



July 20, 2022

Karla Nemeth, Director  
California Department of Water Resources  
1416 9th Street  
Sacramento, CA 95814

Chuck Bonham, Director  
California Department of Fish and Wildlife  
1416 9th Street  
Sacramento, CA 95814

**RE: Request that DWR and CDFW Rescind Any Funding from Proposition 1 of 2014 that is Proposed for Habitat Restoration Projects to Meet Existing Mitigation and Compliance Obligations, including the Lower Yolo Tidal Marsh Habitat Restoration Project**

Dear Director Nemeth and Director Bonham:

On behalf of the Natural Resources Defense Council, Sierra Club California, the Planning and Conservation League, Restore the Delta, San Francisco Baykeeper, California Sportfishing Protection Alliance, Pacific Coast Federation of Fishermen’s Associations, Institute for Fisheries Resources, and Defenders of Wildlife, we are writing to request that your agencies confirm that taxpayer funding from Proposition 1 of 2014 is not being used for habitat restoration projects that are intended to meet existing compliance and mitigation obligations of the State Water Project (“SWP”) and federal Central Valley Project (“CVP”), including as part of the Lower Yolo Ranch Restoration Project. We are writing because public documents that have been recently obtained pursuant to the California Public Records Act and Freedom of Information Act indicate that DWR has awarded millions of dollars of public taxpayer funding from Proposition 1 of 2014 for habitat restoration projects that are intended to meet existing mitigation and compliance obligations, as well as using Proposition 1 funding that was intended for statewide flood protection improvements for these mitigation projects. This appears to violate the letter and intent of Proposition 1, and we request that DWR rescind any Proposition 1 funding for the Lower Yolo Ranch Restoration Project and substitute funding provided by the contractors to the SWP and CVP.

Furthermore, based on these and other public records, it appears that state and federal agencies anticipate providing mitigation credits as “tidal marsh habitat” for lands that are more than 6.5 feet above sea level as part of the Lower Yolo Tidal Marsh Habitat Restoration Project.

However, state and local agency documents show that there generally is no tidal influence on lands at elevations above 6.5 feet above sea level in this part of the Delta, and therefore these lands are not “tidal” marsh, “tidal wetland,” or “intertidal” habitat and should not be credited towards meeting existing mitigation and compliance obligations relating to the operations of the CVP and SWP. We therefore request that your agencies refuse to certify mitigation credits of such uplands as tidal wetland habitat and provide a detailed accounting of the elevations of acreage that will be credited as part of this project.

Finally, we also request that DWR disclose whether and to what extent it has utilized taxpayer funding from Proposition 1 for any habitat restoration project that is intended to be credited towards existing mitigation and compliance obligations, including projects in the Yolo Bypass.

Taken together, these public documents raise significant concerns regarding the propriety of DWR’s and CDFW’s habitat restoration work. These documents also reinforce the importance of transparent public processes, like those conducted by the California Wildlife Conservation Board, to oversee taxpayer spending on habitat restoration projects and ensure that public dollars are not used to subsidize existing mitigation and compliance obligations.

**I. Public Documents Demonstrate that DWR is Misusing Proposition 1 Monies, Subverting Public Funding for Flood Control Projects in an Attempt to Subsidize Water Contractors’ Existing Mitigation and Compliance Obligations**

Despite the statutory prohibition on using public funds from Proposition 1 to pay for existing mitigation and compliance obligations, recently disclosed public records indicate that DWR has awarded at least \$37.9M from Proposition 1 for habitat restoration projects that are intended to meet existing mitigation and compliance obligations of the CVP and SWP, thereby subsidizing the obligations of the CVP and SWP’s contractors.

The text of Proposition 1 generally prohibits using funds from this bond measure to meet existing mitigation and compliance obligations. *See* Cal. Water Code §§ 79710(b), 79732(b), 79737(f). This is intended to ensure that taxpayers do not subsidize the obligations of specific parties, including water contractors of the CVP and SWP, to mitigate the environmental impacts that those parties cause.

According to the attached email from Maribel Velazquez of DWR (attached hereto as Exhibit A), DWR has awarded \$16M from Proposition 1 for the Lower Yolo Ranch Restoration Project and has awarded \$21.9M from Proposition 1 for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project. *See* Exhibit A. DWR and the water contractors have identified both of these projects as intended to be credited towards existing mitigation and compliance obligations. *See, e.g.,* Exhibit B.

Moreover, DWR’s email indicates that the agency has awarded funding for these projects from funding authorized by section 79781 of the Water Code. *See* Exhibit A. However, this section

of Proposition 1 does not authorize this use of funding for the Lower Yolo Ranch Tidal Marsh Habitat Restoration Project (nor does section 79780, also codified in Chapter 11). Section 79781 of the Water Code provides that funding pursuant to that section is statutorily “available to reduce the risk of levee failure and flood in the Delta” for specific types of projects, such as local assistance under the Delta levee maintenance subventions program. Similarly, section 79780 (also part of Chapter 11) authorizes funding to DWR “for the purpose of statewide flood management projects and activities.” While section 79780 authorizes multibenefit projects, the Lower Yolo Ranch project does not appear to qualify as it is not intended to “achieve public safety” nor is it a statewide flood management project.

We therefore request that DWR confirm that it is not using taxpayer funding from Proposition 1 for the Lower Yolo Ranch Habitat Restoration Project, and if monies from Proposition 1 have been used for this project, we request that DWR immediately rescind such funding from Proposition 1 and substitute funding obtained from contractors of the SWP and CVP. These contractors, not public taxpayers, are required to pay for this habitat restoration project if it will be credited towards meeting existing mitigation and compliance obligations.

## **II. Public Records Cast Significant Doubt on the Claimed Habitat Restoration Credits for the Lower Yolo Ranch Habitat Restoration Project**

In addition to providing \$16M in taxpayer funding from Proposition 1 to subsidize the Lower Yolo Ranch Habitat Restoration Project, public documents also indicate that state and federal agencies appear to be considering improperly providing mitigation credits for lands that are more than 6.5 feet above sea level – which are not tidally influenced – as “tidal marsh habitat.”

Since 2008, the State Water Project (“SWP”) and federal Central Valley Project (“CVP”) have been legally obligated to restore tens of thousands of acres of habitat to help mitigate the environmental destruction caused by the operations of the SWP and CVP, including tidal marsh habitat in the Delta. The SWP’s 2020 incidental take permit issued under the California Endangered Species Act includes obligations to restore more than 8,000 acres of “tidal wetland” habitat. CDFW, Final Incidental Take Permit at 112 (“ITP”). Attachment 4 to that ITP provides guidance on habitat restoration, and it states that,

For tidal wetlands, elevation is probably the most important attribute for future restoration. Figure 5 shows elevations that are conducive to tidal marsh restoration. **Tidal marsh generally forms between mean lower low water and mean higher high water, which in the Cache Slough Complex is between 2 and 6.5 feet above sea level (Environmental Work Group 2008).**

ITP, Attachment 4, at 20 (emphasis added).<sup>1</sup> Thus to qualify as mitigation acreage, the restored wetlands must be “tidal.”

Public records indicate that the Lower Yolo Restoration Project could be credited for restoring approximately 1,700 acres of tidal marsh habitat, including several webpages maintained by DWR and the Resources Agency,<sup>2</sup> as well as contracts executed by DWR that estimate 1,679.5 acres of tidal marsh habitat would be created, *see* Exhibit C. In contrast, public records also indicate that the Lower Yolo Restoration Project would create or restore less than 600 acres of tidal marsh habitat. As a result, it appears that state and federal agencies are improperly considering providing mitigation credits as “tidal marsh habitat” for lands that are not tidally influenced because they are at elevations well above 6.5 feet above sea level.

For instance, according to the notice of preparation and initial study for the Lower Yolo Restoration Project prepared by the State and Federal Water Contractors Authority to comply with CEQA, the original proposal would have resulted in a total of 1,100 acres of tidal marsh habitat, with approximately 700 acres of proposed tidal marsh currently at intertidal elevations and 470 acres that would be constructed by grading down land to intertidal elevations. *See* Initial Study at 9. Significant construction would be required to grade much of the land to intertidal elevations, because much of the property is at elevations above tidal influence. Draft EIR at 4.<sup>3</sup>

The Draft EIR for the project examined the proposed project and several alternatives. Alternative 4 in the DEIR states that it would result in, “[r]estoring approximately 572 [acres] of tidal marsh, enhancing approximately 28 [acres] of tidal marsh, enhancing about 1,100 [acres] of seasonal floodplain wetlands, and enhancing about 49 [acres] of riparian habitat.” Draft EIR at 5-39. The construction work included some grading of land to facilitate establishment of intertidal wetlands, *id.*, which would be necessary because only approximately 572 acres of the 1,790 acre parcel was currently at intertidal elevations, *id.* at 5-41. Alternative 4 would result in “a

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<sup>1</sup> Similarly, the U.S. Fish and Wildlife Service’s 2008 biological opinion, which was the original basis for this mitigation obligation, explicitly requires the creation or restoration of “a minimum of 8,000 acres of intertidal and associated subtidal habitat.” 2008 Biological Opinion at 283, 379. The habitat restoration requirement in the incidental take permit “is carried forward from the compensatory mitigation obligation originally established in the 2008 BiOp and associated CDFW consistency determination.” *See* Final Incidental Take Permit at 112.

<sup>2</sup> *See, e.g.*, <https://water.ca.gov/News/Blog/2021/March/Lower-Yolo-Ranch-Tidal-Restoration-Project>; [https://resources.ca.gov/CNRALegacyFiles/docs/ecorestore/projects/Lower\\_Yolo\\_Restoration.pdf](https://resources.ca.gov/CNRALegacyFiles/docs/ecorestore/projects/Lower_Yolo_Restoration.pdf).

<sup>3</sup> The DEIR states that, “Much of the site is at elevations above modern mean higher high tide (+6.5 ft NAVD88), with elevations ranging between +6.5 to +15 ft NAVD88. Maximum elevations of +15 ft NAVD88 and above are located in the extreme northwestern corner of the property near the intersection of Levee and Delhi roads. Approximately one quarter of the site is within intertidal ranges of +2 to +6.5 ft NAVD88.”

dramatically smaller volume of soil” excavation than the proposed project in the DEIS (44,300 cubic yards versus 2.5 million cubic yards). *Id.* at 5-56. This is presumably because far less of the upland acreage would be graded to be at intertidal elevations.<sup>4</sup> Ultimately, Alternative 4 in the Final EIR was selected as the final project. *See* State and Federal Contractors Water Agency, Resolution 13-2, July 18, 2013.

In 2018, the Westlands Water District adopted an addendum under CEQA for this project, which states that construction activities as part of the approved project include “Restoring approximately 571 acres of tidal marsh and enhancing approximately 28 acres of tidal marsh.” Westlands Water District, Final Addendum to the Lower Yolo Restoration Project Final Environmental Impact Report (SCH #2011032001), September 2018, at 5, available online at: <https://wwd.ca.gov/wp-content/uploads/2018/09/yolo-restoration-eir.pdf>. While the project would include enhancement of more than 1,000 acres of “seasonal floodplain wetlands,” the document identifies less than 600 acres of tidal marsh habitat restoration resulting from this project.

These documents appear to show that less than 600 acres of tidal marsh habitat would be restored as part of the Lower Yolo Restoration Project, even as the state’s documents indicate that the project is anticipated to obtain credits for nearly three times as much tidal marsh habitat.

We therefore request that your agencies provide a detailed explanation of the acreage of the Lower Yolo Restoration Project that would be tidally influenced and thus would constitute tidal marsh habitat, and exclude from such crediting any lands that are not tidally influenced.

We appreciate your prompt attention to this matter and look forward to your written response.

Sincerely,



Doug Obegi  
Natural Resources Defense Council



Brandon Dawson  
Sierra Club California

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<sup>4</sup> Similarly, the 2015 supplemental draft EIR for the Yolo Flyway Farms Restoration Project noted that the original design for the Lower Yolo Ranch Restoration Project (of which the Yolo Flyway Farms Restoration Project was originally a part) was modified to significantly reduce “the previously planned excavation of land to lower the surface to create tidal habitat.” Yolo County, Supplemental Draft EIR for the Yolo Flyway Farms Restoration Project, available online at: <http://www.yolocounty.org/home/showdocument?id=34152>.

NRDC letter to DWR and CDFW re Lower Yolo Ranch Habitat Restoration Project  
July 20, 2022



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Planning and Conservation League



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cc: Senate Pro Tem Atkins  
Assembly Speaker Rendon  
Senate Budget Committee Chair Skinner  
Assembly Budget Committee Chair Ting