

March 23, 2021

**VIA ELECTRONIC MAIL**

Delta Stewardship Council  
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Re: Lookout Slough Tidal Habitat Restoration & Flood Improvement Project C20215  
Reclamation District 2060 & 2068's Appeal of Delta Steward Council Certification

Dear Chair Tatayon and Members of the Delta Stewardship Council:

This is an appeal of the California Department of Water Resource's ("DWR") Certificate of Consistency ("COC") for the proposed Lookout Slough Tidal Habitat Restoration and Flood Improvement Project ("Project"), certificate ID C20215. This appeal is filed on behalf of Reclamation District 2060 ("RD 2060") and Reclamation District 2068 ("RD 2068," or collectively "Appellants"). This appeal challenges DWR's consistency determinations concerning Policies GP 1(b)(1) (23 CCR Section 5002(b)(1)): Coequal Goals, GP 1(b)(2) (23 CCR Section 5002(b)(2)): Mitigation Measures, GP 1(b)(3) (23 CCR Section 5002(b)(3)): Best Available Science, GP 1(b)(4) (23 CCR Section 5002(b)(4)): Adaptive Management; ER P5 (23 CCR Section 5009): Invasive Nonnative Species, DP P2 (23 CCR Section 5011): Respect Local Land Use, and RR P1 (23 CCR Section 5012): Prioritization of State Investments in Delta Levees and Risk Reduction.

Under Delta Plan Policy GP 1(b)(1) (23 CCR Section 5002(b)(1)), "[i]f the proposed action cannot achieve full consistency with all relevant regulatory policies contained in Article 3, an agency may make an overriding determination that the action is nevertheless consistent with the Delta Plan's co-equal goals." DWR cannot make such a finding here. 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. DWR's consistency determination is not supported by substantial evidence, because it fails to analyze the impacts to water quality and to water users in the Delta.

First, DWR has not adequately analyzed adverse Project impacts to water quality, including the secondary impacts to agricultural and municipal diverters, who will be forced to address this degradation. The Project will likely result in 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. DWR’s Environmental Impact Report for the Project (“EIR”), includes a brief mention of salinity issues, but lacks sufficient detail to demonstrate that the Project will adequately protect the municipal and agricultural beneficial uses in the Delta. DWR provides no technical analyses, modeling results, or data that would allow agencies to understand the likely carbon, salinity, and bromide impacts.

Second, DWR failed to address adverse impacts to critical agricultural and municipal water diversions, including those of Appellants and landowners within their districts. The Project aims to increase populations of endangered species, which, if successful, would have adverse secondary impacts on water diverters. For example, the presence of such species at the location of agricultural diversions impedes Appellants’ ability to divert, and could ultimately require costly (and potentially infeasible) upgrades to infrastructure. DWR did not disclose this potential adverse impact, nor attempt to mitigate its impacts on existing agricultural and municipal users in the Delta, specifically within the Cache Slough Complex (“CSC”), including Solano County Water Agency, Napa County Flood Control and Water Conservation District, City of Vallejo, and Reclamation District 2068.

In summary, because DWR failed to address likely significant impacts to water quality and significant impacts to agricultural and municipal diverters, DWR’s ostensible finding that the Project is consistent with the Delta Plan’s co-equal goals is not supported by substantial evidence.

## **I. GP 1(b)(2) (23 CCR Section 5002(b)(2)): Mitigation Measures**

GP 1(b)(2) requires that “[c]overed actions not exempt from CEQA must include all applicable feasible mitigation measures adopted and incorporated into the Delta Plan. . . or substitute mitigation measures that the agency that files the certification of consistency finds are equally or more effective.” The Lookout Slough EIR includes mitigation measures that apply to covered actions through G P1(b)(2) (Cal. Code Regs., tit. 23, § 5002). These mitigation measures are meant to ensure covered actions conform to the Delta Plan. But DWR has failed to meet its burden to demonstrate the Project’s mitigation measures are equal to or more effective than the Delta Plan’s mitigation measures. DWR has failed to demonstrate consistency with specific mitigation measures as detailed below.

DWR’s effort to implement adequate mitigation has been flawed throughout Project review. The Draft EIR did not properly evaluate significant adverse Project impacts and failed to include effective mitigation. In an attempt to rectify problems with the mitigation in the Draft EIR, DWR made significant changes to at least 39 of the Project’s mitigation measures and added 15 entirely new measures. Examples of mitigation measures that are not demonstrated to be equally effective

### *1. MM 7-1 Agriculture Resources*

Mitigation Measure 7-1 addresses agricultural resources and requires:

- (1) Minimization of the loss of high value farm land (7-1.1);

- (2) Reconnecting utilities or infrastructure that serve agricultural uses if these are disturbed by project construction. If a project temporarily or permanently cuts off roadway access or removes utility lines, irrigation features, or other infrastructure, the project proponents shall be responsible for restoring access as necessary to ensure that economically viable farming operations are not interrupted (7-1.4);
- (3) Minimizing introduction of invasive species that could affect adjacent agricultural land (7-1.5); and
- (4) Establishing buffer areas between projects and adjacent agricultural land that are sufficient to protect and maintain land capability and agricultural operation flexibility (7-1.6).

DWR has failed to establish that its chosen mitigation strategy is equally effective as or more effective than MM 7-1. MM AG-1a is inadequate because it does not include specific criteria or a standard of performance. MM AG-1a states that DWR will install irrigation infrastructure to convert “all or part” of a specific property to Prime Farmland. This mitigation measure is vague and does not commit DWR to a measurable criteria or performance standard. DWR also does not analyze or mitigate the impacts associated with conversion of privately-owned farmland to habitat uses, as required by MM 7-1.

DWR also fails to show consistency with MM 7-1 by mitigating the Project’s significant impacts regarding utilities. The COC does not address 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.

The Project will inundate a large number of acres of lands that may have active or inactive buried gas lines and above ground power lines. Maintenance or replacement of these lines will be impaired or impossible if they are under water. A power line adjacent to and south of Liberty Island road, which may have to be removed as part of the Project, provides electricity to the District’s Pump Station #5. This plant serves a critical public safety purpose during flood and high rainfall events. Adequate access for routine and emergency maintenance and repair to the plant and its power supply is essential for proper flood management within Appellants’ districts. Further, any future power or gas transmission needs by local landowners in the region will be limited due to the Project area being covered in water. The COC does not mention how impacts to water quality and water levels could reduce the ability for local agricultural entities to meet their water needs, and potentially reduce agricultural productivity in the area.

Additionally, the Project’s proposed water diversions will impact agricultural use through increases in populations of protected species in the Project area and restrictions on Appellants’ use of pesticides, herbicides, fertilizers, and other agricultural chemicals. Appellants could experience lowered surface water elevations as well as regulatory restrictions and increased costs associated with a greater presence of endangered fish species in the vicinity of intakes maintained by Appellants. DWR has failed to address or mitigate this impact to agricultural operations in its COC. DWR has also failed to provide mitigation for decreased yield due to an increase in avian populations that feed on Appellants’ crops.

The Project also proposes to create habitat, which will be suitable for agriculture pests including waterfowl and mosquitos. Appellants most abundant crop is irrigated pasture and increased populations of geese may decimate grass that is being grown for livestock if there is proper roosting habitat nearby, which the Project will be creating.<sup>1</sup> Mosquitoes also live and breed on the surface of standing water and the habitat created by the Project will increase the number of mosquitos, which are known carriers of viruses including West Nile, western equine encephalomyelitis, and St. Louis encephalitis virus that can be transmitted to humans and other animals.

Finally, DWR fails to mitigate impacts on emergency ingress/egress from construction and abandonment of Liberty Island Road, the sole access to a RD 2068 pumping plant. The Project fails 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.

## 2. *MM 4-1, 4-2, and 4-3 Biological Resources*

Delta Plan Mitigation Measures 4-1, 4-2, and 4-3 addresses biological resources and require:

- (1) Avoidance, minimization, and compensation for reduction in area and/or habitat quality of sensitive natural communities (4-1.1);
- (2) Implementing advanced mitigation planning for ecosystem restoration prior to construction (4-1.2);
- (3) Developing and implementing an invasive species management plan for any project where construction or operation could lead to introduction or facilitation of invasive species establishment. Notably, the plan shall ensure that invasive plant species and populations are kept below preconstruction abundance and distribution levels (4-1.6);
- (4) Establishing buffers around special-status species habitats to exclude effects of construction activities (4-2.4); and
- (5) Restoring enhance habitats for wildlife species that would be lost (4-3.3).

DWR has failed to establish that the Project includes mitigation measures equal to or more effective than MM 4-1, 4-2, and 4-3. The mitigation measures, including BIO-1, BIO-4, and BIO-5G are inadequate to mitigate the Project's significant impacts to biological resources. The Project fails to consider operational impacts where there are entrainment hazards to endangered fish species. Nor does DWR propose feasible mitigation for existing water diversion facilities. The Project's mitigation of permanent impacts to Western Pond Turtle nesting habitat is inadequate and the Project fails to mitigate water quality impacts associated with invasive aquatic plants, which negatively impact fish species such as Delta Smelt and Chinook salmon.<sup>2</sup>

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<sup>1</sup> <https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1045&context=icwdmbirdcontrol>

<sup>2</sup> <https://www.kcet.org/redefine/5-invasive-plants-currently-messing-up-californias-delta>;

DSC itself expressed concern regarding DWR’s proposed mitigation to address invasive species. Measure 4-1 requires development and implementation of an invasive species management **plan** for any project where construction or operation could lead to introduction or facilitation of invasive species establishment. This Project requires such a plan, but DWR has not prepared one.

3. *MM 5-1, 5-2, 5-4, and 5-5 Delta Flood Risk*

Delta Plan Mitigation Measures 5-1, 5-2, 5-4, and 5-5 address Delta flood risks and require:

- (1) Preparation of a drainage or hydrology and hydraulic study, in accordance with applicable standards of local reclamation districts, that would assess the need and provide a basis for the design of drainage-related mitigations, such as new onsite drainage systems or new cross drainage facilities (5-1.1, 5.2-1, 5.4-1 5-5.1);
- (2) Installation of setback levees or bypass channels to maintain channel capacity and to mitigate hydraulic impacts (5-1.5);
- (3) For areas that would be flooded as a result of the project, or where existing flooding would be increased in magnitude, frequency, or duration, purchasing a flowage easement and/or property at the fair-market value (5-1.9);
- (4) Performing a seepage and stability analyses that would assess the need and act as a basis for design of other seepage and stability related mitigations, such as cutoff walls, adjacent levees, setback levees, berms, and subdrainage features (5-4.8); and
- (5) Constructing new evacuation roads and access roads, as necessary (5-4.14).

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.

The COC 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. This includes the failure 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.

In its COC, DWR states that “[o]ff-site levees across Cache and Hass Sloughs would. . . not be at risk for underseepage.” But the Project will set back the Yolo Bypass Levee from the

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Tobias, V.D., Conrad, J.L., Mahardja, B. et al. Biol Invasions (2019) 21: 3479.  
<https://doi.org/10.1007/s10530-019-02061-2> (citing Khanna et al. 2012).

constructed segment of Shag Slough and breach a section of the Project Levee on Cache Slough. This activity 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. The inundation of currently levee protected lands of RD 2098 would subject the remaining channel banks and levees to increased wave fetch and erosion.

Additionally, the Project fails to mitigate its impacts to the local and regional flood plains as well as to the FEMA 100-year flood plain (i.e., increase base flood elevations). The Project fails to mitigate its impacts of additional stress on flood-control infrastructure, such as hydraulic-shear stresses that have potential to cause erosion. The EIR's description of existing hydrology is inadequate and/or inaccurate, leading to this inadequate mitigation.

Finally, DWR states in its COC that MM 5-1, subsection 9, which addresses areas that would be flooded as part of the Project is not applicable. But the Project will in fact flood approximately two-thirds of RD 2098. Because reclamation districts are funded by landowner assessments and have to adhere to the Proposition 218 requirements, the operations and maintenance costs of the remaining RD 2098 levees will be spread over fewer acres. In addition, the planned breach will make maintaining the remnant levee south of the breach difficult and more expensive, because equipment will not have access from land and must be barged. Currently, RD 2098 has minimal funding due to the limited ability to generate adequate assessments from low profit land uses. Any reduction in the size of RD 2098 will make it more difficult to remain solvent. As a Reclamation District that shares levees with RD 2098 as part of a hydrologic basin, this is very concerning.

#### 4. *MM 3-1 Water Resources*

Delta Plan Mitigation Measure 3-1 requires:

- (1) Mitigation of sediment contaminant bioavailability impacts through minimization of methylmercury production and/or maximization of contaminant degradation before discharge of water (3-1.4);
- (2) Apply other best management practices ("BMPs") as determined necessary by the regulating entity (city, county) (3.1-2); and
- (3) Apply BMPs to avoid or reduce temporary increases in suspended sediment. Turbidity shall be monitored up- and downstream of construction sites as a measure of impact (3-1.5).

DWR's COC references MM HYDRO-1 as consistent with MM 3-1, but DWR's mitigation measure simply states that the contractor in charge of the Project will obtain a NPDES permit, thereby deferring analysis of BMPs. This 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. In particular, altering the tidal flux by breaching levees and changing tidal conditions has the potential to impair water quality near the District's point of diversion due to changes in Cache Slough salinities.<sup>3</sup>

5. *MM 14-3 Hazards and Hazardous Materials*

Delta Plan Mitigation Measure 14-3.1 requires avoidance of ponding in tidal marsh habitat or in areas within the waterside of setback levees; and designing ecosystem restoration areas, waterfowl hunting areas, setback levees, parks, canals, and surface water storage facilities to minimize standing water, or the use of other methods such as mosquito fish to reduce mosquito breeding.

In its COC, DWR states that the Project would result in a decrease in suitable mosquito breeding habitat relative to current conditions through the creation of open water channels subject to tidal circulation, increase in water surface turbidity, and creation of more favorable habitat for mosquito predators. But as discussed above, the Project also proposes to create habitat, which will be suitable for agriculture pests including waterfowl and mosquitos. Mosquitoes also live and breed on the surface of standing water and the habitat created by the Project will increase the number of mosquitos, which are known carriers of viruses including West Nile, western equine encephalomyelitis, and St. Louis encephalitis virus that can be transmitted to humans and other animals.

In summary, DWR fails to provide substantial evidence that Project mitigation is equal to or as effective as the correlating mitigation measures in the Delta Plan; accordingly, the COC fails to demonstrate consistency with this policy.

**II. GP 1(b)(3) (23 CCR Section 5002(b)(3)): Best Available Science**

GP 1(b)(3) requires that "all covered actions must document use of best available science." The COC fails to demonstrate that the Project is consistent with this policy. As discussed above, the COC fails to adequately address potential degradation of water quality and impacts to municipal and agricultural diverters. 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. Accordingly, DWR did not use best available science, and the COC fails to demonstrate consistency with this policy.

**III. GP 1(b)(4) (23 CCR Section 5002(b)(4)): Adaptive Management**

GP 1(b)(4) requires that "[e]cosystem restoration and water management covered actions must include adequate provisions, appropriate to the scope of the covered action, to assure continued implementation of adaptive management. This requirement shall be satisfied through both of the following: (A) An adaptive management plan that describes the approach to be taken consistent with the adaptive management framework in Appendix 1B; and (B) Documentation of

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<sup>3</sup> Davis, S.N., J.T. Fabryka-Martin, et al. (2004). "Variations of bromide in potable ground water in the United States." *Ground Water* 42(6): 902-909.  
<http://onlinelibrary.wiley.com/doi/10.1111/j.1745-6584.2004.t01-8-.x/abstract>

access to adequate resources and delineated authority by the entity responsible for the implementation of the proposed adaptive management process.”

The Project’s Adaptive Management and Monitoring Plan (“AMMP”) is inconsistent with the Delta Plan’s requirement to provide for continued adaptive management 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. Breaches in the RD 2098 Cache and Haas Slough levee should be designed to confine the opening by hardening the extents of the levee and base of the breach with appropriate revetment or structural components. Land-based access over the opening should be considered to allow OMRR&R of the Cache and Haas Slough levee using conventional equipment south of the breach location. The RD 2098 Cache and Haas Slough levee should remain a feature of the Sacramento River Flood Control Project, and an entity with a dedicated funding source needs to be identified to perform the OMRR&R of this feature. It is not sufficient to say the state will perform OMRR&R without identifying a reliable source of funding.

Accordingly, the COC does not include substantial evidence to demonstrate that the Project is consistent with this policy.

**IV. ER P5 (23 CCR Section 5009): Avoid Introductions of and Habitat for Invasive Nonnative Species**

ER P5 requires that “[t]he 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.”

Given the narrow levee breaches proposed along the eastern edge of the Project site, careful consideration of tidal dynamics relative to habitat conditions for invasive nonnative species on the Project site is warranted.

DWR indicated in its COC that “[t]his policy is not applicable because the Project would not result in a reasonable probability of introducing, or improving habitat conditions for, nonnative invasive species.”

However, as discussed above in regards to both agriculture and mitigation measures, the Project fails to analyze or mitigate introduction of invasive species and DWR’s AMMP is inconsistent with the Delta Plan’s requirement to provide for continued adaptive management because it fails to identify a reliable source of funding to perform OMRR&R of the Cache and Haas Slough levee. Accordingly, the COC fails to demonstrate consistency with this policy.

**V. DP P2 (23 CCR Section 5011): Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats**

DP P2 requires that “[w]ater 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.”

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.

The Project fails to adequately discuss inconsistencies with such plans including, but not limited to, the Delta Plan, the Solano County General Plan, and the Solano County Climate Action Plan. 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; how and where the Project will dispose of huge volumes of excavated material; 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.

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 such as the actions identified in Conservation Measure 21 (CM 21) of the Delta Plan. The CM 21 actions include providing state funding to landowners to install fish screens, consolidate diversions, relocate diversions, voluntarily alter diversion operations, and remove diversions. Landowners who participated in the program receive full funding to implement the selected actions and would be provided incidental take authorization associated with their ongoing water diversions. DWR has not addressed any such measures. Accordingly, the COC fails to demonstrate consistency with this Policy.

**VI. RR P1 (23 CCR Section 5012): Prioritization of State Investments in Delta Levees and Risk Reduction**

The Project aims to “provide additional flood storage and conveyance within the Yolo Bypass to reduce the chance of catastrophic flooding and protect existing nearby infrastructure.” The EIR discusses some issues related to flood risk, such as tidal dampening, wave run-up reductions, benefits of emergent marsh vegetation, benefits of the PG&E access roads in reducing waves, roughness coefficients, etc. Yolo Bypass levee management requires (a) ongoing maintenance and (b) immediate repairs during and after flood events. Despite raising these issues in the COC, DWR provides no details regarding how any necessary measures will be funded or implemented. This lack of certainty with regard to flood control maintenance is of significant concern to Appellants, who will be directly impacted.

DWR has failed to set forth a detailed plan for the provision of operation and maintenance funding, capital funding, and on-site personnel to ensure adequate maintenance of facilities and management of flood risk. Accordingly, DWR cannot demonstrate consistency with this policy.

**VII. Conclusion**

The Project as currently designed is inconsistent with the Delta Stewardship Council's adopted regulatory policies, yet alternatives are available that could make the Project consistent. Granting this appeal will encourage DWR to seek design alternatives that are more consistent, or at the very least impose mitigation measures for the Project's indefinite operational impacts for water quality and critical habitat.

Sincerely,

DOWNEY BRAND LLP



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