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

Appealed by:

Appellant Name	Appeal Number	Acronym
Liberty Island Access	C20215-A1	LIA
Solano County Water Agency	C20215-A2	SCWA
Reclamation District 2060 & Reclamation District 2068	C20215-A3	Districts
Central Delta Water Agency	C20215-A4	CDWA

In this Determination Regarding Appeal of the Certification of Consistency by the California Department of Water Resources for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project ("Determination"), the Delta Stewardship Council ("Council") finds that: 1) Appellants failed to show that the Certification of Consistency, in part, is not supported by substantial evidence ~~exists~~ in the record ~~before us~~ 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~~, in part,~~ with the Delta Plan~~, in part,~~ on the ~~specific~~ issues identified below for denial; and 2) Appellant LIA has shown that the Certification, in part, is not supported by substantial evidence ~~does not exist~~ in the record ~~before us~~ to support the Department's finding that the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project is consistent with the Delta Plan~~, in part,~~ on the ~~specific~~ issues identified for remand below. Because the Department's Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project is not supported by substantial evidence in the record, in part, we *remand the matter to the Department for reconsideration on the issues identified for remand* ~~*below*~~*in Section G of this Determination*, pursuant to Water Code section 85225.25. The Council also *dismisses*: 1) non-appealable issues and those outside the Council's jurisdiction; and 2) issues for which Appellant has failed to provide the required specificity.

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[1]—must certify to the Council that its action is consistent with the Delta Plan. (*Ibid.*)

2. Brief Description of Covered Action

The Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (referred to hereinafter as "Lookout Slough Project" or "Covered Action" or "Action") is a covered action. On February 22, 2021, the Department filed a Certification of Consistency for the Lookout Slough Project ("Certification" or "Certification of Consistency"). (*See* Certification.)

According to the Certification, 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, pp. 2-3).

The Certification 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, 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

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

Central Valley Flood Protection Plan, which calls for multi-benefit projects that expand the Yolo Bypass while incorporating ecosystem-enhancing features" (Certification, p. 2).

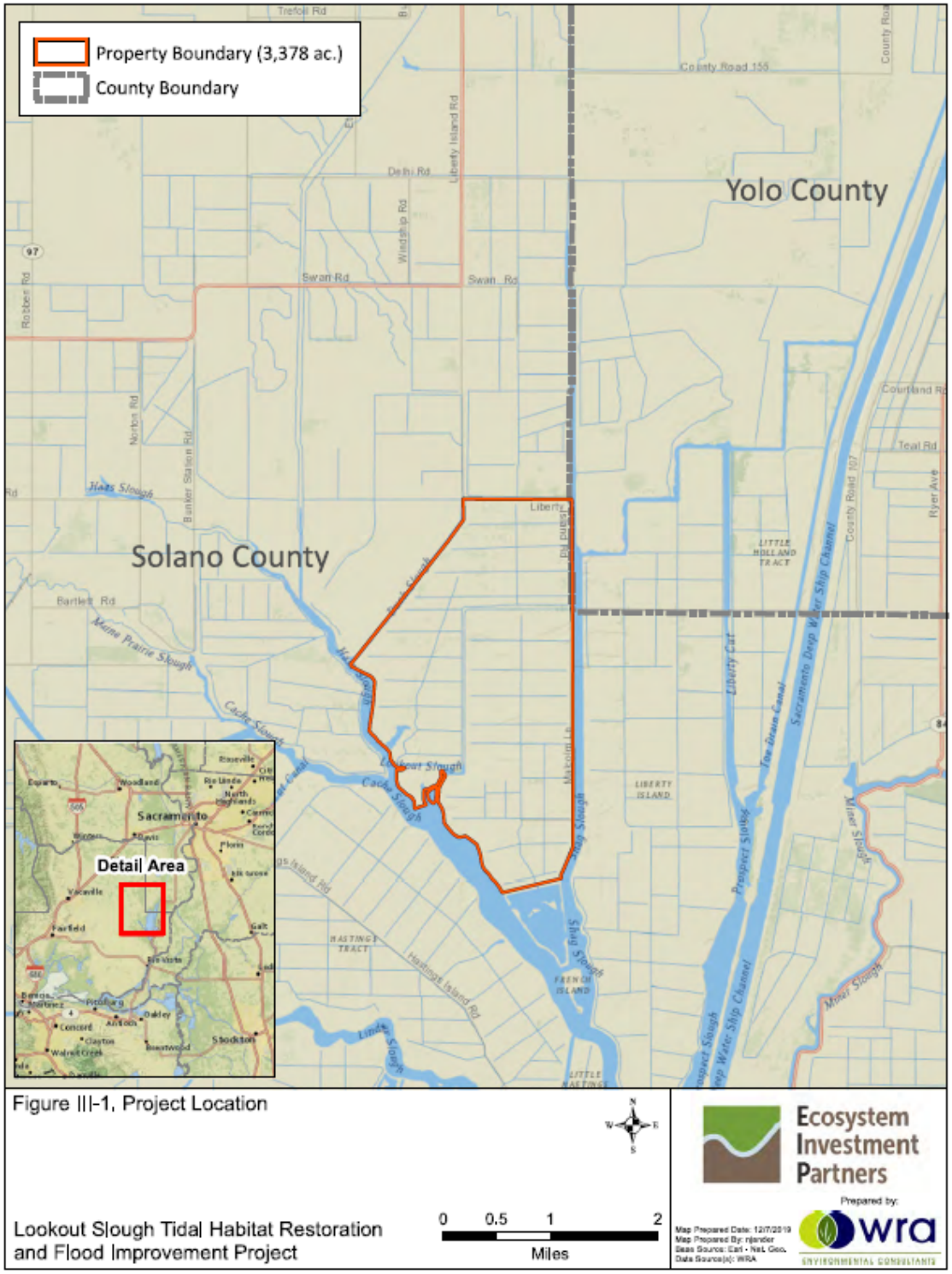

Figure 1. Location (Draft EIR, Certification Record LOS.4.00001, p. III-4)

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, pp. 2-3).

The Lookout Slough Project would be located on three properties: the Bowlsbey Property, the Liberty Farms Property, and the Vogel Property (Figure 2) (Certification, 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, p. 3). Lookout Slough is a man-made drainage channel that cuts through the site, separating the Bowlsbey and Liberty Farms Properties (Certification, p. 3). The Vogel Property is bounded by the Bowlsbey Property on its northern side, and is bounded on the east, south, and west by an agricultural levee (Certification, 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, 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, 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, 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, p. 2). The Duck Slough Setback Levee would become part of the SPFC and the Yolo Bypass West Levee System (Certification, p. 3).

According to the Certification, 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, 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, p. 2).

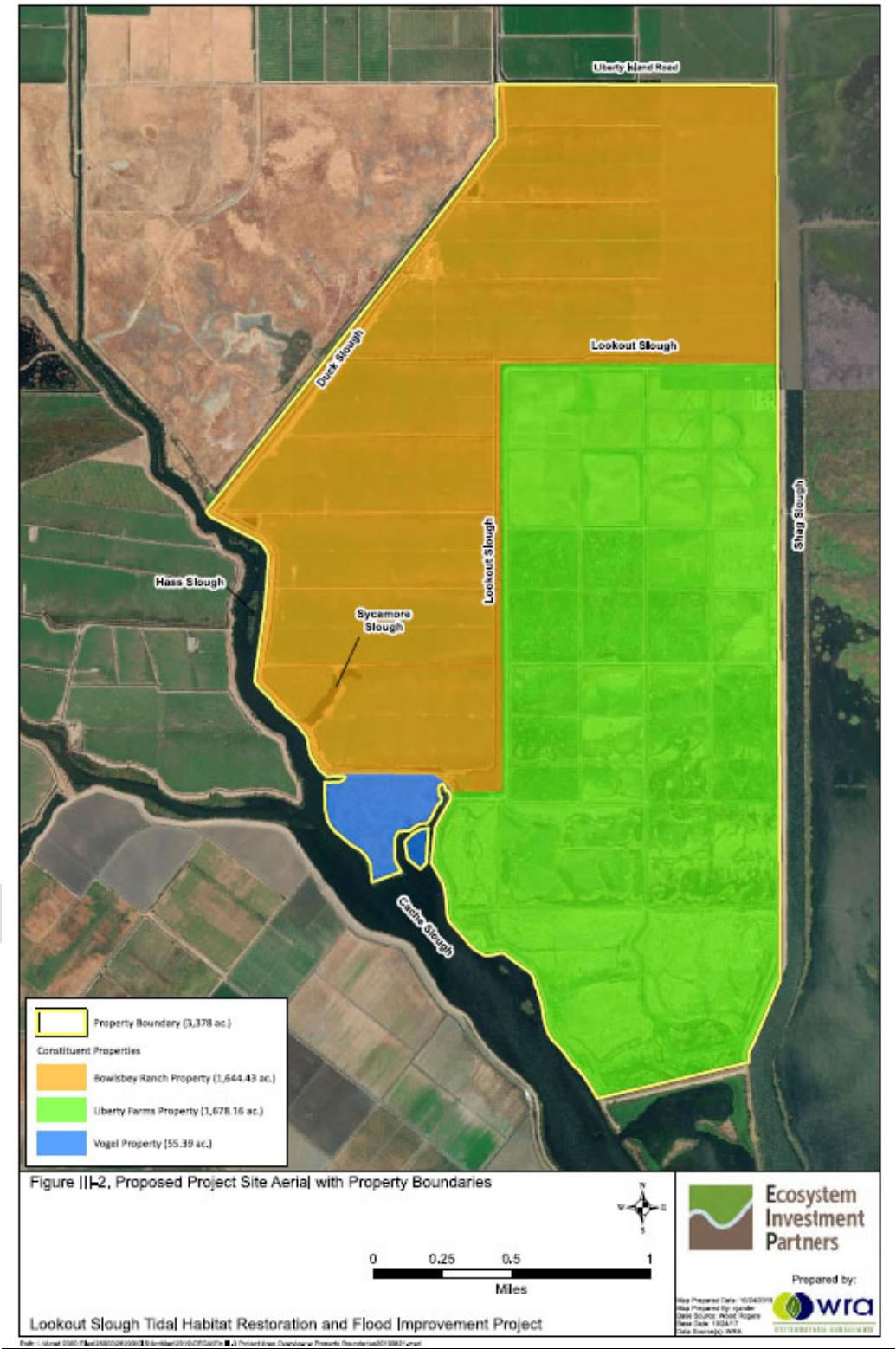

Figure 2. Site Aerial with Property Boundaries (Draft EIR, Certification Record LOS.4.00001, p. III-9)

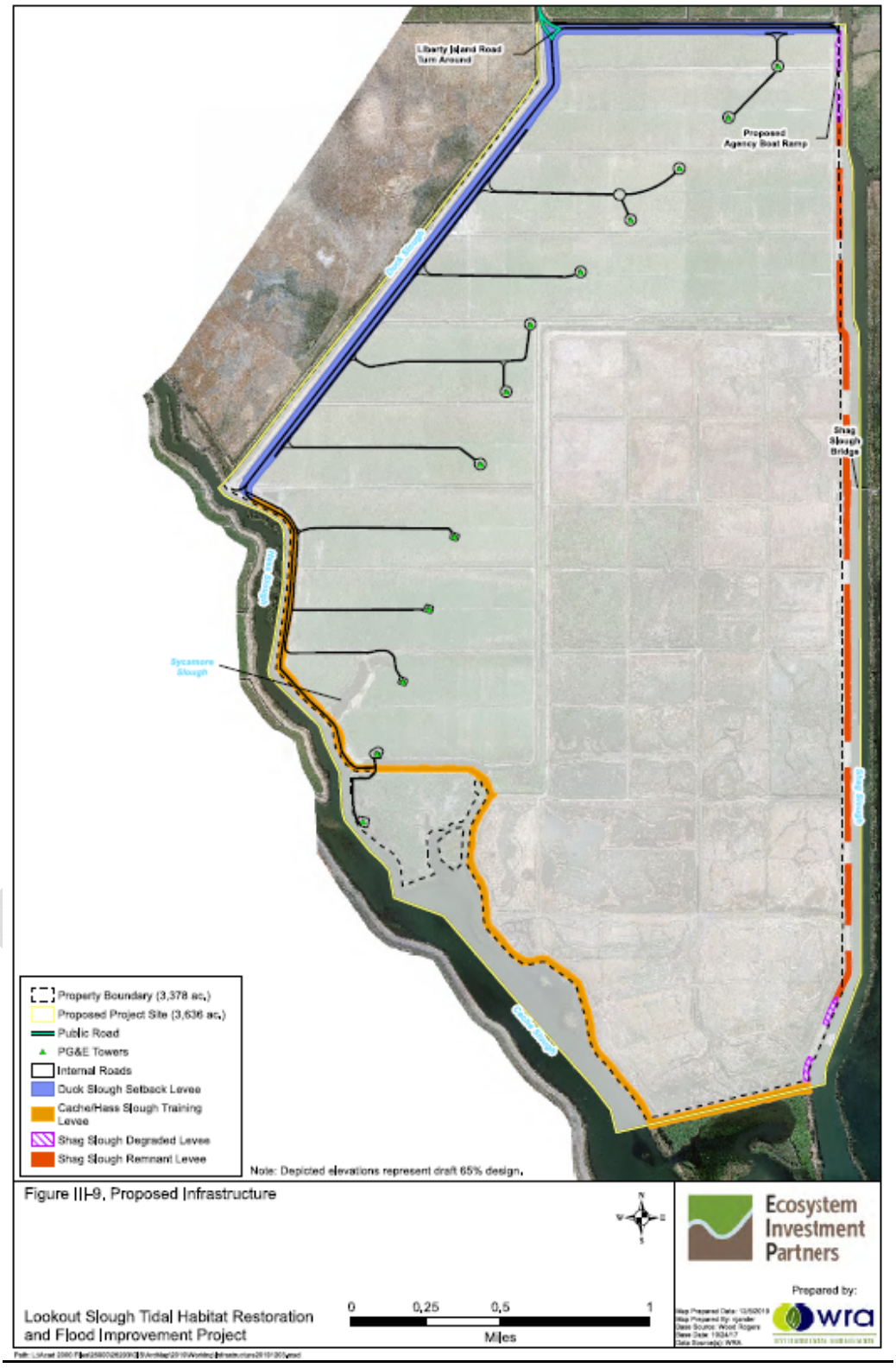
Liberty Island Road Turn Around
Proposed Agency Boat Ramp
Shag Slough Bridge
Duck Slough
Sycamore Slough
Property Boundary (3,378 ac.)
Proposed Project Site (3,636 ac.)
Public Road
PG&E Towers
Internal Roads
Duck Slough Setback Levee
Cache/Hass Slough Training Levee
Shag Slough Degraded Levee
Shag Slough Remnant Levee
Note: Depicted elevations represent draft 65% design.
Figure III-9. Proposed Infrastructure
Lookout Slough Tidal Habitat Restoration and Flood Improvement Project
0 0,25 0,5 1
Miles
Ecosystem Investment Partners
Prepared by:
wra

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

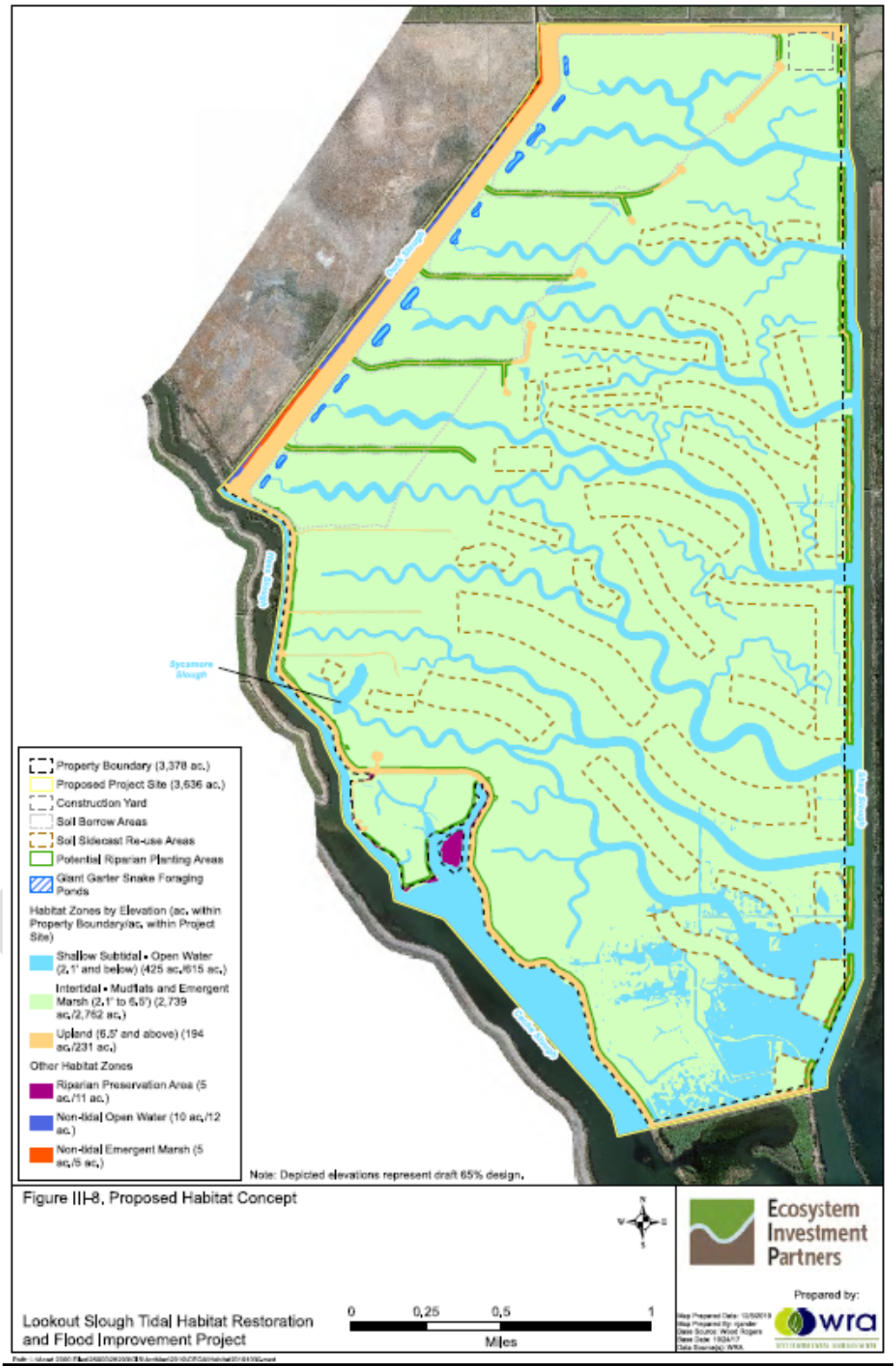
Property Boundary (3,378 ac.)
Proposed Project Site (3,636 ac.)
Construction Yard
Soil Borrow Areas
Soil Sidecast Re-use Areas
Potential Riparian Planting Areas
Giant Garter Snake Foraging Ponds
Habitat Zones by Elevation (ac. within Property Boundary/ac. within Project Site)
Shallow Subtidal - Open Water (2.1' and below) (425 ac./615 ac.)
Intertidal - Mudflats and Emergent Marsh (2.1' to 6.5') (2,739 ac./2,762 ac.)
Upland (6.5' and above) (194 ac./231 ac.)
Other Habitat Zones
Riparian Preservation Area (5 ac./11 ac.)
Non-tidal Open Water (10 ac./12 ac.)
Non-tidal Emergent Marsh (5 ac./5 ac.)
Note: Depicted elevations represent draft 65% design.
Figure III-8, Proposed Habitat Concept
Lookout Slough Tidal Habitat Restoration and Flood Improvement Project
0
0,25
0,5
1
Miles
Ecosystem Investment Partners
Prepared by:
wra

Figure 4. Proposed Habitat Concept (Draft EIR, Certification Record LOS.4.00001, p. III-31)

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.)

We received four timely appeals to the Certification from the following entities (Appellants or Appellant Groups):

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

The appeals were deemed filed on March 24, 2021. The Council has chosen to consolidate these appeals pursuant to Appeals Procedures § 31.

The Department certified the administrative record in this matter on April 5, 2021.[2] The Council held a fully remote-access two-day hearing on the appeals on May 20-21, 2021 ("May hearing") where the Department, the Delta Protection Commission, and the Appellants offered Letters and oral presentations; we also received public comments on the Certification and appeals.[3]

Upon conclusion of the May hearing, the Presiding Officer directed Council staff to prepare draft findings regarding the appeals based on the record and comments received in the matter, and to release that draft document to receive input on the draft findings. Staff's proposed draft findings for consideration were released for a 10-day public review period on June 18, 2021.

All comments on the June 18, 2021 Staff Draft Determination received by noon, Monday, June 28, 2021, as specified in the June 18, 2021 publication notice for the Staff Draft Determination, were considered in preparation of the Proposed Determination. Ensuing revisions were part of the Proposed Determination and shown

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

[3] The hearing was held remotely via Cal-Span and Zoom in accordance with Governor Newsom's March 12, 2020 Executive Order N-25-20 and March 17, 2020 Executive Order N-29-20.

as track changes in the redline version included as Attachment 2 to the staff report (part of the Council meeting packet). 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 its findings either denying an appeal or remanding a covered action to the agency within 60 days of the first hearing, which occurred on May 20-21, 2021. (Wat. Code, §§ 85225.20 and 85225.25.)

The Council held a second remote-access hearing on the appeals on July 15-16, 2021, and received comments from the Department, the Appellants, the Commission, and the public on the Proposed Determination.

Having reviewed the entirety of the record in this matter and following the hearing on the appeals conducted on July 15-16,2021, the Council has made its findings on the appeals as set forth below in Section F (Non-Appealable Issues & Issues Outside the Council's Jurisdiction) and Section G (Analysis & Findings) of this Determination. (*See* Cal. Wat. Code, §§ 85225.15, 85225.20.)[4]

B. BRIEF SUMMARY OF FINDINGS

The Appellants substantively challenged the Certification's findings of consistency with eight Delta Plan policies, one of which (G P1 (Cal. Code Regs., tit. 23, § 5002)), has four subdivisions. The Appellants challenged the Department's Certification under all four of the G P1 subdivisions. For clarity of analysis in this Determination, we treat the challenges under the four G P1 subdivisions as individual Delta Plan policy challenges (i.e., as if a total of eleven, rather than eight, Delta Plan policies are implicated).

The Council ~~also~~ dismissed certain issues because they were not appealable or within the Council's jurisdiction (Wat. Code, § 85225.20; Appeals Procedures § 15, subd. (c~~).~~

1. ~~In~~)). The following issues, discussed in more detail in Section ~~E~~F of this Determination ("Non-Appealable Issues and Issues Outside the Council's Jurisdiction"), ~~the following claims~~ are *dismissed* as not raising appealable issues and/or not being within the Council's jurisdiction:

    - Allocation of Proposition 1 Funds ~~under DP P2 and RR P1~~;
        - 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;

[4] The Council's vote will be reflected in the Council meeting summary, once approved.

- 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 11; ~~and~~
- Policy DP P2 (Cal. Code Regs., tit. 23, § 5011): Davis-Dolwig Act~~.~~;
- ~~In~~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. The Council remands the matter to the Department for reconsideration of the specific issues identified for remand and denies the appeals on the specific issues identified for denial as discussed in Section ~~F~~G of this Determination ("Analysis & Findings"~~), the Council~~ ") (Cal. Wat. Code, § 85225.25) and finds that:

   a. The Department's Certification of Consistency with respect to the following issues for the two Delta Plan policies below is *not supported* by substantial evidence in the record, as detailed in the analysis and findings in this determination~~:~~, and we therefore *remand* 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:[5]

         i. ~~LIA has shown that there is no substantial evidence in the record to demonstrate~~ that recreational uses of Liberty Island Road, the Shag

[5] We did not reach a conclusion regarding the issue of whether ~~the~~ siting ~~of~~ the ~~Covered Action~~Lookout Slough Project to avoid or reduce conflicts with existing uses was feasible because ~~there~~the Certification is ~~no~~not supported by substantial evidence in the record that the Department ~~considered~~ avoided or reduced conflicts with existing recreational uses ~~or analyzed whether there is conflict with such uses~~of Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Lookout Slough Project.

Slough Bridge, and Liberty Island Ecological Reserve (LIER) do not constitute existing uses;

ii. ~~LIA has shown that there is no substantial evidence in the record to demonstrate that the Lookout Slough Project~~that the Covered Action would not conflict with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER; and

iii. ~~LIA has shown that there is no substantial evidence in the record~~ that the Department avoided or reduced conflicts with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Lookout Slough Project.

b. The Appellants 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 five Delta Plan policies, and we therefore *deny* the portions of the appeals that challenge the Certification on these grounds:

- 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 ~~salinity and water quality~~ 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 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 do not apply to the Covered Action, and we therefore *deny* the portions of the appeals that challenge the Certification 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.

The ~~Council finds that:~~

~~1) substantial evidence exists in~~Appellants failed to provide the ~~record before us to support the Department's finding that the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project is consistent, in part, with the Delta Plan~~required specificity on the ~~specific~~following specified issues ~~summarized above and discussed in greater detail in Section F below; and~~ and we ~~*deny*~~therefore *dismiss* the appeals as to these issues~~; and~~

3. ~~2) substantial evidence does not exist in the record before us to support the Department's finding that the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project is consistent, in part, with the Delta Plan on the specific issues summarized above and discussed in greater detail in Section F below and we *remand the matter to the Department for reconsideration on the issues*, pursuant to Water~~ (Cal. Wat. Code ~~section~~, § 85225.~~25.~~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.

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.[6] (See

[6] In its June 28, 2021 letter, the Commission states that the Delta Reform Act does not place this obligation on Appellants. However, under established legal principles, the Department's actions, "like any

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. DELTA PROTECTION COMMISSION

The Commission has a unique and important role in representing the interests of Delta communities. (Commission's May 11, 2021 Letter, p. 1; Wat. Code, §§ 85085, subd. (a), 85200, subd. (b)(1), and 85301.) The architecture of the Delta Reform Act reflects this role and establishes a process for the Commission to provide recommendations to the Council on various issues. (Pub. Res. Code, § 29773.) That process requires us to adopt a recommendation if, in our discretion, we determine it to be feasible. (Id., § 29773, subd. (b).) The Delta Reform Act provides that "[a]ny person 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 or implementation of government-sponsored flood control programs to reduce risks to people and property in the Delta" may file an appeal no later than 30 days after a certification of consistency is submitted to the Council. (Wat. Code, §§ 85225.10(a) and 85225.15.)

Out of respect for both the Commission and the spirit of the Delta Reform Act, our Appeals Procedures also expressly encourage the Commission to provide testimony and comment "regarding an appeal." (Appeals Procedures, § 11.) On April 8, 2021, we issued a Notice of Public Hearing that incorporated language from our Appeals Procedures and invited the Commission to provide comments on the Lookout Slough Project appeals. On May 11, 2021, the Commission submitted written comments

agency action, comes to the court with a presumption of validity." (*Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1047.) Appellants have "the burden to show" that the agency action is invalid. (*Id*. at p. 1049.)

on the appeals of G P1(b)(2), G P1(b)(3), DP P2, and RR P1.[7] On May 20-21, 2021, the Executive Director of the Commission provided oral comments at the hearing. On June 28, 2021, the Commission submitted written comments on the June 18, 2021 Staff Draft Determination.[8]

Pursuant to the Appeals Procedures and the hearing notice, we may only consider comments and testimony from the Commission "regarding an appeal." Certain of the appeals filed against the Lookout Slough Project address G P1(b)(2), G P1(b)(3), DP P2, and RR P1; thus, we consider the Commission's arguments in the sections below only regarding appeal issues identified by Appellants related to those policies.

~~D.~~E. ADMINISTRATIVE RECORD

The Department certified the administrative record in this matter on April 5, 2021. 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 Appellants LIA, SCWA, and CDWA requested that additional documents be added to the record (LIA Appeal Letter, pp. 11-12; CDWA's May 7, 2021 Letter, pp. 1-3; SCWA's May 10, 2021 Letter, pp. 4-14; LIA's May 12, 2021 Letter; Department's May 12, 2021 Letter; Department's May 19, 2021 Email) 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). On May 25, 2021, CDWA submitted additional

[7] As noted in Exhibit C, the Commission's Attachment A is comprised of multiple documents and sources and is inadmissible as a whole because it does not meet the standards of admissibility for Section 29 of the Appeals Procedures. The Council is not required to speculate as to how each document should be assessed individually, and the Commission did not provide sufficient information to the Council for it to do so. (Cf. Cal. Evid. Code § 453(b).) Further, the Commission provided no evidence that Attachment A as a whole was part of the record before the Department pursuant to Section 10 of the Appeals Procedures. The Commission was provided notice and opportunity to provide additional information in the June 18, 2021 Staff Draft Determination, but it did not do so.

[8] As stated in section 11 of the Council's appeals regulations, the Council may only consider comments and testimony "regarding an appeal." Thus, the Council may only take into consideration the recommendations of the Commission regarding arguments raised by appellants. The reason for this is out of fairness to the certifying party. An appeal may be filed by any person and is required to be filed no later than 30 days after the submission of the certification of consistency. (Wat. Code sections 85225.10 and 85225.15; Appeals Procedures, paragraph 5). If the Council were to take into consideration arguments outside of the requisite 30-day time frame that were not raised by an appellant, the certifying party would be prejudiced.

information to substantiate their request to augment the record (CDWA's May 25, 2021 Letter).

The Department has objected to certain of those requests for admissions (Department's May 12, 2021 Letter, p. 2). In addition, the Department has objected to the contents of Appellants written submissions and hearing presentations on the grounds that they contain extra-record evidence (Department's May 25, 2021 Letter). On May 28, 2021, SCWA submitted a response to the Department's objection (SCWA's May 28, 2021 Letter).

In addition to the above requests, LIA, SCWA, the Districts, CDWA, the Department, and the Delta Protection Commission have cited to extra-record evidence in their written and oral presentations to the Council. When appropriate, the Council has evaluated whether to supplement the record or take official notice of this evidence pursuant to Appeals Procedures, Section 10 or Section 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.~~F. NON-APPEALABLE ISSUES ~~AND~~& ISSUES OUTSIDE THE COUNCIL'S JURISDICTION

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).)

Issues dismissed for failure to provide the required specificity are discussed in Section ~~F~~G ("Analysis ~~and~~& Findings"), below, within discussions for each applicable Delta Plan policy. Issues dismissed because the issue raised is not within the Council's jurisdiction or for failure to raise an appealable issue within the scope of the implicated Delta Plan policy are discussed in this Section ~~E~~F.

1. Allocation of Proposition 1 funds

Appellants raise issues related to allocation of Proposition 1 funds in regard to policies RR P1 and DP P2. For the reasons discussed below, these issues are dismissed because they raise non-appealable issues and are outside the Council's jurisdiction.

a. Policy DP P2 (Cal. Code Regs., tit. 23, § 5011): Allocation of Proposition 1 Funds ~~under DP P2~~

DP P2 ("Respect Local Land Use when Siting Water or Flood Facilities or Restoring Habitats") requires that covered actions "be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans" (23 CCR § 5011). Use of state funding is neither an "existing use" or a use "described or depicted in city and county general plans" as contemplated by DP P2.

Moreover, neither the legal obligations of State Water Contractors nor the Proposition 1 bond covenants are within the Council's jurisdiction. Therefore, CDWA's claim that Proposition 1 funding was misapplied to the Covered Action does not raise an appealable issue within the Council's jurisdiction and we *dismiss* the appeal as to this issue.

b. Policy RR P1 (Cal. Code Regs., tit. 23, § 5012): Allocation of Proposition 1 Funds ~~under RR P1~~

CDWA asserts that the Lookout Slough Project is inconsistent with ~~Delta Plan policies DP P2 and~~ RR P1 because it was "wrongly allocated $21.9 million in funding from Proposition 1 Delta levee funds" (CDWA Appeal Form, p. 7) and because it "misdirects the use of Proposition 1 funds intended for improvement [sic.] existing levees most impacted by potential earthquakes and sea level rise" (CDWA Appeal Form, p. 6). CDWA alleges that "under state law, it's the obligation of the state contractors to pay for that project" (May 20, 2021 Hearing Transcript, p. 125).

RR P1 applies to "…a proposed action that involves discretionary State investments in Delta flood risk management, including levee operations, maintenance, and improvements" (23 CCR § 5012). The funds utilized to support a project are only relevant to RR P1 in so much as to determine whether the project involves discretionary State investments that should meet the goals established by the regulation, not whether the use of such discretionary funds is appropriate. As a result, CDWA's assertion that the Department improperly allocated Proposition 1 funds for this Covered Action is outside the scope of determining consistency with RR P1 and does not raise an appealable issue within the Council's jurisdiction. We therefore *dismiss* the appeal as to this issue.

2. Policy DP P2 (Cal. Code Regs., tit. 23, § 5011): Disproportionate Impacts and Demographic Considerations

Appellant LIA raises the issue of disproportionate impacts and demographic considerations in regard to DP P2. For the reasons discussed below, these issues are dismissed because they raise non-appealable issues within the scope of DP P2.

LIA contends that the Lookout Slough Project will result in disproportionate impacts for low-income people (May 20, 2021 Hearing Transcript, p. 208, ll. 5-19), and

that "Frankly this is an environmental justice issue" (May 20, 2021 Hearing Transcript p. 208, ll. 20-21). LIA also refers to public comments on the Draft EIR, submitted by the California Department of Fish and Wildlife (CDFW~~,~~), which state that recreational impacts would disproportionately affect lower income individuals and communities (May 20, 2021 Hearing Transcript, p. 82, ll. 8-11; Final EIR, Certification Record LOS.3.00001, PDF p. 99). Similarly, the Delta Protection Commission emphasized that LIER is frequented "by working people" (May 20, 2021 Hearing Transcript, p. 35, l. 3).

DP P2 requires, in relevant part, certain actions to be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans. While we recognize that disproportionate impacts are salient concerns, they are not within the scope of DP P2. Therefore, LIA's claim that the Covered Action would have disproportionate impacts on low income people does not raise an appealable issue within the Council's jurisdiction and we *dismiss* the appeal as to this issue.

3. Policy DP P2 (Cal. Code Regs., tit. 23, § 5011): Delta Plan Recommendation 11

~~Appellants have~~In support of its DP P2 appeal, Appellant LIA has raised issues of consistency in regard to Delta Plan Recommendation 11. The Delta Plan describes its "working parts" as "recommendations" and "policies." (Delta Plan, ES-4.) "Recommendations call attention to tasks being done or to be done by others." (*Ibid*.) "Policies are legal requirements that anyone undertaking a significant project in the Delta must meet." (*Ibid*.)

Appellants LIA and the Delta Protection Commission have faulted the Lookout Slough Project for allegedly failing to comply with Delta Plan Recommendation 11 recommendations. (LIA Appeal Letter Exhibit B – Information Presented to DWR, PDF pp. 24; Commission's May 11, 2021 Letter, pp. 7-8; May 20, 2021 Hearing Transcript, p. 38, ll. 1-17 and p. 73, ll. 4-8).

However, Delta Plan Recommendations have not gone through the rulemaking process required by the Administrative Procedure Act. We wish to make it clear that we have not and will not use recommendations to assess the consistency of the Lookout Slough Project or any other covered action with the Delta Plan. To do otherwise would be to improperly convert the recommendations into underground regulations. (See *Center for Biological Diversity v. Dept. of Fish and Wildlife* (2015) 234 Cal.App.4th 214, 259.) Therefore, assertions raised in regard to consistency with Delta Plan Recommendation 11 do not raise an appealable issue and we *dismiss* the appeal as to this issue.

4. Policy DP P2 (Cal. Code Regs., tit. 23, § 5011): Davis-Dolwig Act

~~The~~In its comments on the appeals of DP P2, the Delta Protection Commission ~~provided in its comments~~alleges that the Department did not abide by an applicable state law, the Davis-Dolwig Act, which provides that, "The planning for public recreation

use...in connection with state water projects shall be part of the general project formulation activities of the Department of Water Resources" (Commission's May 11, 2021 Letter, p. 6-7; Wat. Code § 11911). The Commission asserts that Lookout Slough is a project as defined under the provisions of the Davis-Dolwig Act and that the Department has not completed the required recreation planning (Commission's May 11, 2021 Letter, p. 7).

The Council notes that these comments from the Delta Protection Commission were not raised on appeal. Per the Appeals Procedures and the hearing notice, we may only consider comments and testimony "regarding an appeal." (Appeals Procedures § 11.) As such, the Council finds that this is not an issue on appeal before the Council.

Moreover, the Council does not have authority to enforce the Davis-Dolwig Act. Compliance with the Davis-Dolwig Act is outside the Council's jurisdiction. Therefore, assertions that the Covered Action does not comply with the Davis-Dolwig Act do not raise an appealable issue within the Council's jurisdiction and we *dismiss* ~~these issues~~this issue.

5. Policy ER P2 (Cal. Code Regs., tit. 23, § 5006): Alternate Sea Level Rise Projections[9]

Appellant CDWA states, "Water Code Section 85320 required the DSC [Delta Stewardship Council] to include a comprehensive review and analysis of the [Bay Delta Conservation Plan] BDCP with possible sea level rise up to 55 inches (4 feet 7 inches)" (CDWA's May 3, 2021 Letter, p. 5). This reference is to the 2009 Delta Reform Act, Division 5, Chapter 2, and is a requirement for the review of the BDCP specifically. The BDCP is no longer an active project and is not part of this Covered Action.

ER P2 does not require consideration of 55 inches of sea level rise or any specific sea level rise projections. As noted in the regulatory language for Delta Plan Policy ER P2, habitat restoration must be carried out consistent with Delta Plan Appendix 3, which is Section II of the Draft Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions (California Department of Fish and Wildlife 2011). Appendix 3 provides narrative and background on habitats in the Bay-Delta estuary and describes development of a Delta Conservation Strategy Map. Development of Appendix 3 and elevation data used in the Appendix 4 map assumed a potential 55-inch sea level rise over the next 50-100 years. With regard to sea level rise, Delta Plan Appendix 3 states, in relevant part:

> "…the areas of the Delta that are of highest priority for restoration include lands that are in the existing intertidal range, floodplain areas that can be seasonally inundated, and transitional and upland habitats. Assuming a rise in

[9] Note: Analysis and findings for this issue were moved from Section G ("Analysis & Findings") in the June 18, 2021 Staff Draft Determination to this Section F ("Non-Appealable Issues & Issues Outside the Council's Jurisdiction") with minimal, non-substantive revisions for clarity.

sea level of approximately 55 inches over the next 50-100 years (Cayan et al. 2009), these areas would become shallow subtidal, seasonally inundated floodplain, and intertidal and upland habitats respectively" (Appendix 3, Habitat Restoration, Delta Plan, pp. 30-31).

The May 3, 2021 CDWA statement also states that "The Governor's single tunnel plan references a 10 foot rise in sea level. See Attachment E hereto." (CDWA's May 3, 2021 Letter, p. 5). Attachment E references a standard for a separate proposed project, which is neither a requirement of nor relevant to consideration of ER P2 for the Lookout Slough Project (CDWA's May 3, 2021 Letter, Exhibit E, PDF pp. 19-22). Sea level rise projections alternate to ER P2 requirements are not a matter for the Council to decide in the matter of consistency with ER P2. The Council may consider only whether substantial evidence supports the Department's findings that the Covered Action is consistent with ER P2, which requires consistency with Delta Plan Appendices 3 and 4, neither of which require the consideration of sea level rise nor alternate sea level rise projections. Therefore, the Council finds that CDWA failed to identify an appealable issue within the scope of ER P2 and we *dismiss* the appeal as to the issue of sea level rise.

6. Policy ER P2 (Cal. Code Regs., tit. 23, § 5006): Propagation of Predatory Fish Species[10]

Appellant CDWA argues that the Covered Action "…is also likely to propagate predatory species of fish" (CDWA Appeal Form, p. 5). In support, CDWA cites to Vogel (2011) (CDWA's May 3, 2021 Letter, p. 6; Final EIR, Certification Record LOS.3.00001, PDF p. 190). CDWA provided the full article to the Council and excerpts of Vogel (2011) are included as an attachment to CDWA's comments in response to the Draft EIR (Final EIR, Certification Record LOS.3.00001, PDF pp. 153-195); in Response 10-8 the Department states that this report, "was reviewed but not considered as relevant" (Final EIR, Certification Record LOS.3.00001, PDF p. 164).

CDWA asserts that the Covered Action has the potential to propagate invasive species but does not specify how this is relevant to the requirements of ER P2, Delta Plan Appendix 3, or Delta Plan Appendix 4. ER P2 requires that covered actions be sited at appropriate elevations but does not require analysis related to the propagation of predatory species. Therefore, the Council finds that CDWA failed to identify an appealable issue within the scope of ER P2 and we *dismiss* the appeal as to the issue of propagation of predatory fish species.

[10] Note: Analysis and findings for this issue were moved from Section G ("Analysis & Findings") in the June 18, 2021 Staff Draft Determination to this Section F ("Non-Appealable Issues & Issues Outside the Council's Jurisdiction") without revision.

7. 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[11]

Appellants SCWA and the Districts raise the lack of a detailed plan for operation and maintenance, capital funding, and on-site personnel to ensure facility maintenance and manage flood risk as the core reason that the Covered Action is inconsistent with RR P1. (Districts Appeal Letter, p. 9; SCWA Appeal Letter, p. 9). In oral comments at the May hearing, the Districts state that "revenues are not adequate for it [RD 2098] to do that work and DWR has not addressed where 2098 will ultimately get that money" (May 20, 2021 Hearing Transcript, p. 105). The express language of RR P1 does not require a funding plan or the details identified by the appellants. Consequently, SCWA and the Districts have not raised an appealable issue within the scope of RR P1.

~~F.~~G. ANALYSIS & FINDINGS

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

1. Policy G P1(b)(1) (Cal. Code Regs., tit. 23, § 5002 subd. (b)(1)): Coequal Goals)): Coequal Goals

The Department states that G P1(b)(1) does not apply to the Covered Action. Appellants SCWA and Districts argue that because the Covered Action is not consistent with all Delta Plan policies, the Department should have demonstrated that the Action is consistent with the coequal goals. For the reasons discussed below, the Council finds that G P1(b)(1) does not apply to the Covered Action, and so demonstration of consistency is not required. Accordingly, we *deny* the appeals as to this policy.

a. Policy Requirements

G P1, subdivision (b)(1), requires that a covered action be consistent with each Delta Plan policy that it implicates. Subdivision (b)(1) recognizes an exception, however, that "in some cases, based upon the nature of the covered action, full consistency with all relevant regulatory policies may not be feasible." In those cases, "the agency that files the certification of consistency may nevertheless determine that the covered action is consistent with the Delta Plan because on whole, that action is consistent with the coequal goals. That determination must include a clear identification of areas where consistency with relevant regulatory policies is not feasible, an explanation of the reasons why it is not feasible, and an explanation of how the covered action

[11] Note: Analysis and findings for this issue were moved from Section G ("Analysis & Findings") in the June 18, 2021 Staff Draft Determination to this Section F ("Non-Appealable Issues & Issues Outside the Council's Jurisdiction") with minimal, non-substantive revisions for clarity.

nevertheless, on whole, is consistent with the coequal goals." (Cal. Code Reg., tit. 23, § 5002, subd. (b)(1).) The Delta Plan defines "feasible" to mean "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors." (Cal. Code Reg., tit. 23, § 5001, subd. (p).)

b. Certification

The Department states that G P1(b)(1) is not applicable to the Lookout Slough Project (Certification G P1(b)(1) Finding, p. 4). The Department does not identify in the Certification any area where consistency with a Delta Plan policy that it deems applicable is not feasible.

Nevertheless, in the answer justification offered for this policy, the Department offers an alternative finding that "... the Proposed Project is consistent with the Delta Plan's Coequal Goals through restoration of native ecosystem habitats and functions, protecting approximately 3,400 acres of open space in permanence comprising approximately 3,165 acres of tidal marsh and subtidal habitats and 149 acres of seasonal floodplain habitat, partially fulfilling DWR's State Water Project/Central Valley Project restoration obligations" (Certification G P1(b)(1) Finding, p. 4).

c. Appeal and Analysis

The Council received appeals regarding the Department's Certification of Consistency with GP 1(b)(1) from the following parties:[12]

- Solano County Water Agency (SCWA)
- Reclamation District 2060 & Reclamation District 2068 (Districts)

Appellant SCWA asserts that the Covered Action is inconsistent with this policy. Specifically, SCWA contends that "…the Project has direct adverse impacts upon (i) water quality and (ii) endangered species concerns to existing municipal and agricultural intakes in close hydrodynamic proximity to the Project…" (SCWA Appeal Letter, p. 2). The Districts make similar assertions, stating "The Project conflicts with the co-equal goals, set forth at section 5002(b)(1), as it will have direct adverse impacts on water quality, and will adversely impact intakes that are critical to agricultural and municipal diverters" (Districts Appeal Letter, p. 1). The Districts further contend that the Department cannot make a finding of consistency with this policy because it failed to "…analyze the impacts to water quality and to water users in the Delta" (Districts Appeal

[12] While appellants LIA and SCWA asserted inconsistency with the coequal goals during the Council hearing on May 20, 2021, neither party formally appealed G P1(b)(1). Therefore, these statements are not considered further here. Similarly, the Delta Protection Commission and several public commentors submitted letters and/or provided oral statements during the Council hearing on May 20, 2021 and May 21, 2021 concerning potential inconsistencies with the coequal goals. These statements are also not appeals and therefore are not considered by the Council as such.

Letter, p. 1). The Council acknowledges that appellants have raised these issues. However, first we must consider the applicability of G P1(b)(1).

In its Certification, the Department states that G P1(b)(1) is not applicable. Appellants SCWA and the Districts argue that the Lookout Slough Project is inconsistent with G P1(b)(1) and argue that it is therefore applicable.[13] The Department contends that the Covered Action is consistent with all Delta Plan policies and makes no attempt to show "a clear identification of areas where consistency with relevant regulatory policies is not feasible, an explanation of the reasons why it is not feasible, and an explanation of how the covered action nevertheless, on whole, is consistent with the coequal goals," as required by GP 1(b)(1). Because the Department has not met the requirements to rely upon the exception set forth in GP 1(b)(1), Appellants' arguments are moot. The Council notes, however, that SCWA and the Districts have not cited to specific evidence in the record that would contradict the Department's finding that the policy does not apply to the Covered Action. Furthermore, in its May 3, 2021 Letter, the Department has cited to ~~substantial~~ evidence in the record in Final Environmental Impact Report (EIR) Chapter 3 and Final EIR Appendix X with regard to the water quality and endangered species issues raised by appellants.

d. Conclusion

The Department maintains that G P1(b)(1) does not apply to the Lookout Slough Project, and does not identify any area where consistency with a Delta Plan policy is not feasible, as is required to utilize the exception articulated in G P1(b)(1). Appellants SCWA and the Districts argue that G P1(b)(1) does apply and that the Covered Action is inconsistent with G P1(b)(1). Appellants SCWA and the Districts have failed to show that ~~there~~the Certification is ~~no~~not supported by substantial evidence in the record ~~to support the Department's finding~~ that G P1(b)(1) does not apply. Therefore, we *deny* the appeals.

[13] G P1(b)(1) requires that covered actions be consistent with all applicable Delta Plan policies, not that covered actions also must show compliance with "the coequal goals." The Council made this intent clear during the 2013 Delta Plan rulemaking process, when it stated: "covered actions need to be consistent with the Delta Plan and do so by being consistent with each of the regulatory policies contained in Article 3." (Council Responses to Comments Received During the 15-day Notice Period April 8, 2013 through April 22, 2013, comment 6.) Indeed, the first version of G P1(b)(1) that the Council released for public comment stated that "*[c]overed actions must be consistent with the coequal goals, as well as* with each of the regulatory policies contained in Article 3 implicated by the covered action." (Emphasis added.) Several agencies (including the Department) commented that this language was ambiguous; thus, the Council changed the language to the current text of G P1(b)(1), thereby clarifying that covered actions must be consistent with the Delta Plan's policies.

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

The Department certifies that the Lookout Slough Project is consistent with Delta Plan Policy G P1(b)(2). Three Appellants (LIA, SCWA, and the Districts) raise substantive arguments that it is not. This analysis considers the Appellants' arguments that specific Lookout Slough Project mitigation measures are applicable but are not equally or more effective than applicable mitigation measures adopted and incorporated into the Delta Plan. For the reasons discussed below, the Council finds that the Appellants failed to show that the Certification of Consistency with G P1(b)(2) is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(2). We therefore *deny* the appeals as to this policy.

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 its certification of consistency, the Department identifies Lookout Slough Project Mitigation Measures that it states 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.

For example, under CEQA, where an environmental analysis concludes that a project has no potential significant impacts, CEQA does not require mitigation measures. (Pub. Res. Code § 21081, subd. (a)(1); Kostka & Zischke, *Practice Under the Cal. Environmental Quality Act* (Cont. Ed. Bar 2018) § 18.3.) In this example, for purposes of G P1(b)(2), mitigation would not be "applicable," because it was not

required under CEQA. Mitigation also is not required if measures are included in the project to reduce significant impacts. (*See* CEQA Guidelines § 15126.4(a)(1)(A) (Cal. Code Regs., tit. 14, § 15126.4(a)(1)(A)) (distinguishing between mitigation measures and measures proposed to be included in the project).) Where the facts of the specific Covered Action show that environmental impacts will not occur because the project will be designed, constructed and/or operated in such a manner that no significant environmental impact will occur, the Delta Plan Measures are not required and as a result are not applicable to the Covered Action under G P1(b)(2).

The Council does not adjudicate the adequacy of an EIR under CEQA. To the extent there may be disagreement as to the validity of a finding in the EIR, that is outside the Council's jurisdiction and should be addressed through the CEQA process.

b. Certification

In its Certification, the Department states that the Covered Action is consistent with this policy and provides a "Mitigation Equivalency Table" (Certification G P1(b)(2) Finding, p. 6; Certification Attachment 7 – Mitigation Equivalency Table). This table includes each Delta Plan Mitigation Measure that the Department has deemed applicable, identifies for each such measure the Lookout Slough Project Mitigation Measures that the Department considers to be equally or more effective, and provides a brief narrative explanation of that finding (Certification Attachment 7 – Mitigation Equivalency Table, pp. 1-35).

The Mitigation Equivalency Table includes material from and references to the project Draft EIR, Final EIR, and Avoidance and Minimization Measures from the Section 7 Biological Assessments for the Covered Action that were submitted to the U.S. Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service (NMFS). In its Mitigation Equivalency Table, the Department identifies the substantial evidence it claims supports its G P1(b)(2) finding for each measure. The substance of the Lookout Slough Project EIR mitigation measures ("Project mitigation measures") and environmental commitments is summarized in the Lookout Slough Project Mitigation Monitoring and Reporting Program (MMRP) prepared by the Department in accordance with CEQA requirements. (MMRP, Certification Record LOS.2.00002) The MMRP draws upon mitigation measures set forth in the Draft EIR, Final EIR, and Adaptive Management and Monitoring Plan (AMMP) for the Covered Action, which are cited to by the Department under individual Project mitigation measures included in the Mitigation Equivalency Table (Certification Attachment 7 – Mitigation Equivalency Table, pp. 1-35).

c. Appeal and Analysis

The Council received appeals regarding the Department's Certification of Consistency with GP 1(b)(2) from the following parties:

- Liberty Island Access (LIA)
- Solano County Water Agency (SCWA)

- Reclamation District 2060 & Reclamation District 2068 (Districts)

The Appellants contend both that the Department failed to include several applicable mitigation measures, and that the Department failed to include mitigation measures that are equally or more effective than applicable Delta Plan measures. The Council may consider only whether the Lookout Slough Project is consistent with the Delta Plan—in the immediate context, whether substantial evidence supports the Department's findings that each challenged Lookout Slough Project Mitigation Measure is equally or more effective than an *applicable* Delta Plan Mitigation Measure. This analysis considers ~~substantial~~ evidence in the record for Lookout Slough Project Mitigation Measures that Appellants specifically identify in their appeals.

Below, we consider the 11 Delta Plan Mitigation Measures that the Appellants identify in their appeals of this policy. Mitigation measures are listed in the order they appear in the Mitigation Equivalency Table (Certification Attachment 7 – Mitigation Equivalency Table, pp. 1-35). Many Delta Plan Mitigation Measures include multiple components and lengthy text. For each Delta Plan Mitigation Measure considered here, the Council has paraphrased select, relevant components in order to concisely frame the discussion. Please see Delta Plan Appendix O for the full text of each appealed Delta Plan Mitigation Measure (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, PDF pp. 1-68).

i. Delta Plan Mitigation Measure 3-1

Delta Plan Mitigation Measure 3-1 requires, in relevant part, that typical construction mitigation measures and best management practices (BMPs) are used in the construction of all new facilities (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, PDF pp. 9-10). This measure has several components, including but not limited to storm water control measures to prevent erosion, minimization of sediment contaminant bioavailability (e.g., methylmercury production), and BMPs to avoid or reduce suspended sediment.

The Districts appeal the Certification as to this Delta Plan Mitigation Measure, raising two main assertions: (1) that the Covered Action fails to adequately mitigate impacts to methylmercury concentrations, and (2) that the Covered Action fails to adequately mitigate for impacts to a range of other water quality variables.

(a) Methylmercury

With regard to methylmercury, the Districts assert that the Department "…fails to adequately mitigate the Project's significant impacts to methylmercury concentrations, which already exceeds total maximum daily load at the Project site" (Districts Appeal Letter, p. 6). No specific citation to evidence in the record is included to support this assertion. The Department cites to research that "…suggest that tidal wetlands do not export mercury or methylmercury in significant amounts" (Certification Attachment 7 – Mitigation Equivalency Table, p. 2). In its May 3, 2021 Letter, the Department further clarifies that this issue is discussed in the Final EIR (Department's May 3, 2021 Letter, p

20; Final EIR, Certification Record LOS.3.00001, p. 3-18). This evidence is considered in the following paragraph. The Department states that the area is currently impaired by methylmercury due to historic mining operations and that "current 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" (Final EIR, Certification Record LOS.3.00001, p. 3-18).

The Department includes references to two Department reports (DWR 2015, Certification Record – Final EIR References, p. 3-18, FN#18; DWR 2020, Certification Record – FEIR References, p. 3-18, FN#19). These reports include findings for methylmercury and total mercury imports and exports in four tidal wetlands in the region: Yolo Wildlife Area Tidal Wetland, Blacklock Tidal Wetland, North Lindsey Slough Tidal Wetland, and the Westervelt Cosumnes River Tidal Wetland (*Ibid.*). The Department states that based on findings summarized in the referenced reports, the Project would have a less-than-significant impact on methylmercury concentrations in the Delta (Final EIR, Certification Record LOS.3.00001, pp. 3-18). The Final EIR in turn cites to the Draft EIR sections IV.D-46 and IV.D 87-88. These Draft EIR sections cite to the requirements of Delta Plan Policy G P1(b)(2) and identify that the Project's impact to methylmercury food web accumulation would be less-than-significant.[14]

As discussed above, where an environmental analysis concludes that no potential significant impact would occur, CEQA does not require mitigation measures. Therefore, there is no applicable Delta Plan Mitigation Measure required for this specific impact area. Nevertheless, the Districts have not raised any specific contention that would contradict these reports or cited to other specific evidence in the record supporting their contention that the Covered Action "fails to adequately mitigate the Project's significant impacts to methylmercury concentrations" (Districts Appeal Letter, pp. 6~~)..~~).

(b) Other water quality variables

With regard to other water quality variables, the Districts assert that, "The Project also fails to adequately mitigate the Project's significant impacts to salinity, bromide, dissolved organic carbon, dissolved oxygen, turbidity, and water temperature" (Districts Appeal Letter, pp. 6-7). The Districts assert that for this mitigation measure, the Department relies on Project Mitigation Measure HYDRO-1, but that the Department's mitigation measure "…simply states that the contractor in charge of the Project will obtain a NPDES [National Pollutant Discharge Elimination System] permit, thereby

[14] The Department identifies water quality as an area with potential cumulative impacts, noting "Hydraulic changes from restoration, levee modification, and other related projects detailed in Table V-2 have the potential to alter regional water quality metrics, particularly salinity and methylmercury" (Draft EIR, Certification Record LOS.4.00001, p. V-13). However, in the Draft EIR, the Department states that these "impacts to hydrology and water quality would be less than cumulatively considerable" (Draft EIR, Certification Record LOS.4.00001, p. V-14). Such cumulative impacts are also not before the Council and, setting aside the Department's statement in the Draft EIR, are not relevant here.

deferring analysis of BMPs [Best Management Practices]" (Districts Appeal Letter, p. 6). The Districts further contend that these impacts have the potential to be caused by "altering the tidal flux by breeching levees and changing tidal conditions" and could impact water quality near a district point of diversion" (Districts Appeal Letter, p. 7). As support for this contention, the Districts cite to literature on bromide in the United States (Davis et al. 2004). This document is not included in the record, and there is no evidence that it was before the Department at the time of certification.

The Council notes that Delta Plan Mitigation Measure 3-1 does not include requirements to mitigate for water quality generally, including variables such as dissolved oxygen, water temperature, salinity, bromide, or dissolved organic carbon. Rather, Mitigation Measure 3-1 describes mitigation and best practices to limit sediment and sediment-associated contaminants. However, setting this aside, the Department has included additional actions that it would take as part of this measure that were not acknowledged in the Districts' appeal (Certification Attachment 7 – Mitigation Equivalency Table, p. 3). Specifically, the Department states that "The Contractor will adhere to SWPPP [Storm Water Pollution Prevention Plan] measures, Central Valley Regional Water Quality Control Board (CVRWQCB) Sec. 401 Certification and Waste Discharge Requirements (WDR), and internal DWR standards and protocols" (Certification Attachment 7 – Mitigation Equivalency Table, p. 3).

(c) Bromide, salinity, and turbidity

In their appeal, the Districts also assert that the Covered Action fails to adequately mitigate for impacts to bromide, salinity, and turbidity (Districts Appeal Letter, p. 6). In its May 3, 2021 Letter, the Department notes that Delta Plan Mitigation Measure 3-1 does not focus on water quality generally, but rather on "sediment discharge" (Department's May 3, 2021 Letter, p. 20). Nevertheless, the Department cites to Final EIR Master Response 3 and Final EIR Appendix X, which includes modeling findings for bromide and salinity impacts (Final EIR, Certification Record LOS.3.00001, pp. 3-6; Final EIR, Certification Record LOS.3.00001, Appendix X). With regard to salinity, the Department determines that the Project would have a less-than-significant impact (Final EIR, Certification Record LOS.3.00001, pp. 3-6). With regard to turbidity (sediment), the Department states that the Project contractor will:

> "…adhere to [Clean Water Act] Sec. 404 permit avoidance and minimization measures for protection of water quality and erosion control and general construction BMPs. The Contractor will also adhere to stormwater pollution control measures, Central Valley Regional Water Quality Control Board Section 401 Certification and Waste Discharge Requirements, and internal DWR standards and protocols" (Department's May 3, 2021 Letter, p. 20).

The Department states that there are no regulatory water quality standards for bromide and cites to modeling conducted for the Final EIR (Department's May 3, 2021 Letter, p. 20). The Final EIR section referenced in the Department's Letter states, in part, that "results of the hydrodynamic modeling ([Final EIR] Appendix X) show the

Proposed Project would result in relatively small increases and decreases in bromide" (Final EIR, Certification Record LOS.3.00001, pp. 3-11). However, Delta Plan Mitigation Measure 3-1 does not include a requirement to mitigate specifically for bromide.[15]

(d) Best management practices

Lastly, the Districts contend that best management practices (BMPs) have been deferred. However, the Districts do not identify any Delta Plan Mitigation Measures, including Delta Plan Mitigation Measure 3-1, for which the identified BMPs fall short of the "equally or more effective" standard, nor do they argue that these BMPs are otherwise inconsistent with the Delta Plan. The Districts therefore have failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(2) for Delta Plan Mitigation Measure 3-1 as to BMPs.

(e) Conclusion

The Districts have failed to show that Delta Plan Mitigation Measure 3-1 is applicable to the Lookout Slough Project for multiple water quality variables, including dissolved oxygen, water temperature, salinity, bromide, and dissolved organic carbon. In addition, for the other areas discussed above, the Districts have failed to show that Project Mitigation Measure HYDRO-1 is not equally or more effective than Delta Plan Mitigation Measure 3-1. Therefore, with regard to Delta Plan Mitigation Measure 3-1, the Council finds that the Districts 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).

ii. Delta Plan Mitigation Measure 4-1

Delta Plan Measure 4-1 requires, in relevant part, advanced mitigation planning for ecosystem restoration prior to construction and an invasive species management plan for projects that could lead to introduction or facilitation of invasive species management (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, PDF p. 11-13).[16]

The Department states in the Mitigation Equivalency Table that, when considered together, Project Mitigation Measures BIO-1, BIO-2, BIO-4, and Avoidance and Minimization Measures detailed and finalized in Section 7 consultation, Section 401, Section 404, and CDFW Section 1600 permit applications are equally or more effective than Delta Plan Mitigation Measure 4-1, (Certification Attachment 7 – Mitigation Equivalency Table, pp. 3-5).

[15] Bromide concentrations are also addressed under analyses for Delta Plan policies G P1(b)(3) and DP P2.

[16] The Districts also refer to Project Mitigation Measure BIO-5G with regards to Delta Plan Mitigation Measure 4-1. BIO-5G includes mitigation related to Valley Elderberry Longhorn Beetle and is not relevant here, but is considered below under Delta Plan Mitigation Measures 4-2 and 4-3.

Project Mitigation Measure BIO-1 establishes replant ratios for riparian vegetation and woodland during construction (MMRP, Certification Record LOS.2.00002, p. 6), BIO-2 presents measures for avoiding, preserving, and re-planting special-status plants during construction (MMRP, Certification Record LOS.2.00002, pp. 6-7), and BIO-4 requires invasive species abatement (MMRP, Certification Record LOS.2.00002, p. 9).

The Districts and SCWA contend that the Department fails to propose equally or more effective mitigation than Delta Plan Measure 4-1. SCWA asserts that without a "dedicated invasive species management plan", the Covered Action is inconsistent with Delta Plan Mitigation Measure 4-1 (SCWA Appeal Letter, p. 4). Similarly, the Districts state that, "Measure 4-1 requires development and implementation of an invasive species management plan... This Project requires such a plan, but DWR has not prepared one" (Districts Appeal Letter, p. 5). The Districts also state that, "BIO-1, BIO-4, and BIO-5G are inadequate" (Districts Appeal Letter, p. 4, Districts May 10, 2021 Letter, p. 9). These assertions are analyzed separately below.

(a) Invasive species management

Delta Plan Mitigation Measure 4-1 states that, "The [invasive species management] plan shall ensure that invasive plant species and populations are kept below preconstruction abundance and distribution levels," be developed using best available science, and that it should include the following elements:

- "Nonnative species eradication methods (if eradication is feasible)
- Nonnative species management methods
- Early detection methods
- Notification methods
- Best management practices for preconstruction, construction, and post construction periods
- Monitoring, remedial actions and reporting requirements
- Provisions for updating the target species list over the lifetime of the project as new invasive species become potential threats to the integrity of the local ecosystems" (Appendix O, Mitigation and Monitoring Reporting Program, Delta Plan, PDF pp. 12 – 13).

Appellants SCWA and the Districts argue that the Department's omission of an invasive species management plan makes the Covered Action inconsistent with G P1(b)(2) with respect to this issue. The Districts specifically refer to Lookout Slough Project Mitigation Measure BIO-4 (Districts Appeal Letter, p. 4; Districts' May 10, 2021 Letter, pp. 10-11), and both the Districts and SCWA cite to a Council comment letter on the Draft EIR to support their assertions (Districts Appeal Letter, p. 4; SCWA's May 10, 2021 Letter, p. 13).

Delta Plan Measure 4-1 requires, in part, that "an invasive species management plan shall be developed and implemented for any project whose construction or

operation could lead to introduction or facilitation of invasive species establishment" (Appendix O, Mitigation and Monitoring Reporting Program, Delta Plan, pp. 4-5). SCWA asserts that because the Covered Action "provides open water space and emergent marsh available for non-native species to proliferate", the Department should have adopted a dedicated invasive species management plan as outlined in Delta Plan Mitigation Measure 4-1 (SCWA Appeal Letter, p. 4).

The Districts state that the Covered Action "requires such a plan, but the [Department] has not prepared one" and that "DSC itself expressed concern regarding DWR's proposed mitigation to address invasive species" (Districts Appeal Letter, p. 5). SCWA also cites to the Council's comments on the Draft EIR (SCWA Appeal Letter, p. 4; SCWA's May 10, 2021 Letter, pp. 12-13) which states:

> "*DWR should review the Delta Plan MMRP (https://deltacouncil.ca.gov/pdf/delta-plan/ 2018-appendix-o-mitigation- monitoring-and-reporting-program.pdf) to ensure that each proposed measure related to invasive nonnative species is equally or more effective than related Delta Plan mitigation measures. Specifically, in the Final EIR, DWR should describe how proposed project Mitigation Measure BIO-4 is equally or more effective than Delta Plan Mitigation Measure 4-1. Delta Plan Mitigation Measure 4-1 requires development and implementation of an invasive species management plan for any project whose construction or operation could lead to introduction or facilitation of invasive species establishment, and describes the required content of the management plan*" (Final EIR, Certification Record LOS.3.00001, PDF p. 116).

As identified by the Council in its February 14, 2020 comment letter, Delta Plan Mitigation Measure 4-1 does include a requirement to develop and implement an invasive species management plan for "any project who construction or operation could lead to introduction or facilitation of invasive species establishment (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, PDF pp. 11-13). Delta Plan Mitigation Measure 4-1 specifies the elements that such a plan would include but does not define what form such a plan must take.

The Districts also state that Project Mitigation Measure BIO-4 is inadequate because it "does not include enforceable or measurable performance standards" (Districts' May 10, 2021 Letter, p. 10). The Districts continue, stating that BIO-4 "provides a vague list of possible management methods to be implemented at the discretion of the Department with no concrete performance standards, and does not call for consultation with any experts" (Districts' May 10, 2021 Letter, p. 11). However, the Department indicates the Lookout Slough Project's Long-Term Management Plan (LTMP) was developed with consultation with CDFW and the Interagency Ecological Program Aquatic Vegetation Project Work Team, using invasive vegetation control methods approved by the California Invasive Plant Council (Draft LTMP/WRPO, Certification Record LOS.8.00007, pp. 24, 41 – 42).

The Draft AMMP describes that invasive vegetation percent cover would be monitored using visual inspection (e.g., aerial images), sonar (for submerged aquatic vegetation), and/or rake transect surveys, and that the performance standard for invasive aquatic vegetation is that absolute percent cover is "similar to or lower than what is observed in other wetlands in the western Delta" (Draft AMMP, Certification Record CAP_Draft LOS AMMP, pp. 3, 17). Surveys are to occur prior to breaching of the site, and periodically thereafter (Draft AMMP, Certification Record CAP_Draft LOS AMMP, p. 17). The Draft AMMP lists invasive vegetation (terrestrial and aquatic) of highest management priority and states that treatment plans would be informed by the California Invasive Plant Council's (Cal-IPC) California Invasive Plant Inventory, 2015 Online Database (Draft AMMP, Certification Record CAP_Draft LOS AMMP, p. 25). Nonnative plant management methods include mechanical removal prior to construction and chemical treatments following construction (Draft AMMP, Certification Record CAP_Draft LOS AMMP, pp. 25, 51). Invasive species plant identification and management methods are further detailed in Project Mitigation Measure BIO-4 (Final EIR, Certification Record LOS.3.00001, pp. II-18 – II-19).

The Department cites to a Long-Term Management Plan (LTMP) which was developed with consultation with CDFW and the Interagency Ecological Program Aquatic Vegetation Project Work Team, to indicate how post-construction monitoring and management of invasive vegetation will use methods approved by the California Invasive Plant Council (Draft LTMP/WRPO, Certification Record LOS.8.00007, pp. 24, 41 – 42). These methods include sonar and thatch rake for sampling, and chemical and mechanical control for treatment of invasive vegetation. Following these procedures in the LTMP, the Department states that the Covered Action would "[p]erform invasive plant species control within the areas of disturbance for the purpose of reducing the potential for ecological impairment caused by invasive species within the restoration site and surrounding areas" (Draft LTMP/WRPO, Certification Record LOS.8.00007, p. 24).

The Department also states that monitoring, management, and treatment of invasive vegetation at the Lookout Slough Project site is required by, and for the case of aquatic invasive vegetation, controlled solely by other agencies (Department's May 3, 2021 Letter, p. 4). These include the ~~US Fish and Wildlife Service (~~2008 USFWS~~)~~ ~~Biological Opinion~~ BiOp (USFWS Project BiOp, Certification Record LOS.8.00003), ~~California Department of Fish and Wildlife (CDFW)~~CDFW Incidental Take Permit (ITP Draft Application, Certification Record LOS.8.00002), and sole jurisdiction of invasive aquatic weed treatment by the Department of Parks and Recreation Division of Boating and Waterways (DBW) (FRP/DBW Contract, Certification Record LOS.10.00015) (Department's May 3, 2021 Letter, p. 4).The Department cites to the USFWS Project BiOp for detail on methods of invasive plant control, levee vegetation management and implications for invasive plant species, and long-term invasive species management at the site (USFWS Project BiOp, Certification Record LOS.8.00003, pp. 20-24).

The Department also cites to their application for an Incidental Take Permit (ITP) (ITP Draft Application, Certification Record LOS.8.00002) to support the statement that invasive vegetation control has been developed in partnership with other agencies. The

ITP Application includes statements describing methods of invasive plant control, levee vegetation management and implications for invasive plant species, and long-term invasive species management in the proposed upland and aquatic habitats that would be created by the Covered Action (ITP Draft Application, Certification Record LOS.8.00002, pp. 5, 17, 18-19). The Department cites to the USFWS Project BiOp and Final EIR to support its statement that it has an existing contract with DBW, which is solely responsible for monitoring and removal of aquatic invasive vegetation (USFWS Project BiOp, Certification Record LOS.8.00003, pp. 22-23). At this location, the Department also cites to the Final EIR. The Council has reviewed this document and identified further information regarding this topic (Final EIR, Certification Record LOS.3.00001, pp. 3-28 – 3-29). The USFWS Project BiOp discusses herbicide application implemented in the Delta by DBW under Service BiOp file number 08FBDT00-2018-F-0029 (USFWS Project BiOp, Certification Record LOS.8.00003, pp. 22-23). The Final EIR also states that aquatic invasive species monitoring and maintenance are conducted by "(DBW)'s Submersed Aquatic Vegetation Control Program and Floating Aquatic Vegetation Control Program, and through the Delta Region Areawide Aquatic Weed Project funding of invasive aquatic vegetation research, monitoring, and control in the Delta", and that the Department's Fish Restoration Program (FRP) manages the aquatic invasive species control contract with DBW (Final EIR, Certification Record LOS.3.00001, pp. 3-28 – 3-29). The contract specifies that, "DBW engages in surveys of areas where invasive species plant control is needed at FRP sites and DWR conducts aerial photography of all FRP restoration sites to identify vegetation composition, including invasive species infestations, before and following levee breaching" (Final EIR, Certification Record LOS.3.00001, pp. 3-28 – 3-29).

While SCWA and the Districts allege that the lack of a "dedicated invasive species plan" (SCWA Appeal Letter, p. 4) makes the Covered Action inconsistent with G P1(b)(2) with respect to Delta Plan Mitigation Measure 4-1, they do not explain how the documents that the Department certifies as equivalent to or more effective than Delta Plan Measure 4-1 are insufficient. Furthermore, while the Council highlighted the requirements of Delta Plan Mitigation Measure 4-1 to include an invasive species management plan, that measure identifies elements that such a plan will include, not what form these elements take. In its Certification, the Department cites to a number of documents (discussed above) that it certifies meet the requirements of an invasives management plan under Delta Plan Mitigation Measure 4-1. The Council finds that there is sufficient evidence in the record cited by the Department regarding these elements for invasive vegetation species, and that the Districts and 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.

(b) Adequacy of BIO-1

The Districts refer to Project Mitigation Measure BIO-1 as inadequate with respect to Delta Plan Measure 4-1 (Districts Appeal Letter, p.4; Districts' May 10, 2021 Letter, pp. 9-10). The Districts assert that Project Mitigation Measure BIO-1 is insufficient because Delta Plan Measure 4-1 requires a

> "more robust evaluation of whether avoidance is feasible, including selection of project site(s) that avoid habitats to the maximum extent practicable, designing project elements to avoid effects on sensitive natural communities, and scheduling construction to avoid impacts on these species" (Districts' May 10, 2021 Letter, p. 10).

The Department cites to Project Mitigation Measure BIO-1 in the Final EIR as support for consistency with two subsections of Delta Plan Measure 4-1 (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, p. 3). The Department states that the Covered Action would result in temporary construction-related loss of "approximately 24.8 acres of sensitive Great Valley mixed riparian forest through grading, levee breaching, and conversion to tidal marsh" (Certification Attachment 7 – Mitigation Equivalency Table, p. 3). Project Mitigation Measure BIO-1 requires avoiding "long-term net loss of riparian habitat", establishes replant ratios for riparian vegetation and woodland, and has measures for monitoring and necessary replanting the year following construction (Final EIR, Certification Record LOS.3.00001, p. II-18). The Department states that BIO-1 is wholly equivalent to or more effective than the following subsection of the Delta Plan Mitigation Measure 4-1:

> "Avoid, minimize, and compensate for reduction in area and/or habitat quality of sensitive natural communities, including wetlands, by doing the following:
>
> - Selecting project site(s) that would avoid sensitive natural communities, including jurisdictional wetlands and other waters, vernal pools, alkali seasonal wetlands, riparian habitats, and inland dune scrub.
> - Design, to the extent practicable, project elements to avoid effects on sensitive natural communities.
> - Replacing, restoring, or enhancing on a "no net loss" basis (in accordance with U.S. Army Corps of Engineers (USACE) and State Water Resources Control Board (SWRCB) requirements), wetlands and other waters of the United States and waters of the State that would be removed, lost, and/or degraded.
> - Where impacts to sensitive natural communities other than waters of the United States or State are unavoidable, compensating for impacts by restoring and/or preserving in-kind sensitive natural communities on-site, or off-site at a nearby site, or by purchasing in-kind restoration or preservation credits from a mitigation bank that services the project site and that is approved by the appropriate agencies, in consultation with applicable regulatory agencies (at ratios that offset temporal loss of habitat value)." (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, p. 3)

The Department in part identifies Project Mitigation Measure BIO-1 as equivalent to or more effective than another subsection of Delta Plan Measure 4-1, together with Project Mitigation Measure BIO-2, which was not referred to in the Districts' Appeal.

Project Mitigation Measure BIO-2 includes measures for special-status plant avoidance, preservation, and re-planting (Final EIR, Certification Record LOS.3.0001, p. II-18):

"Restore areas temporarily affected by construction activities, including:

- Preparing restoration plan for temporary impacts sites for review by resource agencies.
- Minimizing soil disturbance and stockpiling topsoil for later use in any areas to be graded.
- Decompacting or amending soil if necessary before planting and use native species for revegetation.
- Restoring natural communities with similar or improved function from communities that were affected." (Appendix O, Mitigation monitoring and Reporting Program, Delta Plan, p. 4)

The Districts cite to the Draft EIR text of Project Mitigation Measure BIO-1 to support their assertion, and state that it "calls for avoidance of long-term net loss of riparian habitat and mitigation for direct impacts at a 1.1:1 ratio" (Districts' May 10, 2021 Letter, p. 10). However, this ratio is incorrect as cited, and may be referring to the Project Mitigation Measures in the Draft EIR instead of those in the Final EIR. In the Mitigation Equivalency Table, the Department notes that that BIO-1 should be referred to in the record at p. II-18 of the Final EIR (Certification Attachment 7 – Mitigation Equivalency Table, pp. 3-4), and requires "mitigation [to] occur at a 3:1 replacement ratio for riparian woodland impacts and 1.5:1 replacement ratio for riparian scrub impacts" (Final EIR, Certification Record LOS.3.00001, p. II-18). The Council has reviewed this document, which shows a revision from BIO-1 as included in the Draft EIR and matches the Department's description. The Department continues to state that with implementation of Mitigation Measure BIO-1, there would be no net loss of riparian scrub and its short-term loss will be mitigated for using the 1.5:1 ratio (Certification Attachment 7 – Mitigation Equivalency Table, pp. 3-4). (Details for Project Mitigation Measure BIO-1 are described in the Project MMRP (MMRP, Certification Record LOS.2.00002, p. 6).

The Department states that Project Mitigation Measure BIO-1 is equivalent or more effective than the ~~sub-section~~subsection of Delta Plan Measure 4-1 and cites to evidence in the record, including the Mitigation Equivalency Table (Certification Attachment 7 – Mitigation Equivalency Table, pp. 3-6), Draft EIR (Draft EIR, Certification Record LOS.4.00001, p. IV.D 50 – IV.D 90), and Final EIR Chapter 2 (Final EIR, Certification Record LOS.3.00001, pp. 2-17 – 2-24, 2-27) (Department's May 3, 2021 Letter Exhibit A – Response to Appeals, p. 2-9). Evidence in the record at these locations shows that although construction impacts to riparian habitat would not be avoided with implementation of Project Mitigation Measure BIO-1, required replant ratios following construction would result in a temporary loss, and no long-term net loss would occur with implementation of BIO-1. Delta Plan Mitigation Measure 4-1 requires that construction activities must avoid, minimize, compensate, and/or restore sensitive natural communities, including riparian habitat. As mentioned above, the Department

cites to Project Mitigation Measure BIO-1 as it is described in the Final EIR, which states that loss of riparian habitat during construction would be temporary and such habitat would be restored post-construction at a ratio that results in no long-term net loss.

The Districts and SCWA contend that the Department fails to propose equally or more effective mitigation than Delta Plan Measure 4-1 with regard to invasives, riparian forest, and Valley longhorn beetle. The Department has cited to evidence in the record, as described above, and finds that Project Mitigation Measures BIO-1, BIO-2, and BIO-4 are equal to or more effective than Delta Plan Mitigation Measure 4-1. Therefore, the Council finds that the Districts and 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) and Delta Plan Mitigation Measure 4-1.

(c) Western pond turtle

The Districts assert that the Project fails to comply with Delta Plan Mitigation Measure 4-1 because it does not mitigate permanent impacts to western pond turtle nesting habitat (Districts Appeal Letter, p. 4; Districts' May 10, 2021 Letter, p. 10). Delta Plan Mitigation Measure 4-1 does not specifically require mitigation for this species, but rather, in relevant part, for "sensitive natural communities" (Appendix O, Mitigation monitoring and Reporting Program, Delta Plan, PDF p. 11). The Districts also raise this issue in relation to Delta Plan Mitigation Measure 4-2, which includes a requirement to, in relevant part, compensate for impacts to special-status species, when such impacts are unavoidable (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, PDF p. 11). As such, this issue is considered below under Delta Plan Mitigation Measure 4-2.

(d) Water quality impacts and invasive plants

The Districts allege that water quality impacts associated with invasive aquatic weeds to fish species such as Delta Smelt and Chinook salmon are not mitigated (Districts Appeal Letter, p. 4; Districts' May 10, 2021 Letter, p. 10). Delta Plan Mitigation Measure 4-1 does not specifically highlight impacts to water quality resulting in invasive aquatic weeds or the aforementioned fish species (Appendix O, Mitigation monitoring and Reporting Program, Delta Plan, PDF pp. 11-13). This mitigation measure does however include, in relevant part, requirements to "avoid, minimize, and compensate for reduction in area and/or habitat quality of sensitive natural communities" (p. 11) and develop and implement an "invasive species management plan" (p. 12). Nevertheless, in its Certification for Delta Plan Measure 4-1, the Department identifies Project Mitigation Measures BIO-1, BIO-2, and BIO-4, which include measures to reduce expansion of invasive plant species, as equivalent (Certification Attachment 7 – Mitigation Equivalency Table, p. 6). There are no stated measures under BIO-1, BIO-2, and BIO-4 corresponding to Delta Plan Mitigation Measure 4-1 to reduce water quality impacts from invasive species because invasive species are stated to be sufficiently

controlled (see analysis ~~sub-section~~subsection (a) above, which cites to ITP Draft Application, Certification Record LOS.8.00002).

Where an environmental analysis concludes that no potential significant impact would occur, CEQA does not require mitigation measures. Therefore, there is no applicable Delta Plan Mitigation Measure required for this specific impact area. However, in its review of the record, the Council notes that the Department includes a Project Mitigation Measure BIO-6, which is focused on special-status fish species. BIO-6 notes that the section 401 water quality certification will include water quality protection measures (MMRP, Certification Record LOS.2.00002, pp. 16).

(e) Conclusion

Appellants SCWA, the Districts, and CDWA have failed to show that Project Mitigation Measures BIO-1, BIO-2, BIO-4, the Draft LTMP/WRPO, and the Draft AMMP are not equally or more effective than Delta Plan Mitigation Measure 4-1. Therefore, with regard to Project Mitigation Measures BIO-1, BIO-2, BIO-4, the Draft LTMP/WRPO, and the Draft AMMP, the Council finds that Appellants SCWA, the Districts, and CDWA 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 Delta Plan Mitigation Measure 4-1.

iii. Delta Plan Mitigation Measure 4-2

Delta Plan Mitigation Measure 4-2 requires, in relevant part, the avoidance of impacts to special-status species and, if such impact is unavoidable, the restoration or preservation of compensatory habitat for the affected species (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, PDF p. 14). The Department states in its Equivalency Table that, when considered together, Project Mitigation Measures BIO-1 through BIO-6 are equally or more effective than Delta Plan Mitigation Measure 4-2 (Certification Attachment 7 – Mitigation Equivalency Table, p. 5; MMRP, Certification Record LOS.2.00002, pp. 6-17).

Project Mitigation Measure BIO-1 establishes replant ratios for riparian vegetation and woodland during construction (MMRP, Certification Record LOS.2.00002, p. 6), BIO-2 presents measures for avoiding, preserving, and re-planting special-status plants during construction (MMRP, Certification Record LOS.2.00002, pp. 6-7), BIO-3 contains measures for habitat protection and avoidance during construction (MMRP, Certification Record LOS.2.00002, pp. 7-8), BIO-4 requires invasive species abatement (MMRP, Certification Record LOS.2.00002, p. 9), and BIO-5 mitigates construction impacts to specific species including nesting birds, Swainson's hawk, tricolored blackbird, giant garter snake, western pond turtle, roosting bats, and Valley elderberry longhorn beetle (MMRP, Certification Record LOS.2.00002, pp. 9-16). Project Mitigation Measure BIO-6 mitigates construction impacts to special-status fish species (MMRP, Certification Record LOS.2.00002, pp. 16-17). All biological impacts

are stated to be less than significant with mitigation (Draft EIR, Certification Record LOS.4.00001, pp. IV.D- 51– IV.D-90).

The Districts argue that the Covered Action fails to comply with this measure because it does not fully consider operational entrainment impacts to endangered fish species, permanent impacts to western pond turtle nesting habitat, and water quality impacts to fish species from aquatic invasive plants (Districts Appeal Letter, p. 4; Districts' May 10, 2021 Letter, p. 10). The Districts refer to Project Mitigation Measures BIO-1, BIO-4, and BIO-5G as inadequate relative to Delta Plan Mitigation Measure 4-2 (Districts Appeal Letter, p. 4).

(a) Operational entrainment impacts

In their appeal letter, the Districts assert that the "Project fails to consider operational impacts where there are entrainment hazards to endangered species. Nor does DWR propose feasible mitigation for existing water diversion facilities" (Districts Appeal Letter, p. 4). No specific detail nor citation to materials in the record is provided to support the assertion that operational entrainment impacts to endangered fish species are not fully considered. In the Draft EIR, the Department identifies potentially significant impacts to listed fish species prior to mitigation, but no significant operational impacts, including entrainment, to endangered fish species (Draft EIR, Certification Record LOS.4.00001, pp. IV.D-78 – IV.D-80). Where an environmental analysis concludes that no potential significant impact would occur, CEQA does not require mitigation measures. Therefore, there is no applicable Delta Plan Mitigation Measure required for this specific impact area.

The Mitigation Equivalency Table and Draft EIR state that with mitigation there is a less-than-significant impact to special-status fish species during construction, and that the Covered Action would increase fish access to critical habitat, including nursery, foraging, and rearing habitat, refuge from high-flow events, and food web support (Certification Attachment 7 – Mitigation Equivalency Table, p. 6; Draft EIR, Certification Record LOS.4.00001, pp. IV.D-78 — IV.D-79). In addition, the Department cites to evidence in the record that no significant operational impacts, including entrainment of endangered fish species, would occur (Draft EIR, Certification Record LOS.4.00001, pp. IV.D-78 – IV.D-80. Therefore, the Council finds that the Districts 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) and Delta Plan Mitigation Measure 4-2 as to operational impacts from entrainment.

(b) Western pond turtle

The Districts allege that the Covered Action fails to also comply with Delta Plan Mitigation Measure 4-2 because it does not mitigate permanent impacts to western pond turtle nesting habitat (Districts Appeal Letter, p. 4; Districts' May 10, 2021 Letter, p. 10). Project Mitigation Measure BIO-5E, cited by the Department in the Draft and Final EIRs, refers to mitigating construction impacts to the western pond turtle (Draft

EIR, Certification Record LOS.4.00001, p. IV.D-73; Final EIR, Certification Record LOS.3.00001, p. II-22). The Districts do not refer to Project Mitigation Measure BIO-5E.

BIO-5E is listed by the Department under Delta Plan Measure 4-2 in the Mitigation Equivalency Table (Certification Attachment 7 – Mitigation Equivalency Table, p. 5). In the Draft EIR, the Department states that there is a less-than-significant impact to the western pond turtle with mitigation during construction activities and the Covered Action would, "increase the quality and quantity of western pond turtle aquatic habitat on the Proposed Project Site" (Draft EIR, Certification Record LOS.4.00001, p. IV.D-72). The Districts do not cite to evidence in the record to support their assertion of permanent impacts to western pond turtle nesting habitat nor why the referenced Project mitigation measure is not equally or more effective than Delta Plan Mitigation Measure 4-2. The Council finds that the Districts 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) and Delta Plan Mitigation Measure 4-2 as to this issue.

(c) Water quality impacts and invasive plants

The Districts allege that water quality impacts associated with invasive aquatic weeds to fish species such as Delta Smelt and Chinook salmon are not mitigated (Districts Appeal Letter, p. 4; Districts' May 10, 2021 Letter, p. 10). Delta Plan Mitigation Measure 4-2, in relevant part, requires that unavoidable impacts to special status species be compensated for by restoring or preserving in-kind suitable habitat (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, PDF p. 14). This mitigation measure does not specifically require mitigation for water quality (*Ibid.*). In its Certification for Delta Plan Mitigation Measure 4-2, the Department identifies Project Mitigation Measures BIO-1 through BIO-6 as equally or more effective. Project Mitigation Measure BIO-4 includes measures to abate invasive plant species and references these in its Mitigation Equivalency Table (Certification Attachment 7 – Mitigation Equivalency Table, p. 6).

In their appeal, the Districts have not provided detail, nor cited to specific evidence in the record supporting their contention regarding water quality and invasive plants, as relevant to Delta Plan Mitigation Measure 4-2 (Districts Appeal Letter). In the Districts' May 10, 2021 Letter discussion is provided for G P1(b)(1) (Districts' May 10, 2021 Letter, p. 6), but is not considered here because it is not related to the original appeal for either G P1(b)(1) nor G P1(b)(2) (Districts Appeal Letter). The Council finds that the Districts 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) and Delta Plan Mitigation Measure 4-2 as to this issue.

(d) Other Issues: BIO-1, BIO-4, and BIO-5G

The Districts refer to Project Mitigation Measures BIO-1, BIO-4, and BIO-5G as inadequate with respect to Delta Plan Mitigation Measure 4-2 (Districts Appeal Letter, p. 4; Districts' May 10, 2021 Letter, pp. 10-11).

The Department identifies Project Mitigation Measures BIO-1 through BIO-6 together in the Final EIR as corresponding to five of seven subsections of Delta Plan Measure 4-2, and also refers to permits from USFWS, NMFS, and CDFW (Certification Attachment 7 – Mitigation Equivalency Table, p. 5). Together, the Department identifies Project Mitigation Measures BIO-1, BIO-2, and BIO-5 as equally or more effective than the two remaining subsections of Delta Plan Measure 4-2 (relocation, compensation for unavoidable impacts to special-status species). The Department states, "Mitigation Measures BIO-1 through BIO-6 will limit and avoid impacts to species...The Proposed Project will beneficially increase and enhance habitat for special-status species" (Certification Attachment 7 – Mitigation Equivalency Table, p. 5).

Project Mitigation Measure BIO-5G (mitigation for the Valley Elderberry Longhorn Beetle) is identified as a component of the Department's certification of mitigation measures that are equally or more effective than Delta Plan Mitigation Measure 4-2 (Certification Attachment 7 – Mitigation Equivalency Table, pp. 3-5). The Districts allege that Project Mitigation Measure BIO-5G was "improperly delegated...to a private party" and disputes the Department's changes made to the Project Mitigation Measure BIO-5G in the Final EIR, Response to Comment 12-1 (Districts' May 10, 2021 Letter, p. 11). The Council does not review mitigation measures for adequacy under CEQA. Rather, the Council considers only whether a mitigation measure is equally or more effective than the corresponding Delta Plan Mitigation Measure. The Districts also contend that Project Mitigation Measure BIO-5G is not equivalent to Delta Plan Mitigation Measure 4-2 and 4-3 because it has insufficient avoidance measures for impacts to biological resources, specifically Valley Elderberry Longhorn Beetle (Districts' Appeal Letter, p. 4; Districts' May 10, 2021 Letter, p. 11). Project Mitigation Measure BIO-5G includes several avoidance measures, for example: "To the extent feasible, as determined by DWR, project activities within 165 feet of occupied elderberry shrubs shall be avoided" (Final EIR, Certification Record LOS.3.00001, pp. II-22 – II-23). For impacts to occupied elderberry shrubs that cannot be avoided, there are eight measures to avoid impacts to Valley Elderberry Longhorn Beetle, including fencing, avoidance areas, worker education, construction monitoring, timing, trimming, chemical use, and mowing (Draft EIR, Certification Record LOS.4.00001, p. II-32). Project Mitigation Measure BIO-5G also sets forth several measures for transplantation.

The Districts assert that BIO-5G is inadequate with regard to Delta Plan Mitigation Measures 4-2 and 4-3, but only raise a specific contention under 4-2, where they state that Delta Plan Mitigation Measure 4-2 "sets a far higher bar, requiring projects to be redesigned to avoid habitat for special-status species "to the maximum extent practicable" and that compensation is permitted only where "impacts to special-status species are unavoidable" (Districts' May 10, 2021 Letter, p. 11). Delta Plan Measure 4-2 includes six elements to avoid and minimize impacts to special-status species, including site selection, timing, consulting experts for survey methodology to detect special status species before and during construction, establishing buffers, and relocation. The last measure requires "restoring or preserving in- kind suitable habitat on-site, or off-site, or by purchasing restoration or preservation credits" when impacts

are unavoidable (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, PDF p. 14).

The Districts cite to the Mitigation Equivalency Table to support their assertions, but do not identify other ~~substantial~~ evidence in the record. The Districts do not specify why the components of Project Mitigation Measure BIO-5G are not equivalent to or less efficient than "the maximum extent practicable." There also is no mention of compensation in Project Mitigation Measure BIO-5G. The Council finds that the Districts have not shown that there is not substantial evidence in the record to support the Department's Certification of Consistency with G P1(b)(2) and Mitigation Measure 4-2 as to this issue.

(e) Conclusion

The Districts have failed to show that Project Mitigation Measures BIO-1 through BIO-6 are not equally or more effective than Delta Plan Mitigation Measure 4-2. Therefore, with regard to Project Mitigation Measures BIO-1 through BIO-6, the Council finds that Appellant the Districts 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) and Delta Plan Mitigation Measure 4-2 as to this issue.

iv. Delta Plan Mitigation Measure 4-3

Delta Plan Mitigation Measure 4-3 requires, in relevant part, projects to avoid reducing existing fish and wildlife species habitat, or to replace, enhance, or preserve in-kind habitat to offset loss (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, PDF pp. 14-15). The Department states that Project Mitigation Measures BIO-1 through BIO-6, which apply to construction-related impacts, are equally or more effective than Delta Plan Mitigation Measure 4-3 (Certification Attachment 7 – Mitigation Equivalency Table, p. 6; MMRP, Certification Record LOS.2.00002, pp. 6-17).

Project Mitigation Measure BIO-1 establishes replant ratios for riparian vegetation and woodland during construction (MMRP, Certification Record LOS.2.00002, p. 6), Project Mitigation Measure BIO-2 presents measures for avoiding, preserving, and re-planting special-status plants during construction (MMRP, Certification Record LOS.2.00002, pp. 6-7), Project Mitigation Measure BIO-3 contains measures for habitat protection and avoidance during construction (MMRP, Certification Record LOS.2.00002, pp. 7-8), Project Mitigation Measure BIO-4 requires invasive species abatement (MMRP, Certification Record LOS.2.00002, p. 9), and Project Mitigation Measure BIO-5 mitigates construction impacts to specific species including nesting birds, Swainson's hawk, tricolored blackbird, giant garter snake, western pond turtle, roosting bats, and Valley elderberry longhorn beetle (MMRP, Certification Record LOS.2.00002, pp. 9-16). Project Mitigation Measure BIO-6 mitigates construction impacts to special-status fish species (MMRP, Certification Record LOS.2.00002, pp. 16-17).

The Districts argue that the Covered Action fails to comply with this measure because it does not fully consider "water quality impacts associated with invasive aquatic plants" to endangered fish species and permanent impacts to western pond turtle nesting habitat (Districts Appeal Letter, p. 4). The Districts refer to Project Mitigation Measures BIO-1, BIO-4, and BIO-5G as inadequate relative to Delta Plan Mitigation Measure 4-3 (Districts Appeal Letter, p. 4). Project Mitigation Measure BIO-1 establishes replant ratios for riparian vegetation and woodland (MMRP, Certification Record LOS.2.00002, p. 6), Project Mitigation Measure BIO-4 requires invasive species abatement (MMRP, Certification Record LOS.2.00002, p. 9), and Project Mitigation Measure BIO-5G mitigates impacts to Valley Elderberry Longhorn Beetle (MMRP, Certification Record LOS.2.00002, pp. 14-15).

(a) Water quality impacts and invasive plants

As discussed above, the Districts allege that the Covered Action would result in water quality impacts associated with invasive aquatic weeds that would, in turn, impact fish species such as Delta Smelt and Chinook salmon, and that the Department has not mitigated for these impacts (Districts Appeal Letter, p. 4; Districts' May 10, 2021 Letter, p. 10). Delta Plan Mitigation Measure 4-3 does not include a specific requirement to mitigate for water quality and invasive plants. However, this mitigation measure does, in relevant part, require the replacement, restoration, or enhancement of habitats for fish or wildlife species that would be lost (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, PDF pp. 14-15). In its Certification for Delta Plan Mitigation Measure 4-3, the Department identifies Project Mitigation Measures BIO-1 through BIO-6 as equivalent. Project Mitigation Measure BIO-4 includes measures to abate invasive plant species (Certification Attachment 7 – Mitigation Equivalency Table, p. 6). Project Mitigation Measure BIO-6 focuses on special-status fish species and notes that the section 401 water quality certification will include water quality protection measures (MMRP, Certification Record LOS.2.00002, pp. 16).

In their appeal, the Districts have not provided supporting facts nor cited to specific evidence in the record supporting their contention regarding this issue. The Council finds that the Districts 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) and Delta Plan Mitigation Measure 4-3 as to this issue.

(b) Western pond turtle

As discussed above, the Districts allege that the Covered Action fails to comply with Delta Plan Mitigation Measure 4-3, because the Lookout Slough Project does not mitigate for permanent impacts to western pond turtle nesting habitat (Districts Appeal Letter, p. 4; Districts' May 10, 2021 Letter, p. 10). Delta Plan Mitigation Measure 4-3 includes, in relevant part, requirements to "replace, restore, or enhance habitats for fish and wildlife species that would be lost" and to "compensate for impacts by preserving in-

kind habitat" where substantial loss of such habitats is unavoidable (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, PDF pp. 14-15).

Project Mitigation Measure BIO-5E is identified by the Department as equivalent to Delta Plan Mitigation Measure 4-3 (Certification Attachment 7 – Mitigation Equivalency Table, p. 5). Project Mitigation Measure BIO-5E describes measures to reduce construction-related impacts to the western pond turtle (Draft EIR, Certification Record LOS.4.00001, p. IV.D-73; Final EIR, Certification Record LOS.3.00001, p. II-22). The record shows that the Covered Action would, "increase the quality and quantity of western pond turtle aquatic habitat on the Proposed Project Site" (Draft EIR, Certification Record LOS.4.00001, p. IV.D-72). The Districts do not cite to evidence in the record to support their assertion of permanent impacts to western pond turtle nesting habitat nor why the referenced measure is inadequate. The Council finds that the Districts 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) and Delta Plan Mitigation Measure 4-3 as to this issue.

(c) Other issues: BIO-1, BIO-4, and BIO-5G

The Districts refer to Project Mitigation Measures BIO-1, BIO-4, and BIO-5G as inadequate with respect to Delta Plan Mitigation Measure 4-3 (Districts Appeal Letter, p. 4; Districts' May 10, 2021 Letter, pp. 9-10). The Department states that with implementation of Project Mitigation Measure BIO-1, there would be no net loss of riparian scrub and short term loss will be mitigated at a 1.5:1 ratio (Certification Attachment 7 – Mitigation Equivalency Table, pp. 3-4). Delta Plan Mitigation Measure 4-3 requires avoiding reducing habitat and replacing habitats lost (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, PDF pp. 14-15). Additionally, Project Mitigation Measure BIO-1 is certified as a portion of the equivalency for Delta Plan Measure 4-3 with other mitigation measures, including Project Mitigation Measure BIO-3, which is not cited by the Appellant. Project Mitigation Measure BIO-3 includes 10 measures required for habitat protection and avoidance (MMRP, Certification Record LOS.2.00002, pp. 7-8).

Project Mitigation Measure BIO-4 requires invasive species abatement actions such as identifying, monitoring, and controlling invasive weeds before, during, and after construction (MMRP, Certification Record LOS.2.00002, p. 9).The Districts allege that Project Mitigation Measure BIO-4 is inadequate relative to Delta Plan Mitigation Measure 4-3 because it "does not include enforceable or measurable performance standards" (Districts' May 10, 2021 Letter, p. 10). There are no subsections of Delta Plan Mitigation Measure 4-3 that specifically reference invasive species abatement or include performance standards. The Districts do not clearly link this allegation to specific aspects of Delta Plan Mitigation Measure 4-3, nor cit~~ate~~ to ~~substantial~~ evidence in the record in support of this assertion.

The Department identifies Project Mitigation Measure BIO-5G (mitigation for the Valley Elderberry Longhorn Beetle) as a component of the Department's mitigation

measures that are equally or more effective than Delta Plan Mitigation Measure 4-3 (Certification Attachment 7 – Mitigation Equivalency Table, pp. 3-5). The Districts assert that Project Mitigation Measure BIO-5G is not equivalent to Delta Plan Mitigation Measure 4-3 because it has insufficient avoidance measures and does not specify redesigning projects to the "maximum extent practicable" to avoid impacts. Project Mitigation Measure BIO-5G includes several avoidance measures discussed above in ~~analysis section III-D.~~subsection (iii)(d). The Districts cite to the Mitigation Equivalency Table to support their assertions, but not to other ~~substantial~~ evidence in the record. Plan Delta Plan Mitigation Measure 4-3 does not specify avoidance measures for special status species, which are instead included under Delta Plan Mitigation Measure 4-2 (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, PDF pp. 14-15).

(d) Conclusion

Appellant the Districts have failed to show that Project Mitigation Measures BIO-1 through BIO-6 are not equally or more effective than Delta Plan Mitigation Measure 4-3. Therefore, with regard to Project Mitigation Measures BIO-1 through BIO-6, the Council finds that Appellant the Districts 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 Delta Plan Mitigation Measure 4-3.

v. Delta Plan Mitigation Measures 5-1, 5-4, and 5-5

Delta Plan Mitigation Measures 5-1, 5-4, and 5-5 require, in relevant part and when applicable, preparation of a drainage or hydrology and hydraulic study, provision of temporary drainage bypass facilities, onsite stormwater detention, and potentially aligning construction features or stockpiles with the direction of floodplain flow (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, PDF pp. 16-17). The Districts assert that the Department "fails to adequately mitigate the Project's significant impacts on flooding, flood storage, and emergency access, as required by MM 5-1, 5-2, and 5-4" (Districts Appeal Letter, p. 5).

In its Certification, the Department cites to a completed Hydrologic and Hydraulic System Analysis (Draft EIR, Certification Record LOS.4.00001, pp. IV.G-30 - IV.G-31), notes the requirements of a Stormwater Pollution Prevention Plan (SWPPP) and the Department's standards and protocols, and cites to relevant permit applications that have been submitted to CDFW, The U.S. Army Corps of Engineers, and the Central Valley Regional Water Quality Control Board (CVRWQCB).

Below we consider the Districts' assertion as to the adequacy of the hydrology and hydraulic study on which the Department bases their finding of consistency with Delta Plan Mitigation Measures 5-1, 5-2, 5-4, and 5-5. Although each of these mitigation measures requires a hydrology and hydraulic study, the Districts only identify specific assertions for Delta Plan Mitigation Measures 5-1, 5-4, and 5-5. Therefore, only these measures are considered below.

(a) Delta Plan Mitigation Measure 5-1: Hydraulic Impacts

Delta Plan Mitigation Measure 5-1 requires mitigation for an altered drainage pattern or runoff. The Districts assert that the Covered Action would "alter the hydraulics in the Cache Slough region at high flow events causing increased water levels and flooding pressure on State Plan of Flood Control levees that have documented erosion, stability and freeboard deficiencies" (Districts Appeal Letter, p. 6). The Districts assert the Covered Action's failure to mitigate its impacts to "…the local and regional flood plains as well as to the FEMA 100-year flood plain…," that the Covered Action would flood "…approximately two-thirds of [Reclamation District] RD 2098…," and that the breach and decreased land area would "…make maintaining the remnant levee south of the breach difficult and more expensive" (Districts Appeal Letter, p. 6). Lastly, the Districts state that "to demonstrate consistency, DWR should describe if and how implementation of the project would encroach upon the Yolo Bypass, and any effect on floodplain functions" (Districts Appeal Letter, p. 5).

The Department states that the existing Cache/Hass Slough Levee would not be breached as part of the Lookout Slough Project (Final EIR, Certification Record LOS.3.00001, PDF p. 600). Rather, the Lookout Slough Project "includes improvements to the stability of the Cache/Hass Slough Training Levee" (Department's May 3, 2021 Letter, pp. 2-11). As support for this, the Department sites to hydrologic and hydraulic modeling conducted for the project, which supports the Department's statement (100% BODR, Appendix A, Certification Record LOS.11.00004). Further, the Department states that the "hydraulic modeling analysis indicates that there would be no change to water levels in Cache and Hass Sloughs, and that the Proposed Project would generally result in localized stage reductions in the Yolo Bypass and would not result in upstream or downstream stage increases. Stage decreases would have modest but positive impacts on flood-related public services by reducing demand on levees" (Department's May 3, 2021 Letter, pp. 2-11). Once again, this is supported by the Department's citations in the record (100% BODR, Appendix A, Certification Record LOS.11.00004).

With regard to floodplain impacts, the Department states that the Covered Action would improve local flood control and conveyance since water elevations, compared to baseline conditions, during the 100-year event would decrease slightly upstream and not change downstream of the project site (Final EIR, Certification Record LOS.3.00001, PDF pp. 244-245). Moreover, the Covered Action would "not change the [Federal Emergency Management Agency] hazard classification" because the Covered Action "lowers flood stages in the region, and does not enlarge the area at risk" (Department's May 3, 2021 Letter, pp. 2-12). This statement is also included in the Final EIR, Response 13-14 (Final EIR, Certification Record LOS.3.00001, PDF pp. 244-245), which in turn cites to the Draft EIR p. IV.G-30 and IV.G-31 (Draft EIR, Certification Record 4.00001, p. IV.G-30—IV.G-31). The Department states that Delta Plan Mitigation Measure 5-1 "does not pertain to maintenance costs or solvency of the Reclamation District" but that the measure requires the purchase of a flood easement and/or property where existing flooding would be increased in magnitude, frequency or

duration (Department's May 3, 2021 Letter, pp. 2-12). As support for this, the Department cites to the Final EIR for a description of the existing regulatory framework that will address such issues (Final EIR, Certification Record LOS.3.00001, PDF pp. 3-20–3-21).

The Districts assert that the Department's drainage and hydrology study, on which it bases its analysis of potential impacts from the Covered Action, is inadequate. The Department cites to an appendix of the 100% basis of design report for the Covered Action that describes in detail the modeling conducted as part of this study. The Council has reviewed this document, and finds that it is not contradicted by the Districts' assertions. Therefore, the Council finds that the Districts have not shown that there is not substantial evidence in the record to support the Department's Certification of Consistency with G P1(b)(2) and Delta Plan Mitigation Measure 5-1 as to this issue.

(b) Delta Plan Mitigation Measure 5-4: Protect People and Structures from Flooding and 5-5: Flood Flow and Inundation Management

Delta Plan Mitigation Measure 5-4 requires, in part, protection from potential erosion, several actions regarding emergency management and safety of the Lookout Slough Project site and surrounding area, the completion of a seepage and stability analysis, and a seismic and liquefaction analysis (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, p. 11). Delta Plan Mitigation Measure 5-5 requires, in part, the maximization of surface flows under flood conditions, maintenance of channel capacity to mitigate hydraulic impacts, the restoration of any affected drainage or facilities, and coordination of flood management with the flood control agencies including USACE, the Department, Central Valley Flood Protection Board (CVFPB~~,~~), and others (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, p. 13).

The Districts assert that the Department failed "…to mitigate the impacts of the conversion of a county road into a full-height levee and its potential to result in inadequate emergency access and/or impede or redirect flood flows and the impacts of the significant modifications to the flood storage capacity of USACE Levee Unit 109, which could result in the permanent loss of 40,000 acre-feet of storage and the loss of a pre-determined levee cut location identified in the Emergency Response Plan" (Districts Appeal Letter, p. 5). In the Districts' oral comments at the May hearing, they add that the Covered Action would result in "water deeper on these [RD 2068] lands. And that's a particular concern for 2068 where they are trying to clear livestock and property so there's a greater risk to damage and loss of life potential unless an emergency response plan or something is developed to mitigate this change" (May 20, 2021 Hearing Transcript, p. 114). Additionally, the Districts assert that "the Project fails to mitigate its impacts of additional stress on flood-control infrastructure, such as hydraulic-sheer stresses that have potential to cause erosion" (Districts Appeal Letter, p. 6) and that the "inundation of currently levee protected lands of RD 2098 would

subject the remaining channel banks and levees to increased wave fetch and erosion" (Districts' May 10, 2021 Letter, p. 12). As support for this, the Districts cite to comment letter 13, submitted by the Solano County Department of Resource Management (Final EIR, Certification Record LOS.3.00001, PDF pp. 232-253). While this comment letter raises a concern about these issues, it does not provide supporting evidence or cite to ~~substantial~~ evidence in the record. In addition, in its response to this comment letter, the Department cites to evidence in the record that the project includes design and other elements to address these potential impacts (Final EIR, Certification Record LOS.3.00001, PDF pp. 243). As support for this, the Department cites to the Draft EIR, section IV.G (Draft EIR, Certification Record LOS.4.00001, pp. IV.G 27, IV.G-29, IV.G-30). In its Certification, the Department states that the "existing rock slope protection would be sufficient to assure that the channel and the levee do not scour or erode" despite the increase in hydraulic sheer stress (Certification Attachment 7 – Mitigation Equivalency Table, p. 9). As support for this, the Department cites to Draft EIR Appendix Q (Draft EIR Appendix Q, Certification Record 4.00001). This appendix is a 2019 draft hydrology and hydraulics study that supports the Department's statement. Regarding emergency access, the Department states that the Covered Action "would not physically or permanently alter publicly accessible roadways in a manner that might result in inadequate emergency access" given that "Shag Slough Bridge does not currently provide safe emergency access for vehicles" (Certification Attachment 7 – Mitigation Equivalency Table, p. 10). As support for this, in the Mitigation Equivalency Table (Certification Attachment 7 – Mitigation Equivalency Table, p. 10) the Department cites to the Draft EIR (Draft EIR, Certification Record LOS.4.00001, p. IV.F-17) and Final EIR (Final EIR, Certification Record LOS.3.00001, p. 2-13).

Additionally, the Department states that "a boat ramp will be created at the northernmost Shag Slough breach on the Project Site for use by DWR and CDFW for monitoring and warden enforcement purposes" (Certification Attachment 7 – Mitigation Equivalency Table, p. 10). As support for this, in the Mitigation Equivalency Table (Certification Attachment 7 – Mitigation Equivalency Table, p. 10) the Department cites to the Draft EIR (Draft EIR, Certification Record LOS.4.00001, p. IV.F-17) and Final EIR (Final EIR, Certification Record LOS.3.00001, p. 2-13). Furthermore, the Department's response states that "a gate would be installed at the northeast corner of the Project Site on the southern side of Liberty Island Road at Shag Slough in order to restrict public pedestrian and vehicular access to the Project Site" and that "the section of Liberty Island Road running east-west will not be vacated, and Reclamation District 2068 will continue to have paved access on Liberty Island Road to its pumping plant (Department's May 3, 2021 Letter Exhibit A – Response to Appeals, p. 2-10). As support for this, in this document, the Department cites to a number of locations in the Final EIR and the Draft EIR that describe the addition of a gate and continued emergency access (Final EIR, Certification Record LOS.3.00001, PDF pp. 247–248); (Draft EIR, Certification Record LOS.4.00001, p. IV.D 50 – IV.A 21).

Regarding flood storage, the Department clarified its calculations for the new flood storage capacity of the Unit 109 levee, stating that the "Unit 109 levee system is designed to protect 13,000 acres of land from flooding originating from the Yolo Bypass, Cache Slough, and Hass Slough. The interior of Unit 109 was not designed to be a flood storage system and therefore any incidental volume in this basin is not counted in the regional calculations for flood protection" (Department's May 3, 2021 Letter, p. 2-10) One of the Lookout Slough Project objectives is to "create approximately 40,000 acre-feet or more of transitory flood storage in the Yolo Bypass through building a new improved Unit 109 levee, decreasing local flood elevations and improving reliability of the system" (Draft EIR, Certification Record LOS.4.00001, p. III-23). In response to the District's oral comments at the May hearing, the Department stated that "there is no loss of flood storage... RD 2068's concept of 40,000-acre feet of flood storage is flawed from a flood control perspective, as it would require their neighbor, RD 2098 to fill with water and flood which is not the intent of the State Plan of Flood Control levees that provide direct protection to RD 2098" (May 20, 2021 Hearing Transcript, p. 167). The Department added that the "existing levees are in such poor condition that RD 2098 cannot keep up with the requirements..." and that RD 2068 "should fix their levees to resolve their long-standing perceived risk and revise their emergency response plan instead of their inequitable and outdated plan that relies on flood damaging their poor neighbor to the south" (May 20, 2021 Hearing Transcript, p. 166-167). Therefore, the Council finds that the Districts have not shown that there is not substantial evidence in the record to support the Department's Certification of Consistency with G P1(b)(2) and Delta Plan Mitigation Measure 5-4 with regard to flood flow and inundation management.

(c) Conclusion

The Districts have failed to show that the hydrology and hydraulics studies referenced by the Department are not equally or more effective than Delta Plan Mitigation Measures 5-1, 5-4, and 5-5. Therefore, with regard to Project Mitigation Measures BIO-1 through BIO-6, the Council finds that the Districts 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 Mitigation Measures 5-1, 5-4, and 5-5.

vi. Delta Plan Mitigation Measure 7-1

Delta Plan Mitigation Measure 7-1 requires, in relevant part, minimizing the loss of the highest value agricultural land, and for projects that will result in the permanent conversion of farmland, to preserve in perpetuity other farmland or contribute funds to do so (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, p. 14). The measure requires the reconnection of utilities that serve agricultural uses if they are disturbed, and to manage project operations to minimize the introduction of invasive nonnative species (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, p. 15).

The Districts assert that the Covered Action fails to comply with this measure and the Department has not established that the chosen mitigation strategy is equally effective or more effective than Delta Plan Mitigation Measure 7-1 because Project Mitigation Measure AG-1a lacks (Districts Appeal Letter, pp. 3-4):

- "specific criteria or a standard of performance" regarding the proposed irrigation infrastructure to Prime Farmland
- mitigation for the "impacts associated with conversion of privately-owned farmland to habitat uses"
- an assessment of the "potential need to relocate existing water-diversion facilities; impacts to buried gas lines and above-ground power lines, or impacts from relocating power lines"
- mitigation for the potential impact of new water levels and increased species abundance on agricultural operations
- mitigation for impacts on emergency ingress and egress with the abandonment of Liberty Island Road

However, the Districts do not specify how these elements are required by Delta Plan Mitigation Measure 7-1, which does not specify a standard of performance for irrigation infrastructure, potential impact of new water levels and species abundance, or impacts from emergency ingress and egress. Nevertheless, the Council notes that for the criteria regarding the proposed irrigation infrastructure, the Department states that Project Mitigation Measures AG-1a and AG-1b were developed "through extensive consultation with Solano County, the tenant who has been ranching part of the Proposed Project Site for many decades, and adjacent landowners" and would "maintain agricultural and economic productivity in the area" (Certification Attachment 7 – Mitigation Equivalency Table, p. 14). These mitigation measures would result in (Certification Attachment 7 – Mitigation Equivalency Table, p. 14; Draft EIR (Draft EIR, Certification Record LOS.4.00001, pp. IV.B-10–IV.B-13; Final EIR, Certification Record LOS.3.00001, p. 2-15):

- "irrigation improvements of 320 acres of Prime Farmland that could not previously be farmed as Prime Farmland"
- "new irrigation infrastructure for 340 acres of land that will become Prime Farmland with the new system"
- "new irrigation infrastructure for 100 acres of non-Prime Farmland"
- "improved drainage of non-irrigated rangeland for 960 acres"
- "the preservation of 1,000 acres of Prime Farmland through conservation easements."

Furthermore, the Draft EIR outlines the criteria and acreage of irrigation improvements to be provided (Draft EIR, Certification Record LOS.4.00001, pp. IV.B-11 to IV.B-12). Project mitigation measures would incorporate agricultural easement

acquisitions and improve farmland irrigation to compensate for lost farmland as a result of the Covered Action, which is a part of the requirements set forth in Delta Plan Mitigation Measure 7-1 (Certification Attachment 7 – Mitigation Equivalency Table, pp. 13-14; (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, PDF pp. 22-23)..

Regarding utilities, the Department notes that power lines would be relocated, but "the lines would be incorporated to the upland areas and would not impact any environmental sensitive habitats," (Draft EIR, Certification Record LOS.4.00001, p. IV. A-22). With regard to the Districts' assertion regarding impacts to natural gas pipelines and facilities, the Department cites to the Draft EIR and supporting documents that state: "no extraction has been documented in the last decade, and all known oil and gas infrastructure has been documented to be plugged and abandoned in accordance with applicable regulatory guidelines" (Draft EIR, Certification Record LOS.4.00001, p. IV.A-22).

The Districts argue that "the Project's proposed water diversions will impact agricultural use through increased populations of protected species in the Project area and restrictions on Appellant's use of pesticides, herbicides, fertilizers, and other agricultural chemicals" as well as habitat for agricultural pests (Districts Appeal Letter, p. 4). Delta Plan Mitigation Measure 7-1 relates to agricultural resources but does not explicitly require mitigation regarding potential impacts to water diversions. Lastly, the Districts argue that the Lookout Slough Project "fails to mitigate impacts on emergency ingress/egress from construction and abandonment of Liberty Island Road" (Districts Appeal Letter, p. 4). The Department identifies access ramps that would provide RD 2068 personnel access during construction (Draft EIR, Certification Record LOS.4.00001, pp. III-37, III-48). The Covered Action would also maintain or move access to Liberty Island Road to provide emergency ingress and egress (Certification Attachment 7 – Mitigation Equivalency Table, pp. 14-15), therefore meeting the Delta Plan Mitigation Measure 7-1 requirement for reconnection of utilities and infrastructure.

The Districts assert that the Department failed to include a number of elements that it asserts are required by Delta Plan Mitigation Measure 7-1, including performance criteria for irrigation infrastructure that the Department states it will install as mitigation, an assessment of relocation of powerlines and other infrastructure, and mitigation for emergency access. However, for the elements required by Delta Plan Mitigation Measure 7-1, the Department has cited to ~~substantial~~ evidence in the record, including in the Draft EIR and Final EIR.

(a) Conclusion

The Districts have failed to show that Project Mitigation Measures AG-1a and AG-1b are not equally or more effective than Delta Plan Mitigation Measure 4-2. Therefore, with regard to Project Mitigation Measures AG-1a and AG-1b, the Council finds that Appellant the Districts 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 Delta Plan Mitigation Measure 4-2.

vii. Delta Plan Mitigation Measures 18-1 and 18-2

Delta Plan Mitigation Measures 18-1 and 18-2 require, in relevant part, mitigation for impairment, degradation, or elimination of recreational facilities (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, pp. 47-48). Specifically, these measures apply if there would be a significant impact to recreational facilities, and would require, in part, replacement facilities of equal capacity and quality to mitigate for "substantial impairment, degradation, or elimination of recreational facilities" (18-1) or directing users to under-utilized recreational facilities as mitigation for "substantial temporary or permanent impairment, degradation, or elimination of recreational facilities" that cause users to be directed toward other facilities (18-2). It is important to highlight that these mitigation measures specifically apply to recreational facilities, not existing recreational uses in an area without such facilities.

The Department certifies that the Covered Action is consistent with G P1(b)(2) with regard to Delta Plan Mitigation Measures 18-1 and 18-2. In its May 3, 2021 Letter, the Department cites to the Final EIR, Master Response 10 (Department's May 3, 2021 Letter, p. 17). Final EIR Master Response 10 addresses recreation, and cites to Section IV.J of the Draft EIR, which analyzes recreational impacts at sites in the region. Based on this analysis, the Department determined that the impacts to recreational resources are less than significant under CEQA (Final EIR, Certification Record LOS.3.00001, p. 3-25). 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. Nevertheless, materials in the record that have been identified by LIA are considered below.

Appellant LIA argues that the "Project eliminates recreational facilities without replacement" in violation of Delta Plan Mitigation Measure 18-1 and 18-2 (LIA Appeal Letter, p. 6). As support for this assertion, LIA cites to annotated satellite imagery attached to their appeal. This information is not part of the record that was before the Department at the time of certification, and therefore is not properly before the Council.

LIA also asserts that the paths on the LIER levee fit the definition of a trail and should be considered as "recreational facilities" (LIA Appeal Letter, p. 8). As support for this, LIA cites to the California Recreational Trails Plan Executive Summary Progress Report (LIA Appeal Letter, p. 8; LIA Appeal Letter Exhibit D – California Recreational Trails Plan Executive Summary Progress Report).[17] In its May 3, 2021 letter, the Department notes that the Covered Action is not affecting "official recreation sites or facilities" and will provide new public access to more than 20 miles of new public channels and waters (Department's May 3, 2021 Letter, p. 2-5, 5-1). As support for this,

[17] In its Appeal Letter, LIA requested that Exhibit D be added to the record. Exhibit D consists of the California Recreation Trails Plan Executive Summary Progress Report, published by California State Parks in 2011. The Council takes official notice of Exhibit D under its Appeals Procedures, section 29, as documented in Exhibit B to this Determination. Although the Council takes official notice of Exhibit D, we do not use its contents to reach any conclusions about whether trails in LIER are "recreational facilities".

the Department cites to master response 10 of the Final EIR (Final EIR, Certification Record LOS.3.00001, pp. 3-24–3-25). This response in turn cites to the Draft EIR, describes the CEQA threshold used for recreation analyses, and states that the impact to recreation would be less-than-significant under this statement (Draft EIR, Certification Record LOS.4.00001, pp. IV.J-5–IV.J-6). While LIA argues that these areas of new public water access created by the Covered Action would require paddling 21 miles or more round trip from the next-closest boat launch, they do not identify a significant impact to a designated recreational facility as a result of the Lookout Slough Project (LIA's May 3, 2021 Letter, p. 1). 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.

(a) Conclusion

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.[18]

viii. Delta Plan Mitigation Measure 19-1

Delta Plan Mitigation Measure 19-1 requires, in part, that projects "Avoid modifications to federal, State, and county highways, local roadways, and bridges that may reduce vehicle capacity, to the extent feasible" (Appendix O, Mitigation Monitoring and Reporting Program, Delta Plan, p. 49). This mitigation measure also includes several components focused on reducing traffic impacts as a result of roadway construction activities, an increase in traffic, from flooding due to floodplain operation, and other elements.

The Department did not include a Project Mitigation Measure that corresponds to Delta Plan Mitigation Measure 19-1 as part of its Certification of Consistency (Certification Attachment 7 – Mitigation Equivalency Table). Rather, the Department states "As there are no feasible alternatives for reconnecting hydraulic and habitat connectivity on the Project site while meeting Project objectives, Delta Plan Mitigation Measure 19-1 is not applicable" (Department's May 3, 2021 Letter, pp. 6-7). As support for this, the Department cites to the Draft EIR for a description of the project objectives (Draft EIR, Certification Record LOS.4.00001, p. III-21–III-22), the Final EIR for a response to comments (Final EIR, Certification Record LOS.3.00001, PDF p. 250), and in turn cites to the ~~Fish Restoration Program (~~FRP~~)~~ Implementation Strategy and states

[18] It should be noted, however, that Delta Plan Mitigation Measures 18-1 and 18-2 may be applicable to a certification of consistency with G P1(b)(2) submitted in response to the remanded recreational issues under G P1(b)(3) and DP P2, or if the Department otherwise modifies its CEQA findings related to recreational impacts.

"the use of culverts in place of breaches is inconsistent with FRP restoration guidelines" (*Ibid.*).

Appellant LIA contends that the Covered Action eliminates a county roadway when other feasible options exist and implies that the Department should have included mitigation or avoided the alleged impact. More specifically, LIA states that the Covered Action would modify a roadway and remove a public right-of-way, but could avoid this impact by using a design incorporating box culverts (LIA Appeal Letter, p. 9). LIA asserts that because the "Project modifies a local roadway in a manner that eliminates vehicle traffic and lacks an explanation of the infeasibility of avoidance, the Project is inconsistent with this Delta Plan Policy (LIA Appeal Letter, p. 9). LIA adds that this issue was raised in a meeting with the Department in February 2021 and cites to a comment submitted by Solano County on this issue that was included in the Lookout Slough Final EIR (Final EIR, Certification Record LOS.3.00001, PDF p. 249). LIA does not explain or cite to evidence in the record to show that the proposed modifications to Liberty Island Road would reduce vehicle capacity.

Avoiding modifications to Liberty Island Road that would reduce vehicle capacity is only necessary if Delta Plan Mitigation Measure 19-1 is applicable to the Lookout Slough Project. The Department has identified substantial evidence in the record that the Covered Action would not result in a significant traffic or circulation impact (Draft EIR, Certification Record LOS.4.00001, p. IV A-20). Moreover, the Department notes "In the long-term, there would be little vehicle traffic associated with the Proposed Project because no new roads, employment sources, housing, or other human-serving facilities are proposed" (Draft EIR, Certification Record LOS.4.00001, p. IV.A-20).

The Council may consider only whether substantial evidence in the record supports the Department's finding that the Lookout Slough Project includes equally or more effective mitigation than applicable Delta Plan Mitigation Measures. There is substantial evidence in the record to show that there are no impacts to traffic or circulation that require mitigation, and thus, Delta Plan Mitigation Measure 19-1 is not applicable. LIA has not cited to ~~substantial~~ evidence that contradicts the Department's findings as to this issue.

(a) Conclusion

LIA has failed to show that Project Mitigation Measure 19-1 is applicable to the Lookout Slough Project. Therefore, the Council finds that 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 Measure 19-1.

d. Conclusions

The Department maintains that the Covered Action is consistent with Policy G P1(b)(2). As support for this, the Department has identified Project Mitigation Measures that it finds are applicable to the Covered Action. For these applicable measures, the Department has cited to substantial evidence in the record as support that its Project Mitigation Measures, or equivalent actions, are equally or more effective than

corresponding Delta Plan mitigation measures. The Department also states that a number of Delta Plan Mitigation Measures are not applicable because no impact or a less-than-significant impact has been identified by the Department for the applicable environmental resource or threshold. Appellants LIA, SCWA, and the Districts argue that the Covered Action is inconsistent with Policy G P1(b)(2) for the reasons discussed above. However, these Appellants have failed to show that there is not substantial evidence in the record to support the Department's finding for G P1(b)(2).

For the reasons stated above, the Council finds that:

1. With regard to Delta Plan Mitigation Measure 3-1, the Districts have failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(2).
2. With regard to Delta Plan Mitigation Measure 4-1, SCWA, the Districts, and CDWA have failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(2).
3. With regard to Delta Plan Mitigation Measures 4-2, and 4-3, the Districts have failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(2).
4. With regard to Delta Plan Mitigation Measures 5-1, 5-4, and 5-5, the Districts have failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(2).
5. With regard to Delta Plan Mitigation Measure 7-1, the Districts have failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(2).
6. With regard to Delta Plan Mitigation Measures 18-1 and 18-2, LIA has 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).
7. With regard to Delta Plan Mitigation Measure 19-1, LIA has 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).

Therefore, we *deny* the appeals.

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

The Department certifies that the Lookout Slough Project is consistent with G P1(b)(3). All four Appellants raise substantive arguments that it is not. For the reasons discussed below, the Council finds that: 1) with regard to methods to estimate recreational use, Appellant LIA showed that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(3~~).~~) as it relates to the best available science criterion of Inclusiveness. We therefore *remand the matter to the Department* for reconsideration of this issue; ~~and 2~~2) with regard to methods to estimate recreational use, 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)(3) as it relates to the best available science criteria of Objectivity and Relevance. We therefore *deny* the appeal as to this issue; and 3) with regard to issues of modeling years selected for water quality analysis; predictive, transparent, and open water quality modeling; cumulative impacts; peer review of water quality analysis; and water quality impacts to municipal and agricultural diverters, Appellants SCWA, the Districts, and CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(3). We therefore *deny* these appeals as to these issues.

a. Policy Requirements

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

> "The Delta Reform Act requires the Council to make use of best available science in implementing the Delta Plan. Best available science is specific to the decision being made at the time frame available for making that decision. Best available science is developed and presented in a transparent manner consistent with the scientific process (Sullivan et al. 2006), including clear statements of assumptions, the use of conceptual models, description of methods used, and presentation of summary conclusions. Sources of data used are cited and analytical tools used in analyses and syntheses are defined. Best available science changes over time and decisions may need to be revisited as new scientific information becomes available. Ultimately, best available science requires scientists to use the best information and data to assist management and policy decisions. The process used should be clearly documented and effectively communicated to foster improved understanding and decision making."

b. Certification

The Department certifies that the Lookout Slough Project is consistent with G P1(b)(3). The certification is based on an iterative design process which involved collection and incorporation of feedback from the sponsor, regulatory agencies, stakeholders, and scientists, including hydrologists and fisheries biologists. The Department states that the "process involved a review and evaluation of historical and regional precedence for the tidal marsh design; utilization of science-based channel

design software to produce channel layouts with refined curvature and sinuosity; development of a surface model with channel design integrated into the base topographic surface; and hydrodynamic and particle tracking modeling" (Certification, pp. 5-6). To substantiate this statement, the Department provides four resources that were used to inform the Lookout Slough Project design (Draft EIR, Appendix F, Certification Record LOS.4.00007; Draft EIR, Appendix P, Certification Record LOS.4.00017; 100% BODR, Certification Record 11.00004; Certification Attachment 12 – Restoration Guidance for Delta Smelt), summarized here. A Biological Resources Assessment describes the Department's analysis of existing natural biological communities and special-status species in the Study Area (Draft EIR, Appendix F, Certification Record LOS.4.00007). A Tidal Hydrology and Hydraulic Analysis describes the models that were used to evaluate potential changes to hydrology, hydraulics, and particle tracking, including model selection, methods and development (Draft EIR, Appendix P, Certification Record LOS.4.00017). A report containing the 100% basis of design provides design details including flood protection, engineering design criteria, levee alterations, and levee maintenance (100% BODR, Certification Record 11.00004). For Delta smelt habitat and preferences in the design, the Department cites to a Technical Memorandum – Restoration Guidance for Delta Smelt (Certification Attachment 12 – Restoration Guidance for Delta Smelt).

The Department analyzed the Covered Action's effect on salinity and bromide using established predictive regional models that have been used by multiple agencies for 20 years. The Certification references Appendix S, "Potential Salinity Impacts" (Draft EIR, Appendix S, Certification Record LOS.4.00020), which includes a summary of Resource Management Associates (RMA) Bay-Delta model simulations of flow under existing conditions and three additional restoration scenarios to predict electrical conductivity (a common proxy for salinity). The Department also provides a more detailed report, "Tidal Habitat Restoration and Flood Improvement Project Modeling," which further describes the RMA model, the model selection process, boundary conditions, and modeling assumptions (Final EIR, Certification Record LOS.3.00001, pp. 674-905). The results include bromide impacts at drinking water intakes and a comparison of salinity changes relative to water quality standards in D-1641 and changes in X2.

The Department states that it used best available science to evaluate the Covered Action's effects on dissolved organic carbon and refers to the Final EIR Response to Comments (Final EIR, Certification Record LOS.3.00001, pp.69-664), which references three papers from 2008-2010 (one of which is peer reviewed) (ESA PWA 2010, Certification Record – FEIR References, p. 3-22, FN#23; PWA 2008, Certification Record – FEIR References, p. 3-22, FN#24; Kraus et al. 2008, Certification Record – FEIR References, p. 3-22, FN#26), as well as the residence time hydrodynamic modeling results described in the Draft EIR Appendix P (Draft EIR, Appendix P, Certification Record LOS.4.00017). For potential effects of methylmercury, within the Final EIR Response to Comments (*Ibid.*), the Department cites to its 2020 study report on mercury imports and exports of four tidal wetlands in the Delta (DWR 2020, Certification Record – FEIR References, p. 3-18, FN#19).

In its Certification, the Department cites to the Draft Adaptive Management and Monitoring Plan (Certification G P1(b)(3) Finding, p. 7) which contains conceptual models based on peer-reviewed and agency-generated literature that describe the scientific basis for the expected functions of the restored wetlands that would result from the Covered Action (Draft AMMP, Certification Record CAP_Draft LOS AMMP). The Draft AMMP also describes methodologies for monitoring the site to generate a scientific basis for ongoing management decisions, and a proposed approach to data management and communication of scientific findings to ensure transparency of findings throughout the project monitoring period.

c. Appeals and Analysis

The Council received appeals regarding the Department's Certification of Consistency with G P1(b)(3) from the following parties:

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

Each of the issues raised in these appeals is briefly described below, with an analysis of the issue related to consistency of the Covered Action with G P1(b)(3). The appeal issues are grouped by topic area.

i. Methods to estimate recreational use

In its appeal, LIA argues that the Department failed to use the best available science to support its finding of a less-than-significant impact on recreation in the Lookout Slough Project EIR (Final EIR, Certification Record LOS.3.00001, p. 61), and specifically asserts that this claim is related to the Delta Plan ~~Best Available Science~~best available science criteria of objectivity, relevance, and inclusiveness.

LIA asserts that the Department did not properly survey the site, which they assert should have included conducting on-site surveys for recreational use. Because the Department conducted 19 other on-site surveys, none of which surveyed for recreational use, LIA asserts that this "suggests a lack of objectivity in DWR's evaluation" (LIA Appeal Letter, p. 2). The ~~Best Available Science~~best available science criterion of Objectivity requires that data collection and analyses considered shall meet the standards of the scientific method and be void of nonscientific influences and considerations (Appendix 1A, Best Available Science, Delta Plan, p. 1A-2). LIA has not established that a specific type of study is required in order to estimate recreational use.[19] Both LIA and the Department have shown that there are other readily available

[19] In its June 28, 2019 letter (p.5), the Commission states that "the agencies charged with protecting fish and wildlife require actual surveys of affected sites that gather real data about the animals and plants a

sources of data, and LIA has not established that those sources are inadequate~~.~~ or that the data collection and analyses included nonscientific influences or considerations. Therefore, we find that the Department was not necessarily required to conduct in-person surveys in order to meet the Objectivity criterion. Therefore, with regard to on-site surveys, the Council finds that LIA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(3) as it relates to the criterion of Objectivity ~~criterion for on-site surveys~~.

LIA also argues that the analyses the Department conducted are not objective because they did not use standardized methods. The Department used remote imagery to analyze recreation access *outside* the project site, but did not use similar methods to analyze recreational use *within* the project site (emphasis added; LIA Appeal Letter, p. 3). The Department used census tract population data to analyze recreational use (Draft EIR, Certification Record LOS.4.00001, p. IV.J-6), a methodological choice that meets the standards of the scientific method and is aligned with the methodology used in the six sources of data in the record on recreation that informed the Department's analysis (Department's May 3, 2021 Letter, p. 7). The Department's May 3 Letter (Department's May 3, 2021 Letter, p. 7) cites to the DEIR section IV.J Recreation, which included seven sources in the record (CDCVB 2019, Certification Record – DEIR References, p. IV.J-3, FN#6; CDFW 2015, Certification Record – DEIR References, p. IV.J-2, FN#1; CSP 2014, Certification Record – DEIR References, p. IV.J-2, FN#3; DPC 2015, Certification Record – DEIR References, p. IV.J-3, FN#4; DSC 2018, Certification Record – DEIR References, p. IV.J-3, FN#5; Mickel et al. (nd.), Certification Record – DEIR References, p. IV.J-6, FN#7; Thomson and Kosaka 2015, Certification Record – DEIR References, p. IV.J-6, FN#8). Therefore, with regard to the use of remote imagery, the Council finds that LIA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(3) as it relates to the ~~Objectivity~~ criterion ~~for use~~ of ~~remote imagery~~Objectivity.

Additionally, LIA contends that the Department reached inaccurate conclusions about recreational impacts because it did not objectively consider evidence in the record related to shoreline access via the Shag Slough Bridge. The appeal asserts that the Shag Slough Bridge supports a higher level of recreation than the Department acknowledged in the Draft EIR (LIA Appeal Letter, p. 3), which could have led to a different finding regarding the significance of impacts to recreation. As evidence, LIA cites to a presentation delivered to the Department prior to submission of the

project may impact," and that actual surveys should be also performed for recreational use. In the region, well-established best practices for performing site analyses of recreational usage do not exist like they do for threatened species. This is likely driven by permitting requirements for threatened species under laws including the California Endangered Species Act. There is no similar permitting requirement which would have led to the degree of scientific work establishing survey methods for recreators in the Delta.

certification of consistency, describing recreational use of the project site, Shag Slough Bridge, and Liberty Island Ecological Reserve (LIA Appeal Letter, Exhibit B – Information Presented to DWR). The presentation includes photographs of Liberty Island Road and Shag Slough Bridge, a screen shot of a "Liberty Island Fishing" Facebook group, and the results of a survey of "Liberty Island/Shag Slough" users conducted by LIA (LIA Appeal Letter, Exhibit B – Information Presented to DWR). LIA also cites to a statement made by the Department in the Draft EIR which describes the shoreline accessible by the bridge as "small," whereas a comment letter from the ~~California Department of Fish and Wildlife (CDFW)~~CDFW states that the shoreline is more than three miles long (LIA Appeal Letter, p. 2; Final EIR, Certification Record LOS.3.00001, p. 98).

The appeal further asserts that the Department used a geographic scale to conduct its analysis that led to inaccurate estimates of the number of visitors to the site in the Draft EIR (LIA Appeal Letter, p. 4). The scale, according to LIA, is inaccurate on two counts; first that the Department's analysis of the "population of the Proposed Project Site's Census Tract" (Draft EIR, Certification Record LOS.4.00001, p. IV.J-6) is not supported by substantial evidence because "there are two census tracks [sic] on the project site" (May 20, 2021 Hearing Transcript, p. 61), and second, that the analysis used in the Draft EIR to calculate recreational use relies on "a one-hour driving radius from the Project site[, which] includes far more than the single census tract considered in their calculation" (LIA Appeal Letter, p. 4). According to LIA, the exclusion of this information fails to meet the ~~Best Available Science~~best available science Relevance and Inclusiveness criteria (LIA Appeal Letter, p. 4).

The Relevance criterion requires that scientific information used should be germane to the Delta ecosystem and/or biological and physical components (and/or processes) affected by the proposed decisions (Appendix 1A, Best Available Science, Delta Plan, p. 1A-2). The Department's analysis of recreational impacts included a survey of relevant science. The Department cites to six sources of data in the record (Department's May 3, 2021 Letter, p. 7) that were used to determine the impacts of the Covered Action on recreation. The Department also uses census data to perform a population analysis of recreation impacts on the site (Draft EIR, Certification Record LOS.4.00001, p. IV.J-6) and an analysis of nearby recreational sites likely to absorb displaced recreational users (Draft EIR, Certification Record LOS.4.00001, pp. IV.J-2 - IV.J-4). Each of these analyses uses science and data sources that meet the relevance standard. Therefore, the Council finds that LIA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(3) as it relates to the criterion of Relevance.

The Inclusiveness criterion requires that scientific information used shall incorporate a thorough review of relevant information and analyses across relevant disciplines (Appendix 1A, Best Available Science, Delta Plan, p. 1A-2). The Department

made the decision to calculate bank fishing use within Liberty Island Ecological Reserve based on a single census tract within which a part of the project site is located (Draft EIR, Certification Record LOS.4.00001, p. IV.J-6). The Department's analysis states, "It is estimated based on fishing rates of Delta residents and the population of the Proposed Project Site's Census Tract that approximately 200 people across the Tract partake in fishing. Of these, approximately 40% fish from the bank, and a smaller subset use the Reserve for bank fishing purposes." (Draft EIR, Certification Record LOS.4.00001, p. IV.J-6). LIA contends that this does not constitute best available science because "there are two census tracks [sic] on the project site" (May 20, 2021 Hearing Transcript, p. 61).

For its analysis of the potential impacts to other recreational facilities due to recreational use displaced by the Covered Action, the Department cites to a 2012 Department of Parks and Recreation report that states that "adult recreationists in California travel between 21 to 60 minutes to the places they visit most often for recreation" (Draft EIR, Certification Record LOS.4.00001, p. IV.J-2). This evidence is used to identify the geographic reach of other recreational sites in the region. However, when describing the reach of recreational users of the project site itself, the analysis uses "the Proposed Project Site's Census Tract" (Draft EIR, Certification Record LOS.4.00001, p. IV.J-6). LIA contends that "a one-hour driving radius from the Project site includes far more than the single census tract considered in their calculation" and that the Department's methods were therefore not inclusive (LIA Appeal Letter, p. 4).

The record indicates that the Department had access to information describing the area within 60 minutes of the site, which was used to identify other recreational areas in the region (Draft EIR, Certification Record LOS.4.00001, p. IV.J-2). Given that the Department used data from one census tract already (Draft EIR, Certification Record LOS.4.00001, p. IV.J-6), there is evidence that the Department had access to census tract data for the region. According to LIA, "a one-hour driving radius from the Project site includes far more than the single census tract considered in their calculation," and therefore the Department underestimated recreational use (LIA Appeal Letter, p. 4). The Department has not explained or identified ~~substantial~~ evidence in the record demonstrating that excluding additional census tracts covered by the project site, or census tracts within the 21 to 60-minute travel distance described in the Parks and Recreation Report, constitutes use of best available science.

Importantly, underestimating the number of recreational users may have influenced the Department's failure to identify and thereby avoid or reduce conflicts with existing recreational uses, as required by DP P2. According to oral comments provided by John Baas at the May hearing (representing the Department), the analysis was intended to provide "an order of magnitude estimate" (May 20, 2021 Hearing Transcript, p. 194). However, including the missing information may have increased the estimate by one or more orders of magnitude. At the May 20, 2021 Hearing, LIA displayed a map illustrating the census tracts within a one-hour driving radius from the Shag Slough Bridge (LIA May 20, 2021 Presentation, pp. 14-16) and stated that, "the one-hour driving travel time distance …covers a population of about 1.9 million people. Not

10,000.[20] 1.9 million. Nearly 200 times the general population that DWR derives their statistics for bank fishing off of." (May 20, 2021 Hearing Transcript, p. 61, ll. 17-22). As noted above, the record shows that the Department had access to information describing the area within 60 minutes of the site, which was used to identify other recreational opportunities in the region (Draft EIR, Certification Record LOS.4.00001, p. IV.J-2). In the Draft EIR, Table IV.J-1 lists bank fishing sites within a one-hour drive of the Lookout Slough Project site; the locations listed for these sites include: Antioch, Isleton, Lodi, Oakley, Rio Vista, and Sacramento (Draft EIR, Certification Record LOS.4.00001, p. IV.J-2). Although the Department had access to census tract data (Draft EIR, Certification Record LOS.4.00001, p. IV.J-6) the census tract data is not provided in the record. ~~Nevertheless, it is common knowledge~~The Council takes official notice of U.S. Census data showing that the combined population of the cities of Antioch, Isleton, Lodi, Oakley, Rio Vista, and Sacramento (and other communities within a one-hour with bank fishing sites) exceeds 10,000 people by at least one order of magnitude.[21]

Lacking substantial evidence in the record to justify that the Certification meets the criterion of Inclusiveness, and given the possibility that the failure to meet that criterion may have led to the Department not fully considering the effects of the Covered Action, the Council finds that LIA showed that the Certification is not supported by substantial evidence in the record as it relates to the Inclusiveness criterion of G P1(b)(3). Therefore, with regard to methods to estimate recreational use, Appellant LIA showed that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(3~~).~~) as it relates to the best available science criterion of Inclusiveness.

ii. Modeling Years selected for water quality analysis

In its appeal, SCWA asserts that

[20] According to LIA, the population of the "larger of the two census tracts, larger in terms of population" that intersects with the Project site, is about 10,000 people, whereas the population of the smaller census tract that intersects with the Project site is about 2,000 people (May 20, 2021 Hearing Testimony, p. 61, ll. 8-11).

[21] The Council takes official notice of the following US Census Bureau 2019 American Community Survey (ACS) estimates: 2019 American Community Survey (ACS) 1-Year Estimates, Table B01003 "Total Population" for Antioch city, California; 2019 ACS 5-Year Estimates, Table B01003 "Total Population" for Isleton city, California; 2019 ACS 1-Year Estimates, Table B01003 "Total Population" for Lodi city, California; 2019 ACS 5-Year Estimates, Table B01003 "Total Population" for Oakley city, California; 2019 ACS 5-Year Estimates, Table B01003 "Total Population" for Rio Vista city, California; 2019 ACS 1-Year Estimates, Table B01003 "Total Population" for Sacramento city, California. The Council takes official notice of this data under section 29 of our Appeals Procedures, because this population information constitutes facts that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy. Based on this data, the combined population of the six cities is 743,522. The US Census Bureau data sources are identified in Exhibit B to this Determination.

> "[….] the draft EIR evaluated the Project's impacts on salinity using results from a simulation modeled and analyzed only for the year 2009. The selection of a single year does not account for uncertainties and variations found in the hydrologic conditions of the Delta and does not constitute making use of best available science. […] While in the final EIR DWR expanded the modeling analysis to include an analysis of potential impacts over three different calendar years (all of which occur as part of a multi-year drought period), this modeling failed to include analysis of salinity in critically dry years and further was not subject to recirculation or further public comment." (SWCA Appeal Letter, p. 5).

The Districts similarly assert that "the models failed to adequately account for variability in hydrologic conditions, including drought" (Districts Appeal Letter, p. 7). CDWA similarly asserts in its appeal that the Department conducted an "Inadequate analysis of the water quality implications of the project" (CDWA Appeal Form, p. 7), again citing the Draft EIR analysis:

> "The draft EIR evaluated the project's impacts on salinity using results from a simulation modeled and analyzed only for the year 2009. The selection of a single year does not account for uncertainties and variations found in the hydrologic conditions of the Delta and does not constitute making use of best available science. Standard technical analyses for other projects typically use longer simulation periods that cover a variety of hydrological conditions to evaluate the potential consequences of a project with an effect on Delta hydrodynamics. This approach was not inclusive or objective" (CDWA Appeal Form, p. 7).

Additionally, CDWA states that "while the final EIR expanded the modeling analysis to include an analysis of potential impacts over three different calendar years (all of which occur as part of a multi-year drought period), this modeling failed to include analysis of salinity in critically dry years" (CDWA Appeal Form, p. 3).

In response to concerns raised by the Districts, SCWA, and CDWA in reference to the Draft EIR, the Department includes in their response to comments in the Final EIR that the analysis was expanded to include three calendar years (2009, 2010 and 2016) (Final EIR, Certification Record LOS.3.00001, p. 9). These years represent a Sacramento River watershed water supply index ranging from below normal to dry hydrologic conditions. All three years are part of a multi-year drought: 2009 is the second year, 2010 the third year, and 2016 the fifth year (Final EIR, Certification Record LOS.3.00001, p. 9) To explain the selection of years, the Department states:

> "For all of the modeled years, the salinity modeling represented dry year conditions which are defined as a minimum monthly flow rate of 4,000 cfs in October and 4,500 cfs in November and December in the lower Sacramento River at Rio Vista. For comparison, critically dry year conditions are defined as a minimum monthly flow rate of 3,000 cfs and

> 3,500 cfs for the same months at the same location (see Table 3 of SWRCB 2018). Water operations in critically dry years are not typical and D-1641 standards in critically dry years include elevated ~~EC.~~[Electric Conductivity] EC. The modeling for this analysis has shown Delta salinity levels are well within D-1641 compliance for dry year conditions and represents a reasonable variety of hydrologic conditions sufficient to analyze potential salinity impacts." (Final EIR, Certification Record LOS.3.00001, p. 3-8).

The Department goes on to state that the three years selected

> "included dry and below normal years within a multi-year drought, when reservoir storage is depleted, and less water is available for salinity management. During these years, the Project is not predicted to change compliance with D-1641, hence no additional changes to State Water Project or Central Valley Project storage operations, or local water management measures would be required […] Since storage operations do not need to be changed, a longer period (including critically dry years) does not need to be analyzed and would not change the findings of the analysis." (Department's May 3, 2021 Letter, p. 10)

During the May 20, 2021 hearing, Matt Brennan of ESA (representing the Department), reiterated the reason for selecting the Below Normal and Dry years for modeling. Selecting years that were in the second, third, and fifth year of a drought, provided "a range of upstream reservoir conditions that would then affect how flows were coming through the Delta." (May 20, 2021 Hearing Transcript, p. 254-255, ll. 14-18; Final EIR, Certification Record LOS.3.00001, p. 3-8).

The ~~Best Available Science~~best available science criteria mentioned in CDWA's appeal are Inclusiveness and Objectivity. The Inclusiveness criterion requires that scientific information used shall incorporate a thorough review of relevant information and analyses across relevant disciplines. The Objectivity criterion requires that data collection and analyses considered shall meet the standards of the scientific method and be void of nonscientific influences and considerations (Appendix 1A, Best Available Science, Delta Plan, p. 1A-2). Regarding inclusiveness, an appendix to the Final EIR prepared by RMA details how the data set was selected, what considerations and adjustments were made due to preliminary results, and how conclusions were reached (e.g., Final EIR, Certification Record LOS.3.00001, pp. 690-691,693, 696, 704). Regarding Objectivity, RMA details an approach in its final report (Final EIR, Certification Record LOS.3.00001, pp. 690-691) justifying the reason for using the RMA Bay-Delta model as a widely accepted tool that is effective at predicting electrical conductivity throughout the Delta, outlining general methods such as using electrical conductivity as a surrogate for salinity, and offering general observations from the modeling results. (Final EIR, Certification Record LOS.3.00001, pp. 676-912). During the May 21, 2021 hearing John DeGeorge of RMA (representing the Department) stated that the Bay-Delta model has previously been used to support the Bay Delta

Conservation Plan, EcoRestore, and tidal restoration projects including Tule Red, Prospect Island and Little Egbert Tract. Mr. DeGeorge further stated that "detailed multi-dimensional modeling of the Delta is computationally demanding, and it is typically used to simulate periods that are most relevant to project analysis." Mr. DeGeorge also clarified the modeling year selection by adding; "During rare critically [dry] years, water quality conditions are likely to be poorer. In that year, specific boundary flows and operation decisions will drive in water quality." (May 21, 2021 Hearing Transcript, pp. 49-51, ll. 15-18; Final EIR, Certification Record LOS.3.00001, pp. 690-691, 676-912). These citations to evidence in the record demonstrate the Department's use of inclusive and objective science.

Appellants SCWA, the Districts, and CDWA do not identify ~~substantial~~ evidence in the record supporting why the Department's analysis should have included a critically dry year, or drought conditions beyond those used in the analysis, and we defer to the Department's choice of modeling years as meeting the criteria for best available science. The Council finds that SCWA, the Districts, and CDWA failed to show that the Certification is not supported by substantial evidence in the record as it relates to the Inclusiveness and Objectivity criteria of G P1(b)(3). Therefore, with regard to the choice of modeling years, the Council finds that these Appellants failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(3).

iii. Predictive, transparent, and open water quality modeling

In its appeal, CDWA asserts that the Department "mischaracterized its [salinity] modeling efforts as predictive, when it is not" (CDWA Appeal Form, p. 3). CDWA cites to a presentation which includes the following statement by the Department: "the Proposed Project was predicted to not cause non-compliance or make non-compliance with D-1641 salinity standards more likely" (Agency Presentation, Certification Record LOS.6.00001, p. 8). The presentation references electrical conductivity (EC) (a common proxy for salinity) modeling conducted by RMA (Final EIR, Certification Record LOS.3.00001, p. 674-905). Further, in its supplemental submission letter, CDWA states that "According to the powerpoint presentation prepared by DWR and [Ecosystem Investment Partners] EIP, 'the model replicates 67-80% of observed EC variance at **some locations**," and that, "Replicating variance at 'some locations' is not a mark of accuracy and indicates that the model is not in fact predictive." CDWA also asserts that the "Final EIR Appendix X provides many examples of how the predictive ability of the RMA model is very poor in various locations, particularly in the fall" (CDWA's May 7, 2021 Letter, p. 4-5; Agency Presentation, Certification Record LOS.6.00001).

Citing to the same presentation by the Department and EIP, the Districts state in their letter that the "Master Response [Master Response 1] itself expressly acknowledges that the models are not reliably predictive" (Districts' May 10, 2021 Letter, pp. 4-5; Agency Presentation, Certification Record LOS.6.00001). Neither appellant cites to specific ~~Best Available Science~~best available science criteria in their appeal on this issue, and the Council could not discern which criteria are implicated.

While CDWA and the Districts claim that the Department's modeling efforts are not predictive, Appendix X of the Final EIR notes that:

> "the RMA Bay-Delta model is a widely accepted tool that is effective at predicting EC throughout the Delta (see Appendix B: Water Quality Model Calibration). The model has been applied to flow and salinity impacts analysis for numerous restoration projects in the Bay-Delta system…The RMA Bay-Delta model has undergone continual development over more than 20 years to reflect currently available data and meet project needs. Similarly, since their original development in the 1970's, the RMA2 and RMA11 computational models have been updated over the years to best utilize the latest scientific knowledge and technology, and to meet new project needs." (Final EIR, Certification Record LOS.3.00001, p. 690)

In their letter, responding to CDWA's claim, the Department states that predictive modeling, in this case, means that the model uses: "fundamental equations to describe the physics of fluid motion, thus making it predictive" (Department's May 3, 2021 Letter, p. 10). At the May 20, 2021 Hearing, the Department further states that, "[t]his modeling approach of using a model based on physics that has been calibrated to an extensive observation data set, which is then used to compare existing proposed conditions, is widely considered the best available science by engineers, scientists, and research managers who study and work in the Delta," (May 20, 2021 Hearing Transcript, p. 185; Final EIR, Certification Record LOS.3.00001, pp. 690). Evidence provided by the Department consists of the coefficient of determination, which is used to quantify the predictive value of modeling results: "at most locations, the coefficient of determination between predicted and observed EC is 0.9 or higher, indicating that the model's predictions replicate 90% or more of the variance in the observed EC. At a few locations in the vicinity of the Proposed Project, local watershed sources of EC play a larger role, but data to characterize these watershed sources is very limited. As a result, the model replicates 67-80% of the EC variance at some locations, which is still a high correlation," (Final EIR, Certification Record LOS.3.00001, p. 41). The lower coefficient of determinations in two locations represents 'fair agreement' between observed and modeled data, despite a lack of data in some locations (Final EIR, Certification Record LOS.3.00001, p. 704). Given the ~~additional~~record evidence and statements provided by the Department, the Council finds that CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)3 with respect to the RMA Bay-Delta model being predictive.

In its appeal, CDWA also asserts, regarding the salinity modeling, that "these actions lack transparency and openness" (CDWA Appeal Form, p. 3). CDWA clarifies in its May 7, 2021 Letter that: "the failure [to use ~~Best Available Science~~best available science to address the potential for increases in salinity from the Project] also implicates the Transparency and Openness criterion, where sources and methods used for analyzing the science, must be clearly identified." (CDWA's May 7, 2021 Letter, p. 9-10).

The Transparency and Openness criterion requires that the sources and methods used for analyzing the science used shall be clearly identified, recommends the opportunity for public comment on the use of science, requires that limitations of research be clearly identified and explained, and requires that uncertainty is communicated (Appendix 1A, Best Available Science, Delta Plan, p. 1A-2). The Department identified the sources and methods used for analyzing the science (Final EIR, Certification Record LOS.3.00001, p. 690) and the Department notes the variety of ways that the Draft EIR was available for review (Final EIR, Certification Record LOS.3.00001, p. 7). The Department speaks to the limitations of research used (Final EIR, Certification Record LOS.3.00001, p. 704) and the range of uncertainty associated with the data and information used (Final EIR, Certification Record LOS.3.00001, p. 720). The Department notes in the Final EIR that, "The RMA Bay-Delta model has undergone continual development over more than 20 years to reflect currently available data and meet project needs. Similarly, since their original development in the 1970's, the RMA2 and RMA11 computational models have been updated over the years to best utilize the latest scientific knowledge and technology, and to meet new project needs," and also lists a number of previous applications of the model to analyze flow and salinity for other projects (Final EIR, Certification Record LOS.3.00001, p. 690). Finally, the Department states that the water quality analysis was publicly available for review as part of the CEQA process (Final EIR, Certification Record LOS.3.00001, Appendix X) and was available for review for three months prior to submittal of this Certificate of Consistency, making the methodologies both transparent and open to the public, agencies, and scientific community" (Department's May 3, 2021 Letter, p. 17). The record supports the Department's statement that the Final EIR was available for three months prior to the Department's submittal of its Certificate of Consistency: the Final EIR was available on November 3, 2020 and the Certification of Consistency was filed on February 22, 2021.

The Department identified sources and methods used to analyze the science for the Project and the Department notes all the ways the Draft EIR was available for public review. The Department also shared the limitations of the research and the range of uncertainty associated with the data used. For these reasons, the Council finds that CDWA failed to show that the Certification is not supported by substantial evidence in the record as it relates to the Transparency and Openness criteria of G P1(b)(3). Therefore, with regard to predictive, transparent, and open water quality modeling, the Council finds that CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(3).

iv. Cumulative impacts

CDWA argues that the Department "ignored cumulative and long term effects of reduced flows through the Delta and corresponding increases in salinity in the Central and South Delta" (CDWA Appeal Form, p. 3). No specific ~~Best Available Science~~best available science criteria are mentioned in this argument, and the Council could not

discern which criteria are implicated. The Department describes in the Final EIR how it considered cumulative impacts:

> "To account for these effects, RMA analyzed the effects of over a dozen other tidal wetland restoration projects in the Delta and Suisun Marsh planned for restoration concurrently with the proposed Project, including Winter Island, Wings Land[ing], Tule Red, McCormack Williamson Tract, Lower Yolo, Dutch Slough, and Prospect Island. The combined effect of the Project on Delta EC in combination with other planned tidal wetland restoration project can at times of the year be appreciable for certain D-1641 monitoring compliance stations when compared to existing baseline conditions without these Delta restoration projects in place (e.g., greater than 8 percent increase in EC for an October 2009 scenario at Station D29); nevertheless, even with the combined effects of the Project with other restoration projects currently under planning, Delta salinities would remain in compliance with D-1641 requirements. Therefore, the Project's incremental effect on salinity in the Delta would not be considerable and the cumulative impact is less than significant." (Final EIR, Certification Record LOS.3.00001, p. 673).

CDWA does not point to ~~substantial~~ evidence in the record to support their assertions. The Council finds that CDWA failed to show that the Certification is not supported by substantial evidence in the record with any of the best available science criteria of G P1(b)(3). Therefore~~, with regard to cumulative water quality impacts~~, the Council finds that CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent as to G P1(b)(3~~). ~~)~~, with regard to cumulative water quality impacts.

v. Peer review of water quality analysis

CDWA asserts that "DWR's analysis of water quality impacts […] was never peer reviewed. The reference to some of the studies upon which DWR relied being peer reviewed fails to meet this criteria [sic]" (CDWA Appeal Form, p. 4). The criterion of Peer Review requires that independent scientific peer review be applied to proposed projects and initial draft plans, in writing after official draft plans or policies are released to the public, and to final released plans (Appendix 1A, Best Available Science, Delta Plan, p. 1A-2). However the Delta Plan Appendix 1A also recognizes that, "the level of peer review for supporting materials and technical information (such as scientific studies, model results, and documents) included in the documentation for a proposed covered action is variable and relative to the scale, scope, and nature of the proposed covered action" (Appendix 1A, Best Available Science, Delta Plan, pp. 1A-2 - 1A-3).

It is unknown whether the water quality analysis in the Final EIR Appendix X was formally subjected to a peer review process; however, the Department notes that, "the model used to support water quality analysis in the Draft and Final EIRs (the RMA Bay-Delta model) has been continually developed and improved over 20 years […] In

addition, over the course of this particular application, the model was reviewed by the staff of federal, state, and local government agencies representing flood control, restoration, and water user interests." (Department's May 3, 2021 Letter, p. 11), which suggests that the model itself has been extensively peer reviewed. Evidence in the record supports this statement;

"The RMA Bay-Delta model is a widely accepted tool that has been shown to be effective at predicting salinity distribution throughout the Delta. The model has been applied to flow and salinity impacts analysis for numerous restoration projects in the Bay-Delta system, including BDCP, Regional Salinity, Suisun Marsh PEIR/EIS, Prospect Island, Little Egbert Tract, McCormack-Williamson Tract, Decker Island, Winter Island, Dutch Slough, Chipps Island, Mallard Farms, Tule Red, Grizzly King, Potrero Marsh, Bradmoor Island, Arnold Slough, Hill Slough and Wings Landing."

(Final EIR, Certification Record LOS.3.00001, p. 690). Evidence in the record confirms that the RMA Bay-Delta model has been used for many other applications, in the form of a list of citations to projects where the model has been used (Final EIR, Certification Record LOS.3.00001, p. 840-841). In addition, the model was revised and further improved after comments to the Draft EIR (Final EIR, Certification Record LOS.3.00001, p. 40).

CDWA does not specify which studies that the Department relied upon fail to meet the Peer Review criterion. Given that the model relied upon for analysis was peer reviewed, the analysis in the FEIR was available for public review for several months prior to the certification of consistency, and that CDWA has not identified other studies that fail to meet the criterion, CDWA does not point to ~~substantial~~ evidence in the record to support its assertions. Therefore, the Council finds that CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent as to the Peer Review criterion of G P1(b)3.

vi. Water quality impacts to municipal and agricultural diverters

Appellants SCWA, the Districts, and CDWA raise various issues related to the Department's use of best available science to analyze and determine water quality impacts on municipal and agricultural diverters. Each Appellant's arguments are analyzed separately, below.

(a) SCWA

In its appeal, SCWA asserts that "the draft EIR failed to include an analysis of the proposed Project's effect on organic carbon […] DWR could have conducted this analysis based on CALFED's adopted total organic carbon water quality target." (SCWA Appeal Letter, p. 5). SCWA does not cite to evidence in the record to support this assertion. The SCWA appeal does not identify which specific best available science criteria the Department is allegedly not consistent as to the Covered Action's effect on organic carbon, but it appears to be related to the criteria of Inclusiveness and

Relevance. The Inclusiveness criterion requires that scientific information used shall incorporate a thorough review of relevant information and analyses across relevant disciplines. The Relevance criterion requires that scientific information used should be germane to the Delta ecosystem and/or biological and physical components (and/or processes) affected by the proposed decisions (Appendix 1A, Best Available Science, Delta Plan, p. 1A-2).

At the May 20, 2021 Hearing, the Department noted that the CALFED total organic carbon (TOC) water quality target is simply a goal, one that the North Bay Aqueduct (NBA) currently does not meet, especially during wet years, and that the target is not enforceable. And as such, it is not the responsibility of the Covered Action to meet this goal for the NBA. The Department stated that it did, however, consider the potential for dissolved organic carbon (DOC) to become worse at the NBA intake using three lines of evidence that demonstrate the Covered Action would not have a potential impact on DOC (May 20, 2021 Hearing Transcript, pp. 274-277). The Department included a qualitative analysis of the Covered Action's effect on DOC in the Final EIR (Final EIR, Certification Record LOS.3.00001, pp. 3-21).

The Department cites to evidence in the record within the Final EIR to substantiate that, "the Proposed Project would not raise DOC and affect the quality of water treated at water treatment plants for the following reasons: the lack of impact from the nearby Liberty Island restoration; the limited potential for water particles from the Proposed Project reaching the NBA intake; and the potential environmental processing of DOC on the Proposed Project Site" (Final EIR, Certification Record LOS.3.00001, p. 3-23). To the first point, the Department cites to a 2010 report by ESA PWA showing that the Liberty Island tidal wetland resulted in no change or slight decreases in DOC levels at the NBA intake from 1998 – 2010 (ESA PWA 2010, Certification Record – FEIR References, p. 3-22, FN#23). To the second point, the Department cites to hydrologic modeling performed for the Covered Action to demonstrate that only 1.3% of water originating from the Lookout Slough Project site reaches Lindsey Slough, which is another five miles away from the North Bay Aqueduct intake (Draft EIR, Appendix P, Certification Record LOS.4.00017). To the final point, the Department cites to research by Kraus et al. (Kraus et al. 2008, Certification Record – FEIR References, p. 3-22, FN#26) which describes how longer residence times result in 'processed' DOC with a lower potential to form disinfection byproducts; the hydrologic analysis results in long water residence times of a week or more in the vicinity of the site (Draft EIR Appendix Q, Certification Record LOS.4.00018).

The record supports the Department's use of best available science with regard to analyzing DOC, which is the most likely organic carbon form to react during chlorination and form disinfection byproducts (ESA PWA 2010, Certification Record – FEIR References, p. 3-22, FN#23). SCWA does not provide ~~substantial~~ evidence that it was necessary to evaluate TOC rather than DOC, that the Department failed to include an analysis of the Covered Action's effect on organic carbon, or that the Department should have conducted this analysis based on CALFED's adopted total organic carbon water quality target. ~~The Council finds that SCWA failed to show that the Certification is~~

~~not supported by substantial evidence in the record as it relates to the Inclusiveness and Relevance criteria of G P1(b)(3). Therefore, the~~The Council finds 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)(3).~~as it relates to the Inclusiveness and Relevance criteria of G P1(b)(3). Therefore, the Council finds 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)(3) with regard to SCWA's appeal on the issue of water quality impacts to municipal and agricultural diverters.

(b) Districts

The Districts assert in their appeal that the Department failed to adequately address potential degradation of water quality and impacts to municipal and agricultural diverters, stating "the analysis of potential impacts to water quality was based upon an inadequate data set, and the models failed to adequately account for variability in hydrologic conditions, including drought" (Districts Appeal Letter, p. 7). Relatedly, the Districts assert that the Department "fails to adequately mitigate the Project's significant impacts to methylmercury concentrations, which already exceeds total maximum daily load at the Project site. The Project also fails to adequately mitigate the Project's significant impacts to salinity, bromide, dissolved organic carbon, dissolved oxygen, turbidity, and water temperature" (Districts Appeal Letter, pp. 6-7). The Districts also assert that "DWR provides no technical analyses, modeling results, or data that would allow agencies to understand the likely carbon, salinity, and bromide impacts" (Districts Appeal Letter, p. 2).

Although the Districts' appeal does not identify specific applicable ~~Best Available Science~~best available science criteria, the Districts clarify in a Letter that these issues are related to the criteria of Inclusiveness and Transparency and Openness (CDWA's May 3, 2021 Letter, p. 9). The Inclusiveness criterion requires that scientific information used shall incorporate a thorough review of relevant information and analyses across relevant disciplines. The Transparency and Openness criterion requires that the sources and methods used for analyzing the science used shall be clearly identified, recommends the opportunity for public comment on the use of science, requires that limitations of research be clearly identified and explained, and requires that uncertainty is communicated (Appendix 1A, Best Available Science, Delta Plan, p. 1A-2).

The Draft EIR states that in order to provide the public with information on analysis, modeling and data, the Department provided a 60-day public review of the Draft EIR and appendices online or by visiting local libraries for a physical copy (Draft EIR, Certification Record LOS.4.00001, p. 31) . In addition, a public meeting was held on January 22, 2020 in Dixon (Final EIR, Certification Record LOS.3.00001, p. 7). The Department, in the Final EIR, included updated modeling results (Final EIR, Certification Record LOS.3.00001, Appendix X). The updated results for salinity at compliance points throughout the Delta come from RMA modeling and are provided at a monthly time scale (Final EIR, Certification Record LOS.3.00001, pp. 34-82). The updated results for bromide come from RMA modeling and are provided at a monthly time scale (Final EIR,

Certification Record LOS.3.00001, pp. 115-145). The Department states that the updated water quality analysis was publicly available for review for three months prior to submittal of the Certification of Consistency (Department's May 3, 2021 Letter, p. 10).

> In the case of dissolved organic carbon, the Department states that:
>
> "[a]lthough […] 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 effect on DOC, there is information related to Liberty Island that provides some indication of DOC export from tidal wetlands. Liberty Island, just east of the Proposed Project Site, was accidentally breached and restored to tidal exchange in 1998. The restored area includes approximately 1,200 acres of tidal marsh. The largest breach at the south end of Liberty Island is closer to the NBA intake and the rest of the Delta than the Proposed Project. Despite the size and proximity of the Liberty Island tidal wetland to the NBA intake, DOC levels at the intake from 1998 to 2010 show no change or slight decreases." (Final EIR, Certification Record LOS.3.00001, pp. 3-22).

Given the Department's evidence in the record that they provided a thorough review of available scientific information, clearly identified their sources and allowed for public review, the Council finds that the Districts failed to show that the Certification is not supported by substantial evidence in the record as it relates to the Inclusiveness and Transparency and Openness criteria of G P1(b)(3). Therefore, the Council finds that the Districts failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b~~)3~~)(3) with regard to the Districts' appeal on the issue of water quality impacts to municipal and agricultural diverters.

(c) CDWA

CDWA asserts in its appeal that "the project's impacts on agricultural productivity from increased salinity of irrigation water and buildup of soil salinity were ignored" (CDWA Appeal Form, p. 3). The CDWA appeal does not identify a specific best available science criterion that is not being met, but it appears to be related to the criterion of Inclusiveness. The Inclusiveness criterion requires that scientific information used shall incorporate a thorough review of relevant information and analyses across relevant disciplines (Appendix 1A, Best Available Science, Delta Plan, p. 1A-2).

The Department argues that protection against soil salinity is implicit in the D-1641 standards, which:

> "are intended to maintain water quality conditions to prevent the following: a) loss of biodiversity, b) conversion of brackish marsh to salt marsh habitat; c) decreased population abundance of wildlife species and/or loss of habitat from increased salinity, and d) *significant reductions in plant*

stature or percent cover from soil salinity or other water quality issues" (Final EIR, Certification Record LOS.3.00001, p. 673, emphasis added).

In addition, the Department asserts that, "in the section 'Salinity in Agricultural Diversions and Soils', the additional modeling and analysis completed in response to comments, described in the Final EIR Appendix X, did not change the conclusions of less than significant for salinity impacts on drinking water, agriculture, and fish and wildlife that were made in the Draft EIR" (Department's May 3, 2021 Letter, p.11).

The Department has provided evidence that D-1641 water quality standards do address soil salinity, and CDWA does not provide evidence to the contrary. The Council finds that CDWA failed to show that the Certification is not supported by substantial evidence in the record as it relates to the Inclusiveness criterion of G P1(b)(3). Therefore, the Council finds that CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b~~)3~~)(3) with regard to CDWA's appeal on the issue of water quality impacts to municipal and agricultural diverters.

d. Conclusions

For the reasons described above, the Council ~~finds that~~makes the following findings:

1. With regard to methods to estimate recreational use, Appellant LIA showed that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(3~~).~~) as it relates to the best available science criterion of Inclusiveness. We therefore *remand the matter to the Department* for reconsideration of the issue of methods to estimate recreational use;[22] and

2. With regard to methods to estimate recreational use, 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)(3) as it relates to the best available science criteria of Objectivity and Relevance. We therefore *deny* the appeal as to this issue.

~~1.~~3. With regard to issues of modeling years selected for water quality analysis; predictive, transparent, and open water quality modeling; cumulative impacts; peer review of water quality analysis; and water quality impacts to municipal and agricultural diverters, Appellants SCWA, the Districts, and CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with G P1(b)(3).

[22] It should be noted that Delta Plan Mitigation Measures 18-1 and 18-2 may be applicable to a certification of consistency submitted in response to the remanded recreational issues under G P1(b)(3), or if the Department otherwise modifies its CEQA findings related to recreational impacts.

We therefore *deny* thes~~e~~ appeals as to ~~the consistency of the Determination with GP 1(b)(3) on the~~ these issues ~~of water quality modeling and analysis~~.

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

The Department certifies that the Lookout Slough Project is consistent with G P1(b)(4). Two appellants—SCWA and the Districts—raise substantive arguments that it is not. For the reasons discussed below, the Council finds that the Appellants failed to show that the Certification is not supported by substantial evidence in the record that the Project is consistent with G P1(b)(4). We therefore *deny* the appeal.

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 decisionmaking 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 (p. C-3) 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 Certification states that the Lookout Slough Project is consistent with G P1(b)(4). The Department submitted as part of its detailed findings a proposed Adaptive Management and Monitoring Plan (AMMP), which the Department states is consistent with the adaptive management framework specified in Appendix 1B of the Delta Plan (Draft AMMP, Certification Record CAP_Draft LOS AMMP). Following is a summary of information provided in the Department's certification and the AMMP that is relevant to the appeals of G P1(b)(4).

i. Adequate Resources

In the Certification, the Department states that funding for the Project's long-term management activities comes from the State Water Project operations and maintenance budget. To support this statement, the Department's supplemental written submission cites to the 2010 Fish Restoration Plan Agreement (FRPA) between itself and the ~~California Department of Fish and Wildlife (CDFW).~~CDFW. The FRPA and its Implementation Strategy established a management and financial framework for implementation of the ~~Fish Restoration Program (FRP)~~FRP to satisfy the 2008 USFWS BiOp, the 2009 NMFS BiOp, and the 2020 LTO ITP, (FRP Agreement, Certification Record LOS.10.00013; FRP Implementation Strategy, Certification Record LOS.10.00014). The Lookout Slough Project is part of the FRPA program (Draft EIR, Certification Record LOS.4.00001, p. III-21). The FRPA Implementation Strategy provides as follows:

> "The FRPA program is funded in whole by DWR through [State Water Project (SWP)] funding to meet permit compliance for SWP Delta operations. Although the FRPA program will have an annual budget, each FRPA action or project component will have an individual budget within the larger program budget. Implementation of actions required by the Biological Opinions or ITP is funded by SWP funds as part of the ongoing SWP operations and maintenance." (FRP Implementation Strategy, Certification Record LOS.10.00014, p. 10).

ii. Delineated Authority

Section 5 of the AMMP, titled "Responsible Parties," describes decision-making under the AMMP as follows:

> "EIP III Credit Co., LLC is the party responsible for developing the design, obtaining permits and constructing the restoration. DWR is the party responsible for ensuring execution of the restoration, management, and certain monitoring of the site. Management activities are outlined in the Long Term Management Plan, and specific monitoring activities are described in Table 11. Generally, DWR is responsible for ensuring management and monitoring activities are completed, maintaining records, reporting, and coordinating and approving any research activities proposed on the site. DWR will plan, permit if necessary, and execute any potential management actions deemed necessary in consultation with the [Fishery Agency Strategy Team or FAST].
>
> Various groups within CDFW and DWR, as well as qualified consultants are responsible for specialized monitoring as described in this plan. The monitoring biologists shall be familiar with wetland biology and have knowledge relative to monitoring protocols, management techniques, endangered species needs, and fisheries ecology. Significant personnel changes will be noted in annual reports to the FAST" (Draft AMMP, Certification Record CAP_Draft LOS AMMP, p. 53).

In addition, the AMMP includes the following table, which identifies the parties responsible for specific monitoring and adaptive management tasks:

Table 11. Parties responsible for specific monitoring and adaptive management tasks.

Task	Method	Responsible Party
Physical Processes Monitoring		
Topography and Bathymetry	Ground-based GPS survey, or LiDAR if available, aerial photos	DWR
Tidal Regime	Gauges or water level loggers	DWR
Substrate composition	Benthic grab samples	CDFW – FRP Monitoring
Water Quality Monitoring		
Water quality (temperature, EC, turbidity, pH, DO)	Sonde and/or discrete measurements	CDFW – FRP Monitoring
Nutrients	Grab samples, standard lab methods	CDFW – FRP Monitoring and contracting lab
Particulate and Dissolved Organic Matter	Grab samples, standard lab methods	CDFW – FRP Monitoring and contracting lab
Contaminants	TBD	DWR and consultants
Food Web Productivity Monitoring		
Chlorophyll a	Optical sensor, grab samples	CDFW – FRP Monitoring and contracting lab
Zooplankton	Zooplankton tows	CDFW – FRP Monitoring
Benthic macroinvertebrates	Benthic grabs or cores	CDFW – FRP Monitoring
Surface invertebrates	Neuston tows	CDFW – FRP Monitoring
Epibenthic/epiphytic macroinvertebrates	Sweep nets	CDFW – FRP Monitoring
Wetlands and vegetation		
General habitat conditions	Photo points	CDFW – FRP Monitoring
EPA recommended level II assessment	CRAM	CDFW – FRP Monitoring
Vegetation composition and Cover	CDFW VegCAMP protocols	CDFW – FRP Implementation
Invasive plants	Visual surveys, rake transects for submerged aquatic	CDFW – FRP Implementation and Monitoring
Adaptive Management		
Planning and Permitting		DWR
Construction		DWR
Monitoring		CDFW FRP Monitoring
Annual Report	N/A	DWR, with assistance from CDFW
Maintenance and General Inspections		DWR, CDFW FRP Implementation

(Draft AMMP, Certification Record CAP_Draft LOS AMMP, p. 54).

c. Appeals and Analysis

The Council received appeals regarding the Department's Certification of Consistency with GP 1(b)(4) from the following parties:

- Solano County Water Agency (SCWA)
- Reclamation District 2060 & Reclamation District 2068 (Districts)

Each of the issues raised in these appeals is briefly described below, with an analysis of the issues related to consistency with G P1(b)(4). The issues are organized under two sub-headings: (1) documentation of access to adequate resources, and (2)

documentation of delineated authority. The organization of the issues is based on the Council's interpretation of the Appellants' claims where Appellants have not stated which aspect of the policy their allegation relates to.

i. Requirement for documentation of adequate resources

(a) SCWA

SCWA alleges that the Project lacks "adequate resources, on-the-ground staff" and "long-term accountability" sufficient to ensure implementation of adaptive management (SCWA Appeal Letter, p. 5). SCWA also alleges that there is a "lack of detail on future funding commitments for ... implementation of the AMMP" (SCWA Appeal Letter, p. 5).

G P1(b)(4) requires state and local public agencies to document access to adequate resources to implement the AMMP. In its supplemental submission, the Department states that the FRPA "delineates an agreement for ongoing monitoring and management activities and funding mechanisms for interim and perpetual management of the Project." As noted above, the Lookout Slough Project is part of the FRPA program (Draft EIR, Certification Record LOS.4.00001, p. III-21), and the FRPA and FRPA Implementation Strategy provide that the FRPA program is funded *in whole* by the Department through State Water Project funding (FRP Implementation Strategy, Certification Record LOS.10.00014, p. 10). As such, the Department has documented that the Project is funded in whole through State Water Project funding. Therefore, SCWA has failed to demonstrate that the Department's Certification is not supported by substantial evidence, and we *deny* its appeal as to the issue of adequate resources to ensure implementation of the AMMP.

SCWA also alleges that "there is a lack of detail on future funding commitments for future Operation and Maintenance (O&M) of the Project . . . and third-party verification" (SCWA Appeal Letter, p. 5). While G P1(b)(4) requires documentation of adequate resources for implementation of adaptive management described in the AMMP, it does not address or require third party verification.

Adaptive management is defined by the Delta Reform Act 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). By this definition, adaptive management does not address all project operations and maintenance, but rather a subset of actions that are related to measuring achievement of project objectives. The project objectives stated in the AMMP (Draft AMMP, Certification Record CAP_Draft LOS AMMP, p. 6-7) are:

- "Improve primary and secondary productivity and food availability for Delta Smelt and other native fishes within the Project and the immediate tidal sloughs surrounding the Project."
- "Improve rearing habitat for Delta Smelt, salmonids, and other native fish."

- "Promote suitable spawning habitat with appropriate water velocities and depths accessible for Delta Smelt within the Project and the immediate tidal sloughs surrounding the Project."
- "Increase on-site diversity of foraging, breeding, and refuge habitat conditions for aquatic and terrestrial wetland-dependent species."
- "To the greatest extent practical, preserve existing topographic variability to allow for habitat succession and resilience against future climate change."
- "To the greatest extent practical, avoid promoting conditions adverse to Project biological objectives, such as those that would favor establishment or spread of invasive exotic species."

SCWA has not provided evidence that project operations and maintenance not addressed in the AMMP should have been included in the AMMP, and therefore that G P1(b)(4) applies to this issue; G P1(b)(4) does not require third-party verification. SCWA failed to provide the required specificity to support its claim that the Covered Action, and the AMMP, is not consistent with G P1(b)(4) as to the issue of funding for operations and maintenance and third party verification. ~~Therefore, the Council finds that SCWA has failed to raise an appealable issue under GP1(b)(4) and~~Therefore, we *dismiss* the appeal as to the issue of funding for operations and maintenance and third party verification.

SCWA further alleges that "DWR has not demonstrated that it will be financially feasible for Reclamation District 2098 to provide long-term O&M for the Duck Slough Setback Levee" and "RD 2098's lack of revenue to operate and maintain the levee will cause flood risk impacts to surrounding properties and flood facilities, an impact not addressed by DWR in any project documents." G P1(b)(4) requires documentation of access to adequate resources for implementation of adaptive management, which is defined by the Delta Reform Act as "a framework and flexible decisionmaking 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). By this definition, adaptive management does not address all project operations and maintenance, but rather a subset of actions that are related to measuring achievement of project objectives. The project objectives stated in the AMMP (Draft AMMP, Certification Record CAP_Draft LOS AMMP, p. 6-7) and itemized above, do not include long-term O&M of levees or adaptive management of flood risk impacts to surrounding properties and flood facilities.

SCWA has not provided an explanation and does not cite to any evidence to show that the operations and maintenance of the Duck Slough Setback Levee should have been part of the adaptive management plan for the project and therefore that G P1(b)(4) applies to this issue. SCWA failed to provide the required specificity to support its claim that the Covered Action is not consistent with G P1(b)(4) as to the issue of operations and maintenance of the Duck Slough Setback Levee. ~~Therefore, the Council finds that SCWA has failed to raise an appealable issue under G P1(b)(4) and~~Therefore, we *dismiss* the appeal on the matter of operations and maintenance of the Duck Slough Setback Levee.

(b) The Districts

The Districts allege that the AMMP is inconsistent with G P1(b)(4) because it "fails to identify a reliable source of funding to perform operation, maintenance, repair, replacement, and rehabilitation ("OMRR&R") of the Cache and Haas Slough levee" and that "an entity with a dedicated funding source needs to be identified to perform the OMRR&R" (Districts Appeal Letter, p. 8).

G P1(b)(4) requires documentation of access to adequate resources for implementation of adaptive management, which is defined by the Delta Reform Act 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). By this definition, adaptive management does not necessarily address all project operations, maintenance, repair, replacement, and rehabilitation, but rather just the actions that are related to measuring achievement of project objectives. The project objectives stated in the AMMP (Draft AMMP, Certification Record CAP_Draft LOS AMMP, p. 6-7), and itemized above, do not include OMRR&R of levees.

The Districts have not provided an explanation to show that the "OMRR&R" of the Cache and Haas Slough levee is relevant to the objectives stated in the AMMP and should have been part of the adaptive management plan for the project, and therefore that G P1(b)(4) applies to this issue. The Districts failed to provide the required specificity to support their claim that the Covered Action is not consistent with G P1(b)(4) as to the issue of funding to perform OMRR&R. ~~Therefore, the Council finds that the Districts fail to raise an appealable issue under G P1(b)(4) and~~Therefore, we *dismiss* the appeal on the issue of funding to perform OMRR&R.

The Districts' appeal also refers to design aspects and maintenance facilitation of the Cache and Haas Slough levee (Districts Appeal Letter, p. 8). G P1(b)(4) requires documentation of access to adequate resources for implementation of adaptive management, which is defined by the Delta Reform Act 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). By this definition, adaptive management does not necessarily address all project operations, maintenance, repair, replacement, and rehabilitation, but rather just the actions that are related to measuring achievement of project objectives.

The Districts have not provided evidence that design aspects and maintenance facilitation of the Cache and Haas Slough levee is relevant to the objectives stated in the AMMP and should have been part of the adaptive management plan for the project, and therefore that G P1(b)(4) applies to this issue. The Districts failed to provide the required specificity to support their claim that the Covered Action is not consistent with G P1(b)(4) as to the issue of design aspects and maintenance facilitation of the Cache and Haas Slough levee. ~~Therefore, the Council finds that the Districts fail to raise an~~

~~appealable issue under G P1(b)(4) and~~Therefore, we *dismiss* the appeal on the issue of design aspects and maintenance facilitation of the Cache and Haas Slough levee.

ii. Documentation of delineated authority

(a) SCWA

SCWA alleges that "the Project does not include...clearly delineated authority" (SCWA Appeal Letter, p. 5). SCWA provides no further explanation to substantiate this claim.

G P1(b)(4) requires a state or local public agency proposing a covered action to document access to delineated authority by the entity responsible for the implementation of the proposed adaptive management process. As noted above, Section 5 of the Department's AMMP identifies responsible parties for implementation of the AMMP, and includes a table identifying the parties responsible for specific monitoring and adaptive management tasks under the AMMP (Draft AMMP, Certification Record CAP_Draft LOS AMMP, p. 53-54). Parties responsible for implementation of the AMMP include the Department, the CDFW FRP monitoring and implementation groups, a contracting lab, and consultants (Draft AMMP, Certification Record CAP_Draft LOS AMMP, p. 54). Additionally, the FRPA describes that the "commitment of specific funding for and implementation of the restoration actions or other activities will be made by DWR through execution of subsequent agreements with other entities," (FRP Agreement, Certification Record LOS.10.00013, p. 3) to demonstrate the delineated authority from the Department to the parties to that contract (see Draft AMMP, Certification Record CAP_Draft LOS AMMP, p. 53-54) to carry out their responsibilities with respect to adaptive management.

The evidence provided by the Department in Section 5 of the AMMP, and in the FRPA, describes the Department's delineated authority to implement adaptive management. Parties with specific monitoring and adaptive management tasks include the Department, the CDFW FRP monitoring and implementation groups, a contracting lab, and consultants (Draft AMMP, Certification Record CAP_Draft LOS AMMP, p. 54). SCWA provides no evidence to the contrary or to support its claim. Therefore, we find that SCWA has failed to demonstrate that the Department's Certification is not supported by substantial evidence, and we *deny* its appeal as to the issue of delineated authority.

SCWA also alleges that the Department and CDFW cannot guarantee the success of project implementation and oversight because they are "overtaxed resource agencies." To support this assertion, SCWA cites the Lindsey Slough Project as an example of a project managed by CDFW that SCWA believes was not adequately implemented (SCWA Appeal Letter, p. 5). G P1(b)(4) requires adequate resources and delineated authority specific to the Covered Action. SCWA does not cite to any evidence in the record that the Covered Action lacks adequate resources that is specific or applicable to the Covered Action. Statements regarding the adaptive management

practices of other projects is not evidence on the success of the implementation of this Covered Action. The record shows that the Department has both delineated authority and adequate resources to support adaptive management of the Covered Action. Therefore, the Council finds that SCWA has failed to show that that the Department's Certification is not supported by substantial evidence in the record as to consistency with G P1(b)(4) and we *deny* the appeal on the issue of the success of project implementation and oversight.

d. Conclusions

For the reasons discussed above, the Council finds that:

1. With regard to the issue of adequate resources to ensure implementation of the AMMP, SCWA has failed to ~~demonstrate~~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

~~1.~~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~~); ~~).

Therefore, we *deny* the appeals as to these issues.

The Council also finds that:

1. With regard to the issue of funding for operations and maintenance and third party verification, SCWA failed to ~~identify an appealable issue within the scope of GP1(b)(4);~~provide the required specificity to support their claim that the Covered Action is not consistent with G P1(b)(4);
2. With regard to the matter of operations and maintenance of the Duck Slough Setback Levee, SCWA failed to ~~identify an appealable issue within the scope of GP1(b)(4);~~provide the required specificity to support their claim that the Covered Action is not consistent with G P1(b)(4);
3. With regard to the issue of funding to perform OMRR&R, the Districts failed to ~~identify an appealable issue within the scope of GP1(b)(4~~provide the required specificity to support their claim that the Covered Action is not consistent with G P1(b)(4);

~~2.~~ With regard to the issue of design aspects and maintenance facilitation of the Cache and Haas Slough levee, the Districts failed to ~~identify an appealable issue within~~provide the ~~scope of G P1(b)(4);~~

~~3. With regard~~required specificity to ~~the issue of delineated authority, SCWA has failed to demonstrate 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~~

4. ~~With regard to the issue of the success of project implementation and oversight, SCWA has failed to demonstrate that the Department's Certification is not supported by substantial evidence in the record~~support their claim that the Covered Action is not consistent with G P1(b)(4~~).~~);

Therefore, we ~~*deny*~~*dismiss* the appeals as to these issues.

5. Policy WR P1 (Cal. Code Regs., tit. 23, § 5003): Reduce Reliance on the Delta Through Improved Regional Water Self-Reliance

The Department states that WR P1 does not apply to the Covered Action. Appellant CDWA argues that it does apply, and that the Department should have demonstrated that the Covered Action is consistent with WR P1. For the reasons discussed below, the Council finds that CDWA failed to show that the Certification is not supported by substantial evidence in the record that WR P1 does not apply to the Covered Action. Accordingly, we *deny* the appeal as to this policy.

a. Policy Requirements

WR P1 states:

"(a) Water shall not be exported from, transferred through, or used in the Delta if all of the following apply:

(1) One or more water suppliers that would receive water as a result of the export, transfer, or use have failed to adequately contribute to reduced reliance on the Delta and improved regional self-reliance consistent with all of the requirements listed in paragraph (1) of subsection (c);

(2) That failure has significantly caused the need for the export, transfer, or use; and

(3) The export, transfer, or use would have a significant adverse environmental impact in the Delta.

(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 to export water from, transfer water through, or use water in the Delta, but does not cover any such action unless one or more water suppliers would receive water as a result of the proposed action.

(c)(1) Water suppliers that have done all of the following are contributing to reduced reliance on the Delta and improved regional self-reliance and are therefore consistent with this policy:(A) Completed a current Urban or Agricultural Water Management Plan (Plan) which has been reviewed by the California Department of Water Resources for compliance with the applicable requirements of Water Code Division 6, Parts 2.55, 2.6, and 2.8;

(B) Identified, evaluated, and commenced implementation, consistent with the implementation schedule set forth in the Plan, of all programs and projects included in the Plan that are locally cost effective and technically feasible which reduce reliance on the Delta; and

(C) Included in the Plan, commencing in 2015, the expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance. The expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance shall be reported in the Plan as the reduction in the amount of water used, or in the percentage of water used, from the Delta watershed. For the purposes of reporting, water efficiency is considered a new source of water supply, consistent with Water Code section 1011(a).

(2) Programs and projects that reduce reliance could include, but are not limited to, improvements in water use efficiency, water recycling, stormwater capture and use, advanced water technologies, conjunctive use projects, local and regional water supply and storage projects, and improved regional coordination of local and regional water supply efforts." (Cal. Code Regs., tit. 23, § 5003.)

b. Certification

The Department certifies that WR P1 is not applicable because water suppliers would not receive water as a result of the Covered Action and the Department is not a water supplier (Certification WR P1 Finding, p. 8; Department's May 3, 2021 Letter, p. 12).

c. Appeal and Analysis

Appellant CDWA states that the Department is incorrect in its claim that WR P1 does not apply to the Covered Action (CDWA Appeal Form, p. 4). CDWA asserts that this specific Covered Action is necessary for the continued operations of the State Water Project (SWP) and Central Valley Project (CVP) as it fulfills one of the Reasonable and Prudent Alternative (RPA) provisions of the 2008 USFWS BiOp and 2009 NMFS BiOp. Further, Appellant CDWA contends that since the Lookout Slough Project is one of the conditions for continued diversion from the Delta by the SWP and CVP, the Covered Action would allow water suppliers to continue to receive exported water from the Delta (CDWA Appeal Form, p. 4). As a result, CDWA contends that WR P1 is applicable to the Covered Action (CDWA Appeal Form, p. 4).[23]

It is understood and recognized that SWP and CVP are obligated to fulfill the RPAs under the 2008 USFWS BiOp and 2009 NMFS BiOp for the continued SWP and

[23] In SCWA's May 10, 2021 Letter, SCWA raise allegations that the Covered Action adversely impacts SCWA and their corresponding member agencies' ability to reduce reliance on the Delta through improved regional water self-reliance. SCWA did not appeal the Department's WR P1 certification of consistency. Consequently, we must refrain from considering SCWA's arguments related to policy WR P1.

CVP operation and water export from the Delta. To that point, the USFWS RPA 4 and NMFS RPA I.6.1 require 8,000 acres of restored tidal habitat in the Delta, but do not specify how the SWP and CVP must fulfill that requirement. (USFWS 2008 BO, Certification Record LOS.10.00008, pp. 280-285). In this instance, the Department has developed a project to restore approximately 3,164 acres of tidal marsh that would partially meet this goal identified in the RPAs, but the Department was not directly mandated to develop this specific Lookout Slough Project, and could have proposed alternative projects to fulfill these obligations.

Furthermore, WR P1 applies to "a proposed action to export water from, transfer water through, or use water in the Delta, but does not cover any such action unless one or more water suppliers would receive water as a result of the proposed action." For the purposes of WR P1, "water suppliers" refers to both "urban water" suppliers and "agricultural water" suppliers (Cal. Code Regs., tit. 23, § 5003). Under the Water Code, "'Agricultural water supplier' refers to both agricultural retail water suppliers and agricultural wholesale water suppliers, but not the California Department of Water Resources or the United States Bureau of Reclamation…" (Cal. Code Regs., tit. 23, § 5001(c)). "Urban water supplier" refers to a publicly or privately owned entity that provides a volume of potable water for municipal purposes (Cal. Code Regs., tit. 23, § 5001(hh)(1) and (2)). As designed and described, one or more water suppliers would *not* receive water as a result of the proposed action (Draft EIR, Certification Record LOS.4.00001, pp. III-22 – III-52; Final EIR, Certification Record LOS.3.00001, pp. 2-13 – 2-14), thus the Department is not providing any volume of water. As discussed above, while the Covered Action is intended to partially fulfill the obligations mandated by the BiOps and RPAs that would allow for the continued operations of the SWP and the CVP, the Covered Action would *not* result in the receipt of water by a water supplier in and of itself (Draft EIR, Certification Record LOS.4.00001, pp. III-22 – III-52; Final EIR, Certification Record LOS.3.00001, pp. 2-13 – 2-14). In other words, one or more water suppliers would not receive water as a result of the proposed action as is required for WR P1 to apply.

d. Conclusion

In its Certification, the Department states that WR P1 does not apply to the Lookout Slough Project. Appellant CDWA argues that it does apply and that the Covered Action is inconsistent with WR P1. Because no water suppliers would receive water as a result of the Covered Action, CDWA has failed to show that there is not substantial evidence in the record to support the Department's finding that WR P1 does not apply. Therefore, the Council finds that CDWA failed to show that the Certification is not supported by substantial evidence in the record that WR P1 does not apply to the Covered Action, and we *deny* the appeal.

6. Policy WR P2 (Cal. Code Regs., tit. 23, § 5004): Transparency in Water Contracting

The Department states that WR P2 does not apply to the Covered Action. Appellant SCWA argues that it does apply, and that the Department should have demonstrated that the Covered Action is consistent with WR P2. For the reasons discussed below, the Council finds that SCWA failed to show that the Certification is not supported by substantial evidence in the record that WR P2 does not apply to the Covered Action, and we *deny* the appeal as to this policy.

a. Policy Requirements

WR P2 states:

"(a) The contracting process for water from the State Water Project and/or the Central Valley Project must be done in a publicly transparent manner consistent with applicable policies of the California Department of Water Resources and the Bureau of Reclamation referenced below.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, this policy covers the following:

(1) With regard to water from the State Water Project, a proposed action to enter into or amend a water supply or water transfer contract subject to California Department of Water Resources Guidelines 03-09 and/or 03-10 (each dated July 3, 2003), which are attached as Appendix 2A; and

(2) With regard to water from the Central Valley Project, a proposed action to enter into or amend a water supply or water transfer contract subject to section 226 of P.L. 97-293, as amended or section 3405(a)(2)(B) of the Central Valley Project Improvement Act, Title XXXIV of Public Law 102-575, as amended, which are attached as Appendix 2B, and Rules and Regulations promulgated by the Secretary of the Interior to implement these laws." (Cal. Code Regs., tit. 23, § 5004.)

b. Certification

In its Certification, the Department states that WR P2 is not applicable because the Covered Action does not involve water supply or water transfer contracts from the State Water Project or Central Valley Project. (Certification WR P2 Finding p. 8 and Department Supplemental Responses, p. 13).

c. Appeal and Analysis

Appellant SCWA states that the Department is incorrect in its claim that WR P2 does not apply to the Covered Action (SCWA Appeal Form, p. 4; SCWA Appeal Letter, p. 6). SCWA states that WR P2 is applicable because the Covered Action is a *de facto* amendment to the State Water Project Water Supply Contract and its provision in Section 19, Water Quality (SCWA Appeal Letter, p. 6). SCWA contends that the

Department must take all reasonable measures to meet project water quality standards listed in the Water Supply Contract's Table of Water Quality Objectives and that the Covered Action anticipates violations of this contractual provision (SCWA Appeal Letter, p. 6). By the Covered Action's anticipated violation, SCWA asserts the Department is not taking reasonable measures to meet water quality standards and the implied covenant of good faith and dealing to fulfill the contract, thus altering the terms of the contract in a manner that should be transparent (SCWA Appeal Letter, p. 7).

It is understood that the Covered Action is described as a 3,164-acre tidal marsh restoration project with additional benefits of improved flood conveyance (Draft EIR, Certification Record LOS.4.00001, pp. III-1 – III-2). The Draft EIR does not refer to or include a description that the Covered Action would be part of or amend the State Water Project (SWP) or Central Valley Project (CVP) contract for water export subject to provisions in the SWP or CVP contract. WR P2 governs the formation process for water contracts from the SWP or CVP, as it requires that these contracts be formed, amended, or otherwise altered in a publicly transparent manner consistent with applicable policies of the Department and the Bureau of Reclamation. WR P2 does not govern the performance of contracts for water from SWP or CVP. Therefore, because the Department would not enter into a water supply or water transfer contract or amend a water supply or water transfer contract as part of the Covered Action, the Covered Action is not required to demonstrate consistency with WR P2. (Cal. Code Regs., tit. 23, § 5004, subdiv. (b)(1).)

d. Conclusion

In its Certification, the Department states that WR P2 does not apply to the Lookout Slough Project. Appellant SCWA argues that it does apply and that the Covered Action is inconsistent with WR P2. Because the Department would not enter into a water supply or water transfer contract or amend a water supply or water transfer contract as part of the Covered Action, SCWA has failed to show that there is not substantial evidence in the record to support the Department's finding that WR P2 does not apply. Therefore, the Council finds that SCWA failed to show that the Certification is not supported by substantial evidence in the record that WR P2 does not apply to the Covered Action, and we *deny* the appeal.

7. Policy ER P1 (Cal. Code Regs., tit. 23, § 5005): Delta Flow Objectives

The Department states that ER P1 does not apply to the Covered Action. Appellant CDWA argues that it does apply, and that the Department should have demonstrated that the Covered Action is consistent with Bay Delta Water Quality Control Plan flow objectives. For the reasons discussed below, the Council finds that CDWA failed to show that the Certification is not supported by substantial evidence in the record that ER P1 does not apply to the Covered Action, and we *deny* the appeal as to this policy.

a. Policy Requirements

ER P1 states:

"(a) The State Water Resources Control Board's Bay Delta Water Quality Control Plan flow objectives shall be used to determine consistency with the Delta Plan. If and when the flow objectives are revised by the State Water Resources Control Board, the revised flow objectives shall be used to determine consistency with the Delta Plan.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, the policy set forth in subsection (a) covers a proposed action that could significantly affect flow in the Delta." (Cal. Code Regs., tit. 23, § 5005.)

b. Certification

The Department certifies that ER P1 is not applicable to the Lookout Slough Project (Certification ER P1 Finding, p. 9). In support of this finding, the Department states "The Proposed Project does not significantly affect flow in the Delta. Potential changes to Delta flows and water levels from the Proposed Project were modeled and are discussed in the Draft and Final EIRs and Attachment 15" (Certification ER P1 Finding, p. 9). In its Certification, the Department also cites to eight documents in the record, including chapters and attachments from the Draft EIR and Final EIR. These documents include analyses conducted for hydrology and water quality, hydraulics, cumulative impacts, flood conveyance, potential salinity impacts, revisions to the Draft EIR, and responses to comments in the Final EIR (Certification ER P1 Finding, p. 9; Draft EIR, Certification Record LOS.4.00001, Ch. IV.G, V; Draft EIR, Appendix P, Certification Record LOS.4.00017; Draft EIR, Appendix O, Certification Record LOS.4.00016; Draft EIR, Appendix S, Certification Record LOS.4.00020; Certification Attachment 15 – Hydrologic and Hydraulic System Analysis[24]; Final EIR, Certification Record LOS.3.00001, Ch. 2-3).

In these documents, the Department states that the Project would have a less-than-significant impact on flow, and that impacts to flow objectives referenced in this policy (i.e., Bay-Delta Water Quality Control Plan Decision 1641, or D-1641) "were found to be less than cumulatively considerable" (Certification ER P1 Finding, p. 9; Draft EIR, Certification Record LOS.4.00001, pp. IV.G-23 [addressing salinity impacts], IV.G-24 [addressing fish and wildlife impacts]).

c. Appeal and Analysis

The Council received one appeal regarding the Department's Certification of Consistency with ER P1 from CDWA. CDWA asserts that the Covered Action would

[24] Attachment 15 is cited to as part of the certification. This document appears to be a revised version of Draft EIR Appendix R but is dated September 2020 versus the 2019 date of Appendix R and adds significantly more detail. Both documents are within the record, but here we considered Attachment 15 since the Department cites to this document.

significantly affect flow in the Delta (CDWA Appeal Form, p. 4). Specifically, CDWA states that the Covered Action would result in more flow going through the Yolo Bypass rather than down the Sacramento River and through the Delta Cross Channel; that the Covered Action would increase the loss of freshwater through evaporation from water surfaces, wetland vegetation and conversion of rangeland to irrigated agriculture. CDWA also states that the modeling prepared for the Covered Action is incomplete and does not demonstrate compliance with State Water Board flow objectives (CDWA Appeal Form, p.4). The Council acknowledges these assertions, but first must examine whether Delta Plan Policy ER P1 is applicable to the Covered Action.

i. Applicability of Policy

First, as a threshold matter, ER P1 "covers a proposed action that could significantly affect flow in the Delta." (Cal. Code Regs., tit. 23, § 5005.).[25] CDWA asserts that the Covered Action would "significantly affect flow in the Delta" and therefore is applicable, and that the Project is inconsistent with ER P1. In its Certification, the Department states that ER P1 is not applicable to the Covered Action because the "Project does not significantly affect flow in the Delta" (Certification ER P1 Finding, p. 9). In support of its statement, the Department cites to evidence in the record including content from the Draft EIR, Final EIR, and an additional attachment (Certification ER P1 Finding, p. 9; Draft EIR, Certification Record LOS.4.00001, Ch. IV.G, V; Draft EIR, Appendix P, Certification Record LOS.4.00017; Draft EIR, Appendix O, Certification Record LOS.4.00016; Draft EIR, Appendix S, Certification Record LOS.4.00020; Certification Attachment 15 – Hydrologic and Hydraulic System Analysis; Final EIR, Certification Record LOS.3.00001, Ch. 2-3). These documents provide ~~substantial~~ evidence that the Action would not, on its own, significantly affect flow in the Delta or result in violations of current Bay-Delta Water Quality Control Plan flow objectives. In its appeal, CDWA cites to a presentation on the Lookout Slough Project by the Department and Ecosystem Investment Partners (Agency Presentation, Certification Record LOS.6.00001, pp. 1-30). The Council has reviewed the presentation document and it does not include evidence that the project would significantly affect flow or result in non-compliance with Bay-Delta Water Quality Control Plan flow objectives. Therefore, the Council finds that Appellant failed to show that the Certification is not supported by substantial evidence in the record that ER P1 does not apply to the Covered Action.

[25] ER P1 covers proposed actions (covered actions) that could *significantly* affect flow in the Delta. It does not automatically cover or apply to all covered actions that have the potential to result in changes in flow or would have a less-than-significant effect on flow. The Council made this intent clear during the rulemaking process for the 2013 Delta Plan, when it added the word "significantly" in response to public comments. As part of the rulemaking process, the Council also clarified and added that the "State Water Resources Control Board's" Bay-Delta Water Quality Control Plan, or a subsequent revision to this plan, *shall* be used to determine consistency with the Delta Plan (Council Response to Comments Received During the 45-day Notice Period November 30, 2012 through January 13, 2013, p. 10).

d. Conclusion

In its Certification, the Department states that ER P1 does not apply to the Lookout Slough Project. Appellant CDWA argues that it does apply and that the Covered Action is inconsistent with ER P1. Appellant CDWA has failed to show that there is not substantial evidence in the record to support the Department's finding that ER P1 does not apply. Therefore, the Council finds that CDWA failed to show that the Certification is not supported by substantial evidence in the record that ER P1 does not apply to the Covered Action, and we *deny* the appeal.

8. Policy ER P2 (Cal. Code Regs., tit. 23, § 5006): Restore Habitats at Appropriate Elevations

In its Certification, the Department states that the Lookout Slough Project is consistent with ER P2. Appellant CDWA raises arguments that it is not. For the reasons discussed below, the Council finds that CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with ER P2, and we *deny* the appeal.

a. Policy Requirements

ER P2 states:

"(a) Habitat restoration must be carried out consistent with Appendix 3, which is Section II of the Draft Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions (California Department of Fish and Wildlife 2011). The elevation map attached as Appendix 4 should be used as a guide for determining appropriate habitat restoration actions based on an area's elevation. If a proposed habitat restoration action is not consistent with Appendix 4, the proposal shall provide rationale for the deviation based on best available science.

(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 includes habitat restoration." (Cal. Code Regs., tit. 23, § 5006.)

b. Certification

The Department states that the Covered Action is consistent with ER P2 and that the majority of the Lookout Slough Project site is at elevations within the intertidal range, as defined in Delta Plan Appendix 4, Elevation Map (Certification ER P2 Finding, pp. 9-10). The Department also states that the site was selected because it has an elevation profile that would be subject to daily tidal inundation once levees are no longer excluding the site from surrounding waters (Certification ER P2 Finding, pp. 9-10; Draft EIR, Certification Record LOS.4.00001, pp. III-13 – III-14, p. III-17, p. III-24). The Department describes the site as historically influenced by tidal action and states that the Covered Action would re-establish tidal action through the restoration of 3,165 acres

of tidal marsh habitat that would also include intertidal and shallow subtidal habitats in a network of tidal channels and floodplain habitat (Certification ER P2 Finding, p. 9; Draft EIR, Certification Record LOS.4.00001, pp. III-13 – III-14).

c. Appeal and Analysis

The Council received an appeal regarding the Department's Certification of Consistency with ER P2 from CDWA. In its appeal, CDWA asserts ~~three~~two primary inconsistencies,[26] asserting that the Lookout Slough Project:

1. Would become permanently inundated with sea level rise ~~(CDWA's May 3, 2021 Letter includes references to sea level rise projections for the BDCP and the Governor's single tunnel project);~~; and

~~2. Would likely propagate invasive species; and~~

~~3~~2. Would not be completely within the intertidal habitat range.

(CDWA Appeal Form, p. 5).

i. Permanent Inundation with Sea Level Rise

CDWA states that although the land in the Lookout Slough Project area is at intertidal elevation currently, sea level rise would result in permanent inundation rather than a periodically inundated floodplain (CDWA Appeal Form, p. 5). In CDWA's May 3, 2021 Letter, p. 5, CDWA cites to Draft EIR Figure III-8, Proposed Habitat Concept, in support of this assertion (Draft EIR, Certification Record LOS 4.00001, p. III-31). CDWA states that this figure shows areas at the following elevations: "Shallow Subtidal - Open Water (2.1' and below) (425 ac./615 ac.), Intertidal - Mudflats and Emergent Marsh (2.1' to 6.5') (2,739 ac./2,762 ac.)" (CDWA's May 3, 2021 Letter, p. 5). CDWA adds that, "As sea level rises the water level will increase and the Project will in great part become Non-tidal Open Water that is neither tidal wetland nor flood plain thereby nullifying the claimed benefits of the Project" (CDWA's May 3, 2021 Letter, p. 5).

In its May 3, 2021 Letter, the Department states that "[i]n addition, as noted in Final EIR, Chapter 3, Response to Comment 5-6, the project site ranges from approximately 3 to 8 feet in elevation, is appropriate for tidal marsh restoration, and provides capacity for tidal marsh to migrate as sea level increases. Thus, the majority of the Proposed Project Site exhibits elevations within the intertidal habitat range." (Department's May 3, 2021 Letter, p. 14; Final EIR, Certification Record LOS.3.00001

[26] CDWA also alleges that the Covered Action is inconsistent with ER P2 because: (1) alternate sea level rise projections should have been considered in determining appropriate elevations for restoration; and (2) the Covered Action will propagate predatory fish species. These allegations are outside the scope of ER P2. Analysis and findings for these issues were moved from this Section G ("Analysis & Findings") in the June 18, 2021 Staff Draft Determination to Section F ("Non-Appealable Issues & Issues Outside the Council's Jurisdiction") with minimal, non-substantive revisions for clarity.

CDWA has not identified evidence in the record supporting its assertion that future sea level rise assumptions would result in the site being converted to open water or its specified relevance to the requirements of ER P2. The Department has cited to evidence in the record that the Project site is at elevations appropriate for the intertidal habitat range appropriate for tidal marsh restoration (Draft EIR, Appendix D, Certification Record LOS.4.00005, PDF p. 600). Final EIR, Certification Record LOS.3.00001, PDF p. 120; Draft EIR, Appendix D, Certification Record LOS.4.00005, PDF p. 600). Therefore, the Council finds that CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with ER P2 on the issue of appropriate elevations that would avoid permanent inundation with sea level rise.

~~ii. Alternate Sea Level Rise Projections~~

~~Although not included in the appeal, and not directly related to the Department's findings for this policy, CDWA's May 3, 2021 Letter also states, "Water Code Section 85320 required the DSC [Delta Stewardship Council] to include a comprehensive review and analysis of the BDCP with possible sea level rise up to 55 inches (4 feet 7 inches)" (, p. 5). This reference is to the 2009 Delta Reform Act, Division 5, Chapter 2, and is a requirement for the review of the BDCP specifically. The BDCP is no longer an active project and is not part of this Covered Action.~~

~~ER P2 does not require consideration of 55 inches of sea level rise or any specific sea level rise projections. As noted in the regulatory language for Delta Plan Policy ER P2, habitat restoration must be carried out consistent with Delta Plan Appendix 3, which is Section II of the Draft Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions (California Department of Fish and Wildlife 2011). Appendix 3 provides narrative and background on habitats in the Bay-Delta estuary and describes development of a Delta Conservation Strategy Map. Development of Appendix 3 and elevation data used in the Appendix 4 map assumed a potential 55-inch sea level rise over the next 50-100 years. With regard to sea level rise, Delta Plan Appendix 3 states, in relevant part:~~

> ~~"…the areas of the Delta that are of highest priority for restoration include lands that are in the existing intertidal range, floodplain areas that can be seasonally inundated, and transitional and upland habitats. Assuming a rise in sea level of approximately 55 inches over the next 50-100 years (Cayan et al. 2009), these areas would become shallow subtidal, seasonally inundated floodplain, and intertidal and upland habitats respectively" (Appendix 3, Habitat Restoration, Delta Plan, pp. 30-31).~~

~~The May 3, 2021 CDWA statement also states that "The Governor's single tunnel plan references a 10 foot rise in sea level. See Attachment E hereto." (CDWA's May 3, 2021 Letter, p. 5). Attachment E references a standard for a separate proposed project, which is neither a requirement of nor relevant to consideration of ER P2 for the Lookout~~

~~Slough Project (CDWA's May 3, 2021 Letter, Exhibit E, PDF pp. 19-22). Sea level rise projections alternate to ER P2 requirements are not a matter for the Council to decide in the matter of consistency with ER P2. The Council may consider only whether substantial evidence supports the Department's findings that the Covered Action is consistent with ER P2, which requires consistency with Delta Plan Appendices 3 and 4, neither of which require the consideration of sea level rise nor alternate sea level rise projections. Therefore, the Council finds that CDWA failed to identify an appealable issue within the scope of ER P2 and we *dismiss* the appeal as to the issue of sea level rise.~~

~~iii. Propagation of predatory fish species~~

~~Appellant CDWA argues that the Covered Action "...is also likely to propagate predatory species of fish" (CDWA Appeal Form, p. 5). In support, CDWA cites to Vogel (2011) (CDWA's May 3, 2021 Letter, p. 6; Final EIR, Certification Record LOS.3.00001, PDF p. 190). CDWA provided the full article to the Council and excerpts of Vogel (2011) are included as an attachment to CDWA's comments in response to the Draft EIR (Final EIR, Certification Record LOS.3.00001, PDF pp. 153-195); in Response 10-8 the Department states that this report, "was reviewed but not considered as relevant" (Final EIR, Certification Record LOS.3.00001, PDF p. 164).~~

~~CDWA asserts that the Covered Action has the potential to propagate invasive species but does not specify how this is relevant to the requirements of ER P2, Delta Plan Appendix 3, or Delta Plan Appendix 4. ER P2 requires that covered actions be sited at appropriate elevations but does not require analysis related to the propagation of predatory species. Therefore, the Council finds that CDWA failed to identify an appealable issue within the scope of ER P2 and we *dismiss* the appeal as to the issue of propagation of predatory fish species.~~

~~iv.~~ii. Intertidal habitat range

"Opportunities for habitat restoration in the Delta are constrained first and foremost by the elevation of land, which determines the potential of an area to be restored." (Chapter 4, Protect, Restore, and Enhancing the Delta Ecosystem, Delta Plan, p. 136). ER P2 requires that "[h]abitat restoration must be carried out consistent with Appendix 3" and that "Appendix 4 should be used as a guide for determining appropriate habitat restoration actions based on an area's elevation." It further states that "if a proposed habitat restoration action is not consistent with Appendix 4, the proposal shall provide rationale for the deviation based on best available science" (Cal. Code Regs., tit. 23, § 5006(a)). ER P2 only requires that Appendix 4 be "used as a guide" and allows deviation from Appendix 4 if rationale is provided based on best available science. For example, the Delta Plan states that, "restoring tidal marsh habitat would generally not be appropriate outside the areas labeled "intertidal"[…] unless they connect other tidal marshes into large habitat areas or can recover elevation over time by natural processes" (Chapter 4, Protect, Restore, and Enhancing the Delta Ecosystem, Delta Plan, p. 149).

The Department states that the majority of the Lookout Slough Project site is below 6.5 feet North American Vertical Datum of 1988 (NAVD88) and "exhibits elevations within the intertidal habitat range" (Draft EIR, Certification Record LOS.4.00001, p. III-13 – III-14, p. III-24). Figure III-6 of the Draft EIR depicts the existing topography of the site, and shows that the 2,868 acres out of 3,378 acres of the site is currently characterized as intertidal in four sub-categories between 2.1 and 6.5 feet NAVD88 (Department's May 3, 2021 Letter, p. 14; Draft EIR, Certification Record LOS.4.00001, p. III-17). In sum, the acres at intertidal elevations between 2.1 and 6.5 feet NAVD88 are approximately 85 percent of the Lookout Slough Project area, as estimated by adding the acres stated to be at intertidal elevation and dividing that sum by the total acres (Draft EIR, Certification Record LOS.4.00001, p. III-17). Figure III-6 further states that 206 acres are at subtidal elevations of 2.1 feet or less (approximately six percent of the total Lookout Slough Project area of 3,378 acres, as estimated by the Council), and approximately seven percent of the site is at upland elevations (Draft EIR, Certification Record LOS.4.00001, p. III-17). Figure III-6 substantiates the Department's claims that the majority of the Lookout Slough Project site is at elevations within the intertidal range.

Appellant CDWA states that "the project is not completely within the intertidal habitat range" (CDWA Appeal Form, p. 5). CDWA's May 3, 2021 Letter cites to Draft EIR Figure III-8, Proposed Habitat Concept to support this statement. CDWA states that the Proposed Habitat Concept, "...shows Shallow Subtidal - Open Water (2.1' and below) (425 ac./615 ac.), Intertidal - Mudflats and Emergent Marsh (2.1' to 6.5') (2,739 ac./2,762 ac.)" and asserts that with sea level rise, the site will become non-tidal open water (CDWA's May 3, 2021 Letter, p. 5; Draft EIR, Certification Record LOS.4.00001, p. III-31). Figure III-8, shows the habitat types proposed by the Covered Action, and at what elevations they would be at following grading and construction. In contrast, Figure III-6 (cited by the Department) shows the current elevations of the site.

Delta Plan Appendix 3 describes the intertidal elevation band as, "lands between one and seven feet above sea level, depending on location" (Appendix 3, Habitat Restoration, Delta Plan, p. 38). Activities appropriate for the intertidal elevation band include "tidal marsh habitats (either brackish or freshwater) with associated mudflats, sloughs, channels, and other open water features" (Appendix 3, Habitat Restoration, Delta Plan, p. 38).

The Department cites evidence in the record to support consistency with Delta Plan Appendix 3 in its Certification and its May 3, 2021 Letter. To support its determination of consistency with Delta Plan Appendix 3, the Department refers to Draft EIR Table III-1, Existing and Future Habitat Conditions (Draft EIR, Certification Record LOS.4.00001, p. III-27; Department's May 3, 2021 Letter, p. 14). Table III-1 lists existing, future, and net change of habitat acres that would be established with Project implementation (Draft EIR, Certification Record LOS.4.00001, p. III-27). This table states that 2,762 acres (approximately 82 percent of the site, as estimated by the Council) would be "[i]ntertidal emergent marsh and mud flats" and 615 acres (approximately 18 percent of the site) would be "shallow subtidal including tidal sloughs

and tidal channels" (Draft EIR, Certification Record LOS.4.00001, p. III-27). Intertidal emergent marsh and mud flats are appropriate activities identified in Appendix 3 for the elevation band identified in Appendix 4 (Appendix 3, Habitat Restoration, Delta Plan, p. 38; Appendix 4, Elevation Map, Delta Plan, p. 4-1).

CDWA has also cited to the Draft EIR noting the Lookout Slough Project's design acres and elevations. However, in its appeal, CDWA has not identified how restoration at those elevations would be inconsistent with ER P2. Furthermore, as noted above, ER P2 specifies that while habitat restoration must be carried out consistent with Delta Plan Appendix 3, the elevation map in Appendix 4 should be used as a guide. ER P2 does not establish a rigid requirement that restoration actions fall entirely within an appropriate elevation band noted in Appendix 4, if justified by best available science. The Department provides evidence in the record that the majority of the Project site is at elevations between 2.1 and 6.5 feet (Draft EIR, Certification Record LOS.4.00001, p. III-17), which is within the elevation range of one and seven feet stated in Delta Plan Appendix 3 to be appropriate for intertidal habitat restoration. The Department cites to evidence in the record that the majority of the Project site will be established as intertidal emergent marsh and mud flats following construction (Draft EIR, Certification Record LOS.4.00001, p. III-27). Therefore, the Council finds that CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with ER P2 on the issue of restoration of intertidal habitat at the appropriate elevations.

d. Conclusions

For the reasons discussed above, the Council finds that:

1. With regard to permanent inundation with sea level rise, CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with ER P2; and
2. ~~With regard to alternate sea level rise projections, CDWA failed to identify an appealable issue within the scope of ER P2;~~
3. ~~With regard to propagation of predatory fish species, CDWA failed to identify an appealable issue within the scope of ER P2; and~~
4. ~~2.~~ With regard to intertidal habitat range, CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with ER P2.

Therefore, we *deny* the appeals.

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

The Department identifies in its Certification that ER P5 does not apply to the Covered Action. Appellants SCWA, the Districts, and CDWA argue that it does apply, and that the Department should have demonstrated that the Covered Action is consistent with ER P5. For the reasons discussed below, the Council finds that: 1)

Appellants showed that the Certification is not supported by substantial evidence in the record that ER P5 does not apply to the Covered Action; and 2) that Appellants failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with ER P5.

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

In its Certification, the Department states that ER P5 is not applicable because "the Project would not result in a reasonable probability of introducing, or improving habitat conditions for, nonnative invasive species" (Certification ER P5 Finding, p.10). However, the Department states that "(i)nvasive species control, monitoring, adaptive management, and long-term management actions are included as part of the Proposed Project" and provides relevant evidence in the record describing details on potential plant species invasion, target species and control methods (Certification ER P5 Finding, pp.10-11; Final EIR, Certification Record LOS.3.00001, p. 3-28). The Certification states that "the Project has been designed to favor native fish species while discouraging establishment and colonization by non-native species"; "[h]owever, it is also expected that non-native fish such as striped bass (*Morone saxatilis*) and Mississippi silverside (*Menidia beryllina*) that can prey on native fish could occur within the new habitat" (Certification ER P5 Finding, pp.10-11). With regard to invasive plants, the Department further states that "(i)t is expected that the Proposed Project will reduce overall cover of invasive species within the Proposed Project Site" (Certification ER P5 Finding, p.11). The Certification states that "...target invasive plant species would be controlled as part of site preparation activities by being mechanically removed and/or sprayed" and that the Lookout Slough Project "would manage invasive species post-construction through compliance monitoring and effectiveness monitoring that will track indicators of ecological status and function" (Certification ER P5 Finding, p.10). Mitigation Measure

BIO-4 Invasive Species Abatement "requires the implementation of weed control protocols prior to, during, and after construction to minimize the potential for habitat degradation due to spread of existing on-site invasive species and establishment of invasive species in the vicinity of the Proposed Project Site" (Final EIR, Certification Record LOS.3.00001, p. 3-29).

Details describing monitoring and potential responses to nonnative invasive species are provided in the AMMP (Draft AMMP, Certification Record CAP_Draft LOS AMMP, pp. 3, 7, 15, 17, 51). The Certification identifies the Department's Fish Restoration Program, California State Parks -- Division of Boating and Waterways, and Department contractors as the entities responsible for monitoring and control on the project site (Certification ER P5 Finding, p.11).

c. Appeal and Analysis

The Council received appeals regarding the Department's Certification of Consistency with ER P5 from the following parties:

- Solano County Water Agency (SCWA)
- Reclamation District 2060 & Reclamation District 2068 (Districts)
- Central Delta Water Agency (CDWA)

i. Whether ER P5 Applies to the Covered Action

As a preliminary matter, the Council must address whether ER P5 applies to the Covered Action. ER P5 "covers a proposed action that has the reasonable probability of introducing, or improving habitat conditions for, nonnative invasive species." (Cal. Code Regs., tit. 23, § 5009.) The Department's Certification states that ER P5 is not applicable to the Covered Action (Certification ER P5 Finding, p. 10). Appellants SCWA, the Districts, and CDWA argue that it does apply, with SCWA and CDWA both stating the reason that "the Project provides open water space and emergent marsh which may allow non-native species to proliferate, further increasing their overall presence in the region" (SCWA Appeal Letter, p. 7; CDWA Appeal Form, p. 5.) and the Districts stating "careful consideration of tidal dynamics relative to habitat conditions for invasive nonnative species on the Project site is warranted" (Districts Appeal Letter, p. 8).

The Department discloses in its May 3, 2021 Letter that "(t)here are existing nonnative species in the Project vicinity and thus it is not possible to exclude them from the Project site, as the site is open to tidal waters" and that "Invasive species control, monitoring, adaptive management, and long-term management actions are included as an integral part of the Project post-construction." (Department's May 3, 2021 Letter, p. 16; Department's May 3, 2021 Letter Exhibit A – Response to Appeals, p. 4-8; Final EIR, Certification Record LOS.3.00001, p. 3-28). Additionally, the Department acknowledges the potential for species to invade restoration projects, stating that "[w]here monitoring and reporting indicate negative outcomes of restoration actions, such as invasive weeds or exotic predatory fish species or do not meet project goals

and objectives, corrective measures will be taken to meet the objectives of the restoration action" (FRP Implementation Strategy, Certification Record LOS.10.00014, p. 33). Extra-record evidence includes a white paper that found that "(t)he growing aquatic weed crisis in the Delta is a critical threat to restoration investments" (SCWA's May 10, 2021 Letter Attachment – Critical Needs for Control of Invasive Aquatic Vegetation in the Sacramento-San Joaquin Delta, p. 3).

Based on ~~substantial~~ evidence in the record, as well as the statements of the Department in its Certification and May 3, 2021 Letter, the Covered Action has a reasonable probability of introducing, or improving habitat conditions for, nonnative invasive species. Therefore, the Council finds that Appellants SCWA, the Districts, and CDWA showed that the Certification is not supported by substantial evidence in the record that ER P5 does not apply to the Covered Action. We now consider whether substantial evidence in the record supports a finding of consistency with ER P5.

ii. Consistency with ER P5

The appeals identify two issues related to consistency of the Covered Action with ER P5. They are: (a) introduction of and providing habitat for nonnative invasive species in the Lookout Slough Project site; and (b) funding and resources to manage nonnative invasive species in the Lookout Slough Project site.

(a) Introduction of and Providing Habitat for Nonnative Invasive Species

Appellants SCWA, the Districts, and CDWA claim the Covered Action is inconsistent with ER P5 due to failure to adequately analyze and avoid or mitigate possible introductions of or improved habitat conditions for nonnative invasive species. Specifically, the Districts claim that the Department "fails to analyze or mitigate" for invasive species introductions (Districts Appeal Letter, p. 8). Further, SCWA states that "the Project provides open water space and emergent marsh which may allow non-native species to proliferate" (SCWA Appeal Letter, p. 7) and CDWA states that the Lookout Slough Project "is conducive to the propagation of striped bass and other nonnative fish as well as nonnative aquatic plants", and the levee breaches "will favor nonnative predatory fish" (CDWA Appeal Form, p. 5).

The Department cites to evidence in the record describing how design and management of the Lookout Slough Project would consider, control, and avoid invasive species (Draft EIR, Certification Record LOS.4.00001, pp. 56, 84-87; Final EIR, Certification Record LOS.3.00001, pp. 2-27). As described above, the Department acknowledges the potential for species to invade restoration projects, stating that "[w]here monitoring and reporting indicate negative outcomes of restoration actions, such as invasive weeds or exotic predatory fish species or do not meet project goals and objectives, corrective measures will be taken to meet the objectives of the

restoration action" (FRP Implementation Strategy, Certification Record LOS.10.00014, p. 33).

Regarding invasive fishes, the Draft EIR states that the "Project has been designed to favor native fish species while discouraging establishment and colonization by non-native fish species", and includes information describing specific design details, including sizing breaches to allow for slower flow, creating dendritic channels that favor native fish, creating large channels, and not including culverts, which attract non-native fish such as striped bass (Draft EIR, Certification Record LOS.4.00001, pp. IV.D-84 - IV.D.87).

The Districts and CDWA claim in their respective letters that levee breaches associated with the Covered Action would improve habitat for non-native fishes, especially those that are predators to native fishes (Districts' May 10, 2021 Letter, pp. 17-18; CDWA's May 3, 2021 Letter, p. 6; CDWA's May 25, 2021 Letter, pp. 3-4), citing to Vogel (2011), excerpts of which are included in the Final EIR (Final EIR, Certification Record LOS.3.00001, pp. 193-194). In the Final EIR, the Vogel (2011) excerpt states, "many [levee] breaches were narrow which have created deep scour holes favoring predatory fish. …Breaching the levees at Liberty Island is an example" (Final EIR, Certification Record LOS.3.00001, pp. 193-194). However, Vogel (2011) does not specify what constitutes a narrow levee breach. Further, evidence in the record shows that the Department accounted for these deep scours by widening the breaches: "To help assure habitat connectivity and heterogeneity in accordance with the best available science, nine large breaches are designed along the Shag Slough Levee, ranging in width up to approximately 575 feet. Such large breaches allow water to slowly enter and exit the site. Numerous, enlarged breaches avoid creating high velocity funnels that can disorient fish as they enter or exit the site. Such channel geometry also favors native fish species with dendritic channels. Constructed channels have been designed to be large and allow for tidal exchange, maximizing primary productivity while minimizing the potential for non-native species establishment (Final EIR, Certification Record LOS.3.00001, PDF pp. 128-129)." During construction of the Lookout Slough Project, "At any time, the Biological Monitor will have the authority to stop work if a federally-listed species is encountered within the proposed project area during construction, or if there are any signs of distress or disturbance that may lead to delayed migrations or increased predation of federally-listed species" (USFWS Project BiOp, Certification Record LOS.8.00003, pp. 28-29).

Regarding nonnative aquatic plants, the Department cites to evidence in the record that describes how the invasive plant species would be controlled as part of site preparation activities by being mechanically removed and/or sprayed (Draft AMMP, Certification Record CAP_Draft LOS AMMP, pp. 25, 51). The Department also states the invasive species would be managed post-construction through compliance monitoring and effectiveness monitoring that track invasive aquatic vegetation performance standards (Draft AMMP, Certification Record CAP_Draft LOS AMMP, pp. 2-4). Details on monitoring and potential management responses are provided in the AMMP (Draft AMMP, Certification Record CAP_Draft LOS AMMP, pp. 3, 7, 15, 17, 51).

Potential management responses include, but are not limited to: re-excavation; manual, mechanical, cutting and/or herbicide application; pruning; and placement of new material on habitat berms (Draft AMMP, Certification Record CAP_Draft LOS AMMP, p. 51).

Appellants identify past restoration sites in the Delta and Suisun Marsh that have resulted in habitats favorable to invasive species. SCWA refers to CDFW's Lindsey Slough Restoration Project as "one of the most recent restoration projects in the Complex, and has been aggressively populated by both Water Hyacinth and Brazilian Waterweed" (SCWA Appeal Letter, p. 7). Additionally, SCWA states that based on "current O&M issues at the North Bay Aqueduct facility, prior restoration projects by state agencies like CDFW and DWR, and the persistence of invasive weed species documents by DWR, DBW, UC Davis, and other respected agencies, that DWR does not have adequate resources or strategies in place to effectively deal with invasive weed species once they become established within the proposed Project." (SCWA's May 10, 2021 Letter, pp 5-6).

However, SCWA does not identify evidence in the record that such inability to manage invasive weeds would occur at the Lookout Slough Project site. In addition, the Department's interagency agreement with DBW "provides resources necessary for DWR to coordinate with DBW to carry out and monitor the effects of the enhanced aquatic invasive plant control action at future Fish Restoration Program sites." (FRP/DBW Contract, Certification Record LOS.10.00015, p. 2-3). The Lindsay Slough Restoration Project and North Bay Aqueduct are not DWR FRP sites (FRP Implementation Strategy, Certification Record LOS.10.00014).

In its appeal, SCWA references a white paper, provided as an attachment to its May 10, 2021 Letter, as evidence to support the claim that the Department and DBW are unable to effectively manage invasive weed species in the Delta as well as the Yolo Bypass/Cache Slough region (SCWA's May 10, 2021 Letter Attachment – Critical Needs for Control of Invasive Aquatic Vegetation in the Sacramento-San Joaquin Delta, p. 4). However, this white paper states that the DBW's Aquatic Invasive Plant Control Program "is the only entity permitted to conduct these treatments [of aquatic vegetation] in navigable waterways throughout the Delta." (SCWA's May 10, 2021 Letter Attachment – Critical Needs for Control of Invasive Aquatic Vegetation in the Sacramento-San Joaquin Delta, p. 4). This white paper highlights the need to research and implement new weed control tools particularly for treating submerged aquatic vegetation, and recommends that agencies pursue collaborative science and funding to support consistent Delta-wide monitoring of aquatic vegetation. However, this white paper does not suggest that the Department would be unable to mitigate or avoid invasive aquatic vegetation on the Lookout Slough Project site.

Rather, there is ~~substantial~~ evidence in the record that the Department would be able to mitigate invasive vegetation as part of the Lookout Slough Project. The Lookout Slough Project's Draft Long-Term Management Plan (LTMP), which was developed in

consultation with CDFW and the Interagency Ecological Program Aquatic Vegetation Project Work Team, identifies monitoring and management responsibilities to control invasive vegetation post-construction using methods approved by the California Invasive Plant Council (Draft LTMP/WRPO, Certification Record LOS.8.00007, pp. 24, 41-42).

There is evidence in the record that the potential for introductions of, or improved habitat conditions for nonnative invasive species has been fully considered and avoided or mitigated in a way that appropriately protects the ecosystem. The record shows that the Department has designed the project to minimize the risk of introducing or improving habitat conditions for invasive species and also provided a plan to monitor, control and mitigate invasions at the project site, pursued in partnership with DBW as the sole entity permitted to conduct chemical or mechanical invasive plant control methods in the region. Therefore, the Council finds that SCWA, the Districts, and CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with ER P5 as to the issue of adequately analyzing and avoiding or mitigating possible introductions of or improved habitat conditions for nonnative invasive species.

(b) Funding/Resources for Invasive Species Management

Appellants SCWA and CDWA claim that there is inadequate funding available to manage invasive species at the project site. SCWA points out “the Division of Boating and Waterways (DBW) is the lead agency that conducts all invasive nonnative species management (primarily with plants) in the Delta on behalf of the State of California”, and may "not have the dedicated on-the-ground resources and staffing, to effectively manage invasive nonnative plants” at the site (SCWA Appeal Letter, p. 7). CDWA states that “without a funding mechanism, dedicated on-the-ground personnel assigned to the project, and no-third party oversight, the Project will improve and support habitat for invasive nonnative species” (CDWA Appeal Form, p. 5).

The Department cites to evidence that it will manage and monitor the Lookout Slough Project into the future, including managing and monitoring invasive species (Draft EIR, Certification Record LOS.4.00001, pp. 193-194, III-47, IV.D-53; Final EIR, Certification Record LOS.3.00001, p. 2-27). The Department designates its Fish Restoration Program, California State Parks Division of Boating and Waterways, and Department contractors as the entities responsible for monitoring and control on the project site (Final EIR, Certification Record LOS.3.00001, pp. 3-28 - 3-29). The record includes a DWR/DBW contract which allocates up to $32.5 million dollars to DBW “to enhance their existing control program in areas identified by DWR to be future locations of tidal wetland restoration projects, and to conduct detailed tracking of the aquatic weed and water quality response to these additional weed treatment areas. This five-year interagency agreement provides resources for DWR to coordinate with DBW to carry out and monitor the effects of the enhanced aquatic invasive plant control action at

future Fish Restoration Program sites." (FRP/DBW Contract, Certification Record LOS.10.00015, p. 3). The Fish Restoration Program Agreement specifies that "(w)here monitoring and reporting indicate negative outcomes of restoration actions, such as invasive weeds or exotic predatory fish species or do not meet project goals and objectives, corrective measures will be taken to meet the objectives of the restoration action" (FRP Implementation Strategy, Certification Record LOS.10.00014, p. 33). Details describing monitoring, intervention thresholds, and potential management responses to nonnative invasive species are provided in the AMMP (Draft AMMP, Certification Record CAP_Draft LOS AMMP, p. 3, 7, 15, 17, 51). In its Letter, the Department states that "the funding for these tasks and habitat restoration activities will be provided by DWR's SWP operations and maintenance budget for perpetual operation and maintenance of the restoration project, in accordance with the Fish Restoration Program Agreement (FRPA) Implementation Strategy" (Department's May 3, 2021 Letter, p. 17). This is supported in the record by information on funding support from the FRP Implementation Strategy (FRP Implementation Strategy, Certification Record LOS.10.00014, p. 10).

The Department identifies dedicated programs for on-the-ground implementation of invasive species management, provides an oversight mechanism, and includes a plan and demonstrated funding for invasive species management in collaboration with DBW (Final EIR, Certification Record LOS.3.00001, pp. 3-28 - 3-29, FRP/DBW Contract, Certification Record LOS.10.00015, p. 3). Therefore, the assertion that the Covered Action may "not have the dedicated on-the-ground resources and staffing, to effectively manage invasive nonnative plants" is contradicted by evidence in the record. Thus, the Council finds SCWA and CDWA have failed to demonstrate that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with ER P5 as to the issue of funding and resources for invasive species management.

d. Conclusions

For the reasons discussed above, the Council finds that:

1. Appellants SCWA, the Districts, and CDWA showed that the Certification is not supported by substantial evidence in the record that ER P5 does not apply to the Covered Action; and
2. Appellants SCWA, the Districts, and CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with ER P5.

Therefore, we *deny* the appeals.

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

The Department certifies that the Lookout Slough Project is consistent with DP P2. All four Appellants raise substantive arguments that it is not. For the reasons discussed below, the Council makes the following findings:

1) We *remand the matter* to the Department for reconsideration of the following issues.

    a. LIA has shown that ~~there~~the Certification is ~~no~~not supported by substantial evidence in the record ~~to demonstrate~~ that recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER do not constitute existing uses;

    b. LIA has shown that ~~there~~the Certification is ~~no~~not supported by substantial evidence in the record ~~to demonstrate~~ that the ~~Lookout Slough Project~~Covered Action would not conflict with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER; and

    c. LIA has shown that ~~there~~the Certification is ~~no~~not supported by substantial evidence in the record that the Department avoided or reduced conflicts with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Lookout Slough Project.

2) We did not reach a conclusion regarding the issue of whether ~~the~~ siting ~~of~~ the ~~Covered Action~~Lookout Slough Project to avoid or reduce conflicts with existing uses was feasible because ~~there~~the Certification is ~~no~~not supported by substantial evidence in the record that the Department ~~considered~~ avoided or reduced conflicts with existing recreational uses ~~or analyzed whether there is conflict with such uses~~of Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Lookout Slough Project.

We *deny* the appeals as to conflicts with existing agricultural uses, conflicts with existing infrastructure, conflicts with use of existing water intakes and beneficial uses of water, conflicts with 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 because SCWA, the Districts, and CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2.

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 its Certification, the Department acknowledges that DP P2 applies to the Covered Action "because the Project involves the siting of ecosystem restoration" (Certification DP P2 Finding, p. 12). The Department certifies that the Covered Action is consistent with DP P2 (Certification DP P2 Finding, p. 12).

In its Certification, the Department identifies multiple existing uses for which the Covered Action has avoided or reduced conflicts, including but not limited to nearby water supply diversions and intakes, neighboring agricultural operations, and the existing agricultural operation located on the project site (Certification DP P2 Finding, pp. 12-18). The Department also states that the Covered Action is compatible with and would not result in conflicts with the Solano County General Plan and zoning (Certification DP P2 Finding, p. 13).

As discussed in more detail below, in its Certification, the Department does not describe efforts to reduce or avoid conflicts with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, or Liberty Island Ecological Reserve ~~(LIER)~~ (Certification DP P2 Finding, PDF pp. 12-18). There is a lack of content in the Certification regarding whether and how the Covered Action was sited to avoid or reduce conflicts with existing recreational uses. The lack of content in the Certification regarding existing recreational uses suggests the Department did not consider existing recreation uses at the time of Certification. A finding by the Council that the Department failed to consider the siting of the Covered Action to avoid or reduce conflicts with existing recreational uses would constitute grounds to remand the matter to the Department for reconsideration of this issue. (See Wat. Code, § 85225 [requiring lead agencies to include written "detailed findings" in their certifications of consistency].)

c. Appeal and Analysis

The Council received appeals regarding the Department's Certification of Consistency with DP P2 from the following parties:

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

The appeals identify seven issues related to consistency of the Covered Action with DP P2. They are: (i) conflicts with existing recreational ~~access to~~uses of Liberty Island Road, the Shag Slough Bridge, and Liberty Island Ecological Reserve; (ii) conflicts with existing agricultural uses; (iii) conflicts with existing infrastructure; (iv) conflicts with existing water intakes and beneficial uses of water, (v) conflicts with existing water intakes and diversions related to endangered species presence, (vi) conflicts with the Solano County General Plan, and (vii) conflicts with the Solano County Climate Action Plan. Each of these issues is addressed separately, below.

i. Conflicts with existing recreational uses of Liberty Island Road, the Shag Slough Bridge and Liberty Island Ecological Reserve

DP P2 requires, in part, that covered actions subject to the policy be sited to avoid or reduce conflicts with existing uses when feasible, considering comments from local agencies and the Delta Protection Commission. Within this subsection on conflicts with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and ~~Liberty Island Ecological Reserve (~~LIER~~),~~, the analysis will begin by assessing whether there is ~~substantial~~ evidence in the record to demonstrate that recreational uses identified by LIA are not existing uses that fall within the scope of DP P2 (subsection (a) "Whether there is an existing recreational use of Liberty Island Road, the Shag Slough Bridge, and LIER"). Then, the analysis will discuss whether the Covered Action siting conflicts with these recreational uses (subsection (b) "Whether the siting of the Lookout Slough Project conflicts with existing recreational use of Liberty Island Road, the Shag Slough Bridge, and LIER"). Next, the analysis will discuss whether conflicts with existing uses were avoided or reduced in the siting of the Covered Action (subsection (c) "Whether the Department avoided or reduced conflicts with existing recreational uses when siting the Lookout Slough Project~~).~~"). Finally, the analysis will discuss evidence in the record regarding whether it was feasible for the Department to avoid or reduce these conflicts (subsection (d) "Whether avoiding or reducing conflicts with existing recreational uses is feasible~~).~~").

(a) Whether there is an existing recreational use of Liberty Island Road, the Shag Slough Bridge, and LIER

LIA contends that existing recreational use of LIER "is significant, it's clearly established, and it's longstanding" (May 20, 2021 Hearing Transcript, p. 67, ll. 5-8). LIA states that recreational activities at LIER include fishing, hunting, kayaking, bird watching, hiking, and bicycle riding (LIA's May 3, 2021 Letter, p. 6). The Delta Protection Commission concurs with LIA, stating that LIER is "well used by bank fishermen and women, waterfowl hunters, birders, kayakers; really, recreation enthusiasts of all stripes" (May 20, 2021 Hearing Transcript, p. 34, ll. 11-14).

Evidence in the record substantiates that LIER is accessed by the public for recreational activities that include waterfowl hunting, fishing, boating, and wildlife

viewing (LIER Land Management Plan, LOS.10.00032, pp. 9-11). The Department states in the Draft EIR that "The Reserve is maintained by CDFW and is open to the public for recreational activities. The Reserve is primarily accessed by boats but can be accessed by pedestrians from the Proposed Project Site via the Liberty Island Bridge…Recreational activities within the interior of the Reserve include fishing, bird watching, and hunting" (Draft EIR, Certification Record LOS.4.00001, pp. IV.J-1 – IV.J-2). The Final EIR affirms this land-based access, stating that "the Shag Slough Bridge provides pedestrian access to a small portion of the western shoreline of Shag Slough in the Reserve where bank fishing is allowed" (Final EIR, Certification Record LOS.3.00001, p. 3-24).

LIA also states that Liberty Island Road is the main access point to LIER's navigable waterways for kayaks and small watercraft (LIA Appeal Letter, p. 4). LIA specifically identifies kayak launch points on LIER, which are reached by Liberty Island Road; and kayak launch points located along both sides of Shag Slough, as "existing access that is available to the general public, 24/7" (LIA's May 3, 2021 Letter, p. 4). LIA further contends that levee trails on LIER are used to access at least two kayak launching sites located south of the Shag Slough Bridge (LIA's May 18, 2021 Letter, PDF p. 13).

Evidence in the record substantiates that boating in small, non-motorized watercraft is an existing recreational use at LIER that is accessed via Liberty Island Road. In the Draft EIR, the Department states, "The interior of the Reserve is open to tidal inundation and is shallow enough to only be accessible by kayak or shallow-water boats" (Draft EIR, Certification Record LOS.4.00001, p. IV.J-2). Furthermore, as cited by LIA, CDFW states in its public comments on the Draft EIR that, "Currently, the [Shag Slough] Bridge provides public access to hand-launch kayaks or small boats within LIER. Kayaking is very common on LIER for year-round fishing and especially for hunting during the waterfowl season…While some hunters can boat the more than ten miles from the nearest launches, many only have access to kayaks or small watercraft and rely on the Bridge as the main access point to hand-launch onto LIER" (Final EIR, Certification Record LOS.3.00001, PDF pp. 98-99).

The Department contends, however, that "there is no 'authorized existing' use of Liberty Island Road nor the Shag Slough Bridge for hand-launching kayaks" (Department's May 3, 2021 Letter, p. 18).[27]

LIA asserts that public use of the Shag Slough Bridge to access navigable waters does not require explicit authorization, citing the precedent of *People v. Sweetser*, 72

[27] In its comment letter on the June 18, 2021 Staff Draft Determination, the Department contends that it "never claimed that recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER do not constitute existing uses" and itemizes the existing recreation uses as: "fishing from the Shag Slough Levee, use of Shag Slough Bridge…as the only pedestrian access point to LIER, and LIER for year-round fishing, hunting, and bird watching" (Department's June 28, 2021 Letter, p. 10). The Department states that "currently parking on Liberty Island Road and recreating on Shag Slough Levee are not authorized and the only formally allowable use is recreating at LIER" (Department's June 28, 2021 Letter, p. 10).

Cal.App.3d 278 (Cal. Ct. App. 1977) and the California State Lands Commission's 2017 Guide to Public's Right to Access Waterways to reach the conclusion that "the public, unless restricted by reasonable government action, may use expressly dedicated road and highway easements to access navigable waters, such as Shag Slough" (LIA's May 3, 2021 Letter, p. 6; LIA's May 12, 2021 Letter Exhibit M – A Legal Guide to the Public's Rights to Access and Use California's Navigable Waters).[28] LIA also contends that the California Constitution protects the Liberty Island Road right-of-way because it leads to a public launching area on public lands for a navigable waterway (LIA's May 18, 2021 Letter, PDF pp.13-14). LIA cites the California Constitution, Article X, Section 4: "No individual or partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water" (LIA's May 18, 2021 Letter, PDF pp. 13-14).[29] LIA also states that public use of Liberty Island Road is "implicitly authorized" by the LIER Land Management Plan, which states, "Kayaks and small specialized boats designed for shallow water can be carried to the water from Liberty Island Road (LIA's May 3, 2021 Letter, p. 7; LIER Land Management Plan, Certification Record LOS.10.00032, p. 11).

~~The Delta Protection Commission supports the position advanced by LIA, stating that boating and fishing use of the site from Liberty Island Road are authorized by the California Constitution; and that protecting recreational uses of LIER "is also consistent with common law requiring protection of the public trust in State waters, including navigation and recreation" (Commission's May 11, 2021 Letter, p. 4).~~

In *People v. Sweetser*, the precedent cited by LIA, the court recognized that a dedicated public highway easement "embraces all public travel on foot or in vehicles that is not prohibited by law or by a restriction in the easement itself." (*Sweetser*, 72 Cal.App.3d at 284.) The court found that a county may, however, impose "reasonable regulations restricting" the use of the public easement, which limit how the public can use the easement. (*Id. See also* Sts. & Hy. Code, § 942.5, subd. (a) (allowing counties to impose restrictions on the use of public highway easements for specified reasons).) In *Sweetser*, the defendant had been convicted of trespassing after he ignored no

[28] In its May 12, 2021 letter, LIA requested that Exhibit M be added to the record. Exhibit M is a State Lands Commission publication from 2017 titled, "A Legal Guide to the Public's Rights to Access and Use California's Navigable Waters". Among other content, the publication provides a summary of *People v. Sweetser*, 72 Cal.App.3d 278 (Cal. Ct. App. 1977) and the implications of the case for public access. The Council takes official notice of Exhibit M under its Appeals Procedures, section 29, as documented in Exhibit B to this Determination. Although the Council takes official notice of Exhibit M, we do not rely on the State Lands Commission's publication to interpret the cited caselaw.

[29] In its May 11, 2021 letter, the Delta Protection Commission supports the position advanced by LIA, stating that boating and fishing use of the site from Liberty Island Road are authorized by the California Constitution; and that protecting recreational uses of LIER "is also consistent with common law requiring protection of the public trust in State waters, including navigation and recreation" (Commission's May 11, 2021 Letter, p. 4).

trespassing signs, climbed a fence next to a public bridge, and hand launched his kayak into a river from the land adjacent to the bridge. (*Sweetser*, 72 Cal.App.3d at 284.) On appeal, the court vacated the conviction because the defendant was "acting within the scope of the easement" when he used the easement to launch his kayak, and there was insufficient evidence to show that the county had placed the no trespassing signs to restrict public use of the easement. (*Id*.) ~~Like the court in *Sweetser*, the State Lands Commission has determined that "the public, unless restricted by reasonable government action, may use expressly dedicated road and highway easements to access navigable waters." (, p. 23).~~ Accordingly, if Liberty Island Road is a dedicated public road easement and the county has not imposed reasonable regulations restricting its use, the public can use the easement for any kind of travel—including pedestrian ~~use~~travel and to launch kayaks into waterways intersecting with the easement.

LIA cites to comments in the record stating that Liberty Island Road is a public right-of-way that occurs as an easement held by Solano County (LIA's May 18, 2021 Letter, PDF p.11). This includes a public comment on the Draft EIR, in which Solano County recognizes Liberty Island Road as a public right of way (Final EIR, Certification Record LOS.3.00001, PDF p. 249; LIA's May 18, 2021 Letter, PDF p. 11); as well as a statement included in the Department's response to Solano County, recognizing that the Covered Action would result in Liberty Island Road "no longer being available for public use" (Final EIR, Certification Record LOS.3.00001, PDF p. 247; LIA's May 18, 2021 Letter, PDF p. 12). LIA also points to other public comments on the Draft EIR, provided to the Department by Reclamation District 2068, stating that, "The DEIR is silent on easements held by Solano County for public roads. These roads may not have a deeded title, but clearly have a prescriptive right" (Final EIR, Certification Record LOS.3.00001, PDF p. 641; LIA's May 18, 2021 Letter, PDF p. 12); as well as public comments provided by Reclamation District 2098 stating that, "According to Solano County, Liberty Island Road is a county road that cannot be removed as a public road unless properly abandoned under law" (Final EIR, Certification Record LOS.3.00001, PDF p. 215; LIA's May 18, 2021 Letter, PDF p. 12). Finally, with its May 18, 2021 Letter, LIA provides copies of three pages from the Solano County Assessor's Map Book as evidence that the road segment in question is a public right of way (LIA's May 18, 2021 Letter, PDF p. 3; LIA's May 12, 2021 Letter Exhibit H – Solano County Assessor's Map Books). ~~Map Book 143-24 shows the segment of Liberty Island Road that borders the project site labeled as "Co. Rd. No. 637" (, p. 1).~~[30]

[30] In its May 12, 2021 letter, LIA requested that Exhibit H be added to the record. Exhibit H consists of three pages from the Solano County Assessor's Map Books, copyright dated 1996. One of these pages, Map Book 143-24, shows the segment of Liberty Island Road that borders the project site labeled as "Co. Rd. No. 637". The Council takes official notice of Exhibit H under its Appeals Procedures, section 29, as documented in Exhibit B to this Determination. Although the Council takes official notice of Exhibit H, the Assessor's Map Book pages are not necessary to support the conclusion that Liberty Island Road is a public right-of-way.

In its Letter following the May hearing (Department's June 1, 2021 Letter, p. 2), the Department also cites to evidence in the record corroborating that Liberty Island Road is also known as County Road 637/County Road No. 1490C/County Road No. 5190C (Road Vacation Letter, Certification Record LOS.8.00021, p. 1). The Road Vacation Letter cited by the Department also includes a copy of a 1963 Yolo County resolution to enter into an agreement with Solano County for maintenance and construction of Solano County Road No. 5190A (also known as Yolo County Road No. 104) (Road Vacation Letter, Certification Record LOS.8.00021, PDF pp. 14-15) as well as a copy of the signed agreement itself (Road Vacation Letter, Certification Record LOS.8.00021, PDF pp. 16-17).

The Department states, nonetheless, that "No Trespassing" and "No Parking" signs are posted along Liberty Island Road (Department's May 3, 2021 Letter, p. 17). At the May hearing, the Department contends that "No Parking" signs are posted along the length of Liberty Island Road, from the northeast corner of the project site where the road turns right, and past the Shag Slough Bridge (May 20, 2021 Hearing Transcript, p. 270, ll. 11-18). LIA states that "There is a no parking sign right about 30 feet from the bridge, but the entire length of that mile and a half of levee does not have no parking signs" (May 20, 2021 Hearing Transcript, p. 282, ll. 3-6). LIA contends that recreationists "park legally" along the road (May 20, 2021 Hearing Transcript, p. 282, l. 3). LIA also states that there is no signage to suggest launching a kayak or small vessel, or loading such a vessel into or from "a temporarily parked vehicle," violates the right-of-way easement use." (LIA's May 3, 2021 Letter, p. 7).

In the record, the Department provides an image of signage posted adjacent to the Shag Slough Bridge (Google Maps, Certification Record LOS.10.00034, PDF p. 1). The cited image shows one "No Trespassing" sign and one "No Parking" sign on the eastern side of Liberty Island Road (the waterside of the Shag Slough levee) to the north of the Shag Slough Bridge. The "No Trespassing" sign in the image seems to indicate that no trespassing is permitted on the waterside of the Shag Slough levee, north of the bridge, and the "No Parking" sign seems to indicate that parking is prohibited along a portion of the eastern side of Liberty Island Road, near the bridge. However, the image does not show parking restrictions on the western side of Liberty Island Road or for the full length of the road, and neither sign appears to restrict travel on Liberty Island Road or Shag Slough Bridge.[31] The Department does not cite to any other evidence of travel restrictions on Liberty Island Road.

When asked whether the record establishes who posted the signs, and for what purpose, the Department responds that they are "generally County of Solano signs. For

[31] In its June 28, 2021 letter, the Department states that the Council, "engages in a minutiae discussion on the placement of the No Trespassing and No Parking signs and at length determines on the basis of [Council] staff's personal judgment that the signs do not prohibit parking on other sections" (p. 13). This discussion is necessitated by the contradictory statements made at the May hearing by the Department and LIA regarding parking restrictions on Liberty Island Road. As such, we must attempt to ascertain whether either of these claims are supported by evidence in the record. As the evidence provided by the Department in the record is an image, we describe here what the image shows.

why it was posted, I don't believe that we did question why the county posted the road signs" (May 20, 2021 Hearing Transcript, p. 270, ll. 19-24). In its subsequent Letter, the Department states that there is not substantial evidence in the record documenting that signs were posted by Solano County (Department's June 1, 2021 Letter, p. 2).

This omission is significant in light of public comments submitted by Ecosystem Investment Partners (EIP), the owner of the project site, contending that "access to the LIER via Liberty Island Road is only attained by trespassing on EIP's private property" (EIP's May 3, 2021 Comment Letter, p. 4). The Department also contends that "the levee side slope is privately owned" (Department's June 1, 2021 Letter, p. 2). The Department acknowledges that the Shag Slough waterway is a public right-of-way, but states that "the area from the road down to the levee is not, so it is trespassing" (May 21, 2021 Hearing Transcript, p. 101, ll. 9-16); although the Department goes on to state that restrictions on trespassing are not widely enforced (May 21, 2021 Hearing Transcript, p. 101, ll. 17-20). The Department has not cited to evidence in the record to show that travel along Liberty Island Road and Shag Slough Bridge in order to access LIER to launch kayaks or for bank fishing constitutes trespass.

~~There is evidence in the record that Liberty Island Road is a public right-of-way.~~ To uphold the Department's Certification on this issue, substantial evidence in the record must demonstrate that uses of Liberty Island Road, the Shag Slough Bridge, and LIER, which are highlighted by Appellant LIA, affirmed by the Commission, and documented in the record, do not constitute existing uses within the scope of DP P2. There is evidence in the record that Liberty Island Road is a public right-of-way. ~~There is no substantial~~There is no evidence in the record that Solano County imposed regulations reasonably restricting the use of the road or the bridge. The limited restrictions indicated by the two signs near the bridge cannot be assumed to apply to both sides of Liberty Island Road from the northeast corner of the project site to the Shag Slough Bridge. Moreover, the Department has not identified evidence of any restrictions on travel along the road or bridge to access LIER.

Therefore, the Council finds that LIA has shown that ~~there~~the Certification is ~~no~~not supported by substantial evidence in the record ~~to demonstrate~~ that recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER~~,~~ do not constitute existing uses.

(b) Whether the siting of the Lookout Slough Project conflicts with existing recreational use of Liberty Island Road, the Shag Slough Bridge, and LIER

LIA states that the Lookout Slough Project would directly conflict with existing recreational use of Liberty Island Road and the Shag Slough Bridge to access navigable waterways and adjacent public lands at LIER by removing land-based access to LIER (LIA Appeal Letter, p. 4). In its May 3, 2021 Letter, LIA explains that, "by removing the only public road that connects to these [kayak] launch sites (particularly for launching into the LIER interior navigable waterways), DWR is very explicitly impairing an existing

access point to a navigable waterway" (LIA's May 3, 2021 Letter, p. 5). LIA cites to the Draft EIR and Final EIR for evidence that the Lookout Slough Project would eliminate public recreational land-based access to LIER and Shag Slough (LIA's May 3, 2021 Letter, p. 9). In its May 11, 2021 Letter, the Commission agrees that the Covered Action "would not only conflict with these recreational uses but would completely eliminate them" (Commission's May 11, 2021 Letter, p. 5).

Evidence in the record substantiates these allegations. In the Draft EIR, the Department states that the Covered Action "would vacate Liberty Farm Road from the northwest corner of the project to the Shag Slough Bridge" (Draft EIR, Certification Record LOS.4.00001, p. III-35). This sentence was later revised in the Final EIR to state that the Covered Action would "vacate Liberty Island Road from the northeast corner of the project to the Shag Slough Bridge" (Final EIR, Certification Record LOS.3.00001, PDF p. 250). The sections of the Draft EIR cited by LIA state that, "The sole terrestrial access point to the Reserve is the Shag Slough Bridge which is currently not accessible by vehicles (foot traffic only) and would no longer be accessible following Liberty Island Road Vacation" (Draft EIR, Certification Record LOS.4.00001, p. IV.A-21) and "The Shag Slough Bridge currently provides pedestrian access from the terminus of Liberty Island Road to the eastern shoreline of Shag Slough for bank fishing. However, this section of Liberty Island Road would be closed to the public as a result of the Proposed Project…. This would eliminate pedestrian access to bank fishing along the shoreline of the Reserve..." (Draft EIR, Certification Record LOS.4.00001, p. IV.J-5). The Department also states in the Final EIR that, "the portion of Liberty Island Road that provides access to the Shag Slough Bridge would be removed as a result of levee breaching, thus eliminating bridge access to the Reserve" (Final EIR, Certification Record LOS.3.00001, p. 3-24).

In its May 3, 2021 Letter, the Department implies that there is no conflict because the Draft EIR did not identify any significant impacts to recreation (Department's May 3, 2021 Letter, pp. 18-19). The Letter states, "The Draft EIR, Chapter IV.J considered recreation significance thresholds from the CEQA Guidelines Appendix G checklist and also considered an additional threshold: how loss of access to the Shag Slough Bridge would affect regional shoreline fishing opportunities. Based on these thresholds, the Draft EIR concluded that potential impacts to recreation would be less than significant" (Department's May 3, 2021 Letter, p. 18). However, independent and distinguishable from the requirements of CEQA, DP P2 requires that covered actions for water management facilities, ecosystem restoration projects, and flood management infrastructure 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 (Cal. Code Regs., tit. 23, § 5011).

The recreation impact analysis in the Draft EIR states that, "it is assumed that a relatively small number of people use the Reserve," and estimates that "The loss of shoreline fishing for pedestrians at the Reserve is small in comparison to other opportunities in the Delta for fishing from a bank or pier" (Draft EIR, Certification Record LOS.4.00001, pp. IV.J-5 - IV.J-6). However, as documented in the G P1(b)(3) findings,

the Department's analysis may underestimate bank fishing at LIER by one or more orders of magnitude and the Council finds that there is insufficient evidence in the record that the estimates are based on best available science. Moreover, the presence of other bank fishing opportunities within the Delta is not evidence that there is no conflict with existing recreational use of Liberty Island Road, Shag Slough Bridge, and LIER for bank fishing or any of the other recreational uses documented in section (a) above (e.g. kayaking, bird-watching, hunting, hiking), for the purposes of DP P2.

LIA has identified evidence in the record to show that the Lookout Slough Project would conflict with existing recreational use of Liberty Island Road, the Shag Slough Bridge, and LIER. The Department has not cited to evidence in the record to show that no conflict would be created by vacating the roadway that connects to LIER.[32] Therefore, the Council finds that LIA has shown that ~~there~~the Certification is ~~no~~not supported by substantial evidence in the record ~~to demonstrate~~ that the Covered Action would not conflict with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER.

(c) Whether the Department avoided or reduced conflicts with existing recreational uses when siting the Lookout Slough Project

LIA states that the Department has not made feasible efforts to reduce or avoid conflicts with existing recreational uses as required by DP P2 (LIA Appeal Letter, p. 6). LIA states that the Covered Action "directly conflicts with longstanding local land use, particularly as it pertains to recreation" and that that the Department "makes no effort to mitigate for the recreational impacts that the Project incurs" (May 20, 2021 Hearing Transcript, pp. 56, ll. 23-25 – 57, l. 1), although "mitigation is feasible" (May 20, 2021 Hearing Transcript, p. 70, l. 16). The Delta Protection Commission also observes that (Commission's May 11, 2021 Letter, p. 5), "[the Department's] Certification of Consistency lacks substantial evidence that its Project will avoid conflicts with the existing recreation uses" (May 20, 2021 Hearing Transcript, p. 37, ll. 3-5).

In its May 3, 2021 Letter, the Department also cites to the Final EIR, which states, "The Reserve would remain accessible by boat, as the Proposed Project does not propose any impediments within navigable waters, nor does it propose excluding access to navigable waters within the Proposed Project Site" (Department's May 3, 2021 Letter, p. 17; Final EIR, Certification Record LOS.3.00001, p. 3-24). Evidence in

[32] In its June 28, 2021 letter, the Department states that "The Delta Plan does not require that no conflicts are allowed to exist on a project, instead conflicts should be avoided or reduced, when feasible" (Department's June 28, 2021 Letter, p. 16). DP P2 requires that conflicts be avoided or reduced, when feasible. If there were evidence in the record that there is no conflict with existing recreational uses, the Department would not be required to avoid or reduce a conflict that does not exist. However, the Department has not identified evidence that there is no conflict. Under DP P2, the Department is required to show that it avoided or reduced the conflict, when feasible (as we assess in subsection (c) "Whether the Department avoided or reduced conflicts with existing recreational uses when siting the Lookout Slough Project"), or that there is no conflict to avoid or reduce.

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 contends that it would reduce the potential conflict with existing recreational uses as follows: "the loss of access to the LIER via Shag Slough bridge will be offset by creating over 20 miles of new public waterways on formerly private lands…This will increase recreational opportunities for boating, fishing, birdwatching, waterfowl hunting, and sightseeing within the Project site" (Department's May 3, 2021 Letter, p. 17).

The Department also refers to a new boat ramp as a component of the Covered Action that would avoid or reduce conflict with existing recreational uses (Department's May 3, 2021 Letter, pp. 17-18). At the May hearing, the Department states that "the relocation of that option [hand-launching kayaks or other watercraft from the Shag Slough Bridge] is by the inclusion of the agency boat ramp" (May 20, 2021 Hearing Transcript, p. 177, ll. 18-23). In its June 28, 2021 letter, the Department states that "The current, informal and unimproved kayak launching point immediately impacted by removal of pedestrian access to the bridge will be replaced by a kayak launching point on the western side of the slough. There is no impairment to navigable waterways." (Department's June 28, 2021 Letter, p. 10).

The Department states that CDFW recommended creation of a boat ramp for hand-launching small vessels and a fishing access point on the northeast corner of the project site, allowing recreational access to Shag Slough and LIER (Department's May 3, 2021 Letter, p. 18). CDFW's recommendations are documented in the record (Final EIR, Certification Record LOS.3.00001, PDF pp. 98-99). In its May 3, 2021 Letter, the Department states that it "did incorporate CDFW's recommendation for the public agency boat ramp and gate into the project description" (Department's May 3, 2021 Letter, p. 18). As evidence the Department cites to the Draft EIR, which states, "The northern slope of the northernmost breach along the Shag Slough Levee would include a boat ramp to allow vehicles to back boats into the open water habitat at the breach location…Access to this boat ramp would be gated and only available for use by authorized personnel, including but not limited to, DWR and CDFW staff" (Draft EIR, Certification Record LOS.4.00001, p. III-41).

However, in oral comments at the May hearing, LIA contends that the new tidal waterways would be "inaccessible wetlands" for most of the general public (May 20, 2021 Hearing Transcript, p. 73, ll. 17-18). In its Letter, LIA states that the boat ramp, roadways, and levees created by the Covered Action would be "closed to the public" (LIA Appeal Letter, p. 5). LIA contends that the Covered Action would not create land-based recreational opportunities of "similar value" to the existing land-based access (LIA's May 3, 2021 Letter, p. 6); and that, as a result of the Covered Action, "the only access to the area would be feasible by powered watercraft making a 21+ mile round trip from the nearest boat launch" (LIA's May 3, 2021 Letter, p. 6). The Delta Protection Commission also observes that the new tidal channels would not replace existing recreational opportunities, because these channels would only be accessible by boating from "distant boat ramps," and therefore would not replace wildlife-viewing, paddling,

bank fishing, and waterfowl hunting available to recreationists who access LIER via Liberty Island Road (Commission's May 11, 2021 Letter, p. 6).

LIA cites evidence in the record to substantiate that new tidal waterways would not provide access for hand-launching non-motorized watercraft (LIA's May 3, 2021 Letter, p. 7). The Final EIR states, "The Proposed Project would provide *non-public* internal access to the Duck Slough Setback Levee, Cache/Hass Slough Training Levee, Cross Levee, and the northern section of the degraded Shag Slough Levee. A gate would be installed at the northeast corner of the Project Site on the southern side of Liberty Island Road at Shag Slough in order to *restrict pedestrian and vehicular access* to the Project Site" (emphasis added; Final EIR, Certification Record LOS.3.00001, p. 2-13). LIA also cites to the Draft EIR, which states, "While the Proposed Project involves construction of minor transportation facilities such as levee roads and a boat launch, these are relatively small project components, *would not be open to the public*, and would not serve any new areas. They would therefore not expand access…" (emphasis added; Draft EIR, Certification Record LOS.4.00001, p. VI-2). The Delta Protection Commission also observes that the boat ramp would be restricted upon completion of the Covered Action, stating, "what is apparent to me from the Final EIR is that's the access for an official public agency [CDFW] to continue to gain access to its property" (May 20, 2021 Hearing Transcript, p. 51, ll. 18-22).

In oral comments at the May hearing, the Department states that the segment of Liberty Island Road and the Shag Slough Levee north of the northernmost breach would provide access to pedestrians for bank fishing upon completion of the Lookout Slough Project (May 20, 2021 Hearing Transcript, p. 149, ll. 19-24). The Department further states that the boat ramp would be accessible for the public to hand-launch small watercraft by walking around the gate (May 20, 2021 Hearing Transcript, p. 248, ll. 5-16). In addition, the Department states that "the walkways along the levees are also open for birdwatching and hiking and strolling" at the project site (May 20, 2021 Hearing Transcript, p. 247, ll. 2-7). As evidence that the Covered Action would allow public access to bank fishing via Liberty Island Road north of the northernmost levee breach, the Department cites to the 100% Basis of Design Report (May 20, 2021 Hearing Transcript, p. 264, ll. 5-12). The 100% Basis of Design Report indicates that the Covered Action would retain a levee segment north of the northern most breach, stating that "the northern segment of the northern breach and the southern segment of the southern breach will be armored to maintain the integrity of the existing levees to remain north and south of the Project" (100% BODR, Certification Record LOS.11.00004, p. 3). However, the 100% Basis of Design Report does not indicate that the section of the Shag Slough Levee north of the northernmost breach would provide public access for bank fishing.

At the May hearing, the Department states that pedestrian access to Shag Slough Levee for bank fishing is not an "explicit" or "sanctioned" use, but that, "access would remain just based on the fact that you could drive straight out to the levee the same as you can today" (May 20, 2021 Hearing Transcript, p. 265, ll. 12-16). The Department explains that, because existing signage indicates "no trespassing," "no

parking," and "no fishing from bridge," that, "we weren't contemplating having signs saying you could do those things" (May 20, 2021 Hearing Transcript, p. 268 ll. 3-7).

As evidence that the new boat ramp would be accessible to the public, the Department also points to the Basis of Design Report, which, the Department contends, shows "how you would be able to walk through that area" (May 20, 2021 Hearing Transcript, p. 266, ll. 6-11). The Department also states that one of the Basis of Design Reports shows that the Covered Action would include a parking area, designed to accommodate a boat trailer, at the dead end of Liberty Island Road at Shag Slough (May 20, 2021 Hearing Transcript, p. 267, ll. 10-18). In a subsequent Letter (Department's June 1, 2021 Letter, p. 3), the Department cites to the 100% Basis of Design plans, which substantiate that the Covered Action design would include an access gate at the new boat ramp (100% BODR, Plan Set 2-17-21, Certification Record LOS.11.00004, PDF pp. 120, 98). The Department also cites to the Final EIR (Department's June 1, 2021 Letter, p. 3), which states, "The Proposed Project would provide *non-public internal access* to the Duck Slough Setback Levee, Cache/Hass Slough Training Levee, Cross Levee, and the northern section of the degraded Shag Slough Levee. A gate would be installed at the northeast corner of the Project Site on the southern side of Liberty Island Road at Shag Slough *in order to restrict public pedestrian and vehicular access to the Project Site*" (emphases added; Final EIR, Certification Record LOS.3.00001, p. 2-13). Finally, the Department cites to a map in the record (Draft LTMP/WRPO, Certification Record LOS.8.00007, PDF p. 90), which confirms the inclusion of a boat ramp in the Lookout Slough Project design (Department's June 1, 2021 Letter, p. 3). However, the Department does not cite to evidence in the record substantiating that the new boat ramp and gate would allow public pedestrian access for hand-launching small watercraft.[33]

As evidence that levees on the project site would be accessible to public recreational use, the Department states that "Similar to…how [levee roadways] are today; it's just, it would be accessible. There's no signage today saying that it's accessible for that use" (May 20, 2021 Hearing Transcript, p. 268, ll. 11-13). In subsequent comments at the May hearing, the Department reiterates that "The Duck Slough Setback Levee, you could walk out there. There's not going to be anything stopping you from doing so" (May 21, 2021 Hearing Transcript, p. 102, ll. 13-15). However, the Department again does not identify specific evidence in the record demonstrating that pedestrians would have recreational access to levees on the project site.

[33] In its June 28, 2021 letter, the Department again cites to the 100% Basis of Design Report Plan Set 2-17-21 for evidence that "the new boat launch … will offer the public the opportunity to safely hand launch boats approximately 550 feet from a gate location adjacent to the paved turnaround at the proposed terminus of Liberty Island Road" (Department's June 28, 2021 Letter, p. 12). As previously stated, while the 100% Basis of Design Report and accompanying Plan Set show the presence of a boat ramp, a gate, and a paved turnaround, they do not contain evidence demonstrating that the public can access these features to hand launch boats. In contrast, there is evidence in the record that the boat launch "would not be open to the public" (Draft EIR, Certification Record LOS.4.00001, p. VI-2).

The Department states in oral comments at the May hearing that "the project has to be under a conservation easement that restricts public access and recreation, which is a common practice and a requirement of California Department of…Fish and Wildlife" (May 20, 2021 Hearing Transcript, pp. 232, ll. 21-25 – 233, l. 1). Additionally, in describing pedestrian access to levee-top trails at the project site, the Department states, "There are some restrictions, especially in the tidal wetlands area, because of the conservation easement" (May 20, 2021 Hearing Transcript, p. 247, ll. 8-10). The Department does not cite to evidence in the record clarifying the terms or extent of restrictions on public access included in the conservation easement.

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 ramp and the segment of Liberty Island Road north of the northernmost levee breach, as described above, the Department fails to cite to specific evidence in the record substantiating these claims. Furthermore, evidence in the record indicates that the Lookout Slough Project would be designed to *restrict* public access to the newly created boat ramp and levees on the project site, including the intact section of the Shag Slough Levee north of the northernmost levee breach.[34]

Finally, the Department refers to an existing Memorandum of Understanding (MOU) with Solano County as evidence that the Covered Action avoids or reduces conflicts with existing recreational uses (Department's May 3, 2021 Letter, p. 18). This MOU, which is included in the record, documents an agreement to work cooperatively with Solano County and other appropriate entities to identify recreational opportunities on future projects, when achievable with project objectives (MOU, Certification Record LOS.10.00030, p. 2). However, the MOU does not commit the Department to specific actions, including actions that would avoid or reduce conflicts between the Covered Action and existing recreational uses identified by LIA.

LIA has identified evidence in the record to show that the Department did not avoid or reduce conflicts with existing recreational use of Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Lookout Slough Project. The Department has not cited to evidence in the record to substantiate its post hoc arguments that conflicts were avoided or reduced. Therefore, the Council finds that LIA has shown that ~~there~~the Certification is ~~no~~not supported by substantial evidence in the record that the Department avoided or reduced conflicts with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Lookout Slough Project.

[34] In its June 28, 2021 letter, the Department states that the proposed gate at the agency boat ramp is "to restrict unauthorized vehicle access"…"consistent with current features at the location" because "there is an existing gate at the [Shag Slough] bridge to restrict unauthorized vehicle access onto LIER" (Department's June 28, 2021 Letter, p. 11). However, as already discussed above, evidence in the record indicates that the Department's intention for the proposed gate is to restrict both vehicular *and* pedestrian access by the public (Final EIR, Certification Record LOS.3.00001, p. 2-13).

(d) Whether avoiding or reducing conflicts with existing recreational uses is feasible

LIA states that the Department has feasible options to reduce or avoid conflicts with existing recreational use for hand-launching small watercraft and pedestrian access to LIER (LIA Appeal Letter, p. 6; LIA's May 18, 2021 Letter, pp. 1-11). LIA advocates for two options to avoid or reduce conflicts, including "the use of box culverts to preserve existing vehicle access, and creating a public access plan for opening Project levee roadways and wetland areas for hiking, hunting, fishing, and hand-launch boat/kayak access" (LIA Appeal Letter, p. 5). LIA states that these options were proposed to the Department during the Draft EIR public comment period, referring to public comments submitted by Solano County (Final EIR, Certification Record LOS.3.00001, PDF p. 249) and a presentation made by LIA to the Department on February 4, 2021 (LIA Appeal Letter Exhibit B – Information Presented to DWR, pp. 29-33).[35] The Delta Protection Commission, referring to suggestions by LIA and comments provided by CDFW (CDFW Draft EIR Comments, Certification Record LOS 4.00025, p. 8), also observes that the Department did not incorporate mitigation measures that could reduce or offset the conflict with existing access to LIER via Liberty Island Road, "without demonstrating their infeasibility" (Commission's May 11, 2021 Letter, p. 6).

The Department states that it was not feasible to maintain public pedestrian access to the bridge (May 20, 2021 Hearing Transcript, pp. 269, ll. 24-25 - 270, ll. 1-5). The Department also contends that maintaining the current level of access for bank fishing was not feasible (May 20, 2021 Hearing Transcript, p. 238, ll. 4-6). The Department states in oral comments at the May hearing that there were conversations with CDFW in early stages of the Lookout Slough Project design to assess whether a bridge could be sited in a different location in order to provide access to LIER (May 20, 2021 Hearing Transcript, p. 241, ll. 14-15; May 21, 2021 Hearing Transcript, pp. 109, ll. 22-25 – 110, ll. 1-4). However, the Department does not cite to evidence in the record documenting this assessment of infeasibility.[36] More broadly, the Department does not

[35] In its Appeal Letter, LIA requested that Exhibit B be added to the record. Exhibit B consists of presentation slides that LIA claims it presented to the Department on February 4, 2021. The Department objects to this evidence, stating that "the bulk of LIA's extra-record evidence may not be included in the administrative record absent evidence those materials were actually presented to DWR prior to February 22, 2021" (Department's June 28, 2021 Letter, p. 17). The fact that LIA did not provide a copy of their presentation, as alleged by the Department, is not determinative because the Department also states that "LIA did present the PowerPoint presentation at a meeting hosted by DWR" (Department's June 28, 2021 Letter, p. 17). As LIA's presentation is dated February 4, 2021, and the Department does not refute that LIA's presentation was before the Department prior to the date it filed the Certification (February 22, 2021), the Council has added Exhibit B to the record under its Appeals Procedures, section 10, as documented in Exhibit A to this Determination.

[36] With regard to retaining land-based access via the use of box culverts specifically, the Department cites to its response to comments on the Draft EIR: "the use of culverts in the place of breaches is inconsistent with [Fish Restoration Program (FRP)] restoration guidelines, as stated in the FRP Implementation Strategy and does not meet the Proposed Project objectives" (Department's May 3, 2021 Letter, p. 8; Final EIR, Certification Record LOS.3.00001, PDF p. 250). The Department cites to specific evidence in

cite to evidence in the record to show that that it is infeasible to avoid or reduce conflicts with the existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER.

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.[37] Irrespective of feasibility, the record could not reflect that the Department properly considered whether the Lookout Slough Project avoids or reduces conflicts with existing recreational uses or the feasibility of doing so when the record does not show that the Department identified a conflict with or properly analyzed existing recreational uses. of Liberty Island Road, the Shag Slough Bridge, or LIER. Therefore, the Council need not reach a conclusion regarding the issue of whether the Department considered feasibilitysiting the Lookout Slough Project to avoid or reduce conflicts with existing uses was feasible because therethe Certification is nonot supported by substantial evidence in the record to show that the Department consideredavoided or reduced conflicts with existing recreational uses or analyzed the whether there is conflict with such usesof Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Lookout Slough Project.

(e) Conclusion

For the reasons discussed above, the Council finds that:

1) LIA has shown that therethe Certification is nonot supported by substantial evidence in the record to demonstrate that recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER do not constitute existing uses;

2) LIA has shown that therethe Certification is nonot supported by substantial evidence in the record to demonstrate that the Lookout Slough Project Covered Action would not conflict with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER; and

3) LIA has shown that therethe Certification is nonot supported by substantial evidence in the record that the Department avoided or reduced conflicts with

the FRP Implementation Strategy (May 20, 2021 Hearing Transcript, pp. 273 ll. 22-25 – p. 273, ll. 1-2; FRP Implementation Strategy, Certification Record LOS.10.00014, p. 10). The Department also states that box culverts attract non-native fish predators and restrict flow of water during seasonal events, and for this reason were determined to be inconsistent with biological and flood optimization objectives of the Project (Department's May 3, 2021 Letter, pp. 6, 8), citing to the Draft and Final EIRs as evidence to substantiate this assessment (Draft EIR, Certification Record LOS.4.0001, p. IV.D-56 and pp. IV.D - 84-IV.D-87; Final EIR, Certification Record LOS.3.00001, PDF pp. 26-27, PDF p. 35; Draft EIR Appendix O, Certification Record LOS.4.00016, pp. 18-29).

[37] The Department cites to Section 29 of the Council's Appeals Procedures regarding testimony provided during the May 20-21 public hearing. (DWR's June 28, 2021 Letter, p.15, Fn. 9). The cited hearing testimony, especially provided for proof of the truth of the matters contained within, does not meet the standard of admissibility under Section 29.

existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Lookout Slough Project.

~~The Council~~We did not reach a conclusion regarding the issue of whether ~~the~~ siting ~~of~~ the ~~Covered Action~~Lookout Slough Project to avoid or reduce conflicts with existing uses was feasible because ~~there~~the Certification is ~~no~~not supported by substantial evidence in the record that the Department ~~considered~~ avoided or reduced conflicts with existing recreational uses ~~or analyzed whether there is conflict with such uses~~of Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Lookout Slough Project.[38]

ii. Conflicts with existing agricultural uses

CDWA appealed the Department's Certification for DP P2 citing conflicts related to existing agricultural uses on the Lookout Slough Project site (CDWA Appeal Form, p. 6). In its appeal, CDWA states that, "The project does not respect local land uses. The action displaces existing agricultural uses" (CDWA Appeal Form, p. 6).

The Department's analysis concurs that such displacement will occur, concluding that the total impact of the Covered Action would be the conversion of 1,460 acres of agricultural land (Draft EIR, Certification Record LOS.4.00001, Page IV.B-11). However, in its Certification, the Department states that "The current agricultural operator of the Proposed Project Site…played an active role in developing the planned mitigation for the Proposed Project's conversion of the Bowlsbey Property to non-agricultural use and additional non-mitigation steps to maintain continued ranching operations relocated by the Proposed Project" (Certification DP P2 Finding, p. 12). These statements are supported by evidence in the Draft EIR, which states that Mitigation Measure AG-1a was developed in collaboration with the current operator to "assure their continued operation in the same region of Solano County" (Draft EIR, Certification Record LOS.4.00001, Page IV.B-10).

In its appeal, CDWA also asserts that, "The project fails to include adequate mitigation or other commitments for its inconsistencies with local land uses and conflicts with DP P2." (CDWA Appeal Form, p. 6). In its Certification, quoting from the Draft EIR, the Department states that "With implementation of various items outlined in the Good Neighbor Checklist … and mitigation measures described in [the Draft EIR and Final EIR], conflict with existing agricultural land uses from the Proposed Project would be minimal" (Certification DP P2 Finding, p. 12; Draft EIR, Certification Record LOS.4.00001, Page IV.A-12). The Department cites to multiple sections in the Draft EIR and the response to comments in the Final EIR for documentation of such mitigation measures. According to the Draft EIR, mitigation measures include the purchase of 1,000 acres of conservation easements in Solano County and the improvement of

[38] In a future certification of consistency submitted in response to the remanded recreational issues under DP P2, if the Department determines that the Covered Action would conflict with existing recreational uses, it should assess the feasibility of avoiding or reducing such conflicts.

agriculture on an additional 1,720 acres of land (Draft EIR, Certification Record LOS.4.00001, Page IV.B-11-12). Attachment E to the Draft EIR describes the Department's engagement with the current agricultural operator of the Bowlsby Property and outreach conducted to neighboring landowners, as well as responses to each of the checklist questions (Draft EIR, Appendix E, Certification Record LOS.4.00006). CDWA does not explain why the cited measures or checklist responses are inadequate, nor does CDWA substantiate their statements with evidence in the record.

DP P2 does not require that a covered action avoid displacing existing uses, but only that it avoid or reduce conflicts with existing uses when feasible. The record shows that the Department reduced conflicts with existing agricultural uses by working with the current agricultural operator of the project site to develop mitigation measures and conducting outreach to nearby landowners using the Good Neighbor Checklist. CDWA has not shown that the Department's finding that, by relocating existing ranching operations and incorporating feasible mitigation measures, the Covered Action avoided or reduced conflicts with existing uses was unsupported by ~~substantial~~ evidence in the record. Therefore, the Council finds that CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2, and we *deny* the appeals as to the issue of conflict with existing agricultural uses.

iii. Conflicts with existing infrastructure

The Districts assert that the Covered Action is inconsistent with DP P2 because, "The Project fails to address the reasonably foreseeable need to relocate water diversion infrastructure; impacts to surrounding levees, bridges, and other structures due to increased areas of inundation and the effects of wind; … and long-term Project impacts on RD 2098, including potential economic effects that would render RD 2098 unable to properly maintain its infrastructure, which would have significant physical impacts on neighboring reclamation districts, including RD 2060 and RD 2068" (Districts Appeal Letter, p. 9). The Districts do not explain how such potential impacts constitute a conflict with an existing use within the scope of DP P2.

In their May 10, 2021 Letter, the Districts provide clarification that the alleged conflicts with water diversion infrastructure would be the result of "reasonably foreseeable impacts" to water quality and entrainment of protected fish species (Districts' May 10, 2021 Letter, pp. 22-23). These issues were also raised by other appellants and are therefore addressed separately in sections (~~v~~iv) and (~~vi~~v) below. This section (~~iv~~iii) will address the remaining issues raised related to conflicts with the Districts' existing infrastructure.

(a) Whether the Department addressed impacts to surrounding levees, bridges, and other structures

The Districts assert that "The Project fails to address …impacts to surrounding levees, bridges, and other structures due to increased areas of inundation and the

effects of wind" (Districts Appeal Letter, p. 9). The Districts do not explain how such potential impacts constitute a conflict with an existing use within the scope of DP P2.

As evidence, the Districts cite to Solano County's comments on the Draft EIR, which state that "removing existing levees or portions thereof could impact levees that surround existing valuable agricultural lands, making these levees susceptible to erosion, wind waves, scouring, and tidal action, and therefore more vulnerable during seismic shaking events if not mitigated and strengthened to current US Army Corps of Engineering standards" (Districts' May 10, 2021 Letter, p. 21; Final EIR, Certification Record LOS.3.00001, PDF p. 242). The Districts contend that the Department failed to adequately address these comments (Districts' May 10, 2021 Letter, p. 22).

In its response to Solano County's comments on the Draft EIR, the Department summarizes design features of the Cache/Hass Slough Training Levee and the Duck Slough Setback Levee that are intended to protect the levees on the opposite side of Cache Slough and Hass Slough from erosion and states that the Covered Action "would not transfer flood risk to adjoining districts" (Final EIR, Certification Record LOS.3.00001, PDF pp. 243-244). These statements are substantiated by the Lookout Slough Setback Levee Wave Runup and Wind Setup Analysis Technical Memorandum, contained in Appendix D to the Draft EIR. Within Appendix D, Appendix C contains an analysis of fetch length and wind wave runup to nearby reclamation districts under current conditions and with implementation of the Covered Action (Draft EIR, Appendix D, Certification Record LOS.4.00005, PDF pp. 723-746). The Response to Comment also cites to Appendix Y to the Final EIR, which confirms the conclusions of the prior analysis in the Draft EIR (Final EIR, Certification Record LOS.3.00001, PDF p. 149 and Appendix Y, PDF p. 908).

The Districts assert that the Covered Action fails to address impacts to surrounding levees, bridges, and other structures, but does not point to evidence in the record that such impacts would occur, nor explain how such potential impacts constitute a conflict with an existing use within the scope of DP P2. The Department has cited to evidence in the record to show that impacts to surrounding infrastructure were evaluated and analyzed and that no conflict was identified. Therefore, with regard to impacts to surrounding infrastructure, the Council finds that the Districts failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2 and we *deny* the appeal as to the issue of impacts to surrounding levees, bridges, and other structures.

(b) Whether RD 2098's ability to maintain its infrastructure would have significant physical impacts on neighboring districts

The Districts allege that "The Project fails to address… long-term Project impacts on RD 2098, including potential economic effects that would render RD 2098 unable to properly maintain its infrastructure, which would have significant physical impacts on

neighboring reclamation districts, including RD 2060 and RD 2068" (Districts Appeal Letter, p. 9).[39]

In its May 3, 2021 Letter, the Department cites to Master Response 7 in the Final EIR, which states that "There is an existing statutory framework for the responsibilities of RDs, funding, and even in the extreme situation, creation of a state-managed maintenance area to ensure continued function" and "periodic inspections will be conducted to ensure flood control responsibilities are met, and to ensure flood impacts are not transferred to neighboring RDs" (Department's May 3, 2021 Letter, p. 46; Final EIR, Certification Record LOS.3.00001, pp. 3-20 to 3-21).

The signed, January 31, 2019 contract between the Department and RD 2098 contains covenants related to operations and maintenance of the Covered Action under Article 18, including a requirement for RD 2098 to execute an agreement with the ~~Central Valley Flood Protection Board (~~CVFPB~~)~~ for operations and maintenance of the completed Lookout Slough Project (Department's May 12, 2021 Letter Attachment 3 - DWR/RD 2098 Contract #4600012776, pp. 10-11). The signed, January 6, 2021 funding agreement between the CVFPB and RD 2098 provides evidence that this requirement has been fulfilled and substantiates the Department's Master Response. The funding agreement states: "If the Funding Recipient has failed or refused to perform the obligations set forth in this OMRR&R Agreement or the requirements of the manuals mentioned above, the State may take appropriate actions including proceedings to establish a maintenance area under Water Code Section 12878 et seq." (OMRR&R Agreement, Certification Record LOS.10.00028, p. 3). The agreement states further that, "the State may itself perform the necessary work or do so by contract" (p. 4).

In their May 10, 2021 Letter, the Districts contend that the Department's Master Response 7, Operation and Maintenance (O&M) of Levees, "fails to address how maintenance will occur if RD 2098 is unable to perform it" (Districts' May 10, 2021 Letter, p. 16). The Districts claims are contradicted by evidence in the record, which describes how maintenance would occur if RD 2098 does not perform it, including the option for the State to take appropriate actions if RD 2098 fails to perform the necessary maintenance.

At the May hearing, the Districts explain that "the project calls for Reclamation District 2098 to play a key role in operation and maintenance with regard to the levees that will be part of this project. Currently, revenues from 2098 are not adequate for it to do that work. And DWR has not addressed where 2098 will ultimately get that money." (May 20, 2021 Hearing Transcript, p. 105, ll. 15-21.) The Districts also state that "DWR fails to address the flood impacts that would result if RD 2098 cannot meet its

[39] This is closely related to the issue discussed in section (~~iv~~iii)(a) above, as the Districts contend that flood risk impacts are "significant and unavoidable" if RD 2098 is unable to adequately maintain the Duck Slough Setback Levee (Districts Appeal Letter, p. 16; Final EIR, Certification Record LOS.3.00001, PDF p. 215). The Districts also raise concerns related to RD 2098's capacity to perform operations and maintenance under Delta Plan policies G P1(b)(2) (Mitigation Measures 5-1, 5-2, and 5-4) and G P1(b)(4).

operations and maintenance obligations" (May 20, 2021 Hearing Transcript, p. 109, ll. 12-14). In its presentation at the May hearing, the Department clarified that "once the project is completed, DWR becomes about a 54 percent ownership of the land within RD 2098 and has made a commitment to remain within the RD and …to pay assessments based on that property in order to ensure sufficient funding for RD 2098 moving forward" (May 20, 2021 Hearing Transcript, p. 272, ll. 17-22). Indeed, based on the provisions of the 2021 funding agreement (OMRR&R Agreement, Certification Record LOS.10.00028, p. 3), it is in the Department's interest to ensure RD 2098 has sufficient funding to perform operations and maintenance, lest the State be forced to perform the work itself.

The Districts have not provided explanation as to why the 2021 funding agreement and Water Code Section 12878 are not sufficiently protective, nor how potential future maintenance deficiencies constitute a conflict with their flood infrastructure. Nor do the Districts substantiate their allegations with evidence in the record. The Department, meanwhile, has identified ~~substantial~~ evidence in the record that funding agreements are in place for RD 2098 operations and maintenance. Therefore, with regard to long-term operation and maintenance of facilities by RD 2098, the Council finds that the Districts failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2.

The Council finds that the Districts failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2. Therefore, we *deny* the appeal as to the issue of conflicts with existing infrastructure.

iv. Conflicts with use of existing water intakes and beneficial uses of water

Appellants SCWA, the Districts, and CDWA assert that the Covered Action would adversely impact water quality, creating conflicts with the use of existing water intakes.

SCWA asserts that "The Project does not appropriately respect local land use including existing municipal and agricultural water supply intakes within the [Cache Slough] Complex. The agency is specifically concerned about water quality impacts to existing municipal and agricultural intakes within the lower Complex, including the NBA, Reclamation District 2068 intake, and numerous agricultural diversions" (SCWA Appeal Letter, p. 8). SCWA alleges that there is insufficient evidence in the record to support the Department's conclusion that the Covered Action would not impact NBA operations, constituting "a threat to an essential water supply for over 500,000 citizens" (SCWA's May 10, 2021 Letter, p. 1).

Similarly, the Districts allege that "The Project fails to address the reasonably foreseeable need to relocate water diversion infrastructure" (Districts Appeal Letter, p. 9). The Districts explain in their Letter that, "the Project will result in impacts to water quality that will limit—or potentially eliminate—the ability of diverters to use that water" (Districts' May 10, 2021 Letter, p. 23). Water quality impacts identified in the Districts'

appeal letter include “increases in organic carbon, as well as increases in salinity and bromide upstream, directly impeding the ability of Appellants, and landowners within their districts, to divert water for agricultural uses and increases in costs for treatment” (Districts Appeal Letter, pp. 1-2). The Districts state that “Current users do not have the infrastructure in place to treat water for agricultural or municipal use when these [water quality] changes (and others) manifest; if they cannot treat the water, they cannot use it, and will be forced to identify alternative supplies” (Districts’ May 10, 2021 Letter, p. 7).

CDWA asserts that “... Degradation of water quality as to salinity, methyl mercury and propagation of microcystis will result [from the Project]. …This projects [sic] degrades water quality and reduces flows in trade for habitat” (CDWA Appeal Form, p. 6). CDWA states that, “the parameters for protection of particular uses rely on the resulting protection of water quality and flow from other uses, such as fisheries” but does not specify which “particular uses” would experience the conflict allegedly created by the Covered Action (CDWA Appeal Form, p. 6).

In its Certification, the Department identifies the following existing nearby water supply diversions: the RD 2068 agricultural diversion, the State Water Project’s ~~BSPP,~~Barker Slough Pumping Plant (BSPP), and several private agricultural diversions (Certification DP P2 Finding, p. 15). The Certification cites to modeling and analyses conducted to evaluate impacts to water quality, and finds that the Covered Action would not result in conflicts with the beneficial use of Delta waters as a drinking water source, nor conflict with in-Delta agricultural irrigation and wildlife beneficial uses (Certification DP P2 Finding, p. 16).

Each water quality impact raised by the Appellants is discussed separately below. Appellants cross-reference arguments and evidence from their related appeals of G P1(b)(3). The analyses below will not restate arguments and evidence related to the adequacy of the water quality objectives, studies, or models that are already addressed under G P1(b)(3), above, and will instead focus on the arguments and evidence specifically related to alleged conflicts with existing uses or those uses described or depicted in local general plans.

(a) Bromide

SCWA asserts that the Covered Action would lead to adverse impacts by increasing bromide concentrations near existing intakes (SCWA Appeal Letter, p. 8). SCWA explains that, “When municipal water supplies are treated to meet drinking water standards, bromide can form bromate, a known and regulated carcinogen, which can impact human health. … Major land use changes, such as that proposed at Lookout Slough, have the potential to enhance sea water intrusion upstream of Rio Vista, and elevate salinity and bromide above baseline concentrations. Since many of the water purveyors in the area utilize ozone to deal with high levels of organics, they would be highly sensitive to changes in bromide above baseline conditions.” (SCWA Appeal Letter, p. 1).

The Districts allege that "The Project will likely result in…increases in salinity and bromide upstream, directly impeding the ability of Appellants, and landowners within their districts, to divert water for agricultural uses and increases in costs for treatment" (Districts Appeal Letter, pp. 1-2). The Districts also indicate that impacts to water quality may force current users to identify alternative supplies for agricultural or municipal use (Districts' May 10, 2021 Letter, p. 7).

As evidence of the potential for the Covered Action to contribute to increased bromide concentrations near intakes, SCWA cites to the ~~Bay Delta Conservation Plan (~~BDCP~~)~~ Recirculated Draft EIR (which SCWA also cited in comments on the Lookout Slough Project Draft EIR). SCWA states that the BDCP Recirculated Draft EIR "identifies the NBA as being negatively impacted by Bromide associated primarily with habitat restoration projects" (SCWA Appeal Letter, p. 8). SCWA quotes from the BDCP Recirculated Draft EIR: "a substantial amount of tidal habitat restoration is still anticipated to occur in the future as part of separate actions (e.g., the California Water Action Plan/EcoRestore), which could result in a greater portion of higher-bromide concentration water in the restored areas… Thus, the cumulative condition for bromide is still considered adverse" (SCWA Appeal Letter, p. 8).[40]

In its DP P2 Certification, the Department states that "The Proposed Project is expected to result in only relatively small percentage changes (1-3 percent increases at South Delta intakes and 1-4 percent decreases at Antioch and Contra Costa Water District intakes) to bromide concentrations" (Certification DP P2 Finding, p. 16). As supporting evidence, the Department cites to Appendix X to the Final EIR, which includes an evaluation of bromide impacts at drinking water intakes. Appendix X states that, "To assess potential impacts associated with the Project, simulations were performed for four scenarios examining existing conditions, implementation of the Project and potential cumulative impacts with and without consideration of other projects in the Delta that may be constructed in the future (Certification DP P2 Finding, p. 18; Final EIR, Certification Record LOS.3.00001, Appendix X, pp. 1-2). The evaluation estimated daily averaged absolute and relative change in bromide concentrations resulting from the Covered Action, relative to existing conditions and the regional restoration scenario (Final EIR, Certification Record LOS.3.00001, Appendix X,

[40] The cited text of the BDCP Recirculated Draft EIR may indicate the potential for adverse cumulative effects associated with tidal wetland restoration in general. However, DP P2 is concerned with the siting of specific, individual projects. Cumulative changes in water quality resulting from multiple constructed and planned tidal wetland restoration projects in the Cache Slough Complex are not before the Council as part of these proceedings. With respect to DP P2, the Council considers only whether substantial evidence in the record supports the Department's finding that the Lookout Slough Project itself avoids or reduces conflicts with existing uses when feasible. The cited text, assuming it accurately reflects the substance of the BDCP Recirculated Draft EIR (which SCWA has not provided in full), does not support SCWA's assertions that the Lookout Slough Project would independently elevate bromide concentrations to a level that would conflict with existing uses. If anything, the cited text of the BDCP Recirculated Draft EIR appears to indicate that individual BDCP alternatives would not, on their own, "significantly affect Delta hydrodynamics and source water fractions" (SCWA Appeal Letter, p. 8). However, this analysis is not a basis for affirming the certification of consistency on this point.

pp. 112). The conclusions described in Appendix X support the Department's Certification.

SCWA alleges that the Lookout Slough Project Draft EIR, "did not adequately address the cumulative impacts associated with all of the planned restoration projects" on bromide concentrations in the Cache Slough Complex (SCWA Appeal Letter, p.8). The regional restoration scenario used in the EC model includes restoration of the following sites: Arnold Slough, Bradmoor Island, Chipps Island, Decker Island, DOW Wetlands, Dutch Slough, Flyway Farms, Hill Slough, Lookout Slough, Lower Yolo, Mallard Farms, McCormack Williamson, Prospect Island, Tule Red, West Island, Wings Landing, and Winter Island (Final EIR, Certification Record LOS.3.00001, Appendix X, pp. 22-24). SCWA does not identify specific planned restoration projects that are not included in this list. ~~Substantial evidence~~Evidence in the record demonstrates that the Department evaluated whether the Covered Action would cause increased bromide concentrations relative to existing conditions, and relative to a scenario in which other restoration projects are implemented in the region, and no conflicts with existing water intakes were identified.

In its Letter, SCWA cites to the 2006 State Water Project Watershed Sanitary Survey as evidence, noting that "The 2006 Update provides a good discussion of the CalFed Water Quality Program, and corresponding water quality objectives for the Delta, for both organic carbon and bromide" (SCWA's May 10, 2021 Letter, p. 9). SCWA emphasizes that "The recommended CALFED targets for both organic carbon and bromide provide a science and policy based target, that is based upon the best available science" (SCWA's May 18, 2021 Letter, p. 1).[41] The cited pages of the 2006 Survey describe existing water quality impairment in the Barker Slough watershed, affecting the NBA, focusing primarily on organic carbon, turbidity, and pathogens (SCWA's May 10, 2021 Letter Attachment – SWP Watershed Sanitary Survey 2006 Update, pp. ES-4, ES-13-ES-15, 5-2).[42] The 2006 Survey describes the sources of impairment as being primarily within the Barker Slough watershed (SCWA's May 10, 2021 Letter Attachment – SWP Watershed Sanitary Survey 2006 Update, pp. 5-2 – 5-4), and lists a variety of actions that the NBA Contractors are taking to address the impairment, such as exploring alternative raw water sources, new treatment processes, and alternative intake locations (SCWA's May 10, 2021 Letter Attachment – SWP Watershed Sanitary Survey 2006 Update, pp. 5-4 – 5-13).

The Districts cite to the Certification itself as evidence that the Covered Action would cause increased bromide concentrations at the RD 2068 water intake (Districts' May 10, 2021 Letter, p. 3). The complete text of the cited Certification G P1(b)(1) finding states, "For agricultural operations and municipal water facilities' use, including RD

[41] This argument is discussed at length under G P1(b)(3).

[42] SCWA inadvertently submitted the RFP instead of the Update. However, this document is easily available to the Council and the Council will exercise its discretion to admit this document under Section 10 of its Appeals Procedures. Pursuant to Section 10, the Council has the discretion to admit any qualifying matter under Section 10 although not required to do so.

2068's agricultural diversion, the State Water Project's Barker Slough Pumping Plant, the City of Vallejo's Cache Slough Pumping Plant, and private agricultural diversions, 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 G P1(b)(1) Finding, p. 5). However, the Certification DP P2 finding concludes that "The only predicted increase in EC at D-1641 stations designated for agricultural beneficial uses due to the Proposed Project occurs at station D29 during the fall, although the slight increases do not make non-compliance more likely" (Certification DP P2 Finding, p. 16). Station D29 is located on the San Joaquin River at Prisoners Point. The Districts have not identified how the predicted seasonal increase in EC at Station D-29 amounts to a conflict with the RD 2068 intake nor the Districts' beneficial use of water.

Evidence in the record demonstrates that the Department considered the potential for the Covered Action to cause water quality impacts related to bromide, and that the Department's evaluation did not identify this as a conflict with beneficial uses of water. SCWA has not shown that changes in bromide resulting from the Covered Action that would amount to a conflict with existing use of the NBA, nor has it shown that the Department's finding otherwise was unsupported by ~~substantial~~ evidence in the record. The Districts have not shown that changes in bromide resulting from the Covered Action would amount to a conflict with existing use of their water supply intakes, nor have they shown that the Department's finding otherwise was unsupported by ~~substantial~~ evidence in the record.

Therefore, the Council finds that SCWA and the Districts have failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2 as to the issue of increased bromide concentrations.

(b) Salinity

The Districts and CDWA raise concerns related to salinity impacts. CDWA asserts that the Covered Action would degrade water quality with regard to salinity (CDWA Appeal Form, p. 6). As evidence of this claim, CDWA states "Final EIR, Appendix X shows water quality degradation expected to occur as a result of the project" (CDWA's May 3, 2021 Letter, pp. 13-14). CDWA does not point to a particular result in Appendix X that shows evidence of changes in salinity that rise to the level of a conflict with an existing use. The Districts allege that "The Project will likely result in…increases in salinity and bromide upstream, directly impeding the ability of Appellants, and landowners within their districts, to divert water for agricultural uses and increases in costs for treatment" (Districts Appeal Letter, pp. 1-2). As discussed in subsection (a), above, the Districts cite to the Certification as evidence that the Covered Action would cause increased salinity concentrations at the RD 2068 water intake (Districts' May 10, 2021 Letter, p. 3).

In its Certification, the Department indicates that non-compliance with the D-1641 water quality objectives for agriculture and wildlife beneficial uses would not be more

likely with implementation of the Covered Action and that the salinity changes resulting from the Covered Action would not result in substantial adverse effects on the beneficial use of Delta waters as a drinking water source (Certification DP P2 Finding, p.16). Potential water quality impacts related to salinity were analyzed in Appendix X to the Draft EIR. Appendix S to the Draft EIR summarizes the findings of Appendix X in relation to CEQA thresholds of significance for drinking water quality, agricultural water quality, and other beneficial uses. In Appendix S, the Department acknowledges that, "Salinity increases are a concern to various municipalities, industries, agricultural interests, and resources agencies that depend on the availability of freshwater to maintain existing beneficial uses" (Draft EIR, Appendix S, Certification Record LOS.4.00020, p. 3). Appendix S also acknowledges that, "Irrigation water that is more saline can negatively impact crop yields" (Draft EIR, Appendix S, Certification Record LOS.4.00020, p. 6). Appendix S concludes that the effects of the Covered Action on salinity would be less than significant for drinking water quality, irrigation water quality for Delta agricultural users, and fish and wildlife habitat conditions (Draft EIR, Appendix S, Certification Record LOS.4.00020, p. 3).

CDWA further contends that, "Existing water quality standards do not prevent the damaging impact of all types of degradation. Even the parameters for protection of particular uses rely on the resulting protection of water quality and flow from other uses, such as fisheries." (CDWA Appeal Form, p. 6). At the May hearing, the Districts stated that they also disagree with the Department's use of D-1641 as the water quality standard against which to evaluate impacts to agricultural use (May 20, 2021 Hearing Transcript, p. 223, ll. 4-8). However, as discussed under G P1(b)(3) section (c)(vi), the Department has identified substantial evidence in the record that D-1641 standards protect against soil salinity, and to support the use of D-1641 objectives as a measure of salinity impacts.

The Department has cited to ~~substantial~~ evidence in the record to support its Certification that the Covered Action's effects on salinity would not conflict with existing beneficial uses of water at existing water intakes. Neither the Districts nor CDWA explain how the results in Appendix X, as summarized in the Certification, are evidence that the Covered Action would conflict with agricultural uses or "directly imped[e] the ability of Appellants, and landowners within their districts, to divert water for agricultural uses and increases in costs for treatment." Therefore, the Council finds that the Districts and CDWA have failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2 and we *deny* the appeal as to the issue of salinity impacts.

(c) Organic carbon

The Districts and SCWA raise concerns that the Covered Action would cause water quality impacts due to increased organic carbon.

In its Certification, the Department states that "the Proposed Project would not raise Dissolved Organic Carbon (DOC) and affect the quality of water treated at water

treatment plants for the following reasons: the lack of impact from the nearby Liberty Island restoration; the limited potential for water particles from the Proposed Project reaching the NBA intake; and the potential environmental processing of DOC on the Proposed Project Site" (Certification DP P2 Finding, p. 17).

For supporting evidence, the Department cites to Final EIR, Chapter 3 Response to Comments (Final EIR, Certification Record LOS.3.00001, pp. 3-21 – 3-22), which in turn cites to a 2010 report by ESA PWA showing that the Liberty Island tidal wetland resulted in no change or slight decreases in DOC levels at the NBA intake from 1998 – 2010 (ESA PWA 2010, Certification Record – FEIR References, p. 3-22, FN#23); hydrologic modeling performed for the Covered Action to demonstrate that only 1.3% of water originating from the Lookout Slough Project site reaches Lindsey Slough, which is another five miles away from the North Bay Aqueduct intake (Draft EIR, Appendix P, Certification Record LOS.4.00017); and research by Kraus et al. (Kraus et al. 2008, Certification Record – FEIR References, p. 3-22, FN#26) which describes how longer residence times result in 'processed' DOC with a lower potential to form disinfection byproducts; the hydrologic analysis results in long water residence times of a week or more in the vicinity of the site (Draft EIR Appendix Q, Certification Record LOS.4.00018). The Department also notes that, "The Barker Slough Pumping Plant of the NBA, which is the closest drinking water intake to the Proposed Project Site, already experiences elevated DOC under existing (baseline) conditions" (Final EIR, Certification Record LOS.3.00001, pp. 3-21).

The Districts allege that "The Project will likely result in increases in organic carbon…directly impeding the ability of Appellants, and landowners within their districts, to divert water for agricultural uses and increases in costs for treatment" (Districts Appeal Letter, pp. 1-2). The Districts allege that these impacts to water quality "will limit—or potentially eliminate—the ability of diverters to use that water" (Districts' May 10, 2021 Letter, p. 23). However, neither the Districts' appeal letter, its May 10, 2021 Letter, nor the Districts' presentation at the May hearing provide additional explanation or evidence related to conflicts with existing water intakes related to organic carbon.

SCWA explains that, "the Project will increase organic carbon and adversely impact municipal water quality. In the drinking water treatment process, organic carbon can react with chlorine to form a variety of carcinogens harmful to human health. The NBA water purveyors are highly sensitive to organic carbon levels as users often need to blend or switch water sources, or aggressively treat NBA source water to maintain safe high-quality municipal drinking water standards. Major land use changes such as the Project export organic carbon and modify hydrodynamic process that will further degrade NBA municipal water quality which already experiences the poorest water quality throughout the entire SWP with regard to Total Organic Carbon levels. These issues have not been quantified or mitigated by DWR." (SCWA Appeal Letter, p. 3).

As evidence, SCWA provides six State Water Project Watershed Sanitary Surveys published between 1990 and 2017 (SCWA's May 10, 2021 Letter, p. 9; SCWA's May 10, 2021 Letter Attachment – Initial SWP Watershed Sanitary Survey,

October 1990; SCWA's May 10, 2021 Letter Attachment –SWP Watershed Sanitary Survey 1996 Update; SCWA's May 10, 2021 Letter Attachment – SWP Watershed Sanitary Survey 2001 Update; SCWA's May 10, 2021 Letter Attachment – SWP Watershed Sanitary Survey 2006 Update;[43] SCWA's May 10, 2021 Letter Attachment – SWP Watershed Sanitary Survey 2011 Update; SCWA's May 10, 2021 Letter Attachment – SWP Watershed Sanitary Survey 2016 Update). SCWA states that "NBA water quality issues are well documented, with the NBA having the poorest water quality of the entire SWP with respect to organic carbon…" (SCWA's May 10, 2021 Letter, p. 9).

The cited pages of the 2006 Survey substantiates SCWA's statements that organic carbon interacts with water treatment processes to form byproducts that are harmful to human health (SCWA's May 10, 2021 Letter Attachment – SWP Watershed Sanitary Survey 2006 Update, p. ES-4) and that "TOC concentrations are much higher in the North Bay Aqueduct (NBA) than any other location in the SWP" (SCWA's May 10, 2021 Letter Attachment – SWP Watershed Sanitary Survey 2006 Update, p. ES-4). The cited pages of the 2011 Survey also describe the NBA's existing water quality impairment from organic carbon, turbidity, and pathogens (SCWA's May 10, 2021 Letter Attachment – SWP Watershed Sanitary Survey 2011 Update, pp. 13-66 to 13-68). The cited pages of the 2006 Survey describe the sources of organic carbon impairment as being primarily within the Barker Slough watershed (SCWA's May 10, 2021 Letter Attachment – SWP Watershed Sanitary Survey 2006 Update, pp. 5-2 – 5-4). This existing water quality impairment and associated health effects described by SCWA are also recognized by the Department in the Final EIR (Final EIR, Certification Record LOS.3.00001, pp. 3-21).

The cited pages of the 2006 and 2011 Surveys also discuss the potential of future habitat restoration projects under the Ecosystem Restoration Program Conservation Strategy and the BDCP "to increase the load of organic carbon discharged to Delta waterways and to potentially increase the organic carbon concentrations at Delta pumping plants" (SCWA's May 10, 2021 Letter Attachment – SWP Watershed Sanitary Survey 2006 Update, p. ES-13; SCWA's May 10, 2021 Letter Attachment – SWP Watershed Sanitary Survey 2011 Update, pp. 13-66 to 13-68). However, the BDCP is no longer an active project and is not part of this Covered Action.[44]

As additional evidence, SCWA cites to three reports prepared for SCWA by consultants PWA and MHW, and Chen et al. (2010) (SCWA's May 10, 2021 Letter;

[43] As noted in ~~footnote #15~~Fn. 42 in section (a) Bromide, above, SCWA inadvertently submitted the RFP instead of the Update. However, this document is easily available to the Council and the Council will exercise its discretion to admit this document under Section 10 of its Appeals Procedures. Pursuant to Section 10, the Council has the discretion to admit any qualifying matter under Section 10 although not required to do so.

[44] As noted in ~~footnote #13~~Fn. 40 in section (a) Bromide, above, cumulative impacts studies conducted for the BDCP are outside the scope of DP P2.

SCWA's May 10, 2021 Letter Attachment – PWA (2008), SCWA's May 10, 2021 Letter Attachment – MHW (2009), SCWA's May 10, 2021 Letter Attachment – Chen et al. (2010)).[45] PWA (2008) and MHW (2009) are not included in the record, and there is no evidence that these reports were before the Department at the time of certification. Chen et al. (2010) reaffirms SCWA's claims regarding the relationship between organic carbon and byproducts of the water treatment process that are harmful to human health (SCWA's May 10, 2021 Letter Attachment – Chen et al. (2010), p. 3). However, the purpose of the study is to estimate future water treatment costs based the combined effects of sea level rise and flooding of western Delta islands (SCWA's May 10, 2021 Letter Attachment – Chen et al. (2010)). The cited study does not appear to present evidence that tidal marsh restoration at the Lookout Slough Project site would create a conflict with use of existing water intakes.

SCWA's hearing presentation refers to evidence that was also cited by the Department in its Final EIR response to comments: a 2010 literature review and evaluation of Liberty Island Conservation Bank conducted by ESA PWA (May 20, 2021 Hearing Transcript, p.216, ll. 7-9). As discussed above, and in G P1(b)(3), the 2010 report shows that the Liberty Island tidal wetland resulted in no change or slight decreases in DOC levels at the NBA intake from 1998 – 2010 (ESA PWA 2010, Certification Record – FEIR References, p. 3-22, FN#23) and was cited by the Department as evidence that the Covered Action would not raise organic carbon concentration or affect the quality of water treated at water treatment plants (Final EIR, Certification Record LOS.3.00001, p. 3-23). SCWA does not explain whether the Department erred in its interpretation of this study or why ESA PWA (2010) is not ~~substantial~~ evidence supporting the Certification.

Although SCWA has provided significant documentation related to this issue, this information only serves to emphasize that NBA water quality is already impaired; that the primary existing sources of water quality impairment are from within the Barker Slough watershed; and that analyses of a former large-scale project, the BDCP, identified potential adverse effects. The issue before the Council is whether the Department avoided or reduced conflicts with existing uses when siting the Lookout Slough Project. SCWA has not cited to evidence in the record that shows that changes in organic carbon associated with the siting of the Lookout Slough Project would rise to the level of a conflict with existing uses. There is ~~substantial~~ evidence in the record that the Department considered and analyzed potential organic carbon impacts on water

[45] In its May 10, 2021 letter, SCWA requested that Chen et al. (2010) be added to the record. Chen et al. (2010) is a scientific research paper titled, "Current and Long-Term Effects of Delta Water Quality on Drinking Water Treatment Costs from Disinfection Byproduct Formation". The paper was published in 2010 in San Francisco Estuary and Watershed Science (SFEWS), a well-known, open-access scientific journal focused on the Bay-Delta. The Council takes official notice of Chen et al. (2010) because it is a generally accepted technical or scientific matter within the Council's jurisdiction.

intakes and concluded that the results do not demonstrate a conflict with the existing beneficial use of water.[46]

Neither the Districts nor SCWA have shown that the siting of the Lookout Slough Project would add to the existing water quality impairment, nor that any incremental change in organic carbon would rise to the level of a conflict with existing uses. Therefore, the Council finds that the Districts and SCWA have failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2, and we *deny* the appeal as to the issue of organic carbon.

(d) Methylmercury

Appellant CDWA asserts that the Covered Action would degrade water quality with regard to methylmercury (CDWA Appeal Form, p. 6).[47] CDWA states that, "the parameters for protection of particular uses rely on the resulting protection of water quality and flow from other uses, such as fisheries" but does not specify which "particular uses" would experience the conflict allegedly created by the Covered Action (CDWA Appeal Form, p. 6).

The Department acknowledges the possible methylmercury impacts and states in the Draft EIR that "...there could be a short-term increase in methylmercury production during or immediately after construction within the proposed project site, which could be transported to adjacent waterways" (Draft EIR, Certification Record LOS.4.00001, p. IV.D-87). However, the Department concludes in its Certification that, "the potential effects of methylmercury were analyzed using the best available and up-to-date science and the Proposed Project was found to not be a source of methylmercury and would have a less-than-significant impact on methylmercury concentrations in the Delta" (Certification DP P2 Finding, p. 17).

In its Certification, the Department cites to Final EIR Master Response 6 to comments from state and local agencies on Methylmercury to support this assertion (Final EIR, Certification Record LOS.3.00001, pp. 3-18, 19, 20). The Department states in Master Response 6 that the Department participated in the Delta Mercury Control Program by conducting wetland characterization studies in the Yolo Bypass, Suisun Marsh, and the Delta. The studies completed by the Department focused on methylmercury and total mercury imports and exports at four tidal wetlands in the Delta. The Department continues that, "Based on the collected data and analyses from the completed studies, it appears that tidal wetlands, such as the Proposed Project, do not

[46] See G P1(b)(3) section (c)(vi) for further analysis related to the Department's analysis of organic carbon impacts.

[47] In the Districts' May 10, 2021 Letter, the Districts raise allegations that the project would cause water quality impacts related to mercury (p. 5). The Districts did not appeal the Department's DP P2 certification of consistency with regard to mercury. Consequently, we must refrain from considering the Districts' arguments related to mercury, as it relates to policy DP P2.

export mercury or methylmercury in large amounts annually. None of the four wetlands studied appear to be significant sources of methylmercury to adjacent waterbodies, nor are concentrations of methylmercury significantly higher leaving the wetlands than entering the wetlands, although seasonal differences may occur" (Final EIR, Certification Record LOS.3.00001, pp 3-18, 19).

Furthermore, Master Response 6 cites to the Draft EIR and describes that the Covered Action was found to be not a source of methylmercury and would have a less-than-significant impact on methylmercury concentrations in the Delta (Draft EIR, Certification Record LOS.4.00001, pp. IV.D-87 - IV.D-88).

CDWA does not cite to evidence in the record that would refute the Department's DP P2 findings and evidence in the record regarding methylmercury and has not shown that there is insufficient evidence in the record to support the Department's Certification. Therefore, CDWA has failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2 as to the issue of methylmercury.

(e) Microcystis

CDWA asserts that the Covered Action would cause propagation of *Microcystis* (CDWA Appeal Form, p. 6). CDWA does not explain how propagation of *Microcystis* creates a conflict with existing uses, and as noted above, CDWA does not specify which "particular uses" would be experience the alleged conflict.

Microcystis is a bacterium that causes harmful algal blooms (HABs). The Department does not address the topic of HABs in its Certification, but the Department received multiple comments from local agencies regarding HABs and addresses these comments in Final EIR Master Response #14 (Final EIR, Certification Record LOS.3.00001, pp. 3-28 – 3-32). In the Master Response, the Department states that, "the Proposed Project will not create conditions that would give rise to HABs with regard to environmental factors including turbidity, salinity, temperature, or nutrients that would trigger the emergence and subsequent growth of HABs" (Final EIR, Certification Record LOS.3.00001, pp. 3-31). The Department also cites to the Draft EIR to explain that the Covered Action would reduce water stagnation by reintroducing tidal influence on the project site, have minimal temperature impacts that may influence the presence of HABs, and limit agricultural inputs that contribute to HABs (Final EIR, Certification Record LOS.3.00001, pp. 3-31, 3-32; Draft EIR, Certification Record LOS.4.00001, pp. IV.G-4, IV.G-21, IV.G-22, IV.G-28). CDWA does not cite to evidence in the record to support its statements that the Covered Action would cause propagation of Microcystis. Therefore, CDWA has failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2 as to the issue of *Microcystis*.

(f) Conclusion

Overall, the Department's Certification cites to substantial evidence in the record showing that the Department analyzed the conflicts with the *existing use* of water supply intakes and existing beneficial uses of water in the Delta and did not identify a conflict with these existing uses. For the reasons described above, the Council finds that:

1. With regard to bromide, SCWA and the Districts failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2;
2. With regard to salinity, the Districts and CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2;
3. With regard to organic carbon, SCWA and the Districts failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2;
4. With regard to methylmercury, CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2; and
5. With regard to *Microcystis*, CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2.

~~We therefore~~Therefore, we *deny* these appeals as to the consistency of the Determination with DP P2 on the issue of conflicts with use of existing water intakes and beneficial uses of water.

v. Conflicts with use of existing water intakes and diversions related to endangered species presence

Appellants SCWA and the Districts allege that the Covered Action is inconsistent with DP P2 because the Lookout Slough Project siting would not avoid or reduce conflicts with their ability to divert water using existing water intakes due to increased presence of endangered species (SCWA Appeal Letter, pp. 3-4, 8; Districts Appeal Letter, pp. 2-3, 9).

SCWA alleges that the Covered Action does not appropriately respect existing municipal and agricultural water supply intakes within the Cache Slough Complex (SCWA Appeal Letter, p. 8). SCWA states that it is "specifically concerned about …biological impacts to existing municipal and agricultural intakes within the lower Complex, including the NBA, Reclamation District 2068 intake, and numerous agricultural diversions" (SCWA Appeal Letter, p. 8). SCWA also alleges that "agricultural pumping intakes in the vicinity of the Project will be adversely impacted by any increase in the presence of endangered species" (SCWA Appeal Letter, pp. 3-4).

SCWA expands on these allegations in its May 10, 2021 Letter, stating that the Covered Action would increase the occurrence of listed fish species (e.g. Delta smelt) at the monitoring station that determines the diversion rate at the ~~Barker Slough Pumping Plant (~~BSPP~~),~~ which supplies the NBA (SCWA's May 10, 2021 Letter, pp. 7-9); that greater abundance of listed fish species at the monitoring station would conflict with SCWA's ability to use the BSPP to divert water (SCWA Appeal Letter, pp. 3-4; SCWA's May 10, 2021 Letter, pp. 7-9); that the Department did not adequately study this impact (SCWA Appeal Letter, pp. 3-4, SCWA's May 10, 2021 Letter, pp. 7-8); and that there has been no effort by the Department to reduce these conflicts (SCWA Appeal Letter, pp. 3-4; SCWA's May 10, 2021 Letter, p. 7).

The Districts allege "The Project fails to address the reasonably foreseeable need to relocate water diversion infrastructure," and that "to address Project impacts on the surrounding diversions, Appellants had proposed that take coverage be provided or other actions be taken to mitigate this issue" (Districts Appeal Letter, p. 9). The Districts state that the Department did not address any of their proposed mitigation measures (Districts Appeal Letter, p. 9). In their May 10, 2021 Letter, the Districts allege that "the practical effect of implementation of this Project could be the effective elimination of water supply for numerous agricultural and municipal diverters in the North Delta if they cannot pay for costly upgrades rendered necessary by this Project. Alternatively, they could be required to move intakes, if the potential impacts to protected species dictate such a result" (Districts' May 10, 2021 Letter, p. 8). The Districts allege that the Department did not disclose this conflict, thoroughly study the conflict, nor develop mitigation in order to avoid or reduce the conflict (Districts Appeal Letter, pp. 2-3, 9; Districts' May 10, 2021 Letter, p. 7-9, 23).

Whether or not the Covered Action is intended to improve conditions for listed fish species is not in question and the Department does not dispute that the Covered Action is intended to benefit Delta Smelt and other listed species. In the Project Description section of the Certification, the Department states that the Covered Action would increase food availability for Delta smelt, Steelhead, winter-run and spring-run Chinook salmon, Green Sturgeon, and Longfin smelt; provide rearing habitat for Delta smelt and salmonids, and provide potential spawning habitat for Delta smelt (Certification, p. 2). The Covered Action is necessary to partially fulfill the 2008 USFWS BiOp and 2009 NMFS BiOp (Certification, p. 2) (which are intended to address the impacts of the federal Central Valley Project and the State Water Project on protected fish species) 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.

With respect to DP P2 as it relates to this issue, the Council considers only whether substantial evidence in the record supports the Department's finding that the Lookout Slough Project and resulting changes in populations of listed fish species, avoids or reduces conflicts with existing water diversions when feasible.

(a) Whether increased endangered species populations attributable to the Covered Action would conflict with existing water intakes and diversions

In its Certification, the Department states that the issue raised by appellants does not constitute a conflict because diversions are already located in critical habitat and are thus already subject to compliance (Certification DP P2 Finding, p. 15).

The Districts allege that the Department "did not disclose this potential adverse impact" (Districts Appeal Letter, p. 2) or sufficiently analyze it (Districts' May 10, 2021 Letter, pp. 7, 23). In their May 10, 2021 Letter (p. 7), the Districts quote their comments on the Draft EIR, which state "the analysis in the DEIR is limited to the impacts that construction might have on fish species, and fails to acknowledge that the Project is proposing to increase fish habitat and population in an area where entrainment hazards exist—i.e., operational impacts" (Final EIR, Certification Record LOS.3.00001, PDF p. 212). The Districts refer to additional comments they provided on the Draft EIR (Districts' May 10, 2021 Letter, p. 23) which state "the DEIR does not analyze how the Project would make fish vulnerable to take via entrainment at longstanding water diversion facilities" (Final EIR, Certification Record LOS.3.00001, PDF p. 212) and "The DEIR[]…provides no analysis whatsoever regarding the potential for the Project to result in a need to relocate existing water diversion facilities of surrounding agricultural and municipal water users" (Final EIR, Certification Record LOS.3.00001, PDF p. 213).

The Districts allege that the Covered Action would require "expensive and onerous upgrades to water infrastructure" due to the increased risk of endangered species "take via entrainment" (Districts' May 10, 2021 Letter, p. 7) and that "the Department does not address how those upgrades will be funded, other than to suggest that the California Department of Fish and Wildlife might share costs with local landowners" (Districts' May 10, 2021 Letter, p. 8).

In its Certification, the Department states that "the potential effects of the Proposed Project on agricultural water users associated with potential increases in special-status fish species in the Delta was analyzed" and cites to Master Response 3 in the Final EIR to support this conclusion (Certification DP P2 Finding, p. 15). Master Response 3 explains that "Fish entrainment depends on the size, location, and timing of the diversion. Limited studies suggest that small irrigation diversions in the Delta may not have a large impact on listed species at all. A number of studies indicate that local agricultural water diversions in the waterways near the Proposed Project Site are likely to have minimal effects on listed fish species due to the limited overlap with regard to listed species seasonal abundance, their associated habitat use, and the irrigation season when most pumping at the various diversions occur" (Final EIR, Certification Record LOS.3.00001, pp. 3-15 – 3-16). In Master Response 3, the Department cites to seven publications supporting these statements (Final EIR, Certification Record LOS.3.00001, pp. 3-15 – 3-16).

In its May 3, 2021 Letter, the Department again refers to Master Response 3, and concludes that, "local agricultural water diversions in the waterways near the Project Site are likely to have minimal effects on listed fish species due to the limited overlap with regard to listed species seasonal abundance, their associated habitat use, and the irrigation season when most pumping at the various diversions occur" (Department's May 3, 2021 Letter, p. 22; Final EIR, Certification Record LOS.3.00001, pp. 3-15 – 3-16). The Districts do not explain how the analysis and evidence contained in the Final EIR is insufficient to address their requests for analysis in response to the Draft EIR.

In its May 10, 2021 Letter, SCWA states that "DWR's final EIR master response to comments regarding local diversions and special status fish species focuses on agricultural diversions and omits discussing the NBA or other M&I [municipal and industrial] diversions" (p. 2). SCWA states that the Department's conclusion that special-status species will not impact diversions is not correct with respect to their facilities: "DWR implies most water diversion activities occur when comparatively few special status fish species are present, and while this may be true for agricultural diversions, it is not for the NBA" (SCWA's May 10, 2021 Letter, p. 2). At the May hearing, SCWA stated that "This simply doesn't equate for a municipal pumping facility that diverts 365 days a year, year-round" (May 20, 2021 Hearing Transcript, p. 89, ll. 8-10).

SCWA states that the BSPP is subject to water diversion curtailment when Delta smelt are present under the State Water Project's 2020 ~~Incidental Take Permit (~~LTO ITP~~),~~ (SCWA's May 10, 2021 Letter, pp. 8-9). SCWA states that the ITP curtails pumping intermittently from January through June, which may coincide with the time of more abundant water supplies (SCWA's May 10, 2021 Letter, p. 8). SCWA states that "the ITP requires the NBA pumping plant to cease operations whenever special status fish species are present" (SCWA's May 10, 2021 Letter, p. 2).

The cited portion of the ITP states that curtailment of BSPP diversion rates to less than 60 cubic feet per second (cfs) may be advised on a week-by-week basis in dry and critically dry years when larval Longfin smelt (between January 15 through March 31) or Delta smelt (between March 1 through June 30) are detected at Station 716 and the Smelt Monitoring Team recommends diversion curtailment due to the detections at Station 716 and other factors that influence entrainment risk (CDFW 2020 ITP, Certification Record 10.00012, pp. 98-99). The ITP states that the diversion rate may be reduced "when larval [Longfin or Delta] smelt are detected" (CDFW 2020 ITP, Certification Record 10.00012, pp. 98-99). While the ITP does not appear to substantiate SCWA's claims that the BSPP must "cease operations" it nevertheless affirms that the BSPP is subject to curtailments during winter months due to presence of smelt. The Council notes that curtailments under the ITP are limited to only dry and critically dry years, contrary to SCWA's claims that "less water will be available to municipal water users through the NBA intake each and every year" (SCWA's May 10, 2021 Letter, p. 2).

SCWA states that "in 2021 the BSPP has been subject to curtailment from January 22 – February 17, and from February 26 – March 23, a period of seven weeks that also overlapped during a time of more abundant water supplies to the NBA SWP Contractors" (SCWA's May 10, 2021 Letter, p. 8). SCWA does not cite to evidence regarding this recent curtailment. Nevertheless, this recent curtailment is an indication of existing challenges faced by SCWA and NBA SWP contractors, not necessarily evidence that the Covered Action would exacerbate the issue. Indeed, the existing conditions of the ITP and the 2021 curtailments cited by SCWA appear to substantiate the Department's argument that increases in listed fish species abundance is not a conflict because diversions are already located in critical habitat and are thus already subject to compliance.

SCWA states that pumping curtailment at the BSPP is determined by smelt abundance at Station 716, a compliance monitoring point located 8 miles downstream from the BSPP at the confluence of Cache Slough and Liberty Island, and 1.9 miles away from the project site (SCWA's May 10, 2021 Letter, pp. 8-9). SCWA lists eight constructed or planned tidal marsh restoration projects and their distances to Station 716, highlighting that these projects are located closer to Station 716 than the BSPP itself (SCWA's May 10, 2021 Letter, pp. 8-9). SCWA argues that, "This factual information…and corresponding cumulative [Endangered Species Act] ESA impact to the BSPP is not adequately addressed in the draft and final EIR, or discussed in the [administrative record]" (SCWA's May 10, 2021 Letter, p. 8).

DP P2 is concerned with the siting of individual projects. We recognize that multiple, large tidal wetland restoration projects are at various stages of implementation within the Cache Slough Complex, and that this is cause of widespread concern among diverters and water users.[48] However, a cumulative increase in the abundance of listed fish species resulting from multiple constructed and planned tidal wetland restoration in the Cache Slough Complex is not a matter before the Council. With respect to DP P2, the Council considers only whether substantial evidence in the record supports the Department's finding that the siting of the Lookout Slough Project itself avoids or reduces conflicts with existing uses or uses described or depicted in local general plans. Therefore, whether the Department addressed cumulative impacts to the BSPP corresponding to the eight listed projects is not pertinent to this analysis.

At the May hearing, SCWA argues that "increased numbers of species increase the likelihood of the expanded population encountering the NBA compliance point and triggering pumping restrictions " (May 20, 2021 Hearing Transcript, p. 215, ll. 10-12). SCWA does not explain or cite to evidence that clearly links any incremental change in smelt abundance resulting from the Lookout Slough Project to a level of curtailment that would rise to the level of a conflict with existing use of the BSPP. If the Covered Action

[48] In addition to the appeals, the Council received comment letters from the City of Benicia, the City of Fairfield, the City of Napa, the City of Vacaville, and the City of Vallejo regarding the project impacts on North Bay Aqueduct. These letters also indicated concerns related to pumping curtailment, with three specifically highlighting curtailments due to endangered species presence.

increases smelt abundance over the same seasonal time frame during which BSPP already experiences curtailments, the Covered Action would not result in an incremental change in BSPP curtailments. SCWA has not explained or provided evidence regarding the frequency and timing of smelt presence that would be attributable to the Lookout Slough Project. Even if the Covered Action resulted in an incremental change in BSPP curtailments, it is unclear whether that change would be tantamount to a conflict with existing uses or uses described or depicted in local general plans. As noted, SCWA has not provided an explanation supported by evidence describing how the Covered Action will result in a level of curtailment that is tantamount to a conflict.

At the May hearing, the Department represents that, "The project is not introducing new populations of listed species in the region. There's no evidence to suggest that the project would change the seasonal patterns of use in the region." (May 20, 2021 Hearing Transcript, p. 175). Indeed, SCWA has cited to evidence showing that the BSPP already faces curtailment during the season when water is more abundant (CDFW 2020 ITP, Certification Record 10.00012, pp. 98-99), and has not cited to evidence to show that the Covered Action would change the seasonal pattern of use. The Department alleges that, "[t]he appellants haven't presented any facts or evidence to suggest that this project specifically will result in a conflict" (May 20, 2021 Hearing Transcript, p. 175) and that, "the project is not anticipated to change any existing circumstances which already require diverters to comply with the endangered species issues" (May 20, 2021 Hearing Transcript, p. 176). These representations comport with the record that was before the Department when it submitted its Certification. SCWA has cited to these existing endangered species requirements (CDFW 2020 ITP, Certification Record 10.00012, pp. 98-99), but has not demonstrated that the Covered Action would change existing circumstances. While SCWA has challenged the Department's conclusions, it has not shown that the Department's conclusions were not supported by substantial evidence in the record.

Evidence in the record shows that existing water intakes are already subject to endangered species requirements and related curtailments. Neither SCWA nor the Districts have shown that the Covered Action would lead to a conflict with the use of existing water diversions with respect to endangered species presence. Therefore, the Council finds that SCWA and the Districts failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2, and we *deny* the appeal as to the issue of conflicts with existing water diversions due to increased endangered species populations attributable to the Covered Action.

(b) Whether the Department reduced conflicts with existing water intakes and diversions when siting the Covered Action

As described in section (a) above, SCWA and the Districts contend that the Covered Action would conflict with existing water diversions by increasing the presence

of endangered species. Appellants also contend that the Department did not reduce this conflict by developing mitigation measures (Districts Appeal Letter, pp. 2-3, p.9, Districts' May 10, 2021 Letter, pp. 7-8, SCWA Appeal Letter, p. 3) or providing take coverage (Districts' May 10, 2021 Letter, p. 23). The Districts state that, "To provide detailed findings of consistency of the Project with DP P2, DWR should describe measures employed by the Project to mitigate conflicts with adjacent uses, and discuss how any comments received from local agencies were considered by DWR" (Districts Appeal Letter, p. 9).

In its May 10, 2021 Letter, SCWA states that, "local agencies...have continuously provided comments to DWR in regards [sic.] to the Project. To date, DWR has not submitted any proposals or mitigation to alleviate or reduce conflicts from the proposed Project. Nor has DWR provided any alternatives, strategies, or backup mitigation for the existing NBA facility" (SCWA's May 10, 2021 Letter, p. 7). At the May hearing, SCWA emphasizes, "We understand DWR's need to mitigate impacts from their own water projects. All we're asking… is that they do not do so to the detriment of the [SCWA]'s water projects." (May 20, 2021 Hearing Transcript, p. 90, ll. 1-4).[49] SCWA points out that BSPP "already has modern fish screens installed" (SCWA's May 10, 2021 Letter). SCWA states that it is seeking, "firm, committed support to help implement multi-benefit, co-equal projects such as the NBA Alternate Intake project" (SCWA Appeal Letter, p. 1; SCWA's May 10, 2021 Letter, p. 21).

In their May 10, 2021 Letter, the Districts state, "Discussions among the Department and area landowners and organizations have been occurring for a lengthy period, and the parties have discussed a variety of methods for addressing the significant risks to agricultural and municipal diverters that will result from this Project" citing to Master Response 3 of the Final EIR as evidence (Districts' May 10, 2021 Letter, p. 23).The cited text of the Final EIR reads: "Some of the commenters suggested that DWR provide incidental take protection for local diverters as mitigation for the Proposed Project. …there is no requirement under CEQA to consider mitigation." (Final EIR, Certification Record LOS.3.00001, p. 3-16). The Districts contend that "relevancy (or lack thereof) under CEQA is a separate matter from whether an issue is relevant and requires mitigation under the Delta Plan" (Districts' May 10, 2021 Letter, p. 8).

The sufficiency of the impact analysis for purposes of CEQA is, indeed, not before the Council. However, issues that fall outside the scope of CEQA may be within the scope of the Council's appellate review. If increased abundance of listed fish species attributable to the siting of a covered action creates a conflict with an existing use or a use described or depicted in a local general plan, then the Council may consider whether that project was sited to avoid or reduce the conflicts created by the addition of listed fish species when feasible. However, as established in section (a) ("Whether increased endangered species populations attributable to the Covered Action would conflict with existing water intakes and diversions") above, SCWA and the

[49] The Council notes that the BSPP and NBA facilities are part of the State Water Project, for which tidal wetland restoration, such as the Project, is a condition of continued operations.

Districts have failed to show that the Covered Action would actually lead to a conflict with the use of existing water diversions due to increased endangered species populations.

DP P2 first requires identification of a conflict before it can be shown to be avoided or reduced when feasible. As in section (a), the Council finds that since neither SCWA nor the Districts have shown that the Covered Action would create impacts that rise to the level of a conflict with the use of existing water diversions, the Department is not obligated to demonstrate that it has reduced the alleged conflict. Therefore, the Council need not reach a conclusion regarding the issue of whether the Department avoided or reduced conflicts because ~~there~~the Appellants have not shown that the Certification is ~~no~~not supported by substantial evidence in the record ~~to show~~ that ~~siting~~ the ~~Covered Action~~Lookout Slough Project would not conflict with existing water intakes with regard to increased endangered species populations.

(c) Conclusion

For the reasons discussed above, the Council finds that SCWA and the Districts failed to show that ~~there~~the Certification is not supported by substantial evidence in the record to demonstrate that increased endangered species populations attributable to the Covered Action would not conflict with existing water intakes and diversions. The Council did not reach a conclusion regarding the issue of whether the Department ~~sited the Lookout Slough Project to reduce~~avoided or reduced conflicts ~~with existing uses~~ because ~~there~~the Appellants have not shown that the Certification is ~~no~~not supported by substantial evidence in the record that the ~~siting of the Covered Action~~ Lookout Slough Project would not conflict with existing water intakes ~~and diversions~~with regard to increased endangered species populations.

Therefore, we *deny* the appeals as to the issue of conflicts with existing water intakes and diversions related to endangered species presence.

vi. Conflicts with the Solano County General Plan

Appellants LIA, SCWA, and the Districts argue that the Covered Action is inconsistent with DP P2 because the Covered Action would not avoid or reduce conflicts with the Solano County General Plan. Specifically, the appeals contend that:

1. The Covered Action creates conflicts with the Solano County General Plan goal for improving agricultural, pedestrian, and general public access and circulation to eastern Solano County (LIA Appeal Letter, pp. 5-6).
2. The Covered Action is inconsistent with the Solano County General Plan (Districts Appeal Letter, p. 9) because it is inconsistent with the County's general plan goal of reducing greenhouse gas emissions (Districts' May 10, 2021 Letter, p. 21).
3. The Covered Action is incompatible with the Solano County General Plan and relevant zoning policies (SCWA Appeal Letter, p. 8).

(a) Whether the Covered Action conflicts with Solano County General Plan goals and recommendations

LIA asserts that, "The Project creates conflict with the existing planning in the area by local government" (LIA Appeal Letter, p. 5). LIA cites to Solano County's comments on the Draft EIR, which state that, "...vacating the public right of way and access to Liberty Island Road, Shag Slough Bridge, and Liberty Island will conflict with the Solano County General Plan goal for improving agricultural, pedestrian, and general public access and circulation to eastern Solano County" (Solano County Draft EIR Comments, Certification Record LOS.4.00038, p. 8). DP P2 requires that covered actions avoid or reduce conflicts with uses described or depicted in general plans. LIA does not explain how the conflict with the Solano County General Plan goal for improving public access and circulation to eastern Solano County represents a conflict with uses described or depicted in the general plan.

Additionally, LIA contends that the Covered Action does not avoid or reduce conflicts with uses described or depicted in the Solano County General Plan because the plan includes a proposal to "Evaluate the desirability and the feasibility of owning and/or operating" Liberty Island as part of the Solano County Regional Park System (LIA's May 3, 2021 Letter, pp. 9-10; Solano County General Plan, Certification Record DEIR References Appendix A, Chapter 10, p. 40). The proposal in the General Plan states, "The Delta Protection Commission has asked that the County consider operating these islands for such recreation uses as hunting, fishing, non-motorized boating, and wildlife observation" (LIA's May 3, 2021 Letter, p. 10; Solano County General Plan, Certification Record DEIR References, Appendix A, Chapter 10, p. 40). LIA states that, "This shows a direct conflict with the general plan, since the proposed project would severely impair the above listed recreational activities" (LIA's May 3, 2021 Letter, p. 10). However, LIA does not show how the activities mentioned by the Delta Protection Commission constitute a use described or depicted in the General Plan. Rather, the activities are discussed in the General Plan as part of a recommendation to evaluate and consider County ownership and/or operation of LIER. LIA has not pointed to evidence of any outcomes of the evaluation nor a decision by the County as to whether to own or operate LIER.

Similarly, the Districts allege that the Covered Action would be inconsistent with the general plan because it is inconsistent with the County's general plan goal of reducing greenhouse gas emissions (Districts' May 10, 2021 Letter, p. 21). As evidence of this inconsistency, the Districts cite to Solano County's comments on the Draft EIR, which state, in part, that, "Greenhouse Gas (GHG) emissions from the Project …directly conflicts with the Solano County General Plan and Climate Action Plan goal of reducing GHG emissions" (Districts' May 10, 2021 Letter, p. 21; Final EIR, Certification Record LOS.3.00001, PDF p. 251). In its May 3, 2021 Letter, the Department states that, "avoiding or reducing conflicts with existing uses or those uses described in the Solano County General Plan as it pertains to the Solano County Climate Action Plan for Energy and Efficiency is only relevant to reducing energy-related greenhouse gas emissions for future development or improvement to industrial, commercial, or residential buildings

and this would not be within the scope of DP P2, which respects local land use when siting water or flood facilities or restoring habitat" (Department's May 3, 2021 Letter, p. 21). The Districts do not cite directly to the General Plan for depictions or descriptions of any uses, nor explain how Climate Action Plan goals to reduce greenhouse gas emissions constitute either an existing use or are uses described or depicted in city or county general plans.

Appellants LIA and the Districts have failed to show that the Covered Action's alleged inconsistencies with Solano County's General Plan goals and recommendations constitute a conflict with existing uses or uses described or depicted in the Solano County General Plan under DP P2. Therefore, the Council finds that LIA and the Districts failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2, and we *deny* the appeals as to this issue.

(b) Whether the Department avoids or reduces conflicts with uses described or depicted in the Solano County General Plan

SCWA asserts that the Covered Action is incompatible with the Solano County General Plan and relevant zoning policies (SCWA Appeal Letter, p. 8). SCWA explains that "The Solano County General Plan designates the property subject to the Project as 'Agriculture,' defined as "areas for the practice of agriculture as the primary use, including areas that contribute significantly to the local agricultural economy, and allows for secondary uses that support the economic viability of agriculture" (SCWA Appeal Letter, p. 8). SCWA alleges that, "While this designation recognizes natural resource uses, adopting such natural resources within land designated as Agriculture requires such uses to maintain "the viability [sic] of underlying land use designations," citing to the General Plan, p. LU-25, for evidence. SCWA alleges that, "As presented, the Project: (1) does not present 'the practice of agriculture as the primary use'; (2) does not 'support the economic viability of agriculture'; and (3) does not maintain 'the validity of the underlying land use designation'" (SCWA Appeal Letter, p. 8).

In its Certification, the Department states that the covered action is compatible with the Solano County General Plan and zoning (Certification DP P2 Finding, p. 13). The Department states that the Solano County General Plan designates the site and its surroundings as agricultural land with a resource conservation overlay (RCO) and that the site is currently zoned Exclusive Agricultural 80 acres (A-80) (Certification DP P2 Finding, p. 13). The Department states that the Exclusive Agriculture general plan land use designation allows for resource conservation uses, including 1) conservation and mitigation banks; 2) tidal, managed, and seasonal wetland restoration; and 3) cultivation of plants and natural feed important to wildlife habitat (Certification DP P2 Finding, p. 13).

SCWA's description of the Agriculture use designation is substantiated by the Solano County general plan (Solano County General Plan, Certification Record DEIR

References, Appendix A, p. LU-19). The RCO description cited by SCWA states that the overlay "Identifies and protects areas of the county with special resource management needs. This designation recognizes the presence of certain important natural resources in the county while maintaining the validity of underlying land use designations" (Solano County General Plan, Certification Record DEIR References, Appendix A, LU-25). The RCO overlay does not discuss compatibility of specific uses, such as natural resource uses, with specific use designations, though it is generally understood that proposed uses should be compatible with any use designations underlying an overlay.

In its Certification, the Department acknowledges that "the Proposed Project would convert prime farmland to non-agricultural use" (Certification DP P2 Finding, pp. 13-14). In its Letter, the Department cites to Master Response 2 in the Final EIR for evidence supporting the Certification that the Covered Action is consistent with uses described or depicted in the Solano County General Plan (Department's May 3, 2021 Letter, pp. 20-21). In Master Response 2, the Department explains that the project site includes two properties not classified as "other" farmland, and that "Agriculture (including grazing) is already a prohibited use on the Liberty Farms Property due to the Wetland Reserve Program" (Final EIR, Certification Record LOS.3.00001, p. 3-14). Therefore, the Department concludes that "conversion of the Vogel Property and Liberty Farms properties to tidal marsh and seasonal floodplain would not result in any conversion of Important farmland to non-agricultural use" (Final EIR, Certification Record LOS.3.00001, p. 3-14). The Department acknowledges that "approximately 1,460 acres of Prime Farmland on the Bowlsbey Property…would be converted to non-agricultural use" (Final EIR, Certification Record LOS.3.00001, p. 3-14). Therefore, evidence in the record supports SCWA's assertion that the Covered Action does not present agriculture as the primary use.

However, the Department states that, "As mitigation for the Project, the Department will be conserving prime farmland and off-site mitigation (MM Ag-1a) to maintain the integrity of agricultural land use designation (MM Ag-1b) under the Solano County General Plan" (Department's June 1, 2021 Letter, p. 3). In its Certification, the Department states that "Proposed Project Mitigation Measure AG-1a would offset this loss [1,460 acres of Prime Farmland] by requiring the purchase of at least one agricultural conservation easement for a minimum of 1,000 acres, and funding for agricultural improvements (e.g., irrigation infrastructure) on a nearby farmed property" (Certification DP P2 Finding, p. 13). The Department lists other farmland and drainage improvements that are part of Mitigation Measure AG-1, claiming that "Together, these mitigation measures would meet or exceed the General Plan's required mitigation ratio for loss of agricultural land of 1.5:1" (Certification DP P2 Finding, p. 13). In its May 3, 2021 Letter, the Department also cites to Final EIR Master Response 2, which states that the intent of proposed agricultural mitigation was to "identify mutually beneficial solutions to maintain agricultural and economic productivity in the area affected" (Department's May 3, 2021 Letter, p. 20; Final EIR, Certification Record LOS.3.00001, pp. 3-14 to 3-15). SCWA does not explain whether or how the proposed mitigation would not maintain agricultural productivity in the area, or support the 'economic viability

of agriculture' as required by the underlying land use designation (SCWA Appeal Letter, p. 8).

Thus, while there is evidence in the record that the Covered Action does not present agriculture as the primary use, there is also evidence in the record that indicates mitigation measures are intended to reduce conflicts with the agricultural use designation and/or support the economic viability of agriculture as required by the underlying agricultural use designation.

In the context of general plan consistency, SCWA raises closely related arguments that the Covered Action conflicts with uses allowed under the Williamson Act (SCWA Appeal Letter, p. 8). SCWA alleges that, "the site for the proposed Project is subject to three separate Williamson Act contracts, and the Project uses conflict with the permitted and consistent uses as defined by the Act and local Williamson Act guidelines" (SCWA Appeal Letter, p. 8). SCWA contends that, "Proceeding with a project located on land restricted by an enforceable Williamson Act contract when some of the project uses conflict with the permitted and consistent uses according to the Williamson Act constitutes a failure by DWR to avoid project conflict with existing land use and policies" (SCWA Appeal Letter, p. 9).

In its Certification, the Department explains that "all three Williamson Act contracts [covering properties within the project site] identify Open Space as an allowed use independent of the separate and equally allowed use for agricultural purposes, and nothing in the language of the contracts prevents the open space use from occupying all of the contracted parcels" (Certification DP P2 Finding, p. 14).

The contracts are not part of the administrative record certified by the Department and are not before the Council. However, this does not affect the present analysis, as the use descriptions and limitations described in the County's Williamson Act Guidelines do not constitute an existing use or a use depicted or described in a general plan as required by DP P2. Solano County's Williamson Act Guidelines set limitations on eligibility for entering into and terminating agricultural preserves and contracts based on existing uses and the local land use designation. Whether the Covered Action is eligible to enter into or to terminate a contract is not a matter before the Council. With respect to DP P2, the Council considers whether substantial evidence in the record supports the Department's finding that the Lookout Slough Project itself avoids or reduces conflicts with existing uses and uses described or depicted in general plans.

The Department has cited to evidence in the record to show that mitigation measures are included in the Covered Action to reduce conflicts with the agricultural use designation and/or support the economic viability of agriculture as required by the underlying agricultural use designation. SCWA does not explain whether or how the proposed mitigation would not support the economic viability of agriculture or reduce conflicts with the agricultural use designation in the general plan. Therefore, the Council finds that SCWA failed to show that the Certification is not supported by substantial

evidence in the record that the Covered Action is consistent with DP P2 and we *deny* the appeal as to the issue of conflicts with uses described or depicted in the Solano County General Plan.

vii. Conflicts with the Solano County Climate Action Plan

SCWA and the Districts assert that the Covered Action is inconsistent with DP P2 because it is inconsistent with the Solano County Climate Action Plan (SCWA Appeal Letter, p. 9; Districts Appeal Letter, p. 9).

In the Certification of Consistency, the Department states that regarding Energy use, "[t]he Proposed Project is compatible with Solano County's Climate Action Plan for Energy and Efficiency as construction energy use would not be wasteful, inefficient, or unnecessary and there would be negligible operational energy use" (Certification DP P2 Finding, p. 13). SCWA asserts that "…it remains unclear how DWR arrived at this conclusion as nowhere in any project documents does it discuss any means or methods of avoiding or reducing inefficient, wasteful or unnecessary consumption of energy from this Project, as required by CEQA. The EIR omits any discussion of energy consuming equipment to be used by the Project, energy requirements of the Project by fuel type, energy conservation equipment, energy costs, or energy consumption per vehicle trip in the project description section. Further, the environmental setting described fails to disclose existing energy supply and use patterns in Solano County or the surrounding region" (SCWA Appeal Letter, p. 9).

SCWA's allegations primarily focus on the sufficiency of the environmental setting and impact analysis in the EIR, which falls outside the scope of the Council's appellate review. With respect to DP P2, the Council considers only whether substantial evidence in the record supports the Department's finding that the Lookout Slough Covered Action avoids conflicts with existing uses and uses described or depicted in city and county general plans when feasible. The Department has cited to evidence in the record demonstrating that it considered the Climate Action Plan, analyzed Project impacts related to energy use and greenhouse gas emissions, and concluded that the Proposed Project is compatible with Solano County's Climate Action Plan for Energy and Efficiency (Certification DP P2 Finding, p. 13; Department's May 3, 2021 Written Statement, p. 21; Draft EIR, Certification Record LOS.4.00001, pp. III-36 to III-37, IV.A-3, IV.C-13; Final EIR, Certification Record LOS.3.00001, p. 2-15 and 2-16). SCWA has not provided evidence to substantiate the alleged deficiencies related to the Climate Action Plan nor an explanation to clarify whether and how the alleged deficiencies would constitute a conflict with an existing use or a use described or depicted in city and county general plans.

As previously described in section (vii) above, although the Districts do connect the alleged inconsistency with the Climate Action Plan to the Solano County General Plan, the Districts do not show how it constitutes a conflict within the scope of DP P2. The Districts allege that the Covered Action would be inconsistent with the Solano

County General Plan because it is inconsistent with the County's general plan goal of reducing greenhouse gas emissions (Districts' May 10, 2021 Letter, p. 21). As evidence of this inconsistency, the Districts cite to Solano County's comments on the Draft EIR, which state, in part, that, "Greenhouse Gas (GHG) emissions from the Project …directly conflicts with the Solano County General Plan and Climate Action Plan goal of reducing GHG emissions" (Districts' May 10, 2021 Letter, p. 21; Final EIR, Certification Record LOS.3.00001, PDF p. 251).

In its Letter, the Department states that, "avoiding or reducing conflicts with existing uses or those uses described in the Solano County General Plan as it pertains to the Solano County Climate Action Plan for Energy and Efficiency is only relevant to reducing energy-related greenhouse gas emissions for future development or improvement to industrial, commercial, or residential buildings and this would not be within the scope of DP P2, which respects local land use when siting water or flood facilities or restoring habitat" (Department's May 3, 2021 Letter, p. 21). The Council agrees; in section (vi~~i~~) above, the Council found that the Districts do not cite directly to the General Plan for depictions or descriptions of any uses, nor explain how Climate Action Plan goals to reduce greenhouse gas emissions represent a conflict with uses described or depicted in the general plan. The Districts therefore failed to show that there is not ~~substantial~~ evidence in the record to support the Department's finding of consistency with DP P2 with regard to uses described or depicted in city or county general plans.

SCWA and the Districts failed to show that there is not ~~substantial~~ evidence in the record to support the Department's finding of consistency with DP P2 with regard to the Solano County Climate Action Plan. Moreover, these Appellants have failed to show that the Covered Action's alleged inconsistencies with Solano County's Climate Action Plan and General Plan goal for greenhouse gas emissions constitute appealable issues under DP P2. Therefore, the Council finds that the Appellants failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2, and we *deny* the appeals as to this issue.

d. Conclusions

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

1) We *remand the matter* to the Department for reconsideration of the following issues.

    a. LIA has shown that ~~there~~the Certification is ~~no~~not supported by substantial evidence in the record ~~to demonstrate~~ that recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER do not constitute existing uses;

b. LIA has shown that ~~there~~the Certification is ~~no~~not supported by substantial evidence in the record ~~to demonstrate~~ that the ~~Lookout Slough Project~~ Covered Action would not conflict with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER; and

c. LIA has shown that ~~there~~the Certification is ~~no~~not supported by substantial evidence in the record that the Department avoided or reduced conflicts with existing recreational uses of Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Lookout Slough Project.

2) We did not reach a conclusion regarding the issue of whether ~~the~~ siting ~~of~~ the ~~Covered Action~~Lookout Slough Project to avoid or reduce conflicts with existing uses was feasible because ~~there~~the Certification is ~~no~~not supported by substantial evidence in the record that the Department ~~considered~~ avoided or reduced conflicts with existing recreational uses ~~or analyzed whether there is conflict with such uses~~of Liberty Island Road, the Shag Slough Bridge, and LIER when siting the Lookout Slough Project.

3) We *deny* the appeals as to conflicts with existing agricultural uses, conflicts with existing infrastructure, conflicts with use of existing water intakes and beneficial uses of water, conflicts with 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 because SCWA, the Districts, and CDWA failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with DP P2.

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

In its Certification, the Department finds that the Covered Action is consistent with RR P1 as a result of the Covered Action's consistency with the following RR P1 *Priorities for State Investment in Delta Integrated Flood Management*: Levee Network, Localized Flood Protection, and Ecosystem Conservation (Certification RR P1 Finding, p.18). ~~Three appellants—~~Appellant CDWA~~, the Districts, and SCWA—raise~~ raises

substantive arguments that the Covered Action is not consistent with RR P1.[50, 51] For the reasons discussed below, the Council finds that Appellant~~s~~ CDWA~~, the Districts, and SCWA have~~ has failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with RR P1, and we *deny* the appeal~~s~~.

a. Policy Requirements

RR P1 states:

"(a) Prior to the completion and adoption of the updated priorities developed pursuant to Water Code section 85306, the interim priorities listed below shall, where applicable and to the extent permitted by law, guide discretionary State investments in Delta flood risk management. Key priorities for interim funding include emergency preparedness, response, and recovery as described in paragraph (1), as well as Delta levees funding as described in paragraph (2).

(1) Delta Emergency Preparedness, Response, and Recovery: Develop and implement appropriate emergency preparedness, response, and recovery strategies, including those developed by the Delta Multi-Hazard Task Force pursuant to Water Code section 12994.5.

(2) Delta Levees Funding: The priorities shown in the following table are meant to guide budget and funding allocation strategies for levee improvements. The goals for funding priorities are all important, and it is expected that, over time, the California Department of Water Resources must balance achievement of those goals. Except on islands planned for ecosystem restoration, improvement of nonproject Delta levees to the Hazard Mitigation Plan (HMP) standard may be funded without justification of the benefits. Improvements to a standard above HMP, such as that set by the U.S. Army

[50] Appellants SCWA and the Districts also allege that the Covered Action is inconsistent with RR P1 because it lacks a detailed funding plan for operations and maintenance, capital funding, and on-site personnel to ensure facility maintenance and manage flood risk. These allegations are outside the scope of RR P1. Analysis and findings for this issue were moved from this Section G ("Analysis & Findings") in the June 18, 2021 Staff Draft Determination to Section F ("Non-Appealable Issues & Issues Outside the Council's Jurisdiction") with minimal, non-substantive revisions for clarity.

[51] The Commission states that "[t]he staff determination improperly dismisses the Delta Protection Commission's suggestions about the project's inconsistency with RR P1." (DPC June 28, 2021 Letter, p. 3). The Council respectfully disagrees. As stated in section 11 of the Council's appeals regulations, the Council may only consider comments and testimony "regarding an appeal." Thus, the Council may only take into consideration the recommendations of the Commission regarding arguments raised by appellants. The reason for this is out of fairness to the certifying party. An appeal may be filed by any person and is required to be filed no later than 30 days after the submission of the certification of consistency. (Wat. Code sections 85225.10 and 85225.15; Appeals Procedures, paragraph 5). If the Council were to take into consideration arguments outside of the requisite 30-day time frame that were not raised by an appellant, the certifying party would be prejudiced. The recommendations asserted by the Commission did not address an issue put forth or argued by any of the Appellants in this matter. (*See also,* Fn. 8).

Corps of Engineers under Public Law 84-99, may be funded as befits the benefits to be provided, consistent with the California Department of Water Resources' current practices and any future adopted investment strategy.

Priorities for State Investment in Delta Integrated Flood Management

Categories of Benefit Analysis

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

(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 involves discretionary State investments in Delta flood risk management, including levee operations, maintenance, and improvements. Nothing in this policy establishes or otherwise changes existing levee standards." (Cal. Code Regs., tit. 23, § 5012.)

b. Certification

The Certification states that the Covered Action is consistent with RR P1 and the goals listed in the table entitled *Priorities for State Investment in Delta Integrated Flood Management* (Certification RR P1 Finding, p.18). The Certification states that "Levee systems on the Proposed Project Site's perimeter along Cache Slough and Hass Slough are considered deficient due to lack of adequate freeboard and deferred maintenance over time, making them particularly vulnerable to increases in water level,

erosion, or wind-wave run-up potential." (Certification RR P1 Finding, p. 19; Draft EIR, Appendix O, Certification Record LOS.4.00016, p. 13). The Certification also states that the levee improvements proposed on the project site have "…a strong potential to create high-quality, contiguous habitat for aquatic special-status species…" (Certification RR P1 Finding, p. 18; Draft EIR, Appendix P, Certification Record LOS.4.00017, p. 10).

In its Certification, the Department identifies the RR P1 priorities and goals that the Covered Action would achieve. Specifically, the Certification states the Covered Action is consistent with the following RR P1 priorities and goals:

Priority: Levee Network

- **Goal # 1** - *Protect water quality and water supply conveyance in the Delta, especially levees that protect freshwater aqueducts and the primary channels that carry fresh water through the Delta.*
    - The Department cites its response to DP P2 to support the Covered Action's demonstration of consistency with Levee Network Goal #1 (Certification RR P1 Finding, p. 19). As it relates to protecting water quality, the Department's certification for DP P2 states, in part, that modeling results demonstrate that the "…Proposed Project salinity changes would…not result in substantial adverse effects on the beneficial use of Delta waters as a drinking water source" (Certification DP P2 Finding, p. 15; Draft EIR, Certification Record LOS.4.00001, p. IV.G-22). The Department goes on to note that the Covered Action is not expected to cause non-compliance or make non-compliance with the D-1641 salinity standard more likely for agricultural, municipal, or fish and wildlife beneficial uses (Draft EIR, Certification Record LOS.4.00001, p. IV.G-23). The Department's DP P2 response goes on to state, in part, that the Covered Action's restoration of tidal wetland habitat would alter the existing drainage system in and adjacent to the project site, including tidal exchanges that could affect agricultural water supply and drainage (Certification DP P2 Finding, p. 15; Draft EIR, Certification Record LOS.4.00001, p. IV.G-24). While the Department notes that large changes to the tidal range as a result of the Covered Action could affect agricultural water management, modeling predicted a reduction in the tidal range with an increase of heights of low tides and a reduction in the heights of high tides (Draft EIR, Certification Record LOS.4.00001, p. IV.G-25). As a result, the slight reduction in average high tides is not expected to appreciably affect the operations of agricultural intakes in the Delta. (Certification DP P2 Finding, p.16; Draft EIR, Certification Record LOS.4.00001, p. IV.G-25). The Department concludes that the "…impacts [of the Covered Action] would not exceed the applicable

threshold of significance related to post-construction changes to tidal range that could affect in-Delta agricultural supplies…" (Draft EIR, Certification Record LOS.4.00001, p. IV.G-25).

- **Goal # 2** - *Protect flood water conveyance in and through the Delta to a level consistent with the State Plan of Flood Control for project levees.*

    - The Department states that the Covered Action is designed to increase local flood conveyance in the Yolo Bypass, which would be achieved by building the Duck Slough Setback Levee, a project levee within the State Plan of Flood Control, to the 100-year flood event (or the 1957 authorized design profile, whichever is higher) with six feet of freeboard and one extra foot for climate resiliency, consistent with the Department's flood planning objectives for the Central Valley (Certification RR P1 Finding, p. 19; Draft EIR, Appendix O, Certification Record LOS.4.00016, p. ES-2). Additionally, the Department states that the levee would be designed to conform to applicable standards from the California Code of Regulations, the Corps Engineering Manual, the Corps Design Guidance for Levee Under-Seepage, and the Code of Federal Regulations (Certification RR P1 Finding, p. 19; Draft EIR, Appendix O, Certification Record LOS.4.00016, p. 10).

- **Goal # 3 -** *Protect cultural, historical aesthetic, and recreational resources (Delta as Place)*

    - The Department states that the Covered Action would protect in perpetuity 3,400 acres of open space including channel-margin habitat. (Certification RR P1 Finding, p. 19; Final EIR, Certification Record LOS.3.00001, p. 1-2)

Priority: Localized Flood Protection

- **Goal # 2 -** *Protect small communities and critical infrastructure of statewide importance (located outside of urban areas)*

    - The Department states that the Covered Action would widen a portion of the Yolo Bypass to increase flood storage and conveyance consistent with the Department's flood planning objectives for the Central Valley. (Certification RR P1 Finding, p. 19; Draft EIR Appendix Q, Certification Record LOS.4.00018, pp. 99-100) By expanding the Yolo Bypass floodplain, constructing the Duck Slough Setback Levee, and improving the Cache/Hass Slough Levee, the Department states that the Covered Action would provide stronger protection to life and property north of Duck Slough as well as throughout the area that depends on flood protection from the Yolo Bypass. (Certification RR P1 Finding, p.

19; Draft EIR Appendix Q, Certification Record LOS.4.00018, pp. 99-100)

Priority: Ecosystem Conservation

- **Goal # 1-** *Protect existing and provide for a net increase in channel-margin habitat*
    - The Department states that the Covered Action would protect in perpetuity 3,400 acres of open space including channel-margin habitat. Furthermore, the Department states that the Covered Action would restore approximately 3,165 acres of tidal marsh. (Certification RR P1 Finding, p. 19; Final EIR, Certification Record LOS.3.00001, p. 1-2; Draft EIR, Appendix A, Certification Record LOS.4.00002, pp. 3-4)
- **Goal # 2** - *Protect existing and provide for net enhancement of floodplain habitat*
    - The Department states that the Covered Action would restore approximately 3,165 acres of tidal wetland habitat including intertidal and shallow subtidal habitats and protect in perpetuity 3,400 acres of open space including channel-margin habitat. (Certification RR P1 Finding, p. 19; Final EIR, Certification Record LOS.3.00001, p. 1-2; Draft EIR, Appendix P, Certification Record LOS.4.00017, p. 10)
- **Goal # 3 -** *Protect existing and provide for a net enhancement of wetlands*
    - The Department states that the Covered Action would restore approximately 3,165 acres of tidal wetland habitat including intertidal and shallow subtidal habitats. (Certification RR P1 Finding, p. 19; Final EIR, Certification Record LOS.3.00001, p. 1-2; Draft EIR, Appendix P, Certification Record LOS.4.00017, p. 10)

c. Appeal and Analysis

~~The Council received appeals regarding the Department's Certification of Consistency with RR P1 from the following parties:~~

- ~~Reclamation District 2060 & Reclamation District 2068 (Districts)~~
- ~~Central Delta Water Agency (CDWA)~~
- ~~Solano County Water Agency (SCWA)~~

~~The appeals consider two issues: (i) Limited flood protection benefit (reduced flood frequency); and (ii) Lack of detailed funding plan for operation and maintenance, capital~~

~~funding, and onsite personnel to ensure facility maintenance and manage flood risk.[52] Each of these issues is addressed separately, below:~~

~~i. Limited flood protection benefit (reduced flood frequency)~~

Appellant CDWA argues that the flood protection offered by the Covered Action would be limited. Specifically, CDWA states that the Covered Action only lowers the 100-year flood water surface elevation by 0.5 feet at the northern weir inlet (CDWA Appeal Form, p. 7; CDWA Appeal Form Attachment – a Lookout Slough 100-year flood impacts, PDF pp.1-2). CDWA also states that the remainder of the Covered Action would result in "very little (flood reduction) impact," noting that the Covered Action would only lower 100-year flood water surface elevation by 0.02 feet at the downstream end of the Lookout Slough Project's footprint, and that there is no impact at the Cache Slough confluence with Steamboat Slough (CDWA Appeal Form, p. 7).

First, it should be noted that while CDWA asserts that the flood protection benefits provided by this Covered Action are not sufficient to demonstrate consistency with RR P1, no appellant disputes the Covered Action's consistency with the goals listed under Ecosystem Conservation or Levee Network Improvements categories.

Second, RR P1 does not require each covered action to address every goal and objective identified in the table.[53] This interpretation is based on multiple factors, including:

1. the Council intended that the nine goals set out in RR P1 should be applied in a flexible manner. This is evidenced by the 2013 Delta Plan rulemaking record, in which the Council considered, but rejected, more rigid priorities (Initial Statement of Reasons, p. 8);
2. it would be unlikely that an individual project could meet all nine goals identified in the table. For instance, a single levee improvement project would be unable to simultaneously protect an urban area and a working agricultural landscape;

~~[52] In its May 11, 2021 letter, the Delta Protection Commission identified an additional consideration that was not addressed by appellants. The Commission observes that "RR P1...identifies nine *equally (emphasis added)* important goals for state investments in improving Delta levees" (Commission's May 11, 2021 Letter, p.10). The Council does not concur with this interpretation, as there is a material difference between the phrase "all important", which does not suggest any particular ranking of the nine goals, and the phrase "equally important", which is not part of the RR P1 regulatory language and would suggest a level of prioritization among the goals that goes beyond a plain reading of the regulation.~~

[53] In its May 11, 2021 letter, the Delta Protection Commission identified an additional consideration that was not addressed by appellants. The Commission observes that "RR P1...identifies nine *equally (emphasis added)* important goals for state investments in improving Delta levees" (Commission's May 11, 2021 Letter, p.10). The Council does not concur with this interpretation, as there is a material difference between the phrase "all important", which does not suggest any particular ranking of the nine goals, and the phrase "equally important", which is not part of the RR P1 regulatory language and would suggest a level of prioritization among the goals that goes beyond a plain reading of the regulation.

3. RR P1 states that the goals for funding priorities are "all important," and it is expected that, "over time," the Department will balance achievement of those goals. We interpret the term "over time" to suggest that a singular project is not expected to demonstrate consistency with all nine goals identified in RR P1. Rather, the balance sought by RR P1 is intended to occur over the span of multiple projects, in multiple locations over time.

As discussed above in section b. ("Certification"), the record supports that the Covered Action achieves RR P1 goals under the Ecosystem Conservation and Levee Network priorities.

For the Ecosystem Conservation goals, the Department cites to evidence in the record that the Covered Action would:

- Goal #1: Protect and provide for a net increase in channel-margin habitat (Certification RR P1 Finding, p. 19; Final EIR, Certification Record LOS.3.00001, p. 1-2; Draft EIR, Appendix O, Certification Record LOS.4.00016, p. 9);
- Goal #2: Protect existing and provide for net enhancement of floodplain habitat (Certification RR P1 Finding, p. 19; Final EIR, Certification Record LOS.3.00001, p. 1-2; Draft EIR, Appendix P, Certification Record LOS.4.00017, p. 10); and
- Goal #3: Protect existing and provide for a net enhancement of wetlands (Certification RR P1 Finding, p. 19; Final EIR, Certification Record LOS.3.00001, p. 1-2; Draft EIR, Appendix P, Certification Record LOS.4.00017, p. 10.)

With regard to the Levee Network goals, the Department cites to evidence in the record that the Covered Action would:

- Goal # 1: Protect water quality and water supply conveyance in the Delta, especially levees that protect freshwater aqueducts and the primary channels that carry fresh water through the Delta (Certification DP P2 Finding, p. 15; Draft EIR, Certification Record LOS.4.00001, pp. IV.G-22 – IV.G-25);
- Goal # 2: Protect flood water conveyance in and through the Delta to a level consistent with the State Plan of Flood Control for project levees (Certification RR P1 Finding, p. 19; Draft EIR, Appendix O, Certification Record LOS.4.00016, pp. ES-2, 10); and
- Goal # 3: Protect cultural, historical, aesthetic, and recreational resources (Delta as Place) (Certification RR P1 Finding, p. 19; Final EIR, Certification Record LOS.3.00001, p. 1-2).

While CDWA did not identify which RR P1 goals it is appealing, staff concluded based on the substance of CDWA's appeal, that CDWA's appeal pertained to the localized flood protection goals of the policy, specifically Goal #2. As a result, no appeal

was received with regard to the levee network goals and ecosystem conservation goals that the Department also asserts consistency with under RR P1. Therefore, the Council finds that CDWA has failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with RR P1 as to th~~is~~e issue of priorities and goals for flood protection.[54]

~~**ii. Lack of a detailed funding plan for operation and maintenance, capital funding, and on-site personnel to ensure facility maintenance and manage flood risk**~~

~~Both SCWA and the Districts raise the lack of a detailed plan for operation and maintenance, capital funding, and on-site personnel to ensure facility maintenance and manage flood risk as the core reason that the Covered Action is inconsistent with RR P1. (Districts Appeal Letter, p. 9; SCWA Appeal Letter, p. 9). In oral comments at the May hearing, the Districts state that "revenues are not adequate for it [RD 2098] to do that work and DWR has not addressed where 2098 will ultimately get that money" (May 20, 2021 Hearing Transcript, p. 105). The express language of RR P1 does not require a funding plan or the details identified by the appellants. Consequently, SCWA and the Districts have not raised an appealable issue within the scope of RR P1.~~

d. Conclusion~~s~~

For the reasons discussed above, the Council finds that~~:~~

~~Appellants SCWA, the Districts, and~~ CDWA ~~have~~ failed to show that the Certification is not supported by substantial evidence in the record that the Covered Action is consistent with RR P1 as to the issue of priorities and goals for flood protection~~; and~~. Therefore, we *deny* the appeal.

~~1. Appellants SCWA and the Districts failed to show that a detailed funding plan is an appealable issue within the scope of RR P1.~~

~~Therefore, we *deny* the appeals.~~

[54] Per the Appeals Procedures and the hearing notice, we may only consider comments and testimony "regarding an appeal." (Appeals Procedures § 11.) We received public comments from the Delta Protection Commission that raise arguments that the Project did not comply with Delta Plan Policies RR P1. Specifically, the Commission argued that "there is no evidence about how DWR is balancing investment across the Delta Plan's nine equal levee improvement goals" (Commission's May 11, 2021 Letter, p.11). The Commission also provides commentary at the May hearing. Appellants did not raise this argument. With respect to this issue, CDWA's appeal and May 20, 2011 presentation do not explicitly dispute the balance of the achievement of the goals for levee improvements by the Department in its Certification for RR P1. As such, the Council finds that this is not an issue on appeal before the Council.

~~G.~~H. DETERMINATION

~~Based on the Analysis and Findings set forth in Sections E and F. above, the Council finds that:~~

~~1) substantial evidence exists in the record before us to support the Department's finding that the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project is consistent, in part, with the Delta Plan on the specific issues discussed in Section F above and we *deny* the appeals as to these issues; and~~

~~2) substantial evidence does not exist in the record before us to support the Department's finding that the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project is consistent, in part, with the Delta Plan on the specific issues discussed in Section F above and we *remand the matter to the Department for reconsideration on the issues*, pursuant to Water Code section 85225.25.~~

Having reviewed the entirety of the record in this matter and following the hearing on the appeals conducted on July 15-16,2021, the Council has made its findings on the appeals as set forth above in Section F (Non-Appealable Issues & Issues Outside the Council's Jurisdiction) and Section G (Analysis & Findings) of this Determination. (*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 [DATE].

AYE:

NO:

RECUSED/ABSENT:

ABSTAIN:

_____

[NAME]
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.[55]

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

Based on the Council's review, we have determined that the documents identified below were part of the record before the Department, but were not fully included in the record submission to the Council.[56]

Document
LIA, Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215) filed February 22, 2021, Exhibit B, *LIA Presentation to DWR*, 38 pages
LIA, Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215) filed February 22, 2021, Exhibit E, *Public Comments on EIR*, 2 pages
CDWA, Lookout Slough Consistency Appeal Supplemental Submission Part 1, dated May 3, 2021, DWR Modernizing Delta Conveyance Infrastructure Q&A, May 2019, 4 pages
CDWA, Lookout Slough Consistency Appeal Supplemental Submission Part 2, dated May 7, 2021, *CDWA Letter to Governor Newsom re: Improper allocation of Proposition 1 Bond Funds, February 11, 2021* (with attachments A-K); 2 documents: 51 pages and 62 pages
CDWA, Lookout Slough Consistency Appeal Supplemental Submission Part 2, dated May 7, 2021, *SWRCB Watermaster Letter to DWR, August 27, 2020*, 2 pages
CDWA, Lookout Slough Consistency Appeal Supplemental Submission Part 2, dated May 7, 2021, Vogel (2011), *Insights into the Problems, Progress, and Potential Solutions for Sacramento River Basin Native Anadromous Fish Restoration*, 174 pages
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, *City of Vacaville, 2015 Urban Water Management Plan Update*, pp. 6-2 to 6-5, 71 pages

[55] Not all documents in this Exhibit were relied upon in the Determination.

[56] The Department states that "many of the documents cited in Exhibit A to the Draft Staff Report post-date DWR's certification." (DWR's June 28, 2021 Letter, p. 17). The items in Exhibit A do not post-date the date of certification; the corresponding dates listed in this section pertain to the date of the written submittal to the Council unless otherwise specified.

SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, *City of Fairfield, 2015 Urban Water Management Plan Update*, pp. 32-33, 37, 39-40; 88 pages
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, *City of Vallejo, 2015 Urban Water Management Plan Update*, pp. 6-1 to 6-2, 6-14, 7-2 to 7-4; 90 pages
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, *City of Benicia, 2015 Urban Water Management Plan Update*, pp. 3-1 to 3-20, 86 pages
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, *City of Napa, 2015 Urban Water Management Plan Update*, pp. 6-4 to 6-7, 6-14, 7-5 to 7-7, 376 pages
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, *City of American Canyon, 2015 Urban Water Management Plan Update*, pp. 6-1 to 6-4, 7-2 to 7-8, 153 pages
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, DWR (2021). *Management of the California State Water Project*, Bulletin 132-18, pp. 43-48, B-26 to 28; 553 pages.
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, State Water Contractors (1990), *Sanitary Survey of the State Water Project, October 1990*, pp. ES-10, ES-11, 5-5 to 5-7, 6-9 to 6-13, 8-6; 310 pages
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, State Water Contractors (1996), *California State Water Project Sanitary Survey Update Report 1996*, pp. ES-3, ES-4, ES-10, ES-13, ES-14, ES-19, ES-21, ES-22, 19-27, 98-105, 123-124, 127-128; 382 pages
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, State Water Contractors (2001), *California State Water Project Watershed Sanitary Survey Update Report 2001*; pp. 3-1 to 3-50, 12-1 to 12-28, 13-1 to 13-3; 761 pages
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, State Water Project Contractors Authority (2007), *California State Water Project Watershed Sanitary Survey 2006 Update*; pp. ES-4, ES-9, ES-10, ES-13 to ES-15, 2-19, 2-20, 3-24, 3-25, 3-27, 3-98 to 3-102, 3-112 to 3-116, 5-1 to 5-13; 730 pages[57]
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, State Water Project Contractors Authority and DWR (2012), *California State Water Project Watershed Sanitary Survey 2011 Update*; pp. ES-13, ES-15, 2-42 to 2-45, 2-50, 3-33, 3-43, 3-45, 4-19 to 4-22, 4-55, 9-12 to 9-16, 9-43, 10-2 to 10-5, 13-66 to 13-79*, 14-3 to 14-12; 837 pages

[57] SCWA inadvertently submitted the RFP instead of the Update. However, this document is easily available to the Council and the Council will exercise its discretion to admit this document under Section 10 of its Appeals Procedures. Pursuant to Section 10, the Council has the discretion to admit any qualifying matter under Section 10 although not required to do so.

SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, State Water Project Contractors Authority (2017), *California State Water Project 2016 Watershed Sanitary Survey Update*; pp. 3-20 to 3-23, 3-54, 3-55, 8-12 to 8-15, 11-6 to 11-10; 538 pages
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, Conrad et al. (2020) *Critical Needs for Control of Invasive Aquatic Vegetation in the Sacramento – San Joaquin Delta*, 18 pages
Department, Submission of Additional Information for C20215, Lookout Slough Tidal Habitat Restoration and Flood Improvement Project, dated May 12, 2021, Document #1, *Division of Boating and Waterways Programmatic Biological Opinion (July 22, 2020*), 142 pages
Department, Submission of Additional Information for C20215, Lookout Slough Tidal Habitat Restoration and Flood Improvement Project, dated May 12, 2021, Document #2, *DWR/EIP Contract # 4600012583 (Restoration Contract) (October 19, 2018)*
Department, Submission of Additional Information for C20215, Lookout Slough Tidal Habitat Restoration and Flood Improvement Project, dated May 12, 2021, Document #3, *DWR/RD 2098 Contract #4600012776 (Flood Contract) (February 14, 2019)*
Department, Submission of Additional Information for C20215, Lookout Slough Tidal Habitat Restoration and Flood Improvement Project, dated May 12, 2021, Document #4, Bond Accountability Resources Webpage, 3 pages
Department, Submission of Additional Information for C20215, Lookout Slough Tidal Habitat Restoration and Flood Improvement Project, dated May 12, 2021, Document #5, *California Water Action Plan 2016 Update*, 25 pages
Department, Submission of Additional Information for C20215, Lookout Slough Tidal Habitat Restoration and Flood Improvement Project, dated May 12, 2021, Document #6, Murphy, D.D. and S.A. Hamilton (2013), Eastward Migration or Marshward Dispersal: Exercising Survey Data to Elicit an Understanding of Seasonal Movement of Delta Smelt, *San Francisco Estuary and Watershed Science* 11(3), 21 pages
Department, Submission of Additional Information for C20215, Lookout Slough Tidal Habitat Restoration and Flood Improvement Project, dated May 12, 2021, Document #7, *Results of Division of Boating and Waterways Biovolume Surveys for SAV Cover Adjacent to Lookout Slough Project Site Pre- and Post- 2020 Herbicide Treatment*
Department, Submission of Additional Information for C20215, Lookout Slough Tidal Habitat Restoration and Flood Improvement Project, dated May 12, 2021, Document #8, *Yolo Bypass and Cache Slough Region: Program Development and Implementation Partnership Road Map November 20, 2018*, 20 pages
Department, Email re: RE: Submission of Additional Information for C20215, Lookout Slough Tidal Habitat Restoration and Flood Improvement Project, dated May 19, 2021, Presentation to the USFWS on project design, 37 pages
Department, Email re: RE: Submission of Additional Information for C20215, Lookout Slough Tidal Habitat Restoration and Flood Improvement Project, dated May 19, 2021, Letter dated August 16, 2018 from the Central Valley Regional Water Quality Control Board to DWR Presentation to the USFWS on project design, p. 19, 37 pages

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.[58]

Paragraph 29 of the Council's Appeals Procedures provides as follows: "29. Notwithstanding any provision of these procedures to the contrary, the council may take official notice in any hearing that it conducts, of any generally accepted technical or scientific matter within the council's jurisdiction, and of any fact that may be judicially noticed by the courts of this State."

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

Document
Department, Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215) filed February 22, 2021, California Department of Fish and Wildlife (2014), *Ecosystem Restoration Program's Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta, Sacramento Valley and San Joaquin Valley Regions*, pp. 29-43, 261 pages
LIA, Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215) filed February 22, 2021, Exhibit D, *California State Parks Recreational Trails Plan Executive Summary Report*, 14 pages
SCWA, Letter Attached to SCWA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215) filed February 22, 2021, *Solano County Uniform Rules and Procedures Governing Agricultural Preserves and Land Conservation Contracts* ("Solano County Williamson Act Guidelines"), Revised 2012, 31 pages
Districts, Letter Attached to Districts Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215) filed February 22, 2021, Tobias et al. (2019). *Impacts of water hyacinth treatment on water quality in a tidal estuarine environme*nt, Biological Invasions 21, pp. 3479–3490
CDWA, CDWA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215) filed February 22, 2021, UC Agronomy Research and Information Center, 2020. Soil Salinity Management Fact Sheet, 2 pages

[58]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.

CDWA, CDWA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215) filed February 22, 2021, UC Agriculture and Natural Resources, South Delta Leaching Fractions Study Summary, 1 page
CDWA, Lookout Slough Consistency Appeal Supplemental Submission Part 2, dated May 7, 2021, *July 2018 Framework for the Sacramento/Delta Update to the Bay-Delta Plan*, p. 15, 35 pages
LIA, Inclusion of Exhibits into the Council's Record, dated May 12, 2021, Exhibit G, *Department of Motor Vehicles Statistics for Publication January through December 2019* and *Total Vessel Registrations by County as of 31 Dec 2018*, 5 pages
LIA, Inclusion of Exhibits into the Council's Record, dated May 12, 2021, Exhibit H, *Solano County Assessor's Map Book*, 3 pages
LIA, Inclusion of Exhibits into the Council's Record, dated May 12, 2021, Exhibit L, USGS (2020). Effects of Box Culverts on Stream Habitat, Channel Morphology, and Fish and Macroinvertebrate Communities at Selected Sites in South Carolina, 2016–18, 64 pages
LIA, Inclusion of Exhibits into the Council's Record, dated May 12, 2021, Exhibit M, State Lands Commission (2017). *A Legal Guide to the Public's Rights to Access and Use California's Navigable Waters*, 52 pages
~~LIA, Inclusion of Exhibits into the Council's Record, dated May 12, 2021, Exhibit N, Delta Protection Commission (2019): *Recreation & Tourism in the Delta*, 81 pages~~
LIA, Inclusion of Exhibits into the Council's Record, dated May 12, 2021, Exhibit P, US DOT (2007): Design for Fish Passage at Roadway-Stream Crossings: Synthesis Report, 280 pages
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, Chen et al. (2010). Current and Long-Term Effects of Delta Water Quality on Drinking Water Treatment Costs from Disinfection Byproduct Formation, 21 pages
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, Solano Agencies Integrated Regional Water Management and Strategic Plan, pp. 3-3 to 3-7, 4-1 to 4-3, Table 5-1, Figure 5-6, Chapters 6-7; 168 pages
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, Westside Sacramento Integrated Regional Water Management Plan Update, 285 pages
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, Public Policy Institute of California (2012). *Aquatic Ecosystem Stressors in the Sacramento–San Joaquin Delta*, pp. 1, 14-15
Commission, Appeals of Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Lookout Slough) Certification of Consistency (Appeals C20215-A1 to A4), dated May 11, 2021, *California State Parks, Central Valley Vision Implementation Plan*, 2009, 40 pages
Commission, Appeals of Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Lookout Slough) Certification of Consistency (Appeals C20215-A1 to A4), dated May 11, 2021, *California State Parks Delta Recreation Proposal for the Sacramento–San Joaquin Delta and Suisun Marsh*, 2011, 40 pages

US Census Bureau (2019). 2019 American Community Survey (ACS) 1-Year Estimates, Table B01003 “Total Population” for Antioch city, California. Accessed at https://data.census.gov
US Census Bureau (2019). 2019 ACS 5-Year Estimates, Table B01003 “Total Population” for Isleton city, California. Accessed at https://data.census.gov
US Census Bureau (2019). 2019 ACS 1-Year Estimates, Table B01003 “Total Population” for Lodi city, California. Accessed at https://data.census.gov
US Census Bureau (2019). 2019 ACS 5-Year Estimates, Table B01003 “Total Population” for Oakley city, California. Accessed at https://data.census.gov
US Census Bureau (2019). 2019 ACS 5-Year Estimates, Table B01003 “Total Population” for Rio Vista city, California. Accessed at https://data.census.gov
US Census Bureau (2019). 2019 ACS 1-Year Estimates, Table B01003 “Total Population” for Sacramento city, California. Accessed at https://data.census.gov

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

Document	Reason for denial
LIA, Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215) filed February 22, 2021, Exhibit A, *Satellite Imagery*, 22 pages	Imagery supplemented with additional information. These interpretations may be subject to dispute. No evidence that the document was part of the record before the agency.
LIA, Letter Attached to LIA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215) filed February 22, 2021, Exhibit C, *On-Site Vehicle Survey*, 10 pages	Document is dated after the February 22, 2021 certification filing date.
SCWA, Letter Attached to SCWA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215) filed February 22, 2021, *SCWA/DWR State Water Project Water Supply Contract, Section 19*	Documents were not provided with request.
SCWA, Letter Attached to SCWA Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215) filed February 22, 2021, *Bay Delta Conservation Plan Recirculated Draft EIR,* p. 5-77	Documents were not provided with request.
Districts, Letter Attached to Districts Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215) filed February 22, 2021, Davis et al. (2004). *Variations of bromide in potable ground water in the United States*, 7 pages	Documents were not provided with request.[59] No evidence that the document was part of the record before the agency.
LIA, Inclusion of Exhibits into the Council's Record, dated May 12, 2021, Exhibit F, *Census 2020 California Hard-to-Count Fact Sheet: Census Tract 2533 in Solano County*, 4 pages	Not verifiable: document author and origin are unclear. No evidence that the document was part of the record before the agency.

[59] A hyperlink was included in the appeal letter, but the document is not accessible to the Council through the hyperlink.

LIA, Inclusion of Exhibits into the Council's Record, dated May 12, 2021, Exhibit I, *LIER Land Management Plan*, 255 pages	The document was submitted with the administrative record prepared and submitted by the Department (See LIER Land Management Plan, Certification Record LOS.10.00032).
LIA, Inclusion of Exhibits into the Council's Record, dated May 12, 2021, Exhibit J, *Solano County General Plan, Ch. 10*, p. 40, 80 pages	The document was submitted with the administrative record prepared and submitted by the Department (See Solano County General Plan, Certification Record DEIR References, Appendix A).
LIA, Inclusion of Exhibits into the Council's Record, dated May 12, 2021, Exhibit K: *Overview of Techniques and Equipment Used to Estimate Recreation Use*, 13 pages	Partial document provided; document author and origin are unclear. No evidence that the document was part of the record before the agency.
LIA, Inclusion of Exhibits into the Council's Record, dated May 12, 2021, Exhibit N, Delta Protection Commission (2019): *Recreation & Tourism in the Delta*, 81 pages	The document was submitted with the administrative record prepared and submitted by the Department (See Mikel et al. (2019), Certification Record – DEIR References, p. IV.J-6, FN#7)
LIA, Inclusion of Exhibits into the Council's Record, dated May 12, 2021, Exhibit O, NOAA (2018): Results of the 2015 Economic Survey of Central Valley Anglers, 136 pages	The document was submitted with the administrative record prepared and submitted by the Department (See Thomson and Kosaka 2015, Certification Record – DEIR References, p. IV.J-6, FN#8)
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, DWR (2021). *Long-Term Operation of the State Water Project in the Sacramento San Joaquin Delta*, Incidental Take Permit No. 2081-2019-066-00, Section 8.12; 144 pages	The document was submitted with the administrative record prepared and submitted by the Department (See CDFW 2020 ITP, Certification Record 10.00012)
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, *Tidal Restoration of a Managed Wetland in California Favors Non-Native Fishes*	Documents were not provided with request. Document is dated after the February 22, 2021 certification filing date.
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, *Memorandum of Understanding: Yolo Bypass-Cache Slough Partnership*	Documents were not provided with request.

SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, *Yolo Bypass-Cache Slough Partnership Vision and Goals*	Documents were not provided with request.
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, *Lower Sacramento/North Delta Corridor Management Framework*	Request is unclear and document was not provided with request.
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, *Adoption Of Amendments To The Water Quality Control Plan For The San Francisco Bay/Sacramento-San Joaquin Delta Estuary And Final Substitute Environmental Document*, p. 61	Documents were not provided with request.
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, CALFED ROD 2000, pp. 65-70	Documents were not provided with request.
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, PWA (2010), *Dissolved Organic Carbon (DOC) Literature Review and Evaluation of Liberty Island Conservation Bank Neg. Declaration*, 30 pages	The document was submitted with the administrative record prepared and submitted by the Department (See ESA PWA. 2010, Certification Record - FEIR References, 3-21)
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, PWA (2008), *Preliminary evaluation of changes in DOC resulting from Cache Slough wetland restoration*, 18 pages	No evidence that the document was part of the record before the agency.
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, MWH (2009) *North Bay Aqueduct Organic Carbon Treatment Study Final Report*, pp. 1-30; 49 pages	No evidence that the document was part of the record before the agency.
SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, PWA (2008), *Results from Calibration/Validation process and scenario runs, Barker Slough Hydrodynamic Study*, Phase 3, pp. 1-15; 30 pages	No evidence that the document was part of the record before the agency.

CDWA, Lookout Slough Consistency Appeal Supplemental Submission Part 2, dated May 7, 2021, *EIP/DWR Powerpoint: Lookout Slough Tidal Habitat Restoration and Flood Improvement Project, Informational Meeting, Salinity & Bromide, October 8, 2020*, 30 pages	The document was submitted with the administrative record prepared and submitted by the Department (See Agency Presentation, Certification Record LOS.6.00001)
CDWA, Lookout Slough Consistency Appeal Supplemental Submission Part 2, dated May 7, 2021, *Delta Plan Executive Summary excerpt*	The Delta Plan does not need to be added to the record.
CDWA, Lookout Slough Consistency Appeal Supplemental Submission Part 2, dated May 7, 2021, EIP Habitat Restoration Concept Map	The document was submitted with the administrative record prepared and submitted by the Department (See Draft EIR, Certification Record LOS.4.00001, p. III-31)
CDWA, Lookout Slough Consistency Appeal Supplemental Submission Part 2, dated May 7, 2021, *SWRCB Executive Director Letter to DWR and Reclamation, April 30, 2021*	Document is dated after the February 22, 2021 certification filing date.
Commission, Appeals of Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Lookout Slough) Certification of Consistency (Appeals C20215-A1 to A4), dated May 11, 2021, Attachment A - Levee Expenditures	Attachment A is comprised of multiple documents and sources and is inadmissible as a whole as it does not meet the standards of admissibility for Section 29. No evidence that the Attachment A as a whole was part of the record before the agency.
Districts, Letter Attached to Districts Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215) filed February 22, 2021, Clark (1976), *An Overview Of Depredating Bird Damage Control In California*. Bird Control Seminars Proceedings, University of Nebraska	No evidence that the document was part of the record before the agency. The Council does not have sufficient information to determine whether this document meets the standard of admissibility for Section 29.
Districts, Letter Attached to Districts Appeal of Certification of Consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (C20215) filed February 22, 2021, Clarke (2015), *5 Invasive Plants Currently Messing Up California's Delta*. KCET.org	No evidence that the document was part of the record before the agency. This webpage does not meet the standards of admissibility for Section 29.

SCWA, Lookout Slough Consistency Appeal Supplemental Submission, dated May 10, 2021, UC Davis 2019, North Delta Arc Study 2019 Annual Report, pp. 50-51	No evidence that the document was part of the record before the agency. The Council does not have sufficient information to determine whether this document meets the standard of admissibility for Section 29.