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INFORMATIONAL HEARING

PROSPECT ISLAND FISH KILL

December 6, 2007

9:30 a.m.

Rio Vista City Council Chambers
One Main Street
Rio Vista

B A C K G R O U N D

On November 20, 2007, Bob McDaris, a local fisherman and marina owner from Freeport discovered large numbers of dead fish near Prospect Island and reported his findings to authorities. The source of the fish kill was determined to be an action initiated by the Bureau of Reclamation, which had hired a contractor to repair levee breaches and begin draining the water from the Island. The action left large numbers of fish stranded as the water receded and oxygen levels were depleted. The fish death toll continued to grow over the following week or so, and while no official count has been reported, state and federal agencies estimate the fish kill to be in the tens of thousands. According to press reports, federal and state agency officials were initially reluctant to take or allow any actions to save the fish, but the Bureau of Reclamation eventually permitted volunteers to intervene in an effort to save some of the remaining fish. Volunteer fishermen spent many hours the weekend of December 1st and 2nd and successfully rescued several thousand fish which were released into deeper water in Miner Slough.

Prospect Island is located in Solano County in the northern portion of the Sacramento-San Joaquin Delta, adjacent to the Sacramento Deep Water Ship Channel and Miner Slough, approximately 8 miles northeast of Rio Vista and 16 miles southwest of Sacramento. The island is bounded on the north by the east-west levee from Arrowhead Harbor to the Ship Channel levee, on the east by Miner Slough, on the south by land owned by the Port of Sacramento, and on the west by the Deep Water Ship Channel.

The 1,253 acre island is owned by the Bureau of Reclamation which purchased the property in 1994 with the goal of restoring wetlands and fishery habitat. The land was purchased with monies from the Central Valley Project Restoration Fund, which was established to provide for habitat restoration, improvement and acquisition, and other fish

and wildlife restoration activities in the Central Valley Project area of California. CALFED identified the island as a desirable location for restoration. Prospect Island is within the CALFED Ecosystem Restoration Program (ERP) North Delta Ecological Management unit, and considered a high priority for meeting ERP and Multi-Species Conservation objectives of CALFED.

PAST EVENTS

Frequent levee breaches causing significant flooding have occurred on the island at least seven times over the past 20 years. Following each flooding event, the state and federal governments, at considerable expense, have repaired the levees and pumped the island dry. The majority of the costs of draining the island and repairing the levees after these flooding incidents have been borne by state and federal agencies. In 1999, \$1.7 million in CALFED funds and \$622,000 in Bureau of Reclamation funds were used to repair the levees and drain the island. The most recent flooding event occurred close to two years ago in January 2006.

In the 1990s the federal government proposed to make Prospect Island part of a North Delta National Wildlife Refuge. That proposal was ultimately dropped after local opposition from landowners, and the United States Fish and Wildlife Service (FWS) did not receive approval to purchase the land. The state and federal governments, through CALFED, then examined alternative proposals for restoring wetlands and fish habitat on the island, and to serve as mitigation for environmental impacts caused by construction and operation of the Ship Channel and the Sacramento Flood Control Project.

A 2001 Environmental Assessment and Initial Study (EA/IS) for the "Prospect Island Ecosystem Restoration Project" prepared jointly by the United States Army Corps of Engineers and the State Department of Water Resources (DWR), proposed to restore wetlands and fish habitat on Prospect Island. The report noted that the restoration would provide tidal wetland habitat beneficial for special status species, including Delta Smelt, Chinook Salmon, Central Valley Steelhead, and Sacramento Splittail. The report noted that waterfowl, shorebirds, songbirds and furbearers would also benefit from restoring open shallow water habitat and riparian vegetation. The proposed project included intentional breaches of levees to restore tidal action. The EA/IS noted that conversion of the island to wetlands would be compatible with frequent flooding. The 2001 EA/IS also concluded it would not be economically feasible to restore the island to agriculture, and that the best use of the island was for restoration of wetlands for fish and wildlife habitat. The restoration project was not implemented after the State was unable to secure the full non-federal cost share, due to a number of factors.

CURRENT PROJECT

According to the Bureau of Reclamation's website, the Bureau initiated the current levee repair and drainage at Prospect Island on October 4, 2007. The Bureau hired contractor DD-M Crane and Rigging of Alameda County to conduct the work, which involved the closing of two levee breaks on the federal property, draining the water from the federal

property, and repairing bank erosion to private property. According to the Bureau, the project was initiated to eliminate a boating hazard, to restore property damaged in the January 2006 levee breaks, to protect the Minor Slough levee, and to restore access to property.

RELEVANT LAWS (partial list):

Federal

1. *Clean Water Act* - Requires a Section 404 permit from the Army Corps of Engineers for any discharge of fill or dredged material affecting bottom elevation of a water of the United States, including wetlands, and a Section 401 permit from the State Regional Water Quality Control Board for dredging activities.
2. *Endangered Species Act* – Prohibits federal agencies from authorizing funding or carrying out actions which may jeopardize the continued existence of endangered or threatened species, and prohibits the "take" of federally listed species without a permit. Administered by the FWS and NOAA Fisheries.
3. *National Environmental Protection Act (NEPA)* - Requires that before taking any major or significant action federal agencies must consider the environmental impacts of the action. Requires preparation of an environmental impact statement (EIS) for any federal action which may have a significant impact on the environment. An EA may be prepared in lieu of an EIS if the agency issues a "finding of no significant impact."

State (not all applicable to federal agencies)

1. *California Environmental Quality Act* – requires lead agency to identify potentially significant adverse effects of a project on the environment, and to follow the best available alternative. Requires preparation of an environmental impact report or negative declaration.
2. *California Endangered Species Act* – Requires the Department of Fish and Game (DFG) to work to protect and preserve threatened and endangered species and their habitats. Prohibits "take" of state listed species, except pursuant to an incidental take permit issued by DFG.
3. *Streambed Alteration law* (F&G Code Section 1600 et seq.) – Requires any person, state or local entity to notify DFG before beginning a project that will divert, obstruct or change the natural flow, or the bed, channel or bank of a river, stream or lake, use materials from a streambed, or result in deposition of debris or waste in such waters. Requires DFG to determine whether action will substantially adversely affect existing fish or wildlife resources.
4. *Porter Cologne Water Quality Act (Water Code Sections 13000-13999)* - Regulates discharges that may affect quality of state's waters.

5. *Fish and Game Code prohibitions on wanton waste of fish* -
 - Section 8076 – Provides that no reduction in fish shall be permitted which may tend to result in waste or deterioration of fish.
 - Section 7704 – Makes it unlawful to cause or permit any deterioration or waste of any fish taken in the waters of this state.
 - Section 1172 – Prohibits issuance of a permit that will result in waste or deterioration of fish.
 - Section 2014 – States that it is the policy of the State to conserve natural resources and prevent willful or negligent destruction of birds, mammals, fish, reptiles or amphibians.
 - California Code of Regulations, Title 14, Section 1.87 –
Makes it unlawful to cause or permit any deterioration or waste of any fish taken in the waters of this state.

6. *California Reclamation Board* – Responsible for approving work in overflow basins of the Sacramento River. (Water Code Section 8710).

7. *Public Trust Doctrine* – The Public Trust doctrine protects the waterways of the state for the people of the state for commerce, transportation and fisheries, and for hunting, fishing, swimming, and recreational boating. The courts have also held that the State has an affirmative duty to protect public trust resources, including fish and wildlife resources, and scenic and wildlife habitat values (California Constitution and *National Audubon Society v. Superior Court*, 33 C.3rd. 419). The DFG has a duty to preserve, protect and restore fish and wildlife. Wildlife resources of the state are held in trust by DFG for the people of the state. (Fish & Game Code Section 710.5) The State Lands Commission also has jurisdiction over and holds in public trust lands underlying navigable and tidal waterways, and tide and submerged lands adjacent to the coast.