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February 1, 2012

Via Email and Overnight Mail
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Ms. Terry Macaulay
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Re: Public Comments on the Draft Delta Plan Program Environmental Impact Report, November 2011 [SCH #2010122028]

Dear Ms. Macaulay:

On behalf of Westlands Water District (“Westlands” or “District”), we appreciate the opportunity to provide the following comments on the Draft Delta Plan Program Environmental Impact Report (“Draft EIR”) released by the Delta Stewardship Council (“Council”) for the Fifth Staff Draft Delta Plan (“Draft Plan”).

Westlands’ mission is to provide a timely, reliable and affordable water supply to its landowners and water users, and to provide drainage service to those lands that need it. Westlands has a limited surface water supply, and as such, water conservation techniques are practiced every day by west side farmers. Since 1991, the Bureau of Reclamation has dramatically reduced the amount of water it delivers to Westlands, to the point where today, the District can expect to receive only about 50 percent of its contractual water supply in an average water year. But even with a full CVP entitlement, Westlands farmers would not have all of the water needed to produce crops on all of the available land. As a result, the farmers on the west side have become experts at maximizing irrigation efficiency and employ the latest irrigation technologies to make each drop count. More than 90 percent of the water delivered to Westlands’ farms is used directly by crops. Westlands’ farmers have one of the highest seasonal application efficiency ratings in the nation, with a 20-year average of 83 percent. Water meters are required at each District delivery and on private wells participating in any of the District’s conjunctive use programs. Accurate metering allows Westlands and its farmers to carefully manage and account for all water delivered. Average water use by

Ms. Terry Macaulay
Delta Stewardship Council
February 1, 2012
Page 2

agriculture in California is approximately 3.08 acre-feet per acre, while average water use in Westlands during the past 10 years has been approximately 2.26 acre-feet per acre. In short, as a result of reduced water allocations in recent years, Westlands farmers already have become experts at doing more with less.

Having reviewed the Draft Plan and the Draft EIR that purports to analyze its environmental impacts, Westlands is concerned that the documents do not reflect a balanced approach to achieving the coequal goals of “providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” (Wat. Code, § 85054.) The Council’s approach to formulating and analyzing the proposed Delta Plan distorts these coequal goals into one – ecosystem protection, restoration and enhancement – by implicitly defining water supply reliability to mean, “expect even less water and your supply will be reliable.” The Council has chosen one goal and subordinated the other. This is not the intent of the Delta Reform Act of 2009 (“Delta Reform Act”). (Wat. Code, §§ 85001, 85004; see also Pub. Resources Code, §§ 29072; Wat. Code, § 85054.)

Westlands also is concerned that the Draft EIR’s evaluation of the proposed Delta Plan is little more than a *pro forma* exercise that skirts important environmental issues and advocates for, rather than assesses the impacts of, the proposed Plan. The Draft EIR raises significant concerns of its improper use as an advocacy document to build momentum for policies that fail to reflect the coequal goals. The California Environmental Quality Act (“CEQA”) requires objective analysis, not advocacy. (Pub. Resources Code, § 21000 et seq.; *Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 918.)

Further, the document seeks to convey credibility through sheer volume, while it lacks some of the most basic information that CEQA requires. Contrary to CEQA’s policies, the Draft EIR emphasizes repetitious background material and fails to focus on the analyses that would be useful to the decision-makers and the public. (CEQA Guidelines, §§ 15002, 15006; Pub. Resources Code, § 21061.) The 2000+ page document is perhaps encyclopedic, but not at all analytic. As a statute designed to ensure that information on environmental impacts is effectively communicated to decision-makers and the public, CEQA cautions against elevating form over substance in environmental documents and recommends that “[t]he text of draft EIRs should normally be less than 150 pages and for proposals of unusual scope or complexity should normally be less than 300 pages.” (CEQA Guidelines, § 15141; see also *id.*, §§ 15003, 15006, subs. (o) & (s); 15143, 15151; Pub. Resources Code, § 21061.) CEQA’s page limits are simply a guideline, and it may be appropriate in some cases to circulate thousands of pages of environmental review. In the present situation, however, while the Council’s

Ms. Terry Macaulay
Delta Stewardship Council
February 1, 2012
Page 3

task undoubtedly is complex and the need for analysis is substantial, the Draft EIR offers little, if any, substantive analysis. CEQA demands an objective evaluation of the environmental impact of implementing the Delta Plan's proposed regulatory policies. (*Planning & Conservation League, supra*, 83 Cal.App.4th at p. 918.)

The Council cannot lawfully implement the proposed Delta Plan without first complying with its duties under CEQA. To comply with CEQA, the Council must do more than generate paper; it must provide an adequate, complete, and good-faith effort at full disclosure of the direct, reasonably foreseeable indirect, and cumulative impacts of the Delta Plan's proposed policies. (CEQA Guidelines, § 15003, subds. (g) and (i); *Bozung v. LAFCO* (1975) 13 Cal.3d 263; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692 ("Kings County").) The Delta Plan Draft EIR fails to serve its fundamental purpose as an informational document.

Westlands provides the following detailed comments for the Council's consideration.

I. Directory Legislative Deadlines Do Not Excuse the Council's CEQA Duties.

All can agree that the Council is charged with an extremely ambitious task – to develop a comprehensive Delta Plan and evaluate its environmental consequences pursuant to CEQA within a very short timeframe. (Wat. Code, §§ 85059, 85300-85309.) The Legislature afforded the Council no statutory exemption from CEQA (Wat. Code, § 85032, subd. (f)), however, and shortness of time does not lower the basic standards of CEQA compliance. Directory legislative deadlines do not excuse the Council's CEQA duties. (*Eller Media Co. v. Community Redevelopment Agency* (2003) 108 Cal.App.4th 25; *Schellinger Brothers v. City of Sebastopol* (2010) 179 Cal.App.4th 1245.) As it endeavors to expeditiously complete its statutory directives, the Council cannot sweep aside its obligation to prepare an informative and legally adequate EIR. As the courts have repeatedly emphasized:

CEQA compels process. It is a meticulous process designed to ensure that the environment is protected. Because the EIR is the heart and soul of CEQA, we must assure that [the lead agency's] EIR facilitate[s] the environmental review process as envisioned by CEQA. We are not at liberty to review the economics or politics of water policy. Our task is extraordinarily limited and our focus is narrow. Did the EIR adequately describe the existing conditions and offer a plausible vision of the foreseeable future?

Ms. Terry Macaulay
Delta Stewardship Council
February 1, 2012
Page 4

(*Planning & Conservation League, supra*, 83 Cal.App.4th at p. 911.)

In this case, the Draft EIR glosses over important environmental issues and fails to satisfy its basic purpose – to “adequately describe the existing conditions and offer a plausible vision of the foreseeable future.” (*Ibid.*) This failure stems, in large part, from premature preparation of the environmental document.

Preparation of an EIR is an empty exercise if it occurs at such point that it cannot serve practically as an important contribution to the decision-making process. (CEQA Guidelines, § 15004; *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 [preparation of an EIR is premature unless the proposed project is sufficiently well defined to provide “meaningful information for environmental assessment”]; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396 (“*Laurel Heights*”) [premature environmental analysis may be meaningless and financially wasteful]; *Concerned McCloud Citizens v. McCloud Community Services Dist.* (2007) 147 Cal.App.4th 181 [premature preparation of an EIR is wholly speculative and essentially meaningless].) The environmental document must be undertaken objectively and in good faith, not as an exercise in form over substance. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 954.) “The EIR must contain facts and analysis, not just the bare conclusions of the agency.” (*Santiago Water Dist. v. County of Orange* (1981) 118 Cal. App. 3d 818, 831.) Under CEQA, the Council owes the public a full and accurate accounting of the project’s elements, its environmental impacts, mitigation measures, and potential alternatives, for review on a timeline that makes such disclosure meaningful.

The Delta Plan Draft EIR fails to meet these basic standards. Rather, throughout the document, the Draft EIR contains extensive and repetitious background discussions, with very little meaningful information pertaining to the details of the Plan, its environmental impacts, and the mitigation measures and/or alternatives that may avoid or lessen those impacts. The Draft EIR states, in a footnote, that it “assumes that the Delta Plan will be successful and will lead to other agencies taking physical actions.” (Draft EIR, p. ES-2, fn. 3.) This assumption misdirects the focus of the EIR away from the required analysis of impacts of the Delta Plan’s proposed regulatory policies, and is unsupported by the record showing that all previous attempts to manage the Delta actually have served to systematically aggravate, rather than improve, environmental conditions. (See Draft EIR, pp. 1-9 – 1-13.) The Draft EIR further assumes that the Delta Plan will result in long-term environmental benefits, which also is speculative and unsupported by any evidence in the record. On page ES-8, the Draft EIR states:

An issue to be resolved by the Council, therefore, is what level of *short-term* environmental adverse impact is acceptable in exchange for reducing worsening *long-term* adverse environmental impacts to water reliability, water quality, flood risk, and ecosystem health.

(Draft EIR, p. ES-8 [italics in original].)

The true extent and likelihood of the proposed Delta Plan's assumed benefits are highly uncertain. The Draft EIR thus artificially and impermissibly limits the scope of its evaluation of the proposed action, and fails to properly analyze the full nature and extent of the proposed project's short-term and long-term significant adverse impacts. In every impact category, the Draft EIR is devoid of analysis and provides only broad generalizations, unsubstantiated assumptions regarding project benefits, and blanket overstatements of many potential impacts as "significant and unavoidable" (i.e., significant impacts that cannot be reduced to a "less-than-significant" level through mitigation). (See, e.g., Draft EIR, pp. 3-77 – 3-101; 4-40 – 4-98; 5-36 – 5-80; 6-43 – 6-72; 7-19 – 7-69; 8-17 – 8-59; 9-14 – 9-48; 10-21-10-62; 11-36 – 11-91; 12-13 – 12-25; 13-7 – 13-19; 14-17 – 14-50; 15-11 – 15-40; 16-16 – 16-33; 17-30 – 17-43; 18-31 – 18-55; 19-20 – 19-62; 20-7 – 20-19; 21-9 – 21-41.) Simply overstating environmental effects is not a substitute for proper analysis and mitigation of those impacts.¹ The

¹ / Under CEQA, an agency may not "approve or carry out a project" that identifies "one or more significant environmental effects," without making specific written findings that: (1) "changes or alterations" (i.e., avoidance or minimization through alternatives and/or mitigation measures) "have been required in, or incorporated into, the project," which "avoid or substantially lessen" any significant environmental effects identified in the EIR; or (2) that "[s]pecific economic, legal, social, technological, or other considerations" make mitigation measures or project alternatives to lessen a significant environmental impact "infeasible." (CEQA Guidelines, § 15091, subd. (a).) The agencies' findings regarding significant environmental impacts and feasible alternatives and mitigation must be "supported by substantial evidence in the record." (CEQA Guidelines, § 15091, subd. (b).) In approving a project that will "result in the occurrence of significant effects" that are not "avoided or substantially lessened," the agency must "state in writing the specific reasons to support its action based on the final EIR and/or other information in the record" – that is, make a "statement of overriding considerations," and support that statement "by substantial evidence in the record." (CEQA Guidelines, § 15093, subd. (b).) It thus follows that, to make the findings required under CEQA regarding a project's potential significant effects and the feasibility or infeasibility of mitigation measures and alternatives, or to adopt a statement of

Council's approach violates the fundamental informational purposes of CEQA. (Pub. Resources Code, § 21061; CEQA Guidelines, § 15002, subd. (a); see *Planning & Conservation League, supra*, 83 Cal. App. 4th at p. 920 [fundamental purpose of CEQA is to inform the public and responsible officials of the environmental consequences of their decisions before they are made].)

Furthermore, the Delta Reform Act sought a detailed roadmap for water management that depends on dozens of plans and studies needed from other agencies.²

overriding considerations, the agency's EIR first must properly identify, evaluate, assess, and analyze the project's potential environmental impacts.

² / The Delta Plan describes more than 25 major planning efforts – either underway or anticipated – as needed to inform its various components. The list of plans that either are to inform or be incorporated into the Delta Plan includes, but is not limited to, the following:

Delta Plans required by 2009 legislation

- Delta Plan
- Strategic and Implementation Plan, Sacramento-San Joaquin Delta Conservancy
- Delta Protection Commission's Delta Economic Sustainability Plan

Delta Science Program

- A Plan for a Delta Science Program
- Recommendations for Delta stressor reductions

California Department of Water Resources

- Central Valley Flood Protection Plan
- Multiple FloodSAFE Initiatives
- California's Groundwater Resources (Bulletin 118)
- California Water Plan
- Surface Water Storage Investigations
- California Statewide Groundwater Elevation Monitoring Program
- Framework for DWR Investments in Delta Integrated Flood Management

California Department of Fish and Game

- Ecosystem Restoration Program's Conservation Strategy

Without these plans and studies on issues such as how to improve the delivery of water around the Delta, flood protection, and the regional economy, the Council lacks the technical information needed to make basic planning decisions.³ In particular, the lack of information makes it impossible to formulate effective and enforceable mitigation measures as well as to identify and compare alternatives, as CEQA requires. (CEQA

State Water Resources Control Board and Central Valley Water Quality Control Board

- Delta Flow Standards
- Regional Water Quality Control Board Basin Plan
- Central Valley Drinking Water Policy Plan
- Central Valley Pesticide TMDL and Basin Plan Amendments

US Army Corps of Engineers

- Delta Islands Levees Feasibility Study
- Long Term Management Strategy for Dredging and Dredge Material Placement,
- Periodic Levee Inspection System
- Levee Safety Portfolio risk Management System
- USACE Expected Annual Damages tool

State-Federal Plans

- Bay-Delta Conservation Plan
- System Reoperation Task Force
- Sacramento-San Joaquin Delta Multi-Hazard Coordination Taskforce Report
- Sacramento-San Joaquin Delta Flood Catastrophic Incident Plan
- Regional Mass Evacuation Plan
- Interoperable Communications Plan

Regional Plans

- Urban Water Management Plan(s) including Water Reliability Element
- Agricultural Water Management Plan including Water Reliability Element
- Integrated Regional Water Management Plans
- Groundwater management plans (regional and local)
- North Bay Aqueduct Alternate Intake Project EIR

³ / The Draft EIR recognizes that attempts to manage the Delta in the absence of sufficient technical information have led to degraded, rather than improved, ecosystem conditions. (Draft EIR, p. 1-9.)

Guidelines, §§ 15126.4, 15126.6.)⁴ As a result, the Delta Plan and Draft EIR make sweeping, unsupported policy statements that are contrary to achievement of the coequal goals, and which the documents themselves show to be rushed and premature.

II. The Information Used to Prepare the EIR Is Legally Inadequate.

Under CEQA, the lead agency's conclusions must be supported by substantial evidence – facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. (CEQA Guidelines, § 15384, subd. (b).) With regard to every resource area allegedly studied in the Draft EIR, the “cut and paste” discussions of project impacts, mitigation measures, and conclusions fail to meet this standard and violate CEQA because they consist of mere speculation and unsupported assumptions. (See, e.g., Draft EIR, pp. 3-77 – 3-101; 4-40 – 4-98; 5-36 – 5-80; 6-43 – 6-72; 7-19 – 7-69; 8-17 – 8-59; 9-14 – 9-48; 10-21-10-62; 11-36 – 11-91; 12-13 – 12-25; 13-7 – 13-19; 14-17 – 14-50; 15-11 – 15-40; 16-16 – 16-33; 17-30 – 17-43; 18-31 – 18-55; 19-20 – 19-62; 20-7 – 20-19; 21-9 – 21-41.) Speculative possibilities do not constitute substantial evidence, and unsubstantiated narrative or even expert opinion saying nothing more than “it is reasonable to assume” that something “potentially may occur” is not *analysis* supported by *evidence*. (*Apartment Association of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1173-1176.)

Moreover, the Legislature imposed upon the Council a higher burden – to use the best available scientific information. (Wat. Code, § 85308, subd. (a).)⁵ Yet, the Delta

⁴ / Under CEQA, EIR preparation and public review “should be coordinated in a timely fashion with the existing planning, review, and project approval processes being used by each public agency. These procedures, to the maximum extent feasible, are to run concurrently, not consecutively.” (CEQA Guidelines, § 15004, subd. (c).)

⁵ / A recent review by the National Research Council of the biological opinions that govern operations of the Central Valley Project and the State Water Project pointed out that scientific support for water management in the Delta is weak, poorly organized, and lacking integration. (National Research Council, 2010, *A Scientific Assessment of Alternatives for Reducing Water Management Effects on Threatened and Endangered Fishes in California's Bay Delta* (“National Research Council, 2010”).) The Little Hoover Commission (2005, 2010) offered similar observations, as has the Delta Vision Blue Ribbon Task Force (2008). The Council has continued the legacy of water planning in a scientific vacuum by formulating a Delta Plan and circulating a Draft EIR without the benefit of fundamentally necessary technical information. Making “regulatory” decisions in a “comprehensive” long-term water management plan on a minimal

Plan and Draft EIR do not reflect best available science showing, for example, that there are many factors or stressors that affect the quality and sustainability of the Delta ecosystem. Instead, the documents focus nearly exclusively on increasing flows by reducing exports – an approach that has been shown to lack effectiveness in addition to lacking sufficient evidentiary basis. (National Research Council, 2010; National Research Council, 2011, *A Review of the Use of Science and Adaptive Management in California's Draft Bay Delta Conservation Plan* (“National Research Council, 2011”); Maunder and Deriso, 2011, *A State-space Multistage Life Cycle Model to Evaluate Population Impacts in the Presence of Density Dependence: Illustrated with Application to Delta Smelt (*Hyposmesus transpacificus*)* (“Maunder and Deriso, 2011”); MacNally et al., 2010, *Analysis of Pelagic Species Decline in the Upper San Francisco Estuary Using Multivariate Autoregressive Modeling (MAR)* (“MacNally et al. 2010”); Thomson et al., 2010, *Bayesian Change Point Analysis of Abundance Trends for Pelagic Fishes in the Upper San Francisco Estuary* (“Thomson et al. 2010”).) Indeed, the Delta Plan advances a flow-centric approach that ignores the other stressors in the system, even though experts, including the Delta Independent Science Board (“ISB”), recommend a more comprehensive strategy. (Delta ISB, January 26, 2011, *Addressing Multiple Stressors and Multiple Goals in the Delta Plan* (“Delta ISB, 2011”).)

The Delta ISB’s 2011 report addressing multiple stressors in the Delta ecosystem such as invasive species, predation, water quality, development, and in-Delta diversions, concludes that there is currently no objective method for ranking the stressors and no evidence that reducing just one or even several stressors will solve a particular problem. (Delta ISB, 2011, pp. 1-2.)⁶ The Delta Plan and Draft EIR do not reflect the Delta ISB’s recommendations or other studies by academic experts showing that the Council’s flow-centric approach is not effective or supported. (See, e.g., Glibert, University of Maryland, 2010, *Long-term Changes in Nutrient Loading and Stoichiometry and their Relationships with Changes in the Food Web and Dominant Pelagic Fish Species in the*

timeframe – in the face of what the Draft EIR discloses are allegedly “significant and unavoidable” environmental effects to a wide array of resources – is nothing more than a perfunctory nod in the direction of CEQA.

⁶ / The report breaks down the long list of stressors into four categories: global drivers (climate change, earthquakes, population growth, state economy); legacy stressors (mostly human-caused – upstream dams, development, invasive species, selenium); current causes (upstream diversions, pumping in the Delta, farm water runoff, wastewater treatment plants, cities and industry); and anticipated stressors (landscape changes, urban expansion, land-use decisions). (Delta ISB, 2011, Attachment 1, p. 6.)

San Francisco Estuary, California (“Glibert 2010”).) As a result of the documents’ misplaced focus, they fail to address the major issues in the Delta in both the short-term and long-term.

The Draft EIR also presents basic information upon which the Delta Plan and its environmental document are based in an inappropriately simplistic and often inaccurate manner. In Chapter 3 of the Draft EIR, for example, in describing the existing setting and potential impacts to water resources – what should be one of the most crucial discussions in the entire document – each figure incorrectly shows Westlands to be located entirely in the Tulare Lake basin and characterizes the District to be an “area outside the Delta watershed that uses Delta water.” (See, e.g., Draft EIR, pp. 3-2, 3-7 – 3-8, 3-28, 3-35 – 3-38; Delta Plan, p. 14.) In reality, however, a substantial portion of Westlands Water District is located in the San Joaquin River watershed, not the Tulare Basin. Westlands receives a substantial portion of its water from the San Joaquin River and Old River in the San Joaquin watershed. This water is not “exported” to Westlands; rather, this water is delivered from sources in the San Joaquin watershed to land located within it. Furthermore, the entire Central Valley drains to the Delta, and the Delta watershed thus includes not only the San Joaquin River watershed but also the Tulare Basin. The Delta Plan’s proposed regulatory policies and Draft EIR’s discussions of existing conditions and project impacts ignore these facts not only as they affect Westlands, but in connection with other water users as well. The Council thus has disregarded important aspects of existing hydrology and water rights that the Legislature intended as fundamental considerations in preparation of the Delta Plan. (Wat. Code, §§ 85004, 85301.) The Draft EIR violates CEQA because it is predicated on fundamentally inaccurate information.

III. The Draft EIR’s Project Description Is Legally Inadequate.

A project description must be accurate and complete in order to determine the proper scope of environmental review:

Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal’s benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the “No Project” alternative) and weigh other alternatives in the balance. An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR.

(*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192-193.)

Ms. Terry Macaulay
Delta Stewardship Council
February 1, 2012
Page 11

The adequacy of an EIR's project description is closely linked to the adequacy of the EIR's analysis of the project's environmental effects. (*Ibid.*; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.3d 713, 722-723.) Indeed, the project description sets forth the analytical foundation for the entire EIR; as such, an accurate, well-conceived, stable and finite project description is essential. (*County of Inyo, supra*, 71 Cal.App.3d at pp. 192-193.) In this case, the lack of meaningful information regarding the proposed project makes it impossible for the Draft EIR to serve its fundamental purpose as an informational document. The Draft EIR's 100+ page project description provides no information regarding the twelve "regulatory" policies of the Delta Plan, and instead oscillates between whether the Delta Plan actually will result in specific projects or not. (Draft EIR, pp. 2A-1 – 2A-107.) For example, page 1-4 of the Draft provides:

The Council does not propose or contemplate constructing, owning, or operating any facilities used for water supplies, ecosystem restoration, water quality protection, flood management, or protection and enhancement of values of the California Delta as an evolving place to implement the Delta Plan recommendations or regulatory policies.

(Draft EIR, p. 1-4.)

A few pages later, the Draft EIR contemplates there could be specific projects when it states:

[A]doption of the Delta Plan by the Council could influence the nature, time, or other aspects of decisions and actions by other agencies (particularly when those actions are "covered actions" under the Delta Reform Act). Those decisions and actions, as potentially influenced by the Delta Plan, could cause physical changes in the environment.

(Draft EIR, p. 1-13.)

In the next chapter, the Draft EIR takes another approach and identifies specific projects that are part of the proposed project. On page 2A-5, the Draft EIR identifies specific projects that are part of the proposal, which it stated previously were not part of the proposed project:

The number and location of all potential projects that will be implemented is not known at this time. Four possible projects, however, are known to

some degree and are named in the Proposed Project: North of Delta Offstream Storage Investigation, Los Vaqueros Reservoir Project – Phase 2, the Upper San Joaquin River Basin Storage Investigation Plan, and the next update of the Department of Water Resources (DWR) Bulletin 118 *California's Groundwater* (DWR 2003).

(Draft EIR, p. 2A-5.)

These inconsistent statements demonstrate the significant analytical wobble that exists throughout the entirety of the Draft EIR as to whether future individual projects are caused and therefore part of the Delta Plan, or whether they would be planned even without the Plan, and finally, whether current proposed projects are actually part of the proposed project. More important, these statements are merely a distraction from what the Delta Plan actually proposes – 12 “mandatory” or “regulatory” policies (which the Draft EIR’s project description fails even to identify) – the implementation of which will result in reasonably foreseeable indirect and cumulative significant adverse environmental effects. The Draft EIR’s project description violates CEQA because it fails to identify these 12 regulatory policies as the basic elements of the proposed action. (CEQA Guidelines, § 15124; *County of Inyo, supra*, 71 Cal.App.3d at pp. 192-193.) Contrary to CEQA, the Draft EIR’s description of the basic elements of the proposed action – the “Policies and Recommendations of the Proposed Project” – is buried in an appendix. (See, e.g., Draft EIR, p. 2A-6 [“[t]he policies and recommendations included in the Proposed Project are presented in Appendix C]; see CEQA Guidelines, § 15124.) “The decision makers and general public should not be forced to sift through obscure minutiae or appendices in order to ferret out” the true nature of the proposed project. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 659; see also *Planning & Conservation League, supra*, 83 Cal.App.4th at p. 911.) Moreover, as further discussed below in Section V, the Draft EIR’s “analysis” bears little, if any, relationship to the potential impacts of these proposed policies. The Draft EIR therefore is fundamentally defective as an informational document.

IV. The Council’s Interpretation of Project Objectives Conflicts with the Delta Reform Act and Unduly Constrains the Range of Potentially Feasible Alternatives.

Under CEQA, the Draft EIR “must include a clear statement of ‘the objectives sought by the proposed project,’ which will help the lead agency ‘develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers in preparing findings or a statement of overriding considerations, if necessary.’” (*San Joaquin Raptor Rescue Center, supra*, 149 Cal.App.4th at pp. 654-655, quoting CEQA Guidelines, §

15124, subd. (b).) The project objectives are crucial to proper consideration and analysis of the proposed action, especially in relation to the formulation and evaluation of project alternatives.

The Delta Plan Draft EIR states that the project's objectives are to achieve the coequal goals "and the eight 'inherent' objectives, in a manner that: (1) furthers the statewide policy to reduce reliance on the Delta in meeting the State's future water supply needs through regional self-reliance, (2) is consistent with specific statutory content requirements for the Delta Plan (Water Code sections 85302(c) through (e), and 85303-85308), (3) is implementable in a comprehensive, concurrent and interrelated fashion, and (4) is accomplished as rapidly as realistically possible without jeopardizing ultimate success." (Draft EIR, p. 1-4.) The Delta Plan and objectives as stated in the Draft EIR fail to reflect the clear legislative direction as summarized in Water Code section 85302, which states in subdivision (d) as follows:

The Delta Plan shall include measures to promote a more reliable water supply that address all of the following:

- (1) Meeting the needs for reasonable and beneficial uses of water.
- (2) Sustaining the economic vitality of the state.
- (3) Improving water quality to protect human health and the environment.

(Wat. Code, § 85302, subd. (d).)

These are the key criteria identified in the Delta Reform Act to achieve the goal of water supply reliability. (*Ibid.*) The Delta Plan and Draft EIR do not reflect these objectives or a balanced approach to achieving the coequal goals of "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem." (Wat. Code, § 85054.)

According to the Council, the Delta Plan increases water supply reliability by requiring users of Delta water to implement local plans to diversify water supplies and improve water efficiency, and reduce pressure on the Delta. Contrary to the Council's legislative direction, the Delta Plan includes proposed policies and recommendations that would reduce the reliability of Delta water supplies as compared to present conditions. (See, e.g., Draft EIR, Executive Summary, p. 4.) The Council has redefined water supply reliability in a manner that conflicts with some of the basic purposes of the Delta Reform Act – to formulate a comprehensive management plan that will improve reliable water supply levels from current conditions through an aggressive plan of restoring habitat, addressing other stressors, and constructing a new conveyance system.

The term “reliability” in the context of the Act has history and meaning that cannot be oversimplified to suit the Council’s preferred course. It is not a simple “make do with less” directive as the Council has suggested. Rather, water supply reliability is a complex concept involving increased and diversified water supplies to reduce the disparity between supply and demand, conservation and efficient use of water resources, and sufficient operational flexibility to respond to changing conditions and meet appropriate public trust, constitutional, and coequal goal requirements. The notion that current contracts cannot or should not be the basis upon which reliability is measured conflicts with the Delta Plan’s purpose and authority. Water supply reliability to meet the standard set forth in Water Code section 85302, subdivision (d), cannot be defined as reducing Delta water supplies from the current baseline. Such an approach distorts the coequal goals and would undermine any real hope of success for the Delta Plan by resulting in disinvestment in the Delta. Reliability can be achieved only through a combination of elements such as improved conveyance and storage, increased water use efficiency, recycling, and water transfers, as well as addressing all ecosystem stressors. (See Wat. Code, § 85004, subd. (b).)⁷

The documents must be substantially revised to reflect a concept of reliability consistent with the coequal goals – increasing the availability of supplies transferred through the Delta at times and in a manner that is more environmentally benign (e.g., through improved conveyance), which in turn allows for relatively less water to be diverted during dry periods. The Council’s interpretation of the legislatively-defined project objectives, and the resulting Delta Plan and Draft EIR, impermissibly attempt to streamline the Council’s task (and unduly constrain the range of project alternatives, in violation of CEQA)⁸ by refusing to grapple with the need to improve water supply

⁷ / Westlands does not contend, as the Council suggests, that it should be entitled to “as much water as it wants, whenever it wants, forever.” (Delta Plan, p. 5.) Such statements belittle the legitimate water supply reliability concerns of Westlands and other water users, attempt to justify the Council’s oversimplified approach to its statutory directives in general and water supply reliability in particular, and highlight the Delta Plan’s lack of a balanced approach to achieving the coequal goals.

⁸ / A lead agency may not give a project’s purpose an artificially narrow definition such that the range of alternatives to the proposed action is unduly constrained. (*In re Bay-Delta Programmatic Environmental Impact Report Programmatic Proceedings* (2008) 43 Cal.4th 1143, 1166 (“*In re Bay-Delta*”); *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1455.)

reliability and the long-term average amount of water available from the Delta compared to current levels.

V. The Draft EIR Fails to Analyze the Potentially Significant Impacts of the Delta Plan's Proposed Regulatory Policies.

It is well-settled that a CEQA document must provide the public and the decision-maker with adequate information to fully assess the direct, reasonably foreseeable indirect, and cumulative impacts of a proposed action. (CEQA Guidelines, §§ 15064, subd. (d), 15126.2, subd. (a), 15130, 15355, 15358; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) An EIR must “avoid minimizing” impacts and “must reflect a conscientious effort to provide ... adequate and relevant detailed information about them.” (*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79.) An agency violates CEQA if its decision is reached without individual consideration and balancing of environmental factors, fully and in good faith. “[F]ailure to provide enough information to permit informed decision-making is fatal.” (*Napa Citizens for Honest Government v. Napa County Board of Supervisors* (2001) 91 Cal.App.4th 342, 361.)

The Draft EIR for the Delta Plan is fatally defective because it attempts to satisfy CEQA by focusing on potential impacts associated with construction and operation of projects that the Council has no authority to implement. (See, e.g., Draft EIR, pp. 3-77 – 3-101; 4-40 – 4-98; 5-36 – 5-80; 6-43 – 6-72; 7-19 – 7-69; 8-17 – 8-59; 9-14 – 9-48; 10-21-10-62; 11-36 – 11-91; 12-13 – 12-25; 13-7 – 13-19; 14-17 – 14-50; 15-11 – 15-40; 16-16 – 16-33; 17-30 – 17-43; 18-31 – 18-55; 19-20 – 19-62; 20-7 – 20-19; 21-9 – 21-41.) CEQA requires analysis of the potentially significant impacts of the Council's proposed action – the proposed regulatory policies of the Delta Plan. The Draft EIR's project description fails even to identify those policies (Draft EIR, pp. 2A-1 – 2A-56), and the document's “analysis” of potential impacts makes no mention of them whatsoever. (Draft EIR, pp. 3-77 – 3-101; 4-40 – 4-98; 5-36 – 5-80; 6-43 – 6-72; 7-19 – 7-69; 8-17 – 8-59; 9-14 – 9-48; 10-21-10-62; 11-36 – 11-91; 12-13 – 12-25; 13-7 – 13-19; 14-17 – 14-50; 15-11 – 15-40; 16-16 – 16-33; 17-30 – 17-43; 18-31 – 18-55; 19-20 – 19-62; 20-7 – 20-19; 21-9 – 21-41.) To minimally comply with CEQA, the Draft EIR must disclose, analyze, and avoid or substantially lessen the environmental impacts of the Delta Plan's proposed policies, such as effects of reduced surface water supplies on agricultural resources, impacts of the use of substitute water sources such as groundwater,⁹

⁹ / The Draft EIR briefly discusses alternative water sources in a single paragraph on page 3-99 in connection with Alternative 2, but fails to analyze the impacts of substitute supplies in any meaningful way (either in the context of the proposed Delta Plan policies

subsidence and water quality issues, adverse impacts to air quality from increased dust and particulate matter, and social and economic impacts of reduced water supplies on local communities.

A. Significant Groundwater Impacts and Related Subsidence and Water Quality Impacts Must Be Analyzed and Mitigated.

Farmers in the San Joaquin Valley, including those served by Westlands, generally rely on three sources of water: (1) groundwater; (2) surface water made available through the Central Valley Project and/or the State Water Project; and (3) annual water transfers. The Delta Plan's proposed regulatory policies related to water supply reliability and "reduced reliance" on water transported through the Delta will result in reduced surface water supplies and, in turn, environmental impacts of substitute supplies, such as increased use of groundwater. (Draft EIR, Appendix C, pp. C-2 – C-4.) When water supplies conveyed through the Delta are reduced, the unintended consequence is increased demand on an already overused and unsustainable groundwater system.

In addition to the obvious and significant adverse environmental impact of substantially depleting groundwater supplies and lowering the local groundwater table (CEQA Guidelines, App. G, § IX, subd. (b)), increased groundwater pumping results in several other serious environmental consequences. Overdraft can result in subsidence, at least at a local scale, which likely would lead to other environmental consequences such as permanent loss of storage capacity in at least some portion of the aquifer, and damage to canals, roads, foundations and other infrastructure. (CEQA Guidelines, App. G, §§ VI, subd. (c), IX, subds. (b) and (d).) Increased groundwater pumping also can result in impacts to subsurface water quality. For example, under natural conditions the boundary between freshwater and saltwater tends to be relatively stable, but pumping can cause saltwater to migrate inland and upward, resulting in saltwater contamination of the water supply. (CEQA Guidelines, App. G., § IX, subd. (f).) Impacts to geology and soils also are likely from the use of lower quality and higher salinity water. (CEQA Guidelines, App. G, § VI, subd. (b).) The Draft EIR violates CEQA because it makes no effort to disclose, analyze, and mitigate these reasonably foreseeable adverse environmental impacts of the Delta Plan's proposed water supply reliability policies. (Draft EIR, Appendix C, pp. C-2 – C-4.)

or in connection with any identified alternative). (Draft EIR, p. 3-99; see also *id.* at pp. 3-77 – 3-90.)

B. Significant Impacts to Agricultural Resources and Related Air Quality, Aesthetic, and Biological Resources Impacts Must Be Analyzed and Mitigated.

One of the major principles of the state's environmental policy is to sustain the long-term productivity of agriculture by conserving and protecting the soil, water, and air that are agriculture's basic resources. (Food & Agr. Code, § 821, subd. (c).) Accordingly, CEQA recognizes agricultural land and resources as part of the physical environment. (Pub. Resources Code, §§ 21060.5, 21068; CEQA Guidelines, App. G, § II [Agricultural Resources].)¹⁰ As currently proposed, the regulatory policies of the Delta Plan related to water supply reliability and "reduced reliance" on water transported through the Delta will reduce, rather than improve, water supply reliability and can be expected to decrease supplies and exacerbate shortages. (Draft EIR, Appendix C, pp. C-2 – C-4.) Alternative water supplies for agricultural use are limited, and the need for new local and regional water supplies is likely to exceed available alternatives. As noted in the Draft EIR, "[m]ost agricultural users are not located near the ocean to obtain water from desalination treatment plants or surface waters that could provide water to local surface water storage facilities." (Draft EIR, p. 3-99.) As a result, fallowing and potential permanent loss of irrigated agricultural lands would add to the impact of statewide conversion of substantial amounts of agricultural lands to other uses.¹¹

¹⁰ / Both CEQA and the National Environmental Policy Act ("NEPA") require analysis of a proposed project's impacts on the physical environment, which includes agricultural lands and resources. (Pub. Resources Code, § 21060.5; CEQA Guidelines, App. G, § 2; 42 U.S.C. §§ 4321 et seq.; 45 Fed. Reg. 59189 [CEQ guidance to federal agencies highlighting their responsibility to consider farmland loss as a potentially significant environmental impact under NEPA].) On page 1-14, the Draft EIR asserts that the document complies with NEPA. As discussed in these comments, however, the document fails to satisfy the basic requirements of NEPA as well as CEQA.

¹¹ / Only about 9 million acres of irrigated land are considered to be prime, unique, or of statewide importance. A 2009 assessment by the American Farmland Trust indicated that development now consumes an average of about 40,000 acres of agricultural land per year. Additional land has been removed from agriculture for environmental purposes, mainly the creation or enlargement of wildlife refuges and withdrawals due to water shortage. Between 2004 and 2006 alone, irrigated farmland declined by more than 200,000 acres statewide due to these and similar causes. (Edward Thompson, Jr., American Farmland Trust, July 2009.) A recent report by the Department of Conservation shows that even during a recession that has slowed urbanization, the number of irrigated acres farmed in California continues to drop by record amounts due

Implementation of the Delta Plan's proposed regulatory policies will result in significant adverse environmental effects on agricultural resources, including cumulative impacts that will occur over time, which must be fully assessed and disclosed in the EIR. (CEQA Guidelines, App. G, § II; see Section V.C, *infra.*)¹² Further, the EIR must identify mitigation measures and alternatives that could feasibly avoid or substantially lessen those effects. (Pub. Resources Code, §§ 21002, 21002.1, subd. (a), 21061; CEQA Guidelines, §§ 15002, subd. (a)(3), 15126.6; *Citizens of Goleta Valley, supra*, 52 Cal.3d at p. 564.)

Fallowing of agricultural lands and potentially permanent loss of agricultural resources would have obvious attendant environmental impacts such as soil erosion and loss of topsoil (CEQA Guidelines, App. G, § VI, subd. (b)), as well as additional dust and particulate emissions (CEQA Guidelines, App. G., § III), including in those areas and counties, such as Merced, Fresno, Kern, and Kings Counties, where air quality already is in noncompliance with federal Clean Air Act standards. Additional fallowing and under-irrigation of agricultural lands due to reduced water supplies could add hundreds of tons per year of wind-borne particulates to the air in the San Joaquin air basin. Non-cultivated fallow fields can provide excellent habitat for non-native plant species such as Russian thistle (aka tumbleweed), which breaks from the soil as it matures and is transported with the wind. This migration can threaten native plant ecosystems and impact crops and infrastructure such as highways and canals.

Particularly given the national and statewide importance of agriculture and the legal requirements of environmental review, the Draft EIR falls far short of its duty to disclose, analyze, and mitigate potentially significant direct, indirect, and cumulative effects on agricultural lands resulting from the Delta Plan's policies that are likely to reduce available surface water supplies. (Draft EIR, Appendix C, pp. C-2 – C-4.)¹³

to water shortages, particularly in the San Joaquin Valley. (Department of Conservation, California Farmland Conversion Report, January 2011.)

¹² / Although the Draft EIR purports to analyze potential impacts of the Delta Plan on the agricultural environment, that "analysis" is limited to impacts involving the direct conversion of agricultural lands as a result of unknown and speculative future projects that the Council has no authority to implement. (Draft EIR, pp. 7-19 – 7-69.)

¹³ / Agriculture is the number one industry in California, which is the leading agricultural state in the nation. (Food & Agr. Code, § 802, subd. (a).) Agriculture is an industry at the foundation of this state's economy, providing employment for one in ten Californians and a variety and quantity of food products that both feed the nation and

C. The Draft EIR's Discussion of Cumulative Impacts Is Legally Inadequate.

Section 15355 of the CEQA Guidelines states:

“Cumulative impacts” refers to two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.

(a) The individual effects may be changes resulting from a single project or a number of separate projects.

(b) The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.

(CEQA Guidelines, § 15355.)

As defined in Section 15355, a cumulative impact consists of an impact resulting from the proposed action in combination with other actions causing related impacts. (*Ibid.*) In assessing the cumulative impacts of a proposed action, the lead agency must focus the evaluation upon *other actions that are closely related in terms of impact on the resource*— not closely related project types. (CEQA Guidelines, § 15130, subd. (b).) The Draft EIR fails to comply with CEQA's requirements for cumulative impacts analysis because although its “list” of related actions, programs, and projects includes biological opinions on the long-term operations of the Central Valley Project and State Water Project related to delta smelt and other fish species, the Draft EIR focuses solely on the asserted environmental benefits of those actions. (Draft EIR, p. 22-28; see also *id.* at pp. 22-2 – 22-20.)

The environmental document fails to discuss the cumulative effects of the proposed Delta Plan's regulatory policies in combination with other actions, such as the biological opinions and other regulatory measures restricting the amount of water

provide a significant source of exports. (CALFED Final Programmatic EIS/EIR, July 2000, pg. 7.1-1.)

supplied through the Delta. (Draft EIR, Appendix C, pp. C-2 – C-4; Draft EIR, p. 22-28.) These policies and programs are causing severe water shortages and are closely related to the water supply policies of the proposed action in terms of their effects on agricultural resources, groundwater supply and water quality, subsidence and soils, air quality, biological resources, and related socioeconomic impacts. (See sections V.B, *supra*, V.D, *infra*.) None of these effects is analyzed as CEQA requires. (CEQA Guidelines, §§ 15130, 15355; Draft EIR, pp. 22-2 – 22-20.) The Draft EIR further fails to examine feasible options for mitigating or avoiding the project's contribution to these significant cumulative effects. (Draft EIR, pp. 22-2 – 22-20; see also *id.* at pp. 3-77 – 3-101; 4-40 – 4-98; 5-36 – 5-80; 6-43 – 6-72; 7-19 – 7-69; 8-17 – 8-59; 9-14 – 9-48; 10-21-10-62; 11-36 – 11-91; 12-13 – 12-25; 13-7 – 13-19; 14-17 – 14-50; 15-11 – 15-40; 16-16 – 16-33; 17-30 – 17-43; 18-31 – 18-55; 19-20 – 19-62; 20-7 – 20-19; 21-9 – 21-41; CEQA Guidelines, § 15130, subd. (b)(5).)

D. Significant Social and Economic Impacts of Reduced Water Supplies on Local Communities Must Be Analyzed and Mitigated.

While social and economic effects of a proposed action are not, by themselves, significant effects on the environment, such effects are relevant where a project will cause significant physical environmental effects that have related economic and social impacts. (CEQA Guidelines, § 15131, subd. (b).) Where, as here, a project's physical impacts may cause severe economic and social consequences, the magnitude of the latter is relevant in determining the significance of the proposed action's physical environmental impacts. (*Ibid.*)

Reduced water supplies in agricultural communities result in fallowing of agricultural land, abandonment and/or destruction of crops, and potentially permanent loss of agricultural resources. These physical environmental impacts lead to lost jobs and increased unemployment, lost business and tax revenue, and increased demand for government services. Important regional differences in the severity of these impacts exist within the San Joaquin Valley, and even within specific counties. At the county level, Fresno, Kings and Kern are the most significantly affected by reduced water supplies in terms of fallowed acres, lost revenue, and lost jobs. Regional impacts also vary within counties. For example, while the east side of Fresno County may experience 1.5% revenue growth, the west side – specifically Westlands Water District – may experience declines of 10% or more. (Michael et al., September 28, 2010, *A Retrospective Estimate of the Economic Impacts of Reduced Water Supplies to the San Joaquin Valley in 2009*.) These differences indicate a strong economic gradient and highlight the importance of identifying and mitigating localized effects of reduced water supplies – physical as well as social and economic – pursuant to CEQA.

VI. The Draft EIR's Mitigation Measures Are Vague, Unenforceable, and Fail to Address the Potentially Significant Impacts of the Proposed Delta Plan's Regulatory Policies.

Public Resources Code section 21002 requires agencies to adopt feasible mitigation measures (or feasible environmentally superior alternatives) in order to avoid or substantially lessen otherwise significant adverse environmental impacts. (Pub. Resources Code, §§ 21002, 21081, subd. (a); CEQA Guidelines, §§ 15002, subd. (a)(3), 15021, subd. (a)(2), 15091, subd. (a)(1).) To effectuate this requirement, EIRs must identify mitigation measures that decision-makers can adopt at the findings stage of the CEQA process. (Pub. Resources Code, § 21100, subd. (b)(3); CEQA Guidelines, §§ 15126, subd. (e), 15126.4, 15370.)

In the present situation, the mitigation measures set forth in the Draft EIR are meaningless, primarily as a result of the document's inadequate project description, distorted interpretation of the project objectives, and superficial impacts analysis that fails to disclose and discuss any of the proposed project's significant environmental effects. (See, e.g., Draft EIR, pp. 3-77 – 3-101; 4-40 – 4-98; 5-36 – 5-80; 6-43 – 6-72; 7-19 – 7-69; 8-17 – 8-59; 9-14 – 9-48; 10-21-10-62; 11-36 – 11-91; 12-13 – 12-25; 13-7 – 13-19; 14-17 – 14-50; 15-11 – 15-40; 16-16 – 16-33; 17-30 – 17-43; 18-31 – 18-55; 19-20 – 19-62; 20-7 – 20-19; 21-9 – 21-41.) The mitigation measures are vague, unenforceable and generally beyond the Council's authority to require or implement, and fail to address the potentially significant impacts of the proposed Delta Plan's regulatory policies. (See, e.g., Draft EIR, pp. 3-91 – 3-93, 4-82 – 4-86, 5-66 – 5-70, 6-62 – 6-64, 7-52 – 7-55, 8-44 – 8-46, 9-37 – 9-42, 10-46 – 10-50, 11-72 – 11-78, 12-20 – 12-21, 13-11 – 13-12, 14-36 – 14-39, 15-27 – 15-30, 16-27 – 16-28, 17-38 – 17-39, 18-45 – 18-48, 19-45 – 19-49, 20-14 – 20-15, 21-28 – 21-34.) Many of the so-called mitigation measures are not tethered to any enforceable program or standard, and most do nothing more than state that future projects will comply with applicable law. (*Ibid.*) Even for a programmatic EIR, CEQA requires much more. (*Kings County, supra*, 221 Cal.App.3d at pp. 727-728; CEQA Guidelines, §§ 15144, 15151; see also footnote 1, *supra* [conclusory findings of "significant and unavoidable" impacts and statement of overriding considerations do not excuse the agency's duty to analyze and disclose all it reasonably can].)

VII. The Draft EIR Fails to Adequately Analyze a Reasonable Range of Alternatives.

CEQA requires a lead agency to adopt feasible alternatives or feasible mitigation measures that can avoid or substantially lessen the proposed project's significant

environmental impacts. (Pub. Resources Code, § 21002; CEQA Guidelines, §§ 15002, subd. (a)(3), 15126.6, subd. (a); *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 41.) CEQA's substantive mandate makes the mitigation and alternative sections the "core of an EIR." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) The purpose of an environmental impact report is to identify the significant effects of a project on the environment, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided. (Pub. Resources Code, §§ 21002.1, subd. (a), 21061.)

The EIR must "describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project, and evaluate the comparative merits of the alternatives." (CEQA Guidelines, § 15126.6, subd. (a).) The discussion must focus on alternatives that avoid or substantially lessen any significant effects of the project. (CEQA Guidelines, § 15126.6, subd. (b).) EIRs "must produce information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned." (*San Bernardino Valley Audubon Society v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 750-751.) The Draft EIR violates CEQA because it fails to comply with these requirements.

A. The Draft EIR Fails to Analyze Alternatives to the Proposed Project at a Level of Detail Sufficient to Permit a Reasoned Choice.

CEQA requires that an EIR describe a reasonable range of feasible alternatives to the project, or to its location, that could substantially reduce one or more of the project's significant environmental impacts while meeting most or all of the project's objectives. (CEQA Guidelines, § 15126.6, subd. (a).) The EIR is required to analyze the potential environmental impacts of each of the alternatives, although not necessarily at the same level of detail as the project. (CEQA Guidelines, § 15126.6.)¹⁴ There must be sufficient detail to be able to compare the respective merits of the alternatives. (*Ibid.*; *Laurel Heights, supra*, 47 Cal.3d at pp. 399-407 [alternatives discussion must "contain facts and analysis, not just the agency's bare conclusions or opinions" and requires "meaningful detail"; *Kings County, supra*, 221 Cal.App.3d at pp. 730-737 [CEQA requires "quantitative, comparative analysis" of the relative environmental impacts of project alternatives].) Here, the Draft EIR's "analysis" of alternatives to the proposed project is perfunctory and meaningless, again primarily as a result of the document's inadequate

¹⁴ / As discussed in section VII.E, below, the Draft EIR claims to comply with NEPA by analyzing alternatives at the same level of detail as the proposed action. (Draft EIR, p. 1-14.) The Draft EIR satisfies neither CEQA nor NEPA, however.

project description, distorted interpretation of the project objectives, and superficial impacts analysis. (Draft EIR, pp. 25-1 – 25-11; see also *id.* at pp. 3-93 – 3-101, 4-86 – 4-98, 5-70 – 5-80, 6-64 – 6-72, 7-55 – 7-69, 8-46 – 8-59, 9-42 – 9-48, 10-50 – 10-62, 11-78 – 11-91, 12-21 – 12-25, 13-12 – 13-19, 14-39 – 14-50, 15-30 – 15-40, 16-28 – 16-33, 17-39 – 17-43, 18-48 – 18-55, 19-50 – 19-62, 20-15 – 20-19, 21-34 – 21-41.)

B. The Draft EIR Presents a Distorted Comparison of the Project and Its Alternatives By Failing to Distinguish Between Existing Environmental Conditions and Project Impacts.

The California Supreme Court has expressly rejected the idea that an alternative should be found “environmentally superior” because it might more effectively address existing environmental problems. (*In re Bay-Delta, supra*, 43 Cal.4th at p. 1168.) The Supreme Court emphasized the importance of distinguishing “between preexisting environmental problems. . . , on the one hand, and adverse environmental effects” of the proposed action or its alternatives on the other, explaining that under CEQA, existing environmental problems are part of the baseline conditions. (*Id.* at pp. 1167-1168; see CEQA Guidelines, § 15125, subd. (a); *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.) The Draft EIR’s alternatives discussion violates these principles and mischaracterizes the impacts of project alternatives by ignoring the important distinction between existing environmental conditions and potential impacts. (Draft EIR, pp. 25-1 – 25-11; see also *id.* at pp. 3-93 – 3-101, 4-86 – 4-98, 5-70 – 5-80, 6-64 – 6-72, 7-55 – 7-69, 8-46 – 8-59, 9-42 – 9-48, 10-50 – 10-62, 11-78 – 11-91, 12-21 – 12-25, 13-12 – 13-19, 14-39 – 14-50, 15-30 – 15-40, 16-28 – 16-33, 17-39 – 17-43, 18-48 – 18-55, 19-50 – 19-62, 20-15 – 20-19, 21-34 – 21-41.)

This results in a skewed presentation that effectively rejects each of the alternatives offered in the document and prevents the decision-makers from evaluating or considering any alternative other than the Council’s preferred proposal. These comparisons violate CEQA because they are drafted not to promote informed decision-making, but rather to encourage approval of the proposed project. (Draft EIR, pp. 25-1 – 25-11.) The Draft EIR fails to properly consider a reasonable range of alternatives and instead reveals that the Council has predetermined that it intends to approve the proposed action regardless of its environmental consequences.

C. The Draft EIR Fails to Properly Analyze the “No Project” Alternative.

Under CEQA, the EIR must include a discussion of the “No Project” alternative, which involves consideration of existing environmental conditions as well as what would

be reasonably expected to occur without the proposed project, based on existing plans and available infrastructure:

The “no project” analysis shall discuss the existing conditions at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, *as well as what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans and consistent with available infrastructure and community services.* If the environmentally superior alternative is the “no project” alternative, the EIR shall also identify an environmentally superior alternative among the other alternatives.

(CEQA Guidelines, § 15126.6, subd. (e)(2) [italics added].)

In *Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 911-920, the court noted that “[t]he existing conditions, supplemented by a reasonable forecast, are characterized as the no project alternative. The description must be straightforward and intelligible, assisting the decision maker and the public in ascertaining the environmental consequences of doing nothing.” (83 Cal.App.4th at p. 911.) “A no project description is nonevaluative. It provides the decision makers and the public with specific information about the environment if the project is not approved. It is a factually based forecast of the environmental impacts of preserving the status quo. It thus provides the decision makers with a base line against which they can measure the environmental advantages and disadvantages of the project and alternatives to the project.” (*Id.* at pp. 917-918.) The court invalidated the EIR in that case because “[b]y failing to provide a thorough examination of the no project alternative, [the lead agency] has undermined the most basic charge under CEQA – to inform the decision maker.” (*Id.* at p. 916.)

The Draft EIR in this situation suffers from the same fundamental defect. It fails to analyze both the existing environmental conditions and the reasonably foreseeable future conditions that are likely to result if the proposed project is not approved. (Draft EIR, pp. 25-1 – 25-11; see also *id.* at pp. 3-93 – 3-101, 4-86 – 4-98, 5-70 – 5-80, 6-64 – 6-72, 7-55 – 7-69, 8-46 – 8-59, 9-42 – 9-48, 10-50 – 10-62, 11-78 – 11-91, 12-21 – 12-25, 13-12 – 13-19, 14-39 – 14-50, 15-30 – 15-40, 16-28 – 16-33, 17-39 – 17-43, 18-48 – 18-55, 19-50 – 19-62, 20-15 – 20-19, 21-34 – 21-41.) The Draft EIR fails to analyze the existing conservation, water quality, and other statutes that are in place and what projects are likely to occur under these existing statutes. (*Ibid.*) This lack of basic information regarding the “No Project” alternative further highlights the legal inadequacy of the

document's project description, which confuses whether specific existing planned and potential future projects are expected to occur as part of the proposed project or whether these projects would occur in the future regardless of the Delta Plan. (See, e.g., Draft EIR, pp. 1-4, 1-13, 2A-5.)

D. The Draft EIR Improperly Assumes that Changing Delta Plan Policies to Recommendations Will Delay or Make Certain Actions Less Certain.

The Draft EIR states "Alternative 1B changes all of the proposed Delta Plan policies to recommendations. With regard to physical actions that the policies target to meet the coequal goals, these actions would be delayed and/or less certain to occur under Alternative 1B." (Draft EIR, p. 2A-68.) No analysis or evidence supports this assumption. Further, no analysis or evidence shows that a detached state agency with veto authority over all projects will result in greater positive changes than local regulation. For example, a proponent may decline to bring forward a project that it otherwise would have, knowing it is subject to layers of bureaucracy including appeal to the Council. Recognizing this reality in other conservancy structures, the state has employed a home rule framework that provides general guidance and recommendations at the state level, with regulatory authority maintained in the local jurisdictions (e.g., Department of Conservation implementation of the Williamson Act and State Mining & Geology Board implementation of the State Mining and Reclamation Act – both home rule structure conservation statutes).

E. The Draft EIR Fails to Comply with NEPA Requirements.

The Draft EIR asserts that the document complies with NEPA, and therefore "all of the alternatives analyzed in this EIR . . . are evaluated at an equal level of detail (while avoiding unnecessary repetition) consistent with NEPA requirements." (Draft EIR, p. 1-14.) On one level, this statement is accurate since the Draft EIR provides very little substantive analysis of the impacts of the proposed action, and its approach to analyzing alternatives is similarly superficial. (Draft EIR, pp. Draft EIR, pp. 25-1 – 25-11; see also *id.* at pp. 3-93 – 3-101, 4-86 – 4-98, 5-70 – 5-80, 6-64 – 6-72, 7-55 – 7-69, 8-46 – 8-59, 9-42 – 9-48, 10-50 – 10-62, 11-78 – 11-91, 12-21 – 12-25, 13-12 – 13-19, 14-39 – 14-50, 15-30 – 15-40, 16-28 – 16-33, 17-39 – 17-43, 18-48 – 18-55, 19-50 – 19-62, 20-15 – 20-19, 21-34 – 21-41.) This approach no more complies with NEPA than it does CEQA, however.

The importance of NEPA's requirement to consider alternatives cannot be downplayed; it has been described both as the "heart" and "linchpin" of an adequate

Ms. Terry Macaulay
Delta Stewardship Council
February 1, 2012
Page 26

NEPA document. (40 C.F.R. § 1502.14; *Monroe County Conservation Council, Inc. v. Volpe*, 472 F.2d 693, 697-698 (2d Cir. 1972).)¹⁵ The purpose of examining alternatives is:

To ensure that each agency decision maker has before him and takes into proper account all possible approaches to a particular project . . . which would alter the environmental impact and the cost-benefit balance. Only in that fashion is it likely that the most intelligent, optimally beneficial decision will ultimately be made.

(*Calvert Cliffs' Coordinating Comm., Inc. v. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).)

It is the agency's duty, under NEPA, to provide a meaningful comparative analysis of alternatives, not merely a superficial recitation of possibilities and speculative summary of potential impacts. The agency must compare the project and its alternatives on the basis of their effects on the human (physical, biological, social, and economic) environment. (42 U.S.C. § 4332(2)(C).) The Draft EIR's so-called "analysis" of impacts in regard to the proposed action as well as the identified alternatives misses the mark. (Draft EIR, pp. 3-77 – 3-101; 4-40 – 4-98; 5-36 – 5-80; 6-43 – 6-72; 7-19 – 7-69; 8-17 – 8-59; 9-14 – 9-48; 10-21-10-62; 11-36 – 11-91; 12-13 – 12-25; 13-7 – 13-19; 14-17 – 14-50; 15-11 – 15-40; 16-16 – 16-33; 17-30 – 17-43; 18-31 – 18-55; 19-20 – 19-62; 20-7 – 20-19; 21-9 – 21-41; 25-1 – 25-11; see section V, *supra*.) Particularly in light of the nature and objectives of the proposed action, the Draft EIR fails to give the meaningful consideration to project alternatives that NEPA requires. (42 U.S.C. § 4332(2)(E).)

* * *

An EIR is required to promote the goal of informed decision-making that is the heart of CEQA. The Draft EIR in this case is neither sufficient nor objective in its identification or analysis of potential impacts of the proposed Delta Plan. Significant revisions to the Delta Plan and its Draft EIR are necessary before the public and the Council's decision-makers will be adequately informed about the nature of the proposed project and its potentially significant environmental effects.

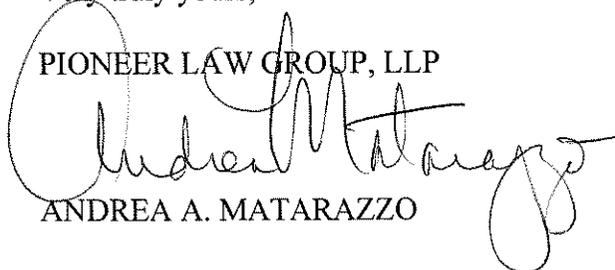
¹⁵ / The extent of the range of reasonable alternatives to be considered depends on the nature of the proposal. Under NEPA, "[a]n agency must look at every reasonable alternative, with the range dictated by the nature and scope of the proposed action." (*Presidio Golf Club v. National Park Service*, 155 F.3d 1153, 1160 (9th Cir. 1998).)

Ms. Terry Macaulay
Delta Stewardship Council
February 1, 2012
Page 27

Thank you for the opportunity to submit these comments.

Very truly yours,

PIONEER LAW GROUP, LLP

A handwritten signature in black ink, appearing to read "Andrea Matarazzo". The signature is written in a cursive style with a large initial "A" and a long, sweeping tail.

ANDREA A. MATARAZZO

AAM:jis

cc: Thomas W. Birmingham, Westlands Water District
Harold Craig Manson, Westlands Water District