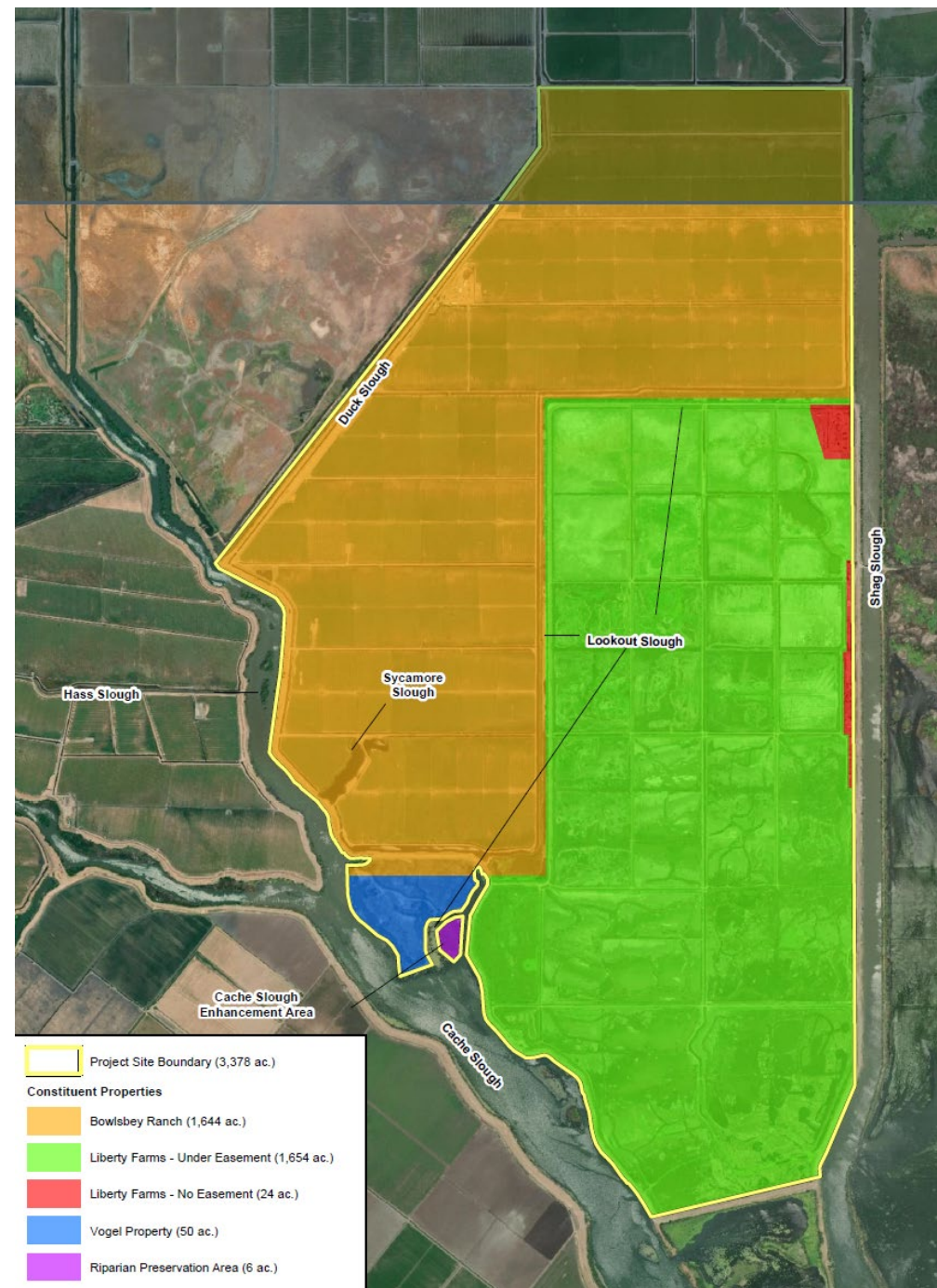


Reclamation Districts 2060 and 2068

Appeal of DWR Delta Plan Certification No. C20215

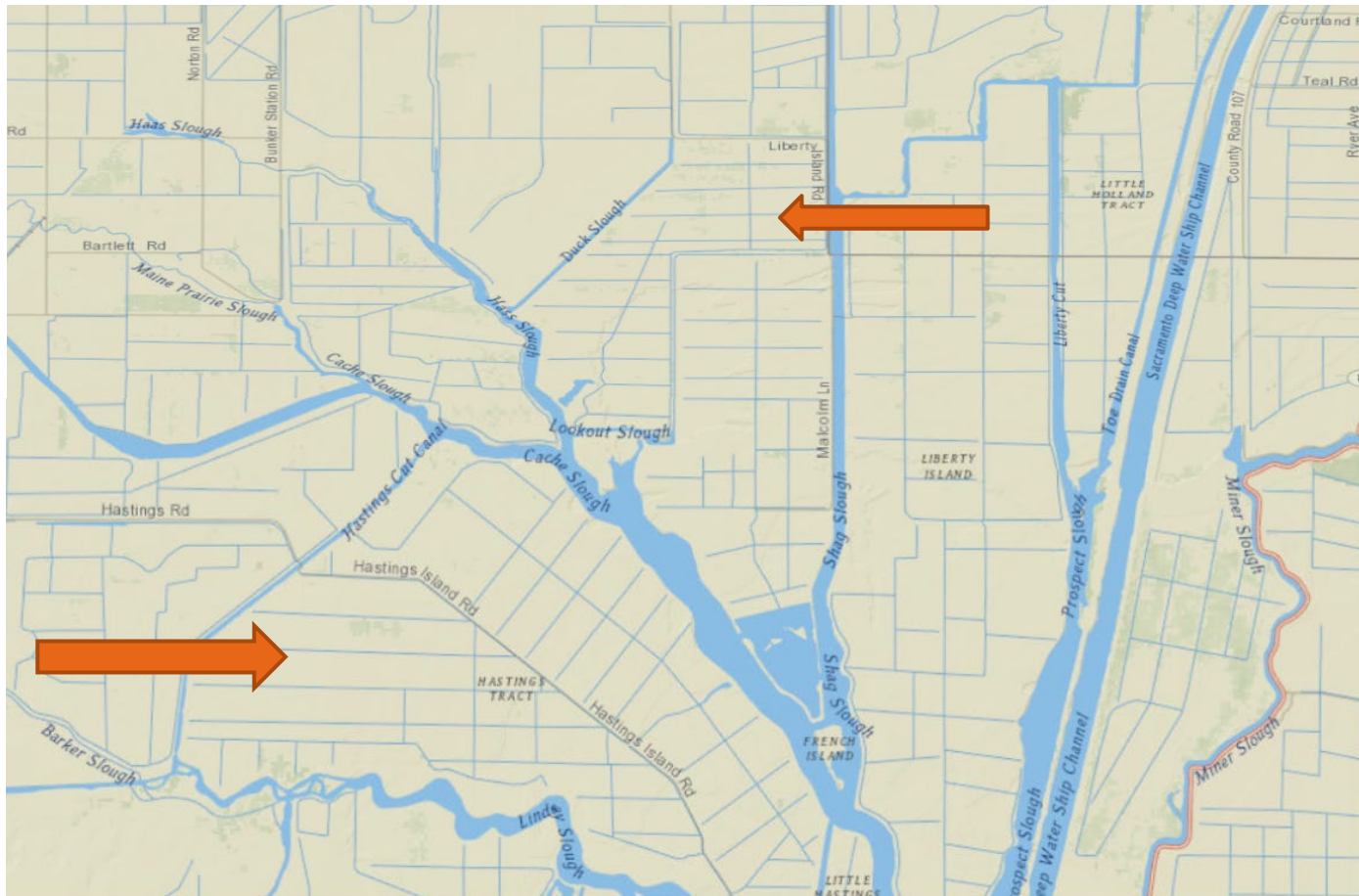
Lookout Slough Tidal Habitat Restoration and Flood Improvement Project

Project Area



Reclamation Districts 2060 and 2068

- ▶ RD 2060 is located southwest of the Project site, on Hastings Tract and running along Cache Slough.
- ▶ RD 2068 is adjacent to the northern boundary of the Project site. RD 2068 and 2098 make up USACE Levee Unit 109 (West Levee of Yolo Bypass and East Levee of Cache Slough) of the Sacramento River Flood Control Project.



Key Issues - Water Supply Impacts

Water Quality



Protected Species



Substantial Evidence

- ▶ DWR must point to substantial evidence in the administrative record of proceedings to demonstrate the Project is consistent with the Delta Plan. (Wat. Code, § 85225.25.)
- ▶ “Substantial evidence” includes facts, reasonable assumptions based on facts, and expert opinion supported by facts. (Pub. Resources Code § 21080, subd. (e).)
- ▶ Not just “any evidence” - must be substantial.
- ▶ “Does not include “[a]rgument, speculation, unsubstantiated opinion or narrative, [or] evidence which is clearly erroneous or inaccurate.” (Cal. Code of Regs., tit. 14, § 15384, subd. (a).)

CEQA Compliance v. Delta Plan Consistency

- ▶ DWR relies almost exclusively on the Environmental Impact Report (EIR) prepared to comply with the California Environmental Quality Act (CEQA) as substantial evidence of consistency with the Delta Plan.
- ▶ EIR is inadequate (litigation pending).
- ▶ Even if EIR were legally adequate, compliance with CEQA is not equivalent to consistency with the Delta Plan.



Policy G P1(b)(1): Coequal Goals

1. Providing a more reliable water supply for California
2. Protecting, restoring, and enhancing the Delta ecosystem

These goals “shall 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.”

Policy G P1(b)(1): Coequal Goals

- ▶ Where “full consistency with all relevant regulatory policies may not be feasible,” certifications of consistency must include “detailed findings” addressing a “determin[ation] that the covered action is consistent with the Delta Plan because, on whole, that action is consistent with the coequal goals.” (Cal. Code Regs., tit. 23, § 5002, subd. (b)(1).)
- ▶ Project is not fully consistent with regulatory policies, and is not, on the whole, consistent with the coequal goals with respect to:
 - ▶ Water quality
 - ▶ Protected species

Water Quality - Modeling Limitations

- ▶ EIR concludes no significant impacts to water quality based on “predictive models,” but the models are flawed and based on artificially narrow data sets (1-3 years of data).
- ▶ FEIR expressly recognizes uncertainties in the ability to predict impacts:
 - ▶ “flows and salinity in the Delta are dynamic, with historic data indicating large fluctuations between seasons and between years due to variation in precipitation, water management practices, and other factors. While modeling can replicate a substantial fraction of these dynamics, there is a limit to their capacity to fully replicate observed conditions.” (FEIR 3-5.)
 - ▶ “The modeling used to analyze potential salinity impacts of the Proposed Project is a regional model of the Delta and San Francisco Bay. As such, calibration of this model may result in some tradeoffs in simulation quality at specific locations. In areas closer to the model’s boundary, the model predictions are more sensitive to the model’s boundary conditions and can only replicate observations within the Delta to the degree that is provided by existing available data.”
 - ▶ Model replicates 67-80% of the EC variance at some locations . . .” (*Ibid.*)
 - ▶ “the current scientific understanding is not sufficient to make accurate predictions to determine the significance of direct, indirect, and cumulative impacts of the Proposed Project’s effects on dissolved organic carbon . . .” (FEIR Master Response Pg.3-22)

Water Quality - Salinity and Bromide

- ▶ The Certification acknowledges that “[f]or agricultural operations and municipal water facilities’ use, including RD 2068’s agricultural diversion . . . RMA modeling results showed that the Proposed Project is predicted to cause both decreases and increases in salinity and bromide concentrations (using electrical conductivity [EC] as a surrogate for salinity) both seasonally and spatially.” (Certification at 5.)
- ▶ Changes in salinity and bromide concentrations will impact water supply of municipal and agricultural diverters in the vicinity of the Project.
- ▶ Based on flawed modeling, EIR declares impacts less than significant.
- ▶ No mitigation to address potential impacts.



Water Quality - Mercury and Methylmercury

- ▶ EIR does not analyze the Project's potential to impact mechanisms that contribute to mercury methylation.
- ▶ DEIR says DWR is conducting studies to determine whether tidal wetlands “are a source or a sink of methylmercury,” and concludes that these studies show “that tidal wetlands do not export mercury or methylmercury in large amounts, although seasonal differences occur and imports and exports are heavily influenced by flow and whether a wetland is associated with a floodplain.”
- ▶ EIR recognizes that “[c]urrent mercury and methylmercury dynamics in tidal wetlands are not well understood, and until recently, few, if any studies existed that were able to collect mercury, methylmercury, and flow data with enough accuracy and precision to make realistic estimates of methylmercury dynamics in tidal wetlands.”
- ▶ FEIR adds reference to the Sacramento-San Joaquin Delta Mercury Control Program and Total Maximum Daily Load, then concludes impacts are less than significant.
- ▶ No mitigation to address potential impacts.

Water Quality - Invasive Aquatic Weeds

- ▶ Certification fails to adequately address invasive aquatic weeds, like water hyacinth, which can have substantial secondary impacts on water quality, including total dissolved oxygen.
- ▶ BIO-4 is inadequate:
 - ▶ No performance measures
 - ▶ Lists measures that may be taken “where determined necessary” and “with the goal of controlling populations.”
 - ▶ Calls for removal to be conducted “to control identified weed populations” and monitoring “to ensure that the procedures are effective,” but it is unclear who decides how to implement, and “control” and “effective” are not defined.



What happens if models prove incorrect, or invasives are not managed?

- ▶ Impacts to water quality threaten the ability of agricultural and municipal diverters to continue pumping water, thus impacting water supply.
- ▶ No current infrastructure in place to treat water for agricultural or municipal use if these impacts manifest.
- ▶ If agricultural and municipal users cannot treat the water, they cannot use it, and will be forced to identify alternative supplies.
- ▶ This is expressly inconsistent with the coequal goal of providing reliable water supply.

Protected Species - Pumping Impacts

- ▶ Project expressly aims to increase populations of Delta Smelt and other protected species.
- ▶ To avoid take/entrainment, diverters could be required to install costly upgrades (fish screens) or relocate intakes.
- ▶ Certification fails to address funding for these reasonably foreseeable impacts of the Project.
- ▶ Physical environmental impacts of construction required to protect against take/entrainment are not addressed in the Project description or EIR.



Impacts Related to Flooding

- ▶ Project calls for RD 2098 to play a key role in Operation and Maintenance (O&M), but fails to identify funding for that maintenance or address how maintenance will occur if RD 2098 cannot perform it.
- ▶ Certification fails to address risks of flooding and changes in emergency access.
- ▶ Potential loss of 40,000 acre-feet of flood storage.
- ▶ Potential impacts to local, regional, and FEMA flood plains.



Additional Issues

- ▶ Inadequate mitigation for biological impacts, flooding impacts, and impacts to agricultural land
- ▶ Agricultural impacts: EIR fails to analyze impacts to landowners outside of the Project footprint, instead cursorily concluding that “[n]o other property of private landowners will be damaged by the construction and operation of the Proposed Project.” (FEIR Response 12-21.)
- ▶ Best available science regarding water quality modeling
- ▶ Inadequate planning for adaptive management
- ▶ Potential introduction of or improved habitat for non-native species
- ▶ Inconsistencies with local land uses

In Summary . . .

- ▶ DWR has not presented substantial evidence that the Project is consistent with the Delta Plan.
- ▶ In fact, it is not consistent with several Delta Plan policies.
- ▶ Because it is not consistent with all regulatory policies, DWR must show that the Project, on the whole, is consistent with the coequal goals:
 - ▶ Providing a more reliable water supply for California
 - ▶ Protecting, restoring, and enhancing the Delta ecosystem
- ▶ The Project directly threatens water availability for agricultural and municipal diverters in the region, and is therefore not consistent with the coequal goals of the Delta plan.

Questions?

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