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# DELTA STEWARDSHIP COUNCIL

*A California State Agency*

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May 2, 2019

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Environmental Services Division  
Contra Costa County Public Works Department  
255 Glacier Drive  
Martinez, CA 94553

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Sent via email: [Claudia.gemberling@pw.cccounty.us](mailto:Claudia.gemberling@pw.cccounty.us).

**RE: Comments on Lower Marsh Creek Stream Corridor Restoration Program Draft Initial Study/Mitigated Negative Declaration, SCH# 2019049002**

Dear Ms. Gemberling:

Thank you for the opportunity to review and comment on the proposed Lower Marsh Creek Stream Corridor Restoration Program Draft Initial Study/Mitigated Negative Declaration (IS/MND). The Delta Stewardship Council (Council) recognizes Contra Costa County's (County) goal(s) of the Lower Marsh Creek Stream Corridor Restoration Program, including floodplain restoration to benefit fish, birds, reptiles, and amphibians, and improvements in flood risk reduction, water quality, and public recreation opportunities. The Council understands that these goals would be achieved, in part, through use of this IS/MND to provide future project applicants with: (a) clear design guidelines; (b) accepted avoidance, minimization and mitigation measures; and (c) a simplified and transparent compliance process for implementing the types of projects envisioned under the program.

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 section 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.

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*"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 section 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 t for meeting the definition of a covered action.

Based on the description provided in the Draft IS/MND, the proposed program and future projects implemented to achieve the program’s goals appear to meet the definition of a covered action set forth in Water Code section 85057.5(a) because it/they:

1. Would occur in whole or in part within the boundaries of the Legal Delta (Water Code section 12220) or Suisun Marsh (Public Resources Code section 29101). This program and subsequent projects under the program would occur within the Secondary Zone of the Legal Delta within the cities of Brentwood and Oakley.
2. Would be carried out, approved, or funded by the State or a local public agency. Projects under this program would be approved or carried out by Contra Costa County.
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 program and subsequent projects under the program 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. Would be 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 program and subsequent projects under the program are discussed below.

The Delta Reform Act requires a 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 section 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 Draft IS/MND. This information is offered to assist Contra Costa County to prepare certified environmental documents that can be used to support the project’s eventual certification of consistency. This information may also assist

Contra Costa County to better describe the relationship between the proposed project and the Delta Plan in the MND.

**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 be demonstrate consistency with the Delta Plan:

**Mitigation Measures**

Delta Plan Policy **G P1, subsection (b)(2)**, (23 CCR section 5002(b)(2)) requires that covered 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\\_atta ch%202.pdf](http://deltacouncil.ca.gov/sites/default/files/documents/files/Agenda%20Item%206a_atta ch%202.pdf)

The Draft IS/MND for the proposed project identifies significant impacts for the topics of biological resources, cultural/tribal resources, geology and soils, noise, recreation, and traffic resource impacts that would be less-than-significant with mitigation. The Draft IS/MND proposes mitigation measures that projects under this program would be required to include to address these impacts. Council staff recommends that the County review the Delta Plan MMRP and, when applicable and feasible, document how the Final IS/MND mitigation measures align with and are equally or more effective than all 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, section 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 the Final IS/MND document the use of best available science, including peer-reviewed publications and planning documents used to develop the proposed program, and how subsequent projects under the program

would be designed based on best available science. Further, the County should consider including a description of any technical review forums that occurred and informed development of the proposed program.

### **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 1B 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. Council staff recommends that the Final IS/MND include a discussion of how subsequent projects under this program would address adaptive management.

### **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](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 Biological Resources section of the Final IS/MND should provide support for this objective by analyzing the elevation of the program area in detail in relation to current water levels and best available science for projected sea level rise. This analysis should then document how future projects under the program should demonstrate that they are 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 program area is located within the Western Delta Priority Habitat Restoration Area. Based on the listed objectives and description of how infrastructure would be modified to reduce flood risk and enable habitat restoration in the Draft IS/MND, ER P3 applies to this program. The Biological Resources section of the Final IS/MND should describe in detail how subsequent

projects under the program would avoid or mitigate impacts to this priority habitat restoration area.

**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.

The Final IS/MND should describe specifically how subsequent projects under this program would avoid or mitigate conditions that would lead to establishment or expansion of habitat for nonnative invasive species. For example, given the program objectives to set back levees and re-establish native vegetation within the creek corridor, careful consideration of how to prevent colonization of invasive nonnative species on project sites 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](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 Final IS/MND should describe how subsequent projects under the program would be sited to avoid or reduce conflicts with existing or planned future land uses. This should include a description of how project features or measures that would mitigate conflicts with adjacent uses would be employed by subsequent projects under the program.

**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) sets key priorities to guide discretionary State investments in Delta flood risk management, which include emergency preparedness, response, and recovery as described in paragraph as well as Delta levees funding.

The proposed program objectives include stream setback levees related to RR P1. As described in the Draft IS/MND, it appears that the program would help avoid adverse flood-related impacts, and would contribute to reduced risk by decreasing potential flood impacts to the communities of Brentwood and Oakley. The Hydrology and Water Quality section of the Final IS/MND should describe how these objectives would be achieved by subsequent projects

under the program. The Final IS/MND should also describe how the priorities for State investment in Delta integrated flood management have been applied to the program.

**Risk Reduction Policy 3: Protect Floodways**

Delta Plan Policy **RR P3** (23 Cal. Code Regs. section 5014) restricts encroachment in floodways that are not either a designated floodway or a regulated stream. Policy RR P3 states that "no encroachment shall be allowed or constructed in a floodway unless it can be demonstrated by appropriate analysis that the encroachment will not unduly impede the free flow of water in the floodway or jeopardize public safety." Encroachments include removal, or planting of vegetation. (23 Cal. Code Regs. section 5001(n)). Council staff understands that the program purposes include expanding channel capacity to increase flood conveyance capacity and improving habitat conditions. The Final IS/MND should analyze and document how the subsequent projects under the program would not impede the free flow of water in the floodway or jeopardize public safety.

**CEQA Regulatory Setting**

The Council appreciates that the Draft IS/MND identifies the Delta Stewardship Council and the Delta Plan certification of consistency process among the potential permits and approvals required from public agencies on page 29. In addition to the specific comments above, this reference in the Final IS/MND should also include a discussion of the specific applicable regulatory policies described in this letter.

**Closing Comments**

The Council invites the County to engage Council staff in early consultation (prior to submittal of a certification of consistency) to discuss program features and mitigation measures that would promote consistency with the Delta Plan. As part of the Council, Delta Science Program staff are available to provide further consultation and guidance regarding appropriate application of best available science and adaptive management.

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

Sincerely,



Jeff Henderson, AICP  
Deputy Executive Officer  
Delta Stewardship Council