SOUTH DELTA WATER AGENCY

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Via e-mail: eircomments@deltacouncil.ca.gov

Delta Stewardship Council
Attn: Terry Macaulay
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Re: Draft EIR

Dear Ms. Macaulay:

The following are the comments of the South Delta Water Agency to the DEIR for the Delta Stewardship Council's Delta Plan. SDWA also joins in the comments of the Central Delta Water Agency, and the County of San Joaquin to the extent they are consistent with these comments.

General Comments

Initially, it must be noted that any review of the draft EIR of the Delta Plan is difficult because the Plan itself does not contain sufficient analysis to allow commentators to discern if the analysis is adequate or legally sufficient. Since the Plan is merely a long listing of general directives and recommendations, it does not constitute a "project" under CEQA guidelines or case law.

The Plan makes numerous statements regarding what others should undertake to do, however, these statements do not rise to any level of specificity, rather they end up being encouragement for those parties to "do the right thing." Hence the SWRCB is encouraged to set flow standards, DWR is encouraged to set ground water criteria and reporting requirements, DFG is encouraged to determine what additional habitat should be created, etc. The net result is that the Plan is merely an admonition that others should undertake projects to improve water supply/availability, improve water quality, increase habitat, etc. In other words, the Plan simply asks other to do what is necessary to meet the co-equal goals. As such, the Plan does not

constitute a project for CEQA purposes. In addition, the Plan does not accomplish, nor does it map out a way to accomplish the co-equal goals.

Just as importantly, although the Plan contains large amounts of relevant and necessary information, it repeats the very same misconceptions, inaccuracies, and false premises which have resulted in the current situation where insufficient water exists to address environmental needs and to supply the amounts of water desired by exports interests. By not challenging the status quo, the Plan ends up as a re-hash of all the same failed policies which caused the current conditions and simple asks others to be more diligent in applying those same policies. As the saying goes, doing the same thing over and over and expecting a different result is the definition of, well you know.

Encouraging others to undertake new conservation projects, new conveyance projects, new storage projects, new re-use projects, new conjunctive projects etc. is the exact same thing that has been going on for the past 30 years. All water suppliers who expect to have insufficient supplies in the future are already considering what projects they can undertake, and determining what projects are the most cost effective. Importantly to the State as a whole, a large portion of this effort is geared to "firm up" a water supply without any consideration of whether the water they seek is available to them. This of course refers to the export interests attempt to "guarantee a certain minimum supply " without regard to priorities or supply.

What is needed is a detailed analysis of what water is produced in the relevant watersheds, what is necessary for environmental needs, what is needed by superior right holders and what is left over for export. As in the BDCP, and in accordance with the export interests, the Delta Plan ignores this necessary first step and so ends up simply encouraging others to find new supply projects without addressing the real problem. Such encouragement in no way moves us closer to a reliable water supply, it simply tells those who do not have enough water they do not have enough water. MWD, SLDMWA, and KCWA all know their supply is intermittent. What is needed is a resolution of the issue of whether they are able to export any water from the Delta when area of origin, in-Delta and environmental needs do not get their full supply. By not examining and addressing this issue, the Council offers no reason (for example through a cost-benefit analysis) why impacts to exports should be maintained much less even considered.

<u>Specific Comments</u>

1. What does a "reliable water supply" mean? First, the controlling statutes do not use the words "sufficient" or "full" or "adequate" water supply. Hence the directives in the statutes relate to what can reasonably be expected by the various water users under different hydrological conditions. A reliable supply may be almost all of what one needs, half of what ones needs, or virtually none of what one needs. "Reliable" does not refer to "need" or "desire," it refers what can be expected. After we have determined what is the reliable supply for any need, then the Council can determine, recommend or suggest how that need might acquire or develop additional water. The Council and the Plan have it backward; they try to hold current supplies

(sometimes unspecified) steady for all users and then suggests everyone simply find more water. Again, that ignores the over-riding problem of whether there is a reliable supply for exporters or whether there is not.

Second, the governing statutes provides

> (a) This division does not diminish, impair, or otherwise affect in any manner whatsoever any area of origin, watershed of origin, county of origin, or any other rights protections, including, but not limited to, rights to water appropriated prior to December 19, 1914, provided under the law. This division does not limit or otherwise affect the application of Article 1.7 (commencing with Section 1215) of Chapter 1 of Part 2 of Division 2, Sections 10505, 10505.5, 11128, 11460, 11461, 11462, and 11463, and Sections 12200 to 12220. (California Water Code Section 85031)

It is clear from this statute that the guidance for determining a "reliable water supply" precludes the Council from interfering with existing legal water right priorities. Since this is the case, the Delta Plan, and the environmental review of that Plan are legally required to go through the supply analysis referenced above. As previously provided to the Council, one estimate (Weber Foundation Studies) indicates that in a repetition of the 1928-34 drought, the Sacramento and San Joaquin river watersheds produced approximately 17.5 MAF in each year of that drought. In-basin needs (non-export) during that same time were approximately 25.5 MAF. This means that the areas of origin are approximately 8 MAF short of supply during such a drought. This situation is of course the over-riding issue facing California's water supply, and any expectation by exporters of a minimum supply is therefore unreasonable, assuming all state agencies are required and will follow the laws.

It is this situation that makes any proposed "new conveyance" an irrelevant question. If the supply to satisfy in-basin needs is insufficient, then it is not a question of re-routing exports to protect their supplies; there ***are*** no supplies under various circumstances. Thus the approach by the Council contains this and other fatal flaws. Without going through this analysis, the Delta Plan's DEIR incorrectly describes the base case as it completely fails to describe the problem of export interests seeking a supply which does not exist; incorrectly describes the no-action alternative by assuming that projects can be approved and Delta operations can continue in contravention of water rights priority laws. The DEIR is therefore legally deficient.

2. The base case and no-action alternative are also faulty by failing to include recent export operations, which operations were previously presented to the Council. 2007 and 2008 were drought years for the Sacramento and San Joaquin watersheds. When calendar year 2009 began, the USBR informed the Exchange Contractors that the lack of supply could result in the CVP being unable to provide the Exchange Contractors with their full contractual amounts via

the DMC, and that some of their water might have to come from the San Joaquin River.[1] The Exchange Contractors are the highest priority users of the CVP system.

In addition, early in 2009, DWR and USBR Petitioned the SWRCB to temporarily relive them of their obligation (under their permits) to meet Delta outflow objectives (for the protection of fish and wildlife beneficial uses). The petition claimed that DWR and USBR upstream supplies were insufficient to meet both Delta outflow and (later in the year) cold water requirements in the streams. The USBR biologists testified it was better to meet the cold water requirements than the outflow ones. Cross-examination indicated that those same biologists did not know if there was enough water to meet the cold water requirements even if the outflow objectives was suspended.

The hearing on the petition also showed that the exporters had increased export pumping when the outflow standard became effective, going from 2,000 cfs to 4,000 cfs. When they did this, the actual outflow was approximately 7,000 cfs instead of 11,400 cfs, the later being the standard a that time.[2]

What this means is that after just two years of drought, the CVP and SWP were "bankrupt" in that they could not meet the minimum fishery requirements and could not supply the senior most export interest. This is a crisis which cannot be overstated. From this we see that current operations of the export projects are not geared to meet permit required minimum fishery protections over more than a two year period, and are certainly not operated to provide any water supply for other needs beyond that same period. This is the crisis facing the state; the crisis is not how to route water through the Delta.

Some have argued that limitations on exports due to fishery concerns precluded making sufficient deliveries to exporters, but we see from the 2007-2009 time frame that is not the case. If export water in storage could not be pumped due to fishery concerns, that water would have remained in storage and be available for export at some later time. Put another way, stored water would have been increased if restrictions on pumping was at fault in not getting water to exporters. To the contrary, there was not enough water in the reservoirs due to fishery restrictions, there simply wasn't enough water. Of course, any non-stored water that was in the system during this time and which was not exported was not "lost" exports, as the projects have no greater claim on such water that other senior uses of the environment.

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[1] This would result in less water available for the Friant users.

[2] In response to an observation about the projects taking water in violation of permit conditions, a representative of the exporters recently stated "That's not fair, 2009 was an emergency." This of course proves the point, that there is insufficient water during some times to support current export needs/desires, and of course that they believe they should be able to export what they want notwithstanding the supply and other obligations.

By failing to even acknowledge this situation and by choosing some other time frame of operations as a base case is not just inappropriate but illegal under CEQA. The DEIR ignores the true state of affairs for the base case and the no-action alternative by choosing a time frame which is not reflective of actual operations and which includes times when standards and other CVP and SWP permits were being violated. One cannot assume that operations will occur and continue in violation of the law.

3. As with water supply reliability, the DEIR and Delta Plan failed to define the other co-equal goal of "protecting, restoring and enhancing the Delta ecosystem." Instead of defining this goal, the Plan and EIR simply assume that virtually all recommendations for increased habitat constitute satisfaction of this goal. It is clear from the statute, as well as from the other myriad ongoing processes, that this goal means that the Delta Plan should outline a method or methods by which the ecosystem can be considered healthy and functioning. The first way to address this is to determine who or what is causing the adverse impacts to the ecosystem, and if so, should some parties be required to mitigate their impacts. Unfortunately, the DEIR reads as if it is everyone's fault and everyone's problem.

Water Code Section 11912 requires that all costs associated with the preservation of fish and wildlife associated with the SWP and CVP be costs of those projects, and only the costs of fish and wildlife enhancement can be charged to the general fund. Hence state law requires that the projects mitigate their impacts on fisheries and that such costs not be transferred to the general public. Recognition of this legal mandate is entirely missing from the Delta Plan or the DEIR.

If one were charged with developing a plan to protect, restore and enhance the Delta ecosystem and Section 11912 were the law, the plan would have to include either a recommendation that the projects must first mitigate their impacts or at least a recommendation that their impacts be first identified. By not doing this and by ignoring the mandates of Section 11912, the DEIR fails to accurately describe the base case or to accurately describe the no-action alternative. The no-action alternative would have to assume that the SWRCB, DFG, FWS, NOAA would all impose conditions to CVP and SWP operations in attempts to force mitigation of those projects adverse effects on fish and wildlife. Instead, the Delta Plan and the DEIR assumes that exports will continue at the same rates as have occurred in the recent past.

4. Also with regard to the Delta ecosystem, the DEIR does not recognize and makes no analysis of how habitat affects fishery populations. As has been previously presented to the Council, the riverine, flood overflow, and tidal habitats in the southern Delta have remained unchanged for at least 40 years. During that time, fishery populations have gone from healthy to near extinction, Obviously, this means that the amount of these habitats in the southern Delta has little if anything to do with fishery populations. The Delta Plan to the contrary (by incorporating BDCP speculation) proposes tens of thousands of new habitat acres in the southern Delta as a means of improving the Delta ecosystem. There is therefore no substantial evidence that the EIR's analysis of this is correct.

5. Contra Costa Water District has provided the Council and the BDCP with the data which indicates that (during most conditions) the operation of the projects has made the Delta more saline than under "historic" conditions. Vast amounts of habitat in the Suisun Bay Delta have been lost due to the intrusion of salt. It is this loss of this important rearing habitat that has adversely impacted the Delta ecosystem, not any loss of habitat in the southern Delta. It is important to note that both the CVP and the SWP have as one of their main project purposes the protection against salinity intrusion in the Delta. Protection against such intrusion would result in the protection of this (now lost) habitat in Suisun Bay. Thus again, the Delta Plan and its review in the DEIR fail at a basic level to accurately describe the current conditions as well as the legal obligations associated with those conditions. The mandates in the controlling statutes for the Council cannot be read as authorization to ignore current water rights or legal obligations of the projects. The DEIR is therefore legally deficient.

6. In Section 1.1 the DEIR quotes the controlling statutes requirement that the co-equal goals be implemented in a manner that protects, enhances the agricultural values of the Delta as an evolving place. When this is read in combination with the requirement to protect, enhance and restore (and not restore the original habitats) the Delta ecosystem we see that any proposal which will result in substantial loss of farmland is incompatible with the statutes. Thus the ecosystem proposals in the DEIR are not in compliance with law.

7. The statutes also require the Plan to "improve water quality to protect human health and the environment consistent with achieving water quality objectives in the Delta." Here again the Plan and the DEIR fail. The DEIR makes very little mention of the southern Delta salinity problems. As previously provided to the Council, in most years the water quality objectives in the southern Delta are regularly violated. This is due to a number of factors, including CVP salts brought into the are via drainage in the San Joaquin River, altered flow patterns resulting from the operations of the projects, increased consumptive use upstream, and barrier operations (to improve water levels adversely impacted by the projects). It is one of the stated mandates of the Plan that it improve water quality in the Delta, yet the problems in the southern Delta are given no consideration.

The Plan is obligated to not just describe, but recommend how this problem needs to be addressed, not to ignore it and pretend it is not an issue. Salt in the southern Delta channels impacts not just local agricultural, but also fishery migration cues, drinking water supply, and discharge conditions.

Under the current conditions, San Joaquin River water only periodically reaches the Bay. Under most conditions, the salts from the River are not flushed out of the area, rather they collect and concentrate in the channels. Only those amounts that are re-exported at the CVP and SWP pumps are removed from the area. This collection and concentration of salts results in adverse impacts to local agriculture in most every year, and affects the water supply of the city of Tracy. The Delta Plan is insufficient by not describing or addressing this problem, and the base case and no-action alternatives are unsupported by not including it.

8. More importantly, the DEIR is legally insufficient by not examining the impacts resulting from any new conveyance of Sacramento River water to the export pumps via an isolated facility. As previously provided to the Council, current water quality conditions in the southern Delta are a function of the amount and concentration of salts in the San Joaquin River, the existence and extent of CVP/SWP null zones in the area which cause the salts to concentrate, the amount of Sacramento River water brought into the area via the tides and as induced by exports, and the amount of those salts removed from the area via the export pumps or as (from time to time) flushed out of the area during high flow conditions.

An isolated facility will by definition remove less water from the southern Delta channels, as such a facility is to secure some or all export water from diversion points on the Sacramento River. Under such operations, not only is less water removed from the southern Delta channels, but less of the Sacramento River water is drawn into the southern Delta channels. Hence, an isolated facility would remove less salt and provide less dilution of salts than does current operations. The results can only be a worsening of water quality ion the southern Delta. This is of course is not only inconsistent with the Council's governing statutes, but also of the state and federal anti-degradation statutes, other SWRCB policy and other water quality mandates.

Although the DEIR may not need to specifically examine the "exact" modeling impacts to southern Delta salinity resulting from an isolated facility, it must at the very least do a programmatic level evaluation under CEQA if such an isolated facility is one of the actions contemplated in the Delta Plan. Such an evaluation would conclude, as is outlined above, that the operation of such a facility would have adverse impacts to local agriculture, fishery migration cues and drinking water supplies. By not describing or examining this issue and the impacts from such an isolated facility the DEIR is legally inadequate.

The amount of information available on southern Delta salinity is extreme to say the least, and the Council's failure to include it in the Plan or the DEIR raises serious questions. It is not clear why this major Delta issue escaped review or treatment. The Council should note that after nearly four years of BDCP efforts, it was finally disclosed last week that BDCP does not consider southern Delta lands as good habitat opportunities due to the expected changes in salinity and temperature resulting from the operations of an isolated facility. Such comments should be incorporated into the Delta Plan's record.

9. It must also be noted that the DEIR lists as a subgoal the improvement of "water quality to meet drinking water, agriculture, and ecosystem long-term goals." It is incorrect for the DEIR to assume that this could/would include a worsening of the quality of the southern Delta. It is impermissible under CEQA to simply assume that the DWR and USBR would somehow find a way to mitigate an isolated facilities' impacts to southern Delta agriculture and water quality. As will be noted later, the Delta's water quality is most times a zero sum game. If exports, and the water quality for urban uses thereof is improved, that necessarily means water

quality at some other location or time is worse. Without examining this transfer of impacts and the magnitude to impacted parties the DEIR legally deficient.

10. The DEIR incorrectly interprets "functional corridors" for migratory species to mean there are not sufficient habitats by which migrating fish can move from the San Joaquin River to the Bay, and vice versa. As stated above, there has been little if any habitat changes during the past 40 years, including times when fish populations were "healthy." The means of course that new riverine, over flow and tidal habitats are not necessary in the southern Delta.

11. On page 1-3, the DEIR notes that the Delta Plan must include "measurable targets" associated with achieving the objectives of that Plan. Since the Delta Plan includes no such measurable targets for southern Delta water quality, it is legally deficient.

12. The DEIR notes the statewide policy of reducing reliance on the Delta for meeting the states water supply needs. This recognition confirms the above analysis regarding the available supply for exports. However, the DEIR does not in any meaningful way specify how this can be accomplished. If those dependent on the Delta for supply (export interests) already have a smaller supply than they are taking or are entitled to, the policy of decreasing dependence on the Delta takes on a whole new meaning. By failing to first define the current supply available for exports, the DEIR is legally deficient.

13. In Section 1.3.3 and at other places, the DEIR continues the fallacy that the Delta used to be saltier than it is now, and that the projects keep the Delta "unnaturally" fresher than before. One hopes that this unsupported notion would be removed from a serious discussion of Delta issues. Although the natural changes in hydrology periodically moved the ocean salts farther into the Delta, the average location of what is now called the mixing zone (or the location of X2) has been moved significantly eastward since the projects became operational. This means that the Delta is now saltier than it was under "historic conditions;" it is not fresher. Native species of course evolved in this system and were able to survive those periodic, but rare occasions when salt intruded far into the Delta (such intrusions were only for very short duration). Surviving such periodic adverse conditions does not mean the health of native species ***requires*** salt in the Delta, rather it means native species were able to survive during those rare times when salinity increased. If anything, it should be noted that non-native species were able to thrive when the Delta became saltier, which argues for a fresher Delta not a saltier one. Further, the DEIR and Plan should be examining the available water supply to maintain water quality objectives under drought conditions. They will find that in another multi-year drought, the projects ability to prevent salt water intrusion disappears after a relatively short time. The notion that the Delta should be periodically "salted" up generally died when its proponents realized that in order to bring ocean salts into the Delta required 3-4 months of **no outflow**; something no one supports.

14. It is contrary to past practice and to law for the Council to anticipate adoption of the Plan under the Federal Coastal Zone Management Act (or other federal involvement and approvals) and not to have concurrent NEPA analysis.

15. The description of "covered actions" makes no distinction between actions by superior right holders or actions within the areas of origin and those by export interests. This artificial construct of what constitutes a covered actions makes the DEIR legally insufficient as it ends up treating superior water rights the same as junior water rights. Thus, any actions by an in-Delta diverter are constrained by the Council's oversight decision on whether such actions help improve the water supply reliability of those who are not entitled to the water which is the subject of the action. There is no language in the controlling statutes which would impose upon area of origin users to make sure the use of their water benefits the need for water supply reliability for other parts of the state. Although said statutes may require the Council to determine how and how much water supply reliability is available for any particular user, they do and cannot affect an area of origin users priority to the use of water. Hence the DEIR is legally deficient in examining and comparing criteria which are contrary to law.

16. Similarly, if the SDWA seeks and obtains a supply contract, or a contract insuring the protection of water quality, such a contract may or may not affect the amount of water available for export. This could be interpreted by the Council as being contrary to achieving the co-equal goal of water supply reliability even though such a preferential contract is required by Water Code 11460 et. seq. and Sections 12200 et. seq. If any in-Delta water user applies for a permit to divert water from the Delta, that permit is required by law to be of a priority higher than exports, yet again , the council might conclude it was contrary to the state's water supply reliability. This point highlights the shortcomings resulting from the Council's failure to define the co-equal goals, and makes the DEIR legally deficient.

17. The DEIR also results in an impermissible limitation of a landowners ability to use his land. The Plan prevents any change in land use that may later interfere with the proposed habitat goals or the routes of the new conveyance facility. The former limits a landowner from using his property because some other water users needs it for mitigation. The same is true for the later as the new conveyance facility is defined as a "conservation measure" by the BDCP, and is thus mitigation for exports effects on fish. Neither the controlling statutes or any other law allows the Council to "take" part of the landowners property rights in order to ease the burden on another who must mitigate adverse impacts to fish.

Such limitations on property rights constitute an unlawful taking under both the California and U.S. Constitutions because the immediate effect of the Delta Plan is to preclude any changes in use of property. Requiring the current use to continue and preventing any changes in use results in a decreased value of any such lands. The DEIR is therefore legally deficient.

18. There is no basis for exempting temporary water transfers from "covered actions." Such transfers have the effect of increasing the demand on a static supply of water unless the transfer is of water previously consumed or otherwise lost to beneficial use. Just because the transferor can make the water available does not mean third party impacts are not present. For example, when a user in the San Joaquin watershed conserves water in order to make a transfer, such conserved water was previously part of the supply for other beneficial uses. Generally, any such transfer simply means that there is less water in the River during dryer times which adversely affects both fish and all other water users downstream (either for supply of for quality). The DEIR is deficient in not examining this issue.

19. The DEIR inexcusably fails to mention that the DWR does not have and has never applied for a "take" permit under CESA. This failure by both DWR and DFG can only be considered a major cause of the decline of fish populations in the Delta. Rather than note that the issuance of a take permit by DFG is not considered a covered action, the DEIR should be noting that this failure to act according to law by two agencies of the State should be investigated and corrected. The no-action alternative should assume that DFG requires DWR to fully mitigate and help restore impacted fisheries. Failure to adequately describe the base case, and failure to assume a no-action alternative will require DWR to help restore the fisheries affected by exports makes the DEIR legally deficient.

20. The DEIR fails to describe the conflict between two of its goals. Water supply reliability deals with how much water is available during various conditions to the differently situated users. Ecosystem protection (as assumed by the Council) deals with establishing new habitat in the Delta. However, as previously provided to the Council, new riverine, tidal and overflow habitat consumes more water than do the existing agricultural uses in the Delta. None of the analyses of programs for habitat in the DEIR note that there will be less water available to the State after converting the land from agriculture to habitat. In fact, no tidal habitat project within the primary zone can ever be consistent with the goal of supply reliability because of this. By failing to note much less examine this issue, the DEIR is legally deficient.

21. The DEIR notes that new flow objectives will be determined by the SWRCB for the protection of fisheries. Although the Plan does not include setting these new standards as covered actions, they will result in major, significant impacts to the system as a whole and the available water supply. If more flow is needed for fish, and if that flow must increase outflow, then there is less water upstream for all other beneficial uses. Since the DEIR and Plan assume there will be greater flows, then the water rights process to impose these flows will necessarily violate one of the co-equal goals; water supply reliability. The DEIR states at one point that those responsible for the increased flows will "find other supplies" to insure they still have sufficient water for their own uses. This truly remarkable and unsupportable conclusion evidences the DEIR's failure to provide even the most general review of the impacts of its proposals. Further, if upstream supplies are needed to mitigate the adverse impacts on fish

resulting from project operations, then both the Council and the SWRCB will be transferring mitigation obligations onto third parties rather than requiring the guilty parties to undertake them (see Water Code 11912 referenced above). For these reasons the DEIR is legally deficient by not examining the significant effects resulting from its proposals.

22. A major portion of the Delta Plan and thus the DEIR is the eventual review of the BDCP for possible inclusion. The BDCP process is for all intents and purposes a method by which the exporters get approval for a peripheral canal or tunnel; the isolated facility. However, the DEIR provides absolutely zero analysis of the effects of such a facility on in-Delta water users, the water supply in general, or the ecosystem. Hence the DEIR simply ignores any environmental consequences from one of the main portions of the "project." CEQA, even at the programmatic level does not allow for such a complete lack of analysis. Any new conveyance (whether a canal or a tunnel), since it is contemplated in the Plan must include some level of analysis of environmental consequences. Although a project level EIR would naturally have more detail, this programmatic document must have some review. By failing to contain any such review, the DEIR is legally deficient.

23. As referenced above, the treatment of transfers in Section 2.2.1.6 and other places contains a gross mis-statement of the effect of transfers. The current problem facing California is a shortage of water; otherwise we would not need this or other related processes. A transfer of water is only beneficial is it puts to use (i.e. increases consumptive use) water which previously was consumed (the seller consumes, as opposed to using less) or the water was previously lost to beneficial uses. If the water does not come in either of these ways, it is simply a shifting of the shortage onto someone else. For example a transfer from the Sacramento system might result in less water leaving the farmer's fields, which means there is less water in the River. Less water in the River means that at some point a reservoir will have to release that same amount of water to maintain water quality criteria, and thus there is no net gain, only a transfer of the shortage. To make matters worse, the transfer has the added detriment of making the buyer an additional party dependent of the limited supply so that when there is a drought he/she is worse off for having relied on water that is only available during wet times. By failing to examine this issue, the DEIR is legally deficient.

Similarly, conservation is only sometimes effective in increasing the net water supply. When farmers "conserve" by decreasing drainage, or a city decreases its discharges, the same result occurs; less water in the river. Again, less water in the River means some other uses must make up for that less water by releasing his/her own water. Thus conservation upstream of the Delta only shift the shortage while conservation downstream of the Delta results in more supply. By failing to describe these basic principles, the DEIR is deficient in its examination of how transfers and conservation affect water supply and the beneficial uses dependent thereon.

24. The DEIR fails to examine how the Plan's proposed removal and shifting of levees conflicts with current law regarding the protection of lands from flooding. Both federal and state laws encouraged (and required) the reclamation of Delta flood and overflowed lands. In addition, other laws require the protection of lands and the maintenance of flood carry capacity. In order to examine the effects of the Plan's proposals for changes in levees, the DEIR would have to examine how any such changes in levees would affect the flood carry capacity of the entire system. It is not enough to assume that additional tidal, flood overflow or riverine habitat would improve the flood capacity of the system (many times it would not). The DEIR is obligated to examine how the resulting flood carry capacity with the project compares with that of the no-action alternative. Since is does not, the DEIR is legally deficient.

25. The DEIR incorrectly describes the SDWA (and others) proposal for a flood corridor at the lower end of the San Joaquin River where it enters the Delta. That proposal is to expand the already in existence Paradise Cut flood bypass in order to lower water stage on the main stem during high flow times. As such, the proposal requires that significant levee work and channel dredging be done downstream of the Cut. It is anticipated that such a project would have a significant habitat component, both for its intrinsic value and as necessary to acquire permits from the relevant agencies. As such, the proposal is not a flood plain restoration project, is not a habitat corridor project, and is not a habitat restoration project. The habitat benefits are a necessary trade-off in order to provide additional flood protection to the thousand of acres of prime farmland as well as the hundreds of thousands of people in the Stockton urban area.

26. The DEIR fails to accurately describe the potential effects of local agricultural diversions on fish. The Fish and Game Code currently provides DFG the ability to assess and require screens on Delta diversion. If the diversion (rate) is above a certain rate, the diverter and DFG pay for the improvement, if below, DFG pays for the improvement. Pursuant to numerous past studies and evaluations by DFG and others, it has been determined that agricultural diversions in the Delta have little effect on fish and are not a significant contributing factor to fishery declines.

27. The DEIR attempts to examine the effects of the Project on "agricultural values" as required by the controlling statutes, but does not do so adequately. As with the co-equal goals, the term "agricultural vales" is not defined and so no proper evaluation can occur. Thus the DEIR assumes that most of the water supply and ecosystem impacts from the project will adversely affect the total amount of agricultural acres in the Delta, but provides no conclusions regarding those effects. The DEIR does reference the Delta Protection Commission's Economic Sustainability Plan, which concludes that certain actions (isolated facility, farmland loss due to new habitat) will significantly harm Delta agriculture. However, the DEIR does not apply the ESP to its analysis in any manner which allows the public to evaluate the project. Where such analysis does occur (and findings occur), the DEIR and Plan make no conclusion as to whether the results comply with the co-equal goals or do not. Thus, impacts to agriculture are considered

significant at some places, but the DEIR makes no effort to resolve the conflict between habitat restoration and the preservation of agricultural values. It is the very purpose of the controlling statutes that the Council propose a plan which accomplishes a number of things without adversely impacting some things. The Plan and the DEIR fail to find this consistency. The law requires any agency to interpret statutes in a manner that accomplishes the intent of each statute, not result in the frustration of one to the benefit of the other. Hence, the DEIR is legally deficient in its analysis and application of the projects effects on statutorily protected agricultural values.

28. The DEIR is deficient in that it does not include reasonable alternatives. Although the lead agency is given wide discretion in developing alternatives, it still must provide a reasonable range. The Plan and DEIR concocted a "Delta interests" alternative which bears little resemblance to any Delta interest's proposals. In its most basic form, many Delta interests, especially the SDWA have proposed that a necessary alternative include the determination of the available water supply, the area of origin and Delta needs, environmental needs and the amount of water surplus to those needs. This results in the amount potentially available for export. Second, the alternative should include provisions for DWR and USBR to fully meet their permit obligations such as outflow, southern Delta salinity requirements, etc. Next, the projects should be assumed to undertake the necessary actions to fully mitigate their impacts to fish and wildlife. The alternative would then come up with answers to all relevant questions and concerns. Is more water needed for fish once the projects have mitigated their impacts? Is more habitat needed? What is the dependable export supply under various hydrological conditions? How much water will area of origin users require and thus how much less is available for exports? Once these are determined, the alternative could suggest how the difference between export needs and available supply might be lessened. Unfortunately, by assuming a new conveyance facility, the DEIR never answers the relevant questions and ends up encouraging a multi-billion dollars facility which does nothing to increase the net supply. By not having an alternative that complies with existing law, the DEIR is legally deficient.

29. The DEIR assumes that under the no-action alternative conditions related to flood risk, ecosystem health, water quality and water supply would degrade (page 2A-67; see also page 2A-87: the ecosystem "will continue to diminish its ability to function"). Such assumptions are unsupportable. At this very moment, significant levee work is being done in the Central Delta. In addition, each Reclamation District undertakes necessary levee work as part of each's obligations under the law. The SWRCB is charged with protecting the Bay-Delta through both its water quality and water rights processes. DFG, FWS and NOAA are charged with protecting fish and wildlife, and the DWR is charged with identifying water needs and proposing projects to meet such needs. It should be noted that the SWRCB is currently in the process of developing new flow standards (in conjunction with DFG) for the purpose of improving and protecting fish and wildlife beneficial uses). Obviously, any assumption that these agencies will not do their jobs is unsupportable. It may be correct to point out where these agencies have failed to meet

their obligations, but that is not the same as assuming they cannot and will not in the future. It would be more instructive and productive for the DEIR to note why the actions of SWRCB, DFG, FWS and NOAA have not protected the environment sufficiently in the past. The obvious answer is that these agencies have been coopted into making export reliability an equal goal to their duties to protect the environment. Such an analysis would go along way in helping define the co-equal goals of the Delta Plan. The DEIR is legally deficient in assuming public agencies will not abide by their statutory obligations.

30. The DEIR is deficient in that one of its alternatives includes additional exports from the Delta. Since this is contrary to existing state policy, it cannot be considered a reasonable alternative.

31. The DEIR also assumes that sea level rise will cause over-topping of levees during calm weather (at page 2A-89). It is totally unrealistic to assume that local reclamation districts and the state would sit idly by while water levels increased to the point where floods would occur. Since there is already adequate freeboard, the only reasonable assumption is that as that freeboard decreased due to sea level rise (if that occurs) the parties responsible for protecting land, utility lines, gas pipelines, water supply lines, highways, etc. would act to maintain such freeboard. The DEIR is legally deficient for such false and illogical assumptions being a part of the no-action alternative.

32. The DEIR makes no provision for the protection or maintenance of water supply for in-Delta users. If the goal of the Delta Plan is to improve water supply reliability, it should include a discussion about recent attacks on in-Delta water rights. Should any in-Delta users be found to not have riparian or pre-1914 right, or his/her license does not provide him/her with water under all circumstances, then area of origin statutes would allow him/her to either apply for a permit/license or contract with DWR or USBR for a priority supply contract. By failing to include this issue and the analysis thereof, the DEIR is legally insufficient.

33. The DEIR incorrectly suggests that the saline intrusion into the San Joaquin County groundwater acquifer is of shallow groundwater in the Delta. San Joaquin County has and is studying this, and the current information suggests that the intrusion is of deeper saline waters, not currently connected to the shallow groundwater.

34. The DEIR mentions that Stockton gets all of its drinking water from wells. I believe that is incorrect. Stockton gets its water from Cal Water (which has numerous wells) and from SEWD which gets water from both the Calaveras River/New Hogan Reservoir and from New Melones on the Stanislaus River.

35. The DEIR mentions a number of water rights of upstream parties by referring to them as “senior water rights” but make no such judgment or conclusion regarding any in-Delta

riparians or pre-1914 users. This highlights not only a bias for certain parties, but also the DEIR's failure to examine how water right priorities affects the question of water supply availability. Failure to examine the Plan in light of water right priorities makes the DEIR legally deficient.

36. The DEIR states that a violation of any water quality standard, or a substantial degradation of water quality constitutes a "significant" effect. However, the DEIR then has no analysis of how the DWR and USBR regularly violate their permits (with included the responsibility for such standards). Since D-1641 was implemented, the projects have violated their permits and numerous standards many times, and are under a Cease and Desist Order to "obviate" threatened violations.[3] The projects have violated salinity standards, fishery standards, outflow standards, and have exported additional water during such violations which constitutes additional violations. Failure to note these ongoing violations makes the DEIR legally deficient.

37. As stated above, the DEIR makes no analysis of how increased exports, changes in export diversion points or increased habitat will affect such things as salinity in the southern Delta. Since each of these actions will either increase the amount of salt in the southern Delta (over a no-action alternative) or increase the concentration of such salts, they will be definition constitute a significant impact of the project. Since the DEIR makes no analysis of these impacts it is legally deficient.

38. Pursuant to public statements made by members of the Council, it appears that the Council believes that a solution to the water shortage problem requires adjustments to existing water right priorities. Such adjustments have been proposed under the "public trust" doctrine and the "reasonable use" provision of the California Constitution. With regard to the former, the protection of public trust does not allow for water right priorities to be overturned. If the Council believes they can make such adjustments, they are required to say so, and to make the necessary cost benefit analysis to support their argument that water for export areas is more important than water for in-basin needs. Such an analysis would be instructive, but would not and could not supercede water right priorities.

As to the latter, the "reasonable use" requirement is oft times cited, but seldom is the entire quote used. Just below the language "reasonable use" the Constitution reaffirms the protection of superior riparian rights.

39. The Council has publically stated that it anticipates a "Sixth Draft Plan" to supercede the Fifth Draft Plan which is the subject of this DEIR. This means that the proposed

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[3] One cannot explain why the SWRCB seeks to obviate threatened violations rather than punish and preclude ongoing violations.

project has not yet been determined and thus it is premature for the DEIR to be released to the public for comment.

Please call me if you have any questions or comments.

Very truly yours,

JOHN HERRICK