

DELTA PROTECTION COMMISSION

Diane Burgis, Chair (Contra Costa County Board of Supervisors)
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December 16, 2024

Katherine Marquez, Program Manager
California Department of Water Resources
1516 9th Street, 2nd Floor
Sacramento, CA 95814

Dear Ms. Marquez:

We are providing comments on the proposed *Delta Conveyance Project, Final Certification of Consistency For 2024-2046 Proposed Geotechnical Activities (C20242)*. On December 12, 2024, the Commission met and considered the content in the letter submitted by the Executive Director on November 27, 2024. The Commission voted to endorse the letter, with seven Commissioners voting in favor, one abstaining, and five absent; Chair Diane Burgis and Commissioner Gloria Sandoval recused themselves from the vote regarding the letter. This updated letter thus contains the comments of the Delta Protection Commission.

The Geotechnical Investigations are Part of the Covered Action Rather than Their Own Covered Action: As Such Consistency Certification is Premature and Improper

The Delta Reform Act defines a covered action as “. . . a plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code. . .” (Water Code Section 85057.5(a)). Public Resources Code Section 21065 defines “project” for the purposes of the California Environmental Quality Act (CEQA). The regulations implementing CEQA further define project as follows: “[a] Project” means the whole of an action. . .” (14 Cal. Code of Regulations Section 15378(a)). Because the covered action is defined by incorporating the definition of a CEQA project, the covered action must conform to the

rules for CEQA projects. The regulations implementing CEQA state that a covered action must include the whole of the action, rather than a part of the action. The purpose of this rule is to avoid the possibility of obscuring the full scope of a project’s environmental effects, by considering only parts of the action.

The Courts have provided the additional test that agencies must analyze the “reasonably foreseeable consequences” of a project (*Laurel Heights Improvement Ass’n v. Univ. of California*, 47 C3d. 376, 396 [1988]). Projects that fail this requirement engage in illegal piecemealing of the project by failing to consider the whole of the action. Typically piecemealing questions involve projects that have some degree of separation, but factually may be intertwined. Here the geotechnical work is necessary to advance design of the Delta Conveyance Project and thus is a foreseeable environmental consequence of the project, and as such should be considered part of that project under *Laurel Heights*. The Department of Water Resource (Department)’s own documents in fact, describe the geotechnical investigations as part of the project for purposes of CEQA review (see Section 3.15 of the Final Environmental Impact Report (FEIR) for the project) (DCP.D1.1.00010:134, DWR 2023).

The Certification of Consistency unambiguously states “*To be clear, this is not a certification of consistency for the Delta Conveyance Project, as described below. This certification of consistency is limited to certain preliminary geotechnical work, described herein, related to the Delta Conveyance Project’s planning and design.*” (DCP.X2.00001: 5, DWR 2024:1-1).

The Department thus has previously stated that geotechnical work is part of the project for purposes of CEQA (in the FEIR) and then later states that the covered action submitted for review is not part of the consistency certification for the Delta Conveyance Project (DCP) itself. These statements cannot be reconciled with the definition of covered action in the Water Code or the definition of a “project” for purposes of CEQA. Because the separation of the geotechnical work from the CEQA project would be improper piecemealing, it is also an improper division of the covered action for purposes of consistency review under Water Code Section 85022, which requires consistency of covered actions with the Delta Plan.

Our analysis of the proper scope of covered actions for purposes of the Delta Reform Act is reinforced by the court order previously issued regarding geotechnical work and the consistency certification, which was also included in the certification submitted by DWR (DCP.X2.00001: 111, Superior Court of California 2024). The court order reads: “*The motions for preliminary injunction are granted. The geotechnical work at issue here is **part of the covered action, which requires certification of consistency with the Delta Plan***”

before it is implemented. The Department is, therefore, enjoined from undertaking the geotechnical work described in Chapter 3 of the FEIR prior to completion of the certification procedure that the Delta Reform Act requires” (DCP.X2.00001: 121, Superior Court of California 2024:11-12, emphasis added). The court order makes the statement that geotechnical investigations are **part of** rather than separate from the covered action that must be certified for consistency prior to implementation (DCP.X2.00001: 114, Superior Court of California 2024:4). The Department’s attempt to split off a portion of the covered action and proceed with it separately from consistency certification for the whole action contradicts both its own representation of the project in the FEIR, the definitions in the Delta Reform Act and Public Resources Code, and the court order enjoining geotechnical investigations. The Commission considers the covered action to consist of all geotechnical work, the construction of the Delta Conveyance Project, and operation of the project.

The Analysis of the Geotechnical Investigations as a Separate Covered Action Incorrectly Concludes the Geotechnical Work Does Not Trigger the Need for Consistency Certification

The Department provides an analysis to determine whether the geotechnical work, by itself, would qualify as a covered action and thus trigger the need for a consistency certification. This analysis is factually incorrect. Even if the geotechnical work could proceed as a covered action separate from the DCP (which it cannot), it would qualify as a covered action under the Delta Reform Act.

On pages 4-2 of the consistency documentation, the Department concludes that because the geotechnical work does not have a significant impact on the achievement of the co-equal goals it is not a covered action pursuant to Water Code Section 85057.5(a)(4) (DCP.X2.00001: 27, DWR 2024:4-2). The Department relies on its assertion that the geotechnical work will not have any effect on the strategies developed by the Delta Stewardship Council and therefore will not have a significant impact on achievement either of the co-equal goals (DCP.X2.00001: 28, DWR 2024:4-3). This interpretation of the Delta Reform Act is misguided. The necessary test is provided in part, by Water Code sections 85057.5(a)(4) and 85054, which supersede the Delta Stewardship Council policies. The strategies to achieve the co-equal goals are subordinate to the co-equal goals, and merely provide guidance regarding how they may be achieved. Water Code Section 85054 defines the co-equal goals in part as “. . .*protecting, restoring, and enhancing the Delta ecosystem.*” This language thus provides the proper test for the coequal goals rather than the policies adopted to further their goals.

The Department’s administrative record demonstrates the geotechnical work will have a substantial effect on the protection of the Delta ecosystem (Water Code Section 85054). Figure 1 from the proposed consistency certification document is enclosed (Attachment 1). It shows the locations of geotechnical work. The map depicts a vast array of investigations that spans the entire eastern and southern Delta, with clusters around the towns of Locke, Hood, and Walnut Grove. The Department’s FEIR for the DCP provides a detailed appendix for terrestrial wildlife movement (DCP.D1.1.00117, Appendix 13E). Figure 13-E2 from this document (DCP.D1.1.00117, Appendix 13E) depicts “Natural Landscape Blocks” and “Essential Connectivity Areas” (enclosed as Attachment 2) clustered in the same portion of the Delta where the Department proposes a vast program of geotechnical work, that will introduce traffic, noise, light, and vibration for extended periods of time (Attachment 1).

The draft consistency certification contains a section entitled “*Attachment 4 2024–2026 Proposed Geotechnical Activities—Evaluation of Consistency with the Delta Conveyance Project’s Final EIR.*” This section asserts “*Geotechnical activities will not involve construction, or placement of powerlines, will avoid take of listed species and habitat loss, will not involve surface disturbance that would disrupt terrestrial wildlife connectivity and movement*” (DCP.X2.1.00001: 166, DWR 2024, Attachment 4: 19). This statement is completely unsupported by any facts or analysis. It is also contradicted by the scope of the program depicted in Figure 1 from the consistency certification (Attachment 1) and the mapbooks for wildlife movement from the DCP FEIR (Attachment 2). The Department effectively is asserting that a vast program of work requiring heavy equipment, noise, light, and vibration, that will occur over a period of only two years and will also occur in mapped connectivity corridors and natural habitat blocks will have no impact on wildlife movement, and thus will not affect the goal of protecting the Delta ecosystem. The Department’s own administrative record shows that the geotechnical work will have such an effect, and thus meets the test for a covered action in Water Code Section 85057.5(a)(4). Thus, even if the geotechnical work could properly be considered its own covered action (which it cannot), the Department’s attempt to define it out of the scope of covered actions is not supported by its own analysis.

The Department Incorrectly Concludes the Geotechnical Work Is Consistent with The Delta Plan

The Department relies heavily on its assertion that the geotechnical work does not need to be certified for consistency, but then states, “*Nevertheless, for the sake of thoroughness and to err on the side of facilitating the DSC’s informed decision-making process, the*

analysis that follows additionally considers Step 3 of the Checklist to determine whether the 2024–2026 Proposed Geotechnical Activities are covered by one or more regulatory Delta Plan policies contained in Article 3 of the DSC’s regulations codified at California Code of Regulations, Title 23, Sections 5003–5015” (DCP.X2.1.00001:29, DWR 2024:4-4). This section of the consistency certification thus provides analysis of consistency of the action in relation to the regulatory policies implementing the plan. This section’s conclusions are not supported by fact.

The Delta Stewardship Council regulations for the purposes of consistency review provide the following standard:

Water management facilities, ecosystem restoration, and flood management infrastructure must be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence when feasible, considering comments from local agencies and the Delta Protection Commission. Plans for ecosystem restoration must consider sites on existing public lands, when feasible and consistent with a project’s purpose, before privately owned sites are purchased. Measures to mitigate conflicts with adjacent uses may include, but are not limited to, buffers to prevent adverse effects on adjacent farmland (23 Cal. Code of Regulations Section 5011(a)).

The proposed geotechnical work fails this test for at least two reasons. First, the geotechnical work will result in the placement of a vast array of geodetic survey monuments in the Delta. These consist of metal markers, typically attached to a subterranean pipe or pole, that are permanently placed in the landscape. The consistency document references these in several locations including *Section 3.6.2, Overview of 2024–2026 Proposed Geotechnical Activities* (DCP.X2.1.00001:20, DWR 2024:3-15).

A cursory review of typical survey monuments shows a standard monument might consist of a 30-inch stainless steel length of pipe with a 3.25-inch bronze cap (Berntsen 2024). DWR relies heavily on the concept that geotechnical work is a transitory activity and will not create permanent facilities. However, the volume and location of monuments proposed would span the entire eastern and southern Delta (see Figure 1 from the consistency document, Attachment 1). Because the Delta is an agricultural landscape subject to tilling and other mechanical methods of farming, the geodetic monuments will leave a permanent impediment to farming across the Delta. Because the purpose of the geotechnical work is to support water management facilities and will leave permanent facilities consisting of survey markers, it is thus a “water management facility” that conflicts with the prevailing land use in the Delta, which is agriculture. For these reasons it

does not satisfy the Delta Stewardship Council regulatory test that “*Water management facilities, ecosystem restoration, and flood management infrastructure must be sited to avoid or reduce conflicts*” (23 Cal. Code of Regulations Section 5011(a)).

Furthermore, the text of Section 5011(a) does not explicitly exclude temporary impacts created by water management facilities on local land use. These impacts logically include the potential for the concentration of equipment and vehicle traffic for extended periods of time that would generate conflicts. DWR states that “*Proposed Geotechnical Activities will generate minimal traffic and will be conducted in coordination with property owners*” (DWR DCP.X2.1.00001:29, 2024:4-3). This statement however provides little other than a bare assertion without any substantive analysis of how the cumulative effect of simultaneous geotechnical investigations at multiple sites compressed into a few years can be synchronized with critical periods of agricultural operations and trucking throughout the Delta.

The Department relies heavily on the assertion that traffic impacts were previously described in and will be consistent with the FEIR. The Department fails to note however that the FEIR only describes the location of geotechnical work in a very general narrative fashion in Section 3.15 of the FEIR. The associated mapbooks for the “Bethany Reservoir Alignment” show that geotechnical investigations may occur anywhere there are project features or alignments (DCP.D1.1.0000.1, DWR 2023). This very general acknowledgement of when and where geotechnical work would occur stands in stark contrast to Figure 1 in the consistency analysis (DCP.X2.00001:10, DWR 2024, also enclosed as Attachment 1). Note that in addition to a newly, substantially greater specificity regarding location shown in the current consistency documentation, the Department also states, “*This work would commence as soon as possible and conclude by the end of 2026*” (DCP.X2.00001:18, DWR 2024:3-13). Figure 1 thus depicts a specific, concentrated, and large program of work that will occur in only two years. Taken at face value, DWR thus asserts that the traffic impact analysis and mitigation approach of the FEIR for traffic impacts now will adequately address the effects of a huge program of investigation that will occur in only two years that was never previously analyzed in detail corresponding to the specificity shown in Figure 1 (Attachment 1).

The 2024 consistency analysis provides no substantiation of how coordination with local property owners will be performed or how the Department will adequately address impacts on agricultural operations for a large and very geographically concentrated program occurring in a compressed time frame. Absent more analysis and substantiation, we conclude that the geotechnical work will conflict with local agricultural practices and trucking, and will conflict with existing land uses in a manner inconsistent with the

regulatory policy of the Delta Plan codified in 23 Cal. Code of Regulations Section 5011(a)). The disparity in specificity and detail between the FEIR and the 2024 consistency documentation also warrants discussion in relation to CEQA.

The CEQA Analysis of the 2024 Consistency Documentation is Incorrect

DWR concludes that no additional CEQA analysis is required for the proposed geotechnical work because the geotechnical work was previously analyzed in the environmental impact report for DCP itself (DCP.X2.1.00001:9, DWR 2024:3-1). In support of this conclusion, DWR included in the 2024 consistency documentation “*Attachment 4, 2024–2026 Proposed Geotechnical Activities—Evaluation of Consistency with the Delta Conveyance Project’s Final EIR*” (DCP.X2.1.00001:147, DWR 2024). This memorandum states that DWR has analyzed “*whether the geotechnical activities have the potential to result in any new or substantially more severe environmental impacts than shown in the Delta Conveyance Project’s Final EIR*” (DCP.X2.1.00001:151, DWR 2024, Attachment 4:4). This is only part of the full standard for analyzing the need for subsequent CEQA documentation.

The CEQA Guidelines provide the following test for the need for subsequent environmental analysis. A subsequent or supplemental EIR is required when:

- Changes to the project will cause either new significant impacts or a substantial increase in the severity of identified impacts (14 Cal. Code of Regulations Section 15162(a)(1), or,
- Changes to the circumstances for the project will cause either new significant impacts or a substantial increase in the severity of identified impacts (14 Cal. Code of Regulations Section 15162(a)(2), or,
- New information of substantial importance, which was not known and could not have been known at the time of the past EIR shows:
 - The project will have one or more significant effects not discussed in the previous EIR or negative declaration, or,
 - Significant effects previously examined will be substantially more severe than shown in the previous EIR, or,
 - Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or,
 - Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more

significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative (14 Cal. Code of Regulations Section 15162(a)(3)).

DWR thus has greatly simplified the language of the proper test and thus avoided significant parts of its meaning. Note that the process of screening for new environmental effects needs to consider the full scope of impacts subject to CEQA analysis. The CEQA Guidelines require that public agencies make a mandatory finding of significance when:

The project has possible environmental effects that are individually limited but cumulatively considerable. “Cumulatively considerable” means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects (14 Cal. Code of Regulations Section 15065(a)(3)).

This means that even if the project’s increment of effect is not significant at a project level, it may combine with other reasonably foreseeable projects or conditions to create a significant impact (14 Cal. Code of Regulations Section 15355).

The CEQA analysis in Attachment 4 to the consistency documentation provides no analysis of the cumulative effect of the proposed geotechnical investigations on any resource or threshold. The only instances of the word “cumulative” occur as explanatory footnotes to air quality standards.

DWR thus proposes a geotechnical program with newly identified specific locations that span the Delta, in a compressed time frame, and concludes that this work will not result in any new impacts on individual resources or substantial increases in the severity of significant impacts. This conclusion fails to consider the cumulative effect of a concentrated and large program of work occurring in a short period of time. This conclusion is largely supported by reliance on the scope of the previous EIR, which lacked the specificity of the 2024 documentation. Note that Section 3.15 in the FEIR for DCP provided only a high-level narrative overview of geotechnical work (DCP.D1.1.00010:134, DWR 2023:134). The conclusion that no impacts to agricultural operations or trucking, or wildlife movement, among myriad other resources, is unsupported by analysis. The available information suggests that these impacts will be more severe than previously disclosed, and thus warrant additional environmental review.

We urge the Department to comply with the policy mandate of both CEQA and the Delta Reform Act by providing a timely analysis of the full scope of the covered action, supported

by adequate CEQA analysis for the newly identified geotechnical program, which is substantially different and of greater detail than that disclosed in the FEIR for DCP.

If you have any questions, please contact our Senior Environmental Planner, Mike Aviña, at Mike.Avina@delta.ca.gov, or at (530) 750-6727.

Sincerely,



Bruce Blodgett, Executive Director
Delta Protection Commission

CC: Jeff Henderson, Deputy Executive Officer for Planning & Performance, Delta Stewardship Council

References Cited

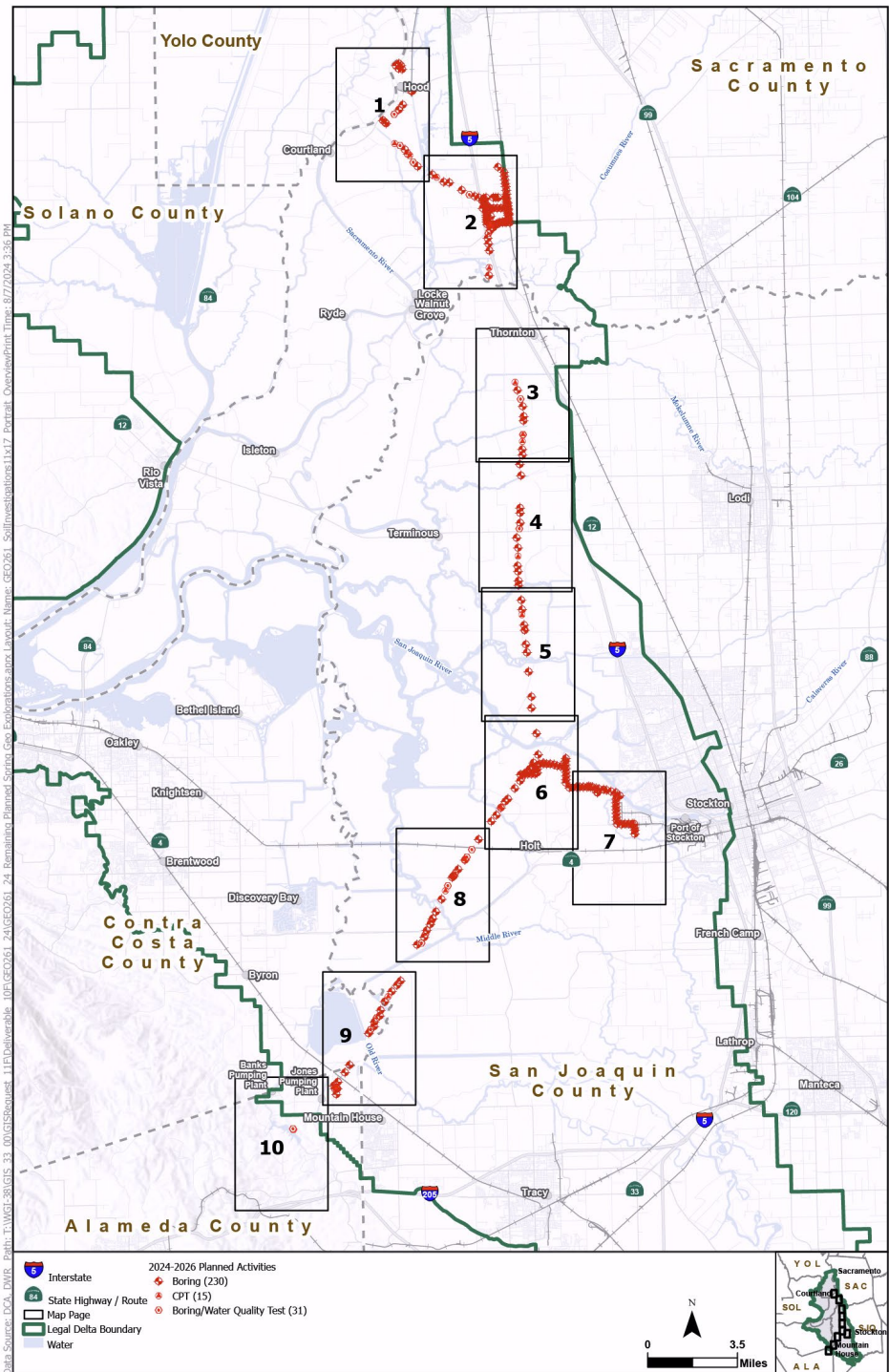
Berntsen. Flarable Pipe Monuments, SSB NB30. 2024. Madison, Wisconsin. Available:
[Flarable Pipe Monuments](#)

California Department of Water Resources (DWR). DELTA CONVEYANCE PROJECT: FINAL CERTIFICATION OF CONSISTENCY FOR 2024–2026 PROPOSED GEOTECHNICAL ACTIVITIES. 2024. Sacramento, California.

DWR. Final Environmental Impact Report, Delta Conveyance Project. 2023. Sacramento, California.

Superior Court of California. Court Order for *Tulare Lake Basin Water Storage District v. California Department of Water Resources*. 2024. Sacramento, California.

Attachment 1



Investigation Locations
 Figure 1. 2024-2026 Proposed Geotechnical Activities Mapbook

Attachment 2

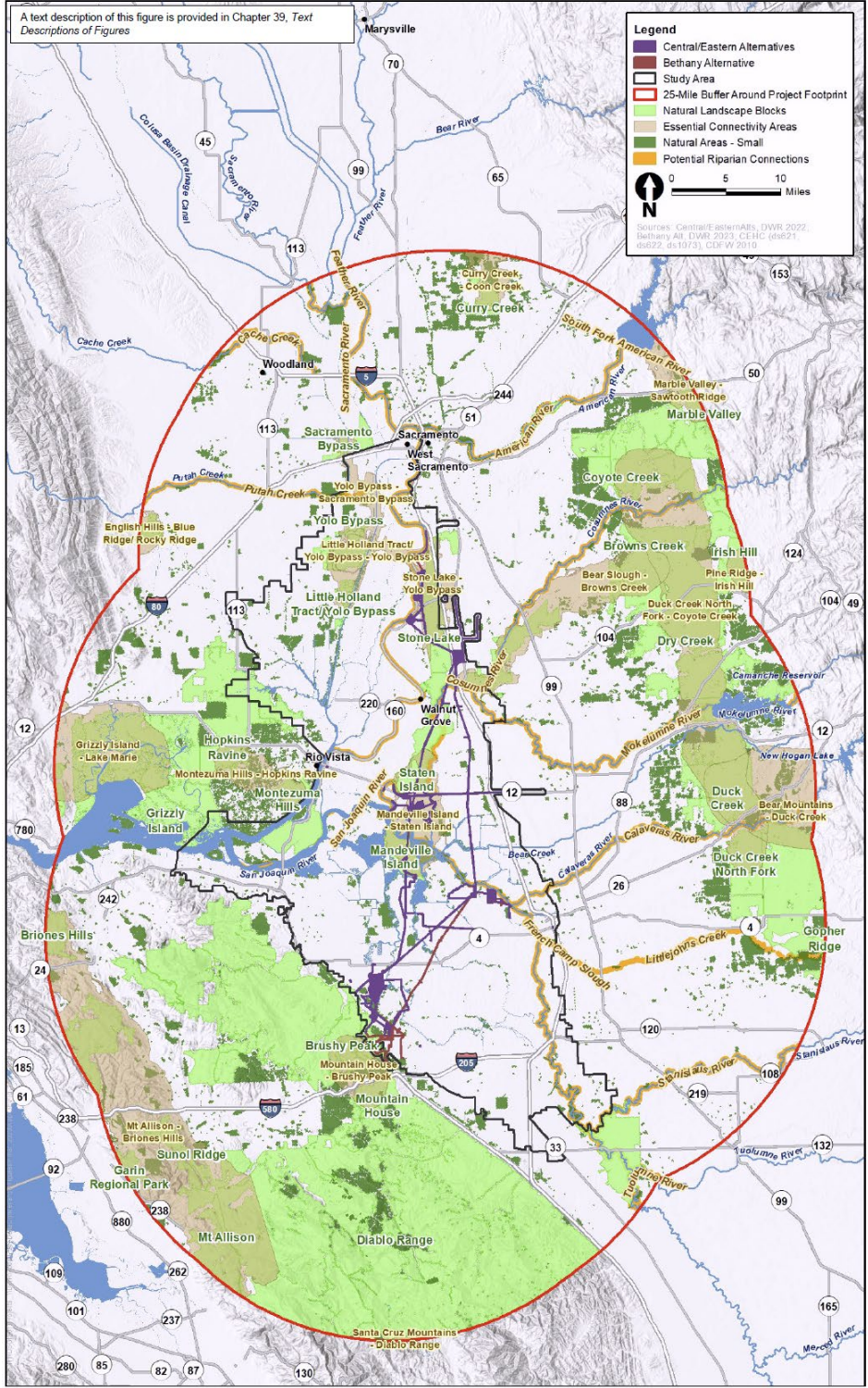


Figure 13E-2. California Essential Habitat Connectivity

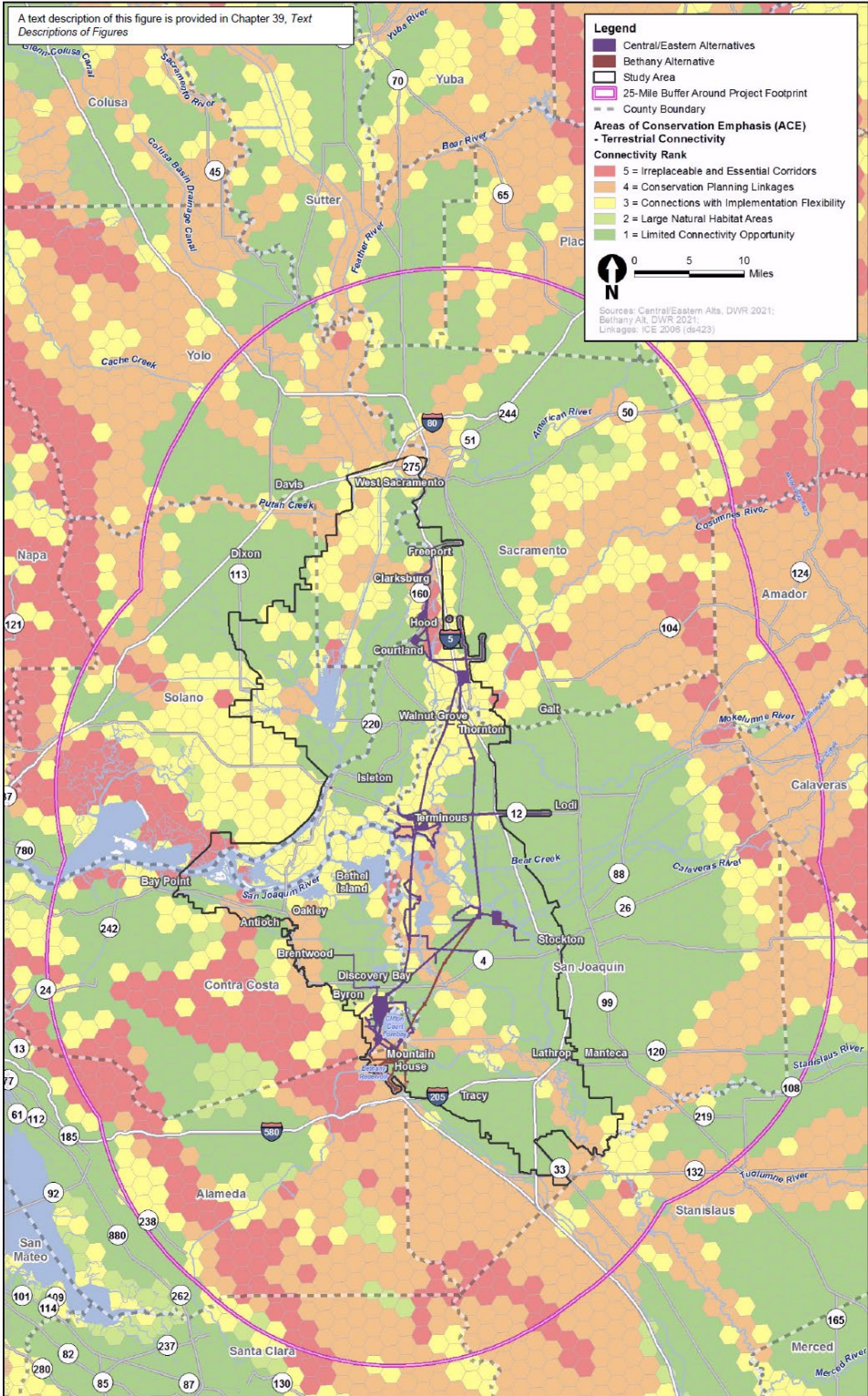


Figure 13E-3. Areas of Conservation Emphasis (ACE)–Terrestrial Connectivity

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November 27, 2024

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Dear Ms. Marquez:

We are providing comments on the proposed *Delta Conveyance Project, Final Certification of Consistency For 2024-2046 Proposed Geotechnical Activities*.

This letter revises our previous letter regarding the certification of consistency, sent on November 5, 2024. That letter, and the following revised comments, reflect my views as the Executive Director of the Delta Projection Commission and the view of my staff. These letters do not represent the views of the Commission as a government body, nor have they been presented to the Commission for endorsement.

Due to the compressed nature of the hearing process and the typical bi-monthly schedule for Commission meetings, it was not possible to present the previous letter or this letter to the Commission. Both letters will be submitted to the Commission at a meeting on December 12, 2024. The Commission may respond with additional comments or clarifications after that meeting. With those caveats in mind, we submit our previous comments, with minor revisions.

Citations to the administrative record of documents submitted by DWR use the administrative record file number first, followed by a citation that follows standard conventions, for purposes of clarity to lay readers.

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A cursory review of typical survey monuments shows a standard monument might consist of a 30-inch stainless steel length of pipe with a 3.25-inch bronze cap (Berntsen 2024).

DWR relies heavily on the concept that geotechnical work is a transitory activity and will not create permanent facilities. However, the volume and location of monuments proposed would span the entire eastern and southern Delta (see Figure 1 from the consistency document, Attachment 1). Because the Delta is an agricultural landscape subject to tilling and other mechanical methods of farming, the geodetic monuments will leave a permanent impediment to farming across the Delta. Because the purpose of the geotechnical work is to support water management facilities and will leave permanent facilities consisting of survey markers, it is thus a “water management facility” that conflicts with the prevailing land use in the Delta, which is agriculture. For these reasons it does not satisfy the Delta Stewardship Council regulatory test that “*Water management facilities, ecosystem restoration, and flood management infrastructure must be sited to avoid or reduce conflicts*” (23 Cal. Code of Regulations Section 5011(a)).

Furthermore, the text of Section 5011(a) does not explicitly exclude temporary impacts created by water management facilities on local land use. These impacts logically include the potential for the concentration of equipment and vehicle traffic for extended periods of time that would generate conflicts. DWR states that “*Proposed Geotechnical Activities will generate minimal traffic and will be conducted in coordination with property owners*” (DWR DCP.X2.1.00001:29, 2024:4-3). This statement however provides little other than a bare assertion without any substantive analysis of how the cumulative effect of simultaneous geotechnical investigations at multiple sites compressed into a few years can be synchronized with critical periods of agricultural operations and trucking throughout the Delta.

The Department relies heavily on the assertion that traffic impacts were previously described in and will be consistent with the FEIR. The Department fails to note however that the FEIR only describes the location of geotechnical work in a very general narrative fashion in Section 3.15 of the FEIR. The associated mapbooks for the “Bethany Reservoir Alignment” show that geotechnical investigations may occur anywhere there are project features or alignments (DCP.D1.1.0000.1, DWR 2023). This very general acknowledgement of when and where geotechnical work would occur stands in stark contrast to Figure 1 in the consistency analysis (DCP.X2.00001:10, DWR 2024, also enclosed as Attachment 1). Note that in addition to a newly, substantially greater specificity regarding location shown in the current consistency documentation, the Department also states, “*This work would commence as soon as possible and conclude by the end of 2026*” (DCP.X2.00001:18, DWR 2024:3-13). Figure 1 thus depicts a specific, concentrated, and large program of work that will occur in only two years. Taken at face value, DWR thus asserts that the traffic impact analysis and mitigation approach of the FEIR for traffic impacts now will adequately address the effects of a huge program of investigation that will occur in only two years that

was never previously analyzed in detail corresponding to the specificity shown in Figure 1 (Attachment 1).

The 2024 consistency analysis provides no substantiation of how coordination with local property owners will be performed or how the Department will adequately address impacts on agricultural operations for a large and very geographically concentrated program occurring in a compressed time frame. Absent more analysis and substantiation, we conclude that the geotechnical work will conflict with local agricultural practices and trucking, and will conflict with existing land uses in a manner inconsistent with the regulatory policy of the Delta Plan codified in 23 Cal. Code of Regulations Section 5011(a). The disparity in specificity and detail between the FEIR and the 2024 consistency documentation also warrants discussion in relation to CEQA.

The CEQA Analysis of the 2024 Consistency Documentation is Incorrect

DWR concludes that no additional CEQA analysis is required for the proposed geotechnical work because the geotechnical work was previously analyzed in the environmental impact report for DCP itself (DCP.X2.1.00001:9, DWR 2024:3-1). In support of this conclusion, DWR included in the 2024 consistency documentation “*Attachment 4, 2024–2026 Proposed Geotechnical Activities—Evaluation of Consistency with the Delta Conveyance Project’s Final EIR*” (DCP.X2.1.00001:147, DWR 2024). This memorandum states that DWR has analyzed “*whether the geotechnical activities have the potential to result in any new or substantially more severe environmental impacts than shown in the Delta Conveyance Project’s Final EIR*” (DCP.X2.1.00001:151, DWR 2024, Attachment 4:4). This is only part of the full standard for analyzing the need for subsequent CEQA documentation.

The CEQA Guidelines provide the following test for the need for subsequent environmental analysis. A subsequent or supplemental EIR is required when:

- Changes to the project will cause either new significant impacts or a substantial increase in the severity of identified impacts (14 Cal. Code of Regulations Section 15162(a)(1), or,
- Changes to the circumstances for the project will cause either new significant impacts or a substantial increase in the severity of identified impacts (14 Cal. Code of Regulations Section 15162(a)(2), or,
- New information of substantial importance, which was not known and could not have been known at the time of the past EIR shows:

- The project will have one or more significant effects not discussed in the previous EIR or negative declaration, or,
- Significant effects previously examined will be substantially more severe than shown in the previous EIR, or,
- Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or,
- Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative (14 Cal. Code of Regulations Section 15162(a)(3)).

DWR thus has greatly simplified the language of the proper test and thus avoided significant parts of its meaning. Note that the process of screening for new environmental effects needs to consider the full scope of impacts subject to CEQA analysis. The CEQA Guidelines require that public agencies make a mandatory finding of significance when:

The project has possible environmental effects that are individually limited but cumulatively considerable. “Cumulatively considerable” means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects (14 Cal. Code of Regulations Section 15065(a)(3)).

This means that even if the project’s increment of effect is not significant at a project level, it may combine with other reasonably foreseeable projects or conditions to create a significant impact (14 Cal. Code of Regulations Section 15355).

The CEQA analysis in Attachment 4 to the consistency documentation provides no analysis of the cumulative effect of the proposed geotechnical investigations on any resource or threshold. The only instances of the word “cumulative” occur as explanatory footnotes to air quality standards.

DWR thus proposes a geotechnical program with newly identified specific locations that span the Delta, in a compressed time frame, and concludes that this work will not result in any new impacts on individual resources or substantial increases in the severity of significant impacts. This conclusion fails to consider the cumulative effect of a concentrated and large program of work occurring in a short period of time. This conclusion is largely supported by reliance on the scope of the previous EIR, which lacked

the specificity of the 2024 documentation. Note that Section 3.15 in the FEIR for DCP provided only a high-level narrative overview of geotechnical work (DCP.D1.1.00010:134, DWR 2023:134). The conclusion that no impacts to agricultural operations or trucking, or wildlife movement, among myriad other resources, is unsupported by analysis. The available information suggests that these impacts will be more severe than previously disclosed, and thus warrant additional environmental review.

We urge the Department to comply with the policy mandate of both CEQA and the Delta Reform Act by providing a timely analysis of the full scope of the covered action, supported by adequate CEQA analysis for the newly identified geotechnical program, which is substantially different and of greater detail than that disclosed in the FEIR for DCP.

If you have any questions, please contact our Senior Environmental Planner, Mike Aviña, at Mike.Avina@delta.ca.gov, or at (530) 750-6727.

Sincerely,



Bruce Blodgett, Executive Director
Delta Protection Commission

CC: Jeff Henderson, Deputy Executive Officer for Planning & Performance, Delta Stewardship Council

References Cited

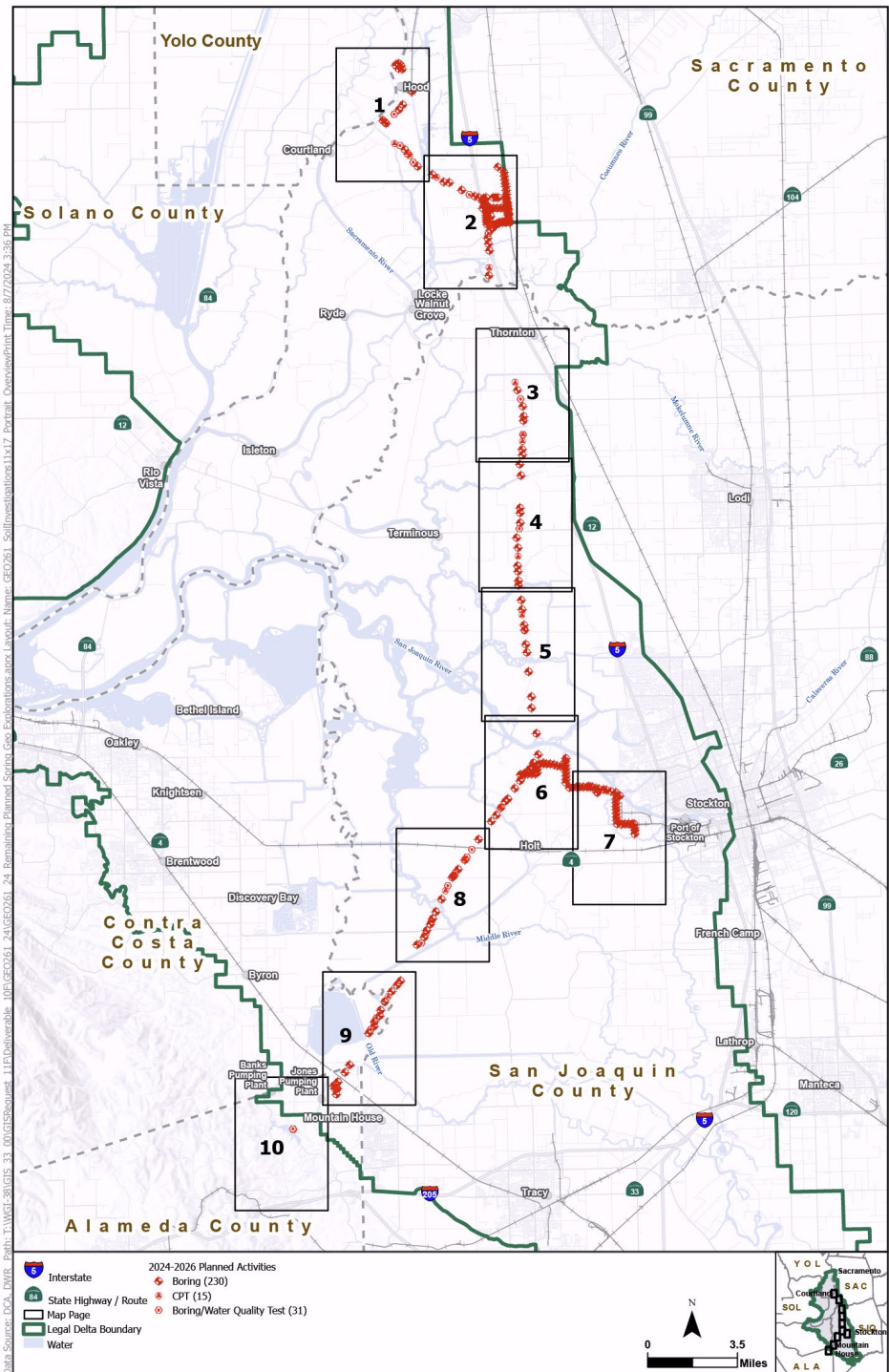
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DWR. Final Environmental Impact Report, Delta Conveyance Project. 2023. Sacramento, California.

Superior Court of California. Court Order for *Tulare Lake Basin Water Storage District v. California Department of Water Resources*. 2024. Sacramento, California.

Attachment 1



Investigation Locations
 Figure 1. 2024-2026 Proposed Geotechnical Activities Mapbook

Attachment 2

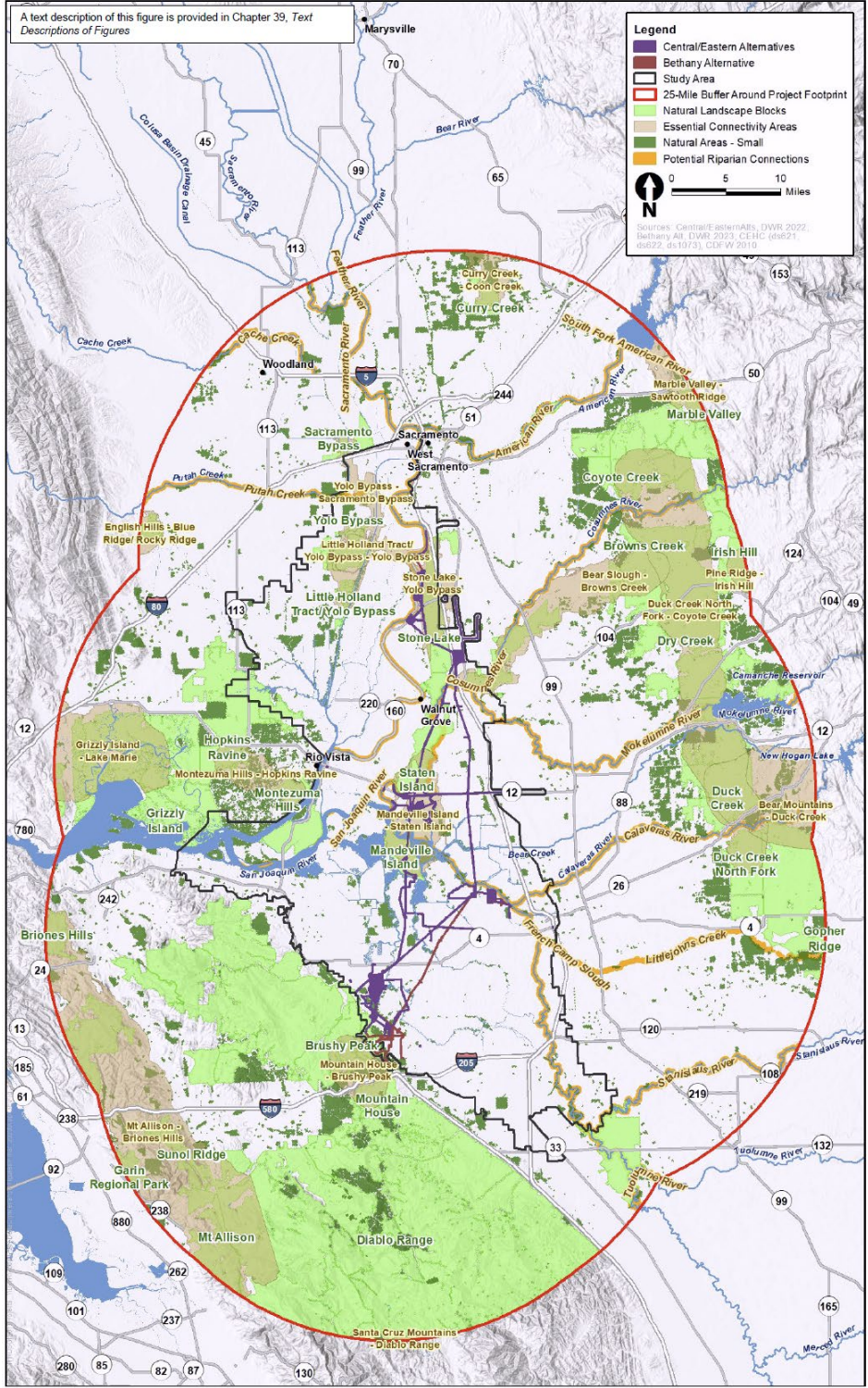


Figure 13E-2. California Essential Habitat Connectivity

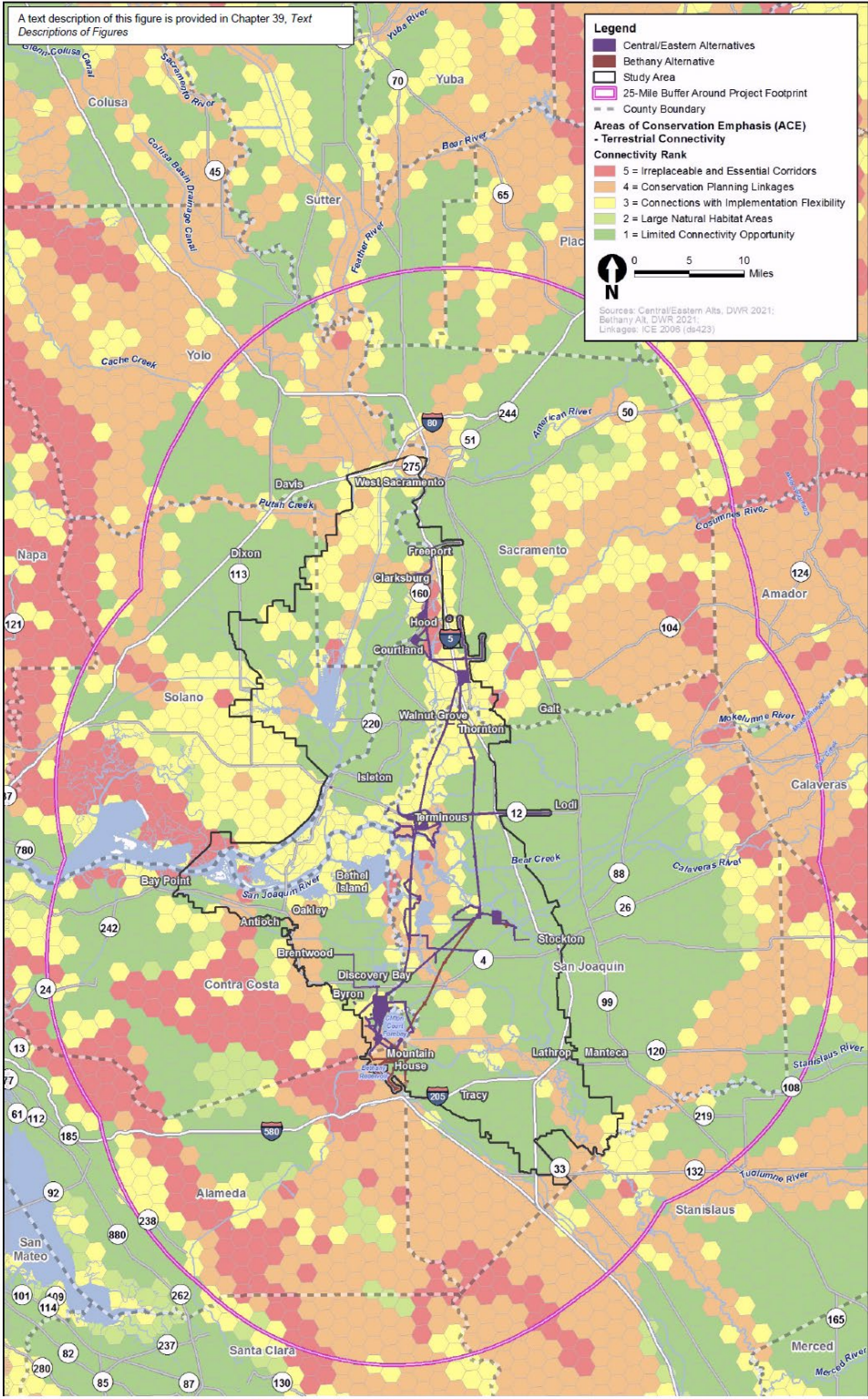


Figure 13E-3. Areas of Conservation Emphasis (ACE)–Terrestrial Connectivity

DELTA PROTECTION COMMISSION

Diane Burgis, Chair (Contra Costa County Board of Supervisors)
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November 5, 2024

Katherine Marquez, Program Manager
California Department of Water Resources
1516 9th Street, 2nd Floor
Sacramento, CA 95814

Dear Ms. Marquez:

We are providing comments on the proposed *Delta Conveyance Project, Final Certification of Consistency For 2024-2046 Proposed Geotechnical Activities*.

The Delta Protection Commission (Commission) is a state agency charged with ensuring orderly and balanced conservation and development of Delta land resources and improved flood protection in the Primary Zone. The Commission performs planning work to further the state's basic goals for the Delta consistent with the Delta Protection Act (California Public Resources Code Section 29700 et seq.). The Commission is thus commenting as a state agency concerned with the best environmental outcomes for the Delta, consistent with state policy as defined in the Delta Protection Act.

The Geotechnical Investigations are Part of the Covered Action Rather than Their Own Covered Action: As Such Consistency Certification is Premature and Improper

The Delta Reform Act defines a covered action as “. . . a plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code. . .” (Water Code Section 85057.5(a)). Public Resources Code Section 21065 defines “project” for the purposes of the California Environmental Quality Act (CEQA). The regulations implementing CEQA further define project as follows: “[a] Project” means the whole of an action. . .” (14 Cal.

Code of Regulations Section 15378(a)). Because the covered action is defined by incorporating the definition of a CEQA project, legally, the covered action must conform to the rules for CEQA projects. The regulations implementing CEQA state that a covered action must include the whole of the action, rather than a part of the action. The purpose of this rule is to avoid the possibility of obscuring the full scope of a project's environmental effects, by considering only parts of the action.

The Courts have provided the additional test that agencies must analyze the “reasonably foreseeable consequences” of a project (*Laurel Heights Improvement Ass’n v. Univ. of California*, 47 C3d. 376, 396 [1988]). Projects that fail this requirement engage in illegal piecemealing of the project by failing to consider the whole of the action. Typically piecemealing questions involve projects that have some degree of separation, but factually may be intertwined. Here the geotechnical work is necessary to advance design of the Delta Conveyance Project and thus is a foreseeable environmental consequence of the project, and as such should be considered part of that project under *Laurel Heights*. The Department of Water Resource (Department)’s own documents in fact, describe the geotechnical investigations as part of the project for purposes of CEQA review (see Section 3.15 of the Final Environmental Impact Report (FEIR) for the project) (DWR 2023).

The Certification of Consistency unambiguously states “*To be clear, this is not a certification of consistency for the Delta Conveyance Project, as described below. This certification of consistency is limited to certain preliminary geotechnical work, described herein, related to the Delta Conveyance Project’s planning and design.*” (DWR 2024:1-1).

The Department thus has previously stated that geotechnical work is part of the project for purposes of CEQA (in the FEIR) and then later states that the covered action submitted for review is not part of the consistency certification for the Delta Conveyance Project (DCP) itself. These statements cannot be reconciled with the definition of covered action in the Water Code or the definition of a “project” for purposes of CEQA. Because the separation of the geotechnical work from the CEQA project would be improper piecemealing, it is also an improper division of the covered action for purposes of consistency review under Water Code Section 85022, which requires consistency of covered actions with the Delta Plan.

Our analysis of the proper scope of covered actions for purposes of the Delta Reform Act is reinforced by the court order previously issued regarding geotechnical work and the consistency certification. The court order reads: “*The motions for preliminary injunction are granted. The geotechnical work at issue here is **part of** the covered action, which requires certification of consistency with the Delta Plan before it is implemented. The Department is, therefore, enjoined from undertaking the geotechnical work described in*

Chapter 3 of the FEIR prior to completion of the certification procedure that the Delta Reform Act requires” (Superior Court of California 2024:11-12, emphasis added). The court order makes the statement that geotechnical investigations are **part of** rather than separate from the covered action that must be certified for consistency prior to implementation (Superior Court of California 2024:4). The Department’s attempt to split off a portion of the covered action and proceed with it separately from consistency certification for the whole action contradicts both its own representation of the project in the FEIR, the definitions in the Delta Reform Act and Public Resources Code, and the court order enjoining geotechnical investigations. As such it contravenes the legal requirements of the Delta Reform Act.

The Analysis of the Geotechnical Investigations as a Separate Covered Action Incorrectly Concludes the Geotechnical Work Does Not Trigger the Need for Consistency Certification

The Department provides an analysis to determine whether the geotechnical work, by itself, would qualify as a covered action and thus trigger the need for a consistency certification. This analysis is factually incorrect. Even if the geotechnical work could proceed as a covered action separate from the DCP (which it cannot), it would qualify as a covered action under the Delta Reform Act.

On pages 4-2 of the consistency documentation, the Department concludes that because the geotechnical work does not have a significant impact on the achievement of the co-equal goals it is not a covered action pursuant to Water Code Section 85057.5(a)(4) (DWR 2024:4-2). The Department relies on its assertion that the geotechnical work will not have any effect on the strategies developed by the Delta Stewardship Council and therefore will not have a significant impact on achievement either of the co-equal goals (DWR 2024:4-3). This interpretation of the Delta Reform Act is misguided. The necessary test is provided in part, by Water Code sections 85057.5(a)(4) and 85054, which supersede the Delta Stewardship Council policies. The strategies to achieve the co-equal goals are subordinate to the co-equal goals, and merely provide guidance regarding how they may be achieved. Water Code Section 85054 defines the co-equal goals in part as “. . .*protecting, restoring, and enhancing the Delta ecosystem.*” This language thus provides the proper test for the coequal goals rather than the policies adopted to further their goals.

The Department’s administrative record demonstrates the geotechnical work will have a substantial effect on the protection of the Delta ecosystem (Water Code Section 85054). Figure 1 from the proposed consistency certification document is enclosed (Attachment

1). It shows the locations of geotechnical work. The map depicts a vast array of investigations that spans the entire eastern and southern Delta, with clusters around the towns of Locke, Hood, and Walnut Grove. The Department’s FEIR for the DCP provides a detailed appendix for terrestrial wildlife movement (Appendix 13E). Figure 13-E2 (also enclosed) depicts “Natural Landscape Blocks” and “Essential Connectivity Areas” (enclosed as Attachment 2) clustered in the same portion of the Delta where the Department proposes a vast program of geotechnical work, that will introduce traffic, noise, light, and vibration for extended periods of time (Attachment 1).

The draft consistency certification contains a section entitled “*Attachment 4 2024–2026 Proposed Geotechnical Activities—Evaluation of Consistency with the Delta Conveyance Project’s Final EIR.*” This section asserts “*Geotechnical activities will not involve construction, or placement of powerlines, will avoid take of listed species and habitat loss, will not involve surface disturbance that would disrupt terrestrial wildlife connectivity and movement*” (DWR 2024, Attachment 4: 19). This statement is completely unsupported by any facts or analysis. It is also contradicted by the scope of the program depicted in Figure 1 from the consistency certification (Attachment 1) and the mapbooks for wildlife movement from the DCP FEIR (Attachment 2). The Department effectively is asserting that a vast program of work requiring heavy equipment, noise, light, and vibration, that will occur over a period of only two years and will also occur in mapped connectivity corridors and natural habitat blocks will have no impact on wildlife movement, and thus will not affect the goal of protecting the Delta ecosystem. The Department’s own administrative record shows that the geotechnical work will have such an effect, and thus meets the test for a covered action in Water Code Section 85057.5(a)(4). Thus, even if the geotechnical work could properly be considered its own covered action (which it cannot), the Department’s attempt to define it out of the scope of covered actions is not supported by its own analysis.

The Department Incorrectly Concludes the Geotechnical Work Is Consistent with The Delta Plan

The Department relies heavily on its assertion that the geotechnical work does not need to be certified for consistency, but then states, “*Nevertheless, for the sake of thoroughness and to err on the side of facilitating the DSC’s informed decision-making process, the analysis that follows additionally considers Step 3 of the Checklist to determine whether the 2024–2026 Proposed Geotechnical Activities are covered by one or more regulatory Delta Plan policies contained in Article 3 of the DSC’s regulations codified at California Code of Regulations, Title 23, Sections 5003–5015*” (DWR 2024:4-4). This section of the

consistency certification thus provides analysis of consistency of the action in relation to the regulatory policies implementing the plan. This section’s conclusions are not supported by fact.

The Delta Stewardship Council regulations for the purposes of consistency review provide the following standard:

Water management facilities, ecosystem restoration, and flood management infrastructure must be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence when feasible, considering comments from local agencies and the Delta Protection Commission. Plans for ecosystem restoration must consider sites on existing public lands, when feasible and consistent with a project's purpose, before privately owned sites are purchased. Measures to mitigate conflicts with adjacent uses may include, but are not limited to, buffers to prevent adverse effects on adjacent farmland (23 Cal. Code of Regulations Section 5011(a)).

The proposed geotechnical work fails this test for at least two reasons. First, the geotechnical work will result in the placement of a vast array of geotactic survey monuments in the Delta. These consist of metal markers, typically attached to a subterranean pipe or pole, that are permanently placed in the landscape. The consistency document references these in several locations including *Section 3.6.2, Overview of 2024–2026 Proposed Geotechnical Activities* (DWR 2024:3-15).

A cursory review of typical survey monuments shows a standard monument might consist of a 30-inch stainless steel length of pipe with a 3.25-inch bronze cap (Berntsen 2024). DWR relies heavily on the concept that geotechnical work is a transitory activity and will not create permanent facilities. However, the volume and location of monuments proposed would span the entire eastern and southern Delta (see Figure 1 from the consistency document, Attachment 1). Because the Delta is an agricultural landscape subject to tilling and other mechanical methods of farming, the geodetic monuments will leave a permanent impediment to farming across the Delta. Because the purpose of the geotechnical work is to support water management facilities and will leave permanent facilities consisting of survey markers, it is thus a “water management facility” that conflicts with the prevailing land use in the Delta, which is agriculture. For these reasons it does not satisfy the Delta Stewardship Council regulatory test that “*Water management facilities, ecosystem restoration, and flood management infrastructure must be sited to avoid or reduce conflicts*” (23 Cal. Code of Regulations Section 5011(a)).

Furthermore, the text of Section 5011(a) does not explicitly exclude temporary impacts created by water management facilities on local land use. These impacts logically include the potential for the concentration of equipment and vehicle traffic for extended periods of time that would generate conflicts. DWR states that “*Proposed Geotechnical Activities will generate minimal traffic and will be conducted in coordination with property owners*” (DWR 2024:4-3). This statement however provides little other than a bare assertion without any substantive analysis of how the cumulative effect of simultaneous geotechnical investigations at multiple sites compressed into a few years can be synchronized with critical periods of agricultural operations and trucking throughout the Delta.

The Department relies heavily on the assertion that traffic impacts were previously described in and will be consistent with the FEIR. The Department fails to note however that the FEIR only describes the location of geotechnical work in a very general narrative fashion in Section 3.15 of the FEIR. The associated mapbooks for the “Bethany Reservoir Alignment” show that geotechnical investigations may occur anywhere there are project features or alignments (DWR 2023). This very general acknowledgement of when and where geotechnical work would occur stands in stark contrast to Figure 1 in the consistency analysis (DWR 2024, also enclosed as Attachment 1). Note that in addition to a newly, substantially greater specificity regarding location shown in the current consistency documentation, the Department also states, “*This work would commence as soon as possible and conclude by the end of 2026*” (DWR 2024:3-13). Figure 1 thus depicts a specific, concentrated, and large program of work that will occur in only two years. Taken at face value, DWR thus asserts that the traffic impact analysis and mitigation approach of the FEIR for traffic impacts now will adequately address the effects of a huge program of investigation that will occur in only two years that was never previously analyzed in detail corresponding to the specificity shown in Figure 1 (Attachment 1).

The 2024 consistency analysis provides no substantiation of how coordination with local property owners will be performed or how the Department will adequately address impacts on agricultural operations for a large and very geographically concentrated program occurring in a compressed time frame. Absent more analysis and substantiation, we conclude that the geotechnical work will conflict with local agricultural practices and trucking, and will conflict with existing land uses in a manner inconsistent with the regulatory policy of the Delta Plan codified in 23 Cal. Code of Regulations Section 5011(a)). The disparity in specificity and detail between the FEIR and the 2024 consistency documentation also warrants discussion in relation to CEQA.

The CEQA Analysis of the 2024 Consistency Documentation is Incorrect

DWR concludes that no additional CEQA analysis is required for the proposed geotechnical work because the geotechnical work was previously analyzed in the environmental impact report for DCP itself (DWR 2024:3-1). In support of this conclusion, DWR included in the 2024 consistency documentation “*Attachment 4, 2024–2026 Proposed Geotechnical Activities—Evaluation of Consistency with the Delta Conveyance Project’s Final EIR*” (DWR 2024). This memorandum states that DWR has analyzed “*whether the geotechnical activities have the potential to result in any new or substantially more severe environmental impacts than shown in the Delta Conveyance Project’s Final EIR*” (DWR 2024, Attachment 4:4). This is only part of the full standard for analyzing the need for subsequent CEQA documentation.

The CEQA Guidelines provide the following test for the need for subsequent environmental analysis. A subsequent or supplemental EIR is required when:

- Changes to the project will cause either new significant impacts or a substantial increase in the severity of identified impacts (14 Cal. Code of Regulations Section 15162(a)(1), or,
- Changes to the circumstances for the project will cause either new significant impacts or a substantial increase in the severity of identified impacts (14 Cal. Code of Regulations Section 15162(a)(2), or,
- New information of substantial importance, which was not known and could not have been known at the time of the past EIR shows:
 - The project will have one or more significant effects not discussed in the previous EIR or negative declaration, or,
 - Significant effects previously examined will be substantially more severe than shown in the previous EIR, or,
 - Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or,
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DWR thus has greatly simplified the language of the proper test and thus avoided significant parts of its meaning. Note that the process of screening for new environmental effects needs to consider the full scope of impacts subject to CEQA analysis. The CEQA Guidelines require that public agencies make a mandatory finding of significance when:

The project has possible environmental effects that are individually limited but cumulatively considerable. “Cumulatively considerable” means that the incremental effects of an individual project are significant when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects (14 Cal. Code of Regulations Section 15065(a)(3)).

This means that even if the project’s increment of effect is not significant at a project level, it may combine with other reasonably foreseeable projects or conditions to create a significant impact (14 Cal. Code of Regulations Section 15355).

The CEQA analysis in Attachment 4 to the consistency documentation provides no analysis of the cumulative effect of the proposed geotechnical investigations on any resource or threshold. The only instances of the word “cumulative” occur as explanatory footnotes to air quality standards.

DWR thus proposes a geotechnical program with newly identified specific locations that span the Delta, in a compressed time frame, and concludes that this work will not result in any new impacts on individual resources or substantial increases in the severity of significant impacts. This conclusion fails to consider the cumulative effect of a concentrated and large program of work occurring in a short period of time. This conclusion is largely supported by reliance on the scope of the previous EIR, which lacked the specificity of the 2024 documentation. Note that Section 3.15 in the FEIR for DCP provided only a high-level narrative overview of geotechnical work. The conclusion that no impacts to agricultural operations or trucking, or wildlife movement, among myriad other resources, is unsupported by analysis. The available information suggests that these impacts will be more severe than previously disclosed, and thus warrant additional environmental review.

We urge the Department to comply with the policy mandate of both CEQA and the Delta Reform Act by providing a timely analysis of the full scope of the covered action, supported by adequate CEQA analysis for the newly identified geotechnical program, which is substantially different and of greater detail than that disclosed in the FEIR for DCP.

If you have any questions, please contact our Senior Environmental Planner, Mike Aviña, at Mike.Avina@delta.ca.gov, or at (530) 750-6727.

Sincerely,

A handwritten signature in blue ink, appearing to read "Bruce Blodgett", with a long horizontal flourish extending to the right.

Bruce Blodgett, Executive Director
Delta Protection Commission

CC: Jeff Henderson, Deputy Executive Officer for Planning & Performance, Delta Stewardship Council

References Cited

Berntsen. Flarable Pipe Monuments, SSB NB30. 2024. Madison, Wisconsin. Available:
[Flarable Pipe Monuments](#)

California Department of Water Resources (DWR). DELTA CONVEYANCE PROJECT: FINAL CERTIFICATION OF CONSISTENCY FOR 2024–2026 PROPOSED GEOTECHNICAL ACTIVITIES. 2024. Sacramento, California.

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Attachment 2

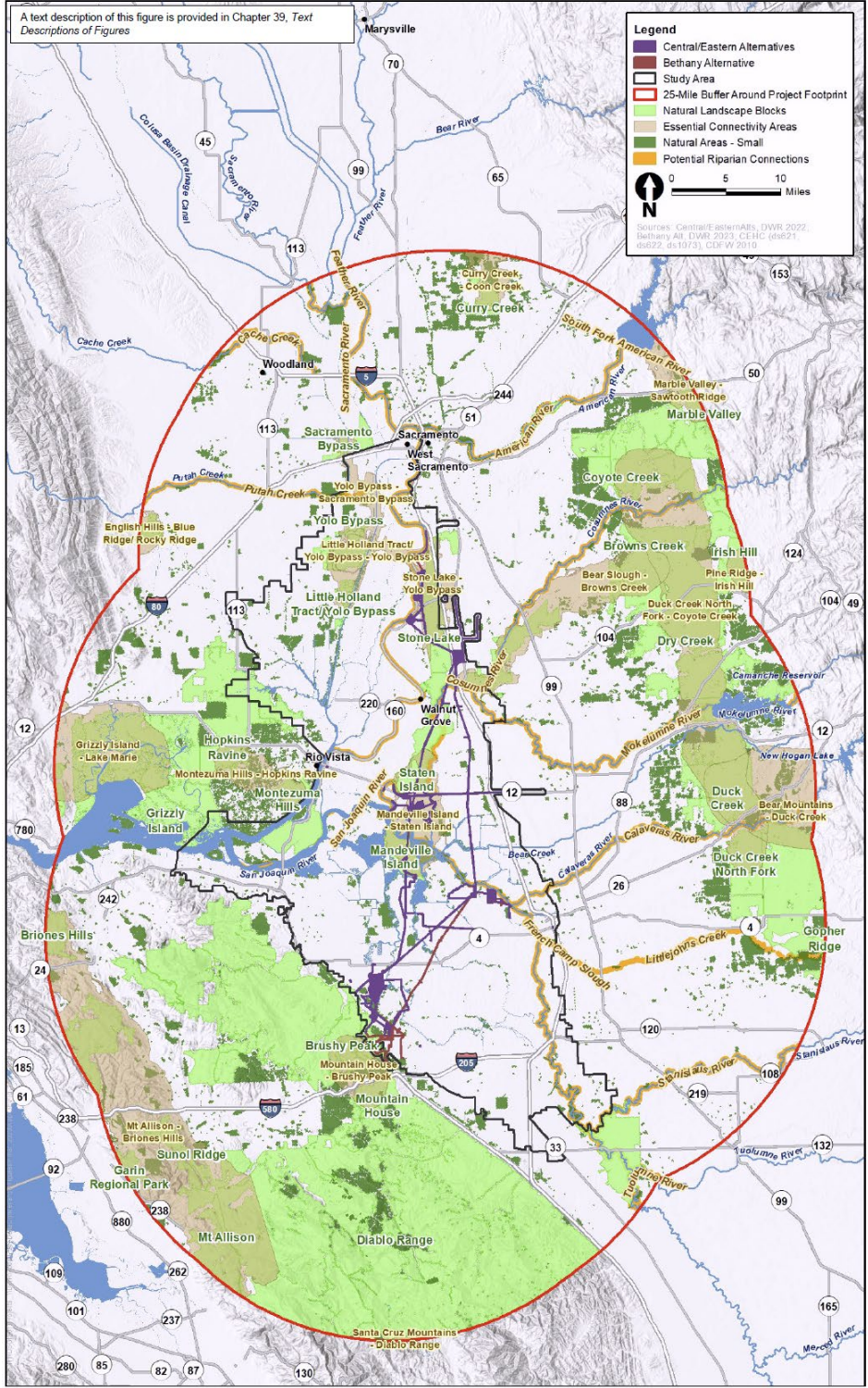


Figure 13E-2. California Essential Habitat Connectivity

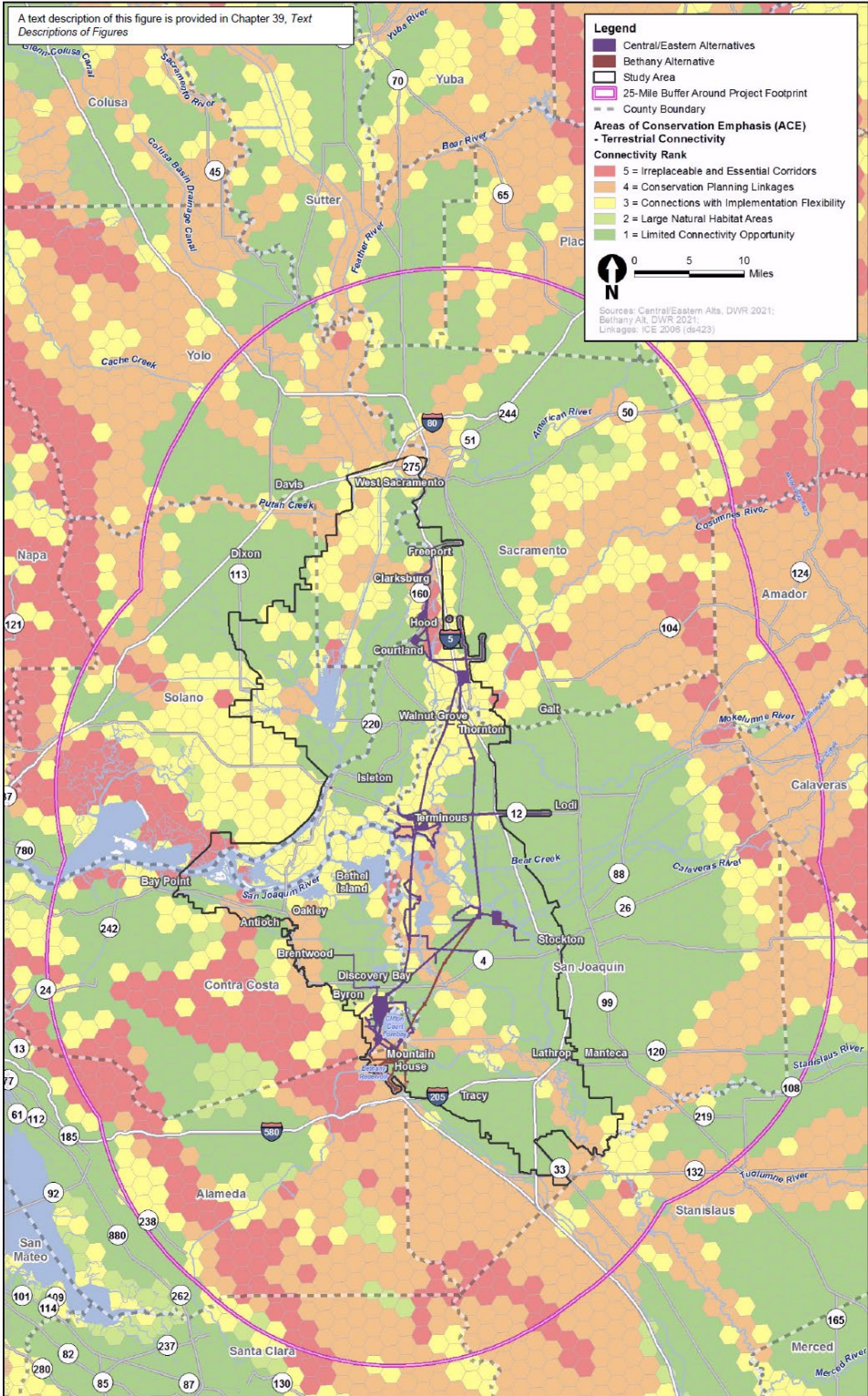


Figure 13E-3. Areas of Conservation Emphasis (ACE)-Terrestrial Connectivity