



February 2, 2012

Delta Stewardship Council  
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Re: Comments on Delta Plan Draft Program EIR

Dear Chairman Isenberg and Delta Stewardship Council Members:

The Delta Caucus (Contra Costa, Sacramento, San Joaquin, Solano and Yolo County Farm Bureaus) appreciates the opportunity to comment on the Delta Plan Draft Program EIR. As you know, the Delta Caucus has been extensively involved in the Delta Plan review process and has submitted detailed comments on the many previous versions of the draft Delta Plan. For the sake of brevity, we will not restate all of our previous comments or objections here. Instead, the Delta Caucus focuses its comments on the deficiencies of the Delta Plan Draft Program Environmental Impact Report ("Draft EIR") and on policies and recommendations within the Fifth Draft Delta Plan to which the Delta Caucus particularly takes issue. The Delta Caucus, however, reaffirms its previous comments and objections and incorporates them herein by reference.

The Delta Caucus is particularly interested in the Delta Stewardship Council ("Council") discharging its public duty to satisfy the requirements of the California Environmental Quality Act ("CEQA"). Generally speaking, the Draft EIR is legally deficient and does not fulfill its duty as an informational document. Rather than certify the Draft EIR, the Council is requested to conduct a sufficient evaluation of the potential environmental effects and thereafter provide a new public review comment period.

These comments are founded on the principle that an EIR acts as an informational document identifying potentially significant impacts of a project, as well as alternatives and mitigation measures necessary for informed decision-making (Pub.Res.C. §21002.1), and that an EIR's findings and conclusions must be supported by substantial evidence. *Laurel Heights Improvement Ass'n v. Regents of the University of California* (1988) 47 Cal.3d 376. An adequate EIR "must be prepared with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences" and "must include detail sufficient to enable those who did not participate in its preparation to

understand and to consider meaningfully the issues raised by the proposed project.” *Id.* The Draft EIR does not meet this threshold. Accordingly, the Draft EIR is not adequate for certification, and the Project cannot be approved at this time.

### **1. The Draft EIR Does Not Adequately Describe or Analyze the Proposed Project.**

An accurate description of the proposed project is “the heart of the EIR process.” *Sacramento Old City Assn. v. City Council* (1991) Cal.App.3d 1011, 1023. Indeed, “[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, 193. “A curtailed or distorted project description may stultify the objectives of the [CEQA EIR] process. Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal’s benefit against its environmental costs, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the ‘no project’ alternative) and weigh other alternatives in the balance.” *Id.* at 192-193. “The defined project and not some different project must be the [environmental document’s] bona fide subject.” *Id.* at 199-200.

In this case, the Draft EIR does not contain a stable, accurate, or finite project description. The problem arises because the Draft EIR only purports to evaluate the Fifth Staff Draft Delta Plan. Yet, according to the Council’s website, this is “the fifth of seven (7) staff draft versions of the Delta Plan.” See <http://deltacouncil.ca.gov/delta-plan>, visited January 11, 2012. Thus, at least two more drafts of the plan will be released following the Draft EIR. In other words, some other project and not the final project as proposed is the subject of the Draft EIR. This procedural error puts the cart before the proverbial horse. It is only after the agency has clearly defined the “Project” that it can evaluate that project in an EIR. Because the Council has not appropriately identified and described the “Project” for purposes of CEQA, the entire CEQA analysis is tainted.

The Draft EIR’s treatment of certain identified projects is also problematic for purposes of describing the Project as CEQA requires. According to the Draft EIR, the document “evaluates” a few “named” projects which the Delta Plan “encourages.” Draft EIR at ES-2. It is unclear, however, whether these specifically “named” projects are considered part of the whole of the Project under review. This point should be clarified as it has important ramifications for future environmental evaluations. See e.g., *Rio Vista Farm Bureau Ctr. v. County of Solano* (1992) 5 Cal.App.4th 351, 373 (the extent specific facilities are named in a program EIR may affect whether and to what extent a future environmental document is needed to review the action).

**2. The Draft EIR Improperly Defines the Project Objectives in Light of the Statutory Mandate to Include Quantified or Other Measurable Targets for Preserving Agriculture.**

An EIR must include a statement of objectives sought by the proposed project. Guideline §15124(b). As the CEQA Guidelines note, “[a] clearly written statement of objectives will help the Lead Agency develop a reasonable range of alternatives in the EIR and will aide the decision makers in preparing findings or a statement of overriding considerations, if necessary.” *Id.* Although the Draft EIR contains some generalized and vague objectives (Draft EIR at 1-3 through 1-4) based on achieving the “coequal goals,” the objectives listed are inadequate based the direct statutory mandate found in Water Code section 85308.

Water Code section 85308(b) provides that the Delta Plan must include “quantified or other measurable targets associated with achieving objectives of the Delta Plan.” The proposed Project objectives on pages 1-3 and 1-4 of the Draft EIR, however, do not contain any such quantifiable or measurable targets, especially for preservation of agricultural lands. Because the statutory scheme *mandates* that such measurable targets be included in the Plan, any Project objectives identified pursuant to CEQA Guideline §15124(b) must necessarily include an identifiable acreage target for preserving agricultural land in the Delta. This information has been omitted from the Draft EIR.

In *City of Carmel-by-the-Sea v. United States Department of Transportation* (9<sup>th</sup> Cir. 1997) 123 F.3d 1142, 1156-57, a case dealing with both NEPA and CEQA issues, the lead agency included a measurable traffic target as a project objective. Specifically, the agency identified Level of Service C as one of the project's purposes and objectives. The Ninth Circuit found that specifying the measurable traffic target as a project objective was reasonable and satisfied both NEPA and CEQA, especially because the project began in response to the severe congestion problems on Highway 1 in the City of Carmel area. *Id.*; see also *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 201 (judicial interpretations of NEPA may be treated as persuasive authority in interpreting CEQA).

Similarly, in this case a key statutory goal under the Delta Reform Act is to enhance and protect agriculture in the Delta. Water Code §§85020(b); 85054. Water Code section 85054 specifically directs that the coequal goals should be achieved in a manner that “protects and enhances the unique...agricultural values of the Delta as an evolving place.” See also Water Code §85020 (“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:... (b) Protect and enhance the unique cultural, recreational, and agricultural values of the California Delta as an evolving place.”). Thus, including an agricultural preservation target as an objective is reasonable and furthers the

underlying purpose of the Delta Plan. Like in *City of Carmel-by-the-Sea*, then, the Council should identify a quantified agricultural preservation target as a Project objective. One potential measurable target could be an objective that there shall be no net-loss of farmland within the Delta.

Not only does omitting a measurable agricultural target taint the required Project objectives, but also it prevents the Draft EIR from identifying a reasonable range of alternatives. By setting an agricultural target as an objective of the project, the alternatives could include varying degrees of preservation so that the decision makers and the public could weigh the benefits and impacts of preserving differing amounts of agricultural lands.

**3. The Procedures for Challenging a Covered Action's Consistency with the Delta Plan Encourage Piecemeal Appeals and Could Have a Chilling Effect on Capital Formation, Causing Physical Impacts that Have Not Been Studied or Disclosed in the Draft EIR.**

Currently, the Draft EIR describes procedures for appealing an agency's certification that its proposed project is consistent with the Delta Plan. See Draft EIR at 2A-1. According to the Draft EIR, "[a]ny person alleging that a covered action is not consistent with the Delta Plan may appeal the consistency certification to the Council (Water Code section 85225.10). If, after hearing the appeal, the Council finds that the action is not consistent with the Delta Plan, the State or local agency may not proceed with the project unless it submits a revised certification of consistency, *which in turn could be challenged by any person through an appeal to the Council* (Water Code section 85225.25)." Draft EIR at 2A-1 (emphasis added).

The problem with this approach, however, is that it encourages piecemeal challenges. A disgruntled neighbor or other adverse party could potentially delay projects for years simply by appealing a consistency certification on one ground, and then if the Council sets aside the certification, raising another ground with each subsequent re-certification. The number of appeals is potentially limitless. The procedures as described will unduly prolong the certification process so that the process itself deters worthy projects and their environmental benefits simply because they happen to be in the Delta.

Courts have repeatedly recognized in the CEQA context that "time is money." *County of Orange v. Superior Court* (2003) 13 Cal.App.4<sup>th</sup> 1, 6. That same principle applies to the proposed Delta Plan. "A project opponent can 'win' even though it 'loses' in an eventual appeal because the sheer extra time required for the unnecessary appeal (with the risk of higher interest rates or other expenses) makes the project less commercially desirable, perhaps even to the point where a developer will abandon it or drastically scale it down." *Id.* Courts have also recognized the profound chilling effect that threatened challenges to

approvals have on capital formation and project development. See e.g., *Friedland v. City of Long Beach* (1998) 62 Cal.App.4<sup>th</sup> 835, 843 (“The fact that litigation may be pending or forthcoming drastically affects the marketability of public bonds[.]...[T]he possibility of future litigation is very likely to have a chilling effect upon potential third party lenders, thus resulting in higher interest rates or even the total denial of credit...”).

The indirect physical impacts caused by prolonged delays and the chilling of capital formation for projects that would otherwise serve to preserve agriculture, water supplies, or even the ecosystem as a result of a never-ending appellate process have not been disclosed or analyzed in the Draft EIR. That omission is prejudicial to a full and informed understanding of the true environmental impacts of the proposed Delta Plan.

“[R]ules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement.” *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal.4<sup>th</sup> 1112, 1132. Yet that is precisely what the appellate procedures as described in the Draft EIR accomplish. Nothing in the statutory language, however, reveals an intent by the Legislature to promote endless rounds of revisions and consistency re-certifications. See Water Code §85225.25. At most, Water Code section 85225.25 requires that after the Council grants an initial appeal, a local agency may determine to proceed with the proposed covered action so long as it addresses each of the findings made by the Council. See Water Code §85225.25 (“If the agency decides to proceed with the action or with the action as modified to respond to the findings of the council, the agency shall, prior to proceeding with the action, file a revised certification of consistency that addresses each of the findings made by the council and file that revised certification with the council.”). Regardless of the proper statutory interpretation, however, at a minimum, the Draft EIR must disclose the potentially significant indirect physical impacts caused by the prolonged Delta Plan appellate process.

This problem is compounded by the fact that there is no apparent consequence if the Council does not fully process the appeal in a timely manner. See Draft EIR at 1-4. Although the EIR provides that the Council has 60 days to hear an appeal and an additional 60 days to make its decision and issue specific written findings, it appears this deadline is directory rather than mandatory. In other words, there is no “deemed approved” provision in the Delta Plan. See e.g., *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4<sup>th</sup> 1245, 1260-61 (“CEQA contains no ‘deemed approval’ provisions for cases where an agency fails to comply with the time requirements for environmental determinations.”); see also Water Code §§85225.20, 85225.25. This will further deter proponents from proposing projects that may ultimately aide in achieving the coequal goals of the Delta Plan simply because there is no end in

sight for the appeal process. Again, the indirect physical impacts caused by this endless delay must be disclosed and analyzed in the Draft EIR.

**4. The Consistency Challenge Procedures May Violate Established Res Judicata Principles.**

As noted above, the seemingly endless appeal procedures have the potential to deter laudable projects in the Delta. The appellate procedures as described in the Draft EIR may also violate important res judicata principles as well. The doctrine of res judicata prevents relitigating a cause of action that was previously adjudicated between the same parties or parties in privity with them. See e.g., *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2004) 126 Cal.App.4<sup>th</sup> 1180, 1202. The doctrine bars the litigation not only of issues that were actually raised and litigated but also issues that could have been litigated. *Id.* These established principles seem directly contrary to the Draft EIR's description of the consistency challenge procedures.

According to the Draft EIR, because revised certifications may be challenged by any person through subsequent appeals (Draft EIR at 2A-1), the same person or party could file multiple, piecemeal appeals challenging one project. To better adhere to established res judicata principles, the Draft EIR should clarify that a party or its privities challenging a consistency determination must raise all potential grounds in its initial appeal. Anything that could have been raised, but was not, cannot be raised in a subsequent appeal. Otherwise, the Council is setting up the Delta Plan to accomplish very little since innumerable projects that could potentially help the Delta and satisfy the coequal goals of the Delta Plan may be forever stalled in the appeal process.

**5. The Draft EIR Fails to Disclose the Delta Plan's Impact of Impermissibly Expanding the Council's Jurisdiction Over Delta Farming Activities.**

In the future, at least some Delta counties may require use permits for various farming activities such as cropping patterns. Although none of the Delta counties presently do so, such use permits are required in places like Monterey County. If any of the Delta counties enact ordinances requiring such use permits, these would likely become "covered actions" within the meaning of the Delta Plan. This would necessarily expand the Council's jurisdiction over farming activities in the Delta. Yet this expansion of the Council's jurisdiction would occur without any due process and without any chance for members of the public to comment on the unwarranted expansion.

Moreover, because the local approval itself would not technically be valid until the Council determined the action was consistent with the plan (assuming there was an appeal of the consistency determination), farmers could potentially miss entire crop seasons if caught in the prolonged appeal process.

Because none of these impacts have been disclosed or discussed in the Draft EIR, the Draft EIR should evaluate the indirect physical effects associated with the Council's potentially expansive jurisdiction.

**6. The Proposed Mitigation Measures are Defective Because It Is Unclear whether the Measures are Enforceable as Required by CEQA.**

One of the fundamental purposes and requirements of CEQA is to reduce significant environmental effects when it is feasible to do so. Pub.Res.Code §§21002, 21002.1(a)-(b). To implement this requirement, Public Resources Code section 21081.6 and Guideline §15091(d) require a lead agency to adopt mitigation measures that are fully enforceable through conditions of approval, contracts, or other legally binding means. The mitigation measures in this case fall short of CEQA's requirements because it is unclear whether the mitigation measures as proposed are required to be included in future projects that may come within the purview of the Delta Plan.

For example, the Draft EIR contains conflicting statements on the enforceability of the proposed mitigation measures. First, the Draft EIR states that it “[i]dentifies feasible mitigation measures to reduce the Proposed Project's significant effects on the environment. Agencies undertaking covered actions must incorporate these measures into their projects or plans in order for any such covered action to be consistent with the Delta Plan.” Draft EIR at 2B-2 (emphasis added). But then, in the Agricultural and Forestry Section of the Draft EIR, the document provides that “[t]his section identifies mitigation that could be considered by lead agencies to develop specific mitigation measures for future projects involving agriculture and forestry resources.” Draft EIR at 7-1 (emphasis added). The Draft EIR similarly provides that “[a]t this program-level of analysis, mitigation measures have been identified for consideration by lead agencies at the time the projects are proposed for implementation.” Draft EIR at 7-18 (emphasis added). Then, in another abrupt about-face, the Draft EIR states that “[a]ny covered action that would have one or more of the significant environmental impacts listed above [to agricultural or forestry resources] shall incorporate the following features and/or requirements related to such impacts (e.g., preserving Farmland in perpetuity to reduce impacts related to conversion of Farmland to nonagricultural uses).” Draft EIR at 7-52 (emphasis added). This apparent ambiguity in the Draft EIR's treatment of mitigation measures itself makes the measures unenforceable in violation of Public Resources Code section 21081.6 and Guideline §15091(d).

The ambiguity is further compounded by Policy G P1 in the Fifth Draft of the Delta Plan. That policy provides:

A covered action must be consistent with the coequal goals and the inherent objectives. In addition, a covered action must be

consistent with each of the policies contained in this Plan implicated by the covered action. The Delta Stewardship Council acknowledges that in some cases, based upon the nature of the covered action, full consistency with all relevant policies may not be feasible. In those cases, covered action proponents must clearly identify areas where consistency is not feasible, explain the reasons, and describe how the covered action nevertheless, on whole, is consistent with the coequal goals and the inherent objectives. In those cases, the Delta Stewardship Council may determine, on appeal, that the covered action is consistent with the Delta Plan.

Fifth Staff Draft Delta Plan at 60. Thus, under Policy G P1, a covered action is *not* required to comply with all 12 policies in the Plan. Yet, the Draft EIR – at least in some places – provides that all mitigation measures must be incorporated into a covered action in order to be deemed “consistent” with the Delta Plan, even if the mitigation measures relate to policies that a particular covered action does not “implicate.” See e.g., Draft EIR at 2B-2 (emphasis added) (“Agencies undertaking covered actions must incorporate these measures into their projects or plans in order for any such covered action to be consistent with the Delta Plan.”). This apparent inconsistency must be resolved so that the public and the decision makers can determine what mitigation measures, if any, are required in order to be considered “consistent” with the Delta Plan.

**7. The Draft EIR Too Narrowly Defines the Thresholds of Significance for Evaluating the Environmental Impacts of Converting Large Portions of Agricultural Land in the Delta Thereby Omitting Indirect Physical Impacts from Its Analysis.**

In assessing the Project's impacts to agricultural resources, the Draft EIR relies solely on the sample questions in Appendix G when identifying the thresholds of significance against which to measure the Project's agricultural impacts. Draft EIR at 7-18. These thresholds, however, are too narrowly drawn given the express statutory mandate under the Delta Reform Act to preserve and enhance the Delta's unique agricultural resources. Water Code §§85020(b); 85054. The Draft EIR should include a threshold of significance that evaluates how the conversion of farmland will affect the ability to satisfy the mandate to preserve agricultural resources.

Furthermore, while the identified thresholds may be a start for evaluating the impacts of converting farmland under the Project, they do not address other environmental impacts such conversion may have. See e.g., *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1110-1111 (plaintiff contended that Appendix G questions did not even address an environmental effect the project would have). For example, losing farmland as

a result of the Project will not only result in the loss of farmland itself, but will have other physical impacts as well that have not been disclosed. If property that otherwise would have been farmed is fallowed under the Project, no one will be actively managing the water table in that area. This could lead to physical impacts related to levees and neighboring property owners. These impacts are not discussed nor disclosed in the Draft EIR's discussion of agricultural resources.

Delta agriculture, moreover, supports a multi-billion dollar industry, benefiting the immediate region, the state of California, and the world. At the same time, it provides substantial employment for many Delta communities. For towns and areas within the Delta that are heavily reliant on agriculture, the loss of farmland could lead to skyrocketing unemployment. Although economic and social effects ordinarily are not considered significant impacts under CEQA (Guideline §15064(e)), where an agency can trace a chain of events from the economic or social impact to a physical impact, that physical impact must be disclosed, evaluated, and potentially mitigated in an EIR. It is reasonably foreseeable that the loss of farmland in certain areas could have social and economic impacts such as unemployment that could leave decaying communities in its wake. See e.g. *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4<sup>th</sup> 1184 (discussing urban decay impacts). The Draft EIR, therefore, should include an urban decay or similar analysis to truly address all of the adverse physical changes that indirectly may be caused by the initial loss of farmland.

Finally, although the Draft EIR's thresholds of significance encompass potential conflicts with Williamson Act contracts (Draft EIR at 7-18), the Draft EIR omits any analysis of the secondary physical impacts cancelling a Williamson Act contract may have as a result of the Project. The Draft EIR makes no mention of the pressure that such cancellations have on *surrounding* agricultural areas. This pressure, much like a domino-effect, may lead to even larger conversions of agricultural land to other uses. The Draft EIR should develop a threshold of significance to study this likely significant physical impact, and disclose exactly what that impact will be.

## **8. The Draft EIR's Alternatives Analysis Is Legally Inadequate.**

Courts have repeatedly recognized that the alternatives section of an EIR, together with its mitigation measures, is its "core." *Rio Vista Farm Bureau Ctr. v. County of Solano* (1992) 5 Cal.App.4<sup>th</sup> 351, 376. "One of the fundamental objectives of CEQA is to facilitate the identification of 'feasible alternatives or feasible mitigation measures which will avoid or substantially lessen' significant environmental effects." *Id.* Under Guideline §15126.6(a), an EIR must consider "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."

In this case, although the Draft EIR includes five alternatives (Draft EIR at 2A-67 through 2A-69 (listing the No Project Alternative, Alternative 1A, Alternative 1B, Alternative 2, and Alternative 3)), the Draft EIR specifically states that “[t]he degree to which the alternatives meet the ‘project objectives’...or are ‘feasible,’ as defined in CEQA” will be assessed as a later date by the Council (but prior to consideration of final adoption of the Delta Plan). Draft EIR at ES-1. Yet the Draft EIR itself must include alternatives that are feasible and meet at least some of the Project’s basic objectives. It cannot wait to determine these issues until after the Draft EIR has been prepared. Based on the Draft EIR’s plain language, the included five alternatives may not meet the minimum criteria set forth in Guideline §15126.6 for an adequate alternatives analysis.

The Draft EIR also fails to include an alternative that truly attempts to preserve the Delta’s unique agricultural way of life as required by Water Code sections 85020(b) and 85054. Such an alternative must be analyzed in the Draft EIR. The Delta Caucus therefore proposes that the Draft EIR be revised to include an “Agricultural Preservation Alternative.” Elements of this alternative would include policies requiring the use of existing channels to provide water flows as well as streamlining the permitting process for maintaining and improving these existing channels, including dredging. The Agricultural Preservation Alternative should also provide for upstream storage to capture the higher rainfalls anticipated as a result of climate change. The Agricultural Preservation Alternative should include implementing the Delta Corridors plan to improve South Delta circulation, improve conveyance south of the Delta and improve the water quality for supplies delivered south of the Delta. The alternative should also include policies that permit only excess water in the Delta to be exported. Finally, the Agricultural Preservation Alternative should analyze policies that promote using rice production in the Delta as a means of rebuilding Delta islands and increasing Delta revenues. This alternative would contrast with the Project which promotes tules to address subsidence issues rather than rice production. Promoting rice production would also have the added advantage of providing wildlife and habitat benefits.

An alternative such as the Agricultural Preservation Alternative would eliminate the need for taking vast areas of agricultural resources out of production thereby preserving the Delta’s unique agricultural values as mandated by the Legislature. Water Code §§85020(b) and 85054. The Draft EIR’s alternatives analysis is incomplete without such a proposal.

**9. The Agricultural Resources Section of the Draft EIR Omits Relevant Information Necessary to Understand the Project's True Impacts on Delta Agriculture.**

An EIR must include a description of the existing environment in the vicinity of a project from both a local and regional perspective. Guideline §15125(a). "Knowledge of the regional setting is critical to the assessment of environmental impacts." Guideline §15125(b). In this case, the Draft EIR's environmental setting with respect to agriculture resources is woefully inadequate, especially given the statutory mandate to protect and enhance the unique agricultural values of the California Delta as an evolving place. Water Code §85020.

Although the environmental setting contains basic information regarding the number of acres dedicated to agriculture and the types of crops planted (Draft EIR at 7-2 through 7-10), what is missing from the section is a detailed description of the important role agriculture plays not only in the Central Valley but throughout California and the world, and the physical impacts it has on the health of all California residents. In other words, the true regional significance of Delta agriculture has been omitted from the Draft EIR. The California Farm Bureau Federation has previously submitted a letter containing detailed information on the regional and global significance of Delta agriculture. See Letter from California Farm Bureau Federation to Delta Stewardship Council dated January 25, 2011 (comments on Delta Stewardship Council Delta as a Place: Agriculture White Paper dated December 6, 2010). Similar information should be included in the Draft EIR. Information from the Delta Protection Commission's Economic Sustainability Plan should also be inserted to add critical missing substantive information on Delta agriculture.

The Draft EIR must be revised to include such information so that the decision makers and the public can truly understand the impact of converting large swaths of agricultural land to other uses and the effect that may have on human health. Like in *Bakersfield*, where the court found that an EIR must correlate a proposed project's adverse air quality impacts to resultant adverse health effects in order to be legally adequate under CEQA (see *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4<sup>th</sup> 1184), the Council must correlate the adverse agricultural impacts to resultant adverse health effects caused by the lack of food from the Delta region. Without such information, the Draft EIR is legally defective.

Another important piece of the puzzle that is missing from the Draft EIR is any discussion of the impact continued growth south of the Delta has on agricultural values in the Delta. Such growth creates a perpetual need for Delta water, which in turn erodes the goal of protecting agricultural values as an evolving place. The Draft EIR should take into consideration such impacts.

**10. The Proposed Measures for Mitigating the Loss of Agricultural Land are Inadequate.**

The Draft EIR includes several proposed measures to purportedly mitigate the impacts of losing substantial amounts of agricultural land as a result of the Project. See e.g., Draft EIR at 7-53 through 7-55. One such measure requires the preservation “in perpetuity [of] other Farmland through acquisition of an agricultural conservation easement, or contributing funds to a land trust or other entity qualified to preserve Farmland in perpetuity (at a ratio of 1:1 to compensate for permanent loss).” Draft EIR at 7-53. Given the importance of agricultural land in the Delta, and the overall *quality* of such land, the 1:1 mitigation ratio is inadequate. At a minimum, the ratio should be 3:1. The mitigation measure should also specify that the replacement acres must be within the Statutory Delta as defined in the Delta Protection Act and not in some distant place as that would not mitigate the loss of farmland *in the Delta*.

**11. Normal Farming Activities Should be Administratively Exempt from the Delta Plan.**

The Council has the ability to administratively find that certain activities do not constitute covered actions within the meaning of the Delta Plan. Draft EIR at 2A-4. As the Delta Caucus has repeatedly urged, normal farming activities should be exempt from the Delta Plan. Such activities would include, but may not be limited to, plowing, cultivating, minor drainage and harvesting for the production of food and fiber and upland soil and water conservation practices.

It is critical that the Delta Plan clarify that if crops have been grown and harvested on a regular basis, the mere addition or change of a cultivation technique (e.g., discing rather than using herbicides for weed control) would not trigger the Delta plan consistency determination. Likewise, the planting of different agricultural crops should be exempt. In other words, the Delta Plan should not limit in any manner cropping choices or activities. Similarly, the resumption of agricultural production in areas laying fallow as part of a normal rotational cycle should be exempt.

Delta agricultural interests must have flexibility to change as conditions and markets readily change. Indeed, maintaining a Delta that provides flood control and drainage that allows agricultural activities to continue is essential to the success of current and future cropping opportunities, including winegrapes, orchards, and other permanent crops in the Delta.

In its current form, however, the Delta Plan is ambiguous as to what farming activities qualify as a covered action and those that would not. See Fifth Staff Draft Delta Plan at 54 (“Routine agricultural practices are unlikely to be considered a covered action unless they have a significant impact on the

achievement of the coequal goals or flood risk.”). Given the importance of farming in the region, and the goal of preserving agriculture, this should be clearly spelled out in the Draft EIR and in the Delta Plan, in whatever form it is finally adopted.

**12. Criteria for Determining whether an Activity Constitutes a “Covered Action” Are Vague and Must be Revised or Clarified.**

Water Code section 85057.5 defines the term “covered action.” Under the statute, four criteria must be satisfied before an activity qualifies as a covered action for purposes of the Delta Plan: (1) the activity is a project under CEQA; (2) which will occur within the boundaries of the Delta or Suisun Marsh; (3) is covered by one or more provisions of the Delta Plan; and (4) will have a significant impact on achieving one or more coequal goal or the implementation of government-sponsored flood control programs. Water Code §85057.5(a)(1)-(4). The statute, however, does not define the meaning of the word “significant” as used in criteria four above.

According to the Draft EIR, for purposes of the Project “significant impact” means “a change in existing conditions that is directly, indirectly, and/or cumulatively caused by an action and that will significantly affect the achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and State interests in the Delta.” Draft EIR at 2A-2. The problem with this definition, however, is it simply uses the term “significant” to define the term “significant.” In other words, it does not tell the reader any useful information.

The definition of the word “significant” as used in Water Code section 85057.5(a)(4) should be separately defined, perhaps more in line with the definition of “significant environmental impact” under CEQA. See Pub.Res.Code §21068 (“‘Significant effect on the environment’ means a substantial, or potentially substantial, adverse change in the environment.”); see also Guideline §15382. In any event, the term should be clarified and explained thoroughly in the Draft EIR.

**13. Ecosystem Restoration Policy ER P3 Should either be Deleted or Significantly Revised, and Any Ecosystem Restoration Efforts Must Focus on Limiting Impacts to Agricultural Lands.**

ER P3 requires all covered actions, other than habitat restoration, within specific areas of the Delta to demonstrate, in consultation with Department of Fish and Game, that any adverse impacts on the “opportunity for habitat restoration” would be avoided or mitigated within the Delta. Draft EIR at 6-52 through 6-53. This policy is impermissibly vague since neither the Project nor the EIR define what constitutes an “opportunity for habitat restoration.” Moreover,

the Draft EIR never identifies to what level the "opportunity" must be mitigated. Projects could be stalled for years based on this mitigation measure alone.

The policy also creates a psychological barrier to developing or proposing projects in the Delta. The policy essentially affects a taking of property without just compensation. The Draft EIR admits that the policy may restrict land use types in certain areas of the Delta and that it could prevent approval of projects based on some amorphous "possibility of future ecosystem restoration." Draft EIR at 6-52 through 6-53 ("For example, a covered action that would result in construction of agricultural-related facilities or infrastructure (e.g., warehouse for storing produce), even if it is in compliance with local regulation, could interfere with the possibility of future ecosystem restoration if it is located within the restoration opportunity areas designated in Figure 2-1. If this interference could not be mitigated, then the covered action would conflict with the Delta Plan and could not be approved."). These physical impacts must be disclosed and analyzed prior to EIR certification.

The Project should also be revised to specifically provide that all habitat restoration projects within the Delta Plan shall occur on government owned lands first. Once all such lands have been exhausted, only then should habitat restoration be encouraged on private lands. And any such private land efforts should be through conservation easements first rather than by obtaining fee title to the land. If fee title to private land is obtained, it should be on a willing seller, willing buyer basis following payment of fair and just compensation. Eminent domain should be used sparingly – if at all.

The Draft EIR also fails to address the impact that ecosystem restoration projects may have on *increasing* water demands in the Delta. Keeping certain lands flooded to provide habitat will result in a net increase in water demand within the Delta as this is not as efficient as the current irrigation systems currently in place. The impact of increasing water demands for restoration efforts while at the same time trying to reduce reliance on Delta water supplies has not been studied or disclosed in the Draft EIR.

**14. Because Policy ER P1 Regarding Flow Objectives and Flow Criteria Is Impermissibly Vague, the EIR has Not Fully Evaluated the Environmental Impacts from Implementing Such a Policy.**

ER P1 encourages the State Water Resources Control Board to adopt, on an expedited basis, updated flow objectives for the Delta and updated flow criteria for high-priority tributaries in the Delta watershed. Draft EIR at Appendix C-4. According to the Draft EIR, the policy "encourages the SWRCB to consider public trust resources in development of Delta flow objectives, and this could encourage a more natural flow regime in the Delta." Draft EIR at 2A-39.

Neither the Fifth Draft Delta Plan nor the Draft EIR ever defines what constitutes a “more natural flow regime.” Without knowing exactly what the Council means by this term, there is no way to evaluate the impact of imposing such a flow regime in the Delta. The Draft EIR should be revised to include this important definition and should re-evaluate Project impacts based on the meaning of this phrase.

In so doing, the Draft EIR must take into account the meaning of “restoration” under Water Code section 85066. That statute provides that “restoration” means “the application of ecological principles to restore a degraded or fragmented ecosystem and return it to a condition in which its biological and structural components achieve a close approximate of its natural potential, taking into consideration the physical changes that have occurred in the past, and the future impact of climate change and sea level rise.” Water Code §85066 (emphasis added). Thus, in defining a “more natural flow regime” the Draft EIR cannot ignore, and specifically must consider, the physical changes that have already occurred as a result of agricultural development in the Delta. Delta agriculture has been thriving for well over 100 years. These activities have permanently altered the habitat of this region, creating the most natural land from a farm production standpoint. In other words, good soils and water supplies in the Delta, which have been used for hundreds of years, have provided critical food for the residents of the region and throughout California. Simply requiring flow objectives and criteria that consider only the interests of fish is not permissible given the well-established agricultural history of the Delta.

**15. Flood Risk Policies Should Clarify that Ongoing Agricultural Activities May Continue Unobstructed in Floodways and Floodplains.**

Policy RR P1 provides that “[f]loodways shall not be encroached upon nor diminished without mitigating for future flood flows. This policy does not apply to ecosystem restoration projects or any ongoing agricultural or flood management activities unless they significantly decrease the existing level of flood protection.” Draft EIR at Appendix C-5. Once again, the policy is impermissibly vague. Neither the Project nor the EIR define what constitutes a “significant decrease” in existing flood protection.

Moreover, the policy should be rewritten to clarify that it does not apply to ongoing agricultural activities in floodways and floodplains. To restrict such activities without any easements or other compensation requirements likely runs afoul of Guideline §15126.4(a)(4).

To the extent the policy may apply to such activities, the Draft EIR must analyze and disclose the impact that prohibiting agricultural activities in such areas will have on protecting and enhancing agriculture in the Delta. That has not been done. It must be before the Council may certify the EIR.

**16. Water Supply Reliability Recommendation R5 Should Be Deleted or Significantly Revised.**

Recommendation WR R5 provides that "The State Water Resources Control Board and/or the Department of Water Resources should require that proponents requesting a new point of diversion, place of use, or purpose of use that results in new or increased use of water from the Delta watershed should demonstrate that the project proponents have evaluated and implemented all other feasible water supply alternatives." Draft EIR at Appendix C-9. The recommendation essentially halts all new diversions from the watershed. At a minimum, this policy should be limited to out-of-Delta requests to divert Delta water. The recommendation should be clarified that it does not apply to in-basin water use.

**17. The Draft EIR Should Include Information Regarding the Financial and Economic Costs of the Proposed Project.**

CEQA Guideline §15124 requires that an EIR describe a project's "technical, economic, and environmental characteristics." Guideline §15124(c). Although Chapter 9 of the Project as proposed includes a Finance Plan Framework, including financing needs as well as a recommended financing strategy for the Delta Plan, the Draft EIR does not evaluate or disclose these economic characteristics nor does it analyze the potential physical impacts associated with the financing plans. The Draft EIR must include this information in order for the decision makers and the public to understand the true environmental impacts of the "whole of the action," which necessarily includes financing requirements or policies.

Moreover, Guideline §15131 specifically provides that a lead agency may include "economic or social information" in an EIR. Indeed, economic and social information *must* be considered by public agencies in deciding whether changes in a proposed project are feasible to reduce or avoid the significant environmental effects identified in an EIR. Guideline §15131(c). Because such information is necessary to determine the feasibility of lessening the Project's environmental impacts, the Council should include this information at the earliest opportunity so that the decision makers and the public have an adequate opportunity to review it and respond to the information. That opportunity is in the Draft EIR.

A holistic economic analysis, rather than simply an economic feasibility study, should therefore be included in the Draft EIR. Once such an analysis is completed, the Council should recirculate the revised Draft EIR for further public comment. Guideline §15088.5 (a) ("A lead agency is required to recirculate an EIR when significant new information is added to the EIR after public notice is

given of the availability of the draft EIR for public review under Section 15087 but before certification." ). It is only after the Draft EIR contains a complete picture of the Project's financial and economic impacts, which will undoubtedly lead to secondary physical impacts within the Delta, that the decision makers and the public can determine whether to proceed with the Project as proposed.

**18. The Draft EIR Fails to Analyze the Impact on Existing Water Rights.**

It is well known that existing water rights in this state are over-allocated. As the Fifth Draft Delta Plan points out, SWP and CVP contract amounts "promise more water than can be consistently delivered." Fifth Staff Draft Delta Plan at 77. The EIR, however, fails to address or analyze where the water for proposed ecosystem restoration policies will come from, and the physical impacts of using any identified supplies. In other words, where does the Council propose finding "new water" when no new storage facilities have been built within California's water system for years?

This issue is critical especially since the Delta Plan cannot be developed or implemented in a way that undermines areas of origin or existing water rights. See e.g., Water Code §85031(a) ("This division does not diminish, impair, or otherwise affect in any manner whatsoever any area of origin, watershed of origin, county of origin, or any other water rights protections, including, but not limited to, rights to water appropriated prior to December 19, 1914, provided under the law.").

**19. The Draft EIR Errors are Prejudicial.**

As set forth above, the Draft EIR omits a substantial amount of critical information thereby thwarting informed decisionmaking. CEQA "provides that 'noncompliance with the information disclosure provisions of this division which precludes relevant information from being presented to the public agency...may constitute a prejudicial abuse of discretion..., regardless of whether a different outcome would have resulted if the public agency had complied with those provisions.'" Pub.Res.C. §21005(a) (emphasis added). Pursuant to *Rural Landowners Association v. Lodi City Council* (1983) 143 Cal.App.3d 1013, 1023, the omission of such information is a prejudicial legal error and the Draft EIR must be revised and recirculated prior to certification or project approval.

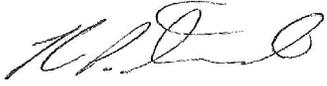
Sincerely yours,



Russell E. van Löben Sels  
Chairman, Delta Caucus



John S. Veitch  
President, Contra Costa County Farm  
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President, Sacramento County Farm  
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Bruce Fry  
President, San Joaquin Farm Bureau  
Federation



On behalf of:  
Derrick Lum  
President, Solano County Farm  
Bureau



Chuck Dudley  
President, Yolo County Farm Bureau