



**Determination Regarding Appeals of the Revised Certification of  
Consistency Number C202110  
of the California Department of Water Resources  
for the Lookout Slough Tidal Habitat Restoration and  
Flood Improvement Project**

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**Appealed by:**

| <b>Appellant Name</b>      | <b>Appeal<br/>Number</b> | <b>Acronym</b> |
|----------------------------|--------------------------|----------------|
| Solano County Water Agency | C202110-A1               | SCWA           |
| Liberty Island Access      | C202110-A2               | LIA            |

This Determination sets forth the specific written findings of the Delta Stewardship Council (Council) regarding appeals of Revised Certification of Consistency C202110 ("Certification C202110" or "Revised Certification") filed by the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project ("Determination") to address our findings on the specific issues remanded to the Department for reconsideration in our July 16, 2021, Determination Regarding Appeals of the Certification of Consistency by the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Council July 2021 Determination), for Certification of Consistency C20215 ("Certification C20215") (Wat. Code § 85225.25).

The Council finds that Appellant LIA failed to show that Certification of Consistency C202110 is not supported by substantial evidence in the record to support the Department of Water Resources' ("Department's" or "DWR's") finding that the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project is consistent with the Delta Plan on the issues discussed below. We therefore *deny* the appeals pursuant to Water Code section 85225.25 as to those issues. The Council also dismisses issues on appeal by LIA and SCWA, as discussed below, as non-appealable issues or issues outside the Council's jurisdiction.

At its March 24, 2022 meeting, the Council also dismissed certain issues on appeal in the *Dismissal of Issues on Appeal of the Certification of Consistency by the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Certification Number C202110)*, which is incorporated into and made part of this Determination as Section H.

## **A. BACKGROUND**

### **1. 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 action<sup>1</sup>—must certify to the Council that its action is consistent with the Delta Plan. (*Ibid.*)

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<sup>1</sup> 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:

## **2. Description of Covered Action**

### **a. Covered Action Overview**

In its Revised Certification, the Department states that the tidal wetland habitat restoration is intended to provide rearing habitat for Delta Smelt and salmonids, provide potential spawning habitat for Delta Smelt, create habitat conditions for other aquatic and terrestrial wetland-dependent species, and increase food availability for Delta Smelt and other “Target Protected Fish Species” ([Certification C202110](#), p. 2). In addition, the Certification states that the Lookout Slough Project is intended to increase flood storage and conveyance, increase the resilience of levees, and reduce flood risk in a manner “consistent with the Central Valley Flood Protection Plan, which calls for multi-benefit projects that expand the Yolo Bypass while incorporating ecosystem-enhancing features” ([Certification C202110](#), p. 2).

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(1) 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.)

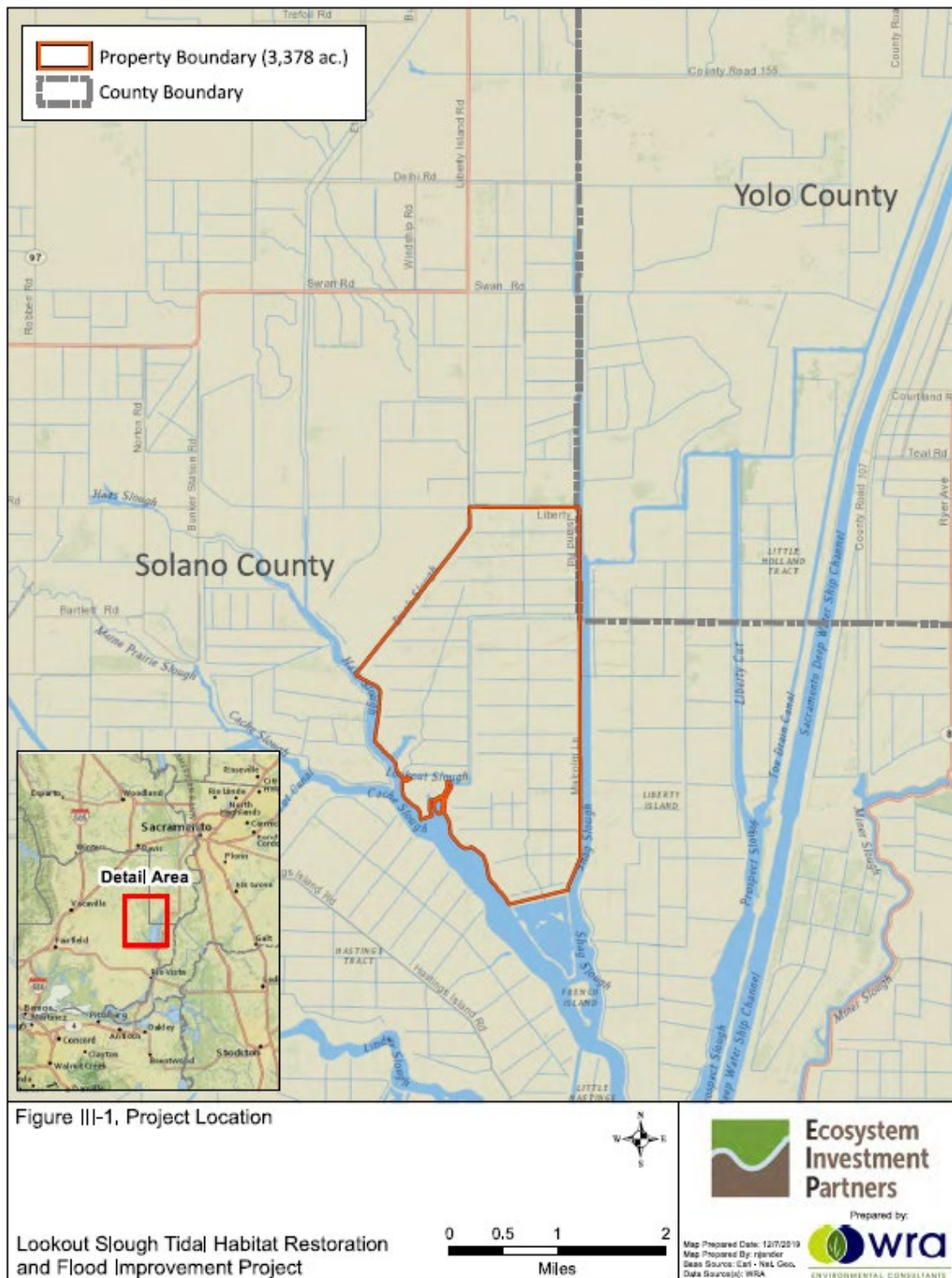


Figure 1. Location (*Draft EIR, Certification Record LOS.4.00001, p. III-4*)

According to the Certification, the Lookout Slough Project is necessary to partially fulfill tidal habitat restoration requirements under the 2008 U.S. Fish and

Wildlife Service (USFWS) Delta Smelt Biological Opinion on the Coordinated Operations of the federal Central Valley Project and the State Water Project (2008 USFWS BiOp), the 2009 National Marine Fisheries Service (NMFS) Biological Opinion and Conference Opinion on the Long-Term Operation of the Central Valley Project and the State Water Project (2009 NMFS BiOp), and Condition 9.1.1 of the Incidental Take Permit for Long-Term Operation of the State Water Project in the Sacramento-San Joaquin Delta (2020 LTO ITP) ([Certification C202110](#), pp. 2-3).

The Lookout Slough Project would be located on three properties: the Bowsbey Property, the Liberty Farms Property, and the Vogel Property (Figure 2) ([Certification C202110](#), p. 3). These properties are currently used for irrigated pasture, recreation, and seasonal grazing, respectively. The site is bounded by Cache Slough on the southwest, Haas Slough and Duck Slough on the west, Liberty Island Road on the north, Shag Slough on the east, and a Cross Levee on the south ([Certification C202110](#), p. 3). Lookout Slough is a human-made drainage channel that cuts through the site, separating the Bowsbey and Liberty Farms Properties ([Certification C202110](#), p. 3). The Vogel Property is bounded by the Bowsbey Property on its northern side, and is bounded on the east, south, and west by an agricultural levee ([Certification C202110](#), p. 3).

According to the Certification, the Lookout Slough Project would include a variety of levee modifications at the edges of the site (Figure 3) and grading of the topography on the landside of the levees (Figure 4). The Shag Slough Levee would be breached to allow for tidal inundation of the site, to create the conditions necessary for tidal wetland restoration ([Certification C202110](#), p. 2). The Shag Slough levee is currently part of the State Plan of Flood Control (SPFC) and the Yolo Bypass West levee system ([Certification C20210](#), p. 3). Under the Covered Action, the Shag Slough levee would be lowered at two locations to allow for tidal inundation and for floodwaters from the Yolo Bypass to be conveyed and stored on the site ([Certification C202110](#), p. 2). A new setback levee would be constructed at the western edge of the project site, along Duck Slough, using borrow material from site regrading and levee degradation ([Certification C202110](#), p. 2). The Duck Slough Setback Levee would become part of the SPFC and the Yolo Bypass West Levee System ([Certification C202110](#), p. 3).

According to the Department, the Lookout Slough Project would modify the levee on the northeast bank of Cache Slough and Haas Slough to prevent high-flow events that inundate the site from raising water surface elevations in Cache Slough ([Certification 202110](#), p. 3). The post-project condition is referred to as the Cache/Hass Slough Training Levee. The modifications would include lowering the

height of the levee to reduce subsidence, widening the base and crown of the levee to increase slope stability and improve maintenance access, and installing rock and vegetation on the slopes for erosion protection ([Draft EIR, Certification Record LOS.4.00001](#), p. III-39). The Vogel levee would be breached to allow for tidal inundation on the Vogel Property ([Certification C202110](#), p. 2).



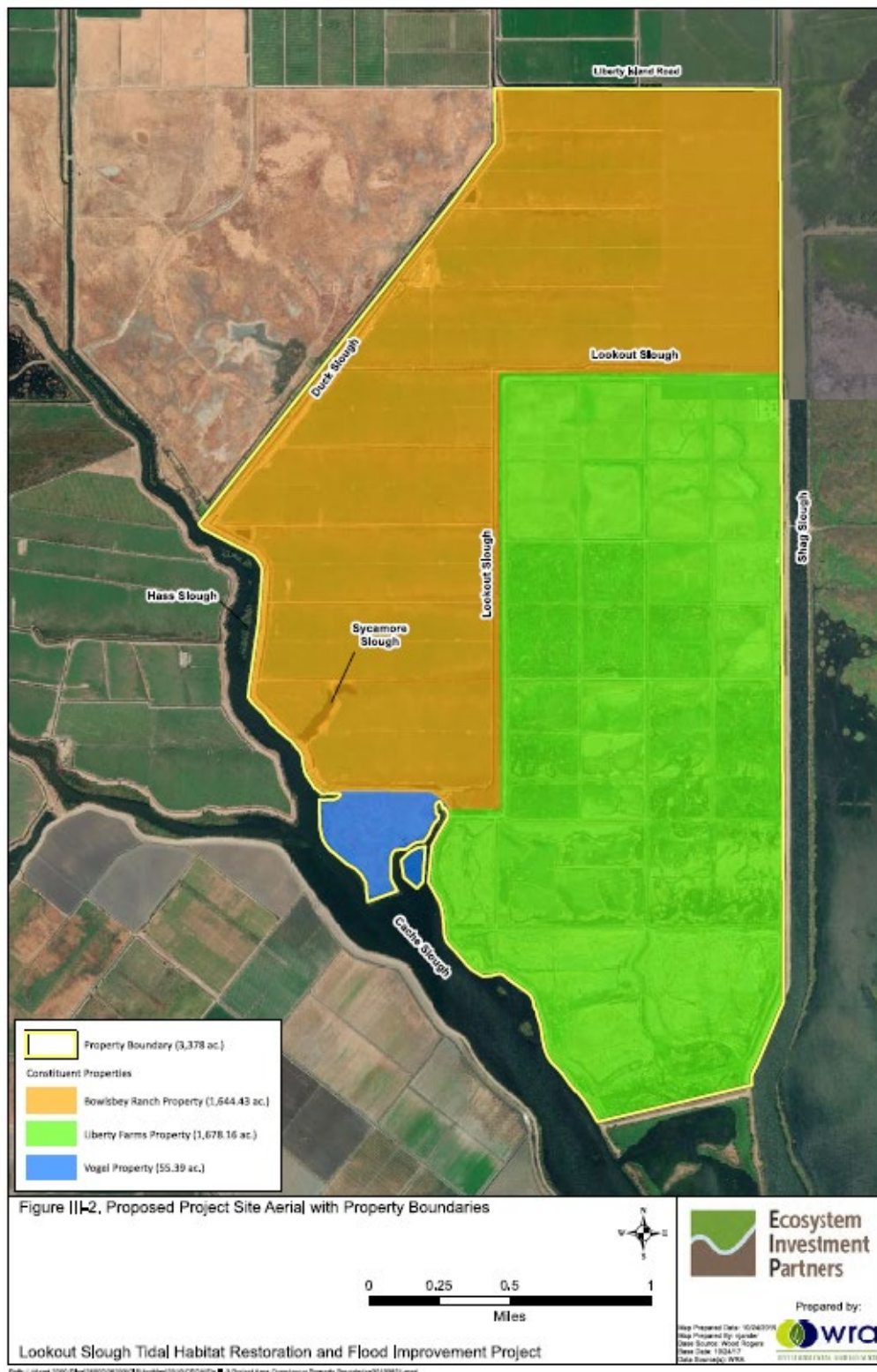


Figure 2. Site Aerial with Property Boundaries ([Draft EIR, Certification Record LOS.4.00001](#), p. III-9)

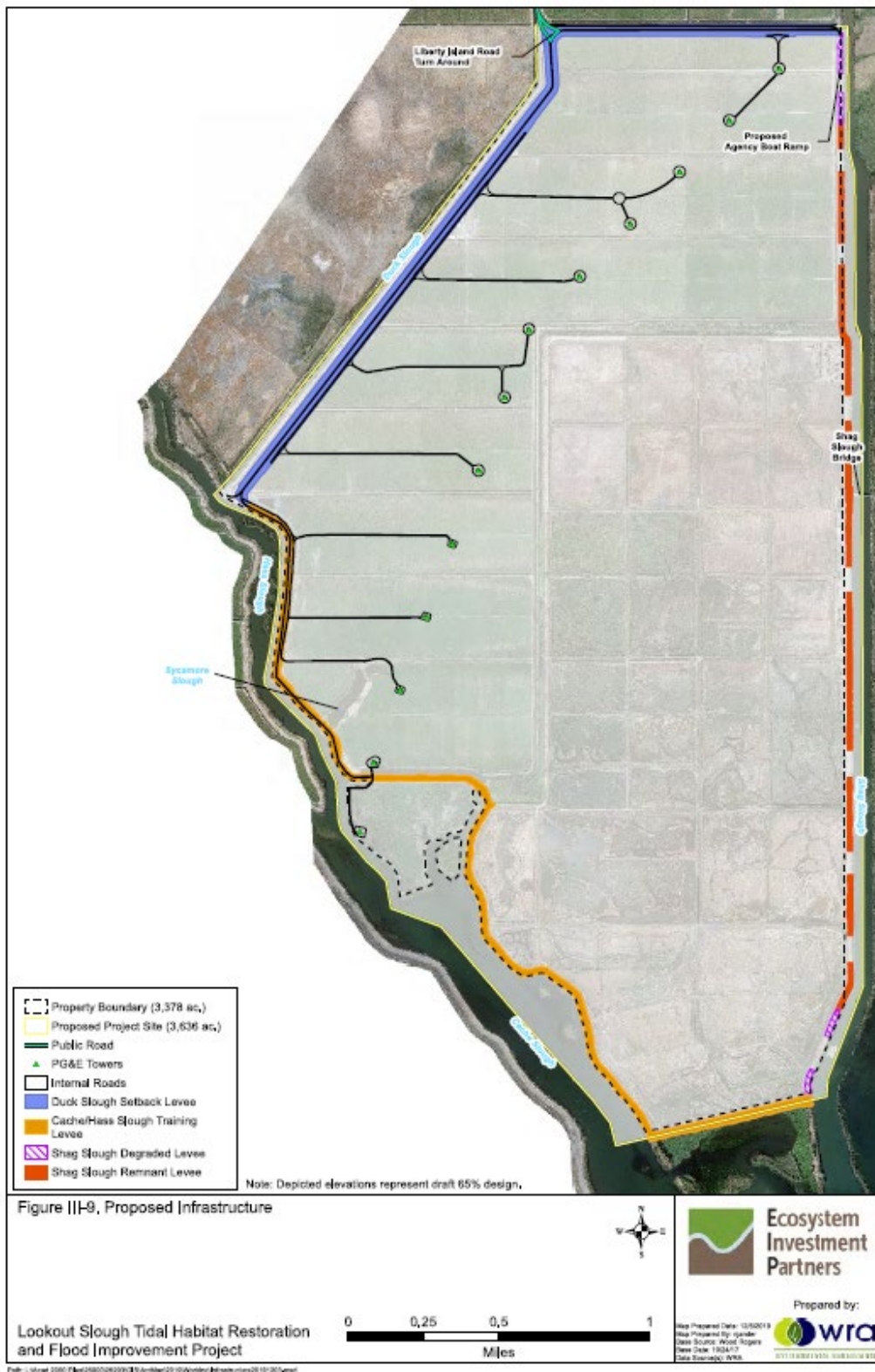


Figure 3. Proposed Infrastructure ([Draft EIR, Certification Record LOS.4.00001](#), p. III-32)



According to Certification C202110, upon completion of the Lookout Slough Project, the site would include project conditions with new channels, breaches, and other site modifications (Figure 3, [Certification C202110 Attachment 4](#), p. 14).

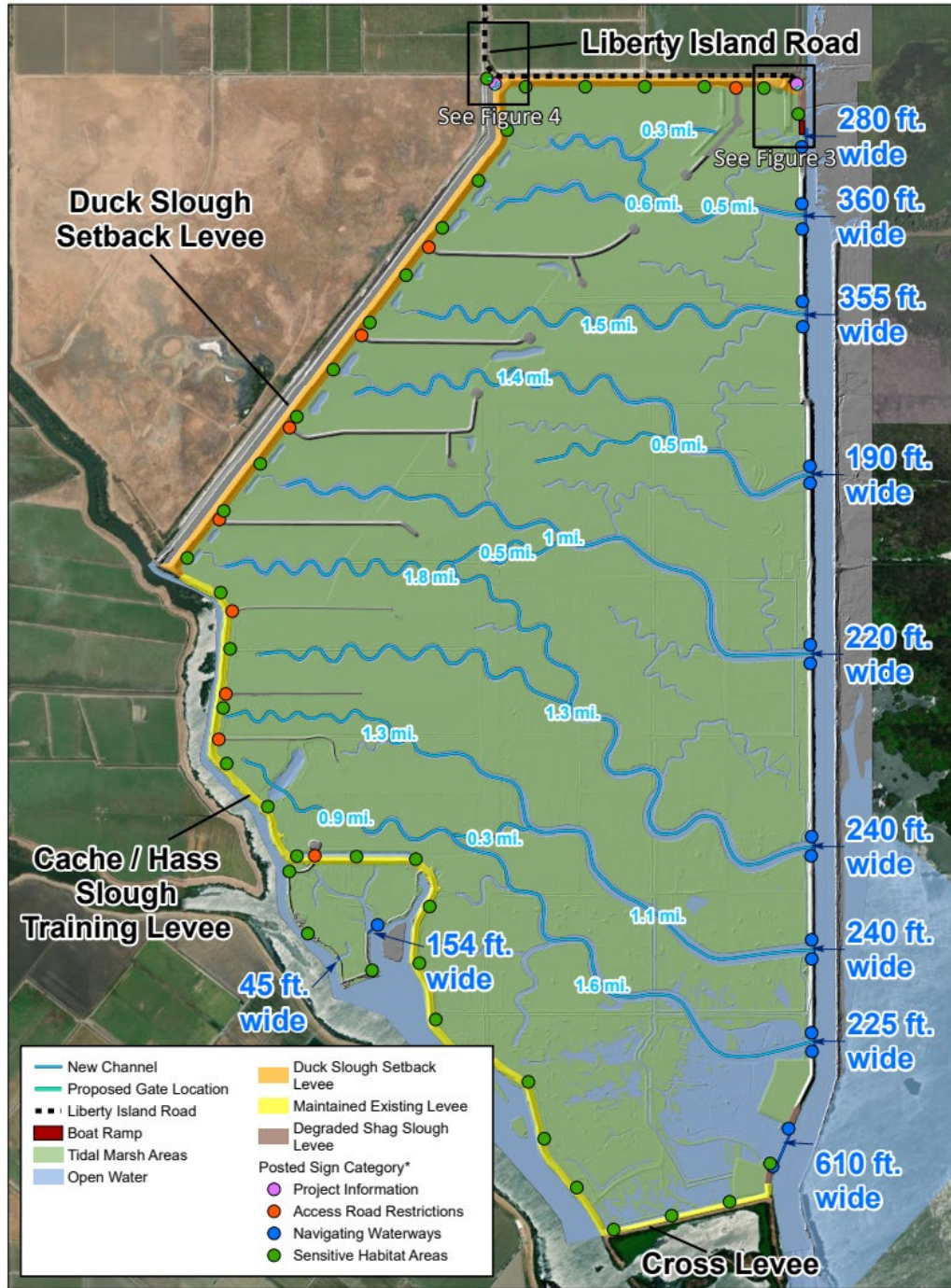


Figure 4. Proposed Project Conditions ([Certification 202110 Attachment 4](#), p. 14).

### 3. Brief Description of Appeals & Procedural History

Any person who claims that a proposed covered action is inconsistent with the Delta Plan may file an appeal of the certification of consistency. (Wat. Code, § 85225.10, subd. (a).) An appeal must identify with specificity how the certification of consistency is not supported by substantial evidence in the record certified by the state or local public agency, and provide necessary factual support. (Wat. Code, § 85225.10, subd. (c); see also Appeals Procedures § 6, and subds. (e) and (f).) The Council may dismiss claims that fail to provide this specificity. (*Ibid.*) Parties have 30 days from the submission of the certification of consistency to file an appeal with the Council. (Wat. Code, § 85225.15.)

#### a. Prior Certification Number C20215

The Department previously submitted [Certification C20215](#) for this covered action on February 2, 2021. Certification C20215 was appealed by four parties, and the Council deemed those appeals filed on March 24, 2021 (the appeals were consolidated into one proceeding). The Council heard and considered issues raised in appeals of Certification C20215 and made the following specific written findings ([Council July 2021 Determination](#), pp. 9-12):

1. We *dismissed* certain issues because they were non-appealable or outside the Council's jurisdiction (Wat. Code, § 85225.20; Appeals Procedures § 15, subd. (c)). The following issues, discussed in more detail in Section F ("Non-Appealable Issues and Issues Outside the Council's Jurisdiction") of the July 16, 2021 Determination for Certification C20215 ("Council July 2021 Determination" or "Determination C20215"), were *dismissed* as not raising appealable issues and/or not being within the Council's jurisdiction:
  - Allocation of Proposition 1 Funds:
    - Policy DP P2 (Cal. Code Regs., tit. 23, § 5011): Allocation of Proposition 1 Funds;
    - Policy RR P1 (Cal. Code Regs., tit. 23, § 5012): Allocation of Proposition 1 Funds;
  - Policy DP P2 (Cal. Code Regs., tit. 23, § 5011): Disproportionate Impacts and Demographic Considerations;
  - Policy DP P2 (Cal. Code Regs., tit. 23, § 5011): Delta Plan Recommendation DP R11;
  - Policy DP P2 (Cal. Code Regs., tit. 23, § 5011): Davis-Dolwig Act;

- Policy ER P2 (Cal. Code Regs., tit. 23, § 5006): Alternate Sea Level Rise Projections;
  - Policy ER P2 (Cal. Code Regs., tit. 23, § 5006): Propagation of Predatory Fish Species; and
  - Policy RR P1 (Cal. Code Regs., tit. 23, § 5012): Lack of a detailed funding plan for operation and maintenance, capital funding, and on-site personnel to ensure facility maintenance and manage flood risk.
2. We *remanded* the matter to the Department for *reconsideration of the specific issues identified for remand* and *denied the appeals on the specific issues identified for denial* as discussed in Section G of the July 2021 Determination (“Analysis & Findings”) (Cal. Wat. Code, § 85225.25) and found that:
- a. The Department’s Certification of Consistency with respect to the following issues for the two Delta Plan policies below was *not supported* by substantial evidence in the record, as detailed in the analysis and findings in the July 2021 Determination, and we therefore *remanded* the matter to the Department *for reconsideration on these issues*:
- G P1(b)(3) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(3)): Best Available Science, as to the issue of methods to estimate recreational use as it relates to the best available science criterion of Inclusiveness; and
  - DP P2 (Cal. Code Regs., tit. 23, § 5011): Respect Local Land Use When Siting Water or Flood Facilities or Restoration Habitats, as to the following issues:<sup>2</sup>
    - that recreational uses of Liberty Island Road, the Shag Slough Bridge, and Liberty Island Ecological Reserve (LIER) do not constitute existing uses;

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<sup>2</sup> We did not previously reach a conclusion regarding the issue of whether siting the Lookout Slough Project to avoid or reduce conflicts with existing uses was feasible because Certification C20215 was not supported by substantial evidence in the record that the Department considered existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER, or analyzed whether there is a conflict with such uses, or whether the project was sited to avoid or reduce conflicts with such uses.

- that the Covered Action would not conflict with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER; and
  - that the Department avoided or reduced conflicts with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Lookout Slough Project.
- b. The Appellants failed to show that there was not substantial evidence in the record to support the Department's Certification of Consistency with respect to the following five Delta Plan policies, and we therefore *denied* the portions of the appeals that challenged Certification C20215 on these grounds<sup>3</sup>:
- G P1(b)(2) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(2)): Detailed Findings to Establish Consistency with the Delta Plan Mitigation Measures;
  - G P1(b)(3) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(3)): Best Available Science, as to the issue of methods to estimate recreational use as it relates to the best available science criteria of Objectivity and Relevance, and as to the issues of modeling years selected for water quality analysis;

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<sup>3</sup> In a covered action appeal, the question before us is whether an appellant has shown that the certification of consistency is not supported by substantial evidence in the record. (Wat. Code, § 85225.25.) In its comments on the draft dismissal, SCWA contends that appellants need not point to "substantial evidence in the record to show the Project is not consistent with the Delta Plan," but that appellants need only "show a project is inconsistent with the Delta Plan and will have a significant adverse effect on achieving the coequal goals supported by factual allegations." It is true that the Delta Reform Act authorizes anyone "who claims that a proposed covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, the action will have a significant adverse impact on the achievement of one or both of the coequal goals" to appeal a certification of consistency. (Wat. Code, § 85225.10, subd. (a).) But the Delta Reform Act only authorizes the Council to remand the matter to the "agency for reconsideration of the covered action *based on the finding that the certification of consistency is not supported by substantial evidence in the record...*" (Wat. Code, § 85225.25, italics added.) Consequently, an appellant must necessarily demonstrate that a certification of consistency is "not supported by substantial evidence in the record" in order for the Council to remand the matter to the public agency at all. For that reason, the appellant in a covered action appeal bears the burden of showing that the certification of consistency is not supported by substantial evidence in the record. (Wat. Code, § 85225.25; see *Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1041, 1047 [agency action carries "a presumption of validity"].)

predictive, transparent, and open water quality modeling; cumulative impacts; peer review of water quality analysis; and water quality impacts to municipal and agricultural diverters;

- G P1(b)(4) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(4)): Adaptive Management, as to the issues of adequate resources to ensure implementation of the Adaptive Management and Monitoring Plan, delineated authority to implement the proposed adaptive management process, and success of project implementation and oversight;
- ER P2 (Cal. Code Regs., tit. 23, § 5006): Restore Habitats at Appropriate Elevations;
- ER P5 (Cal. Code Regs., tit. 23, § 5009): Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species;
- DP P2 (Cal. Code Regs., tit. 23, § 5011): Respect Local Land Use When Siting Water or Flood Facilities or Restoration Habitats, as to the issues of conflicts with existing agricultural uses, conflicts with existing infrastructure, conflicts with use of existing water intakes and beneficial uses of water, conflicts with the use of existing water intakes and diversions related to endangered species presence, conflicts with the Solano County General Plan, and conflicts with the Solano County Climate Action Plan.
- RR P1 (Cal. Code Regs., tit. 23, § 5012): Prioritization of State Investments in Delta Levees and Risk Reduction.

c. The following four Delta Plan policies did not apply to the Covered Action, and we therefore *denied* the portions of the appeals that challenged Certification C20215 on these grounds:

- G P1(b)(1) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(1)): Coequal Goals;
- WR P1 (Cal. Code Regs., tit. 23, § 5003): Reduce Reliance on the Delta Through Improved Regional Water Self-Reliance;



- WR P2 (Cal. Code Regs., tit. 23, § 5004): Transparency in Water Contracting; and
  - ER P1 (Cal. Code Regs., tit. 23, § 5005): Delta Flow Objectives.
3. The Appellants failed to provide the required specificity on the following specific issues and we therefore *dismissed* the appeals as to these issues (Cal. Wat. Code, § 85225.10(c); Appeals Procedures § 6, subd. (e) and (f)); Appeals Procedures § 15, subd. (c)):
- G P1(b)(4) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(4)): Adaptive Management, as to the issues of funding for operations and maintenance and third-party verification; operations and maintenance of the Duck Slough Setback Levee; funding to perform operation, maintenance, repair, replacement, and rehabilitation; and design aspects and maintenance facilitation of the Cache and Haas Slough levee.

**b. Revised Certification C202110**

The Department submitted the Revised Certification C202110 to address the specific issues remanded to the Department for reconsideration, described above, in our July 2021 Determination. The record for Certification C202110 incorporates the record filed for Certification C20215 ([Department Certification of Record for Certification C202110](#), p. 1). Although the record for the Revised Certification contains additional information (Department Record, Certification C202110, February 10, 2022), Certification C202110 states that “The Project has not changed in design, nor has any element of the Project changed or been updated such that reconsideration of Certification under any Delta Plan policy or portion of a policy is necessary other than the two remanded to DWR for reconsideration” ([Certification C202110 Attachment 1](#), p. 1). No appellant has identified a change in the Lookout Slough Project.

We received timely appeals to the Certification from the following entities (Appellants): A202110-1 Solano County Water Agency (SCWA) and A202110-2 Liberty Island Access (LIA).

The appeals were deemed filed on January 31, 2022 and consolidated into one proceeding (Appeals Procedures § 31).

The Council held a fully remote-access hearing on the appeals on March 24, 2022 (“March hearing”) and received presentations from the Department and Appellants as well as public comments.<sup>4</sup> Upon conclusion of the March hearing, the Council dismissed certain issues raised by the Appellants (as set forth in Section H of this Determination) and directed Council staff to prepare draft findings regarding the non-dismissed issues on appeal and to release the draft findings for public comment prior to the Council’s consideration at the April 28, 2022 public meeting. Staff’s proposed draft findings were released for a public comment from April 14 through April 19, 2022.

All comments on the staff draft findings received by 5:00 p.m., Friday, April 19, 2022, as specified in the April 14, 2022 publication notice for the Staff Draft Determination, were considered in preparation of the Proposed Determination. Ensuing revisions were part of the Proposed Determination and are shown as track changes in the redline version included as Attachment 4 to the staff report (part of the Council meeting packet for the April 28, 2022 meeting). Comments not addressed in the Proposed Determination were considered, but would not have altered the analysis or findings.

The Delta Reform Act requires that the Council make specific written findings either denying an appeal or remanding the matter to the agency within 60 days of the hearing; the hearing on appeals of Revised Certification C202110 was held on March 24, 2022. (Wat. Code, §§ 85225.20 and 85225.25.)

The Council received comments from the Appellants, the Department, and the public on the Proposed Determination and considered the findings on appeals at its duly noticed April 28, 2022 public meeting.

Having held a public hearing in this matter on March 24, 2022, and having reviewed the entirety of the record in this matter; received comments from the Appellants, the Department, and the public; and considered the Proposed Determination at its public April 28, 2022 meeting, the Council has made specific written findings on the appeals of Revised Certification C202110 as set forth below in Section E (Dismissed Issues) and Section F (Analysis & Findings) of this Determination. (*See* Cal. Wat. Code, §§ 85225.15, 85225.20.)<sup>5</sup> and Part H (Dismissal

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<sup>4</sup> The hearing was held remotely via Cal-Span and Zoom, pursuant to Assembly Bill 361 (Government Code §11133) and the Governor’s Executive Order N-1-22.

<sup>5</sup> The Council’s vote will be reflected in the Council meeting summary, once approved.

of Issues on Appeal of the Certification of Consistency by the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Certification Number C202110).

## **B. BRIEF SUMMARY OF FINDINGS**

The Appellants challenged the consistency of the Revised Certification based on four Delta Plan policies in their appeals. The Council held a public hearing on the appeals on March 24, 2022. Several of the appealed issues were previously considered and dismissed or denied by the Council as part of its July 2021 Determination on appeals of Certification C20215. Those issues were dismissed by the Council on March 24, 2022, after the hearing on the appeals and are set forth in Section H of this Determination. The Council directed staff to prepare findings on non-dismissed issues on appeal for the Council's consideration at its April 28, 2022 meeting.

The findings of the Council on the issues on appeal of the Revised Certification are summarized as follows:

1. The following issues were *dismissed* as not appealable at the conclusion of the March 24, 2022 hearing, as set forth in Section H of this Determination (Wat. Code, § 85225.20; Appeals Procedures § 15, subd. (c)):
  - a. [G P1\(b\)\(2\)/Cal. Code Regs., tit. 23, § 5002, subd. \(b\)\(2\)](#) - Mitigation Measures:
    - i. Issues appealed by LIA related to recreation and offsite mitigation (Delta Plan Mitigation Measures 18-1 and 18-2).
    - ii. Issues appealed by SCWA related to Delta Plan Mitigation Measure 4-1 and invasive species.
  - b. [G P1\(b\)\(4\)/Cal. Code Regs., tit. 23, § 5002, subd. \(b\)\(4\)](#) - Adaptive Management:
    - i. Issues appealed by SCWA related to adaptive management, including documentation of adequate resources and clearly delineated authority.
  - c. [ER P5 / Cal. Code Regs., tit. 23, § 5009](#) - Avoid Introductions of and Habitat for Invasive Nonnative Species
    - i. Issues appealed by SCWA related to introductions of and habitat for invasive nonnative species, including specificity of the agency or entity that would manage invasive species issues.

- d. [DP P2 / Cal. Code Regs., tit. 23, § 5011](#) - Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats
  - i. Issues appealed by SCWA related to potential impacts to existing uses, including municipal water intakes and local land use.
- 2. For the following issues, we find that Appellant LIA failed to show that there is not substantial evidence in the record to support the Department's Certification of Consistency with respect to the following issues and we therefore *deny* the portions of the appeal that challenge the certification as to these issues (Water Code section 85225.25) as set forth in Section F of this Determination.
  - i. [DP P2 / Cal. Code Regs., tit. 23, § 5011](#) - Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats
    - 0. Issues appealed by LIA related to the range of design options evaluated for feasibility
    - 1. Evidence cited to by LIA and whether this meets the substantial evidence standard of review.
    - 2. Issues appealed by LIA related to the existence of existing boat and bank fishing, waterfowl hunting, and wildlife viewing recreational use of Liberty Island Road, the Shag Slough Bridge, and LIER.
    - 3. Issues appealed by LIA related to the siting of the Lookout Slough Project and new conflicts with existing boat and bank fishing, waterfowl hunting, and wildlife viewing recreational uses.
    - 4. Issues appealed by LIA related to the siting of the Lookout Slough Project and conflicts with existing boat and bank fishing, waterfowl hunting, and wildlife viewing recreational uses.
    - 5. Issues appealed by LIA related to whether the Lookout Slough Project was sited to avoid or reduce conflicts with existing recreational uses where feasible.
    - 6. Issues appealed by LIA related to whether the creation of navigable tidal channels and a new boat ramp would reduce conflicts with existing recreational uses.

7. Issues appealed by LIA related to whether improvements to Liberty Island Road would reduce conflicts with existing recreational uses and parking.
8. Issues appealed by LIA as to whether access to bank fishing north of the northernmost breach of Shag Slough Levee would reduce conflicts with existing recreational uses and parking.
9. Issues appealed by LIA as to whether there is a lack of substantial evidence that improved habitat would reduce conflict with existing recreational uses along Shag Slough and at LIER.
10. Issues appealed by LIA as to whether there is a lack of substantial evidence that signage would reduce conflict with existing recreational uses along Shag Slough and at LIER.
11. Issues appealed by LIA related to whether there is a lack of substantial evidence to support the Department's findings in the Certification of Consistency.

### **C. STANDARD OF REVIEW**

In a covered action appeal, the question before us is whether an appellant has shown that the certification of consistency is not supported by substantial evidence in the record. (Wat. Code, § 85225.25.)

Substantial evidence means evidence that is “reasonable in nature, credible, and of solid value.” (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335.) It includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” (*Cf.* Cal. Code Regs., tit. 14, § 15384.) Speculation or conjecture alone is not substantial evidence. (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286, 308.)

Under the substantial evidence standard of review, we must decide whether there is enough relevant information and reasonable inferences so that a fair argument can be made to support the Department's conclusions, even though other conclusions may also be reached. (*See* Cal. Code Regs., tit. 14, § 15384.)



At the time a state or local public agency submits a certification of consistency, it must also submit the record upon which that certification of consistency is based. (Council's Administrative Procedures Governing Appeals, Part I [Appeals Procedures], § 4, subd. (a).) We may supplement the agency's record submission with any information we conclude was before the agency but nevertheless was not included in the submission to us. (Appeals Procedures §10.) We may also take official notice of any accepted technical or scientific fact, as well as any fact that may be judicially noticed. (*Id.*, § 29.)

We review a certification of consistency to determine whether it is supported by the administrative record, rather than simply reviewing it for error. (*Sierra Club v. California Coastal Comm.* (1993) 19 Cal.App.4th 547, 557.) The entire record will be reviewed, including evidence detracting from the decision. (*Utility Reform Network v. Public Utilities Commission* (2014) 223 Cal.App.4th 945, 959.) However, the Council does not substitute its own findings or inferences for the Department's. (*See Sierra Club v. California Coastal Comm.* (1993) 19 Cal.App.4th 547, 557.) In some instances, evaluating the Certification requires interpretation of the Delta Plan and documents incorporated therein. The Council, as drafter and administrator of the Delta Plan, will interpret the Plan pursuant to its expertise. We will consider interpretations that the parties offer but will ultimately arrive at an independent determination reflecting our expertise. (*See Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1234.)

In arguing that certain Certification findings are not based upon substantial evidence, the Appellant carries the burden of demonstrating that the administrative record does not contain sufficient evidence to support the Department's findings. (*See State Water Res. Control Bd. Cases* (2006) 136 Cal.App.4th 674, 749; *Ocean Harbor House v. California Coastal Comm.* (2008) 163 Cal.App.4th 215, 227.) "A recitation of only the part of the evidence that supports the appellant's position is not the demonstration contemplated under the above rule." (*Ibid.* [internal citation and quotation marks omitted].) Thus, if an appellant fails to set forth specific facts showing that a finding is not supported by substantial evidence in the record, its claim must be dismissed. (Appeals Procedures, § 6, subds. (e), (f), and 15, subd. (c); *Salas v. Cal. Dept. of Transportation* (2011) 198 Cal.App.4th 1058, 1074 [the Council is not required to search the record to ascertain whether it contains support for the Appellant's contentions].) The Council (or Executive Officer) may also dismiss issues that do not raise an appealable issue or are not within the Council's jurisdiction (Wat. Code, § 85225.20; Appeals Procedures § 15, subd. (c)).

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

#### **D. ADMINISTRATIVE RECORD**

The Department certified the administrative record in this matter on February 10, 2022. The Council or its executive officer may supplement the record if the Council or its executive officer determines that additional information was part of the record before the Department, but was not included in the record submitted to the Council. (Appeals Procedures § 10.) The Council may also take official notice of any generally accepted technical or scientific matter within the Council's jurisdiction, and of any fact that may be judicially noticed by the courts of this State. (Appeals Procedures § 29.)

The Department and Appellant LIA requested that additional documents be added to the record because such documents are either: (a) part of the record before the Department, but were not included in the Department's submission to the Council (see Appeals Procedures, § 10); or, (b) generally accepted technical or scientific matter within the Council's jurisdiction (see Appeals Procedures, § 29).

Our rulings on these admissions requests are as follows: documents admitted pursuant to section 10 are listed in Exhibit A attached hereto; documents admitted pursuant to section 29 are listed in Exhibit B attached hereto; documents that we decline to admit into the record are listed in Exhibit C attached hereto.

#### **E. DISMISSED ISSUES**

The Council, or the Executive Officer, may dismiss issues if: 1) the appellant has failed to provide information in the appellant's possession or control within the time requested; or 2) the issue raised is not within the Council's jurisdiction or fails to raise an appealable issue. (Cal. Wat. Code, §§ 85225.10 and 85225.20; Appeals Procedures section 15, sub. (c).)

The Council previously dismissed the appeal issues described previously in section B.1 of this Determination at the conclusion of the March 24, 2022 hearing, as set forth in Section H of this Determination.

## **F. ANALYSIS & FINDINGS: NON-DISMISSED ISSUES**

Our analysis focuses on the Delta Plan policy that was appealed and addresses issues raised that were not otherwise dismissed (see Section E, above).

### **0. Range of design options evaluated for feasibility**

LIA states that additional options to limit the Lookout Slough Project's "damage to recreation" were proposed, citing to evidence in the Record documenting listening sessions between the Department and LIA, the Delta Protection Commission (Commission), California Department of Fish and Wildlife (CDFW), and Solano County. These include:

- 1) retaining Liberty Island Road to the bridge but lowering it so it acts as a weir overtopped at flood stage (LIA's February 28, 2022 Letter, p. 2);
- 2) retaining a portion of Liberty Island Road by eliminating the most northerly levee breach (LIA Appeal Letter\_1-2022, p. 7; LIA's February 28, 2022 Letter, p. 2; Certification C202110 Attachment 3A, p. 5 and 31);
- 3) restoring a historic tidal creek to retain tidal influence from the site's northeast corner to the southern abutment of Shag Slough Bridge (LIA's February 28, 2022 Letter, p. 2; Certification C202110 Attachment 3A, p. 11);
- 4) creating a fishing pier or dock (LIA's February 28, 2022 Letter, p. 2; Certification C202110 Attachment 3A, p. 5); and
- 5) providing offsite public access to "other lands and waters suitable for angling and nature study" (LIA's February 28, 2022 Letter, p. 2; Certification C202110 Attachment 3A, p. 7).

LIA states, "none of these additional mitigations suggested to DWR are included in its project. Instead, access to its boat ramp designed for agency use is the only measure that would mitigate, however inadequately, its project's harm to recreational uses" (LIA's February 28, 2022 Letter, p. 3).

In its appeal letter, LIA also states that the Department has "provided no explanation for why off-site mitigations are not feasible for the Project" (LIA Appeal Letter\_1-2022, p. 7). LIA states that the Project "presents an opportunity for DWR to promote recreation in a material way that might mitigate on-site loss of recreation access, especially for land-based activities like shoreline fishing that are most significantly impacted, and are more financially accessible to disadvantaged communities" (LIA Appeal Letter\_1-2022, pp. 7-8). LIA states that public access

possibilities have been proposed in the Summary Report for the Delta Recreational Master Strategy, but that “DWR has taken no efforts to evaluate any of these possibilities” and “funding for implementation is not present” (LIA Appeal Letter\_1-2022, p. 7). LIA states that the Department has “a more than sufficient budget (over \$4.8 billion) to properly mitigate now for the losses that their proposed Project would incur on recreation access” (LIA Appeal Letter\_1-2022, p. 7) but goes on to state that the Department “has not provided any evidence in the record for funding of any replacement off-site recreation access as mitigation” (LIA Appeal Letter\_1-2022, p. 8).

In its appeal letter LIA states, “DWR has not taken initiative to explore options beyond the few that LIA suggested, or the ideas shared with them by CDFW” (LIA Appeal Letter\_1-2022, p. 7). LIA also states that while DWR asserts it has considered “all the measures suggested by stakeholders” to reduce or mitigate the effects of the Project on recreation, “its certification does not assess a variety of them, including providing adequate parking, trails, a fishing pier, restrooms, trash cans, and accessible design” (LIA’s February 28, 2022 Letter, p. 5). LIA states, “Ultimately, the responsibility for providing mitigation plans for the Project belongs to DWR, not members of the public. DWR has all the resources of a large government agency to creatively come up with a mitigation solution for recreation access. DWR should have aggressively considered and researched a large number of possible mitigation options, including, but certainly not limited to suggestions from LIA” (LIA Appeal Letter\_1-2022, p. 8).

DP P2 imposes an affirmative obligation on lead agencies to site ecosystem restoration projects to avoid or reduce conflicts with existing uses and “consider sites on existing public lands, when feasible and consistent with a project’s purpose.” (Cal. Code Regs., tit. 23, § 5011, subd. (a).) DP P2 thus requires lead agencies for Covered Actions like Lookout Slough to consider potential alternative sites in order to avoid or reduce conflicts with existing uses, if feasible. DP P2 speaks to the siting of projects in order to reduce or avoid conflicts with existing uses, where feasible, considering comments from local agencies and the Delta Protection Commission, but does not require consideration of particular design features that would reduce conflicts with existing uses. (Cal. Code Regs., tit. 23, § 5011, subd. (a)).

The question before the Council is whether LIA has shown that there is a lack of substantial evidence in the Record to support the Department’s certification that the Covered Action was *sited* to reduce or avoid conflict with existing recreational uses, where feasible, in consideration of comments from local agencies and the

Commission. To support its Revised Certification, the Department provides evidence in the Record that (1) feasible design measures were incorporated into siting of the Lookout Slough Project to reduce conflict with existing recreational uses (Certification C202110, Attachment 4), and (2) four alternative proposals for additional design measures that would reduce conflicts with existing recreational uses caused by the project's siting suggested during listening sessions with stakeholders after the Council's July 2021 Determination were considered and found to be infeasible (Certification C202110, Attachments 3 and 3A). In addition, even assuming DP P2 regulates more than project siting and requires the incorporation of project features to mitigate conflicts, LIA has not met its burden in showing a lack of substantial evidence in the record that the Department failed to consider and incorporate feasible mitigation measures under DP P2.

DP P2 requires the Department to *site* the project to reduce or avoid conflicts with existing uses, when feasible. LIA has not met its burden in demonstrating that the Department's certification of consistency with this requirement was not supported by substantial evidence in the record, and thus we *deny* the appeal as to this issue.

**1. Policy DP P2 (Cal. Code Regs., tit. 23, § 5011): Respect Local Land Use When Siting Water or Flood Facilities or Restoration Habitats**

The Department certified that the Lookout Slough Project was consistent with Policy DP P2 as part of Certification C20215. This finding was previously appealed by four parties, under Appeals C20215-A1 (Liberty Island Access), C20215-A2 (Solano County Water Agency), C20215-A3 (Reclamation Districts 2060 and 2068), and C20215-A4 (Central Delta Water Agency). In its July 21, 2021 Determination, the Council denied these appeals in part and found that, in part, Certification C20215 was not supported by substantial evidence in the record that the covered action was consistent with DP P2. The Council remanded the matter, in part, to the Department for consideration of the following issues:

- i. that recreation uses of Liberty Island Road, the Shag Slough Bridge, and Liberty Island Ecological Reserve (LIER) do not constitute existing uses;
- ii. that the Covered Action would not conflict with existing recreation uses of Liberty Island Road, the Shag Slough Bridge, and LIER; and



- iii. that the Department avoided or reduced conflicts with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Project. (Council July 2021 Determination, p. 10)

Additionally, in the Determination, the Council did not reach a conclusion regarding the issue of whether siting the Lookout Slough Project to avoid or reduce conflicts with existing uses was feasible because Certification C20215 was not supported by substantial evidence in the record that the Department considered existing recreational uses of, or analyzed whether there is conflict with such uses, or whether the covered action was sited to avoid or reduce conflict with such uses (Council July 2021 Determination, p. 96).

The Department addresses these remanded issues in Revised Certification C202110 and finds that the covered action is consistent with Policy DP P2 for the remanded issues. Solano County Water Agency (SCWA) and Liberty Island Access (LIA) have appealed this policy again for Certification C202110. SCWA's appeals were dismissed by the Council following the March 24, 2022 hearing (see Section H). LIA's appeal is considered below.

**a. Policy Requirements**

DP P2 states that:

“(a) Water management facilities, ecosystem restoration, and flood management infrastructure must be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence when feasible, considering comments from local agencies and the Delta Protection Commission. Plans for ecosystem restoration must consider sites on existing public lands, when feasible and consistent with a project's purpose, before privately owned sites are purchased. Measures to mitigate conflicts with adjacent uses may include, but are not limited to, buffers to prevent adverse effects on adjacent farmland.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, this policy covers proposed actions that involve the siting of water management facilities, ecosystem restoration, and flood management infrastructure.” (Cal. Code Regs., tit. 23, § 5011.)

**b. Certification**

In Certification C202110, the Department states that “Upon consideration of the full record, DWR confirms that Liberty Island Road, Shag Slough Bridge, and LIER constitute existing recreational uses” (Certification C202110 Attachment 1, p. 9; Attachment 3, pp. 3-4) “and that the Project would conflict with these existing uses by vacating a portion of Liberty Island Road and removing pedestrian access to the LIER” (Certification C202110 Attachment 1, p. 9; Attachment 3, p. 6).

In Certification C202110, the Department states that siting discussions with local, State, and federal stakeholders as part of the project’s regulatory review process included the need to avoid or reduce conflicts with existing recreational uses where feasible, as well as the need to avoid or reduce conflicts with other existing uses in and around the site, including agricultural operations, existing infrastructure, existing water intakes and resulting beneficial uses of water and/or conflicts with diversions related to endangered species, and conflicts with goals and uses described in the Solano County General Plan (Certification C202110 Attachment 1, p. 10). The Department states that the Lookout Slough Project siting process in 2017 determined that the current location “was the most feasible location” for achieving the goals of the Lookout Slough Project (Certification C202110 Attachment 3, p. 5). The Department states that the current site was selected because: 1) it is within the Cache Slough Complex, which State and federal wildlife agencies consider a prime area to advance tidal wetland habitat restoration; 2) other sites suitable for large-scale habitat restoration in the North Delta region have been restored or are undergoing restoration; 3) the location allows for connectivity with other habitat restoration projects; and 4) the location allows for expansion of the lower portion of the Yolo Bypass to decrease flood risk in and around the Lower Sacramento River (Certification C202110 Attachment 1, pp. 9-10; Certification C202110 Attachment 3, pp. 5-6).

The Department states that conflicts with recreational use at the site were examined early in Project design and that extensive public outreach to engage stakeholders was used in designing the Project to best avoid or reduce conflict with recreation and other existing uses (Certification C202110 Attachment 1, p. 10), and that in selecting the Lookout Slough Project site the Department considered alternatives to the Project that could have reduced conflicts with recreational uses, including a No Project alternative, a No Channel alternative and a Yolo Bypass Option 3 alternative (Certification C202110 Attachment 3, p. 8, Draft EIR, Chapter VII, Alternatives). The Department states that the Project site was selected through

iterative drafts and multiple reviews by stakeholders to reduce or avoid the majority of overall potential conflicts with all existing uses at the site (Certification C202110 Attachment 1, p. 11). The Department states, however, that it was not feasible to avoid conflicts with all existing uses (Certification C202110 Attachment 3, p. 6), and that it was determined that the Project would result in an unavoidable conflict with recreational use at the Project site (Certification C202110 Attachment 1, p. 11). The Department states that several Project design features were included to reduce conflict with existing recreational uses, including Liberty Island Road vehicle turnarounds, a publicly accessible boat ramp, over 20 miles of additional navigable public tidal channels, bank fishing, and signage (Certification C202110 Attachment 1, pp. 11-12, and Attachment 4, pp. 3-7).

In response to our finding that “The Department’s post hoc arguments regarding the feasibility of avoiding or reducing conflicts with existing recreational uses are not substantiated by evidence in the record” (Council July 2021 Determination, pp. 110-111), the Department describes how it evaluated the feasibility of Project features intended to avoid or reduce conflict with existing recreational uses during Project design and following the Council hearing (Certification C202110 Attachment 1, pp. 13-22; Certification C202110 Attachment 3, pp. 7-28).

The Revised Certification analyzes the feasibility of several additional Project design features for public access proposed by LIA and the Delta Protection Commission to reduce conflicts with existing recreational uses (Certification C202110 Attachment 3, pp. 9-28). According to the Department, these design features were brought forth during the recreational stakeholder listening sessions conducted by the Department following the July 2021 Determination on C20215 (Certification C202110 Attachment 3, p. 9; Attachment 3A), and also included one proposal previously provided by LIA (Certification C202110 Attachment 3, p. 10).

Based on these additional proposed design features, the Department considered and analyzed four options to provide additional on-site public access within the Lookout Slough Project in the Revised Certification:

- i. opening the Duck Slough Setback Levee to pedestrian access (Certification C202110 Attachment 3, p. 10);
- ii. maintaining the existing Liberty Island Road on the Shag Slough Levee to LIER (Certification C202110 Attachment 3, p. 14);

- iii. providing vehicular access to LIER via construction of an east-west seasonal access road, and scattered parking lots within the Project site (Certification C202110 Attachment 3, p. 23); and
- iv. installing box culverts and bridges across the Shag Slough Levee breach sites (Certification C202110 Attachment 3, p. 24).

The Department further defined option “ii” to include two scenarios in which:

- 1) the northern 1,500 foot degrade and four levee breaches north of Shag Slough Bridge would be eliminated from the Project, and
- 2) the four levee breaches north of Shag Slough Bridge would be eliminated from the Project, but the 1,500-foot degrade would remain (Certification C202110 Attachment 3, p. 14).

In addition, the Department states that the California Department of Fish and Wildlife (CDFW) and Solano County provided input “related to potentially adding parking areas, maintaining Liberty Island Road or modifying the Shag Slough Levee design to retain access to the LIER, and adding wayfinding signage” (Certification C202110, Attachment 3, p. 10). The Department states that “each of these items is discussed either as a facet of the various stakeholder proposals...or were [sic] incorporated into the Project” to reduce conflicts with existing recreational use (Certification C202110, Attachment 3, p. 10, and Attachment 4, p. 3).

### **c. Appeal and Analysis**

This section considers LIA’s appeal of the consistency of the Revised Certification with DP P2. LIA contends that the Project is inconsistent with DP P2 because the Project conflicts with existing local land use (LIA Appeal Letter\_1-2022, p. 1). LIA states that the Project is in direct conflict with the existing recreational uses of Shag Slough and the neighboring public lands at the LIER (LIA Appeal of Certification, p. 3).

DP P2 requires, in part, that covered actions subject to the policy be sited to avoid or reduce conflicts with existing uses when feasible. The following analysis analyzes the Revised Certification of the Lookout Slough Project in regard to LIA’s appeal of the following issues previously remanded by the Council for the Department for reconsideration:

- whether there is existing recreational use of Liberty Island Road, the Shag Slough Bridge, and LIER;

- whether the siting of the Project conflicts with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER; and
- whether the Project was sited to avoid or reduce conflicts with existing recreational uses where feasible, considering specific design elements incorporated within the Project.

Finally, the analysis of the appeal issues considers the Department's conclusions regarding whether stakeholder proposals to reduce conflict with existing recreational uses, as provided during listening sessions, are feasible, with particular focus on the feasibility of providing pedestrian levee-top access – and therefore bank fishing access – on the Lookout Slough Project site.

**i. Whether there have been changes since Certification C20215 to avoid or reduce conflicts with existing recreational uses**

In its appeal letter, LIA states that, although the Department's new studies show recreational use is far higher than originally estimated when the Department "self-determined recreational use as 'insignificant,'" the Department has made no changes to the Lookout Slough Project to reduce impacts to recreational use (LIA Appeal Letter\_1-2022, p. 1). LIA states that "the only relevant change" proposed by the Department in its Revised Certification is the closure of new setback levees to all public access" and that "Nothing has truly changed" (LIA Appeal Letter\_1-2022, p. 1). Furthermore, in its February 28, 2022 Letter, LIA states that "No feature of the project has been altered to retain this ten percent of the current Liberty Island Road bank fishing area" (LIA's February 28, 2022 Letter, p. 2). Certification C202110 states that "The Project has not changed in design, nor has any element of the Project changed or been updated such that reconsideration of Certification under any Delta Plan policy or portion of a policy is necessary other than the two remanded to DWR for reconsideration" (Certification C202110 Attachment 1, p. 1).

To address the Council's findings on remand, the Department must demonstrate that the Covered Action as proposed has been sited to reduce or avoid conflicts with existing uses *where feasible*. Consequently, we consider the Department's analysis of the feasibility of siting the project to avoid or reduce conflicts with existing uses for the Covered Action in Section F(1)(c)(vii) of this Determination.

LIA has not demonstrated that there is a lack of substantial evidence in the Record to support the Department's certification that the Lookout Slough Project is

sited to avoid or reduce conflicts with existing recreational uses and we therefore *deny* the appeal as to this issue.

**ii. Whether evidence cited by LIA meets the substantial evidence standard of review**

In its Appeal Letter, in response to questions posed by the Council in the Notice of Public Hearing for this matter, and in its supplemental Letter submitted March 31, 2022, LIA points to evidence in the Record to contest the Department's conclusion that the Lookout Slough Project incorporates feasible design measures to reduce conflict with existing recreational uses, and therefore is consistent with DP P2. These include:

- LIA references to evidence in the Record that documents a meeting between the Department and CDFW, in which CDFW stated, "the currently planned small turnout won't handle the traffic that comes out there" and "the boat launch also won't cut it" (LIA Appeal Letter\_1-2022, p. 4; Certification C202110 Attachment 3A, p. 5). LIA states, "DWR's record provides ample evidence that CDFW and Solano County's staff with outdoor recreation experience recommended that DWR provide adequate public parking and other features of contemporary boat ramps" (LIA's March 31, 2022 Letter, p. 2; Certification C202110 Attachment 3A, p. 5, p. 15).
- LIA states that the Department proposes the closure of new setback levees to all public access and that this is "the complete opposite" of the claim made by the Department in the July 2021 Council hearings (LIA Appeal Letter\_1-2022, p. 1).
- LIA states, "DWR implies that CDFW is against recreational use along the levees because of conflicts with [giant garter snake] GGS habitat, and will not change the ITP [Incidental Take Permit]. Conversations with CDFW staff have indicated the more nuanced reality, which is that CDFW must issue an amended ITP for GGS if the Project is meant to allow public access along the levees" (LIA Appeal Letter\_1-2022, p. 7). LIA also states, "the record shows that recreation and GGS habitat do not need to be mutually exclusive" (LIA Appeal Letter\_1-2022, p. 5).
- LIA states that aspects of the proposal to open Project levees to trails may be infeasible due to restrictions to protected GGS, but also points to evidence in the Record in which a representative of CDFW "suggests access along levees closer to Shag Slough on the project's west side would be more acceptable to



DFW than further west along Cache and Haas Sloughs” (LIA’s February 28, 2022 Letter, p. 2; Certification C202110 Attachment 2A, p. 5).

- LIA states that the Department “has had many years to work out recreational access issues, and could have easily incorporated increased public access ideas like those proposed by CDFW and LIA if they were serious about avoiding or mitigating recreational impacts” (LIA Appeal Letter\_1-2022, p. 5).
- LIA states that the Department “has maintained a consistent message of disinterest in mitigating or avoiding recreation impacts,” pointing to a statement by the Department’s Deputy Director Kristopher Tjernell that, “We don’t expect the project footprint to change at all during this [remand] process” that was made “well before” the new recreation studies began (LIA Appeal Letter\_1-2022, p. 5).
- LIA states that this “lack of interest at the leadership level makes it clear that the issue of recreational impacts and conforming with the Delta Plan are not taken seriously by the agency” (LIA Appeal Letter\_1-2022, p. 5).
- LIA states that the sketch of potential parking in the Record “is labeled as ‘preliminary,’ ‘draft,’ and ‘for discussion only,’ raising questions about whether it can be relied upon at all in assessing the adequacy of DWR’s proposal” (LIA’s March 31, 2022 Letter, p. 2).

Under the substantial evidence standard of review, the Council’s task is to determine whether there is a lack of substantial evidence in the Record to support the Department’s certification of consistency with the Delta Plan, in light of appeals. Under the substantial evidence of this standard of review, the Council does not weigh conflicting evidence in the Record. As such, the presence of evidence in the record that LIA may use to support a conclusion other than that reached by the Department is not in itself grounds to remand a matter to the agency. (See *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 881-882 [“All conflicts in the evidence and any reasonable doubts must be resolved in favor of the agency’s findings and decision.”], internal quotations omitted.) In its Certification of Consistency and response to Council staff questions the Department cites to evidence in the record regarding the above statements. This includes substantial evidence relevant to parking (Certification C202110 Attachment 4, p. 5, Figure 3 p. 11 Figure 4 p. 12; Wood-Rogers 2021 (2021 02 18\_WR\_Alt1.pdf, 2021 02 18\_WR\_Alt 2.pdf), boat ramp features (Certification C202110 Attachment 4, pp. 4-5; Department’s March 9, 2022 Letter, pp. 8-9; Department of Boating and

Waterways 1991; Wood-Rogers 2021 (2021 12\_04\_WR\_Boat Ramp Ehx.pdf); ESA 2021), and public levee access (Certification C202110 Attachment 3, p. 10, Attachment 4, pp. 5-6; Department's March 9, 2022 Letter, p. 7). In its appeal, LIA highlights evidence in the Record that arguably supports a conclusion that differs from the Department's conclusion that the Project is consistent with DP P2. But the evidence that the Department cites shows that its Certification of Consistency is supported by sufficient relevant information such that "a fair argument can be made to support" the Department's conclusion. (*Center for Biological Diversity v. County of San Bernardino, supra*, 147 Cal.App.4<sup>th</sup> at p. 881, internal quotation omitted.) It does not matter whether "other conclusions might also be reached." (*Ibid.*, internal quotations omitted.) We therefore *deny* appeals related to conflicting evidence cited by LIA under the substantial evidence standard of review.

**iii. Whether there are existing boat and bank fishing, waterfowl hunting, and wildlife viewing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER**

The Council remanded the matter to the Department for reconsideration of whether boat and bank fishing, waterfowl hunting, and wildlife viewing recreational uses of Liberty Island Road, the Shag Slough Bridge, and Liberty Island Ecological Reserve (LIER) constitute existing uses.

In its appeal, LIA states that LIER and Shag Slough are important public outdoor recreation areas for boat and shore fishing, waterfowl hunting, and wildlife viewing (LIA Appeal Letter\_1-2022, p. 2).

In Certification C202110, the Department concludes that Liberty Island Road, Shag Slough, and the LIER constitute existing recreational uses: "Upon consideration of the full record, DWR confirms that Liberty Island Road, Shag Slough Bridge, and the LIER constitute existing recreational uses and that the Project would conflict with these existing recreational uses by vacating a portion of Liberty Island Road and removing pedestrian access to the LIER" (Certification C202110 Attachment 1, p. 9, Attachment 2, p. 39). Therefore, the Department and LIA concur that there are existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER.

**iv. Whether the siting of the Project would create new conflicts with existing recreational uses**

In its appeal letter, LIA states that “forcing previously dispersed parking and recreation into a very concentrated area will not ‘avoid or reduce conflicts with existing uses’ as DP P2 requires, but instead create new conflicts” (LIA Appeal Letter\_1-2022, p. 4). LIA states that parking along the paved east-west segment of Liberty Island Road will create new conflict with landowners on the north side of the road (LIA Appeal Letter\_1-2022, p. 4).<sup>6</sup> Similarly, in its response to Council questions included in the Notice of Public Hearing for this matter, LIA alleges that the Lookout Slough Project will create additional conflict with adjoining uses, referring to conflicts with farmers using Liberty Island Road to move cattle and the reclamation district seeking access to operate pumps and maintain its levees (LIA’s February 28, 2022 Letter, p. 4). LIA cites to evidence in the Record documenting that Solano County representatives raised questions about whether parking will generate conflict between recreational users and farmers and reclamation district officials (LIA’s February 28, 2022 Letter, p. 4; Certification C202110 Attachment 3A, pp. 14-15).

DP P2 requires, in relevant part, that a covered action be sited to avoid or reduce conflict with existing uses where feasible. As noted above, in its appeal, LIA asserts that parking will generate conflict between recreational users and farmers and reclamation district officials (LIA’s February 28, 2022 Letter, p. 4; Certification C202110 Attachment 3A, pp. 14-15). However, LIA does not provide substantiation of these potential conflicts or cite to substantial evidence in the record that such conflicts would occur as a result of the Lookout Slough Project. *LIA has not demonstrated that there is a lack of substantial evidence in the Record to support the Department’s certification that, by providing parking in a concentrated area the Covered Action is sited to avoid or reduce conflicts with existing uses on neighboring properties.*

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<sup>6</sup> Here we considered specific assertions raised in LIA’s appeal as relate to existing recreational uses and parking. Please see the following sections for discussion of potential conflicts with other recreational uses, including levee access and bank fishing (Section F.1.c.v).

**v. Whether the siting of the Project conflicts with existing boat and bank fishing, waterfowl hunting, and wildlife viewing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER**

The Council remanded the matter to the Department for consideration of whether the Covered Action would conflict with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER.

In its appeal, LIA states that the Lookout Slough Project conflicts with existing local land use (LIA Appeal Letter\_1-2022, p. 1). LIA states that the Lookout Slough Project will “eliminate the public’s rightful access to all land-based recreation at LIER and practically all of Shag Slough” (LIA Appeal Letter\_1-22, p. 1) and “will increase conflicts with recreation, in violation of DP P2, rather than ‘avoid or reduce’ them” (LIA Appeal Letter\_1-2022, p. 3).

The Department also states that the Lookout Slough Project conflicts with existing recreational land uses: “Upon consideration of the full record, DWR confirms that Liberty Island Road, Shag Slough Bridge, and the LIER constitute existing recreational uses and that the Project would conflict with these existing recreational uses by vacating a portion of Liberty Island Road and removing pedestrian access to the LIER” (Certification C202110 Attachment 1, p. 9). Therefore, the Department and LIA concur that the Project would conflict with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER.

**vi. Whether the Project was sited to avoid or reduce conflicts with existing boat and bank fishing, waterfowl hunting, and wildlife viewing recreational uses where feasible**

The Council remanded the matter to the Department to consider whether the Project was sited, where feasible, to avoid or reduce conflicts with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER. LIA claims that the Department has made no effort to avoid or reduce conflicts with existing recreational uses of Shag Slough and neighboring public lands at LIER, which LIA claims is required by DP P2 (LIA Appeal-A2 C202110 Form, p. 3).

The Department states that it is not feasible to avoid conflicts with existing recreational uses along Shag Slough and LIER altogether due to landscape requirements for habitat and flood benefits (Certification C202110 Attachment 1, p. 11 and Attachment 3, pp. 5-6). LIA does not directly contest the Department’s

statement that avoiding conflicts with existing recreational uses altogether is not feasible.

In the Revised Certification, the Department states that the Lookout Slough Project is consistent with DP P2 because, while siting the Project at a different location in order to completely avoid recreation conflicts was not feasible, the Department included several elements to reduce conflicts with existing recreational uses (Certification C202110 Attachment 1, pp. 11-12). These elements, described in the Public Access Summary (Certification C202110 Attachment 4, pp. 3-7), include:

- (1) a boat ramp providing public access to the northernmost tidal channel and the Shag Slough;
- (2) improvements to the segment of Liberty Island Road located at the northern boundary of the Project site and two new paved vehicle turnaround areas on the northwest and northeast corners of the Project site;
- (3) pedestrian access to bank fishing on the remaining segment of the Shag Slough Levee;
- (4) improved habitat for wildlife and fish populations that increase the recreational value for hunting, fishing, and wildlife viewing; and
- (5) wayfinding signage to convey essential information about new recreation opportunities created by the Project

The Department states that these elements will “minimize conflicts with existing recreational uses by creating new recreational facilities and opportunities, altering existing public uses such as shoreline fishing, and maintaining access to the LIER by boat” (Certification C202110 Attachment 4, p. 3). The Department also states that routine maintenance activities will maintain a clean and safe site accessible to the public for recreation (Certification C202110 Attachment 4, p. 8).

In order for the Council to affirm its appeal, LIA must demonstrate that the Department’s certification that the Lookout Slough Project is consistent with DP P2 is not supported by substantial evidence in the record. (See Appeals Procedures, § 14; Water Code, § 85225.25.)

**vii. Whether there is a lack of substantial evidence in the record to support the Certification that navigable tidal channels and the new boat ramp would reduce conflict with existing recreational uses**

In Certification C20215, the Department described the creation of new navigable waterways on the Lookout Slough Project site and the installation of a boat ramp for agency use (Draft EIR, Certification Record LOS.4.00001, p. III-41). In our Determination for appeals of Certification C20215, we concluded that “Although the Department states at the May hearing that the Covered Action would allow for public access to the project Site and LIER by way of the newly created boat ramps and the segment of Liberty Island Road north of the northernmost levee breach ... the Department fails to cite to specific evidence in the record substantiating these claims.” (July 2021 Determination, pp. 108-109.)

In the Public Access Summary included in the Record for Revised Certification C202110, the Department states that the Project will create over 20 miles of new navigable public tidal channels accessible to watercraft users (Certification C202110 Attachment 4, p. 3). Evidence in the record substantiates the creation of new waterways on the Project site, “accessible by boats, kayaks, and paddleboards” (Final EIR, Certification Record LOS.3.00001, p. 3-24). The Department also states in its Public Access Summary that a new boat ramp will be constructed in the northeastern portion of the Project site on the north side of the northern-most breach of the Shag Slough Levee to improve public access for watercraft recreation (Certification C202110 Attachment 4, p. 4). In its response to questions posed by the Council in the February 17, 2022 Notice of Public Hearing for this matter, the Department states that the ramp will be constructed in accordance with the California Department of Boating and Waterways guidelines (Department’s March 9, 2022 Letter, p. 9; Department of Boating and Waterways 1991).<sup>7</sup>

The Department states that the boat ramp will accommodate hand launching of watercraft to provide public access to the northernmost tidal channel and Shag Slough from the Shag Slough Levee, along with providing the Department, CDFW, and public safety agencies a new location for motorized boat access to patrol

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<sup>7</sup> The Department of Boating and Waterways (1991) document has been admitted under Section 10 of the Council’s Appeals Procedures (see Exhibit A). In its March 31, 2022 letter LIA also cites to this document and notes that it submitted this to the Department during the 10-day posting period for the draft certification.

waterways (Certification C202110 Attachment 4, p. 1). The Department states “A locked gate will be installed at the interface of the turnaround and the roadway leading to the boat ramp to prevent unauthorized vehicles from the entry. The public will be able to walk around the gate to the boat ramp to hand launch their watercraft. For safety reasons, vehicular access past the gate onto the levee will not be allowed.” (Certification C202110 Attachment 4, pp. 4-5). The Department states that these design elements will provide access to water-based recreation on the Project site and at LIER (Certification C202110 Attachment 4, p. 4), thus reducing the conflict caused by removing access to Shag Slough Levee and LIER (Certification C202110 Attachment 3, p. 6).

In its appeal letter LIA states that the boat ramp and new waterways for boating are “irrelevant and grossly insufficient as a means of mitigating recreation impacts” (LIA Appeal Letter\_1-2022, p. 4). LIA states that, based on recreational use data collected by the Department since the previous appeal, more than 95% of current users will not benefit from the proposed boat ramp (LIA Appeal Letter\_1-2022, p. 4). In its written response to questions posed by the Council in the Notice of Public Hearing for this matter, LIA cites to data collected by the Department and included in the Record claiming that “over 90 percent of visits are by people without watercraft” (Certification C202110 Attachment 2, pp. 26-27) and stating, “Without bank fishing access and other trails, the site’s new channels will provide no benefits to these visitors, many of whom fish for food for their families.” (LIA’s February 28, 2022 Letter, p. 2)

In addition, LIA states that the ramp does not meet current public access standards for paddle craft launch ramps, pointing to examples of facilities in the Bay Area and guidelines from the Division of Boating and Waterways that suggest providing launch docks, ample parking, and accessible design (LIA Appeal Letter\_1-2022, p. 4). LIA elaborates on these standards in its written response to questions posed by the Council in the Notice of Public Hearing for this matter, stating that, with the exception of standards related to the Americans with Disabilities Act, “which are widely accepted matter of fact,” the reports in which the standards are contained were before the Department when it submitted the Revised Certification for the Lookout Slough Project (LIA’s February 28, 2022 Letter, p. 3). LIA also states that representatives of Solano County, CDFW, and LIA pointed out the importance of providing one or more features recommended or required by these standards in the listening sessions conducted with the Department, citing to evidence in the Record (LIA’s February 28, 2022 Letter, p. 3; C202110 Attachment 3A, p. 5, pp. 14-15 and p. 20).



LIA states, “Allowing the public to use DWR’s agency boat ramp is not adequate mitigation for its project’s damage to recreation because it lacks adequate parking and support features and universal access for the disabled” (LIA’s February 28, 2022 Letter, p. 4). In its March 31, 2022 Letter, LIA states “adequately avoiding or reducing the project’s conflicts with recreation is feasible with modest upgrades to the boat launch” (LIA’s March 31 2022 Letter, p. 1). LIA states, “DWR’s assertion that the proposed boat ramp’s location within a flood plain makes the addition of a boarding float...infeasible is not supported by any information in the record,” noting that a boarding float “is among the requirements for small craft boat launching facilities in the Division of Boating and Waterways handbook” (LIA’s March 31, 2022 Letter, p. 1). LIA states, “No evidence submitted by DWR demonstrates that water velocities during occasional floods at the site would make installation or maintenance of a boarding float infeasible” referring to evidence in the Record that, according to LIA, shows “wintertime channel velocities at the ramp are well within recommended safety standards for a person wading in the water, let alone [sic] for an engineered float or pier” (LIA’s March 31, 2022 Letter p. 1; ESA Technical Memorandum 2021). LIA states, “DWR, with its significant engineering resources, is not incapable of designing and building a boarding float safely at the project site” (LIA’s March 31, 2022 Letter, pp. 1-2). LIA also refers to “common sense” in stating that all marinas in the Delta are located in floodplains, and “all successfully accommodate flood flows” (LIA’s March 31, 2022 Letter, p. 2). LIA goes on to state that the Division of Boating and Waterways’ handbook for small craft boat launching has guidance for parking and universal design for small craft launch facilities, including sufficient parking to meet expected demand, provision of parking spaces — not just land that may accommodate parking within 600 feet of the head of the ramp — and designated parking for the disabled (LIA’s March 31, 2022 Letter, p. 2; Department of Boating and Waterways 1991).

Where conflicts cannot be avoided altogether, DP P2 requires that a covered action be sited to reduce conflict with existing land uses when feasible. DP P2 does not specify that to adequately reduce a conflict, the siting of the covered action must maintain all existing qualities of a use, nor does it specify an extent to which conflict must be reduced. LIA’s statements imply that the newly created tidal channels and boat ramp would not provide the same qualities of recreational use that currently exist and would not reduce conflict with existing recreational uses to the extent that they desire. While the Council is sympathetic to LIA’s concerns, these concerns are not in themselves a basis to uphold LIA’s appeal of the Lookout Slough Project on grounds of inconsistency with DP P2. There is evidence in the Record substantiating that the Project will create navigable waterways and a new

boat ramp allowing for public water-based recreational access to the Project site, Shag Slough, and LIER (Certification C202110 Attachment 4, pp. 3-4). In its certification, the Department cites to evidence in the record including a recreation survey, guidance from DBW on boat ramp design, and project design materials that demonstrate creation of navigable waterways and creation of a boat ramp. *LIA has not demonstrated that there is a lack of substantial evidence in the Record to support the Department's certification that, by incorporating navigable water channels and a new boat ramp into the Project, the Covered Action is sited to avoid or reduce conflicts with existing recreational uses along Shag Slough and at LIER.*

**viii. Whether there is a lack of substantial evidence that improvements to Liberty Island Road would reduce conflicts with existing boat and bank fishing, waterfowl hunting, and wildlife viewing recreational uses of Liberty Island Road for parking to access the Shag Slough Levee, Shag Slough, and LIER**

At the July 2021 Hearing on Certification C20215, the Department described the planned availability of parking at the northeast corner of the Project site (May 2021, Hearing Transcript p. 267, ll. 10-18). In our Determination for C20215, we concluded that there was not substantial evidence in the Record to support this claim (July 2021 Determination, p. 107). In the Public Access Summary included in the Record for Certification C202110, the Department states and depicts that the Project will repave the section of Liberty Island Road at the northern boundary of the Project site and create two new paved turnaround areas to accommodate a safe turning radius for large trucks and vehicles towing trailers (Certification C202110 Attachment 4, p. 9). The Department states that, once the Project is implemented, parking will be available along the east-west segment of Liberty Island Road at the northern edge of the Project site and within the newly created turnarounds (Certification C202110 Attachment 4, p. 5; Attachment 3A, p. 13).

The Department states that, because of the remote nature of the Lookout Slough Project site, existing recreational uses require users to access Shag Slough and LIER by parking on Liberty Island Road (Certification C202110 Attachment 3, p. 3). The Department states that visitors who recreate on Shag Slough Levee, Shag Slough Bridge, and at LIER currently park on the shoulder of Liberty Island Road, which has “no designated parking areas” (Certification C202110 Attachment 4, p. 5). The Department states that existing parking along segments of the eastern side of Liberty Island Road is permissible, although the Department also states that parking is not permissible where prohibited by posted signage along Liberty Island

Road by the Shag Slough Bridge and on the Bridge (Certification C202110 Attachment 4, p. 9). The Department cites Solano County Ordinance No. 521, which prohibits parking “on the west side of Liberty Island Road from the Liberty Island Bridge to a point 1.5 miles north thereof” (Certification C202110 Attachment 4, p. 5; Attachment 4A, p. 2).

Nonetheless, the Department acknowledges “a mix of authorized and unauthorized uses on the site and within its vicinity,” and recognizes that the Project would conflict with these existing uses by vacating a portion of Liberty Island Road (Certification C202110 Attachment 1, p. 8). The Department states that formal parking was not incorporated into the Project design as there are not currently designated parking areas on the existing Project site (Certification C202110 Attachment 1, p. 11). However, at the March 24, 2022 Hearing, the Department stated that the turnarounds would accommodate parking for 35 vehicles and that overflow parking would be available along the newly paved east-west section of Liberty Island Road once the Project is implemented (March 24, 2022 Hearing Draft Transcript, p. 65). These statements indicating that the Project will provide for parking for public recreation access are supported by evidence in the Public Access Summary, included as part of the Record, in which the Department states that existing informal uses within the road right-of-way will continue on the portion of Liberty Island Road that remains intact when the Project is implemented, and that parking on Liberty Island Road or the new turnarounds will be required to comply with County rules similar to existing uses (Certification C202110 Attachment 4, p. 9).

In its appeal letter LIA states that approximately 7,900 linear feet of legal parking spots along the eastern side of Liberty Island Road will be “completely removed” (LIA Appeal Letter\_1-2022, p. 3). LIA goes on to state that the Department proposes no replacement parking to mitigate the loss of current parking and takes no responsibility to ensure replacement of removed parking (LIA Appeal Letter\_1-2022, p. 3).

In its written response to questions posed by the Council in the Notice of Public hearing for this matter, LIA states that “sufficient long-term parking is essential because most boaters must bring their equipment to the launch site” (LIA’s February 28, 2022 Letter, p. 3). LIA also points to evidence in the Record documenting that representatives of CDFW, Solano County, and LIA pointed out the need for “sufficient dedicated parking” (LIA’s February 28, 2022 Letter, p. 3). LIA states that the agency boat ramp “provides no parking for the public who will be expected to park on the remainder of Liberty Island Road along the project’s

northern boundary” (LIA’s February 28, 2022 Letter, p. 3). In its appeal letter LIA states that this is inadequate for expected use as “there will likely be increased demand for both recreation and parking from those drawn to the project’s tidal channels and marsh and its new boat ramp” and that the new tidal channels and boat ramp will especially attract users with trailers for transporting watercraft, which require more space (LIA Appeal Letter\_1-2022, pp. 3-4).

Where conflicts cannot be avoided altogether, DP P2 requires that a covered action be sited to reduce conflict with existing land uses when feasible. DP P2 does not specify that to adequately reduce a conflict, the siting of the covered action must maintain all existing qualities of a use, nor does it specify an extent to which conflict must be reduced. LIA’s statements imply that the design elements incorporated by the Department to accommodate parking for public recreational access would not support the same quality of recreational use that currently exists and would not reduce conflict with existing recreational uses to the extent which they desire. Nonetheless, there is evidence in the Record that the Project incorporates design elements that will provide some parking for public access to recreational uses on the Project site, the northernmost segment of Shag Slough Levee, Shag Slough, and LIER (Certification C202110 Attachment 3, p. 5). *LIA has not demonstrated that there is a lack of substantial evidence in the Record to support the Department’s certification that, by paving the northern east-west segment of Liberty Island Road and creating paved turnarounds with capacity to accommodate parking, the Covered Action is sited to avoid or reduce conflicts with existing boat and bank fishing, waterfowl hunting, and wildlife viewing recreational uses of Liberty Island Road for parking to access the Shag Slough Levee, Shag Slough, and LIER.*

**ix. Whether there is a lack of substantial evidence that access to bank fishing north of the northernmost breach of Shag Slough Levee would reduce conflict with existing recreational uses of Shag Slough Levee for bank fishing**

At the July 2021 Hearing on Certification C20215, the Department described the planned availability of bank fishing on the segment of Liberty Island Road to remain intact north of the northernmost levee breach (May 20, 2021 Hearing Transcript p. 149, ll. 19-24). In our Determination for appeals of Certification C20215, we concluded that there was not substantial evidence in the Record to support this claim (July 2021 Determination, p. 107). In its Revised Certification C202110, the Department states that the Lookout Slough Project will eliminate

pedestrian access to portions of the Shag Slough Levee and the Shag Slough Bridge and, therefore, will eliminate pedestrians' abilities to fish on the banks of Shag Slough within LIER (Certification C202110 Attachment 4, p. 6). However, in the Public Access Summary included in the Record for Revised Certification C202110, the Department also states that bank fishing will still be accessible on the remaining Shag Slough Levee segment spanning approximately 0.16 miles between the Project's northern boundary and the northernmost levee breach, "in areas considered to be of the highest fishing use (west bank of Shag Slough) to the extent feasible within the confines of the Project" (Certification C202110 Attachment 4, p. 6).

LIA states that shoreline access for bank fishing would be "decimated" and the quality of remaining bank fishing "greatly diminished" by the Project (LIA Appeal Letter\_1-2022, p. 4). LIA states that the Project will remove all pedestrian access to LIER and "all but 0.16 miles of bank fishing access to Shag Slough" by breaching the levee underlying Liberty Island Road (LIA Appeal Letter\_1-2022, p. 3). LIA states that more than 90% of the 7,900 linear feet of Shag Slough currently accessed from Liberty Island Road and approximately 10,000 linear feet of Shag Slough currently accessed from LIER on the eastern side will be permanently lost as a result of the Project (LIA Appeal Letter\_1-2022, p. 3). In its response to questions posed by the Council in the Notice of Public Hearing for this matter, LIA states this "is the skimpy remainder of the ninety percent of this Liberty Island Road bank fishing area that the project will eliminate" (LIA's February 28, 2022 Letter, p. 2).

LIA goes on to state that currently users with limited mobility can park along the levee near their intended fishing spot, whereas the Project would require them to walk a minimum of 528 feet (LIA Appeal Letter\_1-2022, p. 4). LIA further contends that the limited bank access under the Project design will cause crowding issues that deteriorate the quality of fishing experience (LIA Appeal Letter\_1-2022, p. 4). LIA states that the Department's proposal to provide "massively reduced" bank fishing access "cannot be considered mitigation in any form" (LIA Appeal Letter\_1-2022, p. 4).

LIA's statements imply that the Project design elements incorporated by the Department to allow for continued use of the northernmost section of the Shag Slough Levee for bank fishing would not provide the same qualities of recreational use that currently exist and would not reduce conflict with existing recreational uses to the extent which they desire. However, as explained above, DP P2 does not specify that to adequately reduce a conflict, the siting of the covered action must maintain all existing qualities of a use, nor does it specify an extent to which conflict

must be reduced. There is evidence in the Record that the Project will allow the public access to bank fishing on the northernmost segment of Shag Slough Levee remaining intact following construction (Certification C202110 Attachment 4, pp. 5-6). *LIA has not demonstrated that there is a lack of substantial evidence in the Record to support the Department's certification that, by allowing for bank fishing along Liberty Island Road northern of the northernmost breach of Shag Slough levee, the Project is sited to avoid or reduce conflicts with existing uses for bank fishing.*

**x. Whether there is a lack of substantial evidence that improved habitat would reduce conflict with existing recreational uses along Shag Slough and at LIER**

In the Public Access Summary, included as Attachment 4 to the Certification of Consistency, the Department states that the recreational value of the Lookout Slough Project area for hunting, fishing, and wildlife viewing will be increased because the Project's goals are focused on increasing suitable habitat for native and rare wildlife species of the region (Certification C202110 Attachment 4, p. 6). The Department states that the Lookout Slough Project is designed to increase biological diversity by creating high-quality tidal and other habitat, which fish and wildlife in the region depend upon (Certification C202110 Attachment 4, p. 6). The Department goes on to state that "A key aspect of the Project is maximizing primary productivity that will extend beyond the boundaries of the Project site. The increase in primary productivity will provide food web support throughout the Cache Slough Complex leading to benefits for both fish and wildlife, both on and off the Project site" (Certification C202110 Attachment 4, p. 6). Further, the Department states that the Project will benefit migratory bird species, marsh birds, and diving ducks, as well as promote the growth of invertebrates and thereby provide medium to high quality forage for waterfowl, shorebirds, and other migratory birds (Certification C202110 Attachment 4, p. 6). In summary, the Department states that "As a result of the increase in wildlife habitat associated with the Project, the densities of and variability in wildlife will be improved as compared to existing conditions, benefiting recreational users" (Certification C202110 Attachment 4, p. 6).

In its response to questions posed by the Council in the Notice of Public Hearing for this matter, LIA states that the Department's recreation surveys show that over 90 percent of visits to the site are made by people without watercraft (Certification C202110 Attachment 2 pp. 26-27 and p. 30; LIA's February 28, 2022 Letter, p. 2; Certification C202110 Attachment 2 pp. 26-27 and p. 30). LIA goes on to

state that, “Without bank fishing access and other trails, the site’s new channels will provide no benefit to these visitors” (LIA’s February 28, 2022 Letter, p. 2). Further, LIA states that the fish whose habitat the Project creates (Delta smelt and juvenile salmon) are not legal gamefish, and that most anglers fish for pan fish, largemouth bass, or striped bass, which the Project is designed to discourage (LIA’s February 28, 2022 Letter, p. 2).

LIA’s statements imply that these Project design elements described by the Department would primarily benefit recreational watercraft users, and that they would not provide the same qualities of recreational use that currently exist and would not reduce conflict with existing recreational uses to the extent which they desire. However, as explained above, DP P2 does not specify that to adequately reduce a conflict, the siting of the covered action must maintain all existing qualities of use; nor does it specify an extent to which conflict must be reduced. The Department and LIA concur that recreational boating is an existing use of the area (LIA Appeal Letter\_1-2022, p. 2; Certification C202110, p. 3). Furthermore, as documented in the Record, two of the Project’s goals entail improvements in wildlife habitat and food web productivity (Draft EIR, Certification Record LOS.4.00001 pp. III-21-III-22). LIA does not demonstrate a lack of substantial evidence in the Record to support the Department’s certification that, by improving wildlife habitat, the Lookout Slough Project has been sited to reduce conflict with existing recreational boating uses. Furthermore, LIA does not address the Department’s statements that habitat improvements created by the Project will benefit fish and wildlife, and therefore benefit recreational users, both on and off the Project site. *As such, LIA does not demonstrate that there is a lack of substantial evidence in the Record to support the Department’s certification that improved habitat created by the Project would generally benefit recreational users and therefore reduce conflict with existing boat and bank fishing, waterfowl hunting, and wildlife viewing recreational uses along Shag Slough and at LIER.*

**xi. Whether there is a lack of substantial evidence that signage would reduce conflict with existing boat and bank fishing, waterfowl hunting, and wildlife viewing recreational uses along Shag Slough and at LIER**

The Department states that signage was incorporated into the Lookout Slough Project design based on feedback obtained in listening sessions with CDFW and Solano County Parks (Certification C202110 Attachment 4, p. 7). The Department states that the Lookout Slough Project would incorporate “extensive



wayfinding signage” conveying essential information about the new recreation opportunities created by the Project and posted at both Liberty Island Road turnarounds (Certification C202110 Attachment 4, p. 7). The Department also states that signage will guide boaters in navigating the tidal channel network in the interior of the Project site (Certification C202110 Attachment 4, p. 7). The Department states that signage was incorporated into the Project design based on feedback in listening sessions with CDFW and Solano County Parks (Certification C202110 Attachment 4, p. 7).

LIA’s appeal of the Lookout Slough Project on grounds of inconsistency with DP P2 does not specifically contest whether this design element as described in the Record would reduce or avoid conflicts with existing recreational use. Therefore, we do not reach a conclusion regarding whether there is a lack of substantial evidence in the Record to support the Department’s certification that the incorporation of wayfinding signage into the Project reduces conflict with existing recreational uses along Shag Slough and at LIER.

**xii. Whether there is a lack of substantial evidence to support the Department’s certification that additional proposals for public recreational access for boat and bank fishing, waterfowl hunting, and wildlife viewing are not feasible**

In the Record, the Department provides detailed analyses of the feasibility of several additional Project design elements that would accommodate public access, as proposed by LIA and the Commission, to reduce conflict with existing recreational uses (Certification C202110 Attachment 3, pp. 9-28). According to the Department, these elements were brought forth during the recreational stakeholder outreach conducted by the Department after the July 2021 Determination on C20215 (Certification C202110 Attachment 3, p. 9; Attachment 3A), and also included one proposal previously provided by LIA (Certification C202110 Attachment 3, p. 10).

Based on these additional proposed design features, the Department analyzes four options for on-site public access within the Lookout Slough Project:

- a. opening the Duck Slough Setback Levee to pedestrian access (Certification C202110 Attachment 3, p. 10);
- b. maintaining existing Liberty Island Road on Shag Slough Levee to the LIER (Certification C202110 Attachment 3, p. 14);

- c. providing vehicular access to the LIER via construction of an east-west seasonal access road, and scattered parking lots at the Project site (Certification C202110 Attachment 3, p. 23); and
- d. installing box culverts and bridges across the Shag Slough Levee breach sites (Certification C202110 Attachment 3, p. 24).

The Department further defines option b) to include two scenarios in which:

- (1) the northern 1,500 foot degrade and four levee breaches north of Shag Slough Bridge are eliminated from the Project, and
- (2) the four levee breaches north of Shag Slough Bridge would be eliminated from the Project, but the 1,500-foot degrade would remain (Certification C202110 Attachment 3, p. 14).

In addition, the Department states that CDFW and Solano County provided input “related to the potential addition of parking areas, maintaining Liberty Island Road or modifying the Shag Slough Levee design to retain access to the LIER, and the addition of wayfinding signage” (Certification C202110 Attachment 3, p. 10). The Department states that “Each of these items is discussed either as a facet of the various stakeholder proposals...or were [sic] incorporated into the Project as discussed in Attachment 4 [Public Access Summary]” (Certification C202110 Attachment 4, p. 10) to reduce conflicts with existing recreational use.

The Department’s feasibility analyses are summarized below. In addition, sections of LIA’s Appeal Letter and its letters dated February 28, 2022 and March 31, 2022 refuting the Department’s conclusions from its feasibility analyses are summarized below. For the Council to uphold its appeal, LIA must demonstrate that there is a lack of substantial evidence in the Record to support the Department’s conclusions that it is not feasible to incorporate the alternative design features the Department considered into the Project to reduce conflict with existing recreational uses of Liberty Island Road, the Shag Slough Levee, and LIER.

**(a) Opening the Duck Slough Setback Levee to pedestrian access**

In the Record, the Department evaluates the feasibility of “opening the Duck Slough Setback Levee and all Project levees to formal pedestrian access and trails” (Certification C202110 Attachment 3, p. 10). Based on its analyses, the Department concludes that opening the Duck Slough Setback Levee and all Project levees to formal pedestrian access and trails is not feasible “as the Project could not be accomplished in a successful manner within a reasonable period of time, taking

into account economic, environmental, legal, and social factors” (Certification C202110 Attachment 3, p. 10). More specifically, the Department states that providing pedestrian access to Project levees is not feasible due to: economic, environmental, and legal factors related to the Project’s habitat goals (Certification C202110 Attachment 3, p. 11); legal and social factors related to the Project’s flood storage and conveyance goals (Certification C202110 Attachment 3, pp. 12-13); and economic, environmental, and social factors related to operations and maintenance (Certification C202110 Attachment 3, p. 13).

The Department states that design changes to allow pedestrian access would have the potential to impact giant garter snake (GGS), a federal and State-listed threatened species, through direct mortality, bicyclists running over snakes, or harassment by pets. The Department cites input from CDFW as evidence in the Record (Certification C202110 Attachment 3, p. 11 Attachment 3A p. 6). The Department also states that indirect impacts include transmission of novel pathogens, particularly Snake Fungal Disease (SFD), referencing scientific literature included in the Record in stating, “Transmission of SFD is not well known at this time, but evidence has shown that the causative agent of SFD can live in some soils (Certification C202110 Attachment 3, pp. 11-12; 2015 06 18\_Allender et al; 2016 06 08\_Lorch et al). The Department states, “CDFW has very real concerns that human transfer of the causative agent of SFD could occur if pedestrians are allowed on the Duck Slough Setback Levee” (Certification C202110 Attachment 3, pp. 11-12; Attachment 3A, p. 6). Furthermore, the Department states that public access may spread invasive exotic species that are incompatible with the habitat restoration goals and objectives of the Project (Certification C202110 Attachment 3, p. 12).

In addition, the Department states that CDFW raised concerns about increases in public trespassing to restored intertidal habitat if pedestrian access on Duck Slough Setback Levee is allowed (Certification C202110 Attachment 3, p. 11; Certification C202110 Attachment 3A, p. 4). According to the Department, CDFW stated that allowing pedestrian access to the Duck Slough Setback Levee and the western portion of the Project site would be incompatible with the habitat goals and objectives of the Project (Certification C202110 Attachment 3, p. 11; Certification C202110 Attachment 3A, p. 4). The Department states that CDFW has a key role in ensuring habitat restoration occurs according to the Fish Restoration Program Agreements and the Project’s Incidental Take Permit (ITP), included in the Record (2021 03 24\_CDFW\_2081-2020-031-03\_ITP) and is partially responsible (along with other members of FAST [Fish Agency Strategy Team], i.e., USFWS and NMFS) for the release of credits for the tidal habitat restoration required under the

ITP and the Biological Opinion (BiOps) (Certification C202110 Attachment 3, p. 11). The Department states that design changes affecting habitat quality and special-status species are not likely to be approved by these entities due to conflicts with the Project's habitat restoration goals, and that failure to fully meet these goals could disqualify or reduce the Project's main funding source (Certification C202110 Attachment 3, p. 11). The Department refers to CDFW's comments in listening sessions, which, according to the Department, "show CDFW strongly discouraged allowing public access on those levees...due to concerns about additional impacts to GGS" (Department's March 9, 2022 Letter, p. 14; Certification C202110 Attachment 3A, pp. 4, 6, 27). The Department states further that the conservation easement held by CDFW (2021 03 17\_WRA Inc), which prohibits trespassing in habitat restoration areas of the Project, is a requirement of the Project's ITP and a condition for crediting by FAST (Certification C202110 Attachment 3, p. 12).

Furthermore, the Department states that this design measure is not feasible "as the Project could not be accomplished in a successful manner *within a reasonable period of time*, taking into account economic, environmental, and social factors" (emphasis added; Certification C202110 Attachment 3, p. 10). The Department states that Project design changes to create additional public access beyond that proposed by the Department would require additional environmental review pursuant to CEQA and amendments to Project permits, resulting in delays of one to three years and increased costs not related to the Project's overall purpose and goals, thus necessitating locating and securing additional funding (Certification C202110 Attachment 1, p. 22).

In addition to its analyses in the Record assessing whether opening Project levees to public access is not feasible for reasons related to habitat goals, especially for GGS, the Department also provides analyses to assess whether this proposal is feasible in relation to flood storage and conveyance and operations and maintenance.

The Department states that there are public safety issues associated with using levee flood infrastructure for public recreational access (Certification C202110 Attachment 3, p. 13). The Department states that pedestrian or vehicular traffic on levees could create erosion that compromises the integrity of levees and that the presence of the public can inhibit patrolling and emergency response during a high-water event (Certification C202110 Attachment 3, p. 13; 2021 12 08\_D Pesavento). The Department states that public access can create impacts on and delays to maintenance activities required for flood control levees, including mowing, grazing, and erosion control (Certification C202110 Attachment 3, p. 13).

The Department also states that allowing public access to levees commonly leads to public vandalism, including constructing steps, fishing shacks, and platforms in the levee crown, building fire pits, and other unsanctioned ground disturbance (Certification C202110 Attachment 3, p. 12). The Department states that these types of activities are illegal under US Army Corps of Engineers regulation 33 Code of Federal Regulations Section 208.10 (Certification C202110 Attachment 3, pp. 12-13).

The Department states that erosion and public trespassing and vandalism could compromise levee integrity, increasing the need for and costs associated with patrolling and completing additional operations and maintenance activities (Certification C202110 Attachment 3, p. 13). The Department states that environmental impacts such as introduction of undesirable plants or wildlife onto the Project site would need to be managed per the Project's Long-Term Management Plan and Adaptive Management and Monitoring Plan, possibly affecting the environmental feasibility of the Project's operations and maintenance activities (Certification C202110 Attachment 3, p. 13).

In its appeal letter LIA states that it is feasible for the Department to provide levee-top pedestrian public access on the Project site (LIA Appeal Letter\_1-2022, p. 5). Additionally, LIA states, "From its inception, DWR has proposed no public use on the project site. They now claim that providing pedestrian access to the levee tops is infeasible because it may impact Giant Garter Snakes (GGS), thus violating their Incidental Take Permit (ITP)" (LIA Appeal Letter\_1-2022, pp. 4-5). LIA also states, "If DWR pursued an amendment to their ITP to include limited public access along levee areas, precedent shows that some level of recreational access is feasible" (LIA Appeal Letter\_1-2022, p. 5). LIA states that the Department did not consider ways to integrate recreational access with GGS habitat when applying for an ITP early in the Project design (LIA Appeal Letter\_1-2022, p. 5). LIA states that public use is being provided at many public habitat areas within GGS range, pointing to vehicular roadways and pedestrian trails on state and federally-managed wildlife areas that exist within the species' range (LIA Appeal Letter\_1-2022, p. 5). LIA states that the Department did not look to such examples to assess how loss of recreation at LIER and Shag Slough could be mitigated (LIA Appeal Letter\_1-2022, p. 5).

In the Record the Department provides analyses to support its conclusion that opening Project levee tops to pedestrian access is not feasible due to economic, environmental, and legal factors related to the Project's habitat goals; legal and social factors related to the Project's flood storage and conveyance goals; and economic, environmental, and social factors as related to operations and

maintenance (Certification C202110 Attachment 3, pp. 11-13). In its appeal LIA states that providing levee-top pedestrian access is feasible in relation to GGS and the Department's ITP, but LIA does not address the Department's analyses concluding that pedestrian levee-top access is infeasible on these other grounds. *Therefore, LIA has not demonstrated a lack of substantial evidence in the Record to support the Department's certification that allowing levee-top access to pedestrians is not feasible.*

**(b) Maintaining existing Liberty Island Road on Shag Slough Levee to the LIER**

In the Record, the Department analyzes the feasibility of "keeping the Shag Slough Levee and Liberty Island Road intact to the LIER by eliminating the northern 1,500-foot degrade and four levee breaches north of the Bridge" (Certification C202110, Attachment 3, p. 14). The Department also analyzes the feasibility of "a variation of this proposal, where the 1,500-foot degrade would remain in place" (Certification C202110, Attachment 3, p. 14). Based on its analyses, the Department concludes that eliminating the four northernmost proposed levee breaches in the Shag Slough Levee and the northern 1,500-foot degrade, or maintaining access to LIER via Liberty Island Road while retaining the 1,500-foot degrade is not feasible "as the Project could not be accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, and social factors" (Certification C202110, Attachment 3, p. 14). More specifically, the Department states these proposals are infeasible due to: economic and environmental factors related to the Project's habitat goals (Certification C202110 Attachment 3, pp. 14-16); economic and social factors as related to the Project's flood storage and conveyance goals (Certification C202110 Attachment 3, pp. 16-17); and economic factors related to operations and maintenance requirements (Certification C202110 Attachment 3, pp. 18-20).

The Department states that removing the four breaches north of the Shag Slough Bridge would decrease tidal flow to the northern portion of the site (Certification C202110, Attachment 3C, pp. 3-4), increasing attenuation and tidal damping regardless of channels connecting to breach locations south of the Shag Slough Bridge (Certification C202110, Attachment 3, p. 14). The Department states that tidal damping can stress low marsh vegetation and decrease tidal accessibility to fish species such as Delta Smelt (Certification C202110, Attachment 3, p. 14). The Department states the increase in tidal damping "would result in a loss of creditable tidal marsh habitat," and that this could "further reduce creditable habitat for Delta

Smelt” when combined with the effects of increased public access on the Shag Slough Levee (Certification C202110, Attachment 3, p. 14; Certification C202110, Attachment 3C, p. 12). The Department states that tidal damping effects caused by removing the four northernmost levee breaches and/or the levee degrade would reduce the amount of subtidal and intertidal habitat created by the Project, affecting habitat quality and special-status species, approval of habitat credits, and scoring by FAST members, such that “related funding would be impacted” (Certification C202110 Attachment 3, pp. 14-15). As a result, the Department states, removing the northernmost levee breaches “could impact habitat credit funding for the Project, threatening the Project’s economic feasibility” (Certification C202110, Attachment 3, p. 14).

The Department states that removing the northernmost breaches or degrading the northernmost segment of Shag Slough Levee “directly conflicts with the Project habitat goals and objectives” and “would not meet Project Goal 1 of maximizing the creation of intertidal and subtidal habitat” (Certification C202110, Attachment 3, p. 15). The Department states that the increase in tidal damping would negatively affect tidal circulation, promoting “conditions adverse to the Project’s biological objectives” (Certification C202110, Attachment 3, p. 15). Citing to the Project Restoration Plan (2020 11 04\_WRA Inc, p. 66) and scientific literature included as evidence in the Record (2012\_Burdick et al; 2018 06 18\_Karberg et al; 2007 02\_Brown and Michniuk; 2004 01\_Grimaldo\_et\_al; 2005 10\_Nobriga\_et al), the Department states that invasive plant species and harmful algae can become established in areas with reduced water velocities or areas without sufficient tidal exchange, and that non-native submergent vegetation provides habitat for non-native fish predators, leading to an increase in predation on native fish species such as Delta Smelt (Certification C202110, Attachment 3, p. 15). The Department states “These changes would decrease habitat suitability and value, thus reducing the potential to fully achieve Project Goal 2” (Certification C202110, Attachment 3, p. 15). The Department states that the Project has been designed to ensure tidal damping is minimized in areas at the northern and western edges of the Project, where the greatest potential for tidal damping occurs (Certification C202110, Attachment 3, p. 15; 2019 09\_ESA). The Department states that improved tidal flow will decrease the potential for invasive plant species to establish and harmful algal blooms to occur, and that increased tidal connectivity increases tidal flow (Certification C202110, Attachment 3, pp. 15-16). The Department states, “Compared to Stakeholder Proposal 2, the Project provides additional tidal marsh habitat and associated credits but, more importantly, provides better biological

outcomes, consistent with Goals 1 and 2” (Certification C202110, Attachment 3, p. 16).

The Department states that “Project changes resulting in additional public impacts on GGS would prompt additional mitigation requirements for this species, further delaying the Project timeline and increasing Project costs for features unrelated to the Project goals and objectives” (Certification C202110, Attachment 3, p. 15). The Department states that allowing for vehicular public access would increase the potential for direct and indirect conflicts with project goals and could cause direct mortality to GGS through vehicle strikes, as well as indirect forms of harm and harassment (Certification C202110 Attachment 3, p. 16). The Department states that the Project will require maximum speed restrictions of 15 miles per hour for authorized personnel driving on levees and access roads adjacent to GGS to avoid and minimize direct mortality of basking GGS year round (Certification C202110 Attachment 3, p. 16; Attachment 3D, p. 31). The Department states that strict enforcement of speed limits would be necessary yet problematic, given the remoteness of the area; and that unenforced speeds associated with public uses could potentially harm GGS (Certification C202110 Attachment 3, p. 16).

The Department also states that eliminating the northernmost levee breaches is infeasible due to economic and social factors related to the Project’s flood storage and conveyance goals (Certification C202110 Attachment 3, p. 16). The Department states that that this proposed change to the Project would result in a design that does not meet Project Goal 3 (Certification C202110 Attachment 3, p. 16). The Department states the Project is intended to increase conveyance capacity in a manner consistent with the Department’s 2017 Sacramento Basin-Wide Feasibility Study and Central Valley Flood Storage and Conveyance (2017 08\_DWR), and that the Project provides “the most significant reduction in 100-year flood water-surface elevations (WSE) throughout this area of Yolo Bypass” (Certification C202110 Attachment 3, p. 16; Certification C202110 Attachment 3C). The Department states that under the current Project design the WSE for a 100-year flood event at the northern boundary of the Project site in the Yolo Bypass is estimated to be reduced by 0.52 foot compared to current baseline, using NAVD88 data (Certification C202110 Attachment 3, pp. 16-17; Certification C202110 Attachment 3C). According to the Department, removing the northernmost breaches would reduce WSE for the same event by only 0.07 feet, “providing significantly less flood stage reduction than that provided by the Project” (Certification C202110 Attachment 3, p. 17; Certification C202110 Attachment 3C). The Department states, “The stakeholder proposal would therefore fail to provide



the Project's WSE reductions, affecting the Project's funding for flood conveyance benefits, and would make the Project economically infeasible" (Certification C202110 Attachment 3, p. 17).

The Department also states that the variation in which the Project would incorporate a 1,500 foot degrade in the Shag Slough Levee, retaining a portion of Liberty Island Road as a seasonal road, "would provide improved flood benefits over the initial option of maintaining the road as is. However, the Project's flood storage and conveyance capacity is not maximized under this scenario" (Certification C202110 Attachment 3, p. 17). Referring to modeling conducted by the Department, included as evidence in the Record, the estimated change in WSE from baseline conditions at the northern Project boundary for a 100-year flood event under this Project design would be "a reduction of 0.41 foot versus a reduction of 0.52 foot by the Project, a significant reduction in flood benefits that could jeopardize the Project's funding" (Certification C202110 Attachment 3, p. 17). The Department states, "The Project as designed provides the most significant reduction in 100-year flood WSE throughout this area of the Yolo Bypass to meet Goal 3. Reduction in the Project's flood benefits would threaten its economic feasibility" (Certification C202110 Attachment 3, p. 17).

Furthermore, the Department states that maintaining Liberty Island Road as a future embankment surrounded by Yolo Bypass flooding or as a seasonal roadway with a 1,500-foot degrade "would also exacerbate public safety risks during flood events," by increasing the potential for members of the public to be stranded or exposed to increased risks when flooding occurs (Certification C202110 Attachment 3, p. 17).

The Department also states that removing the northernmost levee breaches or retaining the northern segment of Liberty Island Road as a seasonal roadway with a 1,500 foot levee degrade is not economically feasible "due to the increased difficulty and cost of operating and maintaining Shag Slough Levee once it is no longer part of the federal flood control project or under the responsibility of Reclamation District (RD) 2098" (Certification C202110 Attachment 3, p. 18). The Department states that if the levee segment is not part of the federal flood control project and does not provide flood benefit, it will not be eligible for State and federal funding programs (Certification C202110 Attachment 3, p. 18). According to the Department, "Without eligibility for these programs, it would be extremely difficult and costly to maintain the levee in the long term, making Stakeholder Proposal 2 infeasible economically" (Certification C202110 Attachment 3, p. 18). The Department states that under the current Project design, degradation of known

deficiencies in the levee's current condition (Certification C202110 Attachment 3E; URS Corp 2011; USACE 1993) is expected and planned for, and maintenance will not need to be funded (Certification C202110 Attachment 3, p. 18). The Department also states that "the existing condition of Shag Slough Bridge is compromised, and it is uncertain whether the Bridge will be able to continue supporting pedestrian access in the future" (Certification C202110 Attachment 3, p. 18; Caltrans 2021; AECOM 2015; Urban 2019; Caltrans 2019). Referring to past meetings with Solano County (EIP 2021), the Department states, "there is no indication that the County has funds identified for repair or replacement of the Bridge" (Certification C202110 Attachment 3, p. 18). The Department states, "As neither CDFW nor the County have stated plans to maintain the Bridge in the long term, the burden of operations and maintenance costs would cause Stakeholder Proposal 2 to be economically infeasible" (Certification C202110 Attachment 3, p. 18).

In its March 31, 2022 Letter, LIA states, "Evidence in the record describes only qualitative ecosystem restoration objectives" and, "DWR has provided no evidence that mitigating the project's damage to recreation at LIER or along Shag Slough as LIA has proposed would significantly interfere with achievement of these objectives" (LIA's March 31, 2022 Letter, p. 3; 2021 03 17\_WRA Inc). LIA goes on to state, "DWR's modeling shows that retaining the Shag Slough levee north of the Lookout Slough bridge reduce [sic] tidal marsh by only 5 acres, a mere 0.15% of the 3,165-acre habitat in the project as proposed" (LIA's March 31, 2022 Letter, p. 3; Certification C202110 Attachment 3C, p. 12). LIA goes on to state, "Retaining half the levee, as we recommended at the hearing, would have even less effect" (LIA's March 31, 2022 Letter, p. 3).

In its March 31, 2022 Letter, LIA also states that retaining more of the Shag Slough Levee for bank fishing would not degrade GGS habitats such as winter refugia or a significant area of summer basking habitats (LIA's March 31, 2022 Letter, p. 3). LIA states that summer basking habitats on the levee "are already used for bank fishing, so their retention for bank fishing would not newly disturb giant garter snakes" (LIA's March 31, 2022 Letter, p. 3). LIA states that, by lowering the levee to act as a weir passing flood flows, "after revegetation of the slough banks the acreage of summer basking habitat would increase marginally from the 228 acres of the project as proposed" (LIA's March 31, 2022 Letter, p. 3; Draft EIR, LOS 4.00001 Figure IV.D-3). LIA also states that the EIR and ITP for the Project "include feasible mitigation measures for temporary effects on these areas" (LIA's March 31, 2022 Letter, p. 3; Draft EIR, LOS 4.00001, pp. IV.D-71 – IV.D-72).

LIA goes on to state, “The project, if modified consistent with our recommendations, would also be fully consistent with the project’s flood control objectives” (LIA’s March 31, 2022 Letter, p. 4). LIA states that lowering parts of the Shag Slough Levee while retaining it for bank fishing “would still reduce the elevation of flood waters by five inches at the site’s northeast corner (.41 feet), only 1-inch different from the half foot under the project as proposed” (LIA’s March 31, 2022 Letter, p. 4; Certification C202110, Attachment 1, p. 20). LIA states, “DWR has presented no evidence about the effects of this change on flood storage in the Yolo Bypass, how those changes may affect the risk of levee failure and or the recurrence of flooding along the Bypass, nor how in combination with the other projects recommended in the flood plan [Central Valley Flood Protection Plan], they would affect attainment of its Yolo Bypass objectives. Moreover, DWR has stated lowering but retaining the levee, as has been recommend [sic], meets the project’s flood goals” (LIA’s March 31, 2022 Letter, p. 4; Certification C202110, Attachment 3A, p. 29).

As explained above, under the substantial evidence standard of review, the Council’s task is to determine whether there is a lack of substantial evidence in the Record to support the Department’s certification of consistency with the Delta Plan, in light of appeals. Under the substantial evidence of review, the Council does not weigh conflicting evidence in the Record. As such, the presence of evidence in the record that LIA may use to support a conclusion other than that reached by the Department is not in itself grounds to remand a matter to the agency. (See *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 881-882 [“All conflicts in the evidence and any reasonable doubts must be resolved in favor of the agency’s findings and decision.”], internal quotations omitted.) In highlighting the presence of evidence in the Record that may be used to reach a conclusion that differs from the Department’s conclusion that the Project is consistent with DP P2, LIA does not raise issues that are appealable under the Council’s substantial evidence standard of review.

In the Record the Department provides analyses to support its conclusion that eliminating the northernmost breaches of Shag Slough Levee with or without the 1,500-foot degrade is infeasible due to economic and environmental factors related to the Project’s habitat goals (Certification C202110 Attachment 3, pp. 14-16); economic and social factors as related to the Project’s flood storage and conveyance goals (Certification C202110 Attachment 3, pp. 16-17); and economic factors related to operations and maintenance requirements (Certification C202110 Attachment 3, pp. 18-20). LIA appeals the Project on grounds that retaining the

northernmost section of the Shag Slough Levee would be feasible in that it would allow for the achievement of the Project's habitat goals and flood conveyance goals, but LIA does not address the Department's analyses concluding that retaining the northernmost section of the levee is infeasible due to concerns for public safety and operations and maintenance. *Therefore, LIA does not demonstrate a lack of substantial evidence in the Record to support the Department's conclusion that eliminating the northernmost breaches of Shag Slough Levee with or without the 1,500-foot levee degrade is infeasible.*

**(c) Vehicular access to the LIER via construction of an east-west access seasonal road, and scattered parking lots at the Project site**

Based on its analyses, the Department concludes that allowing access to the LIER via a seasonally inundated road constructed at an east-west orientation and bisecting the Project site, and including scattered parking lots throughout the Project site, is not feasible due to: economic, environmental, legal, and social factors related to the Project's habitat goals (Certification C202110 Attachment 3, pp. 21-23; citing to the 2008 USFWS BiOps Delta Smelt Crediting Decision Model, the 2021 Incidental Take Permit for the Lookout Slough Project, and the Draft Long-Term Management Plan and Wetland Reserve Plan of Operations for the Lookout Slough Project); social factors related to the Project's flood storage and conveyance goals (Certification C202110 Attachment 3, p. 23; citing public safety considerations); and economic factors related to operations and maintenance (Certification C202110 Attachment 3, pp. 23-24; citing long term maintenance expenses for features not related to the funding sources for the Project).

LIA's appeal does not specifically contest the Department's conclusion that providing vehicular access to LIER via construction of an east-west seasonal access road is infeasible. Therefore, we do not reach a conclusion regarding whether there is a lack of substantial evidence to support the Department's conclusion regarding the feasibility of this proposal.

**(d) Installation of box culverts and bridges at Shag Slough Levee breach sites**

Based on its analyses, the Department concludes that maintaining Liberty Island Road access to the LIER by replacing four proposed levee breaches on the Shag Slough Levee with culverts or bridges is not feasible due to: economic and environmental factors related to the Project's habitat goals (Certification C202110

Attachment 3, pp. 24-26; citing to the Fish Restoration Program Agreements and a scientific study concerning predation at road-stream crossing culverts); economic and social factors related to the Project's flood storage and conveyance goals (Certification C202110 Attachment 3, pp. 26-27; citing testimony from DWR during the May 2021 hearing on C20215 concerning ability of culverts to route Yolo Bypass flood flows); and economic, environmental, and technological factors related to the Project's operations and maintenance requirements (Certification C202110 Attachment 3, pp. 27-28; citing testimony from DWR during the May 2021 hearing on C20215 concerning the structural suitability of the Shag Slough Levee to support the road and bridge structures).

LIA's appeal does not specifically contest the Department's conclusion that installing box culverts and bridges at Shag Slough Levee breach sites is infeasible. Therefore, we do not reach a conclusion regarding whether there is a lack of substantial evidence to support the Department's conclusion regarding the feasibility of this proposal.

#### **d. Findings**

DP P2 requires, in relevant part, that the Lookout Slough Project be sited to avoid or reduce conflict with existing uses when feasible. We found in our July 2021 Determination that Certification C20215 for this Project was not supported by substantial evidence in the record that the Department considered existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER, or analyzed whether there is a conflict with such uses, or demonstrated that the Project was sited to avoid or reduce conflicts with such uses. We remanded Certification 20215 to the Department to reconsider these issues. For these same reasons, we did not reach a conclusion regarding the issue of whether siting the Project to avoid or reduce conflicts with existing uses was feasible in our July 2021 Determination.

The Department submitted Revised Certification C202110 and assembled a Record to support that Revised Certification to respond to the remanded issues. SCWA and LIA appealed Revised Certification C202110, claiming that the Lookout Slough Project as proposed is inconsistent with DP P2. The Council dismissed SCWA's appeal following the March 26, 2022 hearing, as described in Section H.D.4 below. The Council has analyzed the DP P2 appeal issues raised by LIA in its appeal letter to determine whether the Appellant demonstrates that there is a lack of substantial evidence in the Record to support the Department's Certification, considering written comments submitted by LIA in subsequent letters dated

February 28, 2022 and March 31, 2022, as well as oral comments presented by LIA and members of the public at the March 26, 2022 hearing.

Based on the analysis provided in this Determination, we conclude that LIA does not demonstrate that the Record lacks substantial evidence to support the Department's Revised Certification 202110 for the Lookout Slough Project pertaining to the issues previously remanded to the Department. We therefore find that LIA does not demonstrate a lack of substantial evidence in the Record to support the Department's certification that the Project was sited to reduce conflict with existing recreational uses where feasible, and we *deny* the appeal.

### **G. CONCLUSION**

Having held a hearing on March 24, 2022, and reviewed the entirety of the record in this matter, and following consideration of this matter at the April 28, 2022 meeting, the Council has made its specific written findings on the appeals as set forth above in Section F (Non-Appealable Issues & Issues Outside the Council's Jurisdiction), Section G (Analysis & Findings) of this Determination, and Section H (Dismissal of Issues on Appeal of the Certification of Consistency by the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Certification Number C202110)). (*See* Cal. Wat. Code, §§ 85225.15, 85225.20.)

The Council's findings on the appeals of the Certification of Consistency for the Lookout Slough Project do not constitute a "project" for purposes of CEQA. That is because the Council's action is not a "discretionary project proposed to be carried out or approved" by a public agency. (Pub. Resources Code, § 21080 subd. (a).) As the Council's role in the appeal process is described in the Delta Reform Act, Water Code sections 85225–85225.25, we do not have the authority to modify or deny a covered action, which is before the Council on appeal regarding consistency with the Delta Plan, for environmental reasons. (*See Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 299, 302 (explaining that a project is discretionary only if the agency that is taking an action can deny or modify the project on the basis of environmental consequences); see also, CEQA Guidelines § 15375 ("Discretionary project" means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity . . .).) The Council does not have the authority to approve or disapprove a covered action on appeal, nor does it have the authority to modify or deny an appealed covered action for environmental reasons. Rather, the Council only has the authority to "den[y] the appeal or reman[d] the matter to the

state or local public agency for reconsideration of the covered action based on the finding that the Certification of Consistency is not supported by substantial evidence in the record.” (Water Code, § 85225.25.) Therefore, the Council’s issuance of findings on the appeals of the Department’s Certification of Consistency with the Delta Plan is not a project for purposes of CEQA.

## CERTIFICATION

The undersigned, Clerk to the Delta Stewardship Council, does hereby certify that the foregoing is a full, true, and correct copy of a determination duly and regularly adopted at a meeting of the Delta Stewardship Council held on April 28, 2022.

AYE: TBD

NO: TBD

RECUSED/ABSENT: TBD

ABSTAIN: TBD

Beck Barger

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Clerk to the Delta Stewardship Council



**H. DISMISSAL OF ISSUES ON APPEAL OF THE CERTIFICATION OF CONSISTENCY BY THE CALIFORNIA DEPARTMENT OF WATER RESOURCES FOR THE LOOKOUT SLOUGH TIDAL HABITAT RESTORATION AND FLOOD IMPROVEMENT PROJECT (CERTIFICATION NUMBER C202110)**

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**Appealed by:**

| <b>Appellant Name</b>      | <b>Appeal Number</b> | <b>Acronym</b> |
|----------------------------|----------------------|----------------|
| Solano County Water Agency | C202110-A1           | SCWA           |
| Liberty Island Access      | C202110-A2           | LIA            |

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The Delta Stewardship Council (“Council”) has considered issues identified in appeals submitted by Appellants Solano County Water Agency (SCWA) and Liberty Island Access (LIA) for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (“Lookout Slough Project”) Certification of Consistency Number C202110 (“Certification C202110” or “Revised Certification”), submitted by the Department of Water Resources (“Department” or “DWR”) on December 30, 2021, to address our findings on the specific issues remanded to the Department for reconsideration in our July 16, 2021, Determination Regarding Appeals of the Certification of Consistency by the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project ([Council July 2021 Determination](#)), for Certification of Consistency C20215 (“Certification C20215”) (Wat. Code § 85225.25). Therefore, as set forth below, we *dismiss* issues appealed for Certification C202110 which were previously denied in the Council’s July 2021 Determination regarding appeals of Certification C20215 (Delta Stewardship Council [Administrative Procedures Governing Appeals](#), para. 13(b); Wat. Code § 85225.20). For remaining issues appealed for Certification C202110 which are not dismissed in this document, we will make specific written findings within 60 days of hearing the appeals (Wat. Code 85225.25).

## **B. BACKGROUND**

### **1. 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 action<sup>8</sup> — must certify to the Council that its action is consistent with the Delta Plan. (*Ibid.*)

### **2. Prior Certification C20215 and Council's Findings on Appeals**

The Department previously submitted [Certification C20215](#) for this covered action on February 2, 2021. Certification C20215 was appealed by four parties, and the Council deemed these appeals filed on March 24, 2021 (the appeals were consolidated into one proceeding). The Council heard and considered issues raised in appeals of Certification C20215 and made the following specific written findings ([Council July 2021 Determination](#), pp. 9-12):

4. We *dismissed* certain issues because they were non-appealable or outside the Council's jurisdiction (Wat. Code, § 85225.20; Appeals Procedures § 15, subd. (c)). The following issues, discussed in more detail in Section F ("Non-Appealable Issues and Issues Outside the Council's Jurisdiction") of the July

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<sup>8</sup> 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) 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.)

16, 2021 Determination for Certification C20215 ("Council July 2021 Determination" or "Determination C20215"), were *dismissed* as not raising appealable issues and/or not being within the Council's jurisdiction:

- Allocation of Proposition 1 Funds:
    - Policy DP P2 (Cal. Code Regs., tit. 23, § 5011): Allocation of Proposition 1 Funds;
    - Policy RR P1 (Cal. Code Regs., tit. 23, § 5012): Allocation of Proposition 1 Funds;
  - Policy DP P2 (Cal. Code Regs., tit. 23, § 5011): Disproportionate Impacts and Demographic Considerations;
  - Policy DP P2 (Cal. Code Regs., tit. 23, § 5011): Delta Plan Recommendation DP R11;
  - Policy DP P2 (Cal. Code Regs., tit. 23, § 5011): Davis-Dolwig Act;
  - Policy ER P2 (Cal. Code Regs., tit. 23, § 5006): Alternate Sea Level Rise Projections;
  - Policy ER P2 (Cal. Code Regs., tit. 23, § 5006): Propagation of Predatory Fish Species; and
  - Policy RR P1 (Cal. Code Regs., tit. 23, § 5012): Lack of a detailed funding plan for operation and maintenance, capital funding, and on-site personnel to ensure facility maintenance and manage flood risk.
5. We *remanded* the matter to the Department for *reconsideration of the specific issues identified for remand* and *denied the appeals on the specific issues identified for denial* as discussed in Section G of the July 2021 Determination ("Analysis & Findings") (Cal. Wat. Code, § 85225.25) and found that:
- a. The Department's Certification of Consistency with respect to the following issues for the two Delta Plan policies below was *not supported* by substantial evidence in the record, as detailed in the analysis and findings in the July 2021 Determination, and we therefore *remanded* the matter to the Department *for reconsideration on these issues*:
- G P1(b)(3) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(3)): Best Available Science, as to the issue of methods to estimate

recreational use as it relates to the best available science criterion of Inclusiveness; and

- DP P2 (Cal. Code Regs., tit. 23, § 5011): Respect Local Land Use When Siting Water or Flood Facilities or Restoration Habitats, as to the following issues:<sup>9</sup>
  - that recreational uses of Liberty Island Road, the Shag Slough Bridge, and Liberty Island Ecological Reserve (LIER) do not constitute existing uses;
  - that the Covered Action would not conflict with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER; and
  - that the Department avoided or reduced conflicts with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Lookout Slough Project.
- b. The Appellants failed to show that there was not substantial evidence in the record to support the Department's Certification of Consistency with respect to the following five Delta Plan policies, and we therefore *denied* the portions of the appeals that challenged Certification C20215 on these grounds<sup>10</sup>:

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<sup>9</sup> We did not previously reach a conclusion regarding the issue of whether siting the Lookout Slough Project to avoid or reduce conflicts with existing uses was feasible because Certification C20215 was not supported by substantial evidence in the record that the Department considered existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER, or analyzed whether there is a conflict with such uses, or whether the project was sited to avoid or reduce conflicts with such uses.

<sup>10</sup> In a covered action appeal, the question before us is whether an appellant has shown that the certification of consistency is not supported by substantial evidence in the record. (Wat. Code, § 85225.25.) In its comments on the draft dismissal, SCWA contends that appellants need not point to "substantial evidence in the record to show the Project is not consistent with the Delta Plan," but that appellants need only "show a project is inconsistent with the Delta Plan and will have a significant adverse effect on achieving the coequal goals supported by factual allegations." It is true that the Delta Reform Act authorizes anyone "who claims that a proposed covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, the action will have a significant adverse impact on the achievement of one or both of the coequal goals" to appeal a certification of consistency. (Wat. Code, § 85225.10, subd. (a).) But the Delta Reform Act only

- G P1(b)(2) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(2).): Detailed Findings to Establish Consistency with the Delta Plan Mitigation Measures;
- G P1(b)(3) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(3)): Best Available Science, as to the issue of methods to estimate recreational use as it relates to the best available science criteria of Objectivity and Relevance, and as to the issues of modeling years selected for water quality analysis; predictive, transparent, and open water quality modeling; cumulative impacts; peer review of water quality analysis; and water quality impacts to municipal and agricultural diverters;
- G P1(b)(4) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(4)): Adaptive Management, as to the issues of adequate resources to ensure implementation of the Adaptive Management and Monitoring Plan, delineated authority to implement the proposed adaptive management process, and success of project implementation and oversight;
- ER P2 (Cal. Code Regs., tit. 23, § 5006): Restore Habitats at Appropriate Elevations;
- ER P5 (Cal. Code Regs., tit. 23, § 5009): Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species;
- DP P2 (Cal. Code Regs., tit. 23, § 5011): Respect Local Land Use When Siting Water or Flood Facilities or Restoration Habitats, as to the issues of conflicts with existing agricultural uses, conflicts with existing infrastructure, conflicts with use of existing water intakes and beneficial

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authorizes the Council to remand the matter to the “agency for reconsideration of the covered action *based on the finding that the certification of consistency is not supported by substantial evidence in the record...*” (Wat. Code, § 85225.25, italics added.) Consequently, an appellant must necessarily demonstrate that a certification of consistency is “not supported by substantial evidence in the record” in order for the Council to remand the matter to the public agency at all. For that reason, the appellant in a covered action appeal bears the burden of showing that the certification of consistency is not supported by substantial evidence in the record. (Wat. Code, § 85225.25; see *Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1041, 1047 [agency action carries “a presumption of validity”].)

uses of water, conflicts with the use of existing water intakes and diversions related to endangered species presence, conflicts with the Solano County General Plan, and conflicts with the Solano County Climate Action Plan.

- RR P1 (Cal. Code Regs., tit. 23, § 5012): Prioritization of State Investments in Delta Levees and Risk Reduction.

c. The following four Delta Plan policies did not apply to the Covered Action, and we therefore *denied* the portions of the appeals that challenged Certification C20215 on these grounds:

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

6. The Appellants failed to provide the required specificity on the following specific issues and we therefore *dismissed* the appeals as to these issues (Cal. Wat. Code, § 85225.10(c); Appeals Procedures § 6, subd. (e) and (f)); Appeals Procedures § 15, subd. (c)):

- G P1(b)(4) (Cal. Code Regs., tit. 23, § 5002, subd. (b)(4)): Adaptive Management, as to the issues of funding for operations and maintenance and third-party verification; operations and maintenance of the Duck Slough Setback Levee; funding to perform operation, maintenance, repair, replacement, and rehabilitation; and design aspects and maintenance facilitation of the Cache and Haas Slough levee.

### 3. Revised Certification C202110

The Department submitted Certification C202110 (or "Revised Certification") to address the specific issues remanded to the Department for reconsideration, described above, in our July 2021 Determination. The record for Certification C202110 incorporates the record filed for Certification C20215 ([Department Certification of Record for Certification C202110](#), p. 1). Although the record for the Revised Certification contains additional information (Department Record, Certification C202110, February 10, 2022),<sup>11</sup> Certification C202110 states that "The Project has not changed in design, nor has any element of the Project changed or been updated such that reconsideration of Certification under any Delta Plan policy or portion of a policy is necessary other than the two remanded to DWR for reconsideration" ([Certification C202110 Attachment 1](#), p. 1). No appellant has identified a change in the Lookout Slough Project.

According to Certification C202110, as depicted in the figures below, the Department is proposing a multi-benefit project to restore approximately 3,165 acres of tidal wetland habitat and create over 40,000 acre-feet of transitory flood storage in the Cache Slough Complex within Solano County, adjacent to the Yolo Bypass (Figure 1) ([Certification C202110](#), pp. 2-3).<sup>12</sup>

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<sup>11</sup> The Department certified the record supporting the Revised Certification as full and complete on February 10, 2022. The Department further specified that the record includes materials submitted to the Council and certified as full and complete on February 10, 2022, as well as the record previously submitted for Certification C20215. The consolidated record for Certification C202110 is [available online](#).

<sup>12</sup> We reviewed Certification C202110 and did not identify changes in the project design that differ from Certification C20215. As such, portions of this document, including the project description, remain similar or identical to that in the Council's July 2021 Determination.

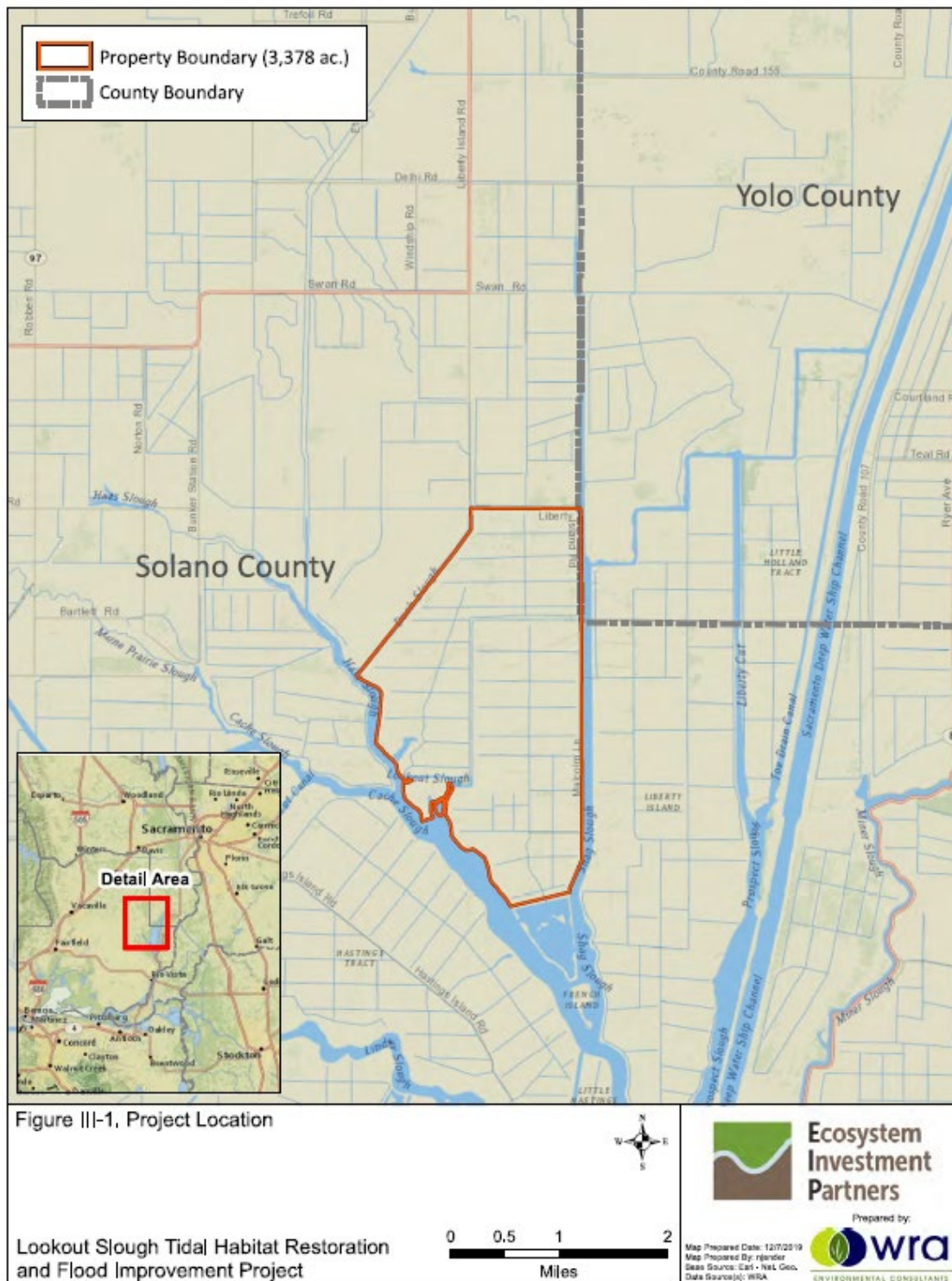


Figure 4. Location (*Draft EIR, Certification Record LOS.4.00001, p. III-4*)



The Lookout Slough Project would be located on three properties: the Bowsbey Property, the Liberty Farms Property, and the Vogel Property (Figure 2) ([Certification C202110](#), p. 3). These properties are currently used for irrigated pasture, recreation, and seasonal grazing, respectively.

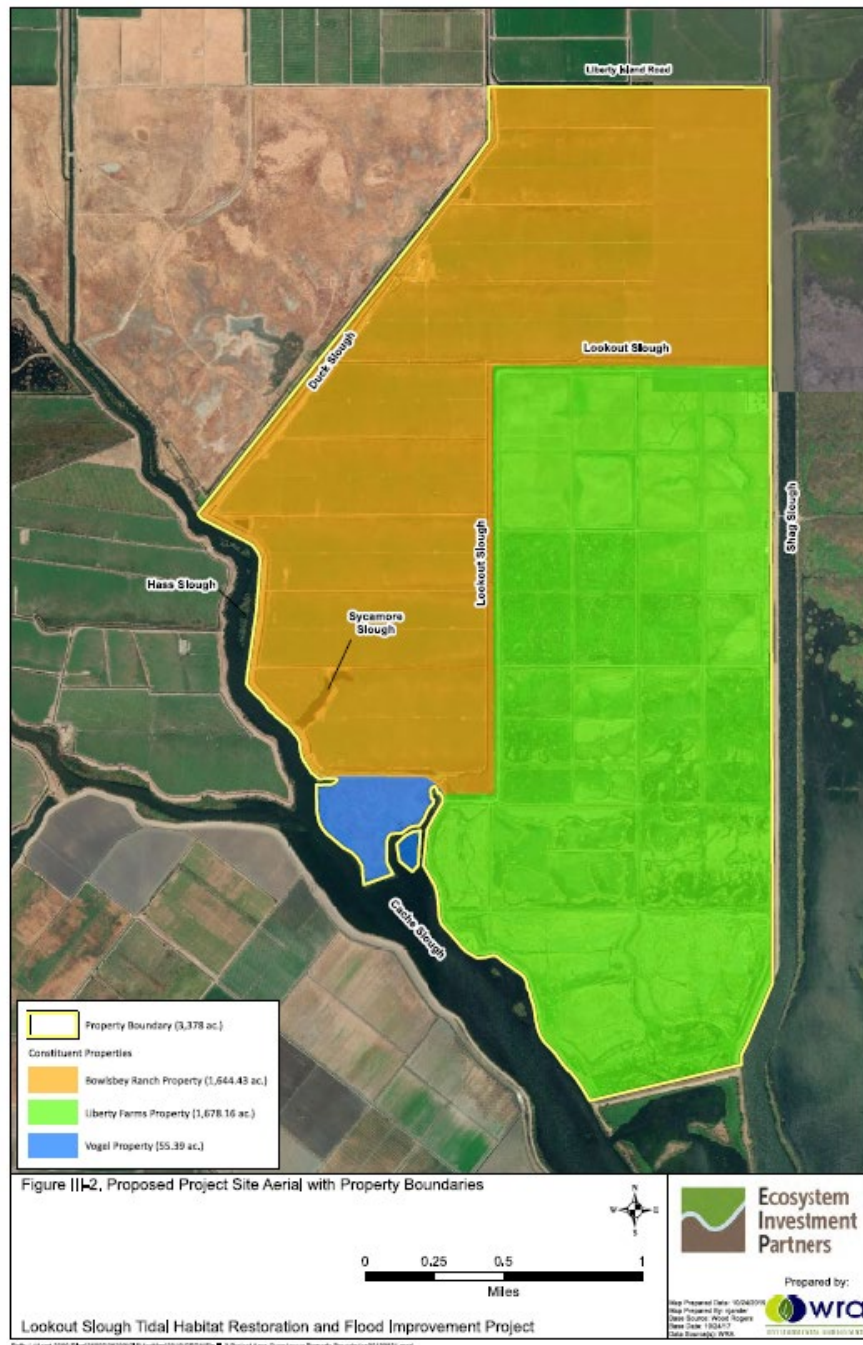


Figure 5. Site Aerial with Property Boundaries ([Draft EIR, Certification Record LOS.4.00001](#), p. III-9)

According to Certification C202110, upon completion of the Lookout Slough Project, the site would include project conditions with new channels, breaches, and other site modifications (Figure 3, [Certification C202110 Attachment 4](#), p. 14).

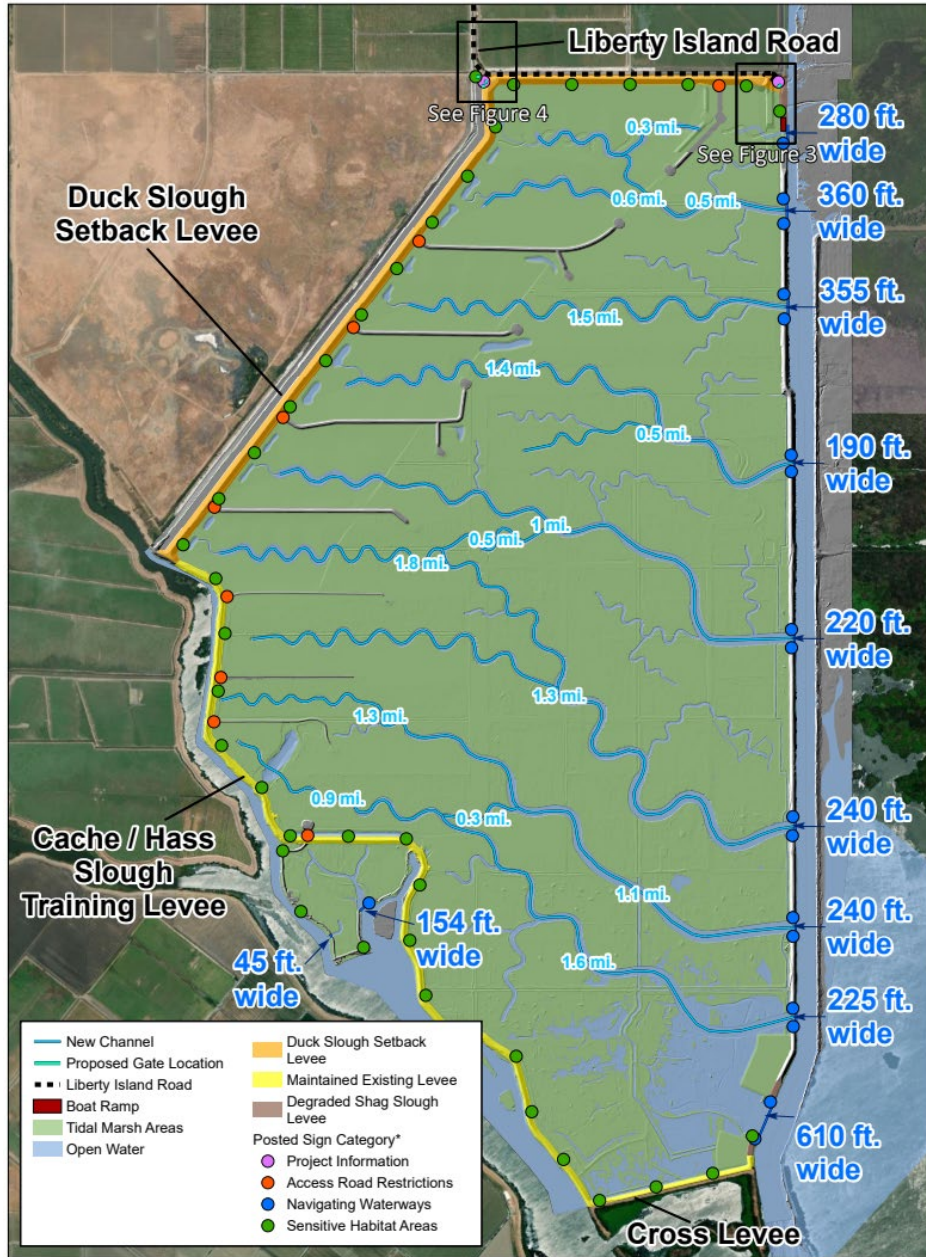


Figure 3. Proposed Project Conditions ([Certification 202110 Attachment 4](#), p. 14).

### C. BRIEF SUMMARY OF DISMISSAL FINDINGS

Appellants challenge the Lookout Slough Project's consistency with four Delta Plan policies, one of which (G P1 (Cal. Code Regs., tit. 23, § 5002)) has four subdivisions. For clarity of analysis, we treat challenges under each G P1 subdivision as an individual Delta Plan policy challenge. The policies appealed by each Appellant are shown in the chart below.

| Appealed Policies   | LIA             | SCWA |
|---|-----------------|------|
| G P1(b)(2) – Mitigation Measures<br>(Cal. Code Regs., tit. 23, § 5002, subd. (b)(2))  | X               | X    |
| G P1(b)(4) - Adaptive Management<br>(Cal. Code Regs., tit. 23, § 5002, subd. (b)(4))  |                 | X    |
| ER P5 – Avoid Introductions of and Habitat for Invasive<br>Nonnative Species (Cal. Code Regs., tit. 23, § 5009)                     |                 | X    |
| DP P2 – Respect Local Land Use when Siting Water or Flood<br>Facilities or Restoring Habitats<br>(Cal. Code Regs., tit. 23, § 5011) | X <sup>13</sup> | X    |

As described above, in our July 2021 Determination we made specific findings and remanded only specific, narrow issues to the Department for reconsideration. There have been no changes to the Lookout Slough Project since the July 2021 Determination ([Certification C202110 Attachment 1](#), p. 1). In addition, no appellant has identified a change in the project ([Appeal C202110-A1](#), [Appeal C202110-A2](#)). The Council may dismiss appeals that do not raise appealable issues or issues within the Council's jurisdiction (Wat. Code, § 85225.20; Appeals Procedures § 13, subd. (b)). We *dismiss* the issues below for Certification C202110 as non-appealable issues because these issues were previously appealed by LIA (Appeal C20215-A1) and SCWA (Appeal C20215-A2) for Certification C20215 and denied in the Council's July 2021 Determination regarding appeals of Certification C20215 because Appellants failed to show that there is not substantial evidence in the record to support the Department's Certification of Consistency C20215 with the identified

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<sup>13</sup> LIA's appeal of Delta Plan Policy DP P2 with relation to existing recreational uses is not dismissed at this time. For this policy, the Council will make specific written findings within 60 days of hearing the appeal, pursuant to Water Code 85225.25.

Delta Plan policies. ([Council July 2021 Determination](#), [Administrative Procedures Governing Appeals](#), para. 13(b); Wat. Code § 85225.20; Wat. Code § 85225.25).

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

#### **D. DISCUSSION OF NON-APPEALABLE ISSUES**

Our analysis is organized by each Delta Plan policy, and subdivisions of G P1 discussed as individual policies, raised by the Appellants.



## **1. G P1(b)(2)/Cal. Code Regs., tit. 23, § 5002, subd. (b)(2) - Mitigation Measures**

Appellants SCWA (C202110-A1) and LIA (C202110-A2) have appealed Certification C202110 as inconsistent with Policy G P1(b)(2). For the reasons discussed below, we *dismiss* these appeals by LIA and SCWA related to policy G P1(b)(2).

### **a. Policy Requirements**

G P1(b)(2) states:

“(b) Certifications of consistency must include detailed findings that address each of the following requirements: ....

(2) Covered actions not exempt from CEQA [the California Environmental Quality Act] must include all *applicable* feasible mitigation measures adopted and incorporated into the Delta Plan as amended April 26, 2018, ... (unless the measure(s) are within the exclusive jurisdiction of an agency other than the agency that files the certification of consistency), or substitute mitigation measures that the agency that files the certification of consistency finds are equally or more effective;” (Emphasis added)

In short, this regulation requires that, for any covered action subject to CEQA, the covered action must include the *applicable* mitigation measures adopted and incorporated into the Delta Plan as amended April 26, 2018 or substitute mitigation measures that are at least as effective. Because the covered action is subject to CEQA, it must comply with this requirement. In Certification C20215, the Department identified Lookout Slough Project Mitigation Measures that it stated are equally or more effective than the applicable Delta Plan Mitigation Measures.

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

The Council does not adjudicate the adequacy of an Environmental Impact Report (EIR) under CEQA. To the extent there may be disagreement as to

the validity of a significance finding in the EIR, that matter is outside the Council's jurisdiction and should be addressed through the CEQA process.

## **b. Certification**

The Department certified that the Lookout Slough Project was consistent with Delta Plan Policy G P1(b)(2) as part of Certification C20215. In Certification C202110, the Department identifies G P1(b)(2) as not applicable because this policy was not a remand issue identified in the Council's Final Determination on Certification C20215. As support for this finding, the Department states "The Project has been deemed consistent for this policy [G P1(b)(2)] under the previous Certification number C20215 and additional justification was provided" ([Certification C202110](#), p. 4).

## **c. Appeals and Analysis**

I. SCWA and LIA have appealed Certification C202110 as inconsistent with G P1(b)(2). Appellant LIA has appealed Certification C202110 related to Delta Plan Mitigation Measures 18-1 and 18-2 ([LIA Appeal C202110-A2 Letter](#), pp. 5-8). LIA previously appealed both mitigation measures in its appeal of Certification C20215 ([LIA Appeal-A1 C20215 Letter](#), pp. 6-9). Appellant SCWA has appealed Certification C202110 related to evaluation or measurement of adverse impacts and inclusion of all applicable, feasible mitigation measures. SCWA previously appealed these issues in its appeal of Certification C20215 ([SCWA Appeal C20215-A2](#), p. 3; [SCWA Appeal C20215-A2 Letter](#), p. 4).

II. These appeal issues are considered below.

### **i. LIA Appeal of Delta Plan Mitigation Measures 18-1 and 18-2**

III. In its prior appeal of Certification C20215, LIA alleged that the Project "would permanently impair or eliminate" recreational facilities and did not include "any form of replacement" ([LIA Appeal-A1 C20215 Letter](#), p. 8). Our findings in the July 16, 2021 Determination for Certification C20215 noted that LIA had not identified a "significant impact to a designated recreational facility as a result of the Lookout Slough Project" ([Council July 2021 Determination](#), p. 50) and that: "LIA does not assert or cite to evidence in the record that Delta Plan Mitigation Measures 18-1 and 18-2 are otherwise applicable. Thus, Delta Plan Mitigation Measures 18-1 and 18-2 do not apply

to the project” ([Council July 2021 Determination](#), p. 49). We denied LIA’s appeal related to mitigation measures 18-1 and 18-2, finding that:

**IV.** “Appellant LIA has failed to show that Project Mitigation Measures 18-1 and 18-2 are applicable to the Lookout Slough Project. Therefore, the Council finds that Appellant LIA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(2) with regard to Project Mitigation Measures 18-1 and 18-2” ([Council July 2021 Determination](#), p. 50).

**V.** LIA has again appealed G P1(b)(2) and Delta Plan Mitigation Measures 18-1 and 18-2 ([LIA Appeal C202110-A2 Letter](#), pp. 5-8) for Certification C202110. LIA alleges that Delta Plan Mitigation Measures 18-1 and 18-2 are applicable to the Project (Appeal C202110-A2, p. 5). As support, LIA quotes an excerpt of G P1(b)(2)/Cal. Code Regs. 23, § 5002, subd. (b)(2), which includes, in part, “...covered actions not exempt from CEQA must include all applicable feasible mitigation measures adopted and incorporated into the Delta Plan.” To consider this in context, the text of this subdivision reads:

**VI.** “Covered actions not exempt from CEQA [California Environmental Quality Act] must include all ***applicable*** feasible mitigation measures adopted and incorporated into the Delta Plan as amended April 26, 2018, which is here by incorporated by reference, (unless the measure(s) are within the exclusive jurisdiction of an agency other than the agency that files the certification of consistency), or substitute mitigation measures that the agency that files the certification of consistency finds are equally or more effective” (*Emphasis added*).

**VII.** In Determination C20215, we found, in part, that LIA had not identified a significant impact to a designated recreational facility as a result of the Lookout Slough Project, as relevant to Delta Plan Mitigation Measures 18-1 and 18-2 ([Council July 2021 Determination](#), p. 50). We also determined that LIA had not cited to evidence in the record for Certification C20215 that these measures are otherwise applicable (*ibid.*), and therefore found that the mitigation measures did not apply to the Lookout Slough Project.

In Appeal C202110-A2, LIA alleges that the Lookout Slough Project will have a significant impact on recreation and that the Department's "conclusion of insignificance" is based on faulty assumptions ([LIA Appeal C202110-A2 Letter](#), p. 6). As support for this, LIA alleges that recreational facilities are not just built or formal features ([LIA Appeal C202110-A2 Letter](#), p. 6), citing to an Oxford dictionary definition for facility and the Department's comparison to other recreational "facilities" in the region: "DWR claims that LIER and Shag Slough "offer comparable facilities and the ability to participate in the same (or similar) activities" when compared to other state recreation areas with shoreline fishing and hunting (COC Attachment 2, pg 10). Furthermore, DWR specifically lists informal bank fishing sites in the Delta with names like "The Patio", "The Dump Gate", and "Tennessee's Hole" as recreational facilities (DEIR Table IV.J-1, pg 368), and even uses those sites as examples in their original estimates of dispersion of recreational use ([LIA Appeal C202110-A2 Letter](#), p. 6).

**VIII.** The Department did not identify a significant impact to recreational facilities in its EIR ([Final EIR, Certification Record LOS.3.00001](#), p. 3-25). The Council does not evaluate the adequacy of the EIR under CEQA. We previously ruled on this issue in Determination C20215, finding that:

**IX.** "Mitigation is not required because there is a less-than-significant impact. To the degree there may be disagreement as to the validity of this finding, this is a CEQA issue that should be addressed as part of the environmental regulatory process, and is not an issue before the Council" ([Council July 2021 Determination](#), p. 49).

Pursuant to CEQA, a covered action need not include mitigation for areas where no significant impact has been identified to demonstrate consistency with the Delta Plan (see Cal. Code Regs., tit. 14 § 15126.4, subd. (a)(3), "Mitigation measures are not required for effects which are not found to be significant"). Furthermore, the Department has not identified a change in the project that would result in a change to the significance of recreational impacts identified in the EIR ([Certification C202110](#), p. 4). We denied appeals as to these issues in Determination C20215, finding that: "Appellant LIA has failed to show that Project Mitigation Measures 18-1 and 18-2 are applicable to the Lookout Slough Project. Therefore, the Council finds that Appellant LIA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(2) with regard to Project Mitigation Measures 18-1 and 18-2" ([Council July 2021 Determination](#), p. 50). In its appeal, LIA does not raise new



arguments relevant to these issues or cite to substantial evidence in the record to support its allegations or changes to the project. LIA has failed to show that the Department's statements in Certification C202110 are not supported by substantial evidence in the record ([LIA Appeal C202110-A2 Letter](#), pp. 5-6).

In its comments on the draft dismissal, LIA argued that it may renew its appeal related to Mitigation Measures 18-1 and 18-2 because, although the project has not changed, "the record certainly has." To that end, LIA contends that the record identifies additional recreational impacts that require mitigation. For the purposes of G P1(b)(2), however, the record has not changed, because the Department has not revised its EIR to identify new significant impacts to existing recreational facilities. LIA argues that G P1(b)(2) requires mitigation notwithstanding a lead agency's findings in its EIR. In making this argument, LIA is effectively inviting the Council to review the Department's EIR to determine whether its findings on the significance of these impacts were proper. As noted, it is not the Council's role to review the adequacy of a lead agency's EIR, or to second-guess the EIR's conclusions. Its role is limited to reviewing the record for consistency with the Delta Plan. (See Wat. Code, § 85225.25.)

The Department has confirmed that there are no changes to the project, and the relevant portions of the record—namely, the Department's conclusion in its EIR that the project will not significantly impact existing recreational facilities—remain the same. This issue was appealed and denied in our July 2021 Determination on appeals of Certification C20215; it was not remanded to the Department for reconsideration. Therefore, we *dismiss* [Appeal C202110-A2](#) of Certification C202110 on issues raised under policy G P1(b)(2).

#### **ii. SCWA Appeal of Mitigation Measure 4-1**

SCWA has appealed G P1(b)(2) with regard to the adequacy of impact evaluations in the EIR, and alleged that many of the Covered Action mitigation measures were exempt from "public scrutiny and meaningful comparison to Delta Plan mitigation measures" ([SCWA Appeal C202110-A1 Letter](#), pp. 3-4). SCWA also asserts that the Department did not include an invasive species management plan, as required by Delta Plan Mitigation Measure 4-1.

The Council has reviewed SCWA's appeal ([SCWA Appeal C202110-A1 Letter](#), pp. 3-4) and compared it to the previous appeal submitted for Certification C20215 ([SCWA Appeal C20215-A2 Letter](#), p. 4). The issues described are identical in both the

previous and current appeals, as relates to Delta Plan Policy G P1(b)(2). We previously denied these appeal issues as part of our July 2021 Determination on Certification C20215 ([Council July 2021 Determination](#), pp. 28-32). In its appeal of Certification C202110, SCWA cites to an attached letter to support its appeal of issues raised under G P1(b)(2). However, SCWA has not cited to substantial evidence in the record in either the appeal form or the attached letter. We previously found that SCWA failed to show that Certification C20215 was not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(2) for Delta Plan Mitigation Measure 4-1.<sup>14</sup> We denied SCWA's appeal related to mitigation measures 4-1, finding that:

"... SCWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(2) for Delta Plan Mitigation Measure 4-1." ([Council July 2021 Determination](#), p. 32).

The Department has confirmed that there are no changes to the Lookout Slough Project, the Council previously denied appeals as to this issue, and SCWA has not cited to substantial evidence that identifies changes to the Covered Action, supporting record, or impacts as related to Delta Plan Mitigation Measure 4-1. Therefore, we *dismiss* SCWA Appeal C202110-A1 of Certification C202110 on the issues raised under policy GP 1(b)(2).

#### **d. Conclusion**

For the reasons described above, the Council makes the following findings:

1. With regard to Delta Plan Mitigation Measure 18-1 and 18-2, LIA has failed to raise an appealable issue under G P1(b)(2). We therefore *dismiss* the appeal as to this issue.

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<sup>14</sup> SCWA also asserts that adverse impacts have not been adequately evaluated or measured by the Department and that mitigation measures were exempt from public review. To the degree there may be disagreement as to these assertions, this is a CEQA issue that should be addressed as part of the environmental regulatory process, and is not an issue before the Council.

2. With regard to Delta Plan Mitigation Measure 4-1, SCWA has failed to raise an appealable issue under G P1(b)(2). We therefore *dismiss* the appeal as to this issue.

X. Therefore, we *dismiss* the LIA Appeal C202110-A2 and SCWA Appeal C202110-A1 of Certification C202110 as to policy GP 1(b)(2).

## **2. Policy G P1(b)(4) (Cal. Code Regs., tit. 23, § 5002 subd. (b)(4)): Adaptive Management. (b)(4)): Adaptive Management**

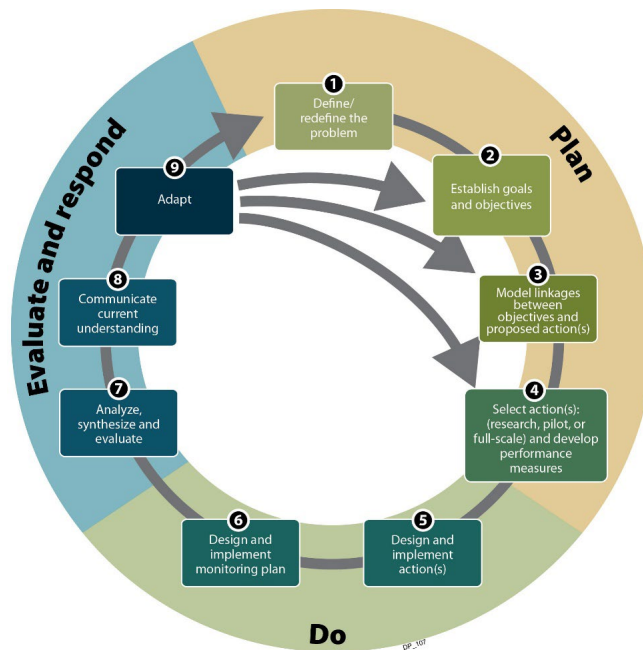
Appellant SCWA has appealed Certification C202110 as inconsistent with policy G P1(b)(4) (Appeal C202110-A1). For the reasons discussed below, we *dismiss* this appeal by SCWA on issues raised under policy G P1(b)(4).

### **a. Policy Requirements**

The Delta Reform Act requires that the Delta Plan include a formal adaptive management strategy for ongoing water management and ecosystem restoration decisions (Wat. Code, § 85308, subd. (f).). Delta Plan Policy G P1(b)(4) (Cal. Code Regs, tit. 23, § 5002, subd. (b)(4)) requires that ecosystem restoration and water management covered actions include “adequate provisions, appropriate to the scope of the covered action, to assure continued implementation of adaptive management.” This requirement is satisfied through both of the following: (a) “[a]n adaptive management plan that describes the approach to be taken consistent with the adaptive management framework in [Delta Plan] Appendix 1B”; and (b) “[d]ocumentation of access to adequate resources and delineated authority by the entity responsible for the implementation of the proposed adaptive management process.” (Ibid.) The Council’s regulations define adaptive management as “a framework and flexible decision making process for ongoing knowledge acquisition, monitoring, and evaluation leading to continuous improvement in management planning and implementation of a project to achieve specified objectives” (Wat. Code, § 85052; Cal. Code Regs, tit. 23, § 5001, subd. (a)).

Delta Plan Appendix 1B, referenced in Policy G P1(b)(4), describes a three-phase, nine-step Adaptive Management Framework used by the Council to review proposed covered actions involving ecosystem restoration and water management. Figure 1C-1 below shows a graphic depiction of the framework. Proposed ecosystem and water management covered actions should include an adaptive management plan that considers all nine steps of the framework, but the steps

need not be rigidly included or implemented in the order described in the framework. (Appendix 1B, Adaptive Management, Delta Plan, p. 1B-1.)



**Figure 1C-1. A Nine-step Adaptive Management Framework.** (Delta Plan Appendix 1B, p. 1B-2.)

## b. Certification

The Department certified that the Lookout Slough Project was consistent with Delta Plan Policy G P1(b)(4) as part of Certification C20215. In the Final Determination on Certification C20215, we found that Appellants failed to show that the Certification of Consistency with G P1(b)(4) is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(4). Specifically, we found that

*"1. With regard to the issue of adequate resources to ensure implementation of the AMMP, SCWA has failed to show that the Department's Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(4);*

*2. With regard to the issue of delineated authority to implement the proposed adaptive management process, SCWA has failed to show that the Department's Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(4); and*

*3. With regard to the issue of the success of project implementation and oversight, SCWA has failed to show that the Department's Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(4).”(Council July 2021 Determination, p. 78).*

In Certification C202110, the Department identifies G P1(b)(4) as not applicable because this policy was not a remand issue identified for the Department's reconsideration in the Council's July 2021 Determination on Certification C20215 and there has been no change to the project ([Certification C202110](#), p. 5).

### **c. Appeals and Analysis**

SCWA appealed the Department's Revised Certification and specific finding under G P1(b)(4). Specifically, SCWA alleges that the Covered Action “does not include adequate resources, on-the-ground staff, clearly delineated authority, or long-term accountability to ensure for continued implementation of adaptive management” ([SCWA Appeal C202110-A1 Letter](#), p. 4).

The Council has reviewed SCWA's appeal ([SCWA Appeal C202110-A1 Letter](#), p. 4) and compared it to the previous appeal submitted for Certification C20215 ([SCWA Appeal C20215-A2 Letter](#), pp. 5-6). The issues described are identical in both the previous and current appeals, as relates to Delta Plan Policy G P1(b)(4). We previously denied these appeal issues as part of our July 2021 Determination on Certification C20215 ([Council July 2021 Determination](#), p. 78).

The Department has confirmed that there are no changes to the Lookout Slough Project ([Certification C202110](#), p. 5), the Council previously denied appeals as to this issue, and SCWA has not cited to substantial evidence that identifies changes to the Covered Action or supporting record. Therefore, we *dismiss* SCWA Appeal C202110-A1 of Certification C202110 on issues raised under policy G P1(b)(4).

### **d. Conclusion**

For the reasons described above, the Council finds that Appellant SCWA has failed to raise an appealable issue under G P1(b)(4), and we *dismiss* SCWA Appeal C202110-A1 of Certification C202110 on issues raised under policy G P1(b)(4).

### **3. Policy ER P5 (Cal. Code Regs., tit. 23, § 5009): Avoid Introducing / Improving Habitats for Invasive Nonnative Species**

Appellant SCWA has appealed Certification C202110 as inconsistent with policy ER P5. For the reasons discussed below, we *dismiss* this appeal by SCWA related to policy ER P5.

#### **a. Policy Requirements**

ER P5 states:

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

(b) For purposes of Water Code Section 85057.5(a)(3) and Section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action that has the reasonable probability of introducing, or improving habitat conditions for, nonnative invasive species.” (Cal. Code Regs. Section 5009)

The Delta Plan defines “nonnative invasive species” for purposes of ER P5 as “species that establish and reproduce rapidly outside of their native range and may threaten the diversity or abundance of native species through competition for resources, predation, parasitism, hybridization with native populations, introduction of pathogens, or physical or chemical alteration of the invaded habitat.” (Cal. Code Regs., tit. 23, § 5001, subd. (v).)

#### **b. Certification**

The Department certified that ER P5 was not applicable to the Lookout Slough Project as part of Certification C20215. This finding was previously appealed by SCWA (C20215-A2), Reclamation Districts 2060 and 2068 (C20215-A3), and Central Delta Water Agency (C20215-A4). In our July 2021 Determination, we concluded that Policy ER P5 was applicable to the Lookout Slough Project, that the Project was consistent with ER P5, and that the appellants had failed to show that Certification C20215 was not supported by substantial evidence in the record that the covered action was consistent with ER P5. Specifically, we found that “SCWA... failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with ER P5” ([Council July 2021 Determination](#), p. 96). We therefore denied the appeals as to this policy (*Ibid.*).

In Certification C202110, the Department identifies ER P5 as not applicable because this policy was not a remand issue identified in the Council's Final Determination on Certification C20215.

### **c. Appeals and Analysis**

SCWA appeals the Department's Certification C202110 and specific finding under ER P5 alleging that the Covered Action may result in introducing or improving habitat for invasive nonnative species and that the Covered Action does not detail which agency will manage the Project for such species ([SCWA Appeal C202110-A1 Letter](#), p. 5).

The Council has reviewed SCWA's appeal under policy ER P5 of Certification C202110 ([SCWA Appeal C202110-A1 Letter](#), p. 5) and compared it to the previous appeal submitted for Certification C20215 ([SCWA Appeal C20215-A2 Letter](#), p. 7). The issues described are identical in both the previous and current appeals in paragraphs 1-3, and paragraph 4 (C20215-A2) and paragraph 6 (C202110-A1). We previously denied these appeal issues in our July 2021 Determination on Certification C20215 ([Council July 2021 Determination](#), p. 96).

In Appeal C202110-A1 of Certification C202110, SCWA adds two additional paragraphs in its attached letter that are considered below.

#### **i. New SCWA Appeal Content**

Appellant SCWA has included two paragraphs of new content related to Delta Plan Policy ER P5 that assert that invasive nonnative species in the area may contribute to decreased dissolved oxygen levels, and that the Covered Action could further exacerbate this issue ([SCWA Appeal C202110-A1 Letter](#), p. 5). These paragraphs read, in full:

*"A real time example of the proliferation of such invasive nonnative plant species exists in the observance of a significant drop in Dissolved Oxygen in the Yolo Bypass Toe Drain which in late 2021 led to the largest known fish kill on Putah Creek due to asphyxiation. The Yolo Bypass Toe Drain is a critical and important multi-use facility to many agencies and landowners. The Agency believes, and field observations by both the Agency and UC Davis suggest, the observed low Dissolved Oxygen levels are the result of existing restoration projects upstream which provide ample habitat for invasive*



*nonnative aquatic vegetation which contributes to the consumption of oxygen (See Figure 2).*

*Low levels of Dissolved Oxygen, which continued along almost 13-miles of the Toe Drain, ending just north of Liberty Island, prevents any further fish passage into Putah Creek and other Yolo Bypass tributaries. As such, the Agency finds it irresponsible that DWR would move forward in approving a project identical to those which already render moot the intended benefits of restoration projects due to DWR's lack of mitigation and monitoring."*

The Council has reviewed Figure 2, which is a map purporting to show dissolved oxygen levels on November 23 and December 3 (year not stated in figure caption) ([SCWA Appeal C202110-A1 Letter](#), p. 9). Although SCWA did not previously raise dissolved oxygen as an explicit appeal issue as part of Appeal C20215-A2, we previously considered and denied appeals on issues related to dissolved oxygen and the applicability of mitigation measures and best available science criteria raised in Appeal C20215-A3 filed by Reclamation Districts 2060 and 2068 as part of our July 2021 Determination on Certification C20215 ([Council July 2021 Determination](#), p. 26-28, 67).<sup>15</sup> The new information provided by SCWA does not change the scope of the appeal issue we previously considered and denied.

Issues appealed under policy ER P5 for Certification C20215 were not remanded to the Department for reconsideration. The Department has confirmed that there are no changes to the Lookout Slough Project for Certification C202110, the Council previously denied an appeal as to the issues raised by SCWA under policy ER P5 for Certification C202110, and SCWA has not cited to substantial evidence that identifies changes to the Covered Action. Therefore, we *dismiss* SCWA Appeal C202110-A1 for Certification C202110 on issues raised under policy ER P5.

#### **d. Conclusion**

For the reasons described above, the Council finds that Appellant SCWA has failed to raise an appealable issue under ER P5, and we *dismiss* SCWA Appeal C202110-A1 for Certification C202110 on issues raised under policy ER P5.

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<sup>15</sup> SCWA did not appeal dissolved oxygen with relevance to Delta Plan Policy as part of Appeal C20215-A2. However, the Council combined the appeals on C20215 and denied appeal issues related to dissolved oxygen as part of Appeal C20215-A3. SCWA has not identified substantial evidence in the record that raises a new issue.



#### **4. Policy DP P2 (Cal. Code Regs., tit. 23, § 5011): Respect Local Land Use When Siting Water or Flood Facilities or Restoration Habitats**

Appellants SCWA and LIA have appealed Certification C202110 as inconsistent with policy DP P2. For the reasons discussed below, we *dismiss* SCWA's appeal related to policy DP P2. LIA's appeal of policy DP P2 will be considered in a determination by the Council to be prepared following the March 24, 2022 hearing.

##### **a. Policy Requirements**

DP P2 states that:

“(a) Water management facilities, ecosystem restoration, and flood management infrastructure must be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence when feasible, considering comments from local agencies and the Delta Protection Commission. Plans for ecosystem restoration must consider sites on existing public lands, when feasible and consistent with a project's purpose, before privately owned sites are purchased. Measures to mitigate conflicts with adjacent uses may include, but are not limited to, buffers to prevent adverse effects on adjacent farmland.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(e) of this Chapter, this policy covers proposed actions that involve the siting of water management facilities, ecosystem restoration, and flood management infrastructure.” (Cal. Code Regs., tit. 23, § 5011.)

##### **b. Certification**

The Department certified that the Lookout Slough Project was consistent with Delta Plan Policy DP P2 as part of Certification C20215. This finding was previously appealed by LIA (C20215-A1), SCWA (C20215-A2), Reclamation Districts 2060 and 2068 (C20215-A3), and Central Delta Water Agency (C20215-A4). In our July 2021 Determination, we denied issues raised by Appellants SCWA, Reclamation

Districts, and Central Delta Water Agency, and those raised in part by LIA.<sup>16</sup> SCWA and LIA have appealed this policy again for Certification C202110.

In its Certification C202110, the Department states that the Covered Action is consistent with DP P2 with regard to the remanded issues. The issues appealed by LIA under policy DP P2 for Certification C202110 which were previously raised by LIA and remanded to the Department for reconsideration for Certification C20215 are not part of this dismissal and will be addressed in findings of the Council after the March 24, 2022, hearing on the appeals.

For remaining DP P2 issues that were not remanded to the Department in our July 2021 Determination, the Department identifies that DP P2 is not applicable to Certification C202110 ([Certification C202110](#), pp. 7-8).

### **c. Appeals and Analysis**

SCWA alleges conflicts with existing municipal and agricultural water supply intakes in the area of the Covered Action. The Council has reviewed SCWA's appeal ([SCWA Appeal C202110-A1 Letter](#), pp. 6-10) and compared it to the previous appeal submitted for Certification C20215 ([SCWA Appeal C20215-A2 Letter](#), pp. 8-9; 10-12). Appeal C202110-A1 includes new text focusing on impacts to municipal water intakes as an existing use. As SCWA states in the new content:

*"[The] Certification dismisses any potential effects of the Project on existing agricultural intakes as already "currently located in critical habitat for several listed fish species," and thus already subject to compliance with the state and federal endangered species act." Indeed, agricultural and municipal intakes alike in the Project area already have to comply with state and federal endangered species act requirements. However, the expected and desired increase in the presence of listed species in the Complex resulting from the*

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<sup>16</sup> In our July 2021 Determination, we found that Certification C20215 was not supported by substantial evidence in the record for consistency with policy DP P2 and remanded the matter to the Department for reconsideration of the following narrow, specific issues: 1) that recreational uses of Liberty Island Road, the Shag Slough Bridge, and Liberty Island Ecological Reserve (LIER) do not constitute existing uses; and 2) that the Covered Action would not conflict with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER; and 3) that the Department avoided or reduced conflicts with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Lookout Slough Project. (Council July 2021 Determination, p. 10)

*numerous restoration projects being pursued by DWR makes continued operation of such intakes infeasible.”*([SCWA Appeal C202110-A1 Letter](#), p. 6).

The Council has reviewed this information. We previously considered and denied SCWA appeal issues related to existing use of municipal and agricultural water supply intakes raised in Appeal C20215-A2 as part of our July 2021 Determination on Certification C20215. In Determination C20215, we found that SCWA failed to show that the Lookout Slough Project would lead to a conflict with the use of existing water diversions with respect to endangered species presence, and denied the appeal as to this issue. ([Council July 2021 Determination](#), pp. 139-140). The new information provided by SCWA does not change the scope of the appeal issue we previously considered and denied. These issues raised under DP P2 were not remanded to the Department for reconsideration.

The Department has confirmed that there are no changes to the Lookout Slough Project for Certification C202110, the Council previously denied an appeal as to this issue and did not remand these issues to the Department for reconsideration. SCWA has not cited to substantial evidence that identifies changes to the Covered Action. Therefore, we *dismiss* SCWA Appeal C202110-A1 of Certification C202110 on the issues raised under policy DP P2.

#### **d. Conclusion**

For the reasons discussed above, with regard to existing use of municipal and agricultural water intakes, the Council finds that SCWA has failed to raise an appealable issue under DP P2, and we *dismiss* SCWA's Appeal C202110-A1 as to the issues raised under policy DP P2. The Council will make specific findings on LIA's appeal of policy DP P2 following the March 24, 2022 hearing.

#### **E. DISMISSAL**

Having reviewed the appeals submitted to the Council in the matter of the Department's Revised Certification C202110 for the Lookout Slough Habitat Restoration Project, the Council has made specific findings *dismissing* appeal issues set forth above in Section C (Non-Appealable Issues) of this document. (See Delta Stewardship Council [Administrative Procedures Governing Appeals](#), para. 13(b); al. Wat. Code, § 85225.20;

## **F. CERTIFICATION**

The undersigned, Clerk to the Delta Stewardship Council, does hereby certify that the foregoing is a full, true, and correct copy of the Council's findings to dismiss appeal issues duly and regularly adopted at a meeting of the Delta Stewardship Council held on March 24, 2022.

AYE: Damrell, Lee, Mehranian, Nottoli, Smith, Zingale, Madueño

NO: None

RECUSED/ABSENT: None

ABSTAIN: None

(Original Signed by)

Beck Barger

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.<sup>17</sup>

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."

The Department has not objected to LIA's requests to admit these documents pursuant to section 10 of our Appeals Procedures. LIA has represented that these documents were provided to the Department before it filed the Certification; the Department has not stated otherwise. As such, the Department does not dispute that the documents identified below were part of the record before the Department, but were not fully included in the record submission to the Council. The Council will thus admit the documents listed below pursuant to section 10 of our Appeals Procedures.

[Exhibit A, Solano Economic Development Corporation Demographics, 4 pages](#), to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021

[Exhibit B, Total Estimated and Projected Population for California and Counties, 2 pages](#), to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021

[Exhibit C, LIA On-site vehicle survey, 10 pages](#), to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021

[Exhibit D, Prepare to Launch! Chapter 1: Characteristics of a launch site, 72 pages](#), to LIA Letter Attached to LIA Appeal of Certification of Consistency for the

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<sup>17</sup> Not all documents in this Exhibit were relied upon in the Determination.

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| Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021  |
| <a href="#"><u>Exhibit E, Giant Garter Snake habitat range, 9 pages</u></a> , to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021   |
| <a href="#"><u>Exhibit F1, Sacramento National Wildlife Refuge map of Auto Tour &amp; Wetland Walk, 2 pages</u></a> , to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021 |
| <a href="#"><u>Exhibit F2, Sacramento National Wildlife Refuge map of Logan Creek Trails, 2 pages</u></a> , to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021           |
| <a href="#"><u>Exhibit F3, Sutter National Wildlife Refuge trail map, 2 pages</u></a> , to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021                               |
| <a href="#"><u>Exhibit F4, Yolo Wildlife Area trail map, 1 page</u></a> , to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021   |
| <a href="#"><u>Exhibit F5, Sutter Bypass Wildlife Area trail map, 1 page</u></a> , to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021                                    |
| <a href="#"><u>Exhibit F6, Colusa National Wildlife Refuge trail map, 2 pages</u></a> , to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021                               |
| <a href="#"><u>Exhibit G, Excerpt from 7.23.21 Central Valley Flood Control Board meeting video, 1 page</u></a> , to LIA Letter Attached to LIA Appeal of Certification of Consistency for the   |

Lookout Slough Tidal Habitat Restoration and Flood Improvement Project  
(C202110-A2) filed December 31, 2021

[Exhibit H, 2015 Inventory of Recreation Facilities in the Sacramento-San Joaquin Delta, 137 pages](#), to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021

[Exhibit J, 2021-22 CA State Budget Dept. Of Water Resources, 21 pages](#), to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021

[Exhibit K, San Francisco Bay Area Water Trail Design Guidelines, 75 pages](#), to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021

[Environmental Science Associates \(ESA\). 2021 Technical Memorandum: Lookout Slough Tidal Habitat Restoration and Flood Improvement Project, Channel Velocities in Vicinity of Proposed Agency Boat Ramp, October 11, 2021](#)

[Division of Boating and Waterways \(DBW\). 1991. Layout, Design and Construction Handbook for Small Craft Boat Launching Facilities, March 1991.](#)

## 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.<sup>18</sup>

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.

[Exhibit F1, Sacramento National Wildlife Refuge map of Auto Tour & Wetland Walk, 2 pages](#), to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021

[Exhibit F2, Sacramento National Wildlife Refuge map of Logan Creek Trails, 2 pages](#), to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021

[Exhibit F3, Sutter National Wildlife Refuge trail map, 2 pages](#), to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021

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<sup>18</sup>Not all documents in this Exhibit were relied upon in the Determination. This Exhibit also contains documents that were officially noticed pursuant to Section 29 of the Appeals Procedures because their existence is judicially noticeable, not because the facts asserted in the documents are judicially noticeable.



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| <p><a href="#"><u>Exhibit F4, Yolo Wildlife Area trail map, 1 page</u></a>, to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021</p>  |
| <p><a href="#"><u>Exhibit F5, Sutter Bypass Wildlife Area trail map, 1 page</u></a>, to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021</p>   |
| <p><a href="#"><u>Exhibit F6, Colusa National Wildlife Refuge trail map, 2 pages</u></a>, to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021</p>                                    |
| <p><a href="#"><u>Exhibit H, 2015 Inventory of Recreation Facilities in the Sacramento-San Joaquin Delta, 137 pages</u></a>, to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021</p> |
| <p><a href="#"><u>Exhibit J, 2021-22 CA State Budget Dept. Of Water Resources, 21 pages</u></a>, to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021</p>                             |
| <p><a href="#"><u>Exhibit K, San Francisco Bay Area Water Trail Design Guidelines, 75 pages</u></a>, to LIA Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C202110-A2) filed December 31, 2021</p>                         |

## EXHIBIT C

### Denied Document Admission Requests (see Appeals Procedures § 10 and § 29)

| Document  | Reason for denial  |
|---|--|
| <a href="#"><u>Exhibit I, LIER Land Management Plan, 255 pages, to LIA, Inclusion of Exhibits into the Council's Record, dated May 12, 2021</u></a> | The document was submitted with the administrative record prepared and submitted by the Department (See LIER Land Management Plan, Certification Record LOS.10.00032). |