

Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Dear Chair Tatayon and Members of the Delta Stewardship Council:

This is an appeal of the California Department of Water Resources (“DWR”) Certification of Consistency (“COC”) for the proposed Lookout Slough Tidal Habitat Restoration And Flood Improvement Project (“Project”), certificate ID C202110. This appeal is filed on behalf of Liberty Island Access (“LIA”). This appeal challenges DWR’s consistency determinations concerning Policies DP P2 (a): Respect Local Land Use, and G P1(b)(2): Mitigation Measures.

About Liberty Island Access

Liberty Island Access is a network of anglers, hunters and other outdoor enthusiasts who recreate at the California Department of Fish and Wildlife (“CDFW”) managed Liberty Island Ecological Reserve (“LIER”) and the nearby Shag Slough. LIA advocates for protecting public access to these lands and waters.

Overview

On July 16, 2021, the Project was remanded by the Council for failure to use Best Available Science in the planning process. Since then, DWR commissioned on-site studies of recreational use that plainly show the popularity and significance of recreation at LIER and Shag Slough. These studies observe and record the long-standing and growing trend of hundreds of unique recreational visitors a month. LIER and Shag Slough have been used for public recreation for decades. Unfortunately, despite DWR’s new studies showing that recreational use is far higher than originally estimated when they self-determined recreational use as “insignificant”, DWR has made no changes to the Project to reduce these impacts. In fact, the only relevant change DWR proposes is the closure of the new setback levees to *all* public access. It should be noted this is the complete opposite of the claim they made in July 2021 during the previous COC hearings (COC Attachment 1, pages 9, 12).

Nothing has truly changed. The proposed Project will still cost taxpayers over \$118 million dollars, and will eliminate the public’s rightful access to all land-based recreation at LIER and practically all of Shag Slough. The record shows this will impact the overwhelming majority of visitors. The Project still has two central failures which put it in contradiction with the Delta Plan. First, the Project conflicts with existing local land use. Second, the Project fails to consider or propose any mitigation measures for the loss of recreation facilities. For these reasons, DWR’s Project is inconsistent with the Delta Plan. This Council should not issue a Certification of Consistency.

Liberty Island Ecological Reserve and Shag Slough are important recreation areas

LIER and Shag Slough are important public outdoor recreation areas. CDFW's webpage for LIER lists fishing from boat or shore, waterfowl hunting, and wildlife viewing as recreation opportunities at the site. Shag Slough is fished for striped bass, catfish, largemouth bass, and other species. LIER and Shag Slough are some of the closest Delta recreation areas to population centers in Yolo and Solano Counties, and attract users from all over northern California. The north Delta region is generally underserved with respect to public recreation access (FEIR¹, pg 99). An indication of Shag Slough and LIER's popularity are the 1900 members of the Liberty Island Fishing group on Facebook. As Solano and Yolo Counties continue to grow (Exhibit A, B), recreation at LIER and Shag Slough will become even more important.

DWR's new on-site studies describe some of this recreation use, and demonstrate that it is substantial. Over the course of 82 days of camera-based vehicle counting, 2461 vehicles for recreational use were observed on Liberty Island Road ("LIR") adjacent to Shag Slough and LIER (COC Attachment 2, Table 6). While DWR did not share any information about the average number of recreational users per vehicle, LIA performed an on-site vehicle study in March 2021 (Exhibit C), and observed an average of 1.97 persons per vehicle. Using this estimate suggests approximately 4848 recreational visits over the survey period, or approximately 21,500 annual visits. This is substantially more than other recreational areas that DWR refers to, such as Colusa-Sacramento River State Recreation Area (7,006 annual visits), Bethany Reservoir (2,263 annual visits), or Delta Meadows (6,547 annual visits) (COC Attachment 1, pg 10).

In September, 10.8% of the visitors surveyed were first-time visitors, and in October the number jumped to 14.7% (COC Attachment 2E, Table 17). This suggests approximately 524-713 new recreational visitors were observed during the study period (based on 1.97 visitors per vehicle). DWR's study states that about 80% of visitors were participating in fishing (COC Attachment 1, pg 10), which suggests that about 419-570 first-time fishing users visited just during the survey period alone, or about 1865-2537 *new* fishing users a year. DWR's study observed that only 3.9% of vehicles were carrying watercraft, which suggests that the majority of fishing use is shoreline based (COC Attachment 2, Table 13). If we generously assume that DWR's study missed two watercraft for every one that was observed, that would suggest that 88% of fishing use was shoreline based, and that 1641-2233 new bank fishing users per year. This means the number of *new* bank fishing users per year is roughly 20 times more than the total of 80 bank fishing individuals that DWR based their assumption of insignificance on. By just counting first-time visitors alone, DWR's new study shows that their original estimate was off by at least an order of magnitude. If we include the regular and semi-regular visitors in the total number of unique visitors, these numbers climb even higher. DWR's new data in the record show that the original assumption of only 80 bank fishing individuals is completely invalid.

¹ Final Environmental Impact Report (FEIR)

In all likelihood, the numbers reported by DWR's survey are low. The studies did not consider night-time use of the site (COC Attachment 2, pg 19), which can be significant on weekend nights, especially during the spring and summer. Furthermore, use by anglers may be especially high when striped bass migrate through the Delta in spring and again in November, outside DWR's survey period. Despite these shortcomings, the new data still show that the level of recreational visitation is indeed at least an order of magnitude higher than originally estimated.

DWR's study shows that in Sept-Oct, 33-41% of visitors were fishing for food (COC Attachment 2E, Table 16), underscoring that a notable portion of the public use the site for reasons even more compelling than recreation alone. Removing public access for these individuals means interference with their food supply.

DWR's Project Fails to Respect Local Land Use

Project will increase conflicts with recreation, in violation of DP P2, rather than "avoid or reduce" them.

DWR clearly admits the obvious fact that the Project conflicts with recreation:

"Upon consideration of the full record, DWR confirms that Liberty Island Road, Shag Slough Bridge, and the LIER constitute existing recreational uses and that the Project would conflict with these existing recreational uses" (COC Attachment 1, pg 9)

DWR proposes to remove all pedestrian access to LIER, and all but 0.16 miles of bank fishing access to Shag Slough by breaching the levee underlying Liberty Island Road (COC Attachment 4, pg 6). It will also create a boat ramp. The boat ramp is designed for authorized agency use, but apparently can be utilized informally by the public who park alongside Liberty Island Road and walk around the ramp's locked gate.

Bank fishing occurs along approximately 7900 linear ft of Shag Slough accessed from Liberty Island Road, as well as another approximately 10,000 linear ft of public access to Shag Slough from LIER on the eastern side. As a result of the proposed Project, more than 90% of this public access for bank fishing will be permanently lost.

Currently, there are approximately 7900 linear ft of legal parking spots along the eastern side of Liberty Island Road used by the public when they access Shag Slough and LIER. This parking will be completely removed, and DWR does not propose building any replacement parking to mitigate for this loss, or take any responsibility to ensure replacement of parking that would be removed (COC Attachment 4, 2.1.3). Not only will there be less parking for recreational users, there will likely be increased demand for both recreation and parking from those drawn to the project's tidal channels and marsh and its new boat ramp. This will attract more users, especially those with trailers for transporting water craft, which require more space.

DWR has stated that users can park along the northern side of the remaining east-west portion of Liberty Island Road (COC Attachment 1, pg 15). This proposal will create new conflicts with landowners along the north side of Liberty Island Road. Forcing previously dispersed parking and recreation into a very concentrated area will not “*avoid or reduce conflicts with existing uses*” as DP P2 requires, but instead create new conflicts.

DWR has not attempted to reduce or mitigate impacts

The language of DP P2 expects mitigation when conflicts occur in the case where avoidance is not determined feasible:

“Measures to mitigate conflicts with adjacent uses may include, but are not limited to, buffers to prevent adverse effects on adjacent farmland.” (23 CA ADC § 5011)

The only measure proposed by DWR to reduce or mitigate the project’s impacts to recreation is to allow informal public use of its long-planned agency boat ramp. This ramp does not meet current public access standards for paddle craft launch ramps. DWR could easily have looked to analogous facilities in the Bay Area (Exhibit K), or the guidelines from the Division of Boating and Waterways of the National Park Service (Exhibit D), which suggest providing launch docks, ample parking, and accessible design. In the conversation transcript with CDFW, CDFW staff agree, and state “*the currently planned small turnout won’t handle the traffic that comes out there*”, and that “*the boat launch also won’t cut it*” (COC Attachment 3A, pg 5).

DWR implies that the agency boat ramp that will be informally accessible to the public is sufficient mitigation for the loss of recreation access at the site. However, their survey data show that boating makes up a very small percentage of the current recreation use. According to the DWR study, only 3.9% (96 of the 2461) of the vehicles observed were transporting watercraft of some kind (COC Attachment 2, Table 13). This suggests that greater than 95% of current users will gain no benefit from the boat ramp DWR proposes. This fact demonstrates that both a boat ramp as well as new waterways for boating are irrelevant and grossly insufficient as a means of mitigating recreation impacts.

Shoreline access for bank fishing under the proposed project would be decimated, with more than 90% of shoreline access permanently removed. Furthermore, the quality of the bank fishing remaining will be greatly diminished. Currently, users with limited mobility can park their vehicle along the levee near the spot they intend to fish. The proposed project requires them to walk a minimum of 528 ft, and likely more depending on how far along Liberty Island Road they have to park (COC Attachment 4, pg 9). Furthermore, the limited bank access will cause crowding issues and thus deteriorate the fishing experience quality. DWR agrees, and states that “*limited space can affect an angler’s ability to safely cast a line and/or avoid getting their line entangled with another angler’s fishing line.*” (COC Attachment 2, pg 13). DWR’s proposal for massively reduced bank fishing access cannot be considered mitigation in any form.

From its inception, DWR has proposed no public use on the project site. They now claim that providing pedestrian access to the levee tops is infeasible because it may impact Giant Garter

Snakes (GGS), thus violating their Incidental Take Permit (ITP). Subsequently, they never considered ways to integrate recreational access with GGS habitat when they applied for an ITP from CDFW early in the design cycle, even though the record shows that recreation and GGS habitat do not need to be mutually exclusive. With proper design, public use is being provided at many public habitat areas within Giant Garter Snake's range. For example, Exhibit E highlights the range of the GGS, while Exhibits F1 through F6 show vehicular roadways and pedestrian trails on state and federally-managed wildlife areas that exist within the species range. If DWR pursued an amendment to their ITP to include limited public access along levee areas, precedent shows that some level of recreational access is feasible. DWR simply did not look to such examples to assess how it could mitigate the loss of recreation at LIER and Shag Slough.

DWR has maintained a consistent message of disinterest in mitigating or avoiding recreation impacts. On July 23 2021, just one week after the DSC made its determination for the first remand of the Project, DWR Deputy Director Kristopher Tjernell stated to the Central Valley Flood Control Board that *"We don't expect the project footprint to change at all during this [remand] process"* (Exhibit G). This statement was made well before the new recreation studies began on August 2, 2021. This lack of interest at the leadership level makes it clear that the issue of recreational impacts and conforming with the Delta Plan are not taken seriously by the agency.

DWR has had many years to work out recreational access issues, and could have easily incorporated increased public access ideas like those proposed by CDFW and LIA if they were serious about avoiding or mitigating recreational impacts. Instead, they relied on census-based estimates of recreational use that their Subject Matter Experts (SMEs) have unanimously stated was a faulty estimation methodology (COC Attachment 2, pg 16). Because they relied on faulty science, they never tried to avoid or mitigate the impacts of the project on recreation.

Mitigation measure 18.1 is applicable

G P1(b)(2)/Cal. Code Regs., tit. 23, § 5002, subd. (b)(2) provides that:

"...covered actions not exempt from CEQA, must include all applicable feasible mitigation measures adopted and incorporated into the Delta Plan"

There are a number of mitigation measures incorporated into the Delta Plan, including one specifically pertinent to recreation ([mitigation measure 18.1](#)):

"If the substantial impairment, degradation, or elimination of recreational facilities occurs, replacement facilities of equal capacity and quality with ongoing funding provided for maintenance of these facilities."

DWR incorrectly claims the project is exempt from this regulatory policy because the Project's EIR erroneously claims the impacts on recreation are insignificant, and thus no mitigation was

proposed. This conclusion of insignificance follows from the assumption that approximately 200 fishing members of the public compose the full extent of relevant recreational users, and that only 80 (the portion who shoreline fish) would be meaningfully impacted by the Project (DEIR², pg IV. J-6). This assumption could not be further from the truth. This COC now demonstrates that DWR grossly underestimated recreational use because its EIR consultants did not apply the best available science in the EIR's recreation estimates. This mediocre work should not now excuse DWR from mitigating the project's damage to recreation.

In addition, the plain language of G P1(b)(2) is clear. An exemption from the Delta Plan's mitigation measures applies only if *the project* is exempt from CEQA (emphasis added). This project is not exempt from CEQA. Nothing in G P1(b)(2) or in the Delta Plan mitigation monitoring and reporting program presented in the plan's Appendix O suggests an agency can exempt itself from a mitigation measure by claiming an impact is insignificant, especially when evidence in the record demonstrates otherwise. The original conclusion made in the EIR regarding significance is not supported by the data in the record, and thus cannot be relied upon for determining the applicability of mitigation measures. Because the project is not exempt from CEQA, mitigation measure 18.1 applies.

Facilities are not just built/formal features

DWR has claimed that the project's impacts do not affect "facilities", and subsequently concludes that no mitigation is required. This assertion is incorrect. Although the Delta Plan glossary does not define "facility", the Oxford dictionary does: "a place, amenity, or piece of equipment provided for a particular purpose". LIER, Shag Slough, and Liberty Island Road are such places.

The record shows that the bank fishing access locations and LIER are considered recreational facilities. DWR claims that LIER and Shag Slough "offer comparable facilities and the ability to participate in the same (or similar) activities" when compared to other state recreation areas with shoreline fishing and hunting (COC Attachment 2, pg 10). Furthermore, DWR specifically lists informal bank fishing sites in the Delta with names like "The Patio", "The Dump Gate", and "Tennessee's Hole" as recreational facilities (DEIR Table IV.J-1, pg 368), and even uses those sites as examples in their original estimates of dispersion of recreational use. These sites have no built or formal features on them, but are simply unmanaged shoreline access areas. Furthermore, their table references the *2015 Inventory of Recreation Facilities in the Sacramento-San Joaquin Delta*, which specifically lists LIER as a "recreational facility" for fishing, hunting, and wildlife viewing (Exhibit H, pg 17). The pattern in the record is one that consistently identifies LIER and the informal bank fishing access along Shag Slough as recreational facilities.

Recreational facilities do not need to be built / man-made features. A public beach may be considered a recreational facility. For example, if the Project in question were permanently prohibiting pedestrian access to the sand / water access on a State Beach, a reasonable person

² Draft Environmental Impact Report (DEIR)

would conclude that a “*substantial impairment*” of a recreational facility was occurring, even if built features like bathrooms and parking lots remained open. Built features are not a prerequisite for determining what can be considered a recreational facility. In fact, most built features like bathrooms, boat launches, and water fountains are secondary in providing functions for recreation. Protecting secondary built features like bathrooms while allowing for the compromise of primary features like shoreline access, etc is unreasonable. As a result, a reasonable person would consider LIER and the Shag Slough bank fishing access recreational facilities.

Recreational mitigation is feasible

On-site options

DWR implies that CDFW is against recreational use along the levees because of conflicts with GGS habitat, and will not change the ITP. Conversations with CDFW staff have indicated the more nuanced reality, which is that CDFW must issue an amended ITP for GGS if the Project is meant to allow public access along the levees. In the conversation transcript with CDFW (COC Attachment 3A, pg 5-6), CDFW staff even suggest removing the northernmost channel cut to allow expanded bank fishing access. DWR has not taken initiative to explore options beyond the few that LIA suggested, or the ideas shared with them by CDFW, such as foregoing the northernmost channel / levee cut proposed in the Project.

Off-site options

Mitigation measure 18.2 dictates that:

“Where impacts to existing facilities are unavoidable, compensate for impacts through mitigation, restoration, or preservation off-site or creation of additional permanent new replacement facilities.”

DWR has listed several mitigation options, all of which were presented to them by LIA (COC Attachment 1, pg 19). These include using bridges or culverts to preserve access to the Shag Slough Bridge and LIER, or creating new public access along the newly created levees. DWR has unfortunately limited their exploration to these mitigation options, and have provided no explanation for why off-site mitigation measures are not feasible for the Project.

There are a number of off-site public access possibilities that have already been proposed in the Summary Report for the Delta Recreation Master Strategy (Exhibit I, pg 16). Unfortunately DWR has taken no efforts to evaluate any of these possibilities, and provide no comments on the feasibility of any kind of off-site mitigation. While the planning has already moved forward on improving recreation in the Cache Slough area, the funding for implementation is not present. DWR has a more than sufficient budget (over \$4.48 billion) to properly mitigate now for the losses that their proposed Project would incur on recreation access (Exhibit J, pg 1). This presents an opportunity for DWR to promote recreation in the region in a material way that might mitigate on-site loss of recreation access, especially for land-based activities like

shoreline fishing that are most significantly impacted, and are more financially accessible to disadvantaged communities. DWR unfortunately has not provided any evidence in the record for funding of any replacement off-site recreation access as mitigation.

LIA has demonstrated an openness to a creative and collaborative solution. We have met with DWR, EIP, DPC, Solano County, CDFW and other interested parties. Indeed, we proposed several possible solutions to DWR to preserve recreation access. It appears the only solutions DWR considered were proposed by LIA. It is not the responsibility of appellants to provide such solutions. Ultimately, the responsibility for providing mitigation plans for the Project belongs to DWR, not members of the public. DWR has all the resources of a large government agency to creatively come up with a mitigation solution for recreation access. DWR should have aggressively considered and researched a large number of possible mitigation options, including, but certainly not limited to, suggestions from LIA.

By not providing proper mitigation, the state of recreation in this region of the Delta would be taking an enormous step backwards. If the public loses access to areas they love and enjoy from ecological restoration projects like Lookout Slough, then a lack of mitigation for recreation puts public support for future projects in the Delta at risk.

Conclusion

DWR's Project, as currently designed, is inconsistent with the Council's adopted regulatory policies. The Project does not respect local land use, nor provide any mitigation measures for the near total loss of public access. The Project does not comply with basic Delta Plan policies.

While DWR has now taken basic steps to study recreation, the conclusions drawn are absolutely contrary to the results of their recent surveys. They have proposed no mitigation measures, and in fact reduce the access level they claimed earlier by completely closing the Project levees to the public. The proposed Project will have devastating impacts on thousands of recreational users.

Alternatives are available that could make the \$118 million dollar Project consistent. Our group once again met with DWR prior to submitting this appeal and attempted to offer tenable solutions. DWR was unwilling to implement our suggestions, or those of other agencies like CDFW. Our group recognizes and supports the importance of ecological restoration. However, it cannot come at the price of violating the Delta Plan and hurting thousands of citizens of this state who recreationally access Shag Slough and LIER. Simple changes would result in a Project that restores ecology, promotes public access and is consistent with the Delta Plan. As it stands, the current Project succeeds in only the first aim.

I urge the Council to grant this appeal and encourage DWR to seek design alternatives that are consistent with the Delta Plan, or at the very least impose mitigation measures for the Project's impacts on recreation and public access.

Very truly yours,

Taylor Dahlke

Liberty Island Access

www.libertyislandaccess.org