



Yolo Habitat/Natural Community Conservation Plan Joint Powers Agency

YOLO NATURAL HERITAGE PROGRAM

~ Partnering for conservation ~

VIA email

February 2, 2012

Chairman Phillip Isenberg
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA
95814

Member Agencies:

County of Yolo

City of Davis

City of Winters

City of West Sacramento

City of Woodland

*University of California,
Davis*

Re: Letter of Comment— Delta Plan Draft Program Environmental Impact Report
(SCH# 2010122028)

Dear Chairman Isenberg, Council, and staff:

The Yolo County Habitat Conservation Plan/Natural Community Conservation Plan Joint Powers Agency (“JPA”) appreciates the opportunity to provide comments on the Delta Plan DEIR.

The JPA, comprised of the County of Yolo, the cities of Davis, Woodland, West Sacramento and Woodland, and the University of California at Davis, was formed for the purpose of completing a multi-species habitat conservation in Yolo County. Known as the Yolo Natural Heritage Program (“Yolo NHP”), the plan is a Habitat Conservation Plan (“HCP”) under the federal Endangered Species Act and a Natural Community Conservation Plan (“NCCP”) under state law. A Planning Agreement between the JPA member agencies, the California Department of Fish and Game and the US Fish and Wildlife Service was executed in August, 2004. A draft HCP/NCCP document and EIS/EIR are in progress and will be available for public review later this year.

The Yolo NHP will provide for the preservation, conservation and recovery needs of more than 65 species over five major habitats by providing three key benefits to wildlife: 1) identify preserve areas sufficient to contribute to the recovery of multiple species, including all federally listed, proposed and candidate plant and animal species that have experienced significant decline in Yolo County; 2) provide for the permanent protection of representative natural communities that characterize Yolo County; and 3) establish a management and monitoring program for lands set aside within the preserve. The natural communities upon which species in Yolo County depend include aquatic, riparian, woodland, wetland and grassland, all of which occur within the vicinity of the Proposed Project. Agriculture in Yolo County provides conservation benefits to at least 8 species and as such is defined as a “habitat type” in the context of the Yolo NHP. Agriculture and the natural communities listed are critical to sustaining fully functional ecosystems for the species proposed for coverage.

Comments outlined herein are in addition to those previously submitted on the Fifth Draft Delta Plan, which are incorporated by reference. The DEIR evaluates potential environmental impacts associated with the Project (the Fifth Staff Draft Delta Plan) and five alternatives. The Project includes regulatory policies that, upon adoption, will have the force of law and could lead to physical actions, including restoration/creation of floodplains, riparian areas, and tidal marsh within the geographic scope of the Delta Plan. Based on the comments that follow, we request that the Council revise and recirculate the DEIR pursuant to CEQA Guidelines §15088.5 which says “an EIR which has been made available for public review, but not yet certified, must be recirculated whenever significant new information has been added to the EIR.”

GENERAL COMMENTS

Programmatic EIR: adequate level of CEQA review.

The Habitat JPA acknowledge the Council’s decision to prepare a programmatic EIR, and agrees that a program EIR may be prepared “on a series of actions that can be characterized as one large project and are related either geographically, as logical parts in the chain of contemplated actions, or in connection with issuance of rules, regulations, plans or other general criteria to govern the conduct of a continuing program.” (Guidelines, § 15168(a); see also *Natural Resources, supra*, 103 Cal.App.4th at p. 281.). However, all types of EIRs must cover the same content (CEQA Guidelines, §§ 15120-15132) and the level of specificity of an EIR is determined by the nature of the project and the “rule of reason.” (*Laurel Heights, supra*, 47 Cal.3d at p. 407.) We contend that the DEIR fails to meet the “rule of reason” test for the reasons outlined below.

Scope of the DEIR

We disagree with conclusions reached in the Initial Study that defined the scope of the DEIR. A lead agency is required to perform an initial study that is sufficient to determine whether a project might have a significant effect on the environment. (Guidelines, § 15063, subd. (a).) The initial study is the preliminary environmental analysis, and an initial study which omits material necessary to informed decisionmaking subverts the purposes of CEQA and is an abuse of discretion. (*Lighthouse Field Beach Rescue v. City of Santa Cruz, supra*, at p. 1202.) We acknowledge that while the Initial Study test regarding HCPs is narrowly limited to those that are approved, the DEIR should have included a reference to the three regional-scale multi-species HCP and HCP/NCCPs that are within the geographic scope of Project and nearing completion. Omitting this information results in a mischaracterization of the both the constraints and opportunities for Delta restoration, and improperly narrows the scope of the analysis.

The subject DEIR also fails to incorporate information about reasonably foreseeable projects where little uncertainty exists as to the characteristics or location of those actions. For example, the DEIR identifies numerous projects, including habitat restoration in the Yolo Bypass, which are expected to occur with or without the Delta Plan. Despite the fact that habitat restoration in the Bypass is identified in three prominent concurrent efforts (the Bay Delta Conservation Plan, the Delta Habitat Conservation and Conveyance Program, and a National Marine Fisheries Service biological opinion addressing salmonids) the DEIR dismisses the Bypass project in the analysis because it is “still in the planning stage”. Even though the exact parameters of generally foreseeable future actions cannot confidently be predicted, the full-disclosure goals of CEQA argue strongly for including an analysis that “acknowledges the degree of uncertainty involved, discusses the reasonably foreseeable alternatives ... and discloses the significant foreseeable environmental effects of each alternative, as well as mitigation measures to minimize each adverse impact.” (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 434.). As a consequence of these and other omissions, the DEIR precludes the analysis of potentially significant environmental impacts and is therefore fatally deficient under CEQA.

Tiering

It is our understanding that the Council anticipates that others will rely on the program EIR as a first tier EIR, pursuant to CEQA Guidelines, § 15152, subd. (h)(3). Tiering is appropriate when the sequence of EIRs is "from a general plan, policy, or program EIR to a . . . site-specific EIR". However, 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" (CEQA Guidelines, § 15152, subd. (b)). The Guidelines further provide that when the first tier EIR is used in connection with a large-scale project, "the development of detailed, site-specific information may not be feasible but can be deferred, in many instances, until such time as the lead agency prepares a future environmental document in connection with a project of more limited geographical scale, as long as deferral does not prevent adequate identification of significant effects of the planning approval at hand" (CEQA Guidelines, § 15152, subd. (c)).

The DEIR improperly defers the analysis of many of the impacts to biological resources to a later time, ignoring the potential cumulative impact of large-scale habitat conversion. For example, the DEIR fails to include a discussion regarding impacts associated with the loss of agricultural lands that function as habitat for special status and at risk species. Agricultural lands are a limited resource in the Study Area. The loss of agricultural lands due to habitat restoration will impact species that depend on rice and row crops as surrogates for natural habitats. Additionally, the DEIR should also include a discussion of the loss of agricultural lands that are economically important to the region but offer little or no habitat value. Will the physical system after completion of the Project support adequate mitigation for these independent but related impacts? We believe this analysis is best undertaken at the programmatic scale in this DEIR.

Significant effects on the environment that were not adequately addressed in the first tier EIR could require a subsequent EIR (CEQA Guidelines, § 15152, subd.(f)). Since most of the impacts identified in the DEIR are Significant, it is unclear if future projects can rely on the first tier EIR without preparing a subsequent EIR (*Communities for a Better Environment* (2002) 126 Cal. Rptr. 2d. 441, Cal.App.3 Dist). Consequently, the DEIR should be prepared in such a way as to reduce the level of significance resulting from Project impacts when it is proper and feasible to do so. Failure to do so could expose future projects to unnecessary CEQA review, project delay, and exposure to litigation.

SPECIFIC COMMENTS

The DEIR fails to describe a sufficient baseline.

Omission of baseline assumptions in an EIR falls short of the requirement of a good faith effort at full disclosure (Cal. Code Regs., tit. 14, § 15151.) An EIR must contain a description of the physical setting existing at the time of the commencement of the project 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 (CEQA Guidelines, § 15125, subd. (a) and *San Joaquin Raptor, supra*, 27 Cal.App.4th at pp. 722-723.) CEQA Guideline section 15125 further provides that the EIR must include a description of the physical environmental conditions in the vicinity of the project from both a local and regional perspective: "This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. The description of the environmental setting shall be no longer than is necessary to an understanding of the significant effects of the proposed project and its alternatives."

The DEIR Study Area is so broadly described that it precludes any meaningful analysis of biological impacts. The DEIR omits readily available information regarding biological resources, producing an inaccurate baseline that has the potential to mask the true significance of impacts. For example, the DEIR attempts to quantify broad habitat categories in both table and graphic forms but provides no context for the remainder of the Study

Area, even as it acknowledges that actions affecting the environment could occur outside of the legal Delta. As a result, the DEIR fails to meet the legal standard of providing complete and accurate information to assess whether it adequately investigated and discussed the impacts of the project. Moreover, the DEIR fails to discuss whether sufficient suitable replacement habitat is available to mitigate the impacts to biological resources. How much suitable habitat is available in the Study Area, how much is expected to be lost due to estimated habitat conversion, and what is the local status of the species expected to be impacted by physical changes in the Study Area? At a minimum, the DEIR should identify priority conservation areas for spatially limited species (i.e. rare plants) and very rare species (such as Least Bell's Vireo), as well as an estimate of the amount of habitat conversion that is needed to restore the Delta.

Many of the most significant impacts associated with the Delta Plan will be irreversible after rough grading has occurred. Thus, reasonably foreseeable information concerning project level impacts should be provided at this stage of project consideration so that decision makers and the public can fully understand the impacts of the proposed project and alternatives. Deferral of information concerning project-related and cumulative impacts, mitigation measures and alternatives is improper and unacceptable given the types of activities and irreversible environmental harm that will result from the initial approval of the Delta Plan by the Stewardship Council. Several projects identified in the DEIR are described with sufficient detail to allow for project level analysis. Where this is the case, the DEIR should function at both the program and project level for the purpose of assessing environmental impacts.

The DEIR fails to apply a consistent project description.

An EIR must contain an accurate, stable and consistent project description. (CEQA Guidelines, § 15124; see also *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199.) An accurate description is necessary for the intelligent evaluation of the potential environmental effects of a proposed action. (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 592.) "CEQA compels an interactive process of assessment of environmental impacts and responsive project modification which must be genuine. It must be open to the public, premised upon a full and meaningful disclosure of the scope, purposes, and effect of a consistently described project, with flexibility to respond to unforeseen insights that emerge from the process." (*Mira Monte Homeowners Assn. v. County of Ventura* (1985) 165 Cal.App.3d 357, 366.) The project description must contain sufficient specific information about the project to allow the public and reviewing agencies to evaluate and review its environmental impacts. A project description that omits integral components of the project may result in an EIR that fails to disclose the actual impacts of the project.

The DEIR fails to describe and analyze the effects of the "whole of the Project", meaning that "the whole of an action that has a potential for resulting in physical change to the environment, and is an activity that may be subject to several discretionary approvals by governmental agencies." Of greatest concern is the DEIR's silence on the magnitude of restoration in and around the Delta that will be required to meet the statutory co-equal goals of "(1) providing a more reliable water supply for California and (2) protecting, restoring, and enhancing the Delta ecosystem in a manner that protects and enhances the unique cultural, recreational, natural resource and agricultural values of the Delta as an evolving place". While the DEIR may not be able to quantify the amount of impact at a fine scale, information regarding the relative magnitude of change has been and is concurrently being discussed in alternate but connected public venues, including the Bay Delta Conservation Plan. Moreover, Policy ER P2 requires habitat restoration projects to be consistent with Figure 5-2 of the Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone (CDFG). Omitting quantitative information from the project description and subsequent discussion and analysis has the potential to render the Project description unstable and misleading, causing decision makers and the public to rely on speculation as the basis for a reasonable and independent evaluation of the impacts (i.e. is 500, 5,000 or 500,000 acres of restoration sufficient to support the objectives of the co-equal goals?)

Finally, the DEIR fails to accurately describe the purpose of the Project. The characterization of the Delta Plan

as “statements of policy direction to other agencies which, if the direction is followed, could lead to types of specific physical actions” is both misleading and inaccurate. In fact, the Delta Plan will have the force of law and the Stewardship Council will have the ability to directly influence which projects are constructed through its consistency determination process. Consequently, the DEIR falsely concludes that reasonably foreseeable actions are so far out of the Council’s control as to be speculative, leading to the deficiencies identified above. Acknowledging the Delta Plan’s true force and effect in the DEIR will provide the basis for an adequate discussion regarding all phases (planning, implementation and operation) of the Project (CEQA Guidelines 15063(a)(1)).

Conclusions presented in the DEIR are not reachable based on information in the record. CEQA requires that findings must be based on substantial evidence in the record and be sufficient to bridge the gap between the available evidence and the conclusions reached. An EIR must contain facts and analysis, and may not consist of the agency's bare conclusions or opinions. It must disclose the "analytic route" the agency used in reaching its conclusions. (*Al Larson, supra*, 18 Cal.App.4th at pp. 739-740.) "An EIR should be prepared with a sufficient analysis to provide decision makers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of the EIR is to be reviewed in light of what is reasonably feasible." (CEQA Guidelines, § 15151.)

The DEIR fails in several instances to meet this requirement. The DEIR devotes significant attention to the restoration of aquatic habitats, but provides little insight into how the restoration of aquatic habitat might impact terrestrial species in the Delta. For example, following a brief qualitative discussion on the effect of the Project on biological resources, the DEIR concludes that impacts to wildlife will be significant. Then, with minimal supporting discussion, the DEIR describes mitigation measures to “reduce the effects” of these impacts on various species and natural communities. Because the document lacks sufficient analytical detail in all but a few focused impact discussions, reviewers are unable to reach independent conclusions based on evidence in the record. This amounts to a “trust us” analysis, which is contrary to both the spirit and intent of CEQA.

Cumulative Impacts.

CEQA requires an Initial Study to determine whether any project impacts are “cumulatively considerable,” which requires consideration of whether any “reasonably foreseeable indirect physical changes” could occur with implementation of the Project. The DEIR fails to properly analyze cumulative impacts associated with Biological Resources because it fails to consider the cumulative effect of the anticipated scale of habitat conversion with other known land use changes in the Study Area. For example, the DEIR relies on the use of mitigation to compensate for the loss of habitat for numerous species, but does not consider if sufficient suitable mitigation lands are now or will be available in the future. A limited geographic area is presumably expected to accommodate the needs of the Delta Plan, build-out of planned urban areas, sea level rise, the conservation requirements associated with the five Delta County HCPs and BDCP, and various flood control projects. This DEIR should determine whether avoidance of scarce resources, instead of mitigation for loss, is the appropriate action.

Additionally, the DEIR must specify all of the planning documents that are being used in the cumulative impacts analysis and to specify where those planning documents can be publicly viewed (Cal. Code Regs., tit. 14, § 15130, subd. (a)(1)(B)). We did not find such a list and request that one be included in FEIR.

DEIR improperly defers analysis and mitigation to the future.

CEQA permits the Lead Agency to defer the specifics of mitigation where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan. However, a DEIR is inadequate if the success or failure of mitigation efforts depend upon management plans

that have not yet been formulated and have not been subject to analysis and review within the DEIR. Reliance on tentative plans for future mitigation after completion of the CEQA process also significantly undermines CEQA's goals of full disclosure and informed decision making.

Guidelines section 15126.4, subdivision (a)(1)(B) specifies as follows: "Formulation of mitigation measures should not be deferred until some future time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way." CEQA requires an EIR to identify and examine the full range of mitigation measures. (*League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 909 (*City of Oakland*)).) The Guidelines provide that where several mitigation measures are available, the basis for selecting a particular measure must be discussed in the EIR. (CEQA Guidelines, § 15126.4.) Mitigation may not be deferred unless clear performance standards are set forth in the EIR. (*Fairview Neighbors, supra*, 70 Cal.App.4th at p. 244; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1030.) Finally, mitigation measures must be enforceable. (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 445.)

The DEIR fails to meet several of the aforementioned tests. The DEIR relies on formulaic, broad brush mitigation measures despite the availability of accepted mitigation measures to reduce impacts to many of the species identified in the DEIR, rendering the DEIR's treatment of mitigation for significant impacts insufficient. The CEQA Guidelines define mitigation as (1) avoidance of impacts by "not taking certain action;" (2) minimizing impacts by reducing the degree or magnitude of action; (3) rectifying the impact by "repairing, rehabilitating, or restoring" the impacted environment; (4) reducing or eliminating the impact over time by preservation and maintenance operations, and (5) compensating for the impact by replacing or providing substituted resources. (CEQA Guideline § 15370; *Mira Mar Mobile Community v. City of Oceanside, supra*, 119 Cal.App.4th at p. 495.) Moreover, Pub. Resources Code, § 21081.6, subd.(b), requires mitigation measures to be fully enforceable through permit conditions, agreements, or other measures.

Most of the recommended mitigation measures are inadequate because (1) they are not fully enforceable, (2) there is no substantial evidence that the measures are feasible or effective, (3) impacts associated with the implementation of the measures themselves were not analyzed in the DEIR, and (4) mitigation measures outlined in the DEIR improperly defer formulation of specific mitigation strategies until after Project approval. We suggest that the DEIR be revised to include more specific mitigation measures when such specificity is readily available and appropriate. CDFG's standard mitigation measures for Swainson's hawk impacts, for example, apply at both the program and project level, and should therefore be included in the DEIR. In addition, we offer the following specific recommendations regarding additional mitigation measures:

Revise MM 4-1 as follows:

(pg. 4-83, line 22) Where impacts to sensitive natural communities other than waters of the United States or State are unavoidable, compensating for impacts by restoring and/or preserving in-kind sensitive natural communities on-site, or off-site at a nearby site, **or** by purchasing in-kind restoration or preservation credits from a mitigation bank that services the project site and that is approved by the appropriate agencies, **or mitigating through an adopted HCP/NCCP** in consultation with applicable regulatory agencies (at ratios that offset temporal loss of habitat value).

(pg. 4-84, line 5) Conserve oak woodlands, through the use of conservation easements **or participation in an adopted HCP/NCCP**.

Revise MM 4-2 as follows:

(pg. 4-85, line 10) Where impacts to special-status species are unavoidable, compensate for impacts by restoring or preserving in-kind suitable habitat on-site, or off-site, or by purchasing restoration or preservation credits (in compliance with CESA and ESA) for affected State- or federally-listed species from a mitigation bank that serves the project site and that is approved by the appropriate agencies, in consultation with the appropriate regulatory agencies (at ratios that offset the temporary loss of habitat value), **or participating in an adopted HCP/NCCP.**

Revise MM 4-5 as follows:

Add the following bullet: **Undertake early consultation with adopted and soon to be adopted HCP/NCCPs prior to implementing actions that have the potential to conflict with requirements of the HCP/NCCP.**

We appreciate the opportunity to comment and look forward to receiving notice of the revised and recirculated DEIR.

Respectfully,



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Executive Director
Yolo County Habitat Conservation Plan/
Natural Community Conservation Plan
Joint Powers Agency

cc: JPA Member Agencies