Stephan C. Volker
Joshua A.H. Harris
Alexis E. Krieg
Stephanie L. Abrahams
Daniel P. Garrett-Steinman
Jamey M.B. Volker
M. Benjamin Eichenberg

Law Offices of
Stephan C. Volker
436 – 14th Street, Suite 1300
Oakland, California 94612
Tel: (510) 496-0600 ❖ Fax: (510) 496-1366
svolker@volkerlaw.com

10.513.01

February 2, 2012

VIA EMAIL AND U.S. MAIL

Delta Stewardship Council
Attn: Terry Macaulay
980 Ninth Street, Suite 1500
Sacramento, CA 95814
eircomments@deltacouncil.ca.gov

Re: Comments of PCFFA, FOR, NCRA, CalSPA, IFR, and Winnemem Wintu Tribe on the Fifth Staff Draft Delta Plan and its Program Environmental Impact Report

Delta Stewardship Council Members:

The Pacific Coast Federation of Fishermen's Associations ("PCFFA"), Friends of the River ("FOR"), North Coast Rivers Alliance ("NCRA"), California Sportfishing Protection Alliance ("CalSPA"), Institute for Fisheries Resources ("IFR"), and the Winnemem Wintu Tribe (collectively, "Conservation Groups") appreciate the opportunity to comment on the Delta Stewardship Council's ("Council's") Fifth Staff Draft Delta Plan ("Draft Plan") and its Draft Program Environmental Impact Report ("DPEIR"). We respectfully request that you revise both the Draft Plan and the DPEIR to bring them into compliance with the Delta Reform Act and CEQA, as discussed below.

I. INTRODUCTION

The largest and most productive estuarine system on the west coast of North and South America – the Sacramento-San Joaquin River Delta – is collapsing for two principal reasons. First, the Central Valley Project ("CVP") and the State Water Project ("SWP") have diverted too much of the Delta's fresh water flows. Second, agricultural diverters have discharged too much contaminated agricultural run-off and return flows into the Delta. These dual threats to the Delta's health have grown steadily over the past five decades. The resulting environmental devastation has pushed the Delta's imperiled fisheries to the brink of extinction. Seventeen species of fish endemic to the Delta have already gone extinct; just twelve indigenous species remain. Habitat for the Sacramento River winter and spring run Chinook salmon, Central Valley steelhead, the Delta smelt, and the Sacramento River Northern American green sturgeon have suffered progressively worsening degradation from excessive Delta exports by the CVP and the

SWP.[1] Their unsustainable levels of diversions from the Delta not only greatly decrease fresh water flows, but also increase salinity and the concentration of herbicides, pesticides, and toxic agricultural run-off in the Delta.

The Delta's imminent ecologic collapse due to excessive freshwater diversions and contaminated agricultural run-off is indisputable. For this reason, in 2009 the California Legislature declared in the Delta Reform Act that "[t]he Sacramento-San Joaquin Delta watershed and California's water infrastructure are in crisis and existing Delta policies are *not sustainable*." Water Code § 85001(a), emphasis added. The Legislature found that "[r]esolving the crisis requires *fundamental reorganization* of the state's management of Delta watershed resources." *Id.,* emphasis added. The Legislature declared that "'the Delta' . . . is a critically important natural resource for California and the nation. It serves Californians concurrently as both the hub of the California water system and the most valuable estuary and wetland ecosystem on the west coast of North and South America." Water Code § 85002. The Legislature therefore resolved "to provide for the sustainable management of the Sacramento-San Joaquin Delta ecosystem, to provide for a more reliable water supply for the state, to protect and enhance the quality of water supply from the Delta, and to establish a governance structure that will direct efforts *across state agencies* to develop a *legally enforceable* Delta Plan." Water Code § 85001(c), emphasis added.

The Legislature adopted two principal overarching policies to protect and restore the Delta. The first comprises eight "policy objectives" designed to restore and enhance the Delta's ecological health while maintaining sustainable water usage:

(a) Manage the Delta's water and environmental resources and the water resources of the state over the long term.

---

[1]Sacramento River winter run Chinook salmon were declared threatened under the federal Endangered Species Act ("ESA") in 1990 (55 Fed.Reg 46515), and then due to continuing population declines, declared endangered in 2005 (70 Fed.Reg 37160). Their critical habitat in the Sacramento River and its tributaries was designated in 1993. 58 Fed.Reg. 33212. Sacramento River spring run Chinook salmon were declared threatened, and their critical habitat designated, in 2005. 70 Fed.Reg. 37160, 52488. Central Valley steelhead were declared threatened in 2000 (65 Fed.Reg. 52084) and their critical habitat was designated in 2005 (70 Fed.Reg 52488). The Sacramento River North American green sturgeon were declared threatened in 2006 (71 Fed.Reg 17757) and its critical habitat was designated in 2008 (73 Fed.Red 52084). Delta smelt were declared endangered in 1993 (58 Fed.Reg. 12854) and their critical habitat was designated in 1994 (59 Fed.Reg. 65256).

(b) Protect and enhance the unique cultural, recreational, and agricultural values of the California Delta as an evolving place.

(c) Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem.

(d) Promote statewide water conservation, water use efficiency, and sustainable water use.

(e) Improve water quality to protect human health and the environment consistent with achieving water quality objectives in the Delta.

(f) Improve the water conveyance system and expand statewide water storage.

(g) Reduce risks to people, property, and state interests in the Delta by effective emergency preparedness, appropriate land uses, and investments in flood protection.

(h) Establish a new governance structure with the authority, responsibility, accountability, scientific support, and adequate and secure funding to achieve these objectives.

Water Code § 85020(a)-(h).

Second, the Legislature announced a new State policy to *reduce* diversions of water from the Delta because it recognized that the existing level of diversions was incompatible with restoration and enhancement of the Delta's ecosystem, and thus not a "sustainable" management scheme for the Delta's imperiled resources:

> The policy of the State of California is to *reduce reliance on the Delta in meeting California's future water supply needs* through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts.

Water Code § 85021, emphasis added.

The Legislature also announced that

> [t]he longstanding constitutional principle of reasonable use and the public trust doctrine *shall be the foundation of state water management policy* and are particularly important and applicable to the Delta.

Water Code § 85023, emphasis added.

Because "[t]he Delta is a distinct and valuable natural resource of vital and enduring interest to all the people and exists as a delicately balanced estuary and wetland ecosystem of hemispheric importance," the Legislature mandated its restoration. Water Code § 85022(c)(1). It declared that "[t]o promote the public safety, health, and welfare, and to protect public and private property, wildlife, fisheries, and the natural environment, it is necessary to protect and enhance the ecosystem of the Delta and prevent its further deterioration and destruction." *Id.* at (c)(3).

The Legislature did not merely adopt lofty goals. It understood that strong and specific measures were necessary to break the management impasse that had pushed the Delta into a calamitous downward spiral. As the Attorney General pointed out in his September 14, 2010, Memorandum to the Council elucidating its CEQA duties, the Delta Reform Act "requires that the Delta Plan include *specific implementation measures* and calls for a plan that is '*legally enforceable*.' (Water Code §§ 85001, subd. (C), 85302, subd. (D) and (e).) To that end, [the Delta Reform Act] requires that the Delta Plan include a 'compliance mechanism.' (*Id.* § 85300, subd. (d) (1) (A).)" *Id.*, emphasis added. The Act thus commands that the Delta Plan include "*performance measurements* that will enable the [C]ouncil to track progress in meeting the objectives of the Delta Plan." Water Code § 85211, emphasis added. These measurements "shall include . . . *quantitative or otherwise measurable assessments* of the status and trends . . . of . . . [t]he health of the Delta's estuary and wetland ecosystem for supporting viable populations of Delta fisheries and other aquatic organisms." Water Code § 85211, emphasis added.

The Act demands *specific* steps to restore Delta species and their habitat. For example, the Plan must include "measures that promote . . . [v]iable populations of native resident and migratory species," "[f]unctional corridors for migratory species," and "[d]iverse and biologically appropriate habitats and ecosystem processes." Water Code § 85302(c). Similarly, the Plan must promote measurable "conditions conducive to *meeting or exceeding* the goals in *existing species recovery plans* and state and federal goals with respect to *doubling salmon populations*." *Id.*, emphasis added.

To assist the Council's adoption of Delta flow criteria essential for salmon recovery, the Department of Fish and Game is directed, in consultation with federal fisheries agencies and "based on the best available science," to "recommend to the [State Water Resources Control

B]oard Delta flow criteria and quantifiable biological objectives for aquatic and terrestrial species of concern dependent on the Delta" by February 3, 2011. Water Code § 85084.5. The State Water Board is required, in turn, to "develop new flow criteria for the Delta ecosystem necessary to protect public trust resources" using "the best available scientific information" by November 2, 2010. Water Code § 85086(c)(1). These "flow criteria for the Delta ecosystem shall include the *volume, quality and timing of water necessary for the Delta ecosystem*" and must be submitted to the Council by December 3, 2010. Water Code § 85086(c)(1) and (e), emphasis added.

In short, the Delta Reform Act calls for a science-based, comprehensive, and specifically enforceable Delta Plan that will sweep aside the feeble, ineffectual and conflicting policies of the past and impose a unified, detailed and forceful regulatory regime that "will direct efforts across state agencies" to achieve consistent, "legally enforceable" and effective standards to restore the Delta to health. Water Code § 85001(c).

The Draft Delta Plan does not comply with these statutory mandates. It fails to provide "specific implementation measures" that are "legally enforceable." It lacks a "compliance mechanism." It proposes *no measures that would significantly alter the status quo. Id.* Instead, it defers and sidesteps the adoption of specific, enforceable measures at every turn. It is a blueprint for yielding to the status quo, thus sealing the Delta's doom. Because it is far too vague and abstract, the Plan will do little to prevent the further degradation of the Delta ecosystem, which, as the DPEIR acknowledges, is "in serious decline." DPEIR at 1-5. The Plan skirts the very question that the Delta Reform Act requires it to answer: how should Delta flows be *altered* to *halt* the Delta's precipitous decline and thereby protect, enhance, and restore its ecosystem while at the same time providing a sustainable level of reliability for the Delta's water diverters?

The immediate and decisive action required by the Delta Reform Act is the only means by which the Delta's imperiled species can be saved from extinction. As the Act emphatically and repeatedly directs, the Delta Plan must include *specific*, *measurable*, and *enforceable* goals, and quantified targets to measure the success of the Plan.

Above all else, the Plan must include detailed Delta flow criteria whose centerpiece is *curtailed diversions* to restore Delta health and "reduce reliance on the Delta in meeting California's future water supply needs." Water Code §§ 85086, 85021. All available science confirms that significant reductions in water exports from the Delta must occur to restore its ecologic health. These curtailments are not only required by the Act's clear mandates, but also by the Public Trust Doctrine, which commands the Council to "avoid or minimize any harm" to public trust resources including the Delta's declining fish and wildlife "so far as feasible." *National Audubon Society v. Superior Court* (1983) 33 Cal.2d 419, 435-36. These necessary reductions would not conflict with the Act's parallel goal of establishing "reliability" in water deliveries. In fact, just the opposite would occur. A long-term, durable commitment to reduced

water exports sends a clear message to water users that the years of boom-and-bust water allocations are over. It resets expectations at sustainable export amounts. But the Council's Draft Plan delays and evades these essential tasks, in direct defiance of the Delta Reform Act's clear mandate that the Council achieve a "fundamental reorganization of the state's management of Delta watershed resources." Water Code § 85001(a).

The Council will – if it proceeds with its current Draft Plan – miss a critical opportunity to address and resolve the twin threats of excessive diversions and contaminated return flows that have pushed the Delta to the brink of ecologic collapse. The Council must heed the Legislature's unmistakable command that it adopt specific, measurable, and enforceable programs to restore the Delta's health. If the Council fails to create a Plan with measurable standards and detailed implementation steps that would have specific and concrete results, it will defy the Legislature's direction and the public's expectation that the Council do its job. Absent a firm and informed Plan, the Delta will die. Accordingly, Conservation Groups urge the Council to revise the Plan to address their concerns, as detailed below.

Conservation Groups likewise urge the Council to revamp the DPEIR to remedy its fatal lack of focus, detail, and direction. The Plan's lack of specificity necessarily resulted in a deficient DPEIR in violation of the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 et seq. As discussed in the third part of this Comment Letter, the DPEIR lacks an adequate and definite project description, fails to provide a detailed discussion of the project's specific impacts, neglects to provide sufficient information regarding alternatives to enable the public to make an informed comparison of the proposed project with a reasonable range of management options, understates the environmental advantages of the Environmental Water Caucus' Alternative 2, and fails to assess the Plan's impacts on public trust resources.

For each of these reasons as detailed below, the Council must revise and recirculate the Draft Plan and DPEIR to comply with its statutory duties.

II. THE DRAFT DELTA PLAN FAILS TO: ACKNOWLEDGE PAST MISMANAGEMENT, RECOGNIZE THE NEED TO REDUCE DELTA EXPORTS, AND PROVIDE SPECIFICALLY ENFORCEABLE OBJECTIVES AND IMPLEMENTATION MEASURES.

The Delta Reform Act directs this Council to adopt a Delta Plan that includes the following five principal features: First, it must recognize that the Delta crisis is the product of past mismanagement. Only by acknowledging the management mistakes – most prominently, excessive diversions – that have caused the Delta's ecologic collapse can the Council rectify those errors. Second, the Plan must posit as its primary goals restoration of the Delta's ecosystem and reduction of Delta exports as necessary to restore sustainability to the Delta's water supply function. Third, the Plan must adopt and implement the eight specific policy

objectives mandated by the Legislature in Water Resources Code section 85020. Fourth, the Plan must include specific implementation measures that will promote recovery of a healthy Delta ecosystem while providing a reliable water supply, improved water conservation, and better water use efficiency, as required by Water Code sections 85302 and 85303. Fifth, the Plan shall be "based on the best available scientific information," include "quantified or otherwise measurable targets" to achieve its objectives, and provide for continuing monitoring and data collection to assure that its management measures do in fact achieve ecosystem restoration, as required by Water Code sections 85211 and 85308.

The Draft Delta Plan fails to satisfy any of these five criteria, as shown below.

A. The Plan Fails to Acknowledge Past Mismanagement.

Those who ignore history are doomed to repeat the mistakes it exposes. The Draft Delta Plan is no exception. Despite the Delta Reform Act's express condemnation of "existing Delta policies" as "not sustainable" because they have pushed "[t]he Sacramento-San Joaquin watershed" into an ecologic "crisis" "requir[ing] fundamental reorganization of the state's management of Delta watershed resources" (Water Code § 85001(a)), the Delta Plan overlooks the management mistakes that caused the crisis. The Plan ignores the history lesson that the Legislature wrote into the Delta Reform Act. The Legislature recognized that (1) "the species that comprise the Delta ecosystem had evolved and adapted to [its] unique, dynamic system," (2) "[a]s *a result of the operations of state and federal water projects*, the natural salinity variations in the Delta have been altered," and (3) "[*r*]*estoring a healthy estuarine ecosystem* in the Delta may require *developing a more natural salinity regime* in parts of the Delta." Water Code § 85003(a) and (c), emphasis added.

Despite the Legislature's finding and declaration that "existing Delta policies are not sustainable" because the CVP and the SWP have exported so much fresh water as to fundamentally alter the Delta's "unique, dynamic" salinity regime, the Draft Plan steps circumspectly around the very mismanagement practices that precipitated the Delta crisis of today. The Plan's passing reference to this "legacy of Delta ecosystem deterioration" ascribes its cause to amorphous "failed natural resource policy, complicated by inconclusive scientific information, land-use patterns, and intense competition over water supplies." Plan at 15. But it is the Plan's primary function to specifically *identify* and *correct* the mismanagement practices that caused the Delta's ecologic collapse. Pointing the finger in all directions effectively masks the root cause of the problem: excessive diversions. By sweeping the excessive diversion elephant under the rug of "inconclusive scientific information," the Plan ignores the source of the problem, and thereby perpetuates its pernicious effects.

Instead of identifying the dramatic increases in water diversions and their obvious adverse ecologic effects – including most notably, reverse flows in the Delta, entrainment of Delta

species such as the Delta smelt, and increased salinity levels as fresh water flows have been pumped south – the Plan blames "hydraulic mining practices over a century ago," levees and swamp reclamation likewise dating from "the late 1800's," and California's "volatile climatic patterns caus[ing] periods of peak flows and prolonged drought." Plan at 16-20. But despite these historic conditions, the Delta remained healthy and hosted salmon runs in the millions *until the CVP and the SWP began pumping* enormous quantities of fresh water south in the 1960's.

The Draft Plan's failure to acknowledge this causal relationship between excessive diversions and ecologic disaster skews the Plan away from the basic Delta problem and its solution. It betrays the Legislature's clear command that the Council acknowledge that "existing Delta policies are not sustainable" and that "[r]esolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources." Water Code § 85001(a). Unless and until the Plan forthrightly acknowledges the management mistakes of the past – including most notably, excessive water diversions – it is doomed to repeat rather than rectify those mistakes.

B. The Draft Plan Fails to Posit as Its Primary Goals Restoration of the Delta's Ecosystem and Reduction of Delta Exports.

The Delta Reform Act sets forth the Legislature's Delta management "policies" in three key provisions. First, in Water Code section 85020, the Act states that "[t]he policy of the State of California is to achieve" eight objectives that will "[r]estore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy and wetland ecosystem," "[p]romote statewide water conservation, water use efficiency, and sustainable water use," and "[i]mprove water quality to protect human health and the environment consistent with achieving water quality objectives in the Delta."" *Id.* at (c), (d), and (e). Additional policy objectives include managing the Delta and the state's water resources "over the long term," "[p]rotect[ing] and enhanc[ing]" the Delta's unique cultural, recreational, and agricultural values," "[i]mprov[ing] the water conveyance system and expand[ing] statewide water storage," "[r]educ[ing] risks . . . by effective emergency preparedness . . . and . . . flood protection," and "[e]stablish[ing] a new governance structure . . . to achieve these objectives." *Id.* at (a), (b), (f), (g), and (h).

Second, Water Code section 85021 forcefully directs that "[t]he policy of the State of California is to *reduce reliance on the Delta* in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." *Id.*, emphasis added. The Legislature's express adoption of this policy is pivotal. It reflects the Legislature's decision to shift the burden of supplying California's future water needs *away from* the overworked and imperiled Delta watershed, and instead *toward* "regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts." *Id.*

Third, the Legislature directed in Water Code section 85023 that "[t]he longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta." *Id.* The Legislature thus recognized that protection of public trust resources – which include fish, wildlife, boating, swimming and fishing – *trumps non-public trust uses that would harm them*, such as excessive Delta exports.

Contrary to these pronouncements of the Legislature's fundamental policies that reshape California's water management policies for the Delta, the Draft Plan doggedly adheres to "business as usual." At no point does it acknowledge that the Legislature has decided "to reduce reliance on the Delta in meeting California's future water supply needs." Water Code § 85021. Nor does the Draft Plan ever acknowledge that the Legislature has mandated that the "constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy," nor that these principles are "particularly . . . applicable to the Delta." Water Code § 85023.

The Draft Plan's failure to acknowledge and implement the Legislature's fundamental paradigm shift from decades of increasing – and unsustainable – exports from the Delta to "reduc[ing] reliance on the Delta" and increasing reliance on surface and ground water supplies elsewhere defies the Legislature's deliberate and explicit rejection of the failed Delta management policies of the past. By hijacking the Water Reform Act's primary thrust toward "reduc[ing] reliance on the Delta" as necessary to "restore the Delta ecosystem," the Draft Plan has usurped the Legislature's authority to adopt the State's Delta management policy. The Draft Plan has inserted a dramatically contrary policy of subordinating restoration of public trust resources to maintaining the existing unsustainable level of current water exports, ostensibly to provide a "reliable water supply" for the state.

The Draft Plan's redirection of the Delta Reform Act's new management policies is directly contrary to the Legislature's decision to reduce Delta exports and its recognition that "[p]roviding a more reliable water supply for the state involves implementation of water use efficiency and conservation projects, wastewater reclamation projects, desalination, and new and improved infrastructure, including water storage and Delta conveyance facilities." Water Code § 85004(b). At no point does the Delta Reform Act imply – let alone expressly allow – the existing excessive level of Delta exports to continue. On the contrary, the Legislature specifically rejected perpetuation of the failed Delta policies of the past by announcing that "[t]he policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs . . . ." Water Code § 85021. The Draft Plan ignores this fundamental change in management direction. Accordingly, it must be revised to conform to the Legislature's unmistakable mandate that Delta exports be reduced.

C. The Draft Plan Must Expressly Adopt and Implement the Legislature's Eight Specific Policy Objectives Set Forth in Section 85020.

The Legislature adopted eight specific objectives that it declared to be "inherent in the co-equal goals for management of the Delta." As noted above, those objectives required restoration of the Delta ecosystem, "including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem," protection of the "unique cultural, recreational, and agricultural values of the California Delta," and improved "statewide water conservation, water use efficiency, and sustainable water use" as necessary to "reduce reliance on the Delta in meeting California's future water supply needs." Water Code §§ 85020(b), (c), (d), 85021. Additional specific policy objectives included managing the Delta and the state's water resources "over the long term," achieving water quality objectives in the Delta, improving the water conveyance system and expanding statewide water storage, reducing risks by increasing emergency preparedness and flood protection, and establishing a new governance structure to achieve these objectives. *Id.* at (a), (e), (f), (g), and (h).

The Plan gives no more than lip service to these clear expressions of the Legislature's new policies for Delta management. Notwithstanding its passing reference to these "core objectives" as "the foundation of the Delta Plan's policies and recommendations" (Plan at 13), the Plan fails to adopt strategies and specific, enforceable measures to achieve these objectives. Despite the fact that restoration of the Delta ecosystem and reduced reliance on Delta exports in favor of improved water storage and water use efficiency elsewhere are the overriding purposes of the Delta Reform Act, the Draft Plan adopts no specific water quality, water flow, or habitat enhancement standards as necessary to assure actual restoration of the imperiled Delta ecosystem and achievement of the Legislature's water quality objectives for the Delta.

Rather than developing specific management steps and enforceable standards to achieve the Legislature's seven substantive objectives set forth in section 85020, the Draft Plan presents only generalized discussions of these topics, sidestepping its primary responsibility to translate the Legislature's clear policy objectives into specific and enforceable management measures and performance standards, as discussed in the following analysis.

D. The Plan Fails to Include Specific Implementation Measures and Performance Standards Essential for Enforcement of the Delta Reform Act's Objectives.

Although the Delta Reform Act clearly and repeatedly directs the Council to include specific implementation measures and performance standards because they are essential to enforcement of the Act's substantive water quality improvement, habitat restoration, and water conservation and efficiency objectives, the Draft Plan fails to provide them.

Chapter 4, which ostensibly identifies measures to achieve "a more reliable water supply for California," never in fact does so. Each of the "policies" it enumerates merely repeats existing requirements of State law (for example, requiring the preparation and implementation of urban water management plans and agricultural water management plans), or proposes mere "recommendations" bereft of any specific enforceability. Plan at 79-84. Instead of adopting updated Delta fresh water flow criteria as a necessary restraint on the quantity and timing of Delta exports, the Plan defers to the State Water Board's ongoing "phased process to review and amend" flow requirements for the Delta and its tributaries. Plan at 84-86. But the State Water Board has already adopted and submitted to the Council the Delta flow criteria required by Water Code section 85086(e), removing any impediment to the Council's immediate inclusion of those criteria in the Draft Plan.

Worse, in response to the Act's direction that the Council develop measures to promote expanded water storage and improved conveyance facilities, the Plan concedes that it provides "[n]o policies with regulatory effect" to achieve these primary statutory imperatives. Plan at 89. Although Chapter 4 seeks a 10 percent reduction in statewide urban per capita water usage by 2015 and 20 percent by 2020, and posits overall goals for increased use of recycled water and storm water run-off, it identifies no specific performance measures by which to achieve, let alone enforce, these objectives. The "performance measures" identified for all of the other water conservation, water efficiency, and water supply improvement projects state only that there be "progress toward" achieving these vague objectives, rendering the entire planning effort illusory. Plan at 98.

In Chapter 5, which is incongruously entitled "Restore the Delta Ecosystem," the Plan actually proposes no specifically enforceable programs to improve Delta habitat. Plan at 107-128. Instead of providing specific fresh water flow criteria and related standards for habitat improvement (such as increased seasonal flows, reduced turbidity, increased dissolved oxygen, and reduced water temperature), this Chapter defers adoption of flow objectives until June 2, 2014 for the Delta and June 2, 2018 for its principal tributaries, and proposes no specific habitat improvements or standards by which their achievement can be measured. Plan at 113-121. Rather than providing the detailed "performance measures" specifically mandated by the Act, the Draft Plan merely repeats the language of the Act and engages in a useless semantic exercise of dividing the types of performance measures into "three general classes." Plan at 125-126. No specific performance measures are articulated. *Id.* Instead, this Chapter merely provides that "progress toward" achievement of various broad categories of habitat improvements is desired. Plan at 127-128. In short, the Draft Plan provides no specific ecosystem restoration measures, let alone standards by which their achievement can be determined. Consequently, the Draft Plan fails utterly to fulfill the principal purpose of the Delta Reform Act – restoration of the Delta's imperiled ecosystem.

Chapter 6, concerning water quality improvements, does identify in broad strokes many of the principal pollutants that currently harm Delta water quality. Plan at 133-138. However, this Chapter, like Chapter 4, defers to the State Water Board responsibility for adopting and implementing updated fresh water flow objectives for the Delta and its tributaries. Plan at 139. As noted, the Legislature clearly intended that the Council itself adopt and implement such objectives in the Delta Plan, utilizing flow criteria the State Water Board has already approved. The Plan likewise sidesteps the Council's clear statutory duty to adopt water quality standards and implementation measures by deferring to actions by the Central Valley Regional Water Quality Control Board, the Department of Water Resources, the State Water Board, and the Department of Public Health. Plan at 141. The Chapter likewise evades any responsibility for adopting water quality standards to protect the environment, again deferring to other agencies including the State Water Board and the San Francisco Bay and Central Valley Regional Water Quality Control Boards. Plan at 148-150. Consequently, the Draft Plan adopts no programs, implementation measures, or performance standards by which to gage achievement of the Legislature's command that the Council improve and protect water quality for human health and the environment.

Chapter 7, which ostensibly responds to the Legislature's direction that the Plan identify programs, implementation measures, and performance standards to reduce risks, increase preparedness, and provide flood protection, fails to perform any of these functions. Plan at 161-186. Rather than identify, adopt, and implement specific programs, measures, and standards in response to this statutory command, Chapter 7 merely recounts general measures underway by other agencies such as the Department of Water Resources, the U.S. Army Corps of Engineers, and the Federal Emergency Management Agency ("FEMA"). Although several broad policies for avoiding encroachment in certain floodways are stated (Plan at 165), no specific measures to implement or enforce these policies are identified, let alone adopted. The Chapter admits that it identifies "[n]o policies with regulatory effect" regarding Emergency Preparedness and Response, nor concerning Reoperation of Upstream Reservoirs and Peak Flow Attenuation. Plan at 180 and 185. Consequently, the Plan fails to provide any specific, quantifiable, and enforceable programs, measures and performance standards to achieve the Legislature's mandate that the Council "[r]educe risks to people, property, and state interests in the Delta by effective emergency preparedness, appropriate land uses, and investments in flood protection." Water Code § 85020(g).

In summary, the Plan completely fails to include any specific implementation measures and performance standards essential for enforcement of the Delta Reform Act's explicit objectives.

III. THE DRAFT DELTA PLAN PROGRAM ENVIRONMENTAL IMPACT REPORT IS INADEQUATE.

The "heart of CEQA" is the environmental impact report. *Citizens for Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564. "The EIR, with all its specificity and complexity, is the mechanism prescribed by CEQA to force informed decision making and to expose the decision making process to public scrutiny." *California Native Plant Soc. v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 978, *quoting Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 910.

The DPEIR's analysis of the Plan fails to foster informed decisionmaking or to expose the Council's decisionmaking process to the public. *Id.* Instead, it suffers from the same high level of abstraction and lack of specificity that plague the Plan itself. The DPEIR does not contain a clearly defined and accessible project description. Nor does it address impacts of the Plan's implementation with specific information about the consequences of approving any of the Plan's features. Comparison of alternatives is likewise impossible because the Plan's substance – and that of its alternatives – is exceedingly hard to grasp. In sum, the DPEIR's analysis is too vague to be useful and therefore violates CEQA, as discussed below.

A. The DPEIR Is Deficient as a Program EIR.

While Conservation Groups recognize that the DPEIR is a "program EIR," its failure to provide the information required by CEQA undermines CEQA's fundamental goal of fostering informed decisionmaking.

A program EIR is prepared for "a series of actions that can be characterized as one large project and are related either: (1) Geographically, (2) As logical parts in the chain of contemplated actions, [or] (3) In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program." Cal. Code Regs., tit. 14 ("CEQA Guidelines"), § 15168 (a). Program EIRs allow agencies to (1) provide "for a more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action;" (2) ensure full consideration of cumulative impacts; (3) avoid "duplicative reconsideration of basic policy considerations;" and (4) allow for consideration of "broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts." *Id.*, § 15168 (b).

That said, program EIRs, like all EIRs, "must meet the content requirements discussed in Article 9" of the CEQA Guidelines. These requirements include an adequate project description (§ 15124) and discussion of alternatives (§ 15126.6), a complete description of the environmental

setting (§ 15125), a robust analysis and discussion of impacts (§ 15126.2) and mitigation measures (§ 15126.6), as well as other CEQA-required topics. The DPEIR fails to meet these requirements and thus must be substantially revised.

B. The DPEIR's Project Description Is Inadequate.

"[A]n 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, 199. However, "[a] curtailed, enigmatic or unstable project description draws a red herring across the path of public input." *Id.* at 197-198. "[O]nly through an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives." *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1454.

As described above, the Plan lacks concrete details about how it will achieve the Delta Reform Act's goals. It consists instead of abstract policies and recommendations devoid of specific objectives, implementation measures, and performance standards. Consequently, the DPEIR's project description section contains the very type of "enigmatic" descriptions that were condemned in *County of Inyo*, 71 Cal.App.3d at 199.

Further, the DPEIR lacks a concise and meaningful summary of the key aspects of the Proposed Plan. The Executive Summary's description of the Proposed Plan lacks substance and therefore fails to provide the reader with any useful information about the Plan's policies and their implementation. DPEIR, at ES-2. Although Section 2A's Proposed Project description is approximately 53 pages long, it contains no summary of key aspects of the Plan. DPEIR at 2A-4 to 2A-57. Appendix C's dense table of the Proposed Project's actual policies and recommendation is approximately 21 pages long and likewise contains no concise, accessible summary of the Plan. App. C-1 to C-21. A narrative discussion of the Proposed Project would greatly assist the reader's understanding of the Plan and shed light on the core differences between it and its alternatives.

Conservation Groups therefore request that the Council revise the DPEIR to include in its Executive Summary specific descriptions of the most significant elements of the Proposed Plan, including, at a minimum, a description, in plain English, of the twelve regulatory policies (ES-2) that make up the foundation of the Plan.

C. The DPEIR's Discussion of the Plan's Purpose and Objectives Is Far Too Vague.

According to the CEQA Guidelines, "[t]he description of the project shall contain . . . [a] statement of the objectives sought by the proposed project. A clearly written statement of objectives 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. The statement of objectives should include the underlying purpose of the project." § 15124 (b).

The DPEIR contains a section entitled "Delta Plan Purpose and Project Objectives" which fails to explain either. DPEIR at 1-1 to 1-4. Although that section recites many of the Delta Reform Act's mandates, it does not provide any further definition of the key terms and management implications of those mandates. For example, the DPEIR does not adequately define the objective of providing a "more reliable water supply." This "goal" without more detail evades informed evaluation and therefore proves unhelpful in the evaluation of alternatives that are intended to achieve the Plan's goals.

D. The DPEIR's Discussion of Alternatives Is Too Narrow and Inadequately Detailed.

"CEQA requires that an EIR, in addition to analyzing the environmental effects of a proposed project, also consider and analyze project alternatives that would reduce adverse environmental impacts." *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162-1163, *citing* Pub. Res. Code §§ 21061, 21001(g), 21002, 21002.1(a), 21003(c). Further, the CEQA Guidelines state that an EIR must "describe a range of reasonable alternatives to the project . . . which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project . . . ." § 15126.6 (a). "There is no ironclad rule governing the nature or scope of the alternatives to be discussed other than the rule of reason." CEQA Guidelines § 15126.6(a). The rule of reason "requires the EIR to set forth only those alternatives necessary to permit a reasoned choice" and to "examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project." *Id.*, § 15126.6(f).

As with the Proposed Project description, the DPEIR's alternatives lack specificity and thereby evade meaningful review. Comparison of the five alternatives to the Proposed Project, which all consist of broad brush policies and recommendations, reveals very little about the consequences of the Council's selection among the alternatives. Furthermore, as discussed above, the Council has failed to provide adequately detailed project objectives that would guide selection of alternatives. Without more precise objectives, the five alternatives lack comparative definition.

Further, the DPEIR's characterization of the Environmental Water Caucus's proposed Alternative 2 understates this alternative's tangible environmental benefits, erroneously deeming this alternative environmentally inferior to the Council's Proposed Project. Contrary to the DPEIR's mischaracterization, Alternative 2 is environmentally superior with respect to all relevant measures, including Delta restoration, water supply reliability, flood risks, water quality, greenhouse gas emissions, and climate change impacts. Moreover, the ecological restoration that Alternative 2 will achieve will yield substantial economic dividends ignored by the DPEIR. The DPEIR's misinterpretation of Alternative 2 as proposing additional ocean desalination and expansion of the Friant/Millerton reservoir is in error, and must be corrected. Because Alternative 2 supports aggressive use and improvement of existing diversion facilities south of the Delta, it has substantially fewer impacts on the Delta ecosystem than any of the alternatives proposing continued or expanded diversion of water from the Delta or its northern tributaries. Alternative 2 is fully consistent with improved Delta levee construction and maintenance, and thus would not pose flood risks greater than the Proposed Project. Finally, Alternative 2's elimination of the use of Delta water to irrigate drainage-impaired farmlands would reduce contamination of the Delta and thereby avoid its substantial economic as well as environmental costs. For each of these reasons, the Council should select Alternative 2 as the environmentally superior alternative that best achieves the Delta Reform Act's objectives.

E. The DPEIR's Discussion of the Project's Impacts Is Incomplete.

"The fundamental purpose of an EIR is 'to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment.' (§ 21061)." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 428. Accordingly, an EIR must adequately identify and analyze the significant environmental effects of the proposed project. Pub. Res. Code § 21100(b); CEQA Guidelines § 15126.2(a). "In assessing the impact of a proposed project on the environment, the lead agency normally examines the 'changes' in existing environmental conditions in the affected area that would occur if the proposed activity is implemented." *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 659-660, citing CEQA Guidelines § 15126.2(a) and *Wal–Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 289. "Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects." CEQA Guidelines § 15126.2(a). "An EIR should be prepared with a sufficient degree of analysis to provide decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible . . . . The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." CEQA Guidelines § 15151.

The DPEIR's impacts analyses fall short of this standard in two significant ways. First, as discussed above, the Plan's unacceptably high level of abstraction impedes the DPEIR's analysis. For example, the Plan's comparison of the Proposed Project's and alternatives' greenhouse gas (GHG) emissions opines:

> The Proposed Project would have approximately the same GHG impacts as all the alternatives (except Alternative 3), but for differing reasons. Alternatives 1A and 1B would involve fewer GHG emissions from construction but more GHG emissions from pumping and moving water, particularly over mountain ranges in southern California. Alternative 2 would involve more GHG emissions from operation of local water projects such as desalination plants and treatment plants but fewer GHG emissions from pumping/moving water. Alternative 3 would involve overall less construction and operation of local water projects and about the same amount of water movement/pumping, so fewer GHG emissions overall.

DPEIR at 25-10. This analysis does not provide the reader with any useful information about the GHG emissions of the Project except that Alternative 3 would likely have fewer GHG emissions. The very generality of the analysis precludes evaluation of the detailed information required by CEQA.

Second, throughout its analysis, the DPEIR defers any specific analysis until project-level environmental reviews of projects implementing the Plan. Much of the information about the impacts of the Plan are thus not revealed. Continuing with the GHG emission example, the chapter addressing GHG emissions repeatedly states that "[a]s individual projects are proposed, these individual projects will need to be evaluated in site-specific environmental documents prepared by the lead agencies." *See, e.g.,* DPEIR at 21-9, 21-11, 21-12, 21-13, 21-17. Conservation Groups are aware that the Draft Plan represents a broad-scale program. Nonetheless, lead agencies cannot defer analysis, even in upper tier environmental analyses, if that analysis can – as here – feasibly be undertaken for the program in question. *EPIC v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 502-03. The DPEIR must be revised to rectify its omission of essential, fact-based analysis.

F. The DPEIR Fails to Address the Council's Public Trust Responsibilities.

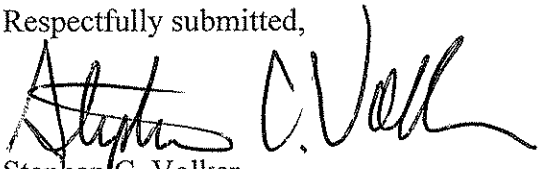
The Legislature directed in the Delta Reform Act that "[t]he longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta." Water Code § 85023. Despite this specific admonition to the Council to recognize and incorporate these foundational principles into the Delta Plan, the Plan fails to do so. Nothing in the Council's DPEIR remedies this omission. Neither the Plan nor the DPEIR ever acknowledges, let alone implements, the Council's paramount duty under the Public Trust Doctrine to "attempt, so far as

feasible, to avoid or minimize any harm to . . . interests [protected by the public trust]." *National Audubon Society*, *supra*, 33 Cal.3d at 435-36. As noted, the Public Trust Doctrine protects public uses of public waters including fishing, boating, swimming, scientific study, wildlife habitat, and aesthetic enjoyment. *Marks v. Whitney* (1971) 6 Cal.3d 251, 259-260; *Carstens v. California Coastal Commission* (1986) 182 Cal.App.3d 277, 294. By specifically incorporating the Public Trust Doctrine into the Council's Delta planning process, the Legislature made crystal clear its intent that the Delta's public trust resources be protected "so far as feasible." But neither the Plan nor the DPEIR provides any discussion of this "foundation of state water management policy" let alone assure its full integration into the Plan and the DPEIR's analysis of its impacts. Because the Council has failed to recognize and implement the Public Trust Doctrine despite the Legislature's clear command that it do so, both the Draft Plan and its DPEIR must be revised to conform to this statutory and constitutional mandate.

IV. CONCLUSION

For each of the foregoing reasons, the Draft Plan and the DPEIR fail to comply with the Delta Reform Act and CEQA. Accordingly, the Council must withdraw these documents and prepare an adequate Plan and EIR that comport fully with the Delta Reform Act and CEQA.

Respectfully submitted,



Stephan C. Volker
Attorney for Pacific Coast Federation of Fishermen's Associations, Friends of the River, North Coast Rivers Alliance, California Sportfishing Protection Alliance, Institute for Fisheries Resources, and the Winnemem Wintu Tribe

SCV:taf