([Appeal Letter](#), pp. 14-15.)
14

15 The Appellant argues that SJAFCA did not analyze effects of water flows on predatory
16 fish, “despite being alerted to the issue,” referencing the memorandum from SJAFCA’s
17 environmental consultant to its modeling consultant regarding the draft results of the
18 hydrodynamic analysis. ([Appeal Letter](#), p. 14, referencing [Certification Record SJA-CEQ-18181-18182](#).)²⁹ The Appellant does not demonstrate that these comments on the draft report were not
19 addressed in the final version of the report or in the FEIR; nor that the conclusion in the FEIR is
20 not based on substantial evidence.
21

22
23 The Appellant also references a comment letter from the Council staff on the Smith
24 Canal Gate Project Draft Environmental Impact Report (DEIR) as evidence that the DEIR was
25 deficient for not analyzing whether increased water flows through the Project’s gate would
26 increase predation in the area. ([Appeal Letter](#), p. 15.) The referenced Council staff comment
27 letter included information for policies possibly implicated by the Project and made the comment
28 that in-water structures can potentially provide shelter for nonnative fish, but did not discuss
29 whether SJAFCA should have analyzed whether water flows would increase predation.
30 ([Certification Record SJA-CEQ-01364-1367](#).) The Council’s comment letter does not support
31 Appellant’s argument that SJAFCA failed to fully consider the effects of water flows or velocities
32 on invasive predatory fish.
33

34 The Appellant similarly referenced a comment letter from the State Lands Commission
35 as evidence that SJAFCA was told that the DEIR was deficient for not analyzing whether
36 increased water flows through the Project’s gate would increase predation in the area. ([Appeal](#)
37 [Letter](#), p. 14, referencing [SJA-CEQ-01384](#).) However, the comment letter does not discuss

²⁹ The memorandum was discussed previously in Section V.A.3.b.i. The full memorandum provides a variety of comments, questions and feedback to the modeling consultant regarding the draft results of the hydrodynamic analysis. (Certification Record SJA-CEQ-18181-SJA-CEQ 18182.) The memorandum also states that, “... there is *little or no difference between baseline and proposed project flows and volumes into Smith Canal*, meaning the project would not be expected to attract or entrain migrating salmonids through the gate structure or in Smith Canal at any higher rate than what might occur under baseline conditions.” ([Certification Record SJA-CEQ-18181](#).) (Emphasis added.) Looking at the full memorandum, it does not appear that “SJAFCA failed to analyze whether increased water flows through the Project... would increase predation” or that “SJAFCA completely ignored the issue of flow velocity alteration as an operational impact of the Project” as the Appellant claims. ([Appeal Letter](#), p. 14 and [Appellant February 28, 2019 Letter](#), p. 4.) If anything, the memorandum shows that the consulting team was considering the issues. The draft hydrodynamic analysis was finalized and is an appendix to the FEIR. ([Certification Record SJA-CEQ-12610](#).)

1 water flows or whether SJAFCA should have analyzed whether water flows would increase
2 habitat for invasive species. ([Certification Record SJA-CEQ-01384-1386.](#)) The comment letter
3 does not support Appellant's position that SJAFCA did not perform such an analysis and failed
4 to fully consider the effects of water flows or velocities on invasive predatory fish.

5
6 In its Certification, SJAFCA references an evaluation completed for the FEIR to
7 determine the potential impacts of "nonnative invasive species, striped bass, and bass, and
8 determined that the Project would not favor such species." ([Certification Record SJA-CEQ-](#)
9 [01144](#); [SJA-CEQ-01391.](#)) The Certification defines the Project area as "low quality native fish
10 habitat (i.e., riprapped banks, poor water quality)," but acknowledges that nonnative species
11 could find shelter in water structures constructed as part of the Project. ([Certification ER P5](#)
12 [Finding](#), p. 20.) To address this, SJAFCA describes changes made to the original floodwall
13 design to reduce areas that could be utilized by nonnative invasive predatory fish. ([Certification](#)
14 [Record SJA-DP-007854.](#)) In addition, SJAFCA states that regular removal of water hyacinth in
15 conjunction with implementation of Mitigation Measure VEG-MM-7 has the potential to decrease
16 predatory fish habitat compared to current conditions. ([SJAFCA Certification](#), p. 9.)³⁰ SJAFCA
17 also describes in its January 17, 2019, written statement that it addressed the State Lands
18 Commission's comments cited by the Appellant through implementation of its water hyacinth
19 control program, "which would decrease predatory fish (e.g., black bass) habitat in the project
20 area." ([SJAFCA January 17, 2019 Letter](#), p. 23; [Certification Record SJA-CEQ-01390-1391.](#))
21 Finally, SJAFCA describes the context of the internal SJAFCA memo prepared by ICF
22 International as a "supervisor's review of the analysis that existed at the time, making
23 suggestions for further analysis." ([SJAFCA January 17, 2019 Letter](#), p. 24.)
24

25 Based on the information in the record, the Council finds that the Appellant has failed to
26 show that there is not substantial evidence in the record to support SJAFCA's finding of
27 consistency with ER P5, and we *deny* the appeal as to this issue.

28 29 **4. Conclusion**

30
31 For the reasons discussed above in Section V. D.3., the Council finds that the Appellant
32 failed to show that the Certification of Consistency with ER P5 is not supported by substantial
33 evidence in the record. We therefore *deny* the appeal on these grounds.
34

35 **VI. DETERMINATION**

36 Based on the Analysis and Findings set forth in Section V. above, the Council concludes
37 that the Appellant failed to show that substantial evidence does not exist in the record before us
38 to support SJAFCA's finding that Smith Canal Gate Project is consistent with the Delta Plan.
39 The appeal is hereby *denied* pursuant to Water Code section 85225.25.

40 The Council's findings on the appeal of the Certification of Consistency for Smith Canal
41 Gate Project do not constitute a "project" for purposes of CEQA. That is because the Council's
42 action is not a "discretionary project proposed to be carried out or approved" by a public agency.

³⁰ The Council notes that the Appellant did not present all the evidence in the administrative record on SJAFCA's analysis of predatory fish in their appeal. As discussed in Section III, Standard of Review, the Appellant has the burden to show that the evidence is insufficient to support the agency's decision and must recite all the evidence in the record; not just the part of the evidence that supports the appellant's position. (*State Water Res. Control Bd. Cases, supra*, 136 Cal.App.4th at pp. 749-750.)

1 (Pub. Resources Code, § 21080 subd. (a).) As the Council's role in the appeal process is
2 described in the Delta Reform Act, Water Code sections 85225–85225.25, we do not have the
3 authority to modify or deny a covered action, which is before the Council on appeal regarding
4 consistency with the Delta Plan, for environmental reasons. (See *Friends of Juana Briones*
5 *House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 299, 302 (explaining that a project is
6 discretionary only if the agency that is taking an action can deny or modify the project on the
7 basis of environmental consequences); see also, CEQA Guidelines § 15375 (“Discretionary
8 project’ means a project which requires the exercise of judgment or deliberation when the public
9 agency or body decides to approve or disapprove a particular activity . . .”).) The Council does
10 not have the authority to approve or disapprove a covered action on appeal, nor does it have
11 the authority to modify or deny an appealed covered action for environmental reasons. Rather,
12 the Council only has the authority to “den[y] the appeal or reman[d] the matter to the state or
13 local public agency for reconsideration of the covered action based on the finding that the
14 Certification of Consistency is not supported by substantial evidence in the record.” (Water
15 Code, § 85225.25.) Therefore, the Council’s issuance of findings on the appeal of SJAFCA’s
16 certification of consistency with the Delta Plan is not a project for purposes of CEQA.

17 **CERTIFICATION**

18 The undersigned, Clerk to the Delta Stewardship Council, does hereby certify that the
19 foregoing is a full, true, and correct copy of a determination duly and regularly adopted at a
20 meeting of the Delta Stewardship Council held on March 21, 2019.

21 AYE: Frank Damrell, Randy Fiorini, Mike Gatto, Ken Weinberg, and Oscar Villegas

22 NO: None

23 RECUSED/ABSENT: Susan Tatayon (Recused) / Maria Mehranian (Absent)

24 ABSTAIN: None

25

26

27

28

29

30



Shalita Brydie
Clerk to the Delta Stewardship Council

Exhibit A

Documents Admitted pursuant to Appeals Procedures section 10

The Council hereby admits the documents listed below pursuant to section 10 of our Appeals Procedures.

Paragraph 10 of the Council's Appeals Procedures provides as follows: "10. The council or its executive officer may supplement the record submitted by the state or local agency if the council or its executive officer determines that additional information was part of the record before the agency, but was not included in the agency's submission to the council."

Based on the Council's review, we have determined that the documents identified below were part of the record before SJAFCA, but were not fully included in the record submission to the Council.

Document
ACPOA, Appeal of San Joaquin Area Flood Control Agency Certification of Consistency for the Smith Canal Gate Project (C20188) filed November 2, 2018, Exhibit B, Sierra Ecosystem Associates, Integrated Management Plan for Aquatic Weeds for the Tahoe Keys Lagoon (2016), 101 pages.
ACPOA, Appeal of San Joaquin Area Flood Control Agency Certification of Consistency for the Smith Canal Gate Project (C20188) filed November 2, 2018, Exhibit C, Berg & Sutula, Factors Affecting Growth of Cyanobacteria With Special Emphasis on the Sacramento-San Joaquin Delta, Southern California Coastal Water Research Project (August 2015), 112 pages.
ACPOA, Appeal of San Joaquin Area Flood Control Agency Certification of Consistency for the Smith Canal Gate Project (C20188) filed November 2, 2018, Exhibit D, Brutemark et al., Growth, Toxicity, and Oxidative Stress of a Cultured Cyanobacterium (<i>Dolichospermum</i> sp.) under different CO ₂ /pH and Temperature Conditions, Phycological Research 63:56-63 (2015), 9 pages.
ACPOA, Appeal of San Joaquin Area Flood Control Agency Certification of Consistency for the Smith Canal Gate Project (C20188) filed November 2, 2018, Exhibit E, Lehman et al., Microcystis Biomass and Toxicity, 2005 Pelagic Organism Decline Program Progress Report, 14 pages.
ACPOA, Appeal of San Joaquin Area Flood Control Agency Certification of Consistency for the Smith Canal Gate Project (C20188) filed November 2, 2018, Exhibit F, Toft et al., The Effects of Introduced Water Hyacinth on Habitat Structure, Invertebrate Assemblages, and Fish Diets, Estuaries Vol. 26, 3:746 (2003), 14 pages.
ACPOA, Appeal of San Joaquin Area Flood Control Agency Certification of Consistency for the Smith Canal Gate Project (C20188) filed November 2, 2018, Exhibit J, Sabalow, Unusual Delta Algae Bloom Worries Researchers, Sacramento Bee (2015), 4 pages.
ACPOA, Appeal of San Joaquin Area Flood Control Agency Certification of Consistency for the Smith Canal Gate Project (C20188) filed November 2, 2018, Exhibit L, Boyer & Sutula, Factors Controlling Submersed and Floating Macrophytes in the Sacramento-San Joaquin Delta (2015) Southern California Coastal Water Research Project, 4 pages.
ACPOA, Appeal of San Joaquin Area Flood Control Agency Certification of Consistency for the Smith Canal Gate Project (C20188) filed November 2, 2018, Exhibit M, Cohen & Moyle, Summary of Data and Analyses Indicating that Exotic Species Have Impaired the Beneficial Uses of Certain California Waters (2004), 26 pages.
ACPOA, Appeal of San Joaquin Area Flood Control Agency Certification of Consistency for the Smith Canal Gate Project (C20188) filed November 2, 2018, Exhibit N, Tsui et al., In Situ

Production of Methylmercury within a Stream Channel in Northern California (2010) 44 Environ. Sci. Technol. 6998-7004, 8 pages.
ACPOA, Appeal of San Joaquin Area Flood Control Agency Certification of Consistency for the Smith Canal Gate Project (C20188) filed November 2, 2018, Exhibit O, Cogliano, Ingested Nitrate and Nitrite, and Cyanobacterial Peptide Toxins (2010) 94 International Agency for Research on Cancer Monographs, p. 412, 2 pages.
SJAFCA, Request To Supplement The Administrative Record and For Official Notice dated January 17, 2019 Exhibit A, Revised Conditional Letter of Map Revision (CLOMR).
SJAFCA, Request To Supplement The Administrative Record and For Official Notice dated January 17, 2019 Exhibit B, Request for Dismissal, filed by Dominick Gulli on June 11, 2018, in <i>Dominick Gulli PE, PLS v. San Joaquin Area Flood Control Agency</i> (San Joaquin County Court No. STK-CV-UWM-2017-0013586).
SJAFCA, Request To Supplement The Administrative Record and For Official Notice dated January 17, 2019 Exhibit D, Judgment Denying Petition for Writ of Mandate, filed by the Superior Court on August 20, 2018, in <i>Dominick Gulli PE, PLS v. San Joaquin Area Flood Control Agency</i> (San Joaquin County Court No. STK-CV-UWM-2015-0011880).
SJAFCA, Request To Supplement The Administrative Record and For Official Notice dated January 17, 2019 Exhibit E, Notice of Appeal, filed by Mr. Gulli on September 13, 2018, in <i>Dominick Gulli PE, PLS v. San Joaquin Area Flood Control Agency</i> (San Joaquin County Court No. STK-CV-UWM-2015-0011880).
SJAFCA, Exhibit G, Ruling on Motion for Sanctions, filed by the Superior Court on May 22, 2018, in <i>Dominick Gulli PE, PLS v. San Joaquin Area Flood Control Agency</i> (San Joaquin County Court No. STK-CV-UWM-2015-0011880).
SJAFCA, Exhibit H, Order Denying Petitioner's Motion to Correct, Supplement and Augment the CEQA Administrative Record and Motion to Stay Pending Appeal of a Related Matter, filed by the Superior Court on February 26, 2018, in <i>Dominick Gulli PE, PLS v. San Joaquin Area Flood Control Agency</i> (San Joaquin County Court No. STK-CV-UWM-2015-0011880).
SJAFCA, Exhibit I, Order Denying Motion for a Subsequent Motion to Petitioners Motion to Correct Supplement and Augment the CEQA Administrative Record Per CCP 1008(B), filed by the Superior Court on May 11, 2018, in <i>Dominick Gulli PE, PLS v. San Joaquin Area Flood Control Agency</i> (San Joaquin County Court No. STK-CV-UWM-2015-0011880).
Dominick Gulli, Amicus Appeal (1) Supplemental of the Appeal Number C20188-A1, dated January 2, 2019, Page 2, f. and Attachment - SJA CEQ-15523-15527.
Dominick Gulli, Amicus Appeal (1) Supplemental of the Appeal Number C20188-A1, dated January 2, 2019, Page 2, f., Attachment- SJA CEQ 12671-12673,12707.
Dominick Gulli, Amicus Appeal (1) Supplemental of the Appeal Number C20188-A1, dated January 2, 2019, Page 2,g., Attachment- SJA CEQ 15530-15535.
Dominick Gulli, Email, Administrative record for Smith Canal (PS), dated January 11, 2019, Dominick Gulli – Attachment 1, 111123.pdf, Letter dated November 23, 2015, 16 pages.
Dominick Gulli, Email Re: Attachment H, dated January 11, 2019, SJA-CEQ-00602-606, 5 pages.
Dominick Gulli, Email Re: Attachment H, dated January 11, 2019, Attachment 2, Smith Canal FEIR 2015 (Summary and Evaluation of Alternatives presented by Green Mountain Engineering) 6 pages, SJA-CEQA-00602-SJA-CEQA-606.
Dominick Gulli, Amicus Appeal, Written Participation Statement for Hearing, dated January 17, 2019, Vol. 1, EX 10 CEQA 1399- 1405. Briscoe, Ivester & Bazel LLP letter, dated August 6, 2015 prepared and signed by John Briscoe and the ICF International response to comments to the Draft EIR.(SJA-CEQ-01399-1405).
Dominick Gulli, Amicus Appeal, Written Participation Statement for Hearing, dated January 17, 2019, Vol. 1, EX 20 State Lands Commission comments of the Draft EIR dated August 7, 2015

and signed by Cy R Oggins, Chief of Environmental Planning and Management and the ICF response, SJA-CEQ-01374-SJA-CEQ-01392.

Dominick Gulli, Amicus Appeal, Written Participation Statement for Hearing, dated January 17, 2019, Vol.3, EX 45 CEQ 25167-25171 FEMA Federal Form MT-2 Overview and Concurrence Form (SJA-CEQ-25167- SJA-CEQ-25171).

Dominick Gulli, Amicus Appeal, Written Participation Statement for Hearing, dated January 17, 2019, Vol.3, EX 50 Order on Demurrer to Second Cause of Action for Declaratory relief by Honorable Judge Lesley Holland Superior Court of San Joaquin.

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Exhibit B
Documents Admitted pursuant to Appeals Procedures section 29

The Council hereby admits the documents listed below pursuant to section 29 of our Appeals Procedures.

Paragraph 29 of the Council’s Appeals Procedures provides as follows: “29. Notwithstanding any provision of these procedures to the contrary, the council may take official notice in any hearing that it conducts, 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.”

Based on the Council’s review, we have determined that the documents identified below were either generally accepted technical or scientific matter within the Council’s jurisdiction, or may be judicially noticed by the courts of this State.

Document
SJAFCA’s Request To Supplement The Administrative Record and For Official Notice dated January 17, 2019 Exhibit C, Decision, filed by the Third Appellate District on November 29, 2018, in <i>Atherton Cove Property Owners Association v. San Joaquin Area Flood Control Agency</i> (Third Appellate District Case No. C085520).

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Exhibit C

Denied Document Admission Requests (see Appeals Procedures, section 10 and 29)

Document	Reason for denial
ACPOA, Appeal of San Joaquin Area Flood Control Agency Certification of Consistency for the Smith Canal Gate Project (C20188) filed November 2, 2018, Attachment 1, Index to Administrative Record of Proceedings, SJAFCA Smith Control Gate CEQA Cases, 3 pages	The document was submitted with the administrative record prepared and submitted by SJAFCA.
ACPOA, Appeal of San Joaquin Area Flood Control Agency Certification of Consistency for the Smith Canal Gate Project (C20188) filed November 2, 2018, Exhibit A, BSK Associates, Biological Resources Review, Smith Gate Canal Project, Stockton, California (2015), 26 pages.	The document was submitted with the administrative record prepared and submitted by SJAFCA. (See SJA-CEQ-02008)
ACPOA, Appeal of San Joaquin Area Flood Control Agency Certification of Consistency for the Smith Canal Gate Project (C20188) filed November 2, 2018, Exhibit G, SJAFCA Board Meeting Transcript (November 19, 2015), 66 pages.	The document was submitted with the administrative record prepared and submitted by SJAFCA.
ACPOA, Appeal of San Joaquin Area Flood Control Agency Certification of Consistency for the Smith Canal Gate Project (C20188) filed November 2, 2018, Exhibit K, ICF International, Comment on Hydrodynamic Modeling Draft Report (May 30, 2014), 3 pages.	The documents was submitted with the administrative record prepared and submitted by SJAFCA.
SJAFCA, Request To Supplement The Administrative Record and For Official Notice dated January 17, 2019 Exhibit F, Draft Determination Regarding Appeals of the Certification of Consistency by the California Department of Water Resources for WaterFix (C20185), issued on November 8, 2018.	Not relevant.
Dominick Gulli, Amicus Appeal in support of Appeal Number C20188-A1, dated December 19, 2018, EX 10. Twenty Seventh Session of California Legislation Chapter XCIII, March 12, 1887.	The document was submitted with the administrative record prepared and submitted by SJAFCA. See SJA-CEQ-24058-24059.
Dominick Gulli, Amicus Appeal in support of Appeal Number C20188-A1, dated December 19, 2018., EX 15 - Email Residual Flood plain. 8/17/15 6:18:34 pm email chain Residual Flood Map Residual Flood Calculation Modified Flood Calculation prepared by DG dated 12/18/18.	The document was submitted with the administrative record prepared and submitted by SJAFCA. See SJA-CEQ-05141-5146.

<p>Dominick Gulli, Amicus Appeal in support of Appeal Number C20188-A1, dated December 19, 2018, Reference 1. Lower San Joaquin River Feasibility Study final CEQA EIR and all appendices. https://www.spk.usace.army.mil/lower_sj_river/</p>	<p>The request is unclear (link broken) and documents were not provided with the request.</p>
<p>Dominick Gulli, Amicus Appeal in support of Appeal Number C20188-A1, dated December 19, 2018,, Reference 2. Dominick Gulli 's written public comments at SJAFCA regular meetings (2015-2018).</p>	<p>To the extent the documents were not already admitted as part of the record, the request is unclear and documents were not provided with the request.</p>
<p>Dominick Gulli, Amicus Appeal in support of Appeal Number C20188-A1, dated December 19, 2018, Reference 3. SJAFCA public meetings minutes and video minutes. http://sjafca.org/board_meetings_sjafcaorg.php.</p>	<p>To the extent the documents were not already admitted as part of the record, the request is unclear and documents were not provided with the request.</p>
<p>Dominick Gulli, Amicus Appeal in support of Appeal Number C20188-A1, dated December 19, 2018, Reference 4. The entire Court File for San Joaquin County Court case's STK-CV-2015-0011880, CV-STK UWM- 2015-0011847, STK CV-UWM-2017-0013586 cms.sjcourts.org/fullcourtweb/civilCase</p>	<p>To the extent the documents were not already admitted as part of the record, the request is unclear and documents were not provided with request.</p>
<p>Dominick Gulli, Amicus Appeal in support of Appeal Number C20188-A1, dated December 19, 2018, Reference 5. Dominick Gulli's "Public Record's Request's dated 4/15/18, 9/24/18 and 10/25/18, once SJAFCA provides such records."</p>	<p>Documents were not provided with request.</p>
<p>Dominick Gulli, Amicus Appeal (1) Supplemental of the Appeal Number C20188-A1, dated January 2, 2019, Page 2, a. "The CEQA admin record does not include 1) all attachments submitted with the 1st, 2nd and 3rd petitions for writ of mandate 2) The documents submitted with the motion to correct the admin record. 3) the required redacted portions of many documents."</p>	<p>Documents were not provided with request.</p>
<p>Dominick Gulli, Amicus Appeal (1) Supplemental of the Appeal Number C20188-A1, dated January 2, 2019, Page 2, b. "The admin record for the Lower San Joaquin River Feasibility study which is a component of the Project."</p>	<p>To the extent the documents were not already admitted as part of the record, the request is unclear and documents were not provided with the request.</p>
<p>Dominick Gulli, Amicus Appeal (1) Supplemental of the Appeal Number C20188-A1, dated January 2, 2019, Page 2, c. "The record for the time frame between the approval of the EIR and the issuance of the</p>	<p>To the extent the document was not already admitted as part of the record, the request is unclear and documents were not provided with the request.</p>

addendum #1. (2016-2017). These include but are not limited to 1) The request for Statement of Qualifications for the Construction Management for the Smith Canal Gate 2) Public comments received by the agency relative to the Gate 3) Minutes of all public meetings (including the video minutes)”	
Dominick Gulli, Amicus Appeal (1) Supplemental of the Appeal Number C20188-A1, dated January 2, 2019, Page 2, d. “The applications for permits and leases (State Lands Commission, CVFPB).”	To the extent the documents were not already admitted as part of the record, the request is unclear and documents were not provided with the request.
Dominick Gulli, Amicus Appeal (1) Supplemental of the Appeal Number C20188-A1, dated January 2, 2019, Page 2, e. “The professional Peer Review reports and correspondence for the DWR funding agreements.”	To the extent the documents were not already admitted as part of the record, the request is unclear and documents were not provided with the request.
Dominick Gulli, Amicus Appeal (1) Supplemental of the Appeal Number C20188-A1, dated January 2, 2019, Page 2, f., “request SJAFCA include this previous model for review, as the addendum 1 location has not been reviewed for water flow impacts.”	Request is unclear and document was not provided with request.
Dominick Gulli, Email, Administrative record for Smith Canal, dated January 11, 2019, 2 pages, Request for transcript of 9/20/18 SJAFCA public meeting.	The document was submitted with the administrative record prepared and submitted by SJAFCA. (See SJA-DP-009123-9150.)
Dominick Gulli, Email, Administrative record for Smith Canal, dated January 11, 2019, Request for “SJAFCA to address rebuttals of 11/11/23.”	Request is unclear and document was not provided with request
Dominick Gulli, Email, Administrative record for Smith Canal, dated January 11, 2019, Attachment 2, Index to Administrative Records Proceedings, SJAFCA Smith Control Gate CEQA Addendum, 6 pages.	The document was submitted with the administrative record prepared and submitted by SJAFCA.
Dominick Gulli, Email, Administrative record for Smith Canal, dated January 11, 2019, request to admit video minutes from 9/20/18 SJAFCA meeting.	The document was submitted with the administrative record prepared and submitted by SJAFCA.
Dominick Gulli, Email Re: Attachment H, dated January 11, 2019, Attachment 3, DWR Freeboard for Smith Canal Levees (Freeboard Analysis Results), 1 page.	No evidence document was presented to or considered by SJAFCA as part of Smith Canal Gate Project.
Dominick Gulli, Amicus Appeal, Written Participation Statement for Hearing, dated January 17, 2019, Vol. 1, EX 30 Colberg, Inc.	Not relevant.

c State of California ex rel Department of Public Works (1967) Cal. 2d.	
Dominick Gulli, Amicus Appeal, Written Participation Statement for Hearing, dated January 17, 2019, Vol.2 , Ex 37 Green Mountain Engineering Statement of Qualifications and Proposal for Smith Canal Flood Control Dated 10/2/13, Prepared by Dominick Gulli.	No evidence document was presented to or considered by SJAFCA as part of Smith Canal Gate Project.
Dominick Gulli, Amicus Appeal, Written Participation Statement for Hearing, dated January 17, 2019, Vol.2 , <i>Ex 40 Sketch of hypothetical realignment to avoid a bridge over the San Joaquin River.</i>	No evidence document was presented to or considered by SJAFCA as part of Smith Canal Gate Project.
Dominick Gulli, Amicus Appeal, Written Participation Statement for Hearing, dated January 17, 2019, Vol.2 , Ex 40 Sketch of hypothetical realignment to avoid a bridge over the San Joaquin River.	No evidence document was presented to or considered by SJAFCA as part of Smith Canal Gate Project.
Dominick Gulli, Amicus Appeal, Written Participation Statement for Hearing, dated January 17, 2019, Vol.3, EX 60 GME Dad's Point Levee Site Evaluation aerial view and details.	No evidence document was presented to or considered by SJAFCA as part of Smith Canal Gate Project.
Dominick Gulli, Amicus Appeal, Written Participation Statement for Hearing, dated January 17, 2019, Vol.3, EX 70 SJAFCA's Application for Lease of State lands for Smith Canal Gate Project.	The document was submitted with the administrative record prepared and submitted by SJAFCA (See SJA-DP-009317-9391).
Dominick Gulli, Email, Smith Canal Gate Inconsistency with the Delta Plan, dated February 28, 2019, Attachment- November 30, 2018, Opinion of Probable Construction Costs, 4 pages.	Document was dated after Certification was filed. No evidence document was presented to or considered by SJAFCA as part of Smith Canal Gate Project.