

PUBLIC HEARING ITEM

Public Hearing Regarding Appeal of the California Department of Water Resources' Certification of Consistency of the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project

(Certification Number C20215)

Summary: On May 20-21, 2021, the Council will conduct a public hearing and receive testimony from interested parties and the public regarding four appeals received on the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project Certification of Consistency. May 20 (Day 1) is reserved for presentations from the California Department of Water Resources, Delta Protection Commission, and Appellants. May 21 (Day 2) is reserved for public comment.

BACKGROUND

Covered Action and Appeals before the Council

On February 22, 2021, the Department of Water Resources (Department) submitted a Certification of Consistency, Certification Number C20215 (Certification), for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Covered Action). The Certification is available at:

https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=ba3c59bf-e359-49f7-b866-60fa781325d0.

The Council received four timely¹ appeals from the following parties (referred to collectively hereafter as Appellants):

- C20215-A1 - Liberty Island Access (LIA)
- C20215-A2 - Solano County Water Agency (SCWA)
- C20215-A3 - Reclamation District 2060 & Reclamation District 2068 (Districts)
- C20215-A4 - Central Delta Water Agency (CDWA)

Covered Action and Appeal Authority

The Delta Reform Act of 2009 charges the Delta Stewardship Council (Council) with implementing the Delta Plan (Water Code §85204). As part of this charge, the

¹ The appeals were deemed filed on March 24, 2021, pursuant to Section 7 of the Council's Administrative Procedures Governing Appeals available at https://coveredactions.deltacouncil.ca.gov/Files/Appeals_Regs_1.pdf.

Council has appellate authority over certain actions to ensure that certain agency actions ("covered actions") in the Sacramento-San Joaquin River Delta and Suisun Marsh (Delta) are consistent with the Delta Plan (Water Code § 85225.10). An agency undertaking a covered action in the Delta (defined in Water Code § 85057.5) must submit to the Council a written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan (Water Code § 85225).

Any 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 goals² or implementation of government-sponsored flood control programs to reduce risks to people and property in the Delta, may appeal the Certification of Consistency no later than 30 days after the submission of a certification of consistency to the Council (Water Code §§ 85225.10 and 85225.15).

Appeals Process

The Council must hold a hearing on the appeal within 60 days of the date of the filing of the appeal, unless it is determined that the issue raised on appeal is not within the Council's jurisdiction or does not raise an appealable issue (Water Code § 85225.20).

The Council issued a Notice of Public Hearing on April 8, 2021. On April 19, 2021, the Council issued a Supplement to the Notice of Public Hearing, which included a list of questions to the Department and the Appellants that are intended to help the parties focus their presentations (Water Code § 85225.10). On April 28, 2021, the Council issued a second Supplement to the Notice of Public Hearing, which included a list of questions to the Department and the Appellants, that are intended to help the parties focus their requests to augment the record. On May 12, 2021, the Council emailed the parties with a list of supplemental questions that are intended to help the parties focus their presentations at the hearing.

After the hearing on an appeal, the Council must make specific written findings either denying the appeal or remanding 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 before the state or local public agency that filed the Certification (Water Code §

² 'Coequal goals' means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall 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. (Water Code § 85054.)

85225.25). The Council is required to make its decision on the appeal within 60 days of hearing the appeal (Water Code § 85225.20).

Project Purpose and Description

According to the Certification, the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project is a proposed multi-benefit covered action that would 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 (Attachment 1, Figure III-1 Project Location) (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 Covered Action is intended to increase flood storage and conveyance, increase the resilience of levees, and reduce flood risk in a manner "consistent with the Central Valley Flood Protection Plan, which calls for multi-benefit projects that expand the Yolo Bypass while incorporating ecosystem-enhancing features," (Certification, p. 2).

According to the Certification, the Covered Action 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 Covered Action site is located on three properties: the Bowlsbey Property, the Liberty Farms Property, and the Vogel Property (Attachment 1, Figure III-2 Proposed Project Site Aerial with Property Boundaries) (Certification, p. 3). These properties are currently used for irrigated pasture, recreation, and seasonal grazing, respectively.

According to the Certification (pp. 2-3), the covered action would include a variety of levee modifications at the edges of the site (Attachment 1, Figure III-8 Proposed Habitat Concept) and grading of the topography on the landside of the levees (Attachment 1, Figure III-9 Proposed Infrastructure). 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 covered action 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 covered action 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 (Certification Attachment 17 – Draft EIR, Chapter 3, p. III-39). The Vogel levee would be breached to allow for tidal inundation on the Vogel Property (Certification, p. 2).

According to the Certification, the Department anticipates completing the covered action by April 2024. The total estimated cost is \$120,000,000 (Certification, p. 3).

Delta Plan Policies Subject of this Appeal

The Appellants have appealed the Certification on the following Delta Plan policies:

Appealed Policies	LIA	SCWA	Districts	CDWA
G P1(b)(1) - Coequal Goals		X	X	
G P(1)(b)(2) – Mitigation Measures	X	X	X	
G P(1)(b)(3) – Best Available Science	X	X	X	X
G P1(b)(4) - Adaptive Management		X	X	
WR P1 - Reduce Reliance on the Delta through Improved Regional Water Self-Reliance				X

Appealed Policies	LIA	SCWA	Districts	CDWA
WR P2 - Transparency in Water Contracting		X		
ER P1 - Delta Flow Objectives				X
ER P2 - Restore Habitats at Appropriate Elevations				X
ER P5 - Avoid Introductions of and Habitat for Invasive Nonnative Species		X	X	X
DP P2 - Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats	X	X	X	X
RR P1 - Prioritization of State Investments in Delta Levees and Risk Reduction		X	X	X

The Certification and appeals are available on the Council's website at: https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=ba3c59bf-e359-49f7-b866-60fa781325d0. Binders containing the Certification and appeals were previously distributed to councilmembers under separate cover. The contents of the binders distributed to councilmembers are also available for public review on the covered action webpage at: https://coveredactions.deltacouncil.ca.gov/profile_summary.aspx?c=ba3c59bf-e359-49f7-b866-60fa781325d0. If you have any questions about these materials and what the councilmembers received, please contact engage@deltacouncil.ca.gov.

PUBLIC HEARING

On May 20, 2021 (Day 1), after the chair opens the hearing, Council staff will briefly summarize the appeal process and the covered action. Following the staff presentation, the Department, the Delta Protection Commission, and the Appellants will make opening and closing presentations. The Council will have the opportunity to ask questions of the parties regarding the written submissions to the Council and oral presentations after each of the opening presentations, and after all of the parties have finished their closing presentations.

The presentation order and time limits will be as follows:

- Opening presentations
 - The Department (10 minutes)
 - Delta Protection Commission (25 minutes)
 - Liberty Island Access (Appellant C20215-A1) (20 minutes)
 - Solano County Water Agency (Appellant C20215-A2) (20 minutes)
 - Reclamation District 2060 & Reclamation District 2068 (Appellant C20215-A3) (20 minutes)
 - Central Delta Water Agency (Appellant C20215-A4) (20 minutes)
- Closing presentations
 - The Department (110 minutes)
 - Delta Protection Commission (5 minutes)
 - Liberty Island Access (Appellant C20215-A1) (10 minutes)
 - Solano County Water Agency (Appellant C20215-A2) (10 minutes)
 - Reclamation District 2060 & Reclamation District 2068 (Appellant C20215-A3) (10 minutes)
 - Central Delta Water Agency (Appellant C20215-A4) (10 minutes)

May 21, 2021 (Day 2), is reserved for public comment. The Council will have the opportunity to ask questions of the parties regarding the written submissions to the Council and oral presentations.

This is the initial hearing on the appeals of the Lookout Slough covered action; the Council will not issue a decision at this hearing.

More information on the public hearing can be found in the April 8, 2021 Notice of Public Hearing at

<https://coveredactions.deltacouncil.ca.gov/services/download.ashx?u=b7a305cc-af96-4816-92af-513d4c8a70ff>.

Pursuant to Water Code § 85225.25, the scope of the Council's review is limited to whether or not the Certification is supported by substantial evidence in the record before the Department' at the time it submitted the Certification. All presentations and written statements should be based solely upon the evidence and legal arguments and should only address whether substantial evidence in the record before the Department supports the Certification.

NEXT STEPS

At the conclusion of the hearing, the Council may direct staff to prepare draft findings regarding the appeals. Council staff will release such findings for public review prior to consideration by the Council at a future publicly noticed hearing. The Council is required to make its decision on the appeal within 60 days of this hearing on the appeal (Water Code §85225.20). Council staff currently anticipates that the hearing on the findings would occur on **July 15-16, 2021**. Pursuant to Water Code section 85225.25, the Council may either deny the appeal or remand the matter back to the Department for reconsideration.

FISCAL INFORMATION

Not applicable.

LIST OF ATTACHMENTS

Attachment 1: Covered Action Maps

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