FRIANT
WATER AUTHORITY

February 2, 2012

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Terry Macaulay
Delta Stewardship Council
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VIA EMAIL TO: eircomments@deltacouncil.ca.gov

Re: Draft Program Environmental Impact Report for the fifth draft Delta Plan

Dear Ms. Macaulay:

The Friant Water Authority ("Friant") submits the following comments on Draft Program Environmental Impact Report (DPEIR) and the fifth draft Delta Plan. Friant is a joint powers authority that consists of twenty member agencies within the Friant Division of the Central Valley Project. The Friant Division supplies water to over one million acres and more than 15,000 mostly small family farms on the east side of the southern San Joaquin Valley (in Merced, Madera, Fresno, Kings, Tulare and Kern counties). Friant Division water supplies are also relied upon by several cities and towns, including the City of Fresno, as a major portion of their municipal and industrial water supplies.

Friant shares the concerns that have been raised in the comments previously submitted by the Ag-Urban Coalition and the San Joaquin River Group Authority, and it joins in those comments. For the sake of brevity, Friant incorporates those comments by reference rather than reiterating those concerns here.

In addition to the issues raised by those commenters, Friant notes the following deficiencies with the DPEIR.

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1. The DPEIR does not analyze the "whole" of the project.

The DPEIR violates CEQA because it fails to evaluate the environmental impacts of the "whole" of the project. For example, the Delta Plan indicates that it will incorporate and implement the Bay-Delta Conservation Plan (BDCP), a habitat conservation plan that is currently being developed under the auspices of the Endangered Species Act. The BDCP is not completed and has not been approved, and its EIR has not been certified. Incomplete future programs and their environmental documents cannot be incorporated into an EIR by reference; CEQA does not permit the lead to defer the analysis of this portion of the project. As it now stands, the DPEIR is *per se* inadequate because it fails to analyze the whole of the project being considered for implementation.

2. For the portions of the project that *are* analyzed in the DPEIR, the DPEIR fails to disclose and analyze the reasonably foreseeable environmental impacts.

The DPEIR concedes that it lacks quantitative analysis, but it seeks to excuse this failing on the grounds that the Delta Plan is a program and the DPEIR is a programmatic, first-tier document. The DPEIR misstates the applicable CEQA standard: even a first-tier programmatic document for a plan to be implemented over many years must analyze, in general terms, the plan's potential reduction in water supplies and the associated environmental effects. *In re Bay-Delta etc.*, 43 Cal. 4th 1143, 1173 (2008). Of course, the degree of specificity required in the environmental document varies depending on the degree of specificity involved in the underlying activity. State CEQA Guidelines § 15145(a). While a planning-level document need not contain the level of detail required for review of a construction project, the lead agency must analyze all reasonably foreseeable direct and indirect impacts of the proposed project. Reasonable forecasting is implicit in environmental review. Foreseeable effects that would be caused by implementation of the proposed action must be evaluated.

"While proper tiering of environmental review allows an agency to defer analysis of certain details of later phases of long-term linked or complex projects until those phases are up for approval, CEQA's demand for meaningful information is not satisfied by simply stating information will be provided in the future. 'Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration.'" *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 431 (2007), citing State CEQA Guidelines § 15152(b). The lead agency cannot defer all analysis of the amount of water that will be needed to implement the project and the environmental impacts associated with that water use. *Vineyard*, 40 Cal. 4th at 431; *In Re Bay-Delta etc.*, 43 Cal. 4th at 1173. Nor can an EIR deem water supplies satisfied by merely assuming that less water will be needed to meet future demands. *Stanislaus Natural Heritage Project v. County of Stanislaus*, 48

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Cal. App. 4th 182, 206 (1996). Where, as here, the plan will reduce available water supplies and require water suppliers to procure additional sources, the volume of water needed and the potential environmental effects of obtaining it must be generally evaluated and disclosed in the EIR. *In re Bay-Delta etc.*, 43 Cal. 4th at 1173; *Santiago County Water Dist. v. County of Orange*, 118 Cal. App. 3d 818, 829 (1981); *Stanislaus Natural Heritage*, 48 Cal. App. 4th at 205-06.

Here, the analysis – like the faulty project description – is simply incomplete. For example, the DPEIR's analysis of "Reliable Water Supply" found that the Plan proposes to reduce the use of Delta water, but the reduction will be offset by actions taken by water suppliers. This section of the DPEIR did not disclose whether the water supply impacts resulting from implementation of the Plan would be significant, potentially significant, mitigated below a level of significance, or less than significant. "A major purpose of an EIR is to inform other governmental agencies, and the public generally, of the environmental impact of a proposed project ... and to inform the decision-making agency of the full range of adverse environmental effects and alternative measures prior to its decision to approve or disapprove such project ...." *Foundation for San Francisco's Architectural Heritage v. City and County of San Francisco*, 106 Cal. App. 3d 893, 909-10 (1980). Obviously, this purpose cannot be fulfilled when the EIR fails to include clear conclusions about both the scope of the project's identified environmental impacts and their significance.

In a separate section, "Ecosystem Restoration," the DPEIR concludes that implementation of the Delta Plan would have a less-than-significant impact to water supply. While the DPEIR recognizes that the Plan will cut water supplies for agricultural, municipal, and industrial water uses in order to implement a "more natural flow regime," the DPEIR dismisses the significance of this impact because "water users would undertake the projects and actions encouraged by the [Plan] to improve water supply reliability, as discussed in Section 2A, Proposed Project and Alternatives, and summarized in Section 3.4.3.1." DPEIR, 3-85.

This analysis is slightly more rigorous than the wholly conclusory evaluation of water supply impacts, but it is still grossly inadequate. First, the DPEIR conflates water supply reliability with water supplies. Increased water supply reliability is irrelevant to the question of whether the loss of water that will result from implementation of the Delta Plan is significant.

Second, the DPEIR impermissibly seeks to shift the burden of analyzing the impacts associated with obtaining replacement water sources from the Council to the local agencies that will suffer the impacts. As the Court of Appeal has recently reaffirmed, the duty to analyze the environmental impacts of a proposed project falls to the lead agency, not to the agency whose service capabilities may be adversely impacted by the project. *City of San Diego v. Board of Trustees of the California State University*, Appellate Court Case No. D057446, ___ Cal. App.

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4th ___ (2011). Inexplicably, the DPEIR violates this legal standard: implementation of the Delta Plan will result in water providers needing to develop alternative sources, yet the DPEIR fails to quantify or analyze this very foreseeable result. Instead, the DPEIR foists the responsibility for analyzing the environmental impacts of that result on to those "local and regional" water suppliers. DPEIR, 3-85. CEQA does not permit the Council to abdicate its responsibility in this manner.

Again, the fault seems to stem from the incomplete project description. For example, the Delta Plan neither describes nor quantifies the "more natural flow regime" that it proposes. It is left to the reader to guess what volume or range of water would be involved in this key feature of the Plan. Here, as in Vineyard, "factual inconsistencies and lack of clarity in the FEIR leave the reader—and the decision makers—without substantial evidence for concluding that sufficient water is, in fact, likely to be available...." *Vineyard*, 40 Cal. 4th at 439. While we understand the Council's desire to meet the statutory deadlines, it is premature to prepare an EIR before completing an accurate, stable, and finite project description that includes sufficient detail to enable environmental analysis. Such ill-defined project features as the wholly unquantified "more natural flow regime" are impossible to analyze adequately. Consequently, the scope of the environmental impacts caused by the project cannot be known or disclosed – and, fundamentally, that is a fatal flaw from which the DPEIR suffers.

3. The DPEIR improperly fails to adopt feasible mitigation measures to mitigate the environmental impacts of the Delta Plan.

As noted above in Section 2, the DPEIR found that mitigation measures for Change in Water Supply Availability to Water Users that Use Delta Water (Impact 3-3) are not necessary because it water users will undertake projects to replace the water supply reductions resulting from the "more natural flow regime." *See, e.g.,* DPEIR, 3-84 – 85. Specifically, the DPEIR concludes that "water users would undertake the projects and actions encouraged by the [Plan] to improve water supply reliability, as discussed in Section 2A, Proposed Project and Alternatives, and summarized in Section 3.4.3.1." DPEIR, 3-85. Thus, the DPEIR acknowledges that implementation of the Delta Plan will result in water supply impacts, but it shifts responsibility for mitigating those impacts *to the water suppliers who will suffer them.* The Council is the entity that is implementing the Delta Plan. Since implementation of the Delta Plan will cause significant environmental impacts on water supply, the Council –not some other entity – has the responsibility to adopt all feasible mitigation measures to reduce or eliminate those impacts. State CEQA Guidelines §§ 15092(b), 15043.

The Council's approach to mitigation is directly analogous to the illegal approach taken by the California State University system, which was squarely rejected by the Court of Appeal in *City of San Diego*, Appellate Court Case No. D057446, ___ Cal. App. 4th ___. In that case,

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CSU found that it was infeasible to mitigate offsite traffic impacts that would result from implementation of its Master Plan for the campus. CSU concluded that certain offsite facilities were the responsibility of the City, not CSU. CSU had not reached any agreement with the City regarding those facilities. While the university chancellor was directed to seek additional funding from the Legislature for mitigating these impacts, that mitigation was not assured since legislative funding was uncertain. CSU's findings certifying the EIR concluded that there was no feasible mitigation for the offsite impacts to the City and the impacts would remain significant and "unavoidable." The appellate court rejected CSU's contention that lack of appropriation rendered mitigation infeasible and allowed it to implement a Plan that would impose significant environmental impacts on the City. Because CSU was required to adopt all feasible mitigation measures and it failed to do so, the EIR was legally insufficient.

Like CSU, the Council seeks to shift the burden of mitigating water supply impacts to the parties who will suffer them. CEQA does not permit this. Since the water supply reductions are the foreseeable result of implementing the Delta Plan, the Council has the legal obligation to adopt all feasible measures to mitigate those impacts.

4. The DPEIR impermissibly fails to evaluate how the project and its alternatives would accomplish the project objectives.

The DPEIR's alternatives analysis violates CEQA because it does not analyze either how well the proposed Delta Plan or any of the alternatives satisfy the project objectives or how feasible they are. Rather, the DPEIR states that "The degree to which the alternatives meet the 'project objectives'... or are 'feasible', as defined in CEQA [California Environmental Quality Act], will be assessed by the Council...following the release of this draft program EIR, but prior to consideration of final adoption of the Delta Plan." DPEIR, ES-1. But it is impossible to determine whether the EIR satisfies its legal mandate of evaluating a reasonable range of feasible alternatives when the EIR makes no attempt to analyze whether any of the alternatives meet the project objectives. "The process of selecting the alternatives to be included in the EIR begins with the establishment of project objectives by the lead agency. '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." *Jones v. Regents of University of California*, 183 Cal. App. 4th 818, 825 (2010), citing *In Re Bay-Delta*, 43 Cal. 4th at 1163. Absent this analysis, it cannot be demonstrated that the DPEIR's alternatives analysis complies with CEQA.

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5. The DPEIR's conclusion that the draft Delta Plan is environmentally superior to the alternatives is arbitrary and capricious.

The omission of this analysis renders the DPEIR's alternatives analysis fatally defective. The DPEIR identifies the proposed Delta Plan as the "environmentally superior alternative," but this designation must be arbitrary and capricious when the DPEIR readily acknowledges that no attempt has been made to discern whether the Delta Plan meets the project objectives or is feasible to implement. Thus, the DPEIR's alternatives analysis has not adequately disclosed the comparative merits of the proposed project and its alternatives, as is required by CEQA.

CONCLUSION

The DPEIR's analysis of the draft Delta Plan's impacts simply does not pass muster under CEQA. The Council cannot adopt the draft Delta Plan until the DPEIR's very serious shortcomings are remedied. The DPEIR must be substantially revised so that it adequately analyzes the potential environmental impacts that could directly or indirectly result from implementing the Delta Plan, and then the DPEIR must be recirculated so that the public has an opportunity to comment on these impacts.

Thank you for your careful consideration of these comments and your inclusion of them in the record of administrative proceedings. We look forward to receiving your responses. Should you have any questions regarding any of the matters in this letter, or if we can provide any further information to assist you, please do not hesitate to contact me at 916-382-4344 or via email to jbuckman@friantwater.org.

Sincerely,

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cc: Ronald D. Jacobsma, General Manager

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