

Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Dear Chair Tatayon and Members of the Delta Stewardship Council:

This is an appeal of the California Department of Water Resources (“DWR”) Certificate of Consistency (“COC”) for the proposed Lookout Slough Tidal Habitat Restoration And Flood Improvement Project (“Project”), certificate ID C20215. This appeal is filed on behalf of Liberty Island Access (“LIA”). This appeal challenges DWR’s consistency determinations concerning Policies G P1(b)(3): Best Available Science, DP P2 (a): Respect Local Land Use, and G P1(b)(2): Mitigation Measures.

Overview

LIER has been used for public recreation for decades. Currently, LIER sees approximately 650 unique recreational visitors a week. The Project is a tidal wetlands restoration, encompasses approximately 3,400 acres of land, and carries a price tag of approximately \$118 million taxpayer dollars. The proposed Project will eliminate all public recreational land-based access to LIER and Shag Slough. The Project has three central failures which put it in contradiction with the Delta Plan. First, the Project relies on faulty data and does not use the Best Available Science. Second, the Project conflicts with local land use. Third, the Project fails to consider or propose any mitigation measures for the loss of recreation use. For these reasons, DWR’s Project is inconsistent with the Delta Plan. This Council should not issue a Certificate of Consistency.

DWR’s Project Does Not Use Best Available Science

DWR fails to demonstrate use of best available science in its evaluation of impacts to recreation from the proposed Project. They have failed to use proper surveying methodology for evaluating current recreational use necessary for coming to conclusions about the related impacts. DWR also contradict themselves and use faulty logic when coming to their conclusions on recreational activity near the Project site.

The Delta Plan defines best available science as the “best scientific information and data for informing management and policy decisions.” (Cal. Code Regs., tit. 23, § 5001(f).) The Delta Plan further defines best available science with six criteria: (1) relevance, (2) inclusiveness, (3) objectivity, (4) transparency and openness, (5)

timeliness, and (6) peer review (Cal. Code Regs., tit. 23, § 5002, subd. (b)(3), Appen. 1A, p. 1A-2).

DWR's Project Lacks Proper Surveying

DWR claims in the Project's Final EIR (FEIR) that the impacts related to recreation are less than significant (pg 61). However, DWR conducted zero on-site or digital surveys to collect the data necessary to reach any conclusion regarding the Project's impact on recreation.

At a minimum, 19 on-site surveys were conducted by DWR for the purposes of evaluating the Project on categories of compliance related to wildlife, biological impacts, site archeology, environmental impacts, and toxic materials. Notably, DWR neglected to perform any surveying on the impacts of very obvious and active recreational use that the Project directly impacts. This reticence to collect on-site survey data for recreational impacts, while readily doing so for other impact categories, suggests a lack of objectivity in DWR's evaluation.

DWR made several false claims due to their lack of proper investigation. For example (DEIR pg 366):

“ ... the (Shag Slough) bridge provides pedestrian access to a small portion of the western shoreline of Shag Slough in the Reserve where bank fishing is allowed.

A simple site survey would reveal that there is approximately 3.0 miles of shoreline with dispersed fishing access that is dependent on access via the Shag Slough bridge. CADFW pointed this very fact out to DWR in their comments regarding the Project (FEIR pg 98):

“The draft EIR states that the Bridge only allows access to a small portion of the LIER; however, the Bridge provides access to more than three miles of shoreline along Shag Slough and the “stairstep” at the north end of the island. Although some portions of this bank are heavily vegetated and difficult to fish from, a large proportion of this bank is accessible to fishing.”

Exhibit A is publicly available satellite imagery sourced from Google Earth. It reveals approximately 18 access points spread out along more than 1.6 miles of the LIER levee that are accessed by a long-standing footpath. This is far more than a “small portion” of the western shoreline, and doesn't even include the fishing access sites located north of

the bridge. Despite how this obvious oversight would immediately be found inaccurate from a single on-site survey, DWR did not even attempt to investigate this shoreline access via satellite imagery. However, DWR found satellite imagery perfectly sufficient for analyzing *other* public fishing access points (DEIR pg 367):

“The length of bank available within these areas was assessed based on the absence of vegetation, which was determined by reviewing current Google Earth imagery.”

The Delta Plan Appendix (1A) states that Best Available Science includes “A good experimental design with standardized methods for data collection”. DWR did not use a standardized method for collecting data to make conclusions on bank fishing access. They used one method of data collection (satellite imagery analysis) for determining regional fishing access outside of the Project vicinity, but failed to apply the same method to determine the extent of fishing access at the site being directly impacted. Furthermore, DWR used multiple on-site surveys to count at-risk species that would be impacted by the Project, but failed to use similarly robust on-site surveying to measure the recreational use, despite the Project having direct impacts on recreation. This inconsistency in data collection methods is not best available science, and is very easily shown to be disreputable with simple on-site surveys and with publicly available satellite imagery.

Accurate Data Surveys Indicate 1,300 Unique Visitors Every Two Weeks

Our own surveys (including survey findings shared with DWR in Exhibit B) indicate significantly more recreational use than indicated by DWR in their DEIR. Our group conducted several on-site observations including an on-site weekend vehicle survey (see Exhibit C). Our survey indicates that during an average week in March there are more than 650 visitors to the impacted area. Upon surveying LIER/Shag Slough recreational users, we found that the median frequency of visitation to the Project site is 21.25 times per year. This suggests that there are roughly 1300 unique site visitors every two weeks. Other heuristic data is in better agreement with this estimate. A Facebook group dedicated to the site called “Liberty Island Fishing” has more than 1600 members (see Exhibit B), which is roughly in line with our visitation estimates, and is a far cry from the 80 semi-regular users speculated by DWR (see DEIR pg 370).

DWR Uses Faulty Logic to Draw Inaccurate Conclusions

DWR estimates that 80 recreational users “semi-regularly” visit the impacted area, and base that estimation in part from the population of the Proposed Project Site’s Census

Tract. However, they also claim that “most Californians travel a maximum of an hour to their preferred recreation spots” (DEIR pg 369). Results from our survey of LIER site users (see Exhibit B) indicates that many users travel between 30-50 miles to visit the site, which is roughly consistent with this claim. However, a one-hour driving radius from the Project site includes far more than the single census tract considered in their calculation. DWR contradict themselves, and use flawed and inconsistent logic to make their gross under-estimation of recreational use. This inconsistency cannot be considered “best available science” since it fails to meet the common standards of logical coherence, as well as the defined criteria of relevance and inclusiveness concerning the assumptions and data used.

DWR’s Project Fails to Respect Local Land Use

The Delta Plan stipulates that the Project should “*avoid or reduce conflicts with existing uses*”. To the contrary, this Project is in direct conflict with the existing uses of the neighboring (public) lands at LIER. Furthermore, there has been no effort by DWR to avoid or reduce these conflicts, even though options have been proposed to them during the DEIR public comment period by Solano County (FEIR pg 249) and by LIA (see Exhibit B) that would considerably minimize or mitigate the impacts that cause conflicts with existing (recreational) uses.

DWR’s Project Makes No Effort to Reduce Conflict

DWR claims in their DEIR that the created public lands would be under a restrictive easement and would prohibit public access. As mentioned by Solano County in their DEIR comments (pg 247) DWR will impair existing access to navigable waterways which is in direct contradiction to the California State Constitution, Art. X, § 4:

“No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.”

The waterways on LIER are commonly navigated by kayaks and small vessels, and rely on the existing right-of-way of Liberty Island Road to access these waterways. CADFW states (FEIR pg 98):

“many [users] only have access to kayaks or small watercraft and rely on the Bridge as the main access point to hand-launch onto LIER “

Many members of the public also questioned the Project’s impacts on access, including some public comments that were before DWR prior to filing the COC, but still not included in the record (see Exhibit E). Removing this access is in direct conflict with the existing use.

The newly created tidal waterways do not include any access provisions for hand-launching, etc, and thus cannot be considered proper mitigation for the loss of hand-launching access from the public right-of-way. Furthermore, the boat launch they proposed creating would also be closed to the public (DEIR pg 405), even though DWR is permanently removing access to established kayak/boat hand-launching facilities on LIER. Furthermore, the newly created roadways and levees that would be constructed for the Project are proposed to be closed to the public. None of these measures help to avoid or reduce conflicts with existing (recreation) land use; they are only accentuating these conflicts further.

Land Use Conflicts are Feasibly Avoidable

There are several ways that DWR could mitigate or minimize these conflicts (see Exhibit B), including the use of box culverts to preserve existing vehicle access, and creating a public access plan for opening Project levee roadways and wetland areas for hiking, hunting, fishing, and hand-launch boat/kayak access.

While DWR may not be the final owner / manager of the Project wetlands or levees, there are many examples of interagency agreements in Northern California that include provisions for public recreation access to other flood control / wetland projects, including the Tisdale, Colousa, and Yolo Bypass areas. Cullinan Ranch (managed by the US Fish and Wildlife Service) along San Pablo Bay is a recent wetland restoration project that has incorporated public access components into its design and management plan. The Project proposed by DWR would be considered an exception to the norm among wetland restoration and flood control projects with its conspicuous lack of a recreational access component. DWR has provided no explanation as to why this Project should be considered a special exception with regards to providing public access provisions.

Furthermore, the Project creates conflict with the existing planning in the area by local government. Solano County addresses the conflict that the Project has with local land use (DEIR pg 247):

“..vacating the public right of way and access to Liberty Island Road, Shag Slough Bridge, and Liberty Island will conflict with the Solano County General Plan goal for improving agricultural, pedestrian, and general public access and circulation to eastern Solano County”

DWR’s Plan Cherry-picks Land Use Mitigation

While DWR is inconsistent in mitigation attempts. DWR has provided mitigation for the conflicts with agricultural land uses that the Project conflicts with by creating new conservation easements offsite and by allocating funds for enhancing nearby farm lands. Yet, DWR has made no effort to provide any form of mitigation for the significant impacts the Project has on recreation. For some reason DWR believes they are exempt from mitigating for the significant impacts to recreation.

The Project makes no attempt to “*avoid or reduce conflicts with existing uses*”, even though options exist for mitigating these conflicts. For this reason, we find the Project is inconsistent with this Delta Plan Policy.

DWR Fails to Propose Any Mitigation Measures

There are a number of mitigation measures that DWR completely ignores in their COC application [mitigation equivalency table](#). In particular, DWR provides no documentation regarding mitigation for the impacts on recreation or on the (complete) reduction of vehicle capacity on the adjacent Liberty Island Road (LIR).

The Project Eliminates Recreational Facilities without Replacement in violation of Measure 18.1

With regards to recreation, [mitigation measure](#) 18.1 states that:

“If the substantial impairment, degradation, or elimination of recreational facilities occurs, replacement facilities of equal capacity and quality with ongoing funding provided for maintenance of these facilities.”

There are a number of recreational facilities that would be permanently impaired by the proposed Project design. These facilities are readily visible in public satellite imagery (Exhibit A).

1. **Parking:**

- a. Currently, large numbers of recreational users park their vehicles along over 1.5 miles of the Liberty Island Road right-of-way shoulder in order to access both Shag Slough and Liberty Island Ecological Reserve (LIER).

2. **Hand-launch boat access:**

- a. On the LIER property, there is a kayak hand-launching area on the south side of the Shag Slough bridge that is regularly used for access to Shag Slough. Many users unload their vehicle and kayak trailer on the eastern side of the bridge to use this launch area, and then park on the western side of the bridge along the levee.
- b. About 150 yards east of the bridge is an additional kayak hand-launching site that is regularly used. Users often “park” their hand-pulled kayak dollies and trailers immediately adjacent to this location when they launch.

3. **Hiking trails:**

- a. There is a well established trail along the eastern bank of the Shag Slough levee (within LIER) that extends approximately 1.65 miles south of the bridge for fishing, hunting, and additional kayak hand-launching access. This trail reaches a number of regularly used fishing access points. There is also a trail that extends north from the bridge, but receives less foot traffic in general.

Trails are considered a facility by the CA State Parks Dept. The CA Recreational Trails Plan Executive Summary Report ([Exhibit D](#)) states that:

*“Our surveys of Californian’s recreational use patterns over the years have shown that our variety of **trails**, from narrow back-country trails to spacious paved multi-use facilities, provide experiences that attract more users than any other **recreational facility** in California”*

At the federal level (23 U.S. Code § 206 - Recreational trails program) recreational trails are defined as:

(2) RECREATIONAL TRAIL.—The term ‘recreational trail’ means a thoroughfare or track across land or snow, used for recreational purposes such as—

(A) pedestrian activities, including wheelchair use;

The paths along the LIER levee fit this definition, as they are thoroughfares across land for the purposes of pedestrian activities. Additionally, the National Recreation Trails Program provides a similar definition:

“A trail is a travel way established either through construction or use which is passable by at least one or more of the following, including but not limited to: foot traffic, stock, watercraft, bicycles, in-line skates, wheelchairs, cross-country skis,

off-road recreation vehicles such as motorcycles, snowmobiles, ATVs, and 4-wheel drive vehicles.”

The paths along the LIER levee also fit this definition, as they are passable by foot traffic, and established first through construction (historically when the property was under cultivation) and more recently through constant use for recreational purposes. For these reasons, the Council should consider these walking trails recreational facilities, as they are used for pedestrian access within a public recreational area.

All of these stated facilities (see Exhibit A) have been under regular use for 10-20+ years. The Project would permanently impair or eliminate these facilities since there would no longer be land-based access to them. Importantly, the Project omits any form of replacement for the impairment of these public recreational facilities, and is thus inconsistent with this Delta Plan Policy.

Project Does Not Compensate for Recreational Impact in Violation of Measure 18.2

DWR has not proven that the Project's devastating impacts to recreational facilities is unavoidable. Instead, DWR has baldly claimed the impact is unavoidable. However, even under the misguided conclusion that recreational impacts are unavoidable, consistency with the Delta Plan dictates mitigation for impacts to recreation access:

“Where impacts to existing facilities are unavoidable, compensate for impacts through mitigation, restoration, or preservation off-site or creation of additional permanent new replacement facilities.”

Nowhere in the COC or Project plan documents does DWR describe any form of mitigation for recreation impacts. DWR has completely ignored this provision of the Delta Plan, and has specifically rejected the obvious mitigation option of creating new public access on the Project site. The DEIR denies public access on its face:

“...the goals of the Proposed Project do not include other improvements related to public access and recreation.” (pg 370)

“Although the Proposed Project includes modifications to infrastructure such as construction of elevated peninsulas to provide maintenance access to transmission towers, levee top roadways, and a new boat ramp, these elements would not be open to the general public.” (pg 405)

And the FIER (pg 248) further states that:

“The Proposed Project would provide non-public internal access for emergency and non-recreational uses to the Duck Slough Setback Levee, Cache/Hass Slough Training Levee, Cross Levee, and the northern section of the degraded Shag Slough Levee. A gate would be installed at the northeast corner of the Project Site on the southern side of Liberty Island Road at Shag Slough in order to restrict public pedestrian and vehicular access to the Project Site.”

This lack of consideration for creating new public access is also in conflict with DP R11 and DP R16.

Project Eliminates County Roadway When Other Feasible Solutions Exist in Violation of Measure 19.1

With regards to traffic and roadway modification, mitigation measure 19.1 states that the COC applicant (DWR) must:

“Avoid modifications to federal, State, and county highways, local roadways, and bridges that may reduce vehicle capacity, to the extent feasible”

The proposed Project makes a significant roadway modification that completely removes a public right-of-way to an existing and heavily used public recreational area. There are several options that could be put in place to maintain this right-of-way. The most cost effective is to substitute the proposed open water channels north of the Shag Slough bridge with box culverts. This option was shared with DWR in the DEIR public comment period by Solano County (Final EIR pg 249) and more specifically during a meeting with DWR in Feb 2021 (see Exhibit B). Culverts would allow for unimpeded water flows consistent with the Project design without impacting the right-of-way.

If DWR chooses to modify the roadway in a way that severely impacts existing traffic when standard engineering options exist to avoid this modification, then mitigation measure 19.1 implies that DWR must show that no other feasible options exist. In order to comply with measure 19.1, DWR must give an explanation of the infeasibility of using standard engineering design options (in this case box culverts or bridgeways). DWR has not made any such showing. Because the Project modifies a local roadway in a manner that eliminates vehicle traffic and lacks an explanation of the infeasibility of avoidance, the Project is inconsistent with this Delta Plan Policy.

DWR's Plan is in Contradiction with Delta Plan Recommendations

Beyond the lack of consistency with Delta Plan Policies, there are also several areas where this Project is inconsistent with Delta Plan Recommendations.

Project Does Not Create New Facilities in Violation of DP R11

DP R11 states that:

“Water management and ecosystem restoration agencies provide recreation opportunities, including visitor-serving business opportunities, at new facilities and habitat areas whenever feasible, and protect existing recreation facilities...”

This Recommendation squarely applies to DWR and this Project. DWR should provide an explanation as to why it is not feasible to follow this Recommendation. They have provided no such explanation.

Project Does Not Increase Fishing, Hunting or, Trail Opportunities in Violation of DP R16

DP R16 states:

“Public agencies owning land should increase opportunities, where feasible, for bank fishing, hunting, levee-top trails, and environmental education.”

Being a public agency owning land, DWR should also be following this Recommendation in order to demonstrate alignment with the Delta Plan principles. DWR has also ignored this Recommendation.

Inclusion of Exhibits into the Council's Record

The Council's Appeals Procedures make clear that information that was before the agency when it made its determination should be included in the record. (See Appeals Procedures, § 4, subd. (b) [“the record that was before the . . . agency at the time it made its certification”], § 10 [“[t]he council . . . may supplement the record . . . if [it] determines that additional information was part of the record before the agency, but was not included in the agency's submission to the council”], § 14 [“[t]he council shall make its decision on the appeal . . . based on . . . the record before the . . . agency that filed the certification”].)

The Council may also take official notice of generally accepted technical or scientific matters within its jurisdiction, as well as any fact that may be judicially noticed by courts. (Appeals Procedures, § 29.) Under Evidence Code sections 451 through 453, courts may take judicial notice of various official public documents. Specifically, judicial notice may be taken of official acts of legislative, executive, and judicial departments of both the Federal and State Government. (Evid. Code, § 452, subd. (c).) In addition, under Water Code section 85225.10, the Council may include information it deems relevant to a consistency appeal.

Each exhibit provided here by LIA is proper for inclusion in the record under either Appeals Procedures sections 10 or 29 or because the exhibits are relevant to the Council's determination.

Exhibit A:

This exhibit is proper for inclusion in the record under Appeals Procedures section 10, because as publicly available satellite imagery, commonly accessed via Google Earth, this data was before the agency prior to the Certification of Consistency filing. Moreover, each of these exhibits are proper for official notice under Procedures section 29, because they relate to the Council's scientific and technical expertise.

Exhibit B:

This exhibit is proper for inclusion in the record under Appeals Procedures section 10, because it was before the agency prior to the Certification of Consistency filing. This exhibit includes evidence supporting this claim. Moreover, the slides in this exhibit that were shown to DWR prior to the COC filing are proper for official notice under Procedures section 29, because they relate to the Council's scientific and technical expertise.

Exhibit C:

This exhibit is proper for inclusion in the record because its findings validate the information shared with DWR prior to the Certification of Consistency filing (which are outlined in Exhibit B). Furthermore it is relevant to the Council's determination, and relates to the Council's scientific and technical expertise.

Exhibit D:

This exhibit is proper for inclusion in the record under Appeals Procedures section 10, because it was before the agency prior to the Certification of Consistency filing. Moreover, this exhibit is proper for official notice under Procedures section 29, because it is a government publication related to the Council's scientific and technical expertise.

Exhibit E:

This exhibit is proper for inclusion in the record under Appeals Procedures section 10, because it was before the agency prior to the Certification of Consistency filing. DWR omitted including many public comments (with those in this Exhibit being only a small subset) despite them being part of the record prior to filing the COC.

Conclusion

DWR's Project, as currently designed, is inconsistent with the Council's adopted regulatory policies. The Project does not use best available science, does not respect local land use, nor provide any mitigation measures for the total loss of public access. The Project does not comply with basic Delta Plan Policies, let alone Delta Plan Recommendations.

DWR has not taken basic steps to ensure an accurate study in regards to recreation and as a result, the conclusions drawn are inaccurate. Even when DWR was made aware of the actual recreational impact, they have proposed no mitigation measures. The impact of the current Project will have devastating impacts on thousands of LIER users.

Alternatives are available that could make the \$118 million dollar Project consistent. Our group met with DWR prior to submitting this appeal and attempted to offer tenable solutions. DWR was unwilling to consider or implement these suggestions. Our group recognizes and supports the importance of ecological restoration. However, it cannot come at the price of violating the Delta Plan and hurting thousands of citizens of this state who recreationally access LIER. Simple changes would result in a Project that restores ecology, promotes public access and is consistent with the Delta Plan. As it stands, the current Project succeeds in only the first aim.

I urge the Council to grant this appeal and encourage DWR to seek design alternatives that are consistent with the Delta Plan, or at the very least impose mitigation measures for the Project's impacts on recreation and public access.

Very truly yours,

Taylor Dahlke
Liberty Island Access
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