

January 27, 2022

Delta Stewardship Council
980 9th Street, Suite 1500
Sacramento, CA 95814

Subject: Lookout Slough Tidal Habitat Restoration and Flood Improvement Project C202110

Delta Stewardship Council:

This letter is submitted on behalf of the Solano County Water Agency (**Agency**) to support its appeal of the Delta Stewardship Council's (**Council**) Consistency Determination of the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (**Project**). While the Agency is firmly committed to supporting co-equal goals in the Delta, this Project does not do so; rather, while the Project may improve conditions for the Central Valley Project (**CVP**) and State Water Project (**SWP**) Operations, it would do so at the sole expense and detriment of Solano County interests. Within the Yolo Bypass Cache Slough Complex (**Complex**), there are numerous existing agricultural and municipal water supply intakes including the North Bay Aqueduct (**NBA**), the City of Vallejo Pumping Plant, Reclamation District 2068, and many others which the Lookout Slough supporting documents do not adequately resolve with respect to water quality, endangered species, and the corresponding cumulative adverse impacts of the more recent and significant Complex restoration projects (i.e., Lower Yolo Ranch, Lower Egbert Tract, and others). In addition, while the NBA represents only 2% of the SWP, the vast majority of habitat restoration for the SWP is being implemented within the Complex and Suisun Marsh regions, within or in close proximity to Solano County and the NBA.

While the Agency has significant concerns about the consistency of the Project with the Delta Plan, the Agency is not seeking to stop the Project. Instead, we believe there is ample opportunity to work collaboratively with the Council, Department of Water Resources (**DWR**), and/or other agencies to meet co-equal goals throughout the entire Delta. Additionally, the Agency is looking for firm, committed support to help implement multi-benefit, co-equal goal projects such as the NBA Alternate Intake Project (**AIP**). The NBA AIP provides multi-agency regional benefit including protection of listed smelt in addition to vital regional water supply resiliency, achieving the co-equal goals, and is one of the recommendations in the Delta Plan (WQ R5). DWR has made numerous unfulfilled commitments to work with local interests in the Complex to provide assurances that existing diversion activities impacted by the numerous restoration projects in the area will be protected from further regulatory actions, however, no concrete efforts to meet these commitments has yet to be achieved. The Yolo Bypass Cache Slough Complex Habitat Conservation Plan currently being considered by DWR does not provide any assurances for the future drinking water needs of 500,000 people served by the NBA. At the same time, DWR continues to move forward with additional restoration projects which, cumulatively, severely impact the North Bay Aqueduct's long-term operations and regional climate resiliency as required by the California Water Action Plan and companion Resiliency Portfolio, further discussed below.

The Agency also wishes to make clear this is its second appeal of the Lookout Slough Project and hopes this demonstrates a commitment to improving the implementation of this Project through collaboration and mitigation. In addition, the Agency brings this second appeal in consideration of the Delta Protection Commission's comments on proposed amendments to the Council's administrative procedures governing appeals of Delta Plan consistency determinations. Specifically, the Council's Final Determination in the first appeal of the Lookout Slough Project denied the appeal of numerous Delta Plan policies reasoning that appellant Agency failed to show the certification was not supported by substantial evidence. However, the above mentioned comments from the Delta Protection Commission state "nothing in the Delta Reform Act places this obligation on appellants." Rather, pursuant to Water Code § 85225.10, appellants must claim only that a project is inconsistent with the Delta Plan and will have a significant adverse effect on achieving the coequal goals and then set forth the basis of their claim including specific allegations. The Agency believes it met and exceeded this threshold in its first appeal by supplying evidence and specific allegations of the Lookout Slough Project's inconsistencies with the Delta Plan and impacts on Agency intakes.

The Agency submits this second appeal in hopes this Council will recognize the potential of this Project to exacerbate already significant issues of invasive species proliferation and lack of mitigation for increased fish restoration in the same areas Agency intakes are located.

Thank you for the opportunity to submit comments. Should you have any questions or concerns, please don't hesitate to contact me or Roland Sanford, General Manager of the Agency, at (707) 455-1103 or by e-mail at rsanford@scwa2.com.

Very Truly Yours,



JEANNE M. ZOLEZZI
Attorney-at-law

I. APPELLANT / CONCERNED PARTY

Solano County Water Agency
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 Vacaville, CA 95688

II. COVERED ACTION THAT IS SUBJECT OF CONCERN

Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Project)
 Certification Number: C202110
 Certification Date: 12/31/2021
 Certifying Agency: California Department of Water Resources
 3500 Industrial Blvd
 West Sacramento, CA 95691

III. SPECIFIC GROUNDS FOR APPEAL / CONCERN

The Project is not fully Consistent with the Delta Plan, for the Delta Plan Policies listed below. Additional explanation is provided in Section IV.

- G P1 (b) (2)
- G P1 (b) (4)
- ER P5
- DP P2

IV. STATEMENT OF FACTS

Delta Plan Section	Title	Language Summarized
G P1(b)(2)/Cal. Code Regs., tit. 23, § 5002 (b)(2)	Mitigation Measures	Covered actions not exempt from CEQA must include all applicable feasible mitigation measures adopted and incorporated into the Delta Plan or substitute mitigation measures the agency finds are equally or more effective.

DWR’s Certification of Consistency for the Project states that the covered action is consistent with this regulatory policy because it includes all applicable feasible mitigation measures adopted and incorporated into the Delta Plan, or substitute measures DWR finds equally or more effective. DWR’s conclusion is implausible when many of the major adverse impacts have not been adequately evaluated or measured. In addition, many of the so-called mitigation measures have been exempt from public scrutiny and meaningful comparison to Delta Plan mitigation measures because in the EIR, DWR made significant changes to at least 39 of the Project’s mitigation measures and added 15 new measures not included or discussed in the draft EIR. None of these changes or new measures were subject to a noticed comment period.

By way of example, in their comments on the draft EIR the Council pointed to a potential deficiency in DWR’s proposed mitigation to address invasive nonnative species. Specifically, the draft EIR describes how the project will address invasive nonnative species, including proposed mitigation measures to reduce potential invasive species to a less than significant level. DSC expressed concern the proposed measure may not be equally or more effective than related Delta Plan mitigation measures as Delta Plan Mitigation

Monitoring and Reporting Program 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. As demonstrated by DSC’s comments and the fact that the Project provides open water space and emergent marsh available for non-native species to proliferate, this Project likely falls within the Delta Plan mitigation requirement that an invasive species management plan be adopted. However, DWR summarily dismissed these concerns in the final EIR and did not elect to adopt a dedicated invasive species management plan. **Therefore, the Project is not consistent with this Delta Plan Section.**

Delta Plan Section	Title	Language Summarized
G P1(b)(4)/Cal. Code Regs., tit. 23, § 5002 (b)(4)	Consistency with the Delta Plan; Adaptive Management	Ecosystem restoration must include adequate provisions to assure continued implementation of adaptive management. This requirement may be satisfied through either: A. An adaptive management plan B. Documentation of access to adequate resources and delineated authority by the entity responsible for the implementation of the proposed adaptive management process.

As part of the Consistency with the Delta Plan, projects must have adequate provisions to assure continued implementation of adaptive management. In addition, there must be documentation of access to adequate resources and delineated authority by the entity responsible for the implementation of the proposed adaptive management process.

The Project does not include adequate resources, on-the-ground staff, clearly delineated authority, or long-term accountability to ensure for continued implementation of adaptive management of the Project. For example, Table 11 in the Adaptive Management and Monitoring Plan (AMMP) shows major commitments made by both DWR and California Fish and Wildlife (CFW), however, there is a lack of detail on future funding commitments for future Operation and Maintenance (O&M) of the Project, implementation of the AMMP, and third-party verification. In addition, leaving implementation and oversight to overtaxed resource agencies like DWR and CFW is not a guarantee of success, as shown by the CFW Lindsey Slough Restoration Project, discussed below. The Agency is extremely concerned that the Project will become a “build-it and forget-it” project, lacking in adequate resources to conduct the AMMP and required future and long-term O&M activities.

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, which they would be responsible for maintaining after Project completion. The Project will reduce revenues for RD 2098 to operate and maintain the Duck Slough Setback Levee in perpetuity. 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. **Without adequate assurances, the Project cannot be deemed consistent with this Delta Plan Section.**

Delta Plan Section	Title	Language Summarized
ER P5/Cal. Code Regs., tit. 23, § 5009	Avoid Introducing / Improving Habitats for Invasive Nonnative Species	The potential for new introductions of or improved habitat conditions for nonnative invasive species, striped bass, or bass must be fully considered, avoided, or mitigated in a way that protects the ecosystem.

DWR’s Certification of Consistency for the Project states that this provision is not applicable because the Project would not result in a reasonable probability of introducing or improving habitat for nonnative invasive species. However, 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.

The Project does not detail which agency (if any) will manage the Project for invasive nonnative species. Table 11 of the AMMP indicates that DWR will be responsible for the management and monitoring responsibilities of the Project with oversight and some monitoring from CFW. However, 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. Similar to DWR and CFW, DBW is significantly taxed in managing invasive nonnative species throughout the entire Delta. Practically, DBW will not have the dedicated on-the-ground resources and staffing, to effectively manage invasive nonnative plants species at the Lookout Slough Project.

Additionally, over the last 10 years, invasive nonnative plant species including Water Hyacinth, Brazilian Waterweed, and others have aggressively moved into the Complex. CFW’s Lindsey Slough Restoration Project, is one of the most recent restoration projects in the Complex, and has been aggressively populated by both Water Hyacinth and Brazilian Waterweed as shown in *Figure 1*. Without a funding mechanism, dedicated on-the-ground personnel assigned to the project, and no-third party oversight, the Project will reach a similar fate as other similar restoration efforts, and will improve and support habitat for invasive nonnative species, conflicting with the Delta Plan and Policy ER P5.

A real time example of the proliferation of such invasive nonnative plant species exists in the observance of a significant drop in Dissolved Oxygen in the Yolo Bypass Toe Drain which in late 2021 led to the largest known fish kill on Putah Creek due to asphyxiation.¹ The Yolo Bypass Toe Drain is a critical and important multi-use facility to many agencies and landowners. The Agency believes, and field observations by both the Agency and UC Davis suggest, the observed low Dissolved Oxygen levels are the result of existing restoration projects upstream which provide ample habitat for invasive nonnative aquatic vegetation which contributes to the consumption of oxygen (See *Figure 2*).

Low levels of Dissolved Oxygen, which continued along almost 13-miles of the Toe Drain, ending just north of Liberty Island, prevents any further fish passage into Putah Creek and other Yolo Bypass tributaries. As such, the Agency finds it irresponsible that DWR would move forward in approving a project identical to those which already render moot the intended benefits of restoration projects due to DWR’s lack of mitigation and monitoring. Further, the presence of non-native species would impair the ability of the Project to increase the population of native species and increase the cost of the District’s maintenance activities, if any. The draft EIR and Certification of Consistency are silent on these impacts. **Without assurances that this serious issue will be addressed, a consistency determination simply cannot be made.**

¹ <https://www.davisenterprise.com/news/local/scores-of-salmon-found-dead-in-putah-creek/>.

Delta Plan Section	Title	Language Summarized
DP P2/Cal. Code Regs., tit. 23, § 5011	Respecting Local Land Use When Siting Water, Flood, or Restoring Habitats	Projects must be sited to avoid or reduce conflicts with existing uses, general plans, spheres of influence when feasible, considering comments from local agencies, and the Delta Protection Commission.

The Project does not appropriately respect local land use including existing municipal and agricultural water supply intakes within the Complex. The Agency 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, as shown in *Figure 3*.

DWR’s Certification of Consistency states the Project is consistent with this section. However, the Certification fails to address impacts identified by the Agency to municipal intakes, an existing local land use. The proposed goal of the Lookout Slough Project is to enhance ecological processes, species diversity, and habitat heterogeneity through the creation of subtidal, intertidal, and floodplain habitat in the Project area. This goal directly conflicts with Agency operation of the largest municipal diversion near the Project site, a major source of drinking water for communities served by the North Bay Aqueduct.

In response to these concerns, the Certification states that the modeled effects of the Project’s restoration activities on Delta drinking water intakes are expected to include limited increases and decreases in salinity relative to base conditions, predicted from the dry and below normal model years. However, concerns expressed by the Agency do not relate to an increase in salinity, but rather on the threat of an introduction of new and increased fish species to the continued operation of municipal intakes.

Moreover, the Certification dismisses any potential effects of the Project on existing agricultural intakes as already “currently located in critical habitat for several listed fish species,” and thus already subject to compliance with the state and federal endangered species act.” Indeed, agricultural and municipal intakes alike in the Project area already have to comply with state and federal endangered species act requirements. However, the expected and desired increase in the presence of listed species in the Complex resulting from the numerous restoration projects being pursued by DWR makes continued operation of such intakes infeasible.

V. PROPOSED SOLUTIONS

It is clear that the Project is inconsistent with the Delta Plan. Nevertheless, the Agency believes the Project can be made consistent with the Delta Plan and meet co-equal goals if it fully evaluates and mitigates serious adverse impacts to neighboring water users and landowners. This can be done in conjunction with projects such as the North Bay Aqueduct Alternative Intake Project (NBA AIP). The NBA AIP is also a listed recommendation (WQ R5) and meets all of the recommended policies below that are part of the Delta Plan. However, at a cost of \$600 million, the NBA AIP is not locally cost-feasible amongst the 500,000 residents in Napa and Solano counties. Additionally, the NBA represents only 2% of the entire SWP, and neither Napa nor Solano County are participants in the CVP. However, the Complex and Suisun Marsh regions are providing the majority of ecosystem benefit primarily for the South Delta CVP and SWP operations. To achieve co-equal goals, there is a synergistic opportunity for State, Federal, and local agencies to partner and provide supplemental funding for the design and construction of the NBA AIP while also furthering the goals of habitat restoration in the Complex. Lastly, the Agency is also the landowner of 1,600-acres within the Priority Habitat Restoration Area of the Complex and is interested in partnering with other agencies to fully meet co-equal goals in the Delta through both improved water conveyance such as the

NBA AIP, protection of agricultural intakes such as Reclamation District 2068, as well as additional habitat restoration within the Complex.

List of Delta Plan Policies & Recommendations that Align with the NBA AIP

Policy #	Main Title
WR R12a	Promote Options for New and Improved Infrastructure Related to Water Conveyance
WR R12b	Evaluate, Design, and Implement New or Improved Conveyance or Diversion Facilities in the Delta
WR R12c	Improve or Modify Through-Delta Conveyance
WR R12h	Operate Delta Water Management Facilities Using Adaptive Management
ER P2	Restore Habitats at Appropriate Elevations
ER P3	Protect Opportunities to Restore Habitat
ER R2	Prioritize and Implement Projects that Restore Delta Habitat
ER P5	Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species
DP P2	Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats
WQ R1	Protect Beneficial Uses
WQ R5	Complete North Bay Aqueduct Alternative Intake Project



Figure 1: DFW Lindsey Slough Restoration Project (Photo taken 11/8/2018, Water Hyacinth in Foreground)

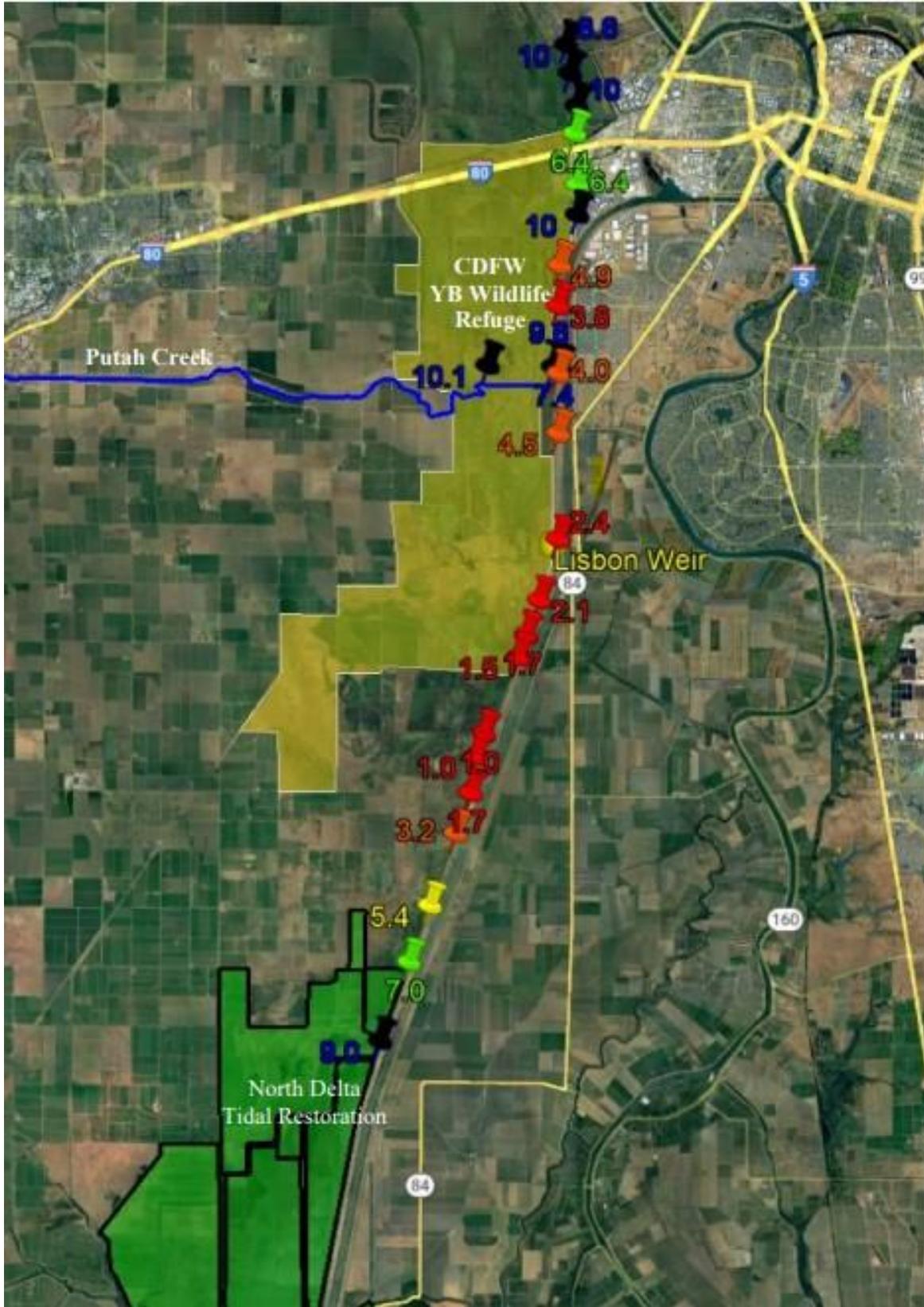


Figure 2: DO in the Toe Drain from I-80 down to the Stairstep Region (11/23 & 12/3). DO sag for over 12-miles.

