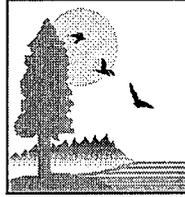


**CALIFORNIA STATE LANDS COMMISSION**  
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June 26, 2015

File Ref: SCH # 2015052070

Ms. Cindy Messer  
Delta Stewardship Council  
980 9th Street, Suite 1500  
Sacramento, CA 95814

**Subject: Notice of Preparation (NOP) for a Draft Environmental Impact Report (EIR)  
for the Delta Levee Investment Strategy, Sacramento and San Joaquin  
Counties**

Dear Ms. Messer:

The California State Lands Commission (CSLC) staff has reviewed the subject NOP for an EIR for the Delta Levee Investment Strategy (Project), which is being prepared by the Delta Stewardship Council (Council). The Council, as the public agency proposing to carry out a project, is the lead agency under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) The CSLC is a trustee agency for projects that could directly or indirectly affect sovereign lands and their accompanying Public Trust resources or uses. Additionally, because the Project would likely involve work on sovereign lands, the CSLC will act as a responsible agency. CSLC staff requests that the Council consult with us on preparation of the draft EIR as required by CEQA section 21153, subdivision (a), and the State CEQA Guidelines section 15086, subdivisions (a)(1) and (a)(2).

### **CSLC Jurisdiction and Public Trust Lands**

The CSLC has jurisdiction and management authority over all ungranted tidelands, submerged lands, and the beds of navigable lakes and waterways. The CSLC also has certain residual and review authority for tidelands and submerged lands legislatively granted in trust to local jurisdictions (Pub. Resources Code, §§ 6301, 6306). All tidelands and submerged lands, granted or ungranted, as well as navigable lakes and waterways, are subject to the protections of the Common Law Public Trust.

As general background, the State of California acquired sovereign ownership of all tidelands and submerged lands and beds of navigable lakes and waterways upon its admission to the United States in 1850. The State holds these lands for the benefit of all

people of the State for statewide Public Trust purposes, which include but are not limited to waterborne commerce, navigation, fisheries, water-related recreation, habitat preservation, and open space. On tidal waterways, the State's sovereign fee ownership extends landward to the mean high tide line, except for areas of fill or artificial accretion or where the boundary has been fixed by agreement or a court. On navigable non-tidal waterways, including lakes, the State holds fee ownership of the bed of the waterway landward to the ordinary low water mark and a Public Trust easement landward to the ordinary high water mark, except where the boundary has been fixed by agreement or a court. Such boundaries may not be readily apparent from present day site inspections.

After review of the information contained in the NOP, CSLC staff has determined that the waterways over which the proposed Project would extend include State-owned sovereign land. As specific projects are planned, CSLC staff should be consulted to determine the extent of that jurisdiction, as a lease and formal authorization for the use of sovereign lands may be required. Please contact Nick Lavoie (contact information is listed at the end of this letter) for further information.

### **Project Description**

The Council is updating the "Risk Reduction" section of its 2013 Delta Plan, which includes an interim regulatory policy for prioritizing State investments in Delta levees. The Council proposes to adopt a new policy that would replace the interim policy (Policy RR P1 [23. C.C.R § 5012]). The proposed Delta Levee Investment Strategy (DLIS) Policy would provide a more comprehensive method to prioritize State investments in Delta levees and more specificity with regard to State interests, priority locations, and the type of levee improvements appropriate to protect State interests than the interim policy.

As described in the NOP, the updated DLIS Policy would be more specific than the existing interim policy in terms of primarily *where* in the Delta the State should prioritize its levee investment and, to some degree, *what types* of levee improvements reflect the State's priorities in those areas. The Council may also recommend other actions to reduce flood risk in the Delta, such as investments in non-structural flood risk reduction measures that complement investments in levees.

### **Environmental Review**

CSLC staff requests that the Council consider the following comments when preparing the draft EIR.

#### **General Comments**

1. **Public Access:** Promotion of public access to and use of California's navigable waters is a mandate of the California Constitution (Article 10, Section 4), a condition of statehood in the Act of Admission (Vol. 9, Statutes at Large, page 452), and a responsibility of State agencies pursuant to the Public Trust Doctrine. During the environmental process and prior to CSLC consideration, the Council should prepare a report on the feasibility of providing public access to the waterway(s) during and after levee improvements.

2. Programmatic Document: Because the EIR is being proposed as a “programmatic” rather than a “project-level” document, the CSLC expects the Project will be presented as a series of distinct but related sequential activities (i.e., implementation of levee maintenance actions, construction of various types of levee improvements, implementation of levee-related ecosystem restoration). The State CEQA Guidelines, section 15168, subdivision (c)(5) states that a program EIR will be most helpful in dealing with subsequent activities if it deals with the effects of the program as specifically and comprehensively as possible. As such, the EIR should make an effort to distinguish what activities and their mitigation measures are being analyzed in sufficient detail to be covered under the EIR without additional project specific environmental review, and what activities will trigger the need for additional environmental analysis (see State CEQA Guidelines, § 15168, subd.(c)).
3. Project Description: A thorough and complete Project Description should be included in the draft EIR in order to facilitate meaningful environmental review of potential impacts, mitigation measures, and alternatives. The Project Description should be as precise as possible in describing the details of all allowable activities (e.g., types of equipment or methods that may be used, maximum area of impact or volume of sediment removed or disturbed, seasonal work windows, locations for material disposal, etc.), as well as the details of the timing and length of activities. Thorough descriptions will facilitate CSLC staff’s determination of the extent and locations of its leasing jurisdiction, make for a more robust analysis of the work that may be performed, and minimize the potential for subsequent environmental analysis to be required.

#### Biological Resources

4. To the extent feasible given the programmatic nature of the document, the draft EIR should disclose and analyze all potentially significant effects on sensitive species and habitats in and around the Project area, including special-status wildlife, fish, and plants, and if appropriate, identify feasible mitigation measures to reduce those impacts. The Council should conduct queries of the California Department of Fish and Wildlife’s (CDFW) California Natural Diversity Database and U.S. Fish and Wildlife Service’s (USFWS) Special Status Species Database to identify any special-status plant or wildlife species that may occur in the Project area, if those general areas are known, and discuss what surveys and/or queries would be conducted prior to each site-specific activity. The draft EIR should also include a discussion of consultation with the CDFW and USFWS, including any recommended mitigation measures and potentially required permits identified by these agencies.
5. Invasive Species: One of the major stressors in California waterways is introduced species. Therefore, the draft EIR should consider the Project’s potential to encourage the establishment or proliferation of aquatic invasive species (AIS) such as the quagga mussel, or other nonindigenous, invasive species including aquatic and terrestrial plants. For example, construction boats and barges brought in from long stays at distant projects may transport new species to the Project area via hull biofouling, wherein marine and aquatic organisms attach to and accumulate on the hull and other submerged parts of a vessel. If the analysis in the draft EIR finds potentially significant AIS impacts, possible mitigation could include contracting vessels and barges from nearby, or requiring contractors to perform a certain degree of hull-cleaning. The

CDFW's Invasive Species Program could assist with this analysis as well as with the development of appropriate mitigation (information at [www.dfg.ca.gov/invasives/](http://www.dfg.ca.gov/invasives/)).

In addition, in light of the recent decline of native pelagic organisms and in order to protect at-risk fish species, the draft EIR should examine if any elements of the Project (e.g., changes in bankside vegetative cover) would favor non-native fisheries within the Delta.

6. Construction Noise: The draft EIR should also evaluate noise and vibration impacts on fish and birds from construction, restoration or flood control activities in the water, on the levees, and for land-side supporting structures. Mitigation measures could include species-specific work windows as defined by CDFW, USFWS, and the National Oceanic and Atmospheric Administration's National Marine Fisheries Service (NMFS). Again, staff recommends early consultation with these agencies to minimize the impacts of the Project on sensitive species.

#### Water Quality

7. Mercury/Methylmercury: On April 22, 2010, the Central Valley Regional Water Quality Control Board (CVRWQCB) identified the CSLC as both a State agency that manages open water areas in the Sacramento-San Joaquin Delta Estuary and a nonpoint source discharger of methylmercury (Resolution No. R5-2010-0043), because subsurface lands under the CSLC's jurisdiction are impacted by mercury from legacy mining activities dating back to California's Gold Rush. Pursuant to a CVRWQCB Total Maximum Daily Load (TMDL), the CVRWQCB is requiring the CSLC to fund studies to identify potential methylmercury control methods in the Delta and to participate in an Exposure Reduction Program. The goal of the studies is to evaluate existing control methods and evaluate options to reduce methylmercury in open waters under jurisdiction of the CSLC. Please note that any action taken that may result in mercury or methylmercury suspension within the Sacramento-San Joaquin Delta Estuary may affect the CSLC's efforts to comply with the CVRWQCB TMDL.

#### Climate Change

8. Greenhouse Gases: A greenhouse gas (GHG) emissions analysis consistent with the California Global Warming Solutions Act (Assembly Bill [AB] 32) and required by the State CEQA Guidelines should be included in the draft EIR. This analysis should identify a threshold for significance for GHG emissions, calculate the level of GHGs that will be emitted as a result of construction and ultimate build-out of the Project, determine the significance of the impacts of those emissions, and, if impacts are significant, identify mitigation measures that would reduce them to the extent feasible. The NOP indicates that air quality/GHG impacts would likely be associated with levee maintenance activities, and to a lesser extent facility operations.
9. Sea Level Rise: A tremendous amount of State-owned lands and resources under the Commission's jurisdiction will be impacted by rising sea levels. With this in mind, the draft EIR should consider discussing the effects of sea level rise on all resource categories potentially affected by the proposed Project. Because of their nature and location, these lands and resources are already vulnerable to a range of natural events.

Note that the State of California released the final "Safeguarding California: Reducing Climate Risk, an Update to the 2009 California Climate Adaptation Strategy" (Safeguarding Plan) on July 31, 2014, to provide policy guidance for state decision-makers as part of continuing efforts to prepare for climate risks. The Safeguarding Plan sets forth "actions needed" to safeguard ocean and coastal ecosystems and resources as part of its policy recommendations for State decision-makers.

In addition, at its meeting on December 17, 2009, the CSLC approved the recommendations made in a previously requested staff report, "A Report on Sea Level Rise Preparedness" (Report), which assessed the degree to which the CSLC's grantees and lessees have considered the eventual effects of sea level rise on facilities located within the CSLC's jurisdiction. (The Report can be found on the CSLC's website, [www.slc.ca.gov](http://www.slc.ca.gov).) One of the Report's recommendations directs CSLC staff to consider the effects of sea level rise on hydrology, soils, geology, transportation, recreation, and other resource categories in all environmental determinations associated with CSLC leases. When considering lease applications, CSLC staff will (1) request information from applicants concerning the potential effects of sea level rise on their proposed projects, (2) if applicable, require applicants to indicate how they plan to address sea level rise and what adaptation strategies are planned during the projected life of their projects, and (3) where appropriate, recommend project modifications that would eliminate or reduce potentially adverse impacts from sea level rise, including adverse impacts on public access.

#### Cultural Resources

10. Submerged Resources: The draft EIR should evaluate potential impacts to submerged cultural resources in the Project area. Please note that any submerged archaeological site or submerged historic resource that has remained in State waters for more than 50 years is presumed to be significant. Because of this possibility, please add a mitigation measure requiring that in the event cultural resources are discovered during any construction activities, Project personnel shall halt all activities in the immediate area and notify a qualified archaeologist to determine the appropriate course of action.
11. Title to Resources: The draft EIR should also mention that the title to all abandoned archaeological sites and historic or cultural resources on or in the tide and submerged lands of California is vested in the State and under the jurisdiction of the CSLC (Pub. Resources Code, § 6313). CSLC staff requests that the Council consult with Assistant Chief Counsel Pam Griggs (see contact information below), should any cultural resources on state lands be discovered during construction of the proposed Project.

#### Mitigation and Alternatives

12. Deferred Mitigation: In order to avoid the improper deferral of mitigation, mitigation measures should either be presented as specific, feasible, enforceable obligations, or should be presented as formulas containing "performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way" (State CEQA Guidelines, §15126.4, subd. (b)). Due to its programmatic nature, the draft EIR may not be able to analyze all project activities in a site-specific context. Nonetheless, CSLC staff encourages the Council to discuss

general impacts and the types of strategies/formulas that would be implemented to minimize those types of impacts (see also comment #2, above). In addition, please note that under CEQA, a lead agency may not defer the formulation of a mitigation measure to other agencies; lead agencies have an independent obligation to address potentially significant impacts, even where a subsequent permit from another agency is necessary.

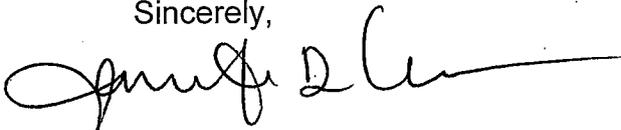
For example, although the Water Quality section of the draft EIR may discuss that a Stormwater Pollution Prevention Plan (SWPPP) would be required for individual levee projects under a General Construction Permit, in addition, the Council should adopt a mitigation measure stating that a SWPPP "shall" be developed, and outlining what measures the plan would be required to include.

13. Alternatives: In addition to describing mitigation measures that would avoid or reduce the potentially significant impacts of the Project, the Council should identify and analyze a range of reasonable alternatives to the proposed Project that would attain most of the Project objectives while avoiding or reducing one or more of the potentially significant impacts (see State CEQA Guidelines, § 15126.6).

Thank you for the opportunity to comment on the NOP for the Project. As a trustee and responsible agency, CSLC staff requests that you consult with us on this Project and keep us advised of changes to the Project description and all other important developments. Please send additional information on the Project to the CSLC staff listed below as the draft EIR is being prepared.

Please refer questions concerning environmental review to Cynthia Herzog, Senior Environmental Scientist, at (916) 574-1310 or via e-mail at [Cynthia.Herzog@slc.ca.gov](mailto:Cynthia.Herzog@slc.ca.gov). For questions concerning archaeological or historic resources under CSLC jurisdiction, please contact Assistant Chief Counsel Pam Griggs at (916) 574-1854 or via email at [Pamela.Griggs@slc.ca.gov](mailto:Pamela.Griggs@slc.ca.gov). For questions concerning CSLC leasing jurisdiction, please contact Nicholas Lavoie, Public Land Manager, at (916) 574-0452, or via email at [Nicholas.Lavoie@slc.ca.gov](mailto:Nicholas.Lavoie@slc.ca.gov).

Sincerely,



*For* Cy R. Oggins, Chief  
Division of Environmental Planning  
and Management

cc: Office of Planning and Research  
C. Herzog, CSLC  
N. Lavoie, CSLC  
S. Blackmon, CSLC