



980 NINTH STREET, SUITE 1500
SACRAMENTO, CALIFORNIA 95814
HTTP://DELTACOUNCIL.CA.GOV
(916) 445-5511

DELTA STEWARDSHIP COUNCIL

A California State Agency

May 28, 2015

Mr. Gary Bardini
Department of Water Resources
1416 Ninth Street, Room 1115-9
Sacramento, CA 95814

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Re: Urban Flood Risk Reduction Program Funding Recommendations

Dear Mr. Bardini:

This letter provides the Delta Stewardship Council (Council)'s comments on the Department of Water Resources (DWR)'s Urban Flood Risk Reduction Program (UFRR) Funding Recommendations. It also follows up on our meeting yesterday (5/26) with the Division of Flood Management's (DFM) Keith Swanson, Michael Sabbaghian, Dave Mraz and your attorney, Robin Brewer. The meeting offered an opportunity for us to discuss both general issues of coordination between DFM and the Council and to learn more about the specific projects proposed for funding. We agreed on several points, including the desirability of further discussions to strengthen cooperation in fulfilling our mutual responsibilities.

Improving Council-Flood Management coordination. More can be done to improve coordination of DWR's Central Valley flood management grant-making decisions with the Delta Plan, we agreed. We share common goals: the UFRR grant program objectives of improving public safety, fostering environmental stewardship, and supporting economic sustainability within an integrated water management framework align with the State's coequal goals of water supply reliability and ecosystem restoration while also addressing enhanced flood protection for the people who live in urban areas within the legal Delta. The Delta Plan outlines priorities for State investments in both project and non-project levees in the Delta. The statute also provides that State and local agencies are responsible for coordinating their actions pursuant to the Delta Plan with the Council and other relevant agencies (Water Code section 85204). The Governor's Water Action Plan directs all relevant agencies to fully participate in this coordination and to work with the Council's Delta Science Program and others to implement the Delta Science Plan to enhance water and natural resource policy and management decisions. These foundations ought to support effective coordination between our programs.

"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."

– CA Water Code §85054

A better job of coordination and consultation could have been done on these grants. For our part, a missed opportunity was last fall's invitation to comment on the UFRR grant guidelines. DWR, for its part, could have done more to reach out to the Council about the specific projects it was considering funding. The Council, pursuant to the Delta Reform Act, has established procedures for early consultation with state and local agencies about projects, like the levee projects, that will need to certify consistency with the Delta Plan. DWR's role is in ensuring its levee funding decisions are consistent with the Delta Plan. In this case, early consultation with DWR, your local grant recipients, and the Council could have been helpful in addressing some of the concerns we raise below. At yesterday's meeting, both our agencies agreed to coordinate more closely regarding the upcoming Proposal Solicitation Package (PSP) for small communities.

The Council's Delta Plan is a legally enforceable management framework for the Delta and Suisun Marsh. As called for in the Delta Reform Act, included in the plan are priorities for investment in project and non-project levees to protect people, property and State investments in the Delta (Water Code sections 85305(a) and 85306). These priorities, in combination with the Council's authority to assure that State agencies act consistently with the Delta Plan, ensure that levee spending by DWR and the Central Valley Flood Protection Board (CVFPB) reflects the Delta Plan's priorities. The Council is currently updating this investment strategy to better define the State's interests. The updated strategy will incorporate information on proposed projects such as the ones proposed for funding through DWR's UFRR grants. Since some of the proposed UFRR projects lie within the Delta and play an important role in maintaining the integrity of the Delta levee system, it is essential that they be consistent with the Delta Plan.

Delta Plan Consistency. Through the Delta Reform Act, the Council was granted specific regulatory and appellate authority over certain actions that take place in whole or in part in the Delta and Suisun Marsh. The Council exercises that authority through development and implementation of the Delta Plan. State and local agencies are required to comply with the set of 14 regulatory policies contained within the Delta Plan. Under the Act, it is the state or local agency approving, funding, or carrying out the project in the Delta that must determine if a project is a "covered action" subject to regulations of the Delta Plan, and if so, certify consistency of the project with Delta Plan policies (Water Code section 85225).

While the California Environmental Quality Act (CEQA) lead agency generally makes the determination if a project is a covered action, which in the case of this activity is the local grant recipient, it is also critical that DWR, as the funding agency, coordinate with the Council and with the project proponents to ensure consistency with the Delta Plan and its regulatory policies. When approving funding for Delta levees it is especially important to review the Delta Plan's policy about priorities for State investments in levees (RR P1 Prioritization of State Investments in Delta Levees and Risk Reduction [23 California Code of Regulations section 5012]). This policy covers a proposed action that involves discretionary State investments in Delta flood risk management, including levee operations, maintenance, and improvements. As

you know, the policy outlines objectives for state investment in project and non-project levees, including the protection of urban and adjacent urbanizing areas by providing 200 year flood protection and protection of other rural, natural resource, water supply, and agricultural resources. Importantly, the policy provides that “it is expected that over time, the California Department of Water Resources must balance achievement of those goals.”

Our preference would be that the first agency acting on a potential covered action – normally the CEQA lead agency to certify consistency with the Delta Plan. In this case, DWR is approving several of these grants prior to completion of the project’s CEQA process, which makes certification of Delta Plan consistency difficult now. As a result, DWR is deferring certification of consistency to the local agency, and making release of grant funds contingent upon the recipients’ completion of the consistency review process. In our view, this is less than satisfactory, for while the recipient agencies can assess whether their local project is consistent with one or more of the Delta Plan’s levee investment priorities, these local agencies are poorly situated to assess whether DWR’s levee investments fulfill the Delta Plan’s expectation that over time, DWR must balance achievement of those goals. Only DWR, with its knowledge of the broad sweep of its diverse levee investment programs, can provide that assessment.

To remedy this shortcoming, if DWR is unwilling to certify these projects are consistent with the Delta Plan, our suggestion is that at the time these grants are approved, DWR make a finding about their consistency with Delta Plan policy RR P1. The finding could include documentation that these grants, together with others approved by DWR, are providing the balanced achievement of goals that the Delta Plan’s regulatory policy seeks. When local agencies subsequently determine their project’s Delta Plan consistency, DWR’s finding about the balance among objectives achieved by its levee investment programs could provide part of the factual basis for the local agency’s Delta Plan consistency certification. This approach achieves the Delta Plan’s interest in seeing that DWR’s levee funding decisions pursue the priorities established in the Delta Plan in a balanced way, while still leaving local agency’s responsible for the final consistency certification.

We suggest this approach can satisfy both our agencies’ interests in how this matter is addressed. We would be happy to work with your staff as DWR makes such a determination.

Adequacy of State Funding Provided to Comply with Applicable Delta Plan provisions. This coordination is especially important at the time DWR determines who will receive funding that both it and its fund recipients consider the costs entailed in complying with the Delta Plan’s regulatory requirements. In the course of reviewing levee improvement-related plans, programs and projects, Council staff has identified a subset of the 14 regulatory policies that often apply to proposed Delta levee improvement projects. These polices include;

- **G P1** (23 California Code of Regulations section 5002) requires that actions not exempt from CEQA and subject to Delta Plan regulations must; document the use of best available science; must include an adaptive management plan consistent with Delta Plan Appendix 1B and document access to resources to implement an adaptive management plan; and, include applicable feasible mitigation measures consistent with or more effective than those identified in the Delta Plan Environmental Impact Report (EIR).
- **DP P2** (23 California Code of Regulations section 5011), calls for siting flood management infrastructure to avoid or reduce conflicts with local land uses when feasible;
- **ER P4** (23 California Code of Regulations section 5008), states that levee projects must evaluate and where feasible, incorporate alternatives including the use of setback levees, to increase floodplains and riparian habitats

And where habitat enhancement or mitigation is part of a levee improvement project, two additional Delta Plan policies may be implicated;

- **ER P2** (23 California Code of Regulations section 5006), calls for restoring habitats at appropriate elevations;
- **ER P5** (23 CCR section 5009) calls for avoiding introductions and habitat improvements for invasive nonnative species

In addition, Delta Plan Policy **G P1** (23 California Code of Regulations section 5002) requires that actions not exempt from CEQA and subject to Delta Plan regulations must include applicable feasible mitigation measures consistent with or more effective than those identified in the Delta Plan Environmental Impact Report (EIR). The Delta Plan's Program EIR provides a list of mitigation measures to consider including those to address impacts to biological resources and agricultural resources. (Mitigation measures can be found in the Delta Plan Mitigation and Monitoring Reporting Program document, http://deltacouncil.ca.gov/sites/default/files/documents/files/Agenda%20Item%206a_attach%202.pdf)

Our staff has reviewed and commented on the draft EIR's for the levee improvement projects proposed for funding in the Delta, pointing out the need for consistency with the policies and offering to consult with the lead agencies as they complete their CEQA process and prepare to certify their project's consistency with these policies. The affected local agencies have not yet completed, and in several cases not yet begun, these consultations. As a result, we cannot assess whether the grants that DWR proposes to award to each agency are sufficient to provide the full state cost share to which each might be entitled. We encourage DWR, as a funding agency, to include the following language as part of the funding agreement their responsibility to determine whether their projects are consistent with the Delta Plan.

As the California Environmental Quality Act (CEQA) lead agency carrying out the project, your agency is responsible for complying with the requirements of the Delta Stewardship Council regarding Covered Actions. This project may meet the definition of a Covered Action under Water Code Section 85057.5. If your agency determines this project is a Covered Action, you will need to complete a certification of consistency that demonstrates that the project is consistent with the regulatory policies of the Delta Plan. (For additional information regarding the Certificate of Consistency and the Covered Action process, please visit the Delta Stewardship Council's website: <http://deltacouncil.ca.gov/covered-actions>.)

In addition, DWR should encourage grant applicants to consider and adopt mitigation measures equivalent to or better than those in the Delta Plan Environmental Impact Report. Projects should receive adequate funding to conduct post-construction monitoring to ensure the effectiveness of mitigation measures and to implement adaptive management measures as described in their adaptive management plans.

Best Available Science and Adaptive Management. The current PSP encourages the grant applicants to "...develop stable institutional structures, coordination protocols, and financial frameworks that enable effective and adaptive integrated flood management (designs, operations and maintenance, permitting, preparedness, response, recovery, and land use and development planning)." We recommend that the grant guidelines more explicitly require an adaptive management plan that is consistent with Delta Plan regulations and appropriate to the scope of the project. For information regarding the adaptive management framework in the Delta Plan please refer to Appendix 1B of Delta Plan found at http://deltacouncil.ca.gov/sites/default/files/documents/files/AppB_Combined_2013.pdf) and informed by best available science (as defined by Appendix 1A of Delta Plan, located at http://deltacouncil.ca.gov/sites/default/files/documents/files/AppB_Combined_2013.pdf).

Additionally, we are recommending all state agencies providing grants for projects that may become covered actions subject to Delta Plan regulations include pertinent definitions of "best available science" and "adaptive management" in grant guidelines and solicitation packages consistent with the Delta Plan, Delta Science Plan, and the California Water Action Plan.

Projects Specific Comments. Council staff has reviewed the available CEQA documents for the following four (4) projects within the legal Delta and proposed for funding by the UFRR. These proposed projects may be covered actions, and therefore subject to Delta Plan regulations. Based on the CEQA documents for each project, we have identified specific issues that we believe DWR should be aware of for the purposes of compliance with the Delta Reform Act.

- A. West Sacramento Area Flood Control Agency (WSAFCA) Southport Construction Project. Council staff became aware of this project in November 2013 when the draft Environmental Impact Statement/Environmental Impact Report (EIS/EIR) was released. A comment letter on the draft EIR/EIS was sent to WSAFCA staff in January 2014 (Attachment 1) and responses to our comments were received from WSAFCA in July 2014 (Attachment 2). Responses include a statement that WSAFCA would be preparing and submitting a certificate of consistency prior to project implementation. In addition, Council staff conducted an early consultation with WSAFCA staff in August 2014 to assist the project team with addressing the needs of preparing the certificate of consistency.

For this project, there are several Delta Plan policies should be considered which include: DP P2 (23 California Code of Regulations section 5011), which calls for siting flood management infrastructure to avoid or reduce conflicts with local land uses when feasible; ER P2 (23 California Code of Regulations section 5006), which calls for restoring habitats at appropriate elevations; ER P4 (23 California Code of Regulations section 5008), which states that levee projects must evaluate and. Where feasible, incorporate alternatives including the use of setback levees, to increase floodplains and riparian habitats; and RR P1 (23 California Code of Regulations section 5012) which calls for the prioritization of state investments in Delta flood risk management, including levee operation, maintenance and improvements. This policy includes interim priorities categorized as specific goals (e.g. localized flood protection, levee network, and ecosystem conservation) to guide budget and funding allocation for levee improvements and to assist DWR in achieving a balance in funding the various goals. In general, Council staff believes this project provides multiple benefits, meets multiple goals including the coequal goals and can be consistent with the Delta Plan. DWR should work with the project proponents to ensure there is adequate funding in the current grant to allow for post-construction monitoring to evaluate the effectiveness of mitigation measures for the project, for development of an adaptive management plan and implementation of this plan.

- B. San Joaquin Area Flood Control Agency (SJAFC) Smith Canal Gate Project. Council staff received the Notice of Preparation for this project in June 2014 and conducted a meeting with the project team in October 2014. This meeting focused on a discussion of the project's scope at the conceptual level and introduced the covered action and certification processes to the project team. Council staff was informed by the project team that the draft EIS/EIR will be released in early July 2015 and Council staff plan on reviewing and commenting on this draft CEQA document to highlight any areas of concerns related to Delta Plan consistency.

C. Sacramento Area Flood Control Agency (SAFCA) Levee Accreditation Project. The draft EIR for this project was released in March 2015 and Council staff provided a comment letter for the draft EIR in May 2015 (Attachment 3). The draft EIR states that the purpose of the proposed action under CEQA is to reduce flood risk to regional urban and urbanizing areas and make the mandatory National Flood Insurance Program (NFIP) flood insurance requirements optional for the residents in the areas protected by the project. We support SAFCA's effort to meet the State requirements for urban level of flood protection. However, Council staff members are concerned that the Pocket Area may not attain the State-required 200-year level of flood protection. As the draft EIR indicated, the Levee Accreditation Project is a subset of the U.S. Army Corps of Engineers (USACE) American River Watershed Common Features General Reevaluation Report (GRR) project, therefore, it is appropriate and important to review these projects together to ensure that the localized goal of the Levee Accreditation Project would not only be consistent with, but also contribute to, the system-wide goal of the GRR project. According to the risk analyses from the GRR, with the Tentatively Selected Plan (TSP) in place, the flood protection assurance (e.g. non-exceedance probability) for the Pocket Area of Sacramento, given a 200-year flood event, is 94%. Conversely, given the GRR project conditions, the risk analyses show that a levee segment along the American River South Reach (index point A) around River Mile (RM) 8.9 can only provide 65% assurance, given a 200-year flood event. The results of the risk analyses from the GRR for the American River South (ARS) Reach concluded that the Annual Exceedance Probability (AEP) for the ARS Reach as a whole is 1 in 147. Even with a 94% flood protection assurance, given the elevations of the natural terrain and the indicated weak link of the levee system at RM 8.9 along the American River, it is not clear that the Pocket Area will attain the State-required 200-year level of flood protection. We recommend that DWR verify if SAFCA has determined or will determine whether the State required level of protection will be met by executing this project. This information will be essential for assessing consistency with Delta Plan Policy RR P1 as well as achieving the goals of the UFRR grant program.

In addition, one issue regarding SAFCA's vegetation management that we are uncertain about is whether SAFCA will be seeking a vegetation variance for the Levee Accreditation Project. The GRR assumes that a variance from vegetation standards will be requested from and approved by USACE, so we would like clarification whether SAFCA is similarly applying for a vegetation variance for its project and if the draft EIR assumes for the purposes of analysis that a variance would be in place. If SAFCA is seeking a variance from USACE, it is important to demonstrate the impacts and relevant mitigation measures to riparian habitat, shaded riverine aquatic habitat, and wildlife species with and without a variance. DWR should clarify this concern and confirm that the pending USACE vegetation variance will not become a potential issue to the project budget and the execution of the project.

For this project, there are several Delta Plan policies that should be considered which include: DP P2 (23 California Code of Regulations section 5011) which states that plans for ecosystem restoration must be sited to avoid or reduce conflicts with existing uses when feasible, considering comments from local agencies and the Delta Protection Commission; ER P2 (23 California Code of Regulations section 5006) which states that habitat restoration must be consistent with Appendix 3 of the Delta Plan regulations, which is an excerpt from the 2011 Draft Ecosystem Restoration Program Conservation Strategy; ER P4 (23 California Code of Regulations section 5008) which calls for levee projects to evaluate and where feasible incorporate alternatives, including the use of setback levees, to increase floodplains and riparian habitats; ER P5 (23 California Code of Regulations section 5009) which calls for avoiding introductions and habitat improvements for invasive nonnative species; and RR P1 (23 California Code of Regulations section 5012) which calls for the prioritization of state investments in Delta flood risk management, including levee operation, maintenance and improvements.

- D. Reclamation District (RD) 17 Levee Basin 200-Year Flood Protection Feasibility Study. The regional level of flood protection for the RD 17 was considered by USACE's draft Lower San Joaquin River Project Integrated Interim Feasibility Report/Environmental Impact Statement/Environmental Impact Report (February 2015). Council staff reviewed and provided comments on this document in April 2015. According to this interim feasibility study, the flood risk improvement alternatives for the RD 17 were eliminated by the USACE to avoid unexpected growth-induction for the existing undeveloped areas. We support the USACE's decision, based on the project screening criteria that are consistent with Executive Order 11988, to minimize induced development of currently undeveloped land in RD 17 and associated environmental impacts, such as conversion of prime farmland in the floodplain.

According to the UFRR funding recommendations, the City of Lathrop's construction proposal was modified by DWR. The revised project description offered by DWR provides limited funding for feasibility and preliminary design activities for levee improvements within the RD 17 levee Basin. Council staff agrees with DWR's decision, but encourages you to provide more detailed guidance about the scope for the proposed feasibility study to evaluate possible levee improvements that provide 200-year protection for urban areas. Large portions of RD 17 are not planned for future urban use, but instead for designated for agriculture and/or open space, in the Delta Plan and applicable local government land uses plan. Guidance should be provided in DWR's grant agreement for this feasibility study to specify that alternatives to be investigated in the study should limit 200-year protection to that needed to protect only areas planned for urban uses in the Delta Plan, at a maximum, rather than for all of RD 17.

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Final Remarks. The Council is working closely with DWR, the CVFPB, the Delta Protection Commission, local agencies, and the California Water Commission, to develop an updated investment strategy for project and non-project levees in the Delta to protect people, property and the State's interests (Water Code sections 85305(a) and 85306). Our mutual success requires collaboration and coordination between state agencies. DWR plays an important role in achieving the Delta Plan's coequal goals and to reduce risk to people, property, and state interests in the Delta. We look forward to continuing to work with your agency on the proposed projects for the UFRR program and how it can be incorporated into the updated Delta levees investment strategy as well as other plans, programs, and projects. If you need clarification regarding our comments, I encourage you to contact You Chen (Tim) Chao at YouChen.Chao@deltacouncil.ca.gov or (916) 445-0143.

Sincerely,

Dan Ray
Chief Deputy Executive Officer
Delta Stewardship Council

Enclosures

cc: Michael Sabbaghian, Department of Water Resources
John Powderly, West Sacramento Area Flood Control Agency
Pete Ghelfi, Sacramento Area Flood Control Agency
Anne Baker, U.S. Army Corps of Engineers, Sacramento District
Erin Brehmer, Department of Water Resources
Juan Neira, San Joaquin Area Flood Control Agency
Tanis Toland, U.S. Army Corps of Engineers, Sacramento District

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