

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF CONTRA COSTA

FILED
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KIMBERLY CLARK, CLERK OF THE COURT
SUPERIOR COURT OF CALIFORNIA
COUNTY OF CONTRA COSTA
By: [Signature]

DATE: November 17, 2022
JUDGE: Edward G. Weil

DEPARTMENT: 39
CLERK: Denese Johnson
UNREPORTED

CITY OF VALLEJO,
Petitioner(s),

vs.

STATE OF CALIFORNIA STATE
DEPARTMENT OF WATER RESOURCES,
Respondent(s).

Case No.: MSN21-0558
(MSN21-0559,
MSN21-0560,
MSN21-0561)

STATEMENT OF DECISION

The Court heard oral argument in this case on October 11, 2022 and then took the matter under submission. After considering all documents filed in this case, along with oral argument, the Court rules as follows:

I. Background

This is a CEQA case involving challenges to a tidal restoration project in Lookout Slough in the Delta. The Project would convert 3,164 acres of agricultural land into tidal marsh by breaching an existing levee and constructing and improving other levees. The Project will help satisfy the Department's obligations to restore approximately 8,000 acres of tidal marsh as required by the United States Fish and Wildlife Service's 2008 Delta Smelt Biological Opinion (BiOp) and will be consistent with RPA I.6.1 of the 2009 National Marine Fisheries Service Salmonid BiOp. The Project is designed to create habitat for Delta Smelt, longfin Smelt, Steelhead, Sacramento Splittail, Chinook salmon, giant garter snake, and other species. The Project would also widen a portion of the Yolo Bypass to increase flood storage and conveyance, increase the resilience of levees, and reduce flood risk.

Respondent, the State of California State Department of Water Resources (the Department) certified the FEIR for the Project on November 2, 2020. Four petitions were filed challenging the certification of the FEIR. The petitions were consolidated. All Petitioners filed joint opening and reply briefs and Respondents and Real Party filed a joint opposition brief.

The Petitioners are City of Vallejo (MSN21-0558), Central Delta Water Agency (MSN21-0560), Reclamation District No. 2060 and Reclamation District No. 2068 (MSN21-0559) and Solano County Water Agency, Inc. (MSN21-0561). Ecosystem Investment Partners, LLC was named as the real party of interest in two of the cases (MSN21-0560 and MSN21-0559).

II. Standard of Review

Under CEQA, the Court's role is to determine whether the agency has prejudicially abused its discretion, which means that it "has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Res. Code, § 21168.5.) A review of whether correct procedures were followed is *de novo*, while the substantive factual conclusions are given deference. (*Ebbetts Pass Forest Watch v. Cal. Dep't of Forestry & Fire Prot.* (2008) 43 Cal.4th 936, 944.) An agency's decision to certify an EIR is presumed correct. (*San Diego Citizenry Group v. Cty. Of San Diego* (2013) 219 Cal.App.4th 1, 11.)

"The substantial evidence standard is applied to conclusions, findings and determinations. It also applies to challenges to the scope of an EIR's analysis of a topic, the methodology used for studying an impact and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.) It also applies "to factual dispute(s) over whether adverse effects have been mitigated or could be better mitigated." (*Oakland Heritage Alliance v. City of Oakland* (2001) 195 Cal.App.4th 884, 898 [internal quotations and citations omitted].) According to the CEQA Guidelines, substantial evidence is "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (CEQA Guidelines, § 15384.)

On the other hand, whether an EIR "is insufficient because it lacks analysis ... is not a substantial evidence question." (*Sierra Club v. Fresno County* (2018) 6 Cal.5th 502, 514-515.) "The ultimate inquiry, as case law and the CEQA guidelines make clear, is whether the EIR includes enough detail 'to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.' [Citations.] The inquiry presents a mixed question of law and fact. As such, it is generally subject to independent review. However, underlying factual determinations—including, for example, an agency's decision as to which methodologies to employ for analyzing an environmental effect—may warrant deference. [Citations.] Thus, to the extent a mixed question requires a determination whether statutory criteria were satisfied, *de novo* review is appropriate; but to the extent factual questions predominate, a more deferential standard is warranted. [Citations.]" (*Id.* at 515-517.) "Whether or not the alleged inadequacy is the complete

omission of a required discussion or a patently inadequate one-paragraph discussion devoid of analysis, the reviewing court must decide whether the EIR serves its purpose as an informational document.” (*Ibid.*)

An EIR must include an analysis of significant environmental impacts that will result from the project in both the short term and the long term. (CEQA Guidelines § 15126.2(a).) In addition, an EIR must analyze certain indirect impacts. “ ‘In evaluating the significance of the environmental effect of a project, the lead agency shall consider ... reasonably foreseeable indirect physical changes in the environment which may be caused by the project.’ (CEQA Guidelines, § 15064, subd. (d).) ‘An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project. ...’ (CEQA Guidelines, § 15064, subd. (d)(2).) ‘An indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable.’ (CEQA Guidelines, § 15064, subd. (d)(3).)” (*City of Long Beach v. City of Los Angeles* (2018) 19 Cal.App.5th 465, 478-479.)

III. CEQA Claims

A. Recirculation of the EIR

Petitioners argue that the FEIR contained significant new information and consequently, the Department was required to recirculate.

“[R]ecirculation is required, for example, when the new information added to an EIR discloses: (1) a new substantial environmental impact resulting from the project or from a new mitigation measure proposed to be implemented [citation]; (2) a substantial increase in the severity of an environmental impact unless mitigation measures are adopted that reduce the impact to a level of insignificance [citation]; (3) a feasible project alternative or mitigation measure that clearly would lessen the environmental impacts of the project, but which the project's proponents decline to adopt [citation]; or (4) that the draft EIR was so fundamentally and basically inadequate and conclusory in nature that public comment on the draft was in effect meaningless [citation].” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1129-1130 (*Laurel Heights II*); see also CEQA Guidelines, §15088.5.) A determination whether new information is significant so as to warrant recirculation is reviewed only for support by substantial evidence. (*Laurel Heights II, supra*, 6 Cal.4th at 1335.)

“Recirculation is not required where the new information added to the EIR merely clarifies or amplifies or makes insignificant modifications in an adequate EIR.” (CEQA Guidelines, §15088.5(b); see also, *Laurel Heights II, supra*, 6 Cal.4th at 1129.)

1. *New information*

Petitioners argue that recirculation is required because the FEIR included a number of new changes. In support of this argument, Petitioners argue that the FEIR is too large because it is 912 pages. Petitioners point out that the CEQA Guidelines state a draft EIR should normally not exceed 150 pages. (CEQA Guidelines, § 15141.) That section states that proposals of unusual scope or complexity should normally be less than 300 pages and applies to *draft* EIRs. (*Ibid.*)

Respondent and Real Party point out that the size of the FEIR is in large part due to the comment letters and responses to those letters, which amount to 628 pages in the FEIR. They also point out that another 248 pages of the FEIR are new appendices requested by the Petitioners. Finally, they point out that there are 27 pages of actual changes to the DEIR. (LOS 104-130.)

Petitioners' reliance on suggested page limits for the DEIR does not convince this Court that the FEIR should be recirculated. In addition, many of the pages included in the FEIR are due to comment letters and responses, including many from the Petitioners.

2. *Changes to mitigation measures*

Petitioners argue that the FEIR significantly changed nearly twenty mitigation measures and thus recirculation is required. Petitioners string-cite the mitigation measures that were changed in the FEIR, but do not discuss most of these measures. Petitioners focus on mitigation measure AIR-1, which is designed to mitigate emissions during construction. (LOS 118-120.) Petitioners quote the changes in the FEIR, but do not explain how these changes to AIR-1 are significant.

Petitioners also point out that CULT-1A and CULT-1B are new mitigation measures. They do not explain, however, why adding these mitigation measures results in significant new information. CULT-1A is a new mitigation measure that requires cultural sensitivity training prior to construction. (LOS 127-128.) Petitioners do not explain how this mitigation measure constitutes significant new information. CULT-1B is not a new mitigation measure but a change in the name of the measure only. (LOS 128.)

The changes to AIR-1 do not appear to be significant and the Court finds that Petitioners have not met their burden of showing that changes to AIR-1, CULT-1A and CULT-1B or the other undiscussed mitigation measures constitute significant new information.

3. *Changes to hydrology modeling*

Petitioners argue that the inclusion of Appendix X in the FEIR constitutes significant new information. In the DEIR, Appendix S provided analysis of salinity levels. (LOS 5399-5406.) Several comments raised questions about the modeling in Appendix S and in response the FEIR included Appendix X. Appendix X includes a more detailed modeling of salinity and bromide levels. (LOS 769-1000.) The FEIR states that the modeling in Appendix X did “not change the conclusions of less than significant for salinity impacts on drinking water, agriculture, and fish and wildlife that were made in the Draft EIR.” (LOS 134.)

Petitioners argue that Appendix X identified significant new information because it showed increases in salinity that were greater than Appendix S and up to 5.5% at one intake station (C19). Petitioners have not shown, however, that this previously undisclosed increase in salinity has a significant impact on water quality. The DEIR and the FEIR both concluded that the Project would have a less than significant impact on water quality. The FEIR specifically notes the salinity levels of 5.5%, but concludes it would not violate the threshold of significance, D-1641, and thus would have a less than significant impact on water quality. As discussed in more detail below, Petitioners have not shown that this analysis was not supported by substantial evidence.

The Court finds that here, as in *Laurel Heights II*, Appendix X is a new study that serves “to amplify, at the public's request, the information found in the draft EIR.” (*Laurel Heights II, supra*, 6 Cal.4th at 1137.) Appendix X is not significant new information that requires recirculation of the FEIR.

B. Analysis of the Projects Impacts on the Environment

1. Agricultural Resources

a. D-1641 Standard

Petitioners argue that the EIR’s decision to use State Water Resources Control Board’s Water Rights Decision D-1641 (D-1641) as the threshold of significance for salinity levels was an error.

Appendix S to the DEIR explains the decision to use D-1641. Appendix S explains that under the CEQA Guidelines, Appendix G, the most important significance criteria are “result in substantial adverse effects on beneficial uses of water” and “violate existing water quality standards, waste discharge requirements, or otherwise substantially degrade water quality.” (LOS 5402.) The Department “has recently analyzed the impacts of tidal wetland restoration projects on salinity (e.g., Prospect Island, Winter Island, Decker Island)” and used a threshold of significance as “whether there would be an exceedance of a standard set forth in the State Water Resources

Control Board's (SWRCB's) Bay-Delta Water Quality Control Plan (Bay-Delta Plan) and/or Water Rights Decision 1641 (D-1641).” (LOS 5402-03.) Appendix S explains that D-1641 “is part of SWRCB's implementation of the 1995 Bay-Delta Water Quality Control Plan (Bay-Delta Plan) and is considered the relevant water quality standard to assess salinity impacts.” (LOS 5403, fn.2.)

Petitioners argue that the FEIR failed to acknowledge that the SWRCB may issue temporary urgency change petitions, allowing standards to be waived or modified. (Water Code §1435.) Furthermore, Petitioners argue that the FEIR does not acknowledge that when a change petition is issued, the Project would be more likely to have a significant adverse impact on agriculture due to high salinity in irrigation water. Petitioners have not cited any evidence or otherwise sufficiently explained when temporary urgency change petitions may be issued.

Petitioners also argue that it is not clear how compliance with D-1641 will occur and that the FEIR did not analyze what will happen to salinity levels when the Department is required to release storage water in order to comply with D-1641. Petitioner points to letters from the Central Delta Water Agency for this issue. (LOS 5560, see also 250-251; LOS 6803, 6808.) As explained in the FEIR, the modeling (appendices S and X) did not indicate any instances of non-compliance with D-1641. (LOS 137.)

Petitioners have not provided substantial evidence that explains why the reliance on D-1641 is improper. Instead, the Court finds that the DEIR and FEIR sufficiently explain why D-1641 can be used as a threshold of significance. (LOS 137, 5402-5403, 1334.)

b. Cumulative impact of salt accumulation in soils

The EIR found that salinity levels in the delta would increase slightly due to the Project, but that the levels would not exceed the D-1641 standard and therefore would have a less than significant effect on the environment. Petitioners argue that the EIR failed to consider whether this increase in salinity would have an impact on salinity levels in soil over time.

The question here is whether the discussion of the Project's impact on soil was sufficient. Respondent's decision to use the D-1641 standard as a threshold of significance and its determination that the Project would not exceed the D-1641 standard are subject to review by this Court under the substantial evidence standard.

The DEIR explained that the D-1641 standard includes agricultural beneficial uses and that the salinity level modeling included two agricultural stations (D15 and D22). (LOS 1343.) The DEIR found that the Project would not exceed the applicable threshold of significance related to agriculture from increased salinity levels postconstruction

operation and thus, the environmental impact on agriculture due to salinity levels in the Delta would be less than significant. (LOS 1343.)

The FEIR included one paragraph on the possibility of salinity building up in the soil that will damage crops. The FEIR stated that the modeling for the Project indicates no change in compliance with D-1641 electric conductivity standards. (Electric conductivity is a method used to measure salinity.) The FEIR concludes the section by explaining that “[i]n addition to the salinity of the diverted water, salinity build-up in soils is also a function of water management (e.g., timing of diversions during low tides) and soil characteristics of a particular site, which is not related to the Proposed Project.” (LOS 141.)

Petitioners include a statement from an expert, Michelle Leinfelder-Miles, on salinity’s effect on agriculture, which was provided in another case. (LOS 389-398.) The expert explained that “[i]rrigation water salinity influences soil salinity because irrigation water carries salts, and when it is applied to fields, salts are added to the soil. Salts accumulate in the soil at higher concentrations than they existed in the irrigation water because evaporation and plant uptake extract water from the soil leaving the salts behind.” (LOS 393.) Different crops have different salinity threshold levels and there is information available on the reduction in crop yields based on various soil salinity levels. (LOS 393-394.) The expert also disagrees with the statement that “a change in water quality that is less than 5% is not an impact” and explains that “even a small change in water salinity could reduce yield if that change resulted in an increase in soil salinity that exceeded the crop tolerance threshold.” (LOS 394.)

Petitioners’ evidence shows that an increase in the salinity level in irrigation water can have a negative impact on crop yields due to the accumulation of salt in the soils. But whether higher salinity levels in the Delta will result in increased salinity levels in the soil is based on numerous factors. (LOS 393.) Petitioners’ expert provides a general statement that even small changes in water salinity can reduce crop yield. Yet, the expert’s statements are pulled from another case and do not address anything specific about this Project or the Project site. Furthermore, the expert does not address the D-1641 standard and thus, has not shown that D-1641 is an improper threshold of significance to determine impacts on agriculture.

The Court finds that Petitioners have not met their burden of showing that the EIR’s analysis of the Project’s impact on agriculture due to increased salinity levels was inadequate.

c. Williamson Act Contracts

The FEIR states that the Project does not violate the Williamson Act and notes that the covered properties each allow for use as open space. (LOS 329-330.) The FEIR notes that the three Williamson Act contracts here were entered into in 1970, 1979 and

1984 and each contract includes open space as a compatible use. (LOS330; see also, Respondent's RJN ex. A, B, C.)

Petitioners argue that the Project violates the Williamson Act because tidal habitat is not an approved use under the Williamson Act contracts. There are three properties in the Project Site with Williamson Act Contracts: Bowlsbey, Liberty Farms and Vogel. (LOS1166). The Solano County Williamson Act guidelines do not define open space to include tidal habitat. (Petitioners' ex. A p.12.)

For contracts that were signed prior to June 7, 1994, the compatible uses are those that are defined by this chapter at the time that Williamson Act contract. (Gov. Code, § 51238.3(c)(1).) Under the Williamson Act, "open-space" is a compatible use and "open-space" includes "habitat for wildlife". (Gov. Code, § 51201(e), (o).) At the time the three contracts were entered into, "open-space" included "essential habitat for wildlife." The parties do not discuss the removal of the word "essential". This Project is being used to fulfill tidal restoration requirements set by the U.S. Fish and Wildlife Service and appears to create essential habitat for wildlife.

The Court finds that the FEIR correctly concluded that the Project does not violate the Williamson Act.

2. Municipal Impacts

a. Salinity and Bromide

The DEIR provided a somewhat limited analysis of the salinity and bromide impacts on water quality. (LOS 1342, 5399-5406.) The FEIR, however, provided a more detailed analysis of those impacts, especially in Appendix X. (LOS 769-1000.)

Petitioners argue that under the modeling in Appendix X, the City of Vallejo's water intake station would exceed 5% salinity and that the EIR did not properly analyze this impact. High salinity levels can have a negative impact on drinking water quality by impacting water treatment operations. (LOS 1342.)

Appendix X shows salinity levels about 5% for Cache Slough (C19) intake for July, August and September 2009 and August 2010. (LOS 849, 856.) The salinity levels did not go above 5% for C19 in 2016. (LOS 863.) Appendix X noted that the "Largest percent EC increases due to Lookout Slough restoration occur... during the fall and summer at C19 (as much as 5.5% / 5.4%)." (LOS 773; see also 932.) The FEIR discusses the salinity increase at C19, "The Proposed Project is predicted to cause increased EC at compliance station C19 of up to 5.5% for about six months per year; however, this increase would not cause non-compliance with D-1641". (LOS 138-139.) The FEIR also explains that Vallejo does not currently use C19 for water intake, but instead uses the Baker Slough

Pumping Plant. (LOS 138.) Appendix X predicts that the Project will decrease salinity levels at the Baker Slough Pumping Plant. (LOS 849, 856, 863.)

Petitioners also argue that the DEIR failed to provide sufficient modeling for bromide. Bromide is a concern for water quality because “[w]hen municipal water supplies are treated (particularly with ozone) to meet drinking water standards, Bromide can form Bromate, a known and regulated carcinogen, which can impact human health.” (LOS 360.) Most of the North Bay Aqueduct water purveyors utilize ozone and would be highly sensitive to changes in bromide above baseline conditions. (LOS 360, 5653.)

Appendix X in the FEIR also provided a more detailed analysis of increases of bromide. The FEIR shows that the Project is predicted to change bromide levels by 2 to 4% for most areas and by 8% for C19. The FEIR again points out that C19 is not used for intake water and that bromide levels are expected to decrease at the Baker Slough Pumping Plant, which is used by Vallejo. (LOS 142.)

Petitioners argue that the increases in salinity and bromide are significant, however, they do not cite to evidence in the record to show that the anticipated levels of salinity or bromide would be a significant impact. Furthermore, assuming that salinity above 5‰ is problematic, Petitioners do not explain why the Project will have a significant impact on water quality if no one is currently taking water from site C19. The FEIR considered the increases in salinity and bromide and, based on substantial evidence, found them to be less than significant. That is all that CEQA requires here.

b. Organic Carbon

The DEIR did not discuss the Project’s impact on organic carbons and their effect in drinking water. The FEIR addressed this point with a Master Response 8. (LOS 152-154.) Dissolved organic carbons (DOC) are part of the ecosystem in the Delta, but are a potential concern for drinking water because DOC can contribute to the formation of disinfection byproducts (DBPs), which are regulated constituents of drinking water. (LOS 152.)

Petitioners argue that the FEIR discussion on organic carbons was insufficient, pointing to the following sentence “The Draft EIR did not include an analysis of the Proposed Project effect on DOC because there is no regulatory standard to form a significant threshold to determine effects on DOC levels.” (LOS 154.) Petitioners argue that CEQA requires the Department to prepare a good faith response to the comments regarding organic carbon or formulate a non-regulatory threshold of significance. (Petitioners’ Brief p. 21.) Petitioners fail to address the remainder of that paragraph, which states that “because several comments were raised regarding DOC, DWR reconsidered the issue based on the above information.” (LOS 154.)

Petitioners also failed to explain why Master Response 8 was an insufficient response to the comments on organic carbon. (LOS 152-154.) Master Response 8 explains that there is no regulatory threshold for dissolved organic carbons and the current scientific understanding is insufficient to make accurate predictions of the Project's impact on DOC. (LOS 153.) The FEIR discussed an accidental levee breach at Liberty Island that resulted in the creation of tidal wetlands from 1998 to 2010. During this time, DOC levels at the North Bay Aqueduct intake stayed the same or slightly decreased. (LOS 153.) The FEIR also noted that modelling found that the water at and near the Project Site would have residence times of a week or more. A study at Shag Slough found that longer residence times resulted in additional environmental processing of DOC which resulted in a lower potential to form DBPs. (LOS 153.) The Court finds that the analysis of the Project's impact on dissolved organic carbons is based on substantial evidence and complies with CEQA.

c. Water Diversions

Petitioners argue that the Project will have negative impacts on their water diversions. The Project may result in increases in non-native plant species like water hyacinth or water primrose. Water hyacinth has been increasing in the Delta from 2004 to 2014. (LOS 322.) Petitioners are also concerned the Project's plan for natural recruitment of other plants will take years or decades and may be unsuccessful due to the invasive plant species. (LOS 335; see also LOS 5638.) Petitioners argue that the non-native plants will increase the cost of Petitioners' maintenance at their diversion points.

Respondent and Real Party point out that the DEIR considered the impact of invasive plant species and included appropriate mitigation measures, including BIO-4. (LOS 1244; see also 159-160.) The FEIR made clear that the monitoring and removal of invasive plant species would occur after construction. (LOS 122.) The FEIR found that it is expected that the Project will reduce overall cover of invasive species. (LOS 159.)

As discussed below, BIO-4 is a proper mitigation measure. Thus, the FEIR has provided sufficient analysis for its conclusion that there would not be an increase in invasive species, which negates Petitioners' concerns about increased maintenance costs due to increased invasive species.

Petitioners also argue that the Project is designed to increase the numbers of listed and endangered fish species, which will adversely impact the ability of municipal and agricultural water users to divert water. Petitioners explained that "[i]f the Project is successful the number of endangered fish species will increase in the vicinity of the District's diversion intakes and drainage outlets. An increased population of endangered species in the project area would cause increased regulatory restrictions and costs for the District to comply with environmental requirements." (LOS 729.) This concern is echoed in the comment letters. One comment letter noted that "the DEIR does not analyze how the Project would make fish vulnerable to take via entrainment at

longstanding water diversion facilities operated by other agencies, and whether this result in a need to relocate water facilities.” (LOS 307.)

Appendix E of the DEIR notes that the Project is intended to provide suitable habitat for Delta Smelt and other special-status fish species and “this may result in a local increase in abundance within the Proposed Project Site and adjacent waterways.” (LOS 2713.) The DEIR found this was not an adverse environmental effect. The DEIR also stated that the “Project does have the potential to indirectly affect nearby agricultural lands through the increase in the abundance of protected fish species that could be entrained by local water diversions including Delta smelt, green sturgeon, Chinook salmon, and other salmonids.” (LOS 2713.)

The FEIR stated that an increase in the numbers of listed fish is not an adverse environmental impact that must be analyzed and mitigated. (LOS 146.) The FEIR goes on to discuss whether the water diversions will have a negative impact on the listed fish species. (LOS 146-147.) The FEIR notes that the California Department of Fish and Wildlife can require that screens be added to diversions to protect listed fish from entrainment, but does not require screens as a mitigation measure. (LOS 147.) The FEIR noted that “[s]ome of the comments raised the question of whether diverters might be required to move their diversions to protect listed fish species. As far as DWR is aware, this is an action that has not been proposed by any regulatory agency and is not considered an environmental effect of the Proposed Project that must be considered for mitigation.” (LOS 147.)

Whether Petitioners will have to move their water diversion facilities or add screens to protect from fish entrainment are potential indirect physical impacts. Thus, the Court’s analysis is whether Petitioners’ concerns that they will have to move their water diversion facilities or add screens are reasonably foreseeable impacts caused by the Project or whether their concerns are speculative or unlikely to occur. (See, *City of Long Beach, supra*, 19 Cal.App.5th at 478-479.) The Project is likely to increase the populations of native fish, but the record does not show that adding screens or moving the facilities are reasonably foreseeable outcomes from the Project. Instead, these concerns are too speculative.

3. *Biological Resources*

a. Fish Predation Impact

Petitioners argue that the EIR improperly found that the Project’s effect on non-native fish would have a less than significant impact on special-status fish species.

The DEIR states that non-native fish are expected to occur in the new habitat created by the Project and would have the opportunity to prey on native fish. (LOS 1272.) The DEIR goes on to explain, however, that the new / restored habitat will

benefit juvenile salmonids and other native fish. The increase in wetland habitat and high food productivity provided by the Project is expected to benefit the growth rates and body size of fish. When native fish are faster or larger than predators, the potential for predation by piscivorous fish is reduced. (LOS 1273.) The DEIR cited to several studies and articles that were provided in the record. (LOS 16461 (The Floor Pulse Concept in River-Floodplain Systems); 16498 (Fish Swimming Stride by Stride); 16582 (Size-Dependent Predation in Piscivores); 17548 (Shallow-Water Piscivore-Prey Dynamics in California's Sacramento-San Joaquin Delta); 17568 (Patterns in the Use of a Restored California Floodplain by Native and Alien Fishes); the Court was unable to locate the article cited in footnote 37 at LOS 1273.)

The DEIR concludes that the Project is designed to provide beneficial effects to native fish while minimizing opportunities for non-native species establishment. Predatory birds using sheetpile perches are the most likely to cause an impact on special-status fish. The DEIR concludes that any impact will be less than significant because natural perches already exist in the area and there will be construction disturbances that are likely to flush birds away. (LOS 1273.)

Petitioners argue that the less than significant finding is not supported by the evidence. Petitioners point to a 2011 article by Natural Resource Scientists that discusses earlier studies about fish in the Delta. (LOS 285-290; 5580-5585.) The 2011 article raises concerns about non-native predatory fish and their effects on native fish in the Delta.

The conclusion that the Project will have a less than significant impact on native fish is supported by substantial evidence. Petitioners' citation to one article providing a contradictory conclusion is insufficient to change this conclusion.

b. Delta Smelt Impacts

Petitioners argue that the Project will have negative impact on delta smelt because it will allow growth of invasive water hyacinth. Petitioners also argue that the mitigation measures related to water hyacinth and sand for spawning are not sufficient to reduce the impact on delta smelt to less than significant.

The DEIR found that with mitigation measures, the Project would have a less than significant impact on special-status fish species, which includes delta smelt. (LOS 1268.)

Petitioners argue that water hyacinth is a major invasive species, having increased from 1.3 to 10.6% of the area of the Delta from 2004 to 2014. (LOS 322; see also 5624 [the information regarding water hyacinth in the Downy Brand letter comes

from an article not included in the record].) According to Petitioners, water hyacinth has a negative impact on water quality and the Project will create more habitat suitable for water hyacinth, which is an impact that should be considered.

The DEIR identified water hyacinth as an invasive plant species requiring long term management. (LOS 1127.) Mitigation Measure BIO-4 includes in part that the Department shall monitor for invasive aquatic plant species and those species shall be removed in accordance with BIO-4(1) and (2). Those subsections state that where necessary to control identified populations, they will be treated according to control methods and practices considered appropriate for those species. (LOS 108-109.)

The Department points out that it currently has a contract with the Department of Parks and Recreation Division of Boating and Waterway (DBW) to monitor and treat invasive vegetation at the Department's Fish Restoration Program restoring sites, including the Project Site. (LOS 159-160.)

Petitioners' argument that the DBW is underfunded and doing a poor job of controlling water hyacinth fails. Petitioners have not presented evidence in the record that DBW is underfunded. Nor has Petitioners shown that DBW is currently unable to control the water hyacinth. Petitioners note an increase in hyacinth from 2004 to 2014, but have not shown further increases since 2014.

In reply, Petitioners argue that the mitigation measure as it relates to water hyacinth was not included in the DEIR and the impacts of invasive aquatic plants on water quality and fish survival were not analyzed in the DEIR, thus the FEIR needs to be recirculated. The DEIR stated that water hyacinth would be removed during construction activities and that it would be removed or sprayed for long term management. (LOS 1111, 1127.) Mitigation Measure Bio-4 was included in the DEIR, but without specific reference to invasive aquatic plants. (LOS 1244-45.) The changes to BIO-4 in the FEIR were not significant. The Court finds that Mitigation Measure BIO-4 is not an improper deferred mitigation (see discussion below) and therefore, the conclusion that the invasive plants will have a less than significant impact with mitigation is supported by substantial evidence.

The DEIR discusses the type of habitat suitable to smelt and explains the Project will provide a direct connection to the Shag Slough, which is known to support all life stages of the delta smelt. (LOS 1113; see also 1220-21 [discussing smelt habitat]; see also 3269- 3286 (Appendix H).) The DEIR also states that "If feasible... tidal channels excavation within the Proposed Project Site would be lined with sand or other suitable substrates for Delta Smelt spawning." (LOS 1114.)

Petitioners focus on the "if feasible" discussion regarding the placement of sand within tidal channels to help create smelt spawning areas. Petitioners have not shown that mitigation measures, including the placement of sand, are required to reduce the

impact on delta smelt. The Project is designed to restore 3,164 acres to tidal marsh and will create new habitat for delta smelt. The DEIR (in Appendix H) considered the requirements for delta smelt and how the Project will benefit delta smelt. (LOS 3282-84.) Appendix H found that “[t]he habitat benefits of restoring the Project area for Delta smelt are anticipated to be numerous and dynamic.” (LOS 3284.) Thus, the record shows that the Project will benefit delta smelt regardless of whether sand is placed in the channels.

4. Hazards and Flooding

CEQA Guidelines Appendix G requires consideration of whether the Project would “Substantially alter the existing drainage pattern of the site or area... in a manner which would... ii) substantially increase the rate or amount of surface runoff in a manner which would result in flooding on- or offsite; iii) create or contribute runoff water which would exceed the capacity of existing or planned stormwater drainage systems or provide substantial additional sources of polluted runoff; or iv) impede or redirect flood flows.” (CEQA Guidelines, Appendix G, Section X. Hydrology and Water Quality.) CEQA also requires consideration of whether the Project would “Result in inadequate emergency access.” (CEQA Guidelines, Appendix G, Section XVII. Transportation.)

a. Impacts on Flood-Control Infrastructure

Petitioners argue that the Project will change wind-wave generation that could lead to erosion of nearby levees and the Project does not adopt mitigation measures to prevent this.

The DEIR noted that there was a concern that the Project would expose levees to wind-generated waves and lead to erosion of levees. (LOS 1346.) The Project design includes several items to protect from such wind-wave erosion. The Project includes a new Duck Slough Setback Levee, just east of Duck Slough. (LOS 1079, 1110.) This Setback Levee will be designed so there is no overtopping from wave run-up. (LOS 1347.) The Cache/Hass Slough east levees will undergo improvements and be turned into a training levee, which would break waves from the Project Site so they would not continue to propagate towards the Cache Slough and Hass Slough west levees. (LOS 1347, see also 1110.) In addition, the DEIR concludes that the Cross Levee (an east-west levee in the southern portion of the Project Site) would break all waves emanating from the Project Site. (LOS 1347.) The DEIR concludes that the Project would not result in adjacent properties being subject to increased wave run-up beyond the Cache/Hass Slough Training Levee and the Duck Slough Setback Levee and therefore, the Project’s impact on wind-wave generated erosion would be less than significant. (LOS 1348.) Additional information on the levees and their designs is discussed in Appendix D to the DEIR. (LOS 1771.) Here, the DEIR raised a concern about potential erosion and then included ways to avoid such erosion as part of the Project’s design. Petitioners have not shown that the DEIR was required to include specific mitigation measures to prevent wind-wave

erosion when the Project itself was designed to reduce such impacts to less than significant. Furthermore, Petitioners have not shown that the DEIR's conclusion that there would be a less than significant impact on wind-wave generated erosion was not based on substantial evidence.

Petitioners state the Project will result in degrading of the Yolo Bypass Levee. The evidence, however, does not support this statement. Prior to the completion of the DEIR, an email was sent stating that the Yolo Bypass Levee is not proposed to be maintained and will degrade overtime. The email explained that this has the potential to put significant pressure on the Cache/Hass Slough levee and that in a 100-year event will contribute to increased wave energy on the RD 2060 levee. The email went on to suggest several ideas, including making the Cache/Hass Slough Levee a training levee. (LOS 96877.) Petitioners have not shown that this email was not considered and addressed in the DEIR. Instead, it appears that the Project included the training levee suggestion made in this email.

Petitioners also argue that the Project will alter hydraulics in the Cache Slough region during high flow events, which would put pressure on other levees. Reclamation District 2068 states that the Project would alter hydraulics in the Cache Slough region at high flow events causing increased water levels and flooding pressure on State Plan of Flood Control levees that already have erosion, stability and freeboard deficiencies and that levees would be subject to increased wave fetch and erosion. (LOS 730.) The North Delta Water Agency also raised concerns about the Project causing more intensive wave-fetch forces leading to erosion of levees for seven reclamation districts in the vicinity. (LOS 242.) The FEIR explains that DEIR included Appendix D, which looked at these issues in detail. (LOS 242; see also 1771.) In particular, the FEIR points to a technical memorandum analyzing wave runup and wind setup for the Duck Slough Setback Levee, the Cache/Hass Training Levee, the Cross Levee and the Yolo Bypass East Levee. (LOS 2495.) The FEIR also points to a map showing the various Reclamation Districts near the area (LOS 1829) and then explains why the concerns about erosion of levees for the seven reclamation districts is unfounded. (LOS 243.)

The North Delta Water Agency also stated that the change in velocities may create erosion of nearby levees during high flow conditions. (LOS 246.) Yet, Appendix D considered velocity on nearby levees and found that existing rock slope protection was sufficient to mitigate erosion during a 100-year event. (LOS 1805.)

The DEIR states that the levee systems on the Project Site's perimeter along Cache and Hass Sloughs are considered deficient due to lack of adequate freeboard and deferred maintenance, and they are particularly vulnerable to increases in water level, erosion and wind-wave run-up potential. (LOS 1084.) The levees identified as being deficient are the Cache Slough Levee, the Hass Slough Levee and the Yolo Bypass West (Shag Slough). (LOS 1350.) The Shag Slough levee will be breached in nine places in order to create the Project. (LOS 1350.) The DEIR explained that the Project was

designed to limit increases of flood stages in Cache and Hass Slough to no more than 0.01 foot. (LOS 1350.) In addition, the Duck Slough Setback Levee is designed to be built at a 100-year event plus six feet of freeboard and an extra one foot for climate resiliency. (LOS 1350.)

Petitioners argue that the EIR fails to adequately analyze impacts of the levee system, failed to include substantial evidence and failed to include mitigation measures. Petitioners' argument fails on all points.

b. Loss of Flooding Capacity and Impacts on Emergency Access

Petitioners argue that the EIR fails to consider the loss of 40,000 acre-feet flood capacity due to changes to Unit 109, citing to page II-39 in the DEIR. (LOS 309.) That cite, however, does not state that the Project will reduce flood capacity. (LOS 1073.) The FEIR responds to this comment by also noting it was unclear what was being referred to. (LOS 309.) The FEIR goes on to explain that the Unit 109 levee system is designed to protect 13,000 acres of land from flooding and was not designed as a flood storage system. FEIR also states that the Project will create approximately 40,000 acre-feet of flood storage. (LOS 309.) Petitioners have not shown that the EIR failed to consider a loss of flood capacity due to changes to the Unit 109 levee.

Petitioners argue that the EIR did not consider the negative effects on emergency access, including changes to the emergency response plans and limits on PG&E's ability to access its towers during an emergency. (LOS 342.) The DEIR stated that the Project would not alter publicly accessible roadways in a manner that might result in inadequate emergency access. Liberty Island Road presently dead ends on the western side of the Liberty Farms Property and does not serve any populated areas that require emergency access. The only property that would see a potential decrease in emergency access is the Liberty Island Ecological Reserve, which is only accessible by foot or boat, and the pedestrian access will be removed as part of the Project. (LOS 1151.) Later, the DEIR notes that the Reserve does not contain any residences or businesses that would require evacuation or response in the event of an emergency. (LOS 1319; see also 342-343.) The FEIR also explains that access roads will be created on top of the levees to allow access for non-public uses. (LOS 310, 341, 734.)

Petitioners argue that the FEIR's statement that the alteration to the RD 2098/2068 Emergency Operation plan will be considered "at the appropriate time" (LOS 344) is an improper deferred mitigation. Petitioners have not shown that there is a significant impact on emergency access such that a mitigation measure is required. At oral argument, Petitioners acknowledged this point but argued that a proper analysis of this issue may have shown a significant impact on the environment, which might have required mitigation.

Petitioners also argue that the Project will affect RD 2068's ability to reduce flooding in RD 2068 during a high-water event by making a cut in Liberty Island Road (along with a second relief cut) to allow water to flow into RD 2098. (LOS 309, 733.) The FEIR states that the Department "and its contractors will comply with all applicable regulatory requirements, including alteration to the RD2098/2068 Emergency Response plan at the appropriate time." (LOS 734.) The FEIR did not provide further details on the Project's impact of flood risks to RD 2068 and instead referenced Master Response 12, which generally states that certain matters are not matters related to environmental impact. (LOS 157-158.)

The Project will require RD 2068 to re-consider its emergency response plan. Petitioners have not shown, however, that it is reasonably foreseeable that their new emergency response plan will result in physical changes to the environment. The Project will eliminate Petitioners' ability to make a cut in Liberty Island Road, but the Project will also add 40,000 acre-feet of flood storage in the general area where RD 2068 would have cut Liberty Island Road to slow or eliminate flooding upstream. Thus, it is possible that the Project will have a positive effect on RD 2068's ability to handle high-water events. It is, of course, possible that the Project will have a negative effect. But the question here is whether there is evidence in the record that the reconsideration of RD 2068's emergency response plan will result in physical changes to the environment. The Court finds that the Petitioners' claims here are too speculative.

c. Long-term maintenance of the Duck Slough Levee and Regional Flood Impacts

According to the DEIR, RD 2098 is responsible for maintaining the Duck Slough Levee and the Department is responsible for maintaining the rest of the Project Site. (LOS 1098, LOS 81477.) RD 2098 endorsed the Project in March 2019 based on the agreement that it would only be responsible for operations and maintenance of flood control facilities north of and including the Duck Slough Levee. (LOS 81476-81478.) Petitioners are concerned that the Project will reduce funding for RD 2098 such that RD 2098 will not be able to properly maintain the Duck Slough Levee. (LOS 201-202, 310, 730.) If that levee is not properly maintained it can create flood risks in nearby Reclamation Districts. (LOS 310.) RD 2060 and RD 2068 point out that RD 2098's funding comes from the landowners in that district and that the Project will reduce the acreage in the District "leaving little acreage and few landowners" to meet the operation and maintenance costs. (LOS 310.)

The FEIR stated that RD 2098 would be responsible for maintenance and operation of the Duck Slough Setback Levee and noted that there is an existing statutory framework for the responsibility of RDs, funding, and even creation of a state-managed maintenance area to ensure continued function. (LOS 151.) Beyond this statement, Respondents and Real Party argue that these concerns about long-term maintenance economic concerns and thus, not required to be included in the EIR.

“[S]ocial, economic and business competition concerns are not relevant to CEQA analysis unless it is demonstrated that those concerns will have a significant effect on the physical environment. [Citations.]” (*Maintain Our Desert Environment v. Town of Apple Valley* (2004) 124 Cal. App. 4th 430, 446; see also CEQA Guidelines § 15064(f)(6), §15131 and §15382.)

In *Maintain Our Desert Environment* the project was a large distribution center and the identified real party in interest was Pluto Development. Plaintiff (and the Attorney General) argued that the project description violated CEQA because it did not identify the planned user of the property as Wal-Mart. Plaintiff argued that had Wal-Mart been disclosed as the user of the project there might be additional public comments on the project. The Court rejected this argument because there was no showing of undisclosed environmental impacts. It explained that the plaintiff needed to show that the identity of the final user of the project “implicates potential physical environmental impacts” and that “in order to establish that the EIR was inadequate because it did not disclose Wal-Mart as the end user of the Project, [plaintiff] must rely on something more than speculation. [Citation.]” (*Maintain Our Desert Environment, supra*, 124 Cal.App.4th at 446.)

In *Goleta Union School Dist. v. Regents of University of California* (1995) 37 Cal.App.4th 1025, the local school district objected to the university’s plan for long-range development, including increasing the amount of students at the university. The SEIR showed that there would be an increase of 192 students in the local school district. The school district argued that CEQA required consideration and mitigation of classroom overcrowding. The Appellate Court disagreed and found that classroom crowding, per se, does not constitute a significant effect on the environment under CEQA. The Court stated that a fivefold increase in student enrollment would likely necessitate the construction of additional classrooms, which could constitute a physical change that significantly affect the environment. (*Id.* at 1032.)

Petitioners have not provided evidence in the record that shows RD 2098 will not be able to afford maintenance of the Duck Slough Setback Levee beyond mere speculation. The Court finds that Petitioners’ argument that RD 2098 may lack insufficient funding in the future to maintain the Duck Slough Setback Levee is too speculative and therefore, the funding issue is an economic one that does not require analysis in the EIR.

5. Hydrology and Water Quality

a. Algal Blooms

Petitioners argue that the EIR failed to consider how the Project will increase harmful algal blooms (HABs) and that the standard of review here is independent

judgment. The FEIR discussed HABs in detail and therefore, the Court finds that the review here is substantial evidence, not independent judgment. Petitioners argue that there are five primary environmental factors that trigger the emergence and subsequent growth of *Microcystis* in the water column of Delta waters:

- (1) water temperatures above 19°C;
- (2) low flows and channel velocities resulting in low turbulence and long residence time;
- (3) water column irradiance and clarity;
- (4) sufficient nutrients availability of nitrogen and phosphorus and
- (5) salinity below 10 ppt.

(LOS 379; 5699; see also LOS 444-504 (exhibit 7 to letter).) Petitioners also point to a study that explains growth of cyanobacteria in the Delta can increase with nutrient loads, shallow water and increased water temperature. (LOS 624 (exhibit 9 to letter); see also 5948.) The study notes that climate change will increase the risk that HABs will become increasingly competitive and that increased temperatures will increase stratification and water column stability, which also benefit HABs. (LOS 633, 5957.)

Respondent and Real Party argues that the FEIR considered all of these factors and found the changes would be less than significant. The DEIR mentions HABs in one paragraph, explaining that “[t]he emergence of increased concentrations of harmful algae blooms is indicative of potential problems with water stagnation, nutrient loading, and temperature increase.” (LOS 1324.) The paragraph also discussed sources of nutrients and stated that “cyanobacterium *Microcystis aeruginosa* has been an increasing component of summer harmful algal blooms in the Delta.” (LOS 1324; see also LOS 17602 [article cited in footnote 8].) Petitioners read this paragraph as admitting that harmful algal blooms have been increasing, however, the paragraph does not state that HABs are increasing.

The FEIR added additional analysis related to HABs. The FEIR states that current farming practices use pesticides and fertilizers, but such practices would end prior to construction and would decrease inputs that might contribute to water quality issues over time as part of the cumulative scenario. (LOS 130.) In addition, the Project would introduce tidal influence to the Project Site, which will reduce water stagnation. (LOS 130.) The section concludes that the Project is expected to have a positive influence on water quality by eliminating agricultural inputs and by reducing stagnation that contribute to the proliferation of HABs. (LOS 130; see also 162-163.)

As to water temperature, the DEIR explains that there is likely to be some water temperature increase from solar radiation in the shallow flats, but the water will mix with the adjacent bodies of water. In addition, the presence of vegetation in the marsh is expected to have a cooling effect. The DEIR concluded that “[t]emperature decreases associated with marsh vegetation shading are therefore anticipated to roughly offset or decrease temperature increases associated with solar radiation due to shallow depth.”

(LOS 1348 and 1274.) The DEIR cited to two studies supporting these conclusions. (LOS 21387 (cited at 1348) and 27227 (cited at 1274).) The FEIR concludes that “the Proposed Project would have minimal effect on water temperature that may influence the presence of HABs.” (LOS 162.)

Petitioners argue that the DEIR’s water temperature analysis is faulty because it does not support the statement that vegetation will provide a temperature offset and the Project will wait for natural revegetation. The DEIR relied on several studies to support its conclusions on water temperature (LOS 1348) and Petitioners do not offer any expert evidence, studies or opinions that explain why the water temperature conclusions are incorrect or why the DEIR’s analysis is incomplete.

The FEIR notes that hydrodynamic modeling found that much of the area within and adjacent to the Project Site was found to have water residence times of a week or more. (LOS 153.) The DEIR estimated residence times at 1 to 14 days. (LOS 1348.) Petitioners argue that longer residence times create a higher probability of HABs. One of the comment letters stated that the technical analysis for another project found that 3-5 days of water retention begins to create risk of HABs. (LOS 379.) The FEIR did not specifically address the difference between 1 to 14 days and a week or more of water residence times. That omission, however, does not mean that the FEIR did not analyze the impact of water residence times and HABs. The FEIR explained that the Project would reintroduce tidal influence to the Project Site, which will reduce water stagnation. (LOS 163.) It may be that water residence times will be one week or more and the risk of HABs will still exist at the Project Site, but the evidence in the EIR shows that the risk will be lower than it is now.

As to salinity, the FEIR relies on the discussion in the DEIR. The DEIR found that the salinity levels would be in compliance with D-1641 standards and the salinity changes would not cause an adverse effect on the Delta as a drinking water source. (LOS 1342.) The FEIR concludes that the Project “would not result in substantial adverse effects on the beneficial use of Delta waters as drinking water or exceed the applicable threshold of significance for agricultural operations or fish and wildlife populations post-construction.” (LOS 162.)

In reply, Petitioners point out that the discussion in the DEIR on the various relevant factors was not specific to HABs. While the DEIR did not analyze each of the five factors in their effects on HABs, the FEIR considered each factor.

Finally, Petitioners argue that the EIR failed to consider cumulative impact of HABs. The FEIR discussed HABs and found there to be a less than significant impact cumulative impact because the Project would not contribute to an increase in HABs.

The Court finds that the FEIR provided substantial evidence of its conclusion that the Project will have a less than significant impact on water quality due to the risk of HABS.

b. Localized Water Supply

Petitioners argue that the FEIR failed to consider whether the Project will result in the need to relocate nearby water facilities due to changes in water quality and the potential for water facilities to entrain fish. (LOS 307-308; 324; see also 5614.) Petitioners point out that one of the Project objectives is to “create, restore, and maintain ideal habitat conditions to encourage the proliferation of Delta Smelt and other sensitive fish species associated with unrestricted tidal freshwater ecosystems in the Delta.” (LOS 1036.) The Project will not remove or otherwise relocate water infrastructure, including diversions. (LOS 308.)

The question here is whether the Project’s impact on local water facilities is the type of indirect impact that must be considered under CEQA. “An indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable.” (CEQA Guidelines § 15064 (d)(3).)

The issue of water quality is discussed above.

As to the concern that water diversion facilities may need to move due to increased fish entrainment, Petitioners are concerned that “[a]s fish density increases, the risk of entrainment increases, and more individual fish may be subject to take water diversions than under existing conditions.” (LOS 307.) Petitioners have not explained under what circumstances a water diversion facility may need to move due to fish entrainment. Nor have they explained what kind of increase in fish is expected from the Project. Respondent and Real Party argues that the Project’s goal is to create more habitat and not necessary increase fish population, but such an argument ignores the mentions elsewhere that the Project will have a net benefit to special status fish, including Delta smelt (LOS 1403-04) and is designed for “recovery of Delta smelt” (LOS 1103).

Petitioners have not met their burden of showing that it is reasonably foreseeable that water diversion facilities will be moved, which would require additional environmental analysis.

c. Regional Water Supply

Petitioners point out that the Delta is an important regional water source and several agencies submitted a comment raising regional water issues. (LOS 232; see also 5672.) Petitioners argue that in order to comply with D-1641 standards, the Department

will have to take water from an alternate source in order to mitigate salinity levels. Petitioners are also concerned that the Project will require the release of storage water to comply with D-1641, which would affect the post-1914 appropriative water rights. (LOS 251.) Petitioners' argument here is based on their argument above that the Project will increase salinity levels to such an extent that water release will be required to comply with D-1641. The FEIR found that the Project would not exceed D-1641 standards and thus, there would be no need to release storage water to prevent exceeding D-1641 limits.

Petitioners also argue that the EIR failed to disclose the impacts of invasive aquatic vegetation on regional water supply. Invasive plants, such as water hyacinth, consume more water than native plants. (LOS 377.) The FIER found that with mitigation measure BIO-4 the Project will have a less than significant impact on water quality due to invasive aquatic vegetation. The Court finds that that the FEIR has provided sufficient analysis for its conclusion that there would not be an increase in invasive species.

6. Recreation Impacts

Currently there is pedestrian access for fishing along the shoreline of the Liberty Island Ecological Reserve (LIER) by way of the Shag Slough Bridge. In addition, pedestrians can fish along the Shag Slough Levee. (LOS 155, 1110, 1377; 5686.) The Project will remove the Shag Slough Bridge and breach the levee along the Shag Slough in several places, which will eliminate pedestrian access to the Reserve and the Shag Slough Levee. (*Id.*)

The FEIR and DEIR acknowledge that the Project will eliminate this pedestrian access, but found the environmental impact to be below the threshold of significance and thus, a less than significant environmental impact. (LOS 155-156, 1377-1379.) The DEIR considered three thresholds of significance, including the two from CEQA Guidelines, Appendix G, plus an additional one specific to this Project:

- (1) increase the use of existing neighborhood and regional parks or other recreational facilities such that substantial physical deterioration of the facility would occur or be accelerated;
- (2) include recreational facilities or require the construction or expansion of recreational facilities, which might have an adverse physical effect on the environment; and
- (3) substantially decrease opportunities to fish from the shoreline within the Delta region.

(LOS 1377.)

Petitioners argue that the Department erred in finding that that third threshold of significance was not met. The Department of Fish and Game believed that the loss of public land-based access to the Liberty Island Ecological Reserve would be a significant

impact and pointed out that there would be a loss of three miles of land that can be used for fishing. (LOS 5686.) The Department of Fish and Game states that public bank fishing is already very limited in the Cache Slough Complex as most levees are on private property or have restricted access and that the removal of the pedestrian access will disproportionately affect lower income individuals who cannot afford boats. (*Id.*)

The DEIR provided an explanation for the conclusion that the Project would not substantially decrease opportunities to fish from the shoreline within the Delta region. The DEIR found 28 informal fishing areas and 30 fishing piers within a 60-minute drive of the Project Site. (LOS 1375-1376.) The DEIR includes a table of approximately 19 sites that offer about 500 linear feet of fishing per site, and two other sites offer 2,000 and 3,000 feet of fishing. (LOS 1375-76.) Using these numbers, the DEIR shows there are about 15,000 linear feet of fishing near the Project Site. (The actual amount is likely higher, as the DEIR mentions 58 fishing locations, but only provides size data on the locations in the table.) The Court notes that there are 5,280 feet in a mile and that 3 miles equals 15,840 feet.

It appears that the loss of 3 miles of shoreline fishing would be approximately equal to the amount of shoreline fishing remaining in the 60-minute driving area from the Project Site. Even if the amount of shoreline access is doubled, the Project would still result in a loss of about one third of the shoreline accessible by pedestrian for fishing. Based on the record available, it appears that the Project will have a significant impact on recreation based upon the third threshold of significance. However, the DEIR and FEIR concluded that the Project's impact on recreation would be less than significant.

The FEIR explains that the Project will also add 20 miles of new channels accessible by watercraft that will increase fishing opportunities. (LOS 155.) But the FEIR does not explain whether any of these new channels will have shoreline fishing access.

Respondents and Real Party argue that the Shag Slough Bridge is unsound and thus, should not be considered when evaluating the Project's impact on recreation. The Record does not support this argument. The Bridge is referred to as "structurally deficient" with a note that it "cannot support emergency vehicles." (LOS 1369, see also 1374.) Throughout the DEIR, there are statements that the Bridge provides pedestrian access to the Liberty Island. The DEIR notes that finishing is not allowed from the Bridge, but it is known to occur. Also, the Bridge provides pedestrian access to Liberty Island where fishing is permitted. (LOS 1374.)

Respondents and Real Party argue that the DEIR estimates only about 80 people use the area for fishing (LOS 1378), and given that small number, any loss of use would be less than significant. The number of fisherpersons is relevant to the first threshold of significance, but as to the third threshold of significance the concern is whether the Project will substantially decrease *opportunities* to fish from the shoreline within the

Delta region. Thus, whether people are currently using the Project Site for fishing is not the inquiry. Instead, the inquiry is how will the Project effect opportunities to fish from the shoreline within the Delta.

Here, the available information shows that the Project will result in the loss of 3 miles of shoreline fishing. The information available in the DEIR shows that the loss of 3 miles of shoreline fishing would be a significant impact and the EIR's conclusion to the contrary was not supported by substantial evidence. Respondent failed to properly consider that Project's impact on opportunities to fish from the shoreline within the Delta region. Therefore, Respondents must re-consider this issue.

7. *Energy Impacts and Appendix F*

Petitioners argue that the DEIR and FEIR did not address the various requirements in CEQA Guideline, Appendix F. The DEIR states "Energy use associated with the Proposed Project is limited to construction-related energy such as fuel used to power equipment and to move workers to and from the site, as well as maintaining electrical power to existing pumps to dewater the site during construction." After construction, energy uses would be limited to powering an existing pump in Duck Slough, and fuel use for vehicles supporting maintenance and monitoring activities during the post-construction management and monitoring period. (LOS 1133.) Exhibit B to the DEIR listed the energy uses during construction. (LOS 1585-1586.) The DEIR included a mitigation measure for reduction in emissions during construction. (LOS 1185.) The DEIR states that materials excavated during construction will be re-used as appropriate to create tidal habitat. (LOS 1114.) (Petitioners failed to address several of the cites to the record provided by Respondent and Real Party.)

Petitioners have not met their burden of showing that the FEIR did not consider the energy impacts of the Project as required under CEQA.

C. FEIR Response to Public Comments

Petitioners argue that the FEIR failed to respond to public comments as required by CEQA. CEQA Guidelines require that the lead agency provide written responses to public comments submitted in response to the DEIR. "Responses to comments need not be exhaustive; they need only demonstrate a 'good faith, reasoned analysis.' [Citations.] ' "[T]he determination of the sufficiency of the agency's responses to comments on the draft EIR turns upon the detail required in the responses. [Citation.] Where a general comment is made, a general response is sufficient." ' [Citations.] ' "[A]n EIR is presumed adequate [citation], and the [petitioner] in a CEQA action has the burden of proving otherwise." ' [Citations.]" (*Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 937; see also, CEQA Guidelines, § 15088(c).)

Petitioners argue that there are several issues raised in the public comments that the FEIR failed to adequately address. Petitioners' citations to the record, however, are almost entirely citations to the public comments. In addition, Petitioners provided only a few citations to the FEIR where the issues were addressed. Petitioners were obligated to provide citations to all relevant evidence in the record. (*No Slo Transit v. City of Long Beach* (1987) 197 Cal.App.3d 241, 251 ["It is incumbent upon appellants to state fully, with transcript references, the evidence which is claimed to be insufficient to support the finding."].) While Petitioners of course cannot provide a page-specific citation to responses that never were provided, in some instances they have asserted that there were no responses, while the Court's review of the record shows that there were. In addition, when showing that no response was provided to a comment, it is helpful to cite to the comment in the FEIR as that often helps the Court to easily determine whether a response was provided.

The Court's ruling on this section is limited to issues where Petitioners provided citations in the record to the issue.

Petitioners argue that the FEIR did not provide an adequate response to a comment on organic carbons. For this argument, Petitioners do not cite to a specific public comment. Instead, they cite only to the Master Response 8 on organic carbon in the FEIR. (LSO 152-153) Without a cite to a specific public comment, the Court cannot tell which comment Petitioners argue was not the subject of an adequate response. In addition, Petitioners do not explain how Master Response 8 was inadequate.

Petitioners argue that the FEIR did not provide an adequate response to a comment on the lack of ability of RD 2098 to fund ongoing maintenance and again only cite to the Master Response on the issue without including any public comment. (LOS 151-152.)

Petitioners argue that FEIR did not respond to comments that the Project would impact its ability to divert water from the Cache Slough Pumping Plant and similar concerns raised by the Solano County Water Agency. (LOS 5587, 5628, 5654; the corresponding FEIR cites are LOS 707, 729, 363.) Petitioners point to several comments that explain the Project's intended result is to increase the number of listed and endangered fish species, which would adversely impact the ability of municipal water users to divert water. (LOS 5614-15; 5628, 5639, 5654, 5669; the corresponding FEIR cites are LOS 307, 729, 335-336, 363, 244.) Petitioners state that the FEIR addressed concerns about salinity in the water and how it relates to municipal water impacts (LOS 140-141), but failed to address the concern that more fish will threaten the operation of municipal intakes. Petitioners did not address or even cite to Master Response 3 in their opening brief, which addresses local water diversions and fish species. (LOS 146-147.)

As discussed above, the Court finds that Master Response 3 sufficiently responded to Petitioners' concerns regarding fish entrainment and how that might

impact water diversion facilities and thus, the Court finds that Master Response 3 provides a good faith, reasoned analysis of Petitioners' concerns on this issue. On the remaining comments, Petitioners have not met their burden of showing that the FEIR did not adequately respond to public comments.

D. Mitigation Measures

1. Farmland Impact / Conservation Easements

The Project would result in the loss of 1,460 acres of prime farmland by converting that land to tidal marsh. (LOS 1166.) The EIR concluded that this loss would be potentially significant unless mitigated. (LOS 1166.) The DEIR includes two mitigation measures: AG-1a and AG-1b. Measure AG-1a provides funding to improve nearby farmland, including improvements on 660 acres of prime farmland and improvements on 1060 acres of non-prime farmland. (LOS 1166-67; see also LOS 145-146.) Measure AG-1b requires the purchase of 1,000 acres of land for an agricultural conservation easement. The easement would require that this land be irrigated farm or pasture. (LOS 1167-1169.) The property chosen for the easement will be located in Solano County that is Prime Farmland according to the USDA Soil Survey, the land will have adequate water supply and the land will not have previously been encumbered by an agricultural conservation easement or used for agricultural mitigation. (LOS 1168.) With these mitigation measures, the DEIR concludes that the Project will have a less than significant impact.

Petitioners argue that the use of conservation easements as mitigation was improper because that mitigation measure prevents the loss of agricultural land due to development, but does not create new agricultural land to offset the loss of the farmland at the Project Site.

In *Citizens for Open Government v. City of Lodi* (2012) 205 Cal.App.4th 296, the EIR found the loss of farmland could not be mitigated with a conservation easement to a less than significant impact. The city made a statement of overriding consideration as to the significant impact on farmland because there was no feasible mitigation for the loss of farmland. The EIR included a partial mitigation with a conservation easement at 1 to 1 ratio. The Court of Appeal found that the EIR had correctly concluded that there was no feasible mitigation measure to replace the loss of farmland. (*Id.* at 322-324.)

A year later, however, *Masonite Corp. v. County of Mendocino* (2013) 218 Cal.App.4th 230, 238, stated that agricultural conservation easements "may appropriately mitigate the direct loss of farmland when a project converts agricultural land to a nonagricultural use, even though an ACE does not replace the onsite resources." (*Id.* at 238.)

In *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, the Court of Appeal found that the use of an agricultural conservation easement to mitigate the loss of farmland was not a proper mitigation. The Court explained that “[e]ntering into a binding agricultural conservation easement does not create new agricultural land to replace the agricultural land being converted to other uses. Instead, an agricultural conservation easement merely prevents the future conversion of the agricultural land subject to the easement. Because the easement does not offset the loss of agricultural land (in whole or in part), the easement does not reduce a project’s impact on agricultural land. The absence of any offset means a project’s significant impact on agricultural land would remain significant after the implementation of the agricultural conservation easement.” (*Id.* at 875.)

In *Save the Hill Group v. City of Livermore* (2022) 76 Cal.App.5th 1092, the project acknowledged a loss of 32 acres of habitat for special status species. The EIR included compensatory mitigation at a 2.5:1 to 3:1 ratio for this permanent habitat loss for each of these species and required the land to be in a conservation easement. (*Id.* at 1116.) Relying on *King and Gardiner*, petitioner argued that the conservation easement would not result in the provision of any new resources to offset or compensate for the habitat permanently lost to the project and thus, would not mitigate the loss of habitat. The Court of Appeal rejected this argument. It distinguished *King and Gardiner* as involving the loss of 7,450 acres as opposed to 32 acres. But the Court of Appeal also explained that such conservation easement mitigations were allowed. “More importantly, CEQA does not require mitigation measures that completely eliminate the environmental impacts of a project. Rather, CEQA permits mitigation measures that would substantially lessen the significant environmental effects of the project. (§ 21002.) The Guidelines, in turn, provide that mitigation may include ‘[c]ompensating for the impact by replacing or providing substitute resources or environments ...’ (Guidelines, § 15370, subd. (e), italics added.)” (*Id.* at 1117.) The full text of section 15370(e) states that mitigation includes “[c]ompensating for the impact by replacing or providing substitute resources or environments, including through permanent protection of such resources in the form of conservation easements.”

Save Panoche Valley v. San Benito County (2013) 217 Cal.App.4th 503 involved a solar project that would use 4,885 acres and the solar items would be removed when the project lost its usefulness (after 30 years). The court rejected the argument that the project was required to create additional agricultural lands to compensate for the ones utilized for the project site are unsubstantiated. (*Id.* at 529.) “The goal of mitigation measures is not to net out the impact of a proposed project but to reduce the impact to insignificant levels.” (*Ibid.*) The mitigation measures there, however, involved conservation easements, but also that the developer would be required to dismantle the project upon conclusion of its useful life, which would include disassembly of any structures and restoration of the lands.

Respondent and Real Party argue that they were not required to identify a specific property for the conservation easements. In *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260 the EIR included a mitigation measure that required the acquisition of property near the project site as habitat for the Quino butterfly that would be impacted by the Project. (*Id.* at 274.) The court noted that “[g]enerally, an agency does not need to identify the exact location of offsite mitigation property for an EIR to comply with CEQA. [Citation.]” (*Id.* at 279.) In *Preserve Wild Santee* a specific property was not identified, but the EIR included criteria on how the property would be selected including that 100 acres would be adjacent to the project site and the remaining acres would either support the Quino or be proven to have a high potential to support the Quino. (*Id.* at 274.) In *Save the Hill Group* the developer identified a specific property for the conservation easement, which the court of appeal stated was suitable for mitigation. (*Save the Hill Group, supra*, 76 Cal.App.5th at 1116.) Relying on *Preserve Wild Santee* the court went on to state that if the chosen site proves inadequate for mitigation, the city could compel the developer to find and protect an alternative site. (*Ibid.*) *Save the Hill Group* did not address whether the RFIER included any criteria on how an alternative site would be chosen.

The Court finds that agricultural conservation easements can be a proper mitigation measure. In order for an agricultural conservation easement to be a proper mitigation measure, however, there must be evidence in the record as to the planned easement area or criteria that will be used to select the easement location. Here, the record shows that the property selected for the easement will be prime farmland in Solano County with sufficient water for irrigation. In addition, referring the “property” in the singular suggests that the easement will occur on one continuous piece of land as opposed to multiple smaller easements. The Court finds that these criteria are sufficient to show that an agricultural conservation easement in this case is an appropriate mitigation measure.

In addition to the agricultural conservation easement mitigation measure, the DEIR included another mitigation measure that would provide improvements to 1,060 acres of non-prime farmland as well as improvements to prime farm land. The DEIR found that these improvements would “increase the agricultural value and productivity of approximately 1,700 acres”. (LOS 1167.) When considering these mitigation measures together, there is substantial evidence to support the finding that these mitigation measures reduce the environmental impact to less than significant.

2. *Biological Resources*

The DEIR states that the Project could facilitate the introduction and establishment of invasive species. (LOS 1244.) The DEIR found that with Mitigation Measure BIO-4, the Project’s impact on invasive species would be less than significant. (LOS 1244.) Petitioners argue that Mitigation Measure BIO-4 is insufficient because it does not disclose and evaluate how the Department will manage invasive species during

the operational phase of the project or the criteria for their removal. (LOS 1244.) In reply, Petitioners argue that the mitigation measure is improperly deferred.

BIO-4 requires that protocols be established prior to construction. The protocols include: (1) identifying weeds that are rated high or moderate for negative ecological impact in the California Invasive Plant Database that have a potential to spread off-site and/or sustain on-site; (2) where determined necessary to control populations, weed infestations shall be treated according to control methods and practices considered appropriate for those species; (3) weed control treatments include all legally permitted herbicide, manual, and mechanical methods and will be in compliance with state and Federal law; and (4) the timing of weed control treatment shall be determined for each target plant species with the goal of controlling populations and the Department will apply these rules for invasive aquatic plant species. (LOS 108-109; see also, 1056, 1244-43.) The FEIR notes that the Department currently has a contract with the Department of Parks and Recreation Division of Boating and Waterway to monitor and treat invasive vegetation. (LOS 159-160.) Respondent and Real Party point out that there is a list of the parties responsible for monitoring and adaptive management tasks. (LOS 75868-75869.)

Respondent and Real Party also argue that BIO-4 should be considered in conjunction with BIO-2, which is designed to create more native plant growth and discourage invasive species growth with a 1: 1 replacement goal. (LOS 1241-42.) BIO-2 may have an effect on invasive plant species, but it does not provide specific criteria to determine when action will be taken on invasive plant species.

“Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan. [Citation.] On the other hand, an agency goes too far when it simply requires a project applicant to obtain a biological report and then comply with any recommendations that may be made in the report. [Citation.]” (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275; see also CEQA Guidelines, § 15126.4, subd. (a)(1)(B).)

BIO-4 provides sufficient information on how invasive species will be identified and what types of controls will be used. The Court finds that BIO-4 is not an improper deferred mitigation.

3. Hydrology and Water Quality

The DEIR found that it would be possible for soil or contaminants to enter surface or groundwater during construction, but found that the impact would be less than significant with mitigation. (LOS 1340.) The EIR includes two mitigation measures, HYDRO 1 and HYDRO 2. (LOS 129, 1347.) Petitioners argue that these mitigation measures are insufficient because the mitigation measures only apply during construction and fail to address the adverse impacts on water quality due to invasive

aquatic species, salinity and bromide and organic carbon. Petitioners' argument here is a repeat of their argument above that the EIR failed to properly analyze the Project's impact on water quality.

The EIR found that invasive aquatic species, salinity and bromide and organic carbon would have a less than significant impact on water quality. Thus, no mitigation measures were required as to these items. The Court finds that the EIR's mitigation measures on hydrology and water quality are sufficient.

E. Cumulative Impacts

The Project is designed to help meet the Department's obligation to restore 8,000 acres of tidal marsh and is part of an effort to restore or enhance 30,000 acres of habitat in the Delta and Suisun March. (LOS 1098.) The DEIR lists several other projects involving habitat restoration in the nearby areas. (LOS 1398-1400.)

Petitioners raise several arguments regarding the salinity levels, including a concern that salinity will exceed 5% in some places and the concern regarding soil salinity levels. (LOS 351; 394.) The FEIR explains that the salinity modeling in Appendix X considered the cumulative impact of the Proposed Project in addition to 17 other regional restoration sites in the Delta and Suisun Marsh. (LOS 143.) The modeling considered all regional projects with and without the Project and evaluated both scenarios for compliance with D-1641. (LOS 143.) The Court finds that the FEIR sufficiently considered the cumulative impact of other projects.

Petitioners argue that in 2015 the Department found that tidal habitat restoration had an adverse impact on water quality due to increases in bromide. (LOS 362; see also 5654.) The FEIR responded that the current version and configuration of this Project was not known in 2015 and that a more accurate and detailed analysis has been provided for this Project. (LOS 362.) Petitioners have not explained why the FEIR's explanation is insufficient.

Petitioners briefly argue that the planned incremental increase of endangered species in the region was not provided. Petitioners provide no citations to the record and insufficient explanation on what was needed on this issue. They also point to the DEIR's discussion on the cumulative impact on the loss agricultural. (LOS 1401.) The cumulative impact analysis found that while there will be a significant cumulative impact on the loss of farmland, the Project would have a less than significant impact with mitigation and the Project's contribution would be less than cumulatively considerable. (LOS 1401.)

F. Judicial Notice

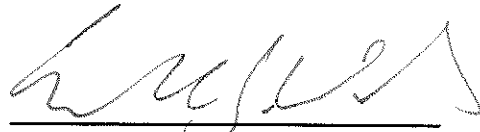
Respondent and Real Party's request for judicial notice of Exhibits A, B and C is granted.

IV. Conclusion

The Court grants the petition for writ of mandate. The Court finds that Respondent violated CEQA because the FEIR's analysis that the Project will have a less than significant impact on opportunities to fish from the shoreline is not supported by substantial evidence. Petitioners' other contentions are rejected.

A writ of mandate shall issue compelling Respondent to set aside the certification of the FEIR. Any further consideration of the project must comply with this order. Counsel for Petitioners are directed to prepare a writ of mandate consistent with this order.

DATED: November 17, 2022



Hon. Edward G. Weil
Judge of the Superior Court

Superior Court of California, Contra Costa County

CV - Martinez-Wakefield Taylor Courthouse
725 Court Street
Martinez CA 94553
925-608-1000
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K. Bieker
Court Executive Officer

CLERK'S CERTIFICATE OF MAILING

CASE NAME:

CITY OF VALLEJO VS CA DEPT OF WATER RESOURCES

CASE NUMBER:

MSN21-0558

THIS NOTICE/DOCUMENT HAS BEEN SENT TO THE FOLLOWING ATTORNEYS/PARTIES:

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K. Bieker
Court Executive Officer

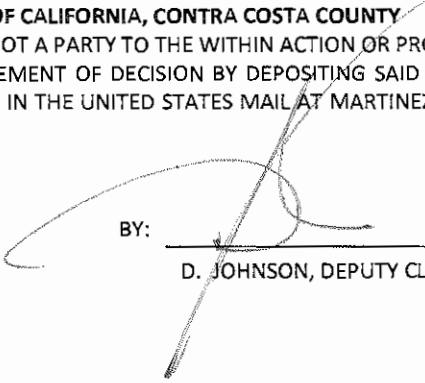
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SUPERIOR COURT OF CALIFORNIA, CONTRA COSTA COUNTY

I DECLARE UNDER PENALTY OF PERJURY THAT I AM NOT A PARTY TO THE WITHIN ACTION OR PROCEEDING; THAT ON THE DATE BELOW INDICATED, I SERVED A COPY OF THE STATEMENT OF DECISION BY DEPOSITING SAID COPY ENCLOSED IN A SEALED ENVELOPE WITH POSTAGE THEREON FULLY PREPAID IN THE UNITED STATES MAIL AT MARTINEZ, CA AS INDICATED ABOVE TO ALL ACTIVE AND DISPOSITIONED PARTIES.

DATE: 11/18/2022

BY: 
D. JOHNSON, DEPUTY CLERK