

Delta Plan Final Program Environmental Impact Report (PEIR): Consideration of Certification and Adoption of Findings

Summary: Before the Council adopts the Delta Plan, it must consider and certify the Delta Plan's Program Environmental Impact Report (PEIR) as having been completed in compliance with CEQA. The Council also must adopt CEQA "Findings" that (i) identify each significant environmental impact of the Delta Plan and any associated mitigation, (ii) contain a Statement of Overriding Considerations (explaining the reasons why the Delta Plan should be adopted despite adverse significant environmental impacts) and (iii) reject (if the Council does so) the alternatives to the proposed Delta Plan. The Council also must adopt a mitigation monitoring and reporting program (MMRP). The Council will consider taking these actions at this May 16-17 meeting. These actions were previewed at the Council's meeting on March 28-29, 2013.

This is an action item. Staff recommends that after receiving the staff's report on the matter, the Council take public comment on the PEIR and CEQA matters, then, after Council deliberation, adopt a Resolution certifying the PEIR and adopting the CEQA Findings and MMRP.

Introduction and Review of March 28-29, 2013, Council Meeting

The California Environmental Quality Act (CEQA) generally requires that a government agency evaluate and consider the potential significant adverse environmental consequences of a proposed action before the agency takes that action. For the Delta Plan, that evaluation has taken the form of a Program Environmental Impact Report (PEIR). The PEIR has been in production since December 2010 and has involved two rounds of formal public review and comment.

At the March 28-29, 2013, Council meeting (agenda item 6a), staff provided a relatively extensive staff report and presentation about the PEIR. Topics included:

- The purpose of CEQA and the PEIR and review of its drafting and public review history,
- The value and major points of information the PEIR and its public comment have provided,
- Common public comments (and staff's responses) on the circulated Draft PEIRs. Those comments included, by way of review (staff responses to these comments were included in the March 28-29 staff report for item 6a):
 - EIR should have evaluated all possible BDCP options in detail.
 - Mitigation measures too vague.
 - Mitigation measures usurp local authority.
 - Upstream impacts of natural flows were not analyzed.
 - EIR's detail not sufficient.

- Specific alternative submitted by commenter not analyzed.
- More Natural Flow Regime and WR P1 would reduce water supply.
- EIR should have included a discussion of the ability of Delta Plan alternatives to meet project objectives.
- Staff recommendation (and Council concurrence) of improvements/refinements to the PEIR's mitigation measures,
- Comparison of the Fall 2012 Final Draft Delta Plan (which is the 7th staff draft) to its six alternatives in terms of environmental consequences, including identifying the environmentally superior alternative and
- Comparison of the Fall 2012 Final Draft Delta Plan's ability to meet the co-equal goals and inherent objectives, as compared to the six alternatives.

At the March 28-29, 2013, Council meeting, staff also previewed the actions it would ask the Council to take at this meeting. Staff now asks the Council to consider taking those actions; there is no change from what was previewed.

Activities Since March 28-29, 2013, Council Meeting

At the close of the March meeting, the Council directed staff to complete the EIR process and prepare it for final Council action. Staff has done so. The EIR process generally involves a "Draft" EIR circulated for public review and comment. That is followed by a "Final" EIR that includes the Draft EIR plus copies of public comments on the Draft EIR (and transcripts of oral comments received during formal comment sessions) and staff's written responses thereto. A Final EIR also typically includes any text changes to the circulated Draft EIR.

At the time of the Council's March meeting, the Draft PEIR had circulated twice for public comment. The first circulation was in November 2011 covering the 5th Staff Draft Delta Plan. The second circulation was in November 2012 covering the Final Draft Delta Plan. As of March, however, staff had not yet completed written responses to those comments. Staff has now completed that task. The comments and responses are included in the Final PEIR, which was posted on the Council website (<http://deltacouncil.ca.gov/final-programmatic-eir>) on May 6, 2013. Since the March meeting, staff also has evaluated the minor refinements/improvements to the Delta Plan that the Council directed at its March meeting, and concluded that recirculation of the PEIR is not required.

Package of CEQA Documents for Council Consideration and Action on May 16-17

1. Final PEIR: The Final PEIR is five volumes.
 - a. *Volumes 1 and 2*. November 2011 Draft PEIR, which evaluated the November 2011 5th Staff Draft Delta Plan. Volume 1 was the analysis; Volume 2 contained back-up appendices.

- b. *Volume 3*. November 2012 Recirculated Draft PEIR, which evaluates the November 2012 Final Draft Delta Plan.
 - c. *Volumes 4 and 5*. May 2013 documents that consist of six Sections.
 - i. Section 1 – Introduction
 - ii. Section 2 – Evaluation of March 2013 Council-directed refinements to the November 2012 Final Draft Delta Plan (concluding that PEIR recirculation is not required)
 - iii. Section 3 – Public comment letters, and public comment sessions transcripts, on the November 2011 Draft PEIR and staff responses thereto
 - iv. Section 4 – Public comment letters, and public comment sessions transcripts, on the November 2012 Recirculated Draft PEIR and staff responses thereto
 - v. Section 5 – Text changes (errata) to the Draft PEIRs Volumes 1, 2 and 3
 - While numerous, the text changes are generally minor. They generally correct typos, provide updated references to reflect the passage of time since the Draft PEIRs were prepared, provide more detailed background information, and update/improve mitigation measures (implementing the improved list of mitigation measures the Council reviewed at its March meeting). These text changes generally were prompted by helpful public comment on the Draft PEIRs, and do not require recirculation of the PEIR.
 - vi. Section 6 – list of references
2. CEQA “Findings”:

- a. *Findings Regarding Impacts and Mitigation*. CEQA requires that, when an agency approves a project that may have significant adverse impacts on the environment, the agency make written findings about each of those significant impacts – i.e., that the impact could occur and why. Each finding also must state whether mitigation has been required and must describe the mitigation. If mitigation has not been required, the finding must explain why not, for example, whether the mitigation is within the jurisdiction of an agency other than the Delta Stewardship Council and/or whether mitigation is infeasible. These findings about the Delta Plan’s potential impacts and mitigation are contained in Sections V, VI and VII of the Findings document, which is attached as **Attachment 1**.

Generally speaking, the Findings conclude that the Delta Plan could have adverse significant environmental impacts from construction/siting of the types of projects the Delta Plan encourages. Generally, these impacts can be mitigated in most cases for covered actions (because the Council can ensure the mitigation measures get implemented). This is not true in all cases, however. Examples include permanent loss of agricultural land

(which is a CEQA environmental resource) by its conversion to non-agricultural use by Delta-Plan-encouraged projects such as habitat restoration. Another example is cases where construction cannot be halted at night (e.g., water diversion/intake structure construction), so nighttime construction noise impacts could be significant – the only mitigation being stopping, which may not be feasible.

Operation of the Delta Plan, i.e., operation of the types of projects and actions the Delta Plan encourages, generally will not have unmitigated significant adverse impacts on the environment, but rather will help arrest currently-worsening environmental problems. This is not true in all cases, however. Examples include operation of water intake facilities, which could entrain special status fish or create conditions that promote predation. Long term maintenance of levees also could disturb special status species such as Swainson's hawks.

Lastly, consistent with the PEIR, the Findings conclude that the Council cannot guarantee that mitigation will occur in all cases because many of the projects the Delta Plan encourages will not be covered actions and are within the responsibility and jurisdiction of agencies other than the Delta Stewardship Council. For those impacts, the Findings conclude, as CEQA requires, that the impacts could remain significant notwithstanding the fact that mitigation is available to be implemented by others (but the EIR explains whether the mitigation, if implemented, would mitigate the impact).

- b. *Statement of Overriding Considerations.* If a project could have significant impacts even after mitigation – either because mitigation is insufficient or cannot be guaranteed due to jurisdictional/enforcement issues – the agency must adopt a Statement of Overriding Considerations (SOC). The SOC for the Delta Plan is Section XII of the Findings document. It states that, among other project benefits, the long-term benefits of the Delta Plan in improving water supply reliability, arresting the decline/improving the health of the Delta ecosystem, reducing flood risk, all while preserving the Delta as a place, outweigh the potential adverse significant environmental impacts of the Delta Plan.
- c. *Findings Regarding Alternatives.* An agency approving a project after an EIR must explain why it is not adopting one of the alternatives to the project based on infeasibility, a greater environmental impact and/or failure to achieve project objectives. Alternatives to the Delta Plan, and reasons they are not being adopted, are discussed in Section VIII of the Findings document. Consistent with the PEIR, the Findings conclude that the Final Delta Plan (May 2013) is environmentally superior to the No Project Alternative, the 5th Staff Draft Delta Plan Alternative, Alternatives 1A and 1B (which generally favor more water supply), Alternative 2 (which generally favors more Delta ecosystem protection/enhancement) and

Alternative 3 (which generally favors protection of the Delta as a place). The Findings document also concludes that the Final Delta Plan will satisfy the Project Objectives (furthering achievement of the co-equal goals and inherent objectives) better than any of the alternatives.

- d. *Other Sections of the Findings Document.* Sections I to IV are introductory, briefly describe the Delta Plan, review the PEIR process/history and preview the findings CEQA legal requirement. Sections IX and X are technical sections about location and incorporation of documents. Section XI explains why no additional recirculation (i.e., additional to the November 2012 recirculation) of the PEIR is required. Section XIII is the summary and conclusion.

Much of the foregoing was discussed in detail at the Council's March meeting, and described in the associated staff report for that meeting.

3. Mitigation Monitoring and Reporting Program (MMRP): CEQA requires that an MMRP be prepared and adopted if mitigation measures are adopted. The MMRP is a working implementation document to ensure that mitigation measures are implemented. The MMRP lists the mitigation measures, when they need to be implemented, who is responsible for implementing them, and who reports on compliance. The MMRP for the Delta Plan PEIR is attached as **Attachment 2**. It will be implemented through the covered action Delta Plan consistency certification process, as explained on page 2 of the MMRP.

Staff Recommendation for Council Action

Staff recommends that, after the Council receives the staff's report on this matter, the Council take public comment on the PEIR and CEQA matters, then, after Council deliberation, adopt Resolution 2013-1 (attached hereto as **Attachment 3**).

That Resolution states that:

1. The Council reviewed and considered the information in the Final PEIR;
2. The Final PEIR reflects the Delta Stewardship Council's independent judgment and analysis;
3. The Final PEIR has been completed in compliance with CEQA;
4. The Council adopts, and thereby makes, CEQA Findings regarding impacts and mitigation, the SOC and alternatives (staff's proposed Findings are at **Attachment 1** to this staff report);;
5. The PEIR's mitigation measures are incorporated into the Delta Plan and the Council adopts the MMRP (the MMRP is at **Attachment 2** to this staff report); and
6. Directs staff to file a CEQA Notice of Determination with the State Clearinghouse (if/when the Council adopts the Delta Plan), which informs all interested parties that the Council has certified the PEIR and adopted the Delta Plan as required by CEQA.

List of Attachments

- Attachment 1: CEQA Findings regarding the Delta Plan
- Attachment 2: Mitigation Monitoring and Reporting Program
- Attachment 3: Draft CEQA Resolution

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