

PORT OF STOCKTON

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February 2, 2012

Phil Isenberg, Chairman, and Council Members
Delta Stewardship Council
Attn: P. Joseph Grindstaff, Executive Officer
980 Ninth Street, Suite 1500
Sacramento, California 95814

RE: PORT OF STOCKTON COMMENTS ON THE DRAFT PROGRAM ENVIRONMENTAL IMPACT REPORT (DRAFT EIR) FOR THE FIFTH STAFF DRAFT DELTA PLAN

Dear Mr. Grindstaff:

The Port of Stockton (Port) has serious concerns related to the adequacy and accuracy of the Delta Plan (Plan) Program Environmental Impact Report (EIR) prepared by the Delta Stewardship Council (Council) dated November 2011. Two major areas of concern are the adequacy of the environmental document and the fact that the current project description may be altered and may not be the project that the Council ultimately approves. The Port is providing an overview of the issues of concern (adequacy of the EIR and status of the Plan) and then provides more detailed concerns related to the adequacy of the EIR.

1.0 Overview

1.1 Adequacy of the EIR

The general purpose of CEQA is to inform decision makers and the public as noted below:

"15002. GENERAL CONCEPTS

(a) Basic Purposes of CEQA. The basic purposes of CEQA are to:

(1) Inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities.

(2) Identify the ways that environmental damage can be avoided or significantly reduced.

(3) Prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes to be feasible.

(4) Disclose to the public the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects are involved.”

The EIR does not meet these criteria for reasons that are detailed in our correspondence. The Port has reviewed the sections of the EIR that may affect our mission; however, it would be anticipated that these comments would apply to other sections of the EIR. Even though comments have not been made on all of the individual topics, it is the strong opinion of the Port that the Council should incorporate the concerns outlined below in the remaining chapters of the document. For the legal adequacy of the analysis, it is the opinion of the Port that the EIR be revised and recirculated to address the issues discussed below.

1.2 Status of the Plan

A more fundamental concern is the fact that based upon information being presented by the Council, it appears that the Plan provided as a basis of the EIR is not intended to be the Plan adopted by the Council. As noted in the August 2011: Fifth Draft of the Plan:

“This is the fifth of five (5) staff draft versions of the Delta Plan that will be presented to the Delta Stewardship Council prior to the release of the Draft Environmental Impact Report (EIR) in August 2011. Two additional staff drafts will be released following the public comment period on the Draft EIR.”

The seventh document will be considered with the Final EIR. The public will have no ability to respond to changes to the Plan and have any way of determining if the Draft EIR has adequately addressed the changes to the Plan. Although CEQA does allow changes to a project to occur between the draft and final EIR, it is incumbent that the public and decision makers be aware of how these changes affect the significance of the conclusions of the public review draft.

It is the opinion of the Port that the EIR should be completely rewritten once the Delta Stewardship Council has made revisions to the Plan. The EIR should be recirculated and the public have another opportunity to respond to the Plan that is under consideration and not a “placeholder”.

2.0 Detailed Discussion of the Adequacy of the EIR

The EIR is not legally adequate and does not achieve the basic tenets of CEQA. The primary deficiencies in the environmental document are organized in the following major categories:

- Inadequate project description of the proposed action
- Confusion related to the definition of what are the covered projects, geographic bounds of the plan and process
- Inadequate description of the alternatives
- Inadequate documentation of the alternatives screening process

- Impact analysis methodology, cumulative assessment and mitigation measures
- Potential for physical impacts to occur as a result of the proposed financing plan is not address. Additionally, the document is intended to provide the analysis necessary for NEPA clearance. NEPA requires socio-economics analysis to be conducted.

2.1 Inadequate project description of the proposed action and resulting inability to conduct a legally adequate assessment of the impacts

The primary responsibility of an EIR is to identify significant effects on the environment, which can only be provided when there is an adequate description of the project. The following section of CEQA identifies this concept very succinctly.

“§ 21002.1. USE OF ENVIRONMENTAL IMPACT REPORTS; POLICY

In order to achieve the objectives set forth in Section 21002, the Legislature hereby finds and declares that the following policy shall apply to the use of environmental impact reports prepared pursuant to this division:

- (a) The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided.”*

CEQA states clearly what should be in a project description:

“15124. PROJECT DESCRIPTION

The description of the project shall contain the following information but should not supply extensive detail beyond that needed for evaluation and review of the environmental impact.

- (a) The precise location and boundaries of the proposed project shall be shown on a detailed map, preferably topographic. The location of the project shall also appear on a regional map.*

(b) A statement of 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.

(c) A general description of the project’s technical, economic, and environmental characteristics, considering the principal engineering proposals if any and supporting public service facilities.

(d) A statement briefly describing the intended uses of the EIR.

(1) This statement shall include, to the extent that the information is known to the Lead Agency,

(A) A list of the agencies that are expected to use the EIR in their decision making, and

(B) A list of permits and other approvals required to implement the project.

(C) A list of related environmental review and consultation requirements required by federal, state, or local laws, regulations, or policies. To the fullest extent possible, the lead agency should integrate CEQA review with these related environmental review and consultation requirements.

(2) If a public agency must make more than one decision on a project, all its decisions subject to CEQA should be listed, preferably in the order in which they will occur. On request, the Office of Planning and Research will provide assistance in identifying state permits for a project.”

The project description of the proposed action is theoretically the list of the policies and recommendations taken from the fifth draft of the Plan. There is no overview of these policies within the EIR. There is insufficient information to show how the Plan is going to change the physical environment, or what the Plan is intended to accomplish other than broad policies/recommendations. To add to the confusion as to what constitutes the project, the project description in the EIR identifies what appears to essentially be a list of existing projects (some at the preliminary plan level, some have already been approved and some projects are in process) that could be “nudged” by adoption of the plan. The fact, that the EIR does not clearly provide any information or clarity as to what the Plan is or what it does. To further the confusion, in section 2b-2, the EIR states:

“The Delta Plan’s likelihood of nudging already considered projects forward, and the Delta Plan’s degree of influence on future undefined projects, is unclear. For these reasons, this EIR does not seek to evaluate the environmental impacts of the change in those actions, activities, and/or projects that could result from the Delta Plan.

This EIR identifies 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. For noncovered actions, the Council lacks authority to require that other agencies adopt any particular mitigation.”

As noted above, the EIR states *“this EIR does not seek to evaluate the environmental impacts of the change in those actions, activities, and/or projects that could result from the Delta Plan”*. If the EIR does not intend to evaluate the impacts as a result of the Delta Plan, then it has failed the most basic of the responsibilities of an EIR and that is to disclose the significant effects of the project.

One of the major projects that could be nudged along as a result of the Plan is the BDCP. The Port recognizes that the BDCP is a unique issue for the Plan. The Council is required to integrate BDCP into the Plan if it meets certain standards. However, that does not preclude the Council’s requirements to address the effects of the BDCP either as part of the Plan or its cumulative effects. Since the BDCP was not approved prior to the Notice of Preparation, the BDCP is not part of the existing conditions. The amount of planning that has been conducted on the BDCP would allow the

BDCP to be considered as part of the cumulative analysis. Whether this EIR addresses BDCP as part of its Plan or as a cumulative project, it is imperative to address the effects of BDCP and the Plan as a whole. Unfortunately, there is total confusion in the EIR as to where the effects (Plan analysis or cumulative) of the BDCP are disclosed. The BDCP is described in a standalone chapter in the EIR. There is no assessment of how the environment would change as a result of the combined actions of the BDCP and the Plan.

The Council has already stated publicly on the website that the draft Plan is subject to at least two additional revisions before the Final EIR is prepared and the Plan goes for review. Therefore, at the minimum, the project description in the EIR is going to change. The adequacy of the conclusions of the EIR (which the Port contends is inadequate for the current project description) will surely be inadequate, may require new information or may have new impacts or greater impacts than disclosed in the current draft. The Plan is not ripe for review at this stage of development.

Overall, the project description is totally inadequate for the reader to ascertain what is included in the impact evaluation. If this EIR is intended to serve as the Program level environmental review for future actions, it will be totally indefensible to tier off the analysis since the Plan is so inadequately identified. Additionally, and most importantly, the reader can not ascertain if the impact analysis has disclosed all of the significant effects. This, combined with the expected changes to the Plan, results in an EIR which does not disclose to the public the true and accurate effects of the implementation of the Plan.

2.2 There is confusion related to the definition of what are the covered projects, geographic bounds of the plan and process to determine consistency with the Plan

There is confusion in the project description as to what constitutes covered projects, the geographic bounds of the project and the process for future regulatory review. Section 1.2 of the EIR states *“The Council does not exercise direct review and approval authority over covered actions to determine their consistency with the regulatory policies in the Delta Plan. Instead, the Council serves as an appellate body. Any person alleging that a covered action is not consistent with the Delta Plan may appeal the certificate of consistency to the Council within 30 days of its being filed. Upon receiving an appeal, the Council has 60 days to hear the appeal and an additional 60 days to make its decision and issue specific written findings. If the covered action is found to be inconsistent, the action or project may not proceed until it is revised so that it is consistent with the Delta Plan.”* There is uncertainty as to what actions are covered projects. The description does not provide the Port with clarity as to what, if any of its actions, may be subject to review by the Council. From a CEQA perspective, due to the ambiguity of the description, it is impossible to identify the environmental effects of the Plan.

There is a Project Map that shows the parts of California that rely on Delta water as part of the boundary of the Plan. Neither the description of Plan nor the EIR define the geographic bounds of the Plan. There is no clarification that the Plan is only applicable to areas of the Delta, but may have indirect effects to the areas that are receiving water from the Delta or whether the Council

has any review authority over the areas receiving water from the Delta. As such, the EIR is not adequate since it does not adequately describe the *precise location and boundaries of the proposed project shall be shown on a detailed map, preferably topographic (as required in Section 15124)*.

Figure 3.2 has a flow diagram showing how you determine if a project is subject to the policies. However, the agency proposing the action makes that determination and then it appears that the agency will only know if they are correct if there is an appeal. This description of how to determine what is a covered project does not provide any information as required by CEQA Section 15124 (*A general description of the project's technical, economic, and environmental characteristics,*).

From this confusing description, the reader is unable to ascertain what projects are covered by this plan, what are the geographic boundaries for the Council's actions and the process in which an applicant can determine the jurisdiction of the Delta Plan. Taken to an extreme, it appears that a housing development in Southern California may have to obtain a consistency finding from the Council because it uses water from the Delta. Although it appears that the Port's activities should not be subject to review by the Council, the ambiguity of this description is totally inadequate for an EIR. More importantly, this confusion leads to an environmental document that is inadequate.

2.3 There is inadequate description of the alternatives which precludes an adequate or accurate description of the impacts

The Port has described above how the project description for the proposed project (the Plan) is inadequate to determine the adequacy and accuracy of the impact analysis. The description of the alternatives can only be described as vague and ambiguous. There is an inadequate level of description for the proposed action to be addressed with no metrics to base the analysis. When this lack of specificity is coupled with an alternatives description that says "export more water" or decreased emphasis" on self reliance, it provides the reader with no ability to evaluate the accuracy of the impact analyses for the alternative. A project description that says that this alternative should "Export more water", the reader does not have any idea as to what order of magnitude is the reduction or from what baseline? There is nothing in the EIR that the reader can turn to, to determine the magnitude of impacts. An example of the level of detail for the alternatives is presented below.

"Alternative 1A - Export More Water Out of the Delta; Decreased Emphasis on Local and Regional Water Self-Reliance; Focus Levee Improvements on Protecting Water Supply Corridors: Development of this alternative was informed by comments from water users in export areas south of the Delta. It involves exporting more water from the Delta and its watershed to areas that receive Delta water, and less water conservation and efficiency measures and fewer construction projects in those Delta-water-using areas aimed at improving local water supplies from new or expanded groundwater storage, ocean desalination plants, and water treatment plants. Alternative 1A accomplishes these changes from the Proposed Project primarily by changing a policy of the Proposed Project related to reliable water supply to a recommendation. As it relates to covered actions, the Delta Plan policy requires users of Delta water to increase water efficiency and

conservation measures, and requires development of a variety of local water supplies so as to reduce reliance on Delta water. Changing this policy to a recommendation would nullify the Council's ability (at least by means of this Delta Plan) to compel other agencies' covered actions to be consistent with existing requirements of law as well as to require additional local water supply development/water efficiency planning. This, in turn, would decrease pressure on other agencies to increase efficiency, conservation, and local supplies, and to develop local and regional water supplies.

This alternative delays and makes less certain the establishment of Delta water flow criteria (for more natural flows) and Delta flow and water quality objectives to protect Delta ecosystem resources. Alternative 1A would, instead, potentially reduce the availability of flows during some periods of the year. Alternative 1A would result in less ecosystem restoration (floodplains, riparian habitat, and tidal marsh) in the Delta.

Alternative 1A would result in less overall levee maintenance and modifications because it would prioritize levees that protect water supply corridors under the theory that spending money on such levees results in more economic benefit per dollar spent than spending money on levees that protect other uses. This approach could result in less aggressive levels of flood risk reduction in other parts of the Delta. This alternative also would result in less reversal of subsidence and/or raising of subsiding lands."

Another issue of concern is that the EIR does not conclude whether the alternatives meet the project objectives. There are no objectives in which the reader can review the alternatives and assess whether the alternative achieves the project objectives. In fact, the EIR (Section 25.2) states:

"The degree to which the alternatives might or might not satisfy the project objectives and be feasible is something the Delta Stewardship Council will consider at some point after the release of this Draft program-level EIR but prior to consideration of final adoption of a Delta Plan."

This defers disclosure of information that is critical to the review process to "some point" in the future. This does not meet the intent of CEQA for adequately disclosing information prior to the adoption/approval of a project.

In summary, the description of the alternatives is substantially less than the proposed plan which is inadequate to evaluate the accuracy of the impact conclusions. There is no discussion on whether the lead agency has concluded that the alternatives are reasonable and can (or can not) meet any or a portion of the project objectives. As such, the alternatives description is so inadequate, the EIR must be revised to describe the alternatives at a level that will allow an impact analyses to be adequately presented. Additionally, the project objectives must be presented and a review of the alternatives must be conducted to ascertain whether those alternatives meet any of the objectives.

2.4 There is inadequate documentation of the alternatives screening process to determine if there is an adequate range of alternatives provided in the EIR

CEQA requires that the alternatives address the potentially significant impacts. The following text was extracted from the EIR:

“2.3.1.4.1 Potential Adverse Impacts of the Proposed Project

Because the First and Second Staff Draft Delta Plans were substantially incomplete, the Third and Fourth Staff Draft Delta Plan versions were reviewed in order to identify the potentially adverse environmental impacts of the Delta Plan. The following potential impacts were identified and used to select a range of alternatives:

- *Implementation of Improved Water Quality policies and recommendations to improve drinking water and ecosystem water quality could result in adverse construction and operations impacts in communities that discharge water to the Delta or Delta tributaries due to construction of water treatment facilities, or adverse impacts due to the loss of agricultural land or other land uses that contribute constituents and cannot effectively eliminate the discharges.*
- *Implementation of Reduced Risk of Floods in the Delta policies and recommendations could result in adverse impacts due to construction impacts of levees and loss of agricultural lands to accommodate levees with more stringent design criteria than existing requirements.*
- *Implementation of recommendations for Protection and Enhancement of Delta as an Evolving Place following completion of the Delta Protection Commission’s Economic Sustainability Plan and evaluation of the designation of the Delta as a National Heritage Area could result in continued land use and community changes compared to existing conditions.”*

Alternatives evaluation process requires that alternatives address the significant impacts of the proposed project. The criteria for alternatives screening in CEQA is defined as the following:

“15126.6. CONSIDERATION AND DISCUSSION OF ALTERNATIVES TO THE PROPOSED PROJECT.

- (a) Alternatives to the Proposed Project. An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. An EIR need not consider every conceivable alternative to a project. Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decision making and public participation. An EIR is not required to consider alternatives which are infeasible. The lead agency is responsible for selecting a range of project alternatives for examination and must publicly disclose its reasoning for selecting those alternatives.”*

Section 15126.6 also states that the “EIR should briefly describe the rationale for selecting the alternatives to be discussed. The EIR should also identify any alternatives that were

considered by the lead agency but were rejected as infeasible during the scoping process and briefly explain the reasons underlying the lead agency's determination". "Among the factors that may be used to eliminate alternatives from detailed consideration in an EIR are :(i) failure to meet most of the basic project objectives, (ii) infeasibility, or (iii) inability to avoid significant environmental impacts."

For the evaluation of the alternatives Section 15126.6 further states that the "EIR shall include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project".

The alternatives screening was based upon incomplete preliminary work products. Significant impacts, as documented in this EIR, were not used as the basis for alternatives screening process. There is no determination of feasibility (meeting the project objectives) since that finding is being deferred. There is no ability of the public to determine if these alternatives meet any of the basic objectives.

In summary, the process for alternatives screening was flawed and the documentation of the alternatives presented in the EIR was inadequate. The accuracy can not be determined because of the lack of detail. As such, the only remedy is to prepare a revised EIR and recirculate for public review.

2.5 The impact analysis was flawed (methodology was not defined, the analysis did not address the impacts associated with construction, cumulative impact assessment does not comply with the Guidelines and mitigation measures are not defined)

The heart of the EIR is considered the impact sections. These sections are intended to disclose the magnitude of the impacts, mitigation measures and the residual impacts from a lead agency authorizing a "project". The impact analysis in this EIR is inadequate for the Port to assess the accuracy of the conclusions. The Affected Environment/Setting sections have a tremendous amount of boilerplate information that is not relevant or used in the subsequent analyses. It provides bulk, but not much substance.

The impact analysis generally concluded that the impacts were potentially significant and unmitigated because the Council could not dictate the mitigation measures. These conclusions were not based upon facts in the record. It appeared that the Council concluded the impacts were significant with out substantiating how they made that conclusion. The analysis did not address the construction impacts even though the EIR has acknowledged that the Plan will nudge these projects forward. CEQA requires that the impact analysis be conducted on the existing conditions, not compared to the No Action scenario. Thus, the analysis should have addressed the effects of the Plan as compared to the conditions on the ground on the date of the Notice of Preparation. Even when there were mitigation measures available, the EIR did not address that the Plan could be modified to include policies to mitigate or avoid some of these impacts.

It is recognized that the Delta Plan has limited specificity; however, the impact analysis is conclusionary without adequate information to substantiate the conclusions. It appears that the lead agency chose the route of stating nearly every impact was potentially significant and was unmitigable. The courts have not approved this approach where the impact analysis was not substantiated by facts in the record.

The cumulative analysis is not defensible. The EIR concluded that there would only be incremental increases in impacts over the Plan. CEQA requires that the geographic extent of the cumulative analysis be defined. The EIR did not identify the geographic extent of the Program analysis nor the geographic extent of the cumulative assessment.

The Port can only recommend that the EIR be revised and recirculated for another public review.

2.6 Potential for physical impacts to occur as a result of the proposed financing plan is not addressed. Additionally, the document is intended to provide the analysis necessary for NEPA clearance. NEPA requires socio-economics analysis to be conducted and an equal level of analysis be conducted for each alternative.

The text below is taken from Section 2 of the EIR. As seen in this excerpt, there is no definition of how much funding is projected and where the funding would originate. There is also no discussion as to whether this funding could trigger adverse impacts to the physical environment (loss of agriculture, increased blight, etc.).

“2.2.6 Recommendations for Financing Framework

The Proposed Project includes policies and recommendations to provide Reliable Water Supplies, Delta Ecosystem Restoration, Water Quality Improvement, Flood Risk Reduction, and Protection and Enhancement of Delta as an Evolving Place. The Delta Plan also includes recommendations for a Finance Plan Framework to generate ongoing revenue and capital construction funds if other agencies decide to implement these policies and recommendations. The Finance Plan Framework is based on the following key tenets:

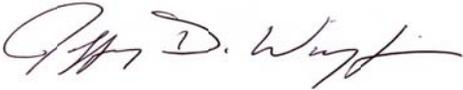
- ◆ *Beneficiaries (those who benefit from the water resources of the Delta and its watershed) should pay for the benefits they receive.*
- ◆ *Stressors (those whose actions adversely affect the Delta ecosystem) should pay for the harm they cause the ecosystem. ...”*

The EIR states that this document will be used for subsequent NEPA clearance. NEPA requires that socio-economic effects must be address (as well as addressing the potential effects of environmental justice). If this document is intended to serve as the NEPA environmental review, there are various deficiencies that will not be detailed in this comment letter. However, many of the issues included in this correspondence (project description, alternatives, screening process, level of detail of analysis, socio-economic issues, etc.) would likely not result in a legally defensible NEPA document.

3.0 Conclusion

In conclusion, based upon a review of the EIR, the Port respectfully submits that the EIR is not adequate and may have significant issues related to accuracy of the data for all of the reasons detailed above. The only remedy is to prepare a revised Plan, then prepare a revised Draft EIR and recirculate to allow the public to review and comment.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeffrey D. Wingfield". The signature is fluid and cursive, with a prominent initial "J" and a long, sweeping underline.

Jeffrey D. Wingfield
Port of Stockton