



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

DELTA STEWARDSHIP COUNCIL

A California State Agency

April 22, 2019

Chair
Susan Tatayon

Ms. Heather Green
California Department of Water Resources
3500 Industrial Blvd
West Sacramento, CA
95691

Members
Frank C. Damrell, Jr.
Randy Fiorini
Michael Gatto
Maria Mehranian
Skip Thomson
Oscar Villegas
Ken Weinberg

Executive Officer
Jessica R. Pearson

Sent via email: FRPA@water.ca.gov

RE: Comments on Notice of Preparation of an Environmental Impact Report and Scoping Meeting for the Lookout Slough Restoration Project, SCH# 2019039136

Dear Ms. Green:

Thank you for the opportunity to review and comment on the Lookout Slough Restoration Project Notice of Preparation (NOP) of an Environmental Impact Report (EIR). The Delta Stewardship Council (Council) recognizes the goal(s) of the Lookout Slough Restoration Project to restore approximately 3,000 acres of tidal marsh and create habitat for Delta Smelt and Giant Garter Snake as well as increase flood storage and flood conveyance capacity. The Council further understands that this project aims to help meet California Department of Water Resource (DWR) obligations under Reasonable and Prudent Alternative (RPA) 4 of the 2008 U.S. Fish and Wildlife Service Delta Smelt Biological Opinion (BiOp) and be consistent with RPA 1.6.1 of the 2009 U.S. National Marine Fisheries Service Salmonid BiOp for the coordinated operations of the State Water Project and Central Valley Project.

The Council is an independent state agency established by the Sacramento-San Joaquin Delta Reform Act of 2009, codified in Division 35 of the California Water Code, sections 85000-85350 (Delta Reform Act). The Delta Reform Act charges the Council with furthering California's coequal goals of achieving a more reliable water supply and protecting, restoring, and enhancing the Sacramento-San Joaquin River Delta (Delta) ecosystem, while protecting and enhancing the Delta's cultural, recreational, and agricultural values (Cal. Water Code §85054). These goals are to be achieved through implementation of the Delta Plan, regulatory portions of which became effective on September 1, 2013, and are set forth in Title 23 of the California Code of Regulations.

"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

Covered Action Determination and Certification of Consistency with the Delta Plan

Pursuant to the Delta Reform Act, the Council has adopted the Delta Plan, a legally enforceable management framework for the Delta and Suisun Marsh for achieving the coequal goals. The Delta Reform Act grants the Council specific regulatory and appellate authority over certain actions that take place in whole or in part in the Delta and Suisun Marsh, referred to as “covered actions.” (Cal. Water Code §§ 85022(a) and 85057.5.) The Council exercises that authority through its regulatory policies (set forth in Title 23 of the California Code of Regulations, Sections 5001 through 5016) and recommendations incorporated into the Delta Plan. State and local agencies are required to demonstrate consistency with the Delta Plan when carrying out, approving, or funding a covered action. (Cal. Water Code §§ 85057.5 and 85225.) Water Code section 85057.5(a) provides a four-part test for meeting the definition of a covered action.

Based on the project location and scope, as provided in the NOP, the proposed project appears to meet the definition of a covered action set forth in Water Code section 85057.5(a) because it:

1. Would occur in whole or in part within the boundaries of the Legal Delta (Water Code §12220) or Suisun Marsh (Public Resources Code §29101).
2. Would be carried out, approved, or funded by the State or a local public agency.
3. Would have a significant impact on the achievement of one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people, property, and State interests in the Delta. It appears that this project would have an impact on the coequal goal of ecosystem restoration, as well as flood control and risk to people, property, and State interests.
4. Is covered by one or more of the regulatory policies contained in the Delta Plan (23 CCR sections 5003-5015). Delta Plan regulatory policies that may apply to the proposed project are discussed below.

The Delta Reform Act requires the State or local agency that proposes to undertake a covered action to file a certification of consistency with the Delta Plan prior to initiation of implementation of the project. (Cal. Water Code § 85225.)

Comments Regarding Delta Plan Policies and Potential Consistency Certification

The following section describes regulatory Delta Plan policies that may apply to the proposed project based on the available information in the NOP. This information is offered to assist DWR to prepare certified environmental documents that can be used to support the project’s eventual certification of consistency. This information may also assist DWR to better describe the relationship between the proposed project and the Delta Plan in the EIR.

General Policy 1 (G P1): Detailed Findings to Establish Consistency with the Delta Plan
Delta Plan Policy **G P1** (23 Cal. Code Regs. section 5002) specifies what must be addressed in a certification of consistency by a project proponent for a covered action. The following is a subset of G P1 requirements that a project must fulfill to demonstrate consistency with the Delta Plan:

Mitigation Measures

Delta Plan Policy **G P1, subsection (b)(2)**, (23 CCR Section 5002(b)(2)) requires that actions not exempt from the California Environmental Quality Act (CEQA) and subject to Delta Plan regulations must include applicable feasible mitigation measures consistent with those identified in the Delta Plan Program EIR or substitute mitigation measures that are equally or more effective. Mitigation measures in the Delta Plan's Mitigation and Monitoring Reporting Program (Delta Plan MMRP) are available at:

http://deltacouncil.ca.gov/sites/default/files/documents/files/Agenda%20Item%206a_attach%202.pdf

If the Lookout Slough Restoration Project EIR identifies significant impacts that require mitigation, Council staff recommends that DWR review the Delta Plan MMRP and, when applicable and feasible, apply the mitigation measures identified in the Delta Plan or ensure that proposed project mitigation is equally or more effective than applicable Delta Plan measures.

Best Available Science

Delta Plan Policy **G P1, subsection (b)(3)**, (23 CCR Section 5002(b)(3)) requires covered actions to document use of best available science as relevant to the purpose and nature of the project.

Best available science is defined in the Delta Plan as the best scientific information and data for informing management and policy decisions, which must be consistent with the guidelines and criteria found in Appendix 1A of the Delta Plan, available at <http://deltacouncil.ca.gov/sites/default/files/2015/09/Appendix%201A.pdf>. (Cal. Code Regs, tit. 23, § 5001, subd. (f).). Six criteria are used to define best available science: relevance, inclusiveness, objectivity, transparency and openness, timeliness, and peer review. This policy generally requires that the lead agency clearly document and communicate the process for analyzing project alternatives, impacts, and mitigation measures of proposed projects, in order to foster improved understanding and decision making. Council staff recommends that DWR document the use of best available science in the EIR, including peer-reviewed publications and planning documents used in the planning and design of the proposed project. Further, DWR should consider including a description of any technical review forums that are undertaken during project planning and design, for example the Fishery Agency Strategy Team (FAST).

Adaptive Management

Delta Plan Policy **G P1, subsection (b)(4)**, (23 CCR Regs. section 5002(b)(4)) requires that ecosystem restoration and water management covered actions include adequate provisions for continued implementation of adaptive management, appropriate to the scope of the action. This requirement is satisfied through: a) the development of an adaptive management plan that is consistent with the framework described in Appendix 1 B of the Delta Plan (available at <http://deltacouncil.ca.gov/sites/default/files/2015/09/Appendix%201B.pdf>); and b) documentation of adequate resources to implement the proposed adaptive management plan.

Ecosystem Restoration Policy 2 (ER P2): Restore Habitats at Appropriate Elevations

Delta Plan Policy **ER P2** (23 Cal. Code Regs. section 5006) requires habitat restoration to be consistent with Delta Plan Appendix 3 (<http://deltacouncil.ca.gov/docs/appendix-3>), which describes the many ecosystem benefits related to restoring floodplains and provides guidance on the types of appropriate habitats given a restoration project site's location and elevation. The elevation map included in the Delta Plan as Figure 4-6 and Appendix 4 (available at http://deltacouncil.ca.gov/sites/default/files/documents/files/Fig4-6_DP_205_Elevation_Habitat%5B1%5D.pdf) should be used as a guide for determining appropriate habitat restoration actions based on an area's elevation.

The NOP identifies appropriate elevation and adaptation to future climate change as an important project objective (Goal 1, Objective E). The Biological Resources section of the EIR for the project should provide support for this objective by analyzing the elevation of the project site in detail in relation to current water levels and best available science for projected sea level rise. This analysis should document how the proposed ecosystem restoration project is planned at an appropriate elevation.

Ecosystem Restoration Policy 3 (ER P3): Protect Opportunities to Restore Habitat

Delta Plan Policy **ER P3** (23 Cal. Code Regs. section 5007) states that within priority habitat restoration areas (PHRAs) depicted in Appendix 5 (available at <http://deltacouncil.ca.gov/sites/default/files/2015/09/Appendix%205.pdf>), significant adverse impacts to the opportunity to restore habitat at appropriate locations must be avoided or mitigated.

The project is located within the Cache Slough Priority Habitat Restoration Area. Based on the objectives listed in the NOP, and short description of how infrastructure would either be protected, relocated, or replaced, it appears the proposed project would support implementation of ER P3. The Biological Resources section of the EIR for the project should describe in detail how the proposed project would avoid or mitigate impacts to this priority habitat restoration area relative to completion and implementation of the Lookout Slough Restoration Project.

Ecosystem Restoration Policy 5 (ER P5): Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species

Delta Plan Policy **ER P5** (23 Cal. Code Regs. section 5009) calls for avoiding introduction of and habitat improvements for invasive, nonnative species or for mitigating these potential impacts in a manner that appropriately protects the ecosystem.

As described in the NOP, the project would address this requirement (Goal 1, Objective F). The Biological Resources section of the EIR for the project should describe how the Lookout Slough Restoration Project would address both nonnative wildlife species as well as terrestrial and aquatic weeds, and fully consider the potential for the project to introduce or improve habitat for such species. The EIR should describe specifically how the project would avoid or mitigate any conditions that would lead to establishment or expansion of habitat for nonnative invasive species. For example, given the narrow levee breaches proposed along the eastern edge of the project site, careful consideration of tidal dynamics relative to habitat conditions for invasive nonnative species on the project site is warranted.

In the event that mitigation is warranted, mitigation measures should be consistent with Delta Plan Mitigation Measure 4-1 available at http://deltacouncil.ca.gov/sites/default/files/documents/files/Agenda%20Item%206a_attach%202.pdf.

Delta as Place Policy 2 (DP P2): Respect Local Land Use when Siting Water or Flood Facilities or Restoring Habitats

Delta Plan Policy **DP P2** (23 Cal. Code Regs. section 5011) reflects one of the Delta Plan's charges to protect the Delta as an evolving place by siting project improvements/facilities to avoid or reduce conflicts with existing uses or planned future uses identified in the applicable city or county general plan when feasible. Policy DP P2 may also apply if mitigation habitat is required within the Delta.

The Initial Study for this project identifies a less-than-significant impact to Land Use and Planning due to the project's lack of potential to conflict with any land use plan, policy, or regulation adopted for the purpose of avoiding or mitigating an environmental impact, noting that conservation and seasonal wetland restoration are permitted land uses in the proposed project site. (IS, p. 69) As a result, the NOP does not identify Land Use and Planning as a CEQA resource area to be discussed in the EIR (NOP, p. 5).

A certification of consistency requires "detailed findings as to whether the covered action is consistent with the Delta Plan." (Cal. Water Code § 85225.) To provide detailed findings of consistency of the project with DP P2, the EIR should contain a Land Use and Planning section that includes additional analysis regarding the consideration of siting conflicts and resulting impacts as they relate to DP P2. The EIR should describe how the project would be sited to avoid or reduce conflicts with existing or planned future uses. This should include a description of measures employed by the project to mitigate conflicts with adjacent uses, and

discuss how any comments received from local agencies and the Delta Protection Commission were considered by DWR.

Risk Reduction Policy 1 (RR P1): Prioritization of State Investments in Delta Levees and Risk Reduction

Delta Plan Policy **RR P1** (23 Cal. Code Regs. section 5012) calls for the prioritization of State investments in Delta flood risk management, including levee operation, maintenance and improvements.

Goal 3 of the project includes two objectives that directly relate to RR P1. Namely, as described in the NOP, it appears that the project would help avoid adverse flood-related impacts, and would contribute to reduced risk by decreasing flood stages in the lower Yolo Bypass. The Hydrology and Water Quality section of the EIR should describe how these objectives would be achieved by the project. The EIR should also describe how the prioritization of State investments in Delta levees and risk reduction has been applied to the project.

Risk Reduction Policy 4 (RR P4): Floodplain Protection

Delta Plan Policy **RR P4** (23 Cal. Code Regs. section 5015) states that no encroachment shall be allowed or constructed in the floodplain of the Yolo Bypass within the Delta unless it can be demonstrated by appropriate analysis that the encroachment will not have a significant adverse impact on floodplain values and functions.

The Hydrology and Water Quality section of the EIR should describe if and how implementation of the project would encroach upon the Yolo Bypass, and how such encroachment would or would not affect floodplain values and functions.

CEQA Regulatory Setting

In addition to the specific comments above, the EIR's Regulatory Setting should include a discussion of the Delta Plan and the specific applicable regulatory policy or policies for each resource section to which a Delta Plan policy is applicable.

Closing Comments

As DWR proceeds with design, development, and environmental impact analysis of the project, the Council invites DWR to engage Council staff in early consultation (prior to submittal of a certification of consistency) to discuss project features and mitigation measures that would promote consistency with the Delta Plan. As part of the Council, the Delta Science Program's Adaptive Management Liaisons are also available to provide further consultation and guidance regarding appropriate application of best available science and adaptive management.

Heather Green
Lookout Slough Restoration Project
April 22, 2019
Page 7

More information on covered actions, early consultation, and the certification process can be found on the Council website, <http://deltacouncil.ca.gov/covered-actions>. The Council is available to discuss issues outlined in this letter as DWR proceeds in the next stages of the project and approval processes. Please contact Daniel Constable at (916) 332- 9338 (Daniel.Constable@deltacouncil.ca.gov) with any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Henderson", with a long horizontal flourish extending to the right.

Jeff Henderson, AICP
Deputy Executive Officer
Delta Stewardship Council