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sent via email

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Comments on the Delta Plan Draft EIR

Dear Chair,

After reviewing the Draft EIR for the Delta Plan, I had concerns about many of the fundamental assumptions in drafting both the Delta Plan and the Delta Plan EIR. Many of these concerns relate to the lack of definition of the relationship between the Delta Plan and the existing CALFED Program. As I compared the Delta Plan with the Delta Reform Act authorizing statutes, and with the commitments made in the CALFED Record of Decision, it became clear that the lack of explicit consideration in the Delta Reform Act of CALFED and the many agency actions continuing under CALFED has created a great deal of confusion. I see quite a bit of confusion within the Natural Resources Agency, as the current relationship between the Delta Stewardship Council, the Department of Water Resources, and the Department of Fish and Game is not well defined.

Because of this confusion, it is at all clear how the intent of the legislature to create “ a new governance structure with the authority, responsibility, accountability, scientific support, and adequate and secure funding to achieve these objectives” will be achieved.

I believe that it is essential that the potential conflicts with the existing CALFED program be straightened out before certification of the Programmatic EIR for the Delta Plan. I hope that these suggestions, while requiring significant rewriting of both the Delta Plan and the Delta Plan DEIR, will straighten out a large number of statutory and regulatory issues.

My suggestions are below.

Sincerely,

Deirdre Des Jardins
California Water Research Associates

1. The No-Action Alternative should be the continuation of the existing CALFED Program goals, objectives, performance measures, and implementation and mitigation commitments.

The Delta Reform Act requires the Delta Stewardship Council to develop and adopt the Delta Plan as a “comprehensive long-term management plan for the Delta.” (California Water Code section 85059 and 85300 et. seq.)

However, the Fifth Staff Draft of the Delta Plan, and the DEIR do not adequately consider the existing CALFED Bay-Delta program, “a 30-year plan to restore the ecological health of the Bay and Delta, improve water supply reliability and water quality, and stabilize the levee systems that provide the foundation for the Delta.”¹ I believe that the failure to explicitly consider the elements of the existing long term management plan for the Delta under CALFED, including the goals, objectives, performance measures, and implementation commitments as well as the full range of ongoing actions, activities and projects that are currently being carried out by the 25 state federal agencies that are partners to CALFED, is a fundamental and systemic flaw in both the Delta Plan and the Delta Plan DEIR.

Section 15125 of the CEQA guidelines requires that, in adopting a new regulatory plan or policy, the “No Action” alternative must be the continuation of the previous plan:

When the project is the revision of an existing land use or regulatory plan, policy or ongoing operation, the “no project” alternative will be the continuation of the existing plan, policy or operation into the future. Typically this is a situation where other projects initiated under the existing plan will continue while the new plan is developed. Thus, the projected impacts of the proposed plan or alternative plans would be compared to the impacts that would occur under the existing plan.
(CEQA guidelines, 15125(a))

The DEIR appears to commit a fundamental error in specification of the No Action alternative. Instead of listing the No Action Alternative as continuing all elements of the current CALFED management plan, the DEIR only lists a few current projects being implemented under the Storage and Conveyance elements of CALFED, and the Dutch Slough Tidal Marsh Restoration Project. The CALFED Bay-Delta Program is much broader in scope than these specific projects. This plan, which was described in 2005 by the Department of Water Resources as the “largest and most comprehensive water management and ecosystem restoration program in the nation”² has 12 elements, which together constitute “broadly described programmatic actions which set the long-term, overall direction of the 30 year CALFED program”³

¹ CALFED June 2005 Program Status, http://calwater.ca.gov/content/Documents/CALFED_ProgramStatus_June_2005.pdf

² Ibid.

³ CALFED Record of Decision, p. 4

The CALFED Record of Decision, here incorporated by reference, lists the following twelve elements⁴

- Governance
- Ecosystem Restoration
- Watersheds
- Water Supply Reliability
- Storage
- Conveyance
- Environmental Water Account
- Water Use Efficiency (conservation and recycling)
- Water Quality
- Water Transfers
- Levees
- Science

To the extent that the Delta Plan Programmatic EIR is intended to replace the CALFED Programmatic EIR for the purpose of tiering new projects, the Delta Stewardship Council needs to explicitly consider the existing CALFED goals, objectives, performance measurements and implementation commitments for these elements as part of the No Action alternative in the DEIR. Each section of the DEIR should explicitly compare the draft Delta Plan policies with the corresponding sections of the CALFED management plan as described in the CALFED Record of Decision.

The Delta Plan does not have adequate specification to be a comprehensive management plan in any of these areas. Therefore, to provide for an adequate comparison between the new Programmatic EIR, and the CALFED Programmatic EIR, the Delta Stewardship Council needs to clarify where the Delta Plan incorporates the goals, objectives, performance measurements and implementation and mitigation commitments in the CALFED Programmatic EIR, and where the Delta Policies are intended to be an addition or replacement for the goals, objectives, performance measurements and implementation and mitigation commitments. The DEIR needs to specifically address the commitments made by the Secretary of Natural Resources in attachment 1, California Environmental Quality Act Requirements, here incorporated by reference.

2. The Delta Plan and DEIR should address inconsistencies with the existing CALFED implementation agreements.

The Delta Reform Act does not address the incorporation of existing programs into the Delta Plan, stating only that:

The council may incorporate other completed plans related to the Delta into the Delta Plan to the extent that the other plans promote the coequal goals.
(Section 85350)

⁴ CALFED Record of Decision, p. 7.

Furthermore, the Delta Plan states that the plans of other agencies must be consistent with the Delta Plan.

State or local agencies that propose to undertake covered actions are required to certify with the Council, prior to initiating implementation, that these proposed plans, programs, or projects are consistent with the Delta Plan (Water Code section 85225 et seq.).

However, the Delta Reform Act also states that the creation of the Delta Stewardship Council does not affect the California Endangered Species Act, the Porter-Cologne Water Quality Control Act, the California Environmental Quality Act, or the application of the public trust doctrine (Delta Reform Act, section 85032.)

In addition, the Natural Resources Agency, the Department of Water Resources, and the Department of Fish and Game are all signatories to the Conservation Agreement regarding the Multi-Species Conservation Strategy, which a joint agreement with the United States Fish and Wildlife Service, the United States Bureau of Reclamation, the United States Bureau of Land Management, the National Marine Fisheries Service, the United States Environmental Protection Agency, the United States Army Corps of Engineers, and the Natural Resource Conservation Service. The Conservation agreement states that ‘This Agreement shall be in effect for thirty years following the Effective Date, unless extended by amendment or terminated.’ With respect to termination, the agreement states, ‘Only the Resources Secretary or the Secretary of the Interior may terminate this Agreement.’ (CALFED ROD, Attachment 5, p. 11.)

Therefore, it seems imperative that the Delta Stewardship Council explicitly consider the existing regulatory environment, including existing commitments under the CALFED Record of Decision and the associated agreements, including the Clean Water Act Section 404 Memorandum of Understanding, the Clean Water Act Section 401 Memorandum of Understanding, and the Coastal Zone Management Act Programmatic Consistency Determination, here incorporated by reference, both in the Delta Plan and the Delta Plan DEIR.

This is required for a new Programmatic EIR for the Delta under section 15125 of CEQA guidelines:

The EIR shall discuss any inconsistencies between the proposed project and applicable general plans, specific plans, and regional plans. Such regional plans include, but are not limited to, the applicable air quality attainment or maintenance plan or State Implementation Plan, area-wide waste treatment and water quality control plans, regional transportation plans, regional housing allocation plans, regional blueprint plans, plans for the reduction of greenhouse gas emissions, habitat conservation plans, natural community conservation plans and regional land use plans for the protection of the Coastal Zone, Lake Tahoe Basin, San Francisco Bay, and Santa Monica Mountains.
(CEQA guidelines 15125(d))

3. The CALFED agencies should be formally consulted in drafting the Delta Plan and Delta Plan Programmatic EIR.

The Delta Reform Act mandates that the council shall consult with other agencies with

responsibilities in the Delta:

(b) In developing the Delta Plan, the council shall consult with federal, state, and local agencies with responsibilities in the Delta. All state agencies with responsibilities in the Delta shall cooperate with the council in developing the Delta Plan, upon request of the council.

We argue that, to the extent that the Delta Plan is intended to be a legally enforceable plan for the Delta, and a new Programmatic EIR for projects in the Delta, it will need to be reviewed and approved by the agencies that are signatories to CALFED, as discussed in the previous section of these comments. The CEQA guidelines § 21080.4 (c) suggest that the Office of Planning and Research can assist the Delta Stewardship Council in identifying responsible agencies and trustee agencies.

4. The Delta Plan needs to more explicitly define the role of the Delta Stewardship Council as a successor to the California Bay-Delta Authority.

The Delta Plan states that the Delta Stewardship Council “has an important role as a facilitator, coordinator, and integrator of activities among the local, State, and federal agencies and other entities that affect the Delta and statewide water supply reliability.”⁵ However, the Delta Plan does not clearly identify how the Delta Stewardship Council will perform that role, stating only that the Delta Stewardship Council will “commence regular, public coordination meetings of the appropriate and interested federal, State, and local agencies and stakeholders after adoption of the Delta Plan.”

The Delta Reform Act stated that the Delta Stewardship Council “shall be the successor to the California Bay-Delta Authority,” and “shall assume from the California Bay-Delta Authority all of the administrative rights, abilities, obligations, and duties of that authority.” (Delta Reform Act section 85034)

Section 79401 of the Bay-Delta Authority Act defined these duties as follows:

(g) The agencies participating in the California Bay-Delta Program have prepared a 30-year plan to coordinate existing programs and direct new programs to improve the quality and reliability of the state’s water supplies and to restore the ecological health of the bay-delta watershed.

(h) To ensure efficiency, transparency, and accountability in decision making, the implementation of the California Bay-Delta Program requires the establishment of an authority. The authority is intended to accomplish all of the following:

- (1) Provide accountability to the Legislature, Congress, and interested parties for the program’s performance.
- (2) Promote the implementation of the program in a balanced manner.
- (3) Provide consistent monitoring, assessment, and reporting of the agencies’ individual and cumulative actions.

⁵ Fifth Staff Draft Delta Plan, p. 55, “Facilitation, Coordination, and Integration”

- (4) Provide the use of sound, consistent science across all program elements.
- (5) Coordinate existing and new government programs to meet common goals, avoid conflicts, and eliminate redundancy and waste.
- (6) Oversee coordinated implementation of the California Bay-Delta Program in a manner that is consistent with the mission statement, goals, and objectives of the CALFED Bay-Delta Program Record of Decision, dated August 28, 2000, or as it may be amended.

The need for a coordinating entity was also specified in the CALFED Record of Decision, which was signed by the Secretary of Natural Resources:

.... the CALFED Agencies will work with the State Legislature and the Congress to develop legislation for a permanent joint Federal-State commission ... The new commission would provide direction and oversight in implementing the long-term plan described in this document and the Final Programmatic EIS/EIR....

Major responsibilities of the Commission would include: reviewing and approving program priorities and budget proposals; assessing and reporting on progress toward program goals; coordinating within CALFED and with related programs to maximize resources and reduce conflicts; resolving disputes among CALFED Agencies; and maintaining contact with and receiving communications from the public and the media, as well as Congress and the California Legislature. The overarching mandate of the Commission would be to assure effective, balanced and coordinated implementation in all program areas.

(CALFED Record of Decision, p.31-32)

This coordinating commission was enacted in the California Bay-Delta Authority Act of 2003.

The abolishment of the Bay-Delta Authority, and its replacement by the Delta Stewardship Council, was recommended in the Delta Vision Strategic Plan:

Delta Vision Task Force, Recommendation 7.1: Establish a new California Delta Ecosystem and Water Council as a policy making, planning, regulatory and oversight body,” and “Abolish the existing California Bay-Delta Authority, transferring needed CALFED programs to the California Delta Ecosystem and Water Council.”⁶

The statute creating the Delta Stewardship Council and abolishing the Bay-Delta Authority was very close to the proposal of the Delta Vision Task Force. In addition to directing that the Delta Stewardship Council assume “all of the duties, rights, and obligations” of the Bay-Delta Authority, the Delta Reform Act stated that:

The policy of the State of California is to achieve the following objectives that the Legislature declares are inherent in the coequal goals for management of the Delta....
“Establish a new governance structure with the authority, responsibility, accountability,

⁶ Delta Vision Final Report, http://deltavision.ca.gov/BlueRibbonTaskForce/FinalVision/Delta_Vision_Final.pdf

scientific support, and adequate and secure funding to achieve these objectives.” (Section 85020)

The intent of the legislature to have the Delta Stewardship Council assume the management and coordinating duties of the Bay-Delta Authority with respect to the CALFED program and other Delta programs seems fairly clear. To meet these statutory and regulatory requirements, the Delta Plan and the Delta Plan DEIR should explicitly discuss the coordination, monitoring, assessment, and reporting responsibilities of the CALFED Bay-Delta Authority in section 79401(h) and explain clearly how the Delta Stewardship Council will assume these duties.

4. The Delta Plan and DEIR need to clearly define the Delta Science Program

The Delta Plan states that the Delta Science Program will “provide oversight of the scientific research, monitoring, and assessment programs that support adaptive management of the Delta and shall report regularly to the Council on this topic, including making recommendations to the Council.” (Fifth Staff Draft Delta Plan, p54.) But the Delta plan fails to provide specific details.

It is not clear how the Delta Stewardship Council plans to continue the monitoring and adaptive management role of the Science Program. The Delta Plan only states:

“... A comprehensive monitoring plan for the Delta should expand on the work of the IEP and plan for coordinated synthesis, integration, and communication beyond monitoring associated with covered actions.”

And states that:

“... The Delta Science Program will play a central role in working with others (such as the IEP and Bay Delta Conservation Plan) to develop a Delta Science Plan by January 1, 2013.”

Suggesting parameters for a monitoring plan and a proposal to develop a Delta Science Plan is not the same as describing an actual monitoring plan and a Delta Science Plan. These elements should be defined in order to meet the Delta Reform Act statutes and also to allow an adequate CEQA analysis of the changes with respect to the previous CALFED Science Program.

In 2009, the Delta Reform Act tasked the Delta Stewardship Council with assuming the management of the science element of the CALFED program.

The council shall assume from the California Bay-Delta Authority all responsibility to manage, in accordance with Chapter 5 (commencing with Section 85280) of Part 3, the science program element that was required to be undertaken by Division 26.4 (commencing with Section 79400) (Section 85034(d))

These duties included the following:

(3) Provide consistent monitoring, assessment, and reporting of the agencies’

individual and cumulative actions.

- (4) Provide the use of sound, consistent science across all program elements.
(California Water Code, Division 26.4, Section 79401(h))

The Science Program element of CALFED is a core part of the adaptive management strategy for CALFED and required as a condition of allowing the increased maximum pumping levels by the State Water Project in the CALFED decision. The CALFED ROD states:

“Implementation of the CALFED Science Program includes implementation of the Comprehensive Monitoring, Assessment and Research Program (CMARP), now under the direction of the interim lead scientist. The Science Program also has primary responsibility to establish the role of adaptive management in program implementation, implement strategies to reduce uncertainties that impede successful accomplishment of CALFED goals, provide programmatic review of overall implementation of mitigation measures and integrate the CALFED Science Program with existing/related agency science programs.” (CALFED Record of Decision, p. 74-75)

The CALFED ROD described the scope of the CALFED Science Program:

- Coordinate existing monitoring and scientific research programs.
- Establish performance measures and indicators, and a consistent strategy of on-going development of these, for each of the program areas.
- Develop an annual science report, format and content, which includes:
 - o Status of the species and effectiveness of efforts to improve conditions, including EWA, ERP and water management strategies, and provide recommendations to maximize fishery benefits while minimizing impacts to water supply.
- Assessment of progress and effectiveness of each program element as indicated by performance measures and indicators.
- Recommended research and/or program adjustments.

To meet the existing regulatory obligations of the Delta Stewardship Council as the successor lead agency in implementing the Science Program in the CALFED Record of Decision, the Delta Plan must clearly define how these essential functions of the CALFED Science program will be carried out, and the Delta Plan DEIR should discuss impacts of any substantial changes with respect to the structure of the previous CALFED Science Program.

As an example of the comprehensiveness of the CALFED Science Program, I include by reference Chapter 4, Part A of the July 2000 CALFED EIS/EIR, which described the proposed monitoring and focused researched program.⁷ Categories included Algae & Plankton, Birds, Contaminants, Fish, Invasive Species, Invertebrates, Vegetation, Terrestrial and Aquatic Species, Energetics & Nutrient Cycling, Aquifers, Channel, Sediment, Soils, Habitat, Flow, Groundwater, and Water Quality.

Studies done under the CALFED Science Program in the biological categories (Algae &

⁷ CALFED EIS/EIR, Chapter 4, Part A

http://calwater.ca.gov/content/Documents/library/July2000_EIS_EIR/311/311_Chapter4_PartA.pdf

Plankton, Birds, Contaminants, Fish, Invasive Species, Invertebrates, Vegetation, Terrestrial and Aquatic Species) have been absolutely critical to understanding the deterioration in the health of the Delta ecosystem, and particularly the reasons for the Pelagic Organism Decline. Some of these studies are ongoing.

The lack of definition of the science component of the Delta Plan with respect to these biological categories makes it impossible to analyze how it will function as an adaptive management program.

5. The Delta Plan and DEIR need to clearly define the role of the Independent Science Board in providing scientific review of research, monitoring, and assessment programs

The CALFED Independent Science Board carried out independent, peer-reviewed scientific review of research monitoring and assessment programs that supported adaptive management of the Delta.

The Delta Reform Act explicitly mandated the continuation of these functions in the new Delta Independent Science Board:

(3) The Delta Independent Science Board shall provide oversight of the scientific research, monitoring, and assessment programs that support adaptive management of the Delta through periodic reviews of each of those programs that shall be scheduled to ensure that all Delta scientific research, monitoring, and assessment programs are reviewed at least once every four years.

(4) The Delta Independent Science Board shall submit to the council a report on the results of each review, including recommendations for any changes in the programs reviewed by the board.

(Delta Reform Act Section 803504(a))

The “Adaptive Management Framework” in the Delta Plan describes how the Independent Science Board might carry out these functions, but does not actually specify the role of the Independent Science Board. As such, the independent scientific review component is not specified sufficiently to evaluate how well it will perform. The 2010 charge by the Delta Stewardship Council to the Independent Science Board⁸, should be incorporated in the Delta Plan and should be compared with the previous charge to the CALFED Independent Science Board and the mandates under the CALFED Record of Decision. The mandates under the CALFED ROD are described in the resolution of the Bay-Delta Authority creating an Independent Science Board, dated 2003.⁹ That resolution is incorporated by reference.

⁸ Delta Stewardship Council Charge to the Independent Science Board, approved August 26, 2010. Available at http://www.deltacouncil.ca.gov/sites/default/files/documents/files/d-isb_2010_charge_final.pdf

⁹ California Bay-Delta Authority, Consideration of a Resolution Adopting an Independent Science Board, August 14, 2003. Available at http://www.science.calwater.ca.gov/pdf/isb/CBDA_report_ISB_consideration_081403.pdf

6. The Delta Plan monitoring, coordination, and science elements need to be independent of the Bay Delta Conservation Plan.

The DEIR describes the Bay-Delta Conservation planning process, that will prepare a habitat conservation plan for the Delta. The BDCP plan will include several elements that are currently being implemented under CALFED, including

Providing for an adaptive management and monitoring program
Providing a comprehensive science-based restoration program for the Delta.

However, the BDCP plan is not currently part of the Delta Plan, and the Delta Plan does not assume adoption of the BDCP. In fact, the Fifth Staff Draft Delta Plan describes alternative actions to ensure a reliable water supply if the BDCP is not finished by 2014:

The relevant federal, State, and local agencies should complete the Bay Delta Conservation Plan, consistent with the provisions of the Delta Reform Act, and receive required incidental take permits by December 31, 2014. If the Bay Delta Conservation Plan process is not completed by this date, the Delta Stewardship Council will consider how to proceed with an alternative process to develop and complete the ecosystem and conveyance planning process.

The sections of the Delta Reform Act mandating the preparation of the Delta Plan are separate from the section on the Bay-Delta Conservation Plan. In particular, it is clear that the requirements in section 85030 eg. seq. to define specific goals and objectives and quantitative metrics in the Delta Plan are separate from incorporation of any proposed project or covered action into the Delta Plan, including the Bay Delta Conservation Plan.

These elements need to be described with sufficient breadth, depth, specificity in the Delta Plan. Changes can be incorporated as revisions to the Delta Plan.

7. Statutory Adequacy of the Delta Plan with respect to section 85302.

The following sections address the statutory adequacy of the Delta Plan with respect to section 85302.

7A. Ecosystem Goals

With respect to ecosystem goals, section 85302(c) states that:

The Delta Plan shall include measures that promote all of the following characteristics of a healthy Delta ecosystem:

- (1) Viable populations of native resident and migratory species.
- (2) Functional corridors for migratory species.
- (3) Diverse and biologically appropriate habitats and ecosystem processes.
- (4) Reduced threats and stresses on the Delta ecosystem.

(5) Conditions conducive to meeting or exceeding the goals in existing species recovery plans and state and federal goals with respect to doubling salmon populations.

The proposed ecosystem goals for the Delta Plan are not well defined. As an example, the Delta Plan describes a plan to hold a workshop to draft ecosystem goals:

The Delta Science Program, in conjunction with the Department of Fish and Game, the Department of Water Resources, the State Water Resources Control Board, and other relevant agencies and stakeholders, should conduct workshops to develop recommendations to the Delta Stewardship Council for measures to reduce stressor impacts on the Delta ecosystem that would support and be consistent with the coequal goals. For example, workshops would consider options for varying salinity to reduce impacts of nonnative invasive species while providing overall ecosystem benefits and minimally disrupting water supply. The recommended measures could be adopted as policies or recommendations by the Delta Stewardship Council into an amended Delta Plan. The resulting recommendations should be provided to the Delta Stewardship Council by January 1, 2013

The statutory mandate in section 85302(c) is to create ecosystem goals, not a plan to hold a workshop to draft ecosystem goals. The goals in this section should be reviewed for compliance with the statute.

In addition, as mandated by CEQA Guidelines section 15124, the DEIR needs to explicitly compare the Delta Plan goals with the CALFED goals with respect to ecosystem restoration, and their associated subgoals:

- Recover endangered and other at-risk species and native biotic communities.
- Rehabilitate ecological processes.
- Maintain or enhance harvested species populations.
- Protect and restore habitats.
- Prevent establishment of and reduce impacts from non-native invasive species.
- Improve or maintain water and sediment quality

We incorporate the CALFED Ecosystem Restoration Program goals and subgoals by reference.¹⁰

If the Delta Plan continues to abandon of the goals of “recover endangered and other at-risk species and native biotic communities” and “maintain or enhance harvested species populations” the DEIR needs to analyze this abandonment in the state’s management plan for the Delta, and explicitly consider the potential effects on the environment.

The current draft Delta Plan also references the draft by the CALFED Program’s Ecosystem Restoration Program implementing agencies for the revised plan for Multi-Agency Ecosystem Restoration Program, as mandated for Stage 2 of the CALFED program implementation:

“ CALFED program implementation was broken into two stages, Stage 1 (2000–2007) and Stage 2 (2008–2030), to allow reevaluation of its preferred alternative. A program performance evaluation conducted at the end of Stage 1 found that CALFED’s through-Delta water supply conveyance alternative had not achieved sufficient progress in sustaining viable populations of endangered and threatened aquatic species or in ecosystem restoration, levee stability, or water supply reliability. In response, the CALFED Program’s Ecosystem Restoration Program (ERP) Implementing Agencies developed the Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions (DFG 2011).”

Since the Delta Stewardship Council is the successor to the Bay-Delta Authority in coordinating and planning this critical interagency effort, the Delta Plan needs to not just reference Stage 2 of implementation of the Multi-Agency Ecological Restoration Program in the new Delta Plan, but should explicitly consider incorporation of both Stage 1 and planned adoption of Stage 2 into the Delta Plan.

We also assert that the Department of Fish and Game should be consulted on this section the Delta Plan, and as a trustee agency, would have to sign off on the Delta Plan and the Delta Plan EIR. For this reason, we assert that the sections of the Delta Plan addressing section 85302 (c) are deficient.

7B. Performance Measurements

The Delta Plan is also required to include performance measurements in meeting goals and objectives:

85211. The Delta Plan shall include performance measurements that will enable the council to track progress in meeting the objectives of the Delta Plan. The performance measurements shall include, but need not be limited to, quantitative or otherwise measurable assessments of the status of

- (a) The health of the Delta’s estuary and wetland ecosystem for supporting viable populations of aquatic and terrestrial species, habitats, and processes, including viable populations of Delta fisheries and other aquatic organisms.
- (b) The reliability of California water supply imported from the Sacramento River or the San Joaquin River watershed.

In “Performance Indicators for the Delta,” Michael Healy also described a matrix of potential performance measures, which we incorporate here by reference.¹¹

The Fifth Staff Draft Delta Plan appears to partly incorporate these proposed performance measures, providing a list “provisional” metrics for assessment of the status of the health of the

¹¹ Performance Indicators for the Delta. (available at http://science.calwater.ca.gov/pdf/isb/meeting_051908/Attachment_C_DeltaEcoPerformance_Healey.pdf)

Delta's estuary and wetland ecosystem. However, the metrics are all qualitative "progress towards" metrics rather than actual quantitative metrics. It would appear that these metrics simply do not meet the statutory mandate, because they are both provisional and qualitative.

At a minimum, the Delta Stewardship Council should include measurements of size of fish populations in the Delta, that are currently tracked by the Department of Fish and Game, including salmonids and listed fish species, as well as other listed species. We request that the Delta Stewardship Council consider for incorporation into the Delta Plan the original "program-wide" ecosystem indicators proposed by the CALFED ecosystem restoration program Performance Indicators Coordination Team. These included measurements of health of populations of Bay-Delta dependent salmonids, other Delta dependent resident native fishes, including Delta smelt, Sacramento splittail, Longfin smelt, and Green Sturgeon, as well as tracking the extent of "estuarine and freshwater marsh plant communities, riparian plant communities, and seasonal wetlands communities." That proposal is incorporated here by reference.¹²

7C. Water Quality

Section 85032(d) requires the following:

- (d) 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.

With regard to requirements (1) and (3), the Delta Plan only explicitly incorporates the CALFED Water Quality Objectives until the State Water Resources Board updates the Bay-Delta Water Quality Control Plan and flows:

The State Water Resources Control Board should update the Bay-Delta Water Quality Control Plan 4 objectives and establish flows as follows:

- a) By June 2, 2014, adopt and implement updated flow objectives for the Delta that are necessary to achieve the coequal goals.⁴⁰
- b) By June 2, 2018, develop flow criteria for high-priority tributaries in the Delta watershed 8 that are necessary to achieve the coequal goals. ⁴¹

Prior to the establishment of revised flow objectives criteria identified above, the existing Bay-Delta Water Quality Control Plan objectives shall be used to determine consistency with the Delta Plan. By June 30, 2013, the Delta Stewardship Council will request an update from the State Water Resources Control Board on items ER P1 (a) and (b). If the Board indicates the items (a) or (b) cannot be met by the dates provided, the Delta Stewardship Council will consider and may

¹² CALFED ERP P Draft "Program-Wide" Program Performance Indicators

amend the Delta Plan to achieve progress on the coequal goals in place of the updated flow objectives.¹³

This regulation does not establish any clear objectives for salinity control in the Delta, nor does it define any metrics for tracking the objective. The prospective actions are also not clearly defined, stating only that if the State Water Resources Board does not act by the specified dates, the Delta Stewardship Council “will consider and may amend the Delta Plan to achieve progress on the coequal goals in place of the specified flow objectives.”

The Delta Plan also needs to also consider the existing Water Quality Program in the CALFED Record of Decision and the objectives that involve sources of contaminants to the Delta that are outside of the Delta. As a successor to the Bay-Delta Authority, the Delta Stewardship Council has the administrative rights, abilities, and duty to continue implementation of these objectives.

Under CEQA Guidelines Section 15125, the DEIR should compare the Delta Plan goals and objectives with the performance measurements and prescribed actions under the CALFED Water Quality Program, both in the near term and after 2014.

The CALFED Program includes the following actions, defined in the California Environmental Quality Act Requirements¹⁴

- Drinking water parameters - Reduce the loads and/or impacts of bromide, total organic carbon (TOC), pathogens, nutrients, salinity, and turbidity through a combination of measures that include source reduction, alternative sources of water, treatment, storage and if necessary, conveyance improvements such as a screened diversion structure (up to 4000 cfs) on the Sacramento River between Hood and Georgiana Slough. The Conveyance section of this document includes a discussion of this potential improvement.
- Pesticides - Reduce the impacts of pesticides through (1) development and implementation of BMPs, for both urban and agricultural uses; and (2) support of pesticide studies for regulatory agencies, while providing education and assistance in implementation of control strategies for the regulated pesticide users.
- Organochlorine pesticides - Reduce the load of organochlorine pesticides in the system By reducing runoff and erosion from agricultural lands through BMPs.
- Trace metals - Reduce the impacts of trace metals, such as copper, cadmium, and zinc, in upper watershed areas near abandoned mine sites. Reduce the impacts of copper through urban storm water programs and agricultural BMPs.
- Mercury - Reduce mercury levels in rivers and the estuary by source control at inactive and abandoned mine sites.
- Selenium - Reduce selenium impacts through reduction of loads at their sources and through appropriate land fallowing and land retirement programs.
- Salinity - Reduce salt sources in urban and industrial wastewater to protect drinking and agricultural water supplies, and facilitate development of successful water recycling,

¹³ Fifth Staff Draft Delta Plan, p. 113

¹⁴ CALFED Record of Decision, attachment 1, California Environmental Quality Act Requirements, CEQA Findings of Fact, p. 6

source water blending, and groundwater storage programs. Salinity in the Delta will be controlled both by limiting salt loadings from its tributaries, and through managing seawater intrusion by such means as using storage capability to maintain Delta outflow and to adjust timing of outflow, and by export management.

- Turbidity and sedimentation - Reduce turbidity and sedimentation, which adversely affect several areas in the Bay Delta and its tributaries.
- Low dissolved oxygen - Reduce the impairment of rivers and the estuary from substances that exert excessive demand on dissolved oxygen.
- Toxicity of unknown origin - Through research and monitoring, identify parameters of concern in the water and sediment and implement actions to reduce their impacts to aquatic resources.

For these reasons, I believe the draft sections of the Delta Plan on water quality need to be greatly expanded. The Delta Plan should include a table that compares the Delta Plan water quality elements with the CALFED water quality elements, and explain how the goals, objectives, outcome measures, and commitments to water quality in CALFED will be continued.

8. Prior to incorporation of the Bay Delta Conservation Plan into the Delta Plan, the Delta Stewardship Council should have the Attorney General review the proposed changes for compliance with state law.

There appear to be fundamental issues with the currently proposed governance structure for the Bay-Delta Conservation Plan, in that it attempts to realign some duties of the Department of Water Resources, the Department of Fish and Game, and the Delta Stewardship Council, to a new “Bay Delta Implementation Office” without an act of the legislature. There seems to also be some confusion about the statutory authority of these two Departments and the Delta Stewardship Council to authorize the realignment. The Delta Stewardship Council should require that the new governance structure be independently reviewed by office of the Attorney General for compliance with state law.

The Bay-Delta Conservation Plan currently proposes that the new conveyance will be constructed by the state and federal water contractors, and managed by an Implementation Office, which will be overseen by an Implementation Board consisting of representatives from the water agencies, as well as a representative from the Department of Water Resources and a representative from the U.S. Bureau of Reclamation.

The Implementation Board would hire and oversee a “BDCP Program Manager” who would run the “BDCP Implementation Office”:

The BDCP Implementation Office, under the direction of the Program Manager, will implement, coordinate, oversee, and report on all aspects of plan implementation, subject to the oversight of the Implementation Board and the limitations set out in section 7.1.4 of this chapter [...]

The Program Manager, with the assistance of the IO staff, will ensure that the BDCP, including the conservation measures, including those related to protection and restoration

of habitat; reduction of ecological stressors; management of conserved habitat; and operation of the water projects, including the development of infrastructure (in its oversight role to ensure plan compliance), are properly implemented throughout the life of the Plan. The Program Manager will also oversee and effectuate the adaptive management program; monitoring, data collection, and scientific research efforts; annual and five-year work plans, budget, and report preparation; and the public outreach process.

This structure would essentially put the management of these functions under the oversight of the Implementation Board. However, it does not appear that the Department of Water Resources has the authority to create the proposed Implementation Board as an entity of the state of California and reassign the statutory duties of its own or other departments within the Natural Resources division. The statutes authorizing the creation of the Department of Water Resources state only that:

For the purpose of administration, the director shall organize the department with the approval of the Governor in the manner he deems necessary to segregate and conduct the work of the department properly. With the approval of the Governor, the director may create such divisions and subdivisions as may be necessary and change or abolish them from time to time...
...Any branch office so established shall be under the control of a branch office manager who, subject to the direction and control of the director, shall represent the department in all matters under the department's jurisdiction in the region.
(California Water Code, section 125)

Similarly, the authority for the Governor to reassign functions amongst agencies requires enactment by statute:

Authority may be provided by statute for the Governor to assign and reorganize functions among executive officers and agencies and their employees, other than elective officers and agencies administered by elective officers.
(California Constitution, Article 5 Executive, Section 6)

So, absent an act of the legislature, it would appear that the proposed Implementation Office could not be created outside of the Department of Water Resources, or assigned duties of other departments within the Natural Resources Agency, nor could the Implementation Board be created as an Board of the State of California with the proposed oversight powers.

It is also not clear if the proposed Implementation Board is even intended to be an agency of the State of California, or is intended to be the type of governing structure that would be implemented if the Department of Water Resources entered into a Joint Powers agreement with the State and Federal Water Contractors and transferred operation of the State Water Project under section the Joint Powers Act. Again, it appears that this could not be done without

authorization by the legislature.

For these reasons, the assertions in the BDCP governance chapter that the proposed structure “will not result in delegation of authority” appears unlikely to withstand legal challenge. These fundamental reassignments of duties of Departments within Natural Resources are also unusual as part of a Habitat Conservation Plan. The original proposal was for the state and federal water contractors participating in BDCP to be on an advisory council, which would be much more appropriate if the Department of Water Resources was to own and operate the new facility.¹⁵

During the most recent public meeting on the Bay-Delta Conservation Program, I asked the Director of Water Resources what entity was going to enact these changes, whether it was the Department of Water Resources, the Delta Stewardship Council, or the legislature. The Director replied that he believed that the “fish agencies” would sign off on the proposed governance changes.

It is clear that the Department of Fish and Game and the National Marine Fisheries Service do not have the authority to approve these proposed changes to the operations of the State Water Project. Because incorporation of the Bay Delta Conservation Plan into the Delta Plan could be seen as formal enactment of these governance changes, the Delta Stewardship Council should ensure that the proposed changes are approved by the Attorney General prior to enactment.

9. The Delta Stewardship Council Coordinating Committee is the appropriate place for participation by water contractors.

Under section 82504 of the Delta Reform Act, the Delta Stewardship Council has the authority to create a coordinating committee of agencies responsible for implementing the Delta Plan.

85204. The council shall establish and oversee a committee of agencies responsible for implementing the Delta Plan. Each agency shall coordinate its actions pursuant to the Delta Plan with the council and the other relevant agencies.

The Fifth Staff Draft Delta Plan describes this coordinating committee:

In recognition that other government agencies have authorities and responsibilities that are critical to the achievement of the coequal goals, the Delta Reform Act requires the Council to establish and oversee a committee of agencies responsible for implementing the Delta Plan. The statute directs each agency to coordinate its actions pursuant to the Delta Plan with the Council and other relevant agencies. The Council will commence regular, public coordination meetings of the appropriate and interested federal, State, and local agencies and stakeholders after adoption of the Delta Plan. In addition, Council staff has met with federal agencies and is developing the Delta Plan in consultation with these agencies in order to pursue future consistency and compliance with the Coastal Zone Management Act, as required by Water 6 Code section 85300(d)(1)(A).

This seems a much more appropriate structure for coordinating the implementation of the Bay Delta Conservation Plan amongst the various state and federal agencies, and the state and federal water contractors, and is in much better agreement with the Delta Reform Act authorizing statute.

The creation of such a committee should be done with full consideration of the co-equal goal of protecting, restoring and enhancing the Delta ecosystem, and also with the understanding that the committee should include all state agencies and departments which are involved in actions in the Delta.

10. Prior to incorporation of the BDCP into the Delta Plan, the Delta Stewardship Council should ensure consistency of the proposed BDCP governance plan with the Delta Reform Act.

In addition to having the Attorney General look at the statutory compliance of the proposed BDCP Implementation Board and BDCP Implementation Office, there are some specific details with respect to the proposed BDCP Implementation Office which should be evaluated with respect to consistency with the Delta Reform Act prior to incorporation in the Delta Plan.

9A. Oversight over habitat conservation measures

The proposed BDCP governance plan gives the “BDCP Implementation Office” oversight over implementation of “conservation measures, including those related to protection and restoration of habitat” and “management of conserved habitat.” However, it appears that the Delta Reform Act gives fundamental authority or oversight of habitat-related land management decisions in the Delta to the Delta Protection Commission and the Delta Stewardship Council, as well as responsibility to ensure that the covered actions are consistent with the Delta Economic Sustainability Plan. We would request that the Delta Stewardship Council ensure that any governance structure is consistent with exercising these statutory responsibilities.

9B. Duties of BDCP Science Officer

The current BDCP governance proposal proposes hiring a Science Officer under oversight of the BDCP Implementation Office, who will oversee the implementation of the Bay Delta Conservation Plan. The current draft states:

The Program Manager, with the concurrence of the Implementation Board, will select a Science Manager to assist with the implementation of the BDCP and to ensure that such implementation decisions are guided by the best available scientific information. The Program Manager will consult with the Implementation Board and the fish and wildlife agencies and the Stakeholder Council in the selection of the Science Manager. The Science Manager will report to the Program Manager. Specifically, the responsibilities of the Science Manager include:

- Assist in the administration and implementation of the adaptive management program;
- Oversee the implementation of the BDCP monitoring and research program,

with the assistance of the IEP and other science programs;

- Oversee the implementation of the BDCP adaptive management program;
- Engage in regular communication and coordination with the Delta Science Program and coordinate with the Independent Science Board, in a manner consistent with Water Code

section 85820, as well as other outside scientists to gather independent scientific information and solicit input and review, as needed, and contract with the Independent Science Board or other scientists to provide such input and review, as needed;

- Support the Program Manager in the preparation of reports and other technical documents; and
- Assist in building sufficient scientific capacity and resources within the IO to advance the goals and objectives of the BDCP.

These duties appear to significantly overlap the duties of the Independent Science Board, as specified in section 85820:

(3) The Delta Independent Science Board shall provide oversight of the scientific research, monitoring, and assessment programs that support adaptive management of the Delta through periodic reviews of each of those programs that shall be scheduled to ensure that all Delta scientific research, monitoring, and assessment programs are reviewed at least once every four years.

(4) The Delta Independent Science Board shall submit to the council a report on the results of each review, including recommendations for any changes in the programs reviewed by the board.

(b) After consultation with the Delta Independent Science Board, the council shall appoint a lead scientist for the Delta Science Program.

[...]

(2) The term of office for the lead scientist shall be no more than three years. The lead scientist may serve no more than two terms.

(3) The lead scientist shall oversee the implementation of the Delta Science Program. In carrying out that responsibility, the lead scientist shall regularly consult with the agencies participating in the program.

The Department of Water Resources should not attempt to subvert the intent of the legislature in establishing an Independent Science Board and lead scientist by creating a parallel structure under the oversight of DWR or a joint agency consisting of DWR and the state and federal water contractors. Such a board would, by its very structure, not be independent.

In the Delta Plan, the Delta Stewardship Council needs to adequately specify the duties of the Independent Science Board with respect to these statutory functions, so that the independence of

the scientific oversight process can be confirmed.

The Delta Plan DEIR needs to also specifically address the independence of the scientific oversight process.

9C. In incorporating the Bay Delta Conservation Plan into the Delta Plan, the Delta Stewardship Council needs to address the disparity in qualifications of the BDCP Science Officer

The qualifications required of the proposed Science Officer for the BDCP Implementation Office are substantially less than those required for the lead scientist for the Delta Science Program. The lead scientist for the Delta Science Program is mandated to have the following qualifications:

- (1) The lead scientist shall meet all of the following qualifications:
 - (A) Hold an advanced degree in a field related to water or ecosystem management.
 - (B) Have a strong record of scientific research and publication in peer-reviewed scientific journals in a field related to water or ecosystem management.
 - (C) Have experience advising high-level managers in science-based decisionmaking in the areas of water management and ecosystem restoration.
 - (D) Have the capability to guide the application of an adaptive management process to resource management policy decisions in the Delta.

The proposed qualifications for the Science Officer of the “BDCP Implementation Office” are substantially less:

Minimum requirements for the [BDCP] Science Officer will be:

- Educational and professional background in relevant scientific disciplines,
- At least 10 years of experience in the management of large programs,
- Substantial experience and involvement in the management of large-scale research or monitoring programs,
- Familiarity with water management and ecological issues related to the Delta; and
- Excellent communication skills.

In particular, the requirement for holding an advanced degree in a field related to water or ecosystems management, and a strong record of publication in peer-reviewed scientific journals is noticeably absent for the proposed BDCP Science Officer. The hiring of a Science Officer without these qualifications, and the proposed delegation of the lead scientist of the Independent Science Board to a “coordinating” role in overseeing the science used in the implementation of the Bay Delta Conservation Plan could greatly weaken the use of real, peer-reviewed science in the implementation of the BDCP, and seems contrary to the intent of the Delta Reform Act.

The Department of Fish and Game has also expressed concerns:

p.7-3, line 12: Science Manager: Selection and Function

Comment: The Department believes that the fishery agencies should be involved in the selection of the Science Manager. In addition, the Department is concerned that there is no mandatory requirement for independent scientific review of any decisions. The current language specifies that gathering of independent scientific information will occur “as needed.” Addressing these concerns is particularly important given the broad array of important tasks to be overseen by the science manager including overseeing the implementation of the adaptive management program and the monitoring and research program. The Department has repeatedly made these same comments on prior versions of this chapter.

It is clear that these concerns need to be addressed. In particular, the Delta Stewardship Council needs to ensure that any proposed scientific oversight adopted as part of the BDCP is in agreement with the statutory mandate for the Delta Independent Science Board and the lead scientist exercise oversight of implementation of the Delta Plan.

11. In incorporating the Bay Delta Conservation Plan into the Delta Plan, the Delta Stewardship Council should ensure compliance with the mandate for a “transparent, real-time operational decisionmaking process”

The BDCP governance structure is also critical to the achievement of biological performance measures. The section on incorporation of the BDCP into the Delta Plan states that:

85321. The BDCP shall include a transparent, real-time operational decisionmaking process in which fishery agencies ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations

I am concerned that the governance structure currently proposed takes the fisheries agencies out of real-time, operational decision making with respect to water system operations, and relegates them to provide advice on permitting. These concerns were expressed by the Department of Fish and Game:

The Department believes that either: (1) the fishery agencies should be members of the Implementation Board or (2) it needs to be recognized that the operational range for the projects will substantially restricted. This concern has been raised by the Department previously in earlier versions of Chapter 7. The role of the fishery agencies is a continuing concern throughout the document. See page. 7-12, line 7. The Department believes that it needs to be more involved in plan decisions beyond the ability to revoke the permit in instances where jeopardy is implicated. To be clear, the Department believes its role should be expanded beyond providing “input” and “coordination.”¹⁶

We believe that this separation of the fishery agencies from real-time operational decision making is contrary to the expressed intent of the legislature, and request that the Delta

¹⁶ Department of Fish and Game, comments on proposed BDCP Governance Structure, June 3, 2011.

Stewardship Council have the Attorney General review any governance structure adopted as part of the BDCP implementation process to ensure that it is in agreement with this section.

12. The role of the Delta Watermaster should be more clearly specified.

I could find no role for the Delta Watermaster in the proposed governance structure, although Section 85230 Delta Reform Act clearly states that “The Delta Watermaster shall exercise the [State Water Resources Control] board’s authority to provide timely monitoring and enforcement of board orders and license and permit terms and conditions. The Delta Watermaster’s delegated authority shall include authority to require monitoring and reporting, authority for approvals delegated to an officer or employee of the board by the terms of a water right permit or license, authority to approve temporary urgency changes pursuant to Chapter 6.6 (commencing with Section 1435) of Part 2 of Division 2, and authority to issue a notice of proposed cease and desist order or administrative civil liability complaint.

The Delta Stewardship Council should clearly specify the role of the Delta Watermaster, and the DEIR should analyze the environmental impacts.

13. Revenue Bonding Authority

The Delta Stewardship Council has asked for the authority to issue revenue bonds in the most recent draft of the Delta Plan. However, the draft EIR states that the Delta Stewardship 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.” In that case, I believe that Delta Stewardship council could not issue revenue bonds for any such facilities, because it would neither construct, own, nor operate the facilities.

This assumption seems to be fundamental to both the current Delta Plan and the Delta Plan EIR, and if the Delta Stewardship Council was to change this policy, and propose to construct, own, or operate any facilities, that it would necessitate preparation of a revised Delta Plan and a new EIR.