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

Subject: Draft Program Environmental Impact Report (PEIR) for the Delta Plan

Dear Ms. Macaulay,

The California State Lands Commission (CSLC) staff has reviewed the subject draft PEIR for the proposed Delta Plan (Plan or Project), which is being prepared by the Delta Stewardship Council (Council) as the lead agency under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.). The CSLC will act as a trustee agency because of its trust responsibility for projects that could directly or indirectly affect sovereign lands, their accompanying Public Trust resources or uses, and the public easement in navigable waters. Additionally, because the Project could involve use of or activities on sovereign lands, the CSLC may act as a responsible agency.

CSLC Jurisdiction and Public Trust Lands

The CSLC has jurisdiction and management authority over all ungranted tidelands, submerged lands, and the beds of navigable lakes and waterways. The CSLC also has certain residual and review authority for tidelands and submerged lands legislatively granted in trust to local jurisdictions (Pub. Resources Code, §§ 6301, 6306). All tidelands and submerged lands, granted or ungranted, as well as navigable lakes and waterways, are subject to the protections of the Common Law Public Trust.

As general background, the State of California acquired sovereign ownership of all tidelands and submerged lands and beds of navigable lakes and waterways upon its admission to the United States in 1850. The State holds these lands for the benefit of all people of the State for statewide Public Trust purposes, which include but are not limited to waterborne commerce, navigation, fisheries, water-related recreation, habitat preservation, and open space. On tidal waterways, the State's sovereign fee ownership extends landward to the mean high tide line (MHTL), except for areas of fill or artificial accretion or where the boundary has been fixed by agreement or a court. On navigable non-tidal waterways, including lakes, the State holds fee ownership of the bed of the waterway landward to the ordinary low water mark and a Public Trust easement landward to the ordinary high water mark, except where the boundary has been fixed by agreement or a court. Such boundaries may not be readily apparent from present day site inspections.

After preliminary review of the information and maps provided in the draft PEIR, CSLC staff finds that there are numerous rivers, streams, sloughs and other areas within the proposed Plan area in which the State of California has ownership or an interest and which are under the jurisdiction of the CSLC. This ownership and interest ranges from fee ownership, which would require a lease for any project located on sovereign land, to reserved mineral rights, a public trust easement for trust uses, and rights for public navigation.

Due to the program-level review of the Project, CSLC staff is currently unable to determine the extent of sovereign ownership or jurisdictional interest of the CSLC in the Project area. We request that as the Project proceeds, the Council submit additional information (e.g., detailed maps) to enable CSLC staff to determine if any components of the Project will require a lease or permit. We additionally request to be placed on any future distribution mailing list for the Project.

This conclusion is without prejudice to any future assertion of State ownership or public rights, should circumstances change, or should additional information become available. This letter is not intended, nor should it be construed as a waiver or limitation of any right, title, or interest of the State of California in any lands under its jurisdiction.

Project Description and Area

The Project is the development of a comprehensive, long-term management plan for the Sacramento-San Joaquin Delta and the Suisun Marsh (Delta). The Project area includes the Delta, the Delta watershed that contributes water to the Delta, and areas outside of the Delta that use Delta water. The Plan is designed to achieve the following coequal goals established by the Delta Reform Act of 2009[1] (Delta Act):

1) Providing a more reliable water supply for California, and
2) Protecting, restoring and enhancing the Delta ecosystem in a manner that protects and enhances the unique cultural, recreational, natural resource and agricultural values of the Delta as an evolving place.

The Plan is a suite of 12 regulatory policies (binding on covered actions[2]) and 61 non-binding recommendations organized into categories or elements. These elements and examples of the types of physical actions/individual project types that could occur in each element are listed below.

- Reliable Water Supply: New or expended reservoirs, groundwater production facilities (wells and pipelines), ocean desalination facilities, and recycled water facilities.
- Delta Ecosystem Restoration: Invasive species management (e.g., vegetation removal), and restoration/creation of floodplains, riparian areas, and tidal marsh.

[1] In November 2009, the California Legislature enacted SBX7 1, which took effect on February 3, 2010. One portion of this legislation is known as the Sacramento-San Joaquin Delta Reform Act of 2009.
[2] The term "covered action" is defined in the Delta Act and generally refers to those actions that 1) occur in whole or in part in the Delta, and 2) could significantly impact the Delta ecosystem or water supply reliability.

- Water Quality Improvement: New or expanded water, wastewater, stormwater, and agricultural runoff treatment plants; new or expanded facilities to improve the quality of well water, such as wellhead treatment and new recharge and monitoring wells.
- Flood Risk Reduction: New setback levees; maintenance, repair and modification of existing levees; floodplain expansion; dredging.
- Protection and Enhancement of the Delta as an Evolving Place: Construction of new or expanded parks, trails, marinas, bike lanes and wildlife enjoyment facilities; additional retail and restaurants in Delta legacy towns to support tourism.
- Finance Plan Framework to Support Coequal Goals.

The Plan also discusses and the draft PEIR includes analysis on four specific or "named" projects, including:

- North of 17 Delta Offstream Storage Investigation;
- Los Vaqueros Reservoir Project - Phase 2;
- Upper San Joaquin 18 River Basin Storage Investigation Plan; and
- Update of the Department of Water Resources 19 (DWR) Bulletin 118 California's Groundwater (DWR 2003).

Environmental Review

CSLC staff offers the following comments on the draft PEIR:

1. Physical Actions Resulting from the Plan: The draft PEIR identifies examples of the types of physical actions and individual project types that could occur as a result of the Plan. Many of these physical actions are the type of projects that would directly or indirectly affect sovereign lands, their accompanying Public Trust resources or uses, and the public easement in navigable waters. For example:
   - invasive species management;
   - restoration/creation of floodplains, riparian areas, and tidal marsh;
   - maintenance, repair and modification of existing levees;
   - floodplain expansion;
   - construction of new or expanded parks and trails.

   Other actions leading to physical changes in the environment could temporarily or permanently affect the availability of fuel and non-fuel mineral resources under the jurisdiction of the CSLC (e.g., natural gas, sand, aggregate).

   Additionally, some examples of physical actions that could occur as a result of the Plan often require the issuance of a lease from the CSLC (e.g., ocean desalination facilities, dredging activities, construction of new or expanded marinas). The PEIR should emphasize that project specific activities requiring discretionary action by responsible agencies (such as the CSLC) will very likely require supplemental environmental review. It would also be helpful if the executive summary contained a section with a general overview of the subsequent environmental review process,

referencing that individual activities proposed by other agencies will need to be evaluated in site-specific environmental documents.

2. Mineral Resources: The CSLC supports the proposed Project's efforts to protect, restore and enhance the Delta ecosystem and its associated Public Trust resources. However, the Delta and Suisun Marsh also contain State lands for which the CSLC has issued many leases for mining and/or within which the CSLC has reserved mineral interests. For example, Section 13 (Mineral Resources) states that:

   > "restoration of tidal marsh in the Delta or Suisun Marsh and other construction projects, if sited in areas with active gas extraction wells or mining operations, could potentially temporarily or permanently affect availability of mineral resource extraction sites due to use conflicts and/or access problems...Impacts due to siting of projects encouraged by the Delta Plan on or near mineral resource extraction sites generally can be mitigated to less-than significant levels except in cases of new inundation of large areas that contain such sites" (p. 13-1).

   CSLC staff is concerned that the PEIR does not, and cannot at this time, present sufficient evidence in support of its conclusion of "less-than significant" for impacts from covered actions to mineral resources that would be of value to the region and residents of the State. The PEIR states "Because of the uncertainties underlying this program-level assessment, project impacts related to loss of availability of locally important resource recovery sites cannot be accurately quantified" (p. 13-10). Despite perspective on the significance of impacts provided by comparisons to other projects recently evaluated under CEQA, the analysis underlying the general expectation of impacts being mitigated to a "less-than significant" level is speculative and contains assumptions and generalizations that cannot conclusively be relied upon. CSLC staff suggests that this impact remain significant and unavoidable.

3. Cultural Resources:

   a. Section 10.2, Regulatory Framework, p. 10-1 and App. D, Sec. 8.2, State Regulatory Framework, p. D-100. The draft PEIR should mention that the title to all abandoned shipwrecks, archaeological sites, and historic or cultural resources on or in the sovereign lands of California is vested in the State and under the jurisdiction of the CSLC. The CSLC administers the Shipwreck and Historic Maritime Resources Program that consists of the CSLC's activities pursuant to California Public Resources Code sections 6309, 6313, and 6314.

   b. Section 10.3.1, Major Sources of Information, p. 10-2. It does not appear that the CSLC Shipwrecks Database was consulted. When any project-specific areas can be identified, a request should be submitted to CSLC staff to check the Shipwrecks Database and other CSLC files for information on potential shipwrecks in the project area. Some areas of the Delta have been surveyed for submerged cultural resources using remote sensing techniques such as sidescan sonar and magnetometer. Areas that have not been surveyed would need to be investigated using appropriate archaeological methods for locating submerged cultural resources.

c. Section 10.3.2.3, Historical Setting, p. 10-7. The importance of maritime trade and commerce between inland areas and the San Francisco Bay area facilitated by the Delta's waterways should be discussed in more detail. This information would provide the historical context for much of the Settlement and Development sections. For example, early steamboats carried miners and supplies to the jumping-off places to the goldfields. Scow schooners like the *Alma*, now at the San Francisco Maritime National Historical Park, carried hay and agricultural products from inland farming areas to Bay area markets. Additionally, large riverboat steamers like the *Delta Queen*, now permanently berthed in Sacramento, plied Delta waters for decades ferrying passengers and cargo in the era before highways and bridges crisscrossed the Delta. Many small ferries, like the recently documented Clarksburg ferry, provided important local access between settlements and farming areas throughout the Delta.

d. Section 10.3.2.4, Known Cultural Resources, p. 10-17. There are many known shipwrecks in the Delta starting with the Gold rush era and probably dozens of others yet to be discovered. There are also historic landings and other maritime-related cultural resources throughout the Delta.

e. Section.4.1.1, Records Search, p. 10-22. As indicated above, the CSLC maintains a Shipwrecks Database and other files on shipwrecks. Please consult CSLC staff to obtain further information on shipwrecks in the Delta.

f. Section 4.1.2, Resource Types, p. 10-23. Please add shipwrecks to the list of resource types.

g. Section 10.4.3.1.1, Impact 10-1a Disturbance or Destruction of Prehistoric and Historic-Era Archaeological Resources, p. 10-25, line 42. Historic shipwrecks are not limited to the mid-19th century. Under California state law, any vessel submerged on State lands for more than 50 years is presumed to be archaeologically or historically significant (Pub. Resources Code, § 6313(c).)

h. Section 10.4.3.6.1, Mitigation Measure 10-1, p. 10-46. Investigations to identify submerged cultural resources should be conducted before any ground-disturbing activities begin. These investigations may include remote sensing surveys and should be conducted by a qualified maritime archaeologist. If avoidance of significant submerged cultural resources is not feasible, a permit from the CSLC may be necessary to conduct resource documentation and possible salvage of important artifacts or components of the vessel. A mitigation measure to cover unanticipated submerged cultural resource discoveries is recommended. Specific mitigation measures developed to address any cultural resources that may be affected by the proposed Project and any unanticipated discoveries during the Project's construction activities should include consultation with CSLC staff.

4. Program Environmental Review and Mitigation: Due to nature of the Plan, the Project is being proposed as a "Program" rather than a "Project-level" EIR. However, it is unclear to CSLC staff which Project activities and associated mitigation measures) are being analyzed in sufficient detail to be covered under the PEIR. The PEIR should make an effort to distinguish between activities covered under the PEIR (without the need for additional project specific environmental review), and activities

that will trigger the need for additional environmental analysis (see State CEQA Guidelines[3] §15168, subd. (c)). In order to avoid the improper deferral of mitigation, a common flaw in program-level environmental documents, mitigation measures should either be presented as specific, feasible, enforceable obligations, or should be presented as formulas containing "performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way" (State CEQA Guidelines §15126.4, subd. (a)(1)(B)).

Prior to final action on the PEIR, the Council should provide a mitigation monitoring program pursuant to State CEQA Guidelines section 15074, subdivision (d). The monitoring program should include timing for implementation of mitigation measures and list all agencies, in addition to the Council, responsible for ensuring compliance and enforcement through permit conditions, agreements or other measures during the life of the Project.

Thank you for the opportunity to comment on the draft PEIR for the Project. As a trustee and, potentially, responsible agency, the CSLC may need to rely on the final PEIR for the issuance of any new lease as specified above and, therefore, we request that you consider our comments prior to adoption of the PEIR.

For questions concerning CSLC leasing jurisdiction, please contact Mary Hays, Public Land Manager, at (916) 574-1812, or via email at Mary.Hays@slc.ca.gov. For questions concerning archaeological or historic resources under CSLC jurisdiction, please contact Senior Staff Counsel Pam Griggs at (916) 574-1854 or via email at Pamela.Griggs@slc.ca.gov. For questions concerning CSLC reserved mineral interests, please contact Greg Pelka, Senior Mineral Resources Engineer, at (562) 590-5227, or via email at Greg.Pelka@slc.ca.gov. Please send electronic copies of future Project-related documents or refer questions concerning environmental review to Jennifer Deleon, Environmental Program Manager, at (916) 574-0748 or via e-mail at Jennifer.Deleon@slc.ca.gov.

Sincerely,

Cy R. Oggins, Chief
Division of Environmental Planning
and Management

cc: Office of Planning and Research
M. Hays, LMD, CSLC
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[3] The State CEQA Guidelines are found in Title 14 of the California Code of Regulations, commencing with section 15000.