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44 N. SAN JOAQUIN STREET, SUITE 627
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February 2, 2012

VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED AND E-MAIL

Delta Stewardship Council
Attention: Terry Macaulay, PE
980 Ninth Street, Suite 1500
Sacramento, CA 95814
E-mail: eircomments@deltacouncil.ca.gov

DELTA COALITION JOINT COMMENTS ON DRAFT PROGRAM ENVIRONMENTAL IMPACT REPORT FOR FIFTH DRAFT DELTA PLAN

Dear Ms. Macaulay:

Thank you for the opportunity to comment on the Draft Program Environmental Impact Report (Draft EIR or DPEIR) for the 5th Staff Draft Delta Plan (Plan).

The Delta Coalition (Coalition) made up of San Joaquin County (County), the seven cities in the County, water agencies, business interests, and civic groups within and surrounding the County have come together to better represent our interest, coalescing around a set of principles that will enable us to move forward collaboratively (see attachments). Coalition members have respectfully submitted separate comments on the DPEIR (incorporated by this reference). This joint Coalition submittal is yet another effort to bring to your immediate attention the fact that the DPEIR and the Plan, in their current format, gravely lack critical information and data essential for the development of a technically and legally adequate DPEIR, and a Plan that will accomplish the coequal goals as specified in the Delta Reform Act.

In addition to our concerns regarding the adequacy of the DPEIR, the Coalition remains seriously concerned regarding the scope of the Plan. We further assert that the DPEIR is premature in that it has not considered viable alternatives, or adequately assessed the far-reaching impacts of the broad-stroked policies in the Plan. The Plan alludes to vague, future mitigation programs and studies; the Plan does not identify tangible impacts and specific mitigation measures. Until and unless this critically important information is developed, an opportunity for full and informed public review and comment is unreasonable and infeasible.

Again, our hope is that the Delta Stewardship Council (DSC) will take into serious consideration the comments put forth, and that you will ultimately recognize the Sacramento-San Joaquin River Delta as the home of many thousands of residents, and one of the most agriculturally-rich regions in California. The Coalition will continue to work together to provide meaningful comments on the Delta Plan, and is committed to working closely with the DSC and DSC staff. Should you have any questions, please contact Tom Gau, Director of Public Works, San Joaquin County, at (209) 468-3100 and/or Michael Niblock, Community Development Program Specialist, City of Stockton, at (209) 937-8090.

Sincerely,



Frank L. Ruhstaller, Second District
San Joaquin County Board of Supervisors



Ann Johnston, Mayor
City of Stockton

Attachments

cc: San Joaquin County's State Delegation
Escalon City Council
Lathrop City Council
Lodi City Council
Manteca City Council
Ripon City Council
Tracy City Council
Port of Stockton

Stockton City Council
Bob Deis, Stockton City Manager
Michael E. Locke, Stockton Deputy City Manager
John Luebberke, Stockton City Attorney
Jeff Willett, Stockton Acting Municipal Utilities Director
Michael Niblock, Stockton Community
Development Interim Program Specialist
David Stagnaro, AICP, Stockton Planning Manager
Stockton Planning Commission
Stockton Development Oversight Commission

11-0334

Resolution No.

STOCKTON CITY COUNCIL

-- A Delta Initiative of Cities and Agencies of San Joaquin County --

RESOLUTION ON LAND USE, WATER, AND OTHER DELTA RELATED ISSUES

This Resolution is effective upon passage by the CITIES, the COUNTY AND OTHER STAKEHOLDERS WITHIN SAN JOAQUIN COUNTY, which include political subdivisions of the State of California and other interested parties, both public and private, hereinafter collectively referred to as "the MEMBERS."

RECITALS

WHEREAS, the Sacramento-San Joaquin River Delta is at risk from many factors, and in addressing these threats the State is proposing large-scale changes to the Delta ecosystem, land use authority within the Delta, water conveyance through and around the Delta, water rights, statewide management, and many other aspects related to the Delta; and

WHEREAS, the CITIES, COUNTY and OTHER STAKEHOLDERS as Members believe there is value in developing an initiative on issues concerning the Sacramento-San Joaquin River Delta, its watershed, and greater Bay/Delta estuary; and

WHEREAS, the MEMBERS wish to collectively articulate the issues and interests from the perspective of the Delta region itself, from the people who call the Delta home and best understand the tremendous resource the Delta represents; and

WHEREAS, the MEMBERS have identified a need for joint action, advocacy, and mutual interests on Delta-related issues.

NOW THEREFORE, the MEMBERS adopt this Resolution for the purpose of articulating mutual interests on Delta issues. Furthermore, the MEMBERS resolve to work together to defend Delta-related interests at a regional perspective and to use their unified voice to advocate on behalf of local government in available forums at all levels. Our principles of mutual interests are as follows:

1. Recognition of the authority and responsibility given to local government related to land use, water resource development, flood management, public health and safety, economic development and sustainable growth, agricultural stability, recreation, and environmental protection.

City Atty

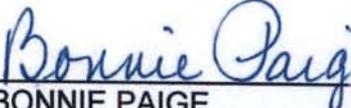
Review

Date December 7, 2011

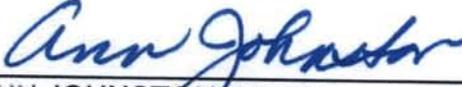
2. Protect the economic viability of agriculture, industry, recreation, and the ongoing vitality of communities throughout the Delta.
3. Represent and include local government in any new governance structures for the Delta.
4. Funding and implementation of urban and non-urban flood protection through rehabilitation, improvement, and maintenance of flood control levees and structures.
5. Protection and restoration of the Delta ecosystem including adequate water supply, quality, and outflow to support fisheries, wildlife, and habitat in perpetuity while supporting immediate improvements to the existing Through-Delta Conveyance as part of a complete strategy for the State's water management.
6. Incorporation of sustainable approaches for improved water supply, quality, and reliability through the overarching principle of regional self-sufficiency to reduce future reliance on exports from the Delta.

PASSED, APPROVED, and ADOPTED December 13, 2011.

ATTEST:


BONNIE PAIGE
City Clerk of the City of Stockton




ANN JOHNSTON, Mayor
of the City of Stockton

Delta Coalition

GOVERNMENT AGENCIES

Assemblymember 26th District	Assemblymember Bill Berryhill
Senator Lois Wolk's office	Max Vargas, Field Representative
Senator Lois Wolk's office	Dillon Delvo, Field Representative
Senator Lois Wolk's office	Mindy Simmons
Congressman McNerney's office	Gary Prost, Field Representative
Assemblymember Berryhill's office	Jennifer Bond, District Director
Assemblymember Galgiani's office	Robin Adam, District Director
Assemblymember Galgiani's office	Chanel Murray, Field Representative
San Joaquin County Board of Supervisors	Supervisor Larry Ruhstaller, District 2
San Joaquin County Board of Supervisors	Supervisor Ken Vogel, District 4
San Joaquin County	Tom Gau, Director of Public Works
San Joaquin County	Mel Lytle, Water Resources Coordinator, Public Works
San Joaquin County	John Macquire, Engineering Services Manager, Flood Management
San Joaquin County	Elena Reyes, Deputy County Administrator/Legislative Coordinator
San Joaquin County	David Wooten, San Joaquin County Counsel
San Joaquin County	Fritz Buchman
City of Escalon	Mayor Danny Fox
City of Lathrop	Mayor J. "Chaka" Santos
City of Lathrop	Glenn Gebhardt, Engineering Manager
City of Lodi	Mayor Bob Johnson
City of Lodi	Charlie Swimley, Deputy Public Works Director
City of Manteca	Steve DeBrum, Councilmember
City of Manteca	Mayor Willie Weatherford
City of Ripon	Mayor Elden "Red" Nutt
City of Stockton	Mayor Ann Johnston
City of Stockton	Vice Mayor Kathy Miller
City of Stockton	Susan Eggman, Councilmember
City of Stockton	John Luebberke, City Attorney
City of Stockton	Mike Locke, Deputy City Manager
City of Stockton	Mike Niblock, Interim Program Specialist, Community Development
City of Stockton	Jeff Willett, Interim Director of Municipal Utilities
City of Stockton	David Stagnaro
City of Tracy	Bill Dean, Development & Engineering Services
City of Tracy	Mayor Brent Ives
City of Tracy	Andrew Malik, Development & Engineering Services Director
City of Tracy	Dan Sodergren, Tracy City Attorney

Delta Coalition

PUBLIC AGENCIES

Business Council of San Joaquin County	Ron Addington, President/CEO
Central Delta Water Agency	Tom Zuckerman, Attorney
Greater Stockton Chamber of Commerce	Doug Wilhoit, CEO
Port of Stockton	Richard Aschieris, Director
Port of Stockton	Jeff Wingfield, Environmental & Regulatory Affairs Manager
San Joaquin Area Flood Control Agency	Jim Giottonini, Executive Director
San Joaquin Area Flood Control Agency	Juan Neira, Associate Civil Engineer
San Joaquin Council of Governments	Andrew Chesley, Executive Director
San Joaquin Council of Governments	Steve Dial, Deputy Executive Director/CFO
San Joaquin Council of Governments	Steve Mayo, Senior Habitat Planner
San Joaquin Council of Governments	Michael Swearingen
San Joaquin Council of Governments	Laura Brunn
San Joaquin Farm Bureau	Katie Patterson, Program Director
San Joaquin County Hispanic Chamber of Commerce	Mark Martinez, CEO
South San Joaquin Irrigation District	Jeff Shields
Stockton East Water Dist.	Anthony Barkett, Steering Committee Member
Stockton East Water Dist.	Karna Harrigfeld, Attorney

PRIVATE COMPANIES

AG Spanos Companies	Natalia Orfanos, Director, Communications/Special Projects
AG Spanos Companies	David Nelson, Attorney
Building Industry Association	John Beckman, CEO
Grupe Company	Nelson Bahler, Attorney
Herum Crabtree	Steve Herum, Attorney
Neumiller & Beardslee	Rod Attebery, Attorney
Nomellini, Grilli & McDaniel	Dante Nomellini, Attorney
River Islands at Lathrop	Susan Dell'sso, Project Director
River Islands at Lathrop	Ramon Batista

ENVIRONMENTAL GROUPS

CA Sportsfishing Protection Alliance (CSPA)	Bill Jennings, Executive Director
Restore the Delta	Barbara Barrigan-Parilla, Campaign Director

**LEWIS
BRISBOIS
BISGAARD
& SMITH LLP**
ATTORNEYS AT LAW

2850 Gateway Oaks Drive, Suite 450
Sacramento, California 95833
Telephone: 916.564.5400
Fax: 916.564.5444
www.lbbsslaw.com

JOSEPH A. SALAZAR
DIRECT DIAL: 916.646.8201
E-MAIL: JSALAZAR@LBBSSLAW.COM

February 2, 2012

File No.
32215.02

**VIA CERTIFIED MAIL RETURN RECEIPT REQUESTED
AND E-MAIL**

Delta Stewardship Council
Attn: Ms. Terry Macaulay
980 Ninth Street, Suite 1500
Sacramento, CA 95814
E-mail: eircomments@deltacouncil.ca.gov

Re: San Joaquin County, South Delta Water Agency, and Central Delta
Water Agency's Comments to the Draft Delta Plan Program
Environmental Impact Report.

Dear Ms. Macaulay:

Thank you for the opportunity to comment on the Draft Delta Plan Program Environmental Impact Statement ("DPEIR") for the Fifth Delta Plan ("Delta Plan") issued on November 4, 2011. This office represents the South Delta Water Agency, the Central Delta Water Agency (hereinafter referred to as the "Water Agencies"), and the County of San Joaquin ("County") (collectively, the "Public Agencies").

These three Public Agencies urge the Delta Stewardship Council ("Council") to reject the DPEIR as premature, incomplete in its failure to consider many potentially significant environmental impacts of the Delta Plan and alternatives to the Delta Plan, and otherwise failing to meet the requirements of the National Environmental Policy Act

("NEPA")¹, the California Environmental Quality ("CEQA"), the Clean Air Act ("CAA"), the Federal Reclamation Act of 1902, the Clean Water Act ("CWA"), the Coastal Zone Management Act ("CZMA"), the Central Valley Project Improvement Act of 1992 ("CVPIA"), and numerous other statutory and common law provisions described in greater detail within the comment letter. The Public Agencies urge the Council to reissue the DPEIR after completing an adequate environmental assessment based on a site-specific project design.

BACKGROUND

The County includes seven cities and spans across approximately 921,600 acres. It is considered to be one of the most agriculturally rich regions in California. For example, the County is the number one producer of asparagus statewide, with 24,000 acres of county farmland dedicated to production of this crop, as well as many others including wheat, alfalfa, cotton, and corn.

The County is supported by various departments that oversee flood management, water resources, water quantity and quality, engineering services, as well as the operations and finances, all of which will be significantly impacted by the vague "policies" set forth in the Delta Plan. The Water Agencies are both located within the County and support its agricultural production by working to protect water quality and supply for Delta landowners that grow crops on roughly 250,000 acres of highly productive farmland within the Delta region.

PUBLIC AGENCIES' COMMENTS ON THE DPEIR

As discussed in further detail in the attached Table "A", the DPEIR has not considered viable alternatives or adequately assessed the far-reaching impacts of the broad-stroked policies set forth in the Delta Plan, including but not limited to geologic and

¹ 40 U.S.C., §4321, *et seq.* and 40 C.F.R., Parts 1500-1508.

soil resources, water resources, water quality, threatened and endangered species, land use, and flood control issues.² Since it provides an incomplete analysis of alternatives, the DPEIR necessarily fails to provide mitigation measures, to prevent the significance of these impacts. These deficiencies include inadequate or missing provisions for monitoring and reporting to federal, state, and local regulatory authorities.

Rather than identify tangible impacts and specific mitigation measures, the DPEIR merely alludes to vague, future mitigation programs and studies. Studies of existing conditions in the Primary Delta³, including the identification of appropriate water flows and multiple baseline parameters, are essential for identifying and assessing the magnitude of environmental impacts arising from the Delta Plan. Were this information provided in the DPEIR, as required by law, the conclusions provided in the document about environmental impacts and necessary mitigation measures would have meaning. Unless this critically important information is developed, an opportunity for full and informed public comment will remain an illusion.

² The Public Agencies reserve the right to join in any of the comments and issues raised by any other parties commenting to the DPEIR following the close of the review and comment period on February 2, 2012.

³ The Primary Delta is defined by Public Resources Code section 29728, as follows:

“ . . . the delta land and water area of primary state concern and statewide significance which is situated within the boundaries of the delta, as described in Section 12220 of the Water Code, but that is not within either the urban limit line or sphere of influence line of any local government's general plan or currently existing studies, as of January 1, 1992. The precise boundary lines of the primary zone includes the land and water areas as shown on the map titled "Delta Protection Zones" on file with the State Lands Commission. Where the boundary between the primary zone and secondary zone is a river, stream, channel, or waterway, the boundary line shall be the middle of that river, stream, channel, or waterway.”

As set forth in Table "A", the Public Agencies' comment letter will address the following:

A. CEQA Challenges

1. Failure to identify a lead agency
2. Inadequate project description
3. Failure to identify the appropriate baseline
4. Failure to evaluate alternatives, including an incomplete analysis of Alternative 3
5. Miscellaneous CEQA challenges

B. Other Non-CEQA Challenges

1. Infringement on the County's constitutional local land use authority
2. Failure to preserve area of origin protections
3. Failure to consider wheeling statutes
4. Failure to comport with Clean Air Act requirements
5. Other inconsistencies within the DPEIR and the Delta Plan
6. Inconsistencies with Delta related legislation
 - a. Watershed Protection Act (Wat. Code, §§ 11460, *et seq.*) and Delta Protection Act (Wat. Code, §§ 12200, *et seq.*)
 - b. Federal Reclamation Act of 1902
 - c. Coastal Zone Management Act
 - d. NEPA
 - e. Public Trust Doctrine
7. Impacts on agriculture are not addressed

C. Specific Comments to the DPEIR

1. Section 1 - Introduction
2. Sections 2A and 2B - Proposed Project and Alternatives and Introduction to Resource Sections
3. Section 3 - Water Resources
4. Section 4 - Biological Resources
5. Section 5 - Delta Flood Risk
6. Section 6 - Land Use and Planning
7. Section 11 - Geology and Soils
8. Section 14 - Hazards and Hazardous Materials
9. Section 16 - Population and Housing
10. Section 19 - Transportation, Traffic, and Circulation
11. Section 20 - Utilities and Service Systems

Ms. Terry Macaulay
February 2, 2012
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12. Section 21 - Climate Change and Greenhouse Gas Emissions
13. Section 32 - Bay Delta Conservation Plan
14. Section 24 - Other CEQA Considerations
15. Section 25 - Comparison of Alternatives

The County and Water Agencies are particularly concerned that the DPEIR contains an inadequate description, discussion, and analysis of the "project" overall, fails to address many baseline environmental conditions, and inadequately evaluates the future direction of the Delta Plan. At a minimum, the DPEIR must set forth basic metrics, such as costs, and clearly defined baseline conditions so that the "project" can be measured against the various alternatives. Without these necessary components, the Delta Plan cannot achieve the stated goal of transparency, and the DPEIR cannot establish a requisite degree of credibility. Should you have any questions regarding this letter, please contact me at (916) 564-5400.

Very truly yours,

/s/

Joseph A. Salazar of
LEWIS BRISBOIS BISGAARD & SMITH LLP

JAS:kah
Enclosures

cc: David Wooten, County Counsel of San Joaquin Valley
Dante J. Nomellini
John Herrick
Terrence R. Dermody, Special Water Counsel
Malissa Hathaway McKeith, Esq.

TABLE "A"

DETAILED COMMENTS ON DRAFT DELTA PLAN PROGRAM ENVIRONMENTAL IMPACT REPORT ("DPEIR")

A. CEQA CHALLENGES.

1. The DPEIR Fails to Identify a Lead Agency.

The DPEIR states that "it is being prepared by the Council as the Project proponent and State lead agency under the California Environmental Quality Act (CEQA)." (DPEIR at Section 1.4, p. 1-13, lines 20-21.)

CEQA defines a "Lead Agency" as follows: "'Lead Agency' means the public agency which has the principal responsibility for carrying out or approving a project that may have a significant effect upon the environment." (Pub. Res. Code, § 21067, emphasis added.) The lead agency is tasked with the responsibility of determining whether a specific project requires an Environmental Impact Report ("EIR"), as well as other enumerated obligations. (*See* Pub. Res. Code, § 21080.4, subd. (a).)

Aside from the Council's self-proclaimed "lead agency" title, it is unclear how the Council can serve as lead agency when the Delta Plan unequivocally states that the Council will not play an active role in proposing and/or construction projects under the Delta Plan. In fact, both the Delta Plan and the DPEIR repeatedly acknowledge that "the [Delta Stewardship] Council does not propose or contemplate constructing, owning, or operating any facilities or directly undertaking any specific activities to implement the Delta Plan recommendations or regulatory policies, there would be no direct physical change in the environment due to adoption of the Delta Plan." (DPEIR at Section 1.4, p. 1-13, lines 27-30.)

The process of identifying a lead agency follows well established guidelines and should not be an onerous task. CEQA Guideline section 15051 provides the following "criteria" to consider when making a lead agency determination:

"Where two or more public agencies will be involved with a project, the determination of which agency will be the Lead Agency shall be governed by the following criteria:

(a) If the project will be carried out by a public agency, that agency shall be the Lead Agency even if the project would be located within the jurisdiction of another public agency.

(b) If the project is to be carried out by a nongovernmental person or entity, the Lead Agency shall be the public agency with the greatest responsibility for supervising or approving the project as a whole.

(1) The Lead Agency will normally be the agency with general governmental powers, such as a city or county, rather than an agency with a single or limited purpose such as an air pollution control district or a district which will provide a public service or public utility to the project.

(c) Where more than one public agency equally meet the criteria in subdivision (b), the agency which will act first on the project in question shall be the Lead Agency.

(14 Cal. Code of Regs. § 15051 ("CEQA Guidelines"), emphasis added.)

The distinction between a lead agency and a "responsible agency" is that the latter is any public agency, other than the lead agency, which has the responsibility for approving the project where more than one public agency is involved. As set forth later in this comment letter, the County has constitutionally guaranteed authority within its boundaries. (See Section B.1. below at pp. 18-20.)

Furthermore, the lead agency is required to meet with any responsible agency when a request is made "to determine the scope and content of the environmental information that any of those responsible agencies, the office, or the public agencies may require." (Pub. Res. Code, § 21080.4, subd. (b).) As a "responsible agency" that squarely falls within the scope of the defined term, the County has been denied the opportunity to meet with the lead agency to determine the scope and content of the environmental information that it is entitled to obtain under Section 21080.4, subdivision (b).

In *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, the County Sanitation District ("CSD") filed a final program EIR for the Joint Outfall System 2010 Master Facilities Plan in June 1995. (*Id.* at p. 1626.) The CSD's draft Program EIR contained some level of specificity. For instance, the Draft Program EIR recognized that emissions generated by trucks would be considered a significant impact

under the South Coast Air Basin's thresholds. (*Id.* at p. 1627.) To mitigate this impact, CSD stated it would perform maintenance on its trucks to reduce harmful emissions. (*Ibid.*)

The court noted that a lead agency is "the public agency [that] has the principal responsibility for carrying out or approving a project [that] may have a significant effect upon the environment." (CEQA Guidelines, § 21067.) "If more than one public agency is involved in a project but only one public agency carries out the project, then 'that agency shall be the lead agency even if the project would be located within the jurisdiction of another public agency.'" (CEQA Guidelines, § 15051, subd. (a), emphasis added; see also Pub. Res. Code, § 21165.)

The DPEIR states that 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." (DPEIR at Section 1-2, p. 1-4, lines 25-26.) Because there is no true lead agency for the Delta Plan, the County has lost the opportunity for substantive input, as well as the opportunity to require environmental information for those activities contemplated within its borders that will surely create significant environmental impacts. Said impacts will undoubtedly encroach upon the County's land use authority.

When a dispute exists as to which agency is lead, the Governor's Office of Planning and Research ("OPR") is charged with selecting the appropriate lead agency:

"(a) If there is a dispute over which of several agencies should be the Lead Agency for a project, the disputing agencies should consult with each other in an effort to resolve the dispute prior to submitting it to the Office of Planning and Research. If an agreement cannot be reached, any public agency, or the applicant if a private project is involved, may submit the dispute to the Office of Planning and Research for resolution.

(b) The Office of Planning and Research shall designate a Lead Agency within 21 days after receiving a completed request to resolve a dispute.

(c) Regulations adopted by the Office of Planning and Research for resolving Lead Agency disputes may be found in Title 14, California Code of Regulations, Sections 16000 et seq.

(d) Designation of a Lead Agency by the Office of Planning and Research shall be based on consideration of the criteria in Section 15051 as well as the capacity of the agency to adequately fulfill the requirements of CEQA."

(*Id.*, emphasis added.)

Because there is inherent confusion regarding the identity of the lead agency, the OPR should be first consulted. Consequently, the comment period on this DPEIR should be suspended until any such determination is made.

2. The DPEIR Does Not Constitute a "Project" under CEQA.

According to the opening paragraph of the DPEIR Executive Summary, the Delta Plan is "a legally enforceable, comprehensive, long-term management plan for the Delta." (DPEIR at p. ES-1.) The Project is defined in the DPEIR, as follows:

"The Delta Plan is a suite of twelve regulatory policies (that would have the force of law once adopted as State regulations). The policies and recommendations do not contain a list of physical projects to achieve the coequal goals. Rather, they are statements of policy direction to other agencies which, if the direction is followed, could lead to types of specific physical actions and sixty-one nonbinding recommendations, which collectively constitute the Proposed Project."

(DPEIR, ES at p. ES-2.)

As currently drafted the DPEIR's Project falls short of complying with the definition of "project" as set forth in Public Resources Code section 21065. That section states:

"'Project' means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following:

(a) An activity directly undertaken by any public agency.

(b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

(c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."

(/d., emphasis added.)

None of the three enumerated activities are found within the Delta Plan. On its face, the purported "project" is more accurately described as a proposed conceptual

activity or role, i.e., overseeing the integration of the Delta Plan policies into state law. As defined, the Project is nothing more than a compilation of ambiguous policies that will purportedly evolve into subsequent projects at a later time.

The Council attempts to minimize this defect by stating that “[t]his EIR is a program-level EIR due to the broad, program level of the Delta Plan . . . hence, this program EIR is not intended to provide project-level clearance for any specific project.” (DPEIR at p.ES-2.) While the document may be a programmatic EIR, the fact remains that the DPEIR provides no identifiable project(s), is impermissibly vague, and is riddled with inconsistencies. Program EIRs are commonly used as a vehicle to address large-scale projects with regional impacts. The scope of this DPEIR, however, is so broad that it does not provide any meaningful assessment or alternatives analysis.

This approach is rejected by the courts. In *City of Santee v. County of San Diego* (2010) 186 Cal.App.4th 55, the Court of Appeal held that the county’s execution of a siting agreement for the future construction of a facility did not constitute a “project” under CEQA. Though the siting agreement identified up to three potential sites for the placement of a state facility, the court noted that the siting agreement did not require CEQA review because:

“it does not identify a site for the reentry facility . . . , it does not describe any project which would be subject to any meaningful CEQA analysis. Rather, the face of the agreement places it squarely in the realm of preliminary agreement needed to explore and formulate projects for which CEQA review would be entirely premature.”

(*Id.* at p. 55.)

The same vagaries exist in the DPEIR, thereby preempting the Public Agencies’ ability to engage in meaningful CEQA analysis.

3. The DPEIR Fails to Identify a Baseline.

Not only does the DPEIR fail to adequately define the scope of the Project , it neglects to identify a definitive baseline against which the public can adequately assess potential environmental impacts. The DPEIR states generally that “[t]he baseline for assessing the significance of impacts of the Proposed Project is the existing environmental setting, not the No Project Alternative.” (DPEIR at Section 2.3.2, p. 2A-

85.) This overly generalized statement sets an invalid baseline for several reasons. It fails to take into account that the current Delta ecosystem is on life support due to excess water exports. Due to the statewide impacts of the projects involved, which could take decades to complete from project start to finish, it is questionable whether this generic baseline will sufficiently protect the coequal goals set forth in the DPEIR.

Pursuant to CEQA Guideline section 15125, subdivision (a), an EIR must include a description of the physical environmental conditions in the vicinity of the project as they exist at the time the Notice of Preparation is published or, if no notice is published, at the time environmental analysis is commenced. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant. (CEQA Guidelines, § 15125(a).) The absence of any meaningful baseline analysis renders the DPEIR defective.

In *Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, the plaintiff sought to challenge the EIR alleging that it failed to disclose the baseline physical conditions, particularly concerning the water quality of water bodies surrounding the project area. (*Id.*) The court noted that in order to ensure “meaningful assessment of a proposed project's significant environmental impacts and the consideration of mitigation measures, an EIR must provide a ‘description of the existing physical conditions on the property at the start of the environmental review process . . .’” (*Id.* at pp. 540-541.)

The Delta Plan acknowledges the changes that have occurred in the Delta over time, and notes the extensive changes from the early “wild” Delta to the “domesticated” Delta. (*See*, Delta Plan at pp. 107-108.) The one defined baseline for fish populations is mistaken. The Delta Plan lists the following as an “outcome performance measure”: “[p]rogress toward achieving the state and federal ‘doubling goal’ for wild Central Valley salmonids. This performance measure contains a clear target: doubling the salmonid population relative to 1995 levels.” (Delta Plan, Ch. 5 at p. 128.)

The footnote references the CVPIA section 3406, subdivision (b)(1). That section adopted a wholly different time frame from 1967-1991, a period when fish populations were much higher than those in 1995. It states:

“(1) Develop within three years of enactment and implement a program which makes all reasonable efforts to ensure that, by the year 2002, natural production of anadromous fish in Central Valley rivers and streams will be

sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991.”

(CVPIA, §3406, subd. (b)(1), emphasis added.)

Recent population studies for Delta fish species demonstrate that the population levels between the two time frames listed above are exceptionally distinct. (U.S. Fish and Wildlife Service, Cal. Dept. of Fish and Game, Doubling Graphs at <http://www.fws.gov/stockton/afrp/documents/Doubling%20goal%20graphs%20041811v3.ppt>, attached hereto as Exh. “1”.) The Delta Plan also limits the “doubling goal” to “wild Central Valley salmonids”. The CVPIA doubling goal, however, applies to “anadromous fish” in the Central Valley - a more expansive population which includes salmon, steelhead, sturgeon, striped bass (a non-native species), and American shad. (CVPIA, §3403, subd. (a).)

The discrepancy in identifying the appropriate baseline for the fish population is just one of many examples of where the baseline is not identified and thus cannot be properly analyzed.

4. The DPEIR Fails to Adequately Assess Reasonable Alternatives.

CEQA requires that the lead agency use its independent judgment to formulate and evaluate, in an EIR, a reasonable range of alternatives to the project that could “feasibly attain most of the basic objectives of the project and avoid or substantially lessen any of the potential adverse environmental impacts of the project.” (CEQA Guidelines, §15121, subd. (a).) This DPEIR describes five alternatives of the Proposed Project, alternatives that necessarily suffer from the highest level of abstraction inherited from the Proposed Project description itself. What follows, then, is an insufficient analysis that is so shallow in its depth that there is absolutely no starting point for alternatives analysis.

In addition to the “No Project Alternative”, the DEIR includes four alternatives that are based upon generalized comments and alternative proposals received from various stakeholder groups, communities, and other interested persons. By merely taking these alternative proposals from other stakeholders, the Council failed to formulate its own assessment of reasonable alternatives. This failure is significant because it illustrates a

breach of the Council's affirmative, public trust duties. Like the Proposed Project, the proposed alternatives are detached from any quantitative input, making true comparisons among the alternatives akin to debating shades of grey.

a. *The DPEIR Provides an Incomplete Analysis of the Project Alternative 3.*

Given the serious limitations noted above, the DPEIR incorrectly identifies the Proposed Project as the environmentally superior alternative. While the Public Agencies do not support Project Alternative 3 as a complete or preferred alternative by any means, there are some elements of Alternative 3 that are superior to the Proposed Project. Despite these slight benefits, the bottom line remains that the volume and quality of water flowing into the Delta are the primary variables that will dictate the viability of restoring the Delta.

Alternative 3 calls for a reduction in Delta water exports, in combination with habitat restoration on public (not private) lands, and a more aggressive approach to invasive species management. (DPEIR at Section 2.3.6, pp. 2A-102 - 2A-103.) From a flood control perspective, Alternative 3 promotes greater levee repair, maintenance, and channel dredging. Even though Alternative 3 limits ecosystem restoration to public lands, historic floodplains, and riparian corridors, a substantial amount of ecosystem restoration remains without impacts to productive agriculture lands.

The Proposed Project, on the other hand, emphasizes ecosystem restoration throughout the Delta on privately owned agricultural lands, turning a blind eye to the unavoidable reduction in food production and economic stimulus. In comparison to the Proposed Project, Alternative 3 provides a stronger platform in which to reach the Delta Plan's identified policy goals, namely flood risk reduction, water supply reliability, Delta ecosystem restoration, and water quality improvement. (DPEIR at Section 2.3.1.3, p. 2A-63.)

For example, because the Delta has a number of invasive plant and animals species that threaten waterways and other areas, Alternative 3 includes an assessment of how to control invasive species and other stressors that could adversely impact the Delta ecosystem. With regard to water reliability and water quality, the DPEIR again opts to side-step these critical issues by declining to assess the environmental impacts

until completion of the Bay Delta Conservation Plan (“BDCP”). (Wat. Code, § 85320(e).) Alternative 3, on the other hand, discusses water reliability and quality within the Delta by emphasizing a “through Delta” conveyance system. Without a through Delta conveyance system, the Delta is in danger of decreasing water reliability and quality, especially during dry years.

Alternative 3 also offers heightened flood protection. With an emphasis on levee strengthening and developing a more stringent levee design, especially on agricultural levees that protect 80% of the Delta, Alternative 3 considers key issues that are simply absent from the Proposed Project.

5. Miscellaneous CEQA Infirmities.

Further clarification is needed to define what exactly is a “covered action” versus “non-covered action” within the Delta Plan and the potential geographical extent of covered actions.

A covered action is defined as follows:

“(a) ‘Covered action’ means a plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code that meets all of the following conditions:

- (1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.
- (2) Will be carried out, approved, or funded by the state or a local public agency.
- (3) Is covered by one or more provisions of the Delta Plan.
- (4) Will have a significant impact on 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.”

(Wat. Code, § 85057.5.)

Far from exhaustive, this definition raises other questions. Do the Delta and Suisun Marsh boundaries refer to the Primary Zone (Pub. Res. Code, § 29728), Secondary Zone (Pub. Res. Code, § 29731), or the “Delta” as defined in Water Code section 12220? If a covered action is a matter of local land use control, sanitation,

public safety or other constitutionally secured authority, does the Council have any jurisdiction? As it presently stands, the definitions are so broad that the public agencies charged with making this determination are without sufficient guidance.

Moreover, the Council's "appellate" role is unclear. The Delta Reform Act provides that once a certification of consistency is filed, "[a]ny person alleging that a covered action is not consistent with the Delta Plan may appeal the certificate . . . to the Council." (DPEIR at Section 1.2, p. 1-4, lines 25-31.) The Council is tasked with holding a hearing which has all the appearances of an initial adjudication more akin to a trial court as opposed to an appellate body.

The DPEIR fails to address the impact of an unlimited ability for, "[a]ny person alleging that a covered action is not consistent with the Delta Plan may appeal the certificate...to the Council." (*Ibid.*) Litigants are traditionally limited to those who have "standing", a stake in the outcome of the process. Here, there is no apparent limitation as to who can file an appeal, leaving the potential for limitless litigation, unwarranted interference with local land use control and restrictions of basic due process rights.

B. NON-CEQA CHALLENGES.

1. The Delta Plan Infringes on the County's Constitutional Local Land Use Authority Under California Constitution Article XI, Section 7.

All of San Joaquin County is within the Primary Delta, Secondary Delta, or Delta watershed. Under California Constitution Article XI, Section 7, all land use decisions in San Joaquin County are governed by either San Joaquin County or one of the respective cities in the County. No other agency shall have land use authority, unless otherwise granted by the County or one of the cities thereof, and shall not be governed by any outside agency. The California Constitution provides that, "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., Art. XI, §7.) This grant of authority is plenary.

Importantly, the general laws do not apply to the Delta:

"It is, therefore, hereby declared that a general law cannot be made applicable to said Delta and that the enactment of this law is necessary

for the protection, conservation, development, control and use of the waters in the Delta for the public good.”

(Wat. Code, § 12200, emphasis added.)

Powers delegated to the Council under several sections of the Delta Reform Act squarely encroach upon the County’s constitutional right to oversee local land use. For instance, the Delta Reform Act of 2009 (Wat. Code, § 85034) sets forth the authority and responsibilities of the Council, which include administering all contracts, grants and easements for its predecessor, the California Bay-Delta Authority. Section 85210 sets forth the powers of the Council, which include requesting reports from state, federal, and local government agencies on issues related to the implementation of the Delta Plan, and commenting on state agency EIRs for projects outside the Delta that are determined to have a significant impact on the Delta. Section 85022 articulates the fundamental goals for managing land use in the Delta. None of these provisions even acknowledge, let alone attempt to trump local control over land use.

Section 85225 offers the most glaring example. It requires the County, prior to initiating a land use decision or flood control project, to prepare and submit to the Council a written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan. If that determination is challenged, the County would have to defend its action before the Council for an action wholly within its own authority. If after hearing the appeal, the Council finds that the action is not consistent with the Delta Plan, purportedly the County will not be allowed to proceed with the project unless it submits a revised certification of consistency, which in turn could be challenged again before the Council (Wat. Code, §§ 85225-85225.25.) The DPEIR fails to touch upon this clear conflict of law, and never addresses the role of the impacted local land use authority, and the pressing issue of whether the outlined process is consistent with constitutionally protected local land use authority.

The DPEIR sidesteps the issue, noting that the Delta Plan functions as a strategic document providing guidance and recommendations to cities, counties, state, federal, and local agencies (DPEIR at Section 1.1, p. 1-2.) The DPEIR further states that the Delta Plan contains several significant regulatory policies with which cities, counties, state, and local agencies are expected to comply, including the consistency

certification requirement discussed above. Finally, the DPEIR declares that the policies set forth in the Delta Reform Act are mandatory in that they will have a regulatory effect on state and local agencies proposing to implement covered actions.

The DPEIR's intent to disregard and trample local authority is clear on its face. The Final PEIR must recognize, incorporate, and where necessary, yield to local authority. This authority is well established in the California Constitution⁴, existing legislation⁵, and case law⁶. If the Delta Plan is going to realize its stated goals, it will have to work with local government, the affected counties in particular.

a. *Flood Control Under the Central Valley Flood Protection Plan and Senate Bill 5 Falls Squarely within the County's Jurisdiction over Local Safety Issues.*

Without question, flood control is a matter of public safety and well being. As previously established, the County has constitutionally protected authority to enact and enforce ordinances and regulations in order to protect the public.

In 2008, the California Legislature passed Senate Bill 5, the Central Valley Flood Protection Act ("CVFPA"), codified at Water Code sections 9600-9625. The CVFPA addresses the expanding populations along the Sacramento and San Joaquin River floodplains and these areas' susceptibility to flooding due to levee failure. (Wat. Code, § 9601). The legislation's goal is to increase public awareness of flood risk and ultimately provide urban areas with 200 year flood protection. (Wat. Code, § 9602, subd. (i).) Like the Delta Reform Act, the CVFPA calls for the creation of a plan to achieve its stated goals. (Wat. Code, § 9603.) But, that is where the similarities end.

Unlike the Delta Reform Act, the CVFPA recognizes local authority and seeks to work with the local agencies, cities, and counties. For example, Section 9616 of the Water Code states:

"(a) The plan shall include a description of both structural and nonstructural means for improving the performance and elimination of deficiencies of levees, weirs, bypasses, and facilities,

⁴ See Cal. Const. Art. XI.

⁵ See Gov't. Code, § 65300, *et seq.*

⁶ *Delta Wetlands v. County of San Joaquin* (2004) 121 Cal.App.4th 128, 145.

including facilities of the State Plan of Flood Control, and, wherever feasible, meet multiple objectives, including each of the following:

...

(5) Increase the engagement of local agencies willing to participate in improving flood protection, ensuring a better connection between state flood protection decisions and local land use decisions."

(*Id.*, emphasis added.)

Other portions of the CVFPA recognize local flood agencies⁷, integrate counties as contributors to the Flood Plan⁸, and, in certain circumstances, provide for county or local operation and maintenance of a facility⁹. In contrast, the Delta Plan's "covered action" process puts everything into the hands of the Council, relegating nothing to local control. Additionally, the Delta Reform Act specifically gives the Delta Plan the authority to take permissive notice of local agency input:

"(a) The Delta Plan may identify actions to be taken outside of the Delta, if those actions are determined to significantly reduce flood risks in the Delta.

(b) The Delta Plan may include local plans of flood protection."

(Wat. Code, § 85307, emphasis added.)

The Delta Plan must recognize the authority for local government to take local control in areas where it has local jurisdiction. Anything less will not pass constitutional muster.

2. The DPEIR Does Not Preserve the Area of Origin Protections.

California's area of origin statutes are codified at Water Code sections 11460-11463. These statutes were enacted to alleviate the concern that the construction of the Central Valley Project ("CVP") would leave inadequate water supplies for local uses. Initially, these protections were limited to acts by the Department of Water Resources.

⁷ Wat. Code, § 9622.

⁸ Wat. Code, § 9621.

⁹ Wat. Code, § 9613, subds. (4)-(5).

Later, Section 11128 of the Water Code made the limitations applicable to any agency of the state or federal government undertaking the construction or operation of the CVP, or any unit thereof. The statutes read as follows:

"11460. In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein.

11461. In no other way than by purchase or otherwise as provided in this part shall water rights of a watershed, area, or the inhabitants be impaired or curtailed by the department, but the provisions of this article shall be strictly limited to the acts and proceedings of the department, as such, and shall not apply to any persons or state agencies.

11463. In the construction and operation by the department of any project under the provisions of this part, no exchange of the water of any watershed or area for the water of any other watershed or area may be made by the department unless the water requirements of the watershed or area in which the exchange is made are first and at all times met and satisfied to the extent that the requirements would have been met were the exchange not made, and no right to the use of water shall be gained or lost by reason of any such exchange."

(Wat. Code, §§ 11460-11463, emphasis added.)

The area of origin doctrine was generally described in 1986 by the California Court of Appeals in *United States v. State Water Control Board*, as "reserving to the Area of Origin an undefined preferential right to future water needs." (*U.S. v. SWRCB* (1986) 182 Cal.App.3d 82, 139.) These protections prevent the Council, or any other state or federal agency from diverting water to the extent the diversion impairs the water rights possessed by the diverters in Water Agencies.

The present day operations of the CVP and State Water Project ("SWP") utilize a through Delta water conveyance, thereby diluting the Delta's existing waters to the point that they can be used for irrigation. As noted, the San Joaquin River has a high concentration of salts where it enters the Delta, a concentration much greater than the Sacramento River water. (Delta Plan at p. 138.) Under the current pumping operations, water quality declines from north to south. The Project, to the extent it includes anything

other than a through Delta conveyance, will reduce the dilution factor of the Sacramento River water and impair the water diverters' rights to an "adequate supply" that can satisfy their "beneficial needs" and reduce salinity control as required by Water Code section 12200. The DPEIR fails to account for this unavoidable fact.¹⁰

3. The DPEIR Fails to Address Requirements Under the Wheeling Statutes for Water Transfers.

Clearly, one of the key projects under consideration is a so-called peripheral canal or conveyance mechanism to move water through the Delta and potentially to southern California. Under most scenarios, the conveyance would run through San Joaquin Valley.

In 1986, the California legislature enacted the "wheeling statutes". (Wat Code, §§ 1810-1814.) Set forth below, these statutes provide that a public agency that owns a water conveyance facility (such as a canal, pipeline, aqueduct, or pumping station, etc.) with excess capacity must allow others that want to transfer water the use of excess capacity under certain conditions. The thrust of the statutes is to facilitate water transfers while concurrently ensuring that others are not injured by those transfers.

Because wheeling statutes will undoubtedly play a role in the Delta Plan, it is problematic that the Council has opted to wholly ignore any analysis of this critical issue. As codified, the wheeling statutes require that water transfers cause no injury to the legal user of water and that the owner of the water transfer facility provide written findings to that effect. Neither analysis has been provided or even considered as part of the Delta Plan or the DPEIR. This complete omission is surprising given the fact that Section 2A of the DPEIR dedicates an entire section to projected conveyance facilities for surface water projects. (DPEIR at Section 2A, 2.2.1.2.3., p. 2A-9.)

¹⁰ The Department of Water Resources released a bulletin in 1993 which confirmed that "[t]he 1992 CVP Improvement Act (P.L. 102-575) prohibits transfers that significantly reduce the quantity or quality of water available for fish and wildlife." (DWR's Water Transfers in California: Translating Concept into Reality, Nov. 1993 at p. 601.) The Final PEIR needs to adequately address this reality.

a. Area of Origin Analysis.

California Water Code section 1810, in relevant part provides:

“Notwithstanding any other provision of law, neither the state, nor any regional or local public agency may deny a bona fide transferor of water the use of a water conveyance facility which has unused capacity, for the period of time for which that capacity is available, if fair compensation is paid for that use, subject to the following:

(a) Any person or public agency that has a long-term water service contract with or the right to receive water from the owner of the conveyance facility shall have the right to use any unused capacity prior to any bona fide transferor . . .

(d) This use of a water conveyance facility is to be made without injuring any legal user of water and without unreasonably affecting fish, wildlife, or other instream beneficial uses and without unreasonably affecting the overall economy or the environment of the county from which the water is being transferred.”

(/d., emphasis added.)

Under subsection (d) of Section 1810, the statute requires that no adverse effects be suffered in the county of origin of transfer during the wheeling or exchange process. The plain meaning of the “non-injury” requirement is clearly incorporated on the face of the code provision. Accordingly, in order for the Delta Plan to comply with applicable statutes, as well as any subsequent projects, a finding that the use of the conveyance facility will be made “without unreasonably affecting the overall economy or the environment of the county from which the water is being transferred” is legally required.

If the BDCP alternate conveyance goes forward and the point of diversion is near the town of Hood, there will be multiple counties of origin, including the County of San Joaquin. Without performing an exhaustive list, multiple upstream counties (where water originates and eventually flows to the point of diversion) will also have to be analyzed.

b. Written Findings of Non-Adverse Impacts are Required by the Entity that Owns the Conveyance.

The wheeling statutes require that the entity that owns the conveyance provide written findings to support its determinations concerning water transfers. (Wat. Code, § 1813 [“In making the determinations required by this article, the respective public agency shall act in a reasonable manner consistent with the requirements of law to facilitate the voluntary sale, lease, or exchange of water and shall support its determinations by written findings.”].)

Though in a slightly different context, this written finding requirement is further supported by *Sierra Club v. City of Hayward* (1981) 28 Cal.3d 840 (“*Hayward*”) and *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506 (“*Topanga*”). In *Hayward*, a conservationist group sought to set aside a city council’s resolution which cancelled an “agricultural preserve” contract. (*Id.*) The Williamson Act authorizes the cancellation of a policy only if the relevant agency finds “[t]hat the cancellation is not inconsistent with the purposes of [the act] . . . and [t]hat cancellation is in the public interest.” (*Id.* at p. 847.) The Supreme Court held that the city council failed to provide substantial evidence supporting its determination that the cancellation was consistent with purposes of the act. (*Id.* at p. 854.)

Similarly in *Topanga*, the court noted that a governing administrative agency, in adjudicating an application for a variance, is required to make findings to support its determination. (*Topanga, supra*, 11 Cal.3d at p. 514 [“that body must render a finding sufficient both to enable the parties to determine whether and on what basis they should seek review and, in the event of review, to apprise a reviewing court of the basis of the board’s action.”].)

Here, the Delta Plan and DPEIR provide absolutely no analysis of the wheeling statutes and how the construction and/or use of existing facilities to transfer water would impact local agencies. Given the large capacity of the anticipated conveyance facilities and far-reaching scope of subsequent programs that will be felt throughout the State of California (“State” or “California”), the environmental impacts and probable continued ecosystem degradation must be assessed before the enactment or approval of any overarching policies.

c. Written Findings of Non-Adverse Impacts are Required by the State Lands Commission.

The present water conveyance to the CVP and SWP are the channels and canals that make up the current Delta. The State Lands Commission is the owner of the lands that form and underlie portions of a number of these channels and canals. To the extent that any portion of these channels and canals comprise a water conveyance facility to be used for water transfers under the Delta Plan, the State Lands Commission must provide the written findings discussed above.

4. The DPEIR Does Not Comport with Requirements under the Clean Air Act ("CAA").

The CAA requires the Environmental Protection Agency ("EPA") to identify air pollutants that endanger the public health and welfare and to formulate national standards that specify the maximum permissible concentrations of those pollutants in the ambient air (the NAAQS) and ensure that regional areas are in attainment of the standards. (42 U.S.C., §§ 7408-7409, and 7506(d).) EPA established such standards for PM₁₀¹¹. (40 C.F.R., Part 50.6.) The states, or regions within the state, are designated as in "attainment" or "nonattainment" depending on whether the area meets the national standards for a particular pollutant. (42 U.S.C., § 7407(d).) The County of San Joaquin is located in a nonattainment area. (17 Cal. Code of Regs., § 60205.)

The CAA requires that non-attainment areas adopt a State Implementation Plan ("SIP") that sets forth all possible emission controls and sources to the extent necessary to attain the NAAQS. (42 U.S.C., §§ 7410(a)(1)-(2), 42 U.S.C., § 7407(a).) The state and/or local air district are primarily responsible for developing and implementing the SIP. (42 U.S.C., §§ 7401, 7407, and 7410; Cal. Health & Safety Code, §§ 40000-40001.) To prevent federal interference with the SIP's attainment strategy, Congress included a prohibition in the CAA that "[n]o department, agency, or instrumentality of the Federal Government shall engage in, support in any way or provide financial assistance

¹¹ PM₁₀ is the acronym for particulate matter less than 10 microns in size, enabling it to penetrate deep into the lungs where it becomes a significant health concern.

for, license or permit, or approve, any activity which does not conform to an implementation plan [SIP].” (42 U.S.C., § 7506(c)(1); Rule 925(A).)

Until such time as the “Project” is described with any specificity, the Public Agencies cannot determine whether the SIP will be violated. Undoubtedly, it will be difficult, if not impossible, to conform to the SIP since most of the Delta proposals involve large construction-type projects.

In the 1990 CAA amendments, Congress further strengthened the requirements so that “conformity” means that federal approval must conform to the SIP’s purpose of eliminating or reducing the severity and number of violations of the national ambient air quality standards and achieving expeditious attainment of such standards; and that such activities will not cause or contribute to any new violation of any standard in any area; increase the frequency or severity of any existing violation of any standard in any area; or delay timely attainment of any standard or any required interim emission reductions or other milestones in any area. (42 U.S.C., § 7506(c)(1)(A)-(B)(i)-(iii).)

The CAA conformity regulations at issue are codified in the San Joaquin Valley Unified Air Pollution Control District’s Rule 9110, which provides, in relevant part:

“(b) The Federal conformity rules under this subpart and 40 CFR part 93, in addition to any existing applicable State requirements, establish the conformity criteria and procedures necessary to meet the Act requirements until such time as the required conformity SIP revision is approved by EPA. A State’s conformity provisions must contain criteria and procedures that are no less stringent than the requirements described in this subpart. A State may establish more stringent conformity criteria and procedures only if they apply equally to non-Federal as well as Federal entities. Following EPA approval of the State conformity provisions (or a portion thereof) in a revision to the applicable SIP, the approved (or approved portion of the) State criteria and procedures would govern conformity determinations and the Federal conformity regulations contained in 40 CFR part 93 would apply only for the portion, if any, of the State’s conformity provisions that is not approved by EPA. In addition, any previously applicable SIP requirements relating to conformity remain enforceable until the State revises its SIP to specifically remove them from the SIP and that revision is approved by EPA.”

(*Id.*, citing Federal General Conformity Regulation, § 51.851, emphasis added.)

Only when it is shown that the activity produces no emissions, or a *de minimis* level of emissions that could not interfere with the SIP, may a full scale conformity

analysis be avoided. The purpose of permitting *de minimis* exemptions is to avoid imposing a regulatory requirement that would “yield a gain of trivial or no value.” (*Natural Res. Def. Council, Inc. v. U.S. E.P.A.* (9th Cir. 1992) 966 F.2d 1292, 1306 *citing* *Alabama Power Co. v. Costle* (D.C. Cir. 1979) 636 F.2d 323, 361 (“*Alabama Power*”).) A *de minimis* exception does not provide “an ability to depart from the statute, but rather a tool to be used in implementing the legislative design.” (*Alabama Power, supra*, 636 F.2d at p. 360.)

Congress intended the CAA conformity requirement to integrate federal actions and air quality planning “to protect the integrity of the SIP by helping to ensure that SIP growth projections are not exceeded, emissions reduction progress targets are achieved, and air quality attainment and maintenance efforts are not undermined.” (*Environmental Defense Fund, Inc. v. E.P.A.* (D.C. Cir. 1996) 82 F.3d 451, 468 .) A high level of justification is necessary to support a *de minimis* exemption, and the agency bears the burden of making the required showing. (*Alabama Power, supra*, 636 F.2d at p. 360.)

Specific activities that are considered to be trivial or zero emissions sources are identified as exempt in Rule 925 (D)(3)(b), (D)(4)-(D)(5). In addition, activities may be exempted when it is demonstrated that the activity’s total direct and indirect emissions are below specific thresholds - referred to as the “general conformity *de minimis* emission thresholds.” (Rule 925 (D)(2), (D)(3)(b).) Despite these exceptions, when the emissions of any pollutant from a federal action represent 10 percent or more of a nonattainment area’s total emissions of that pollutant, the action is defined as a “Regionally Significant Action” and a full-scale conformity analysis is required even if the emissions are considered *de minimis*. (Rule 925 (D)(9).) An applicability analysis must be performed to demonstrate that the activities’ emissions do not exceed the general conformity *de minimis* emission thresholds or that the activity is not a Regionally Significant Action. (*City of Las Vegas v. F.A.A.* (9th Cir. 2009) 570 F.3d 1109, 1117; *County of Delaware v. Dept. of Transp.* (D.C. Cir. 2009) 554 F.3d 143, 145.)

5. Other Inconsistencies within the DPEIR and Delta Plan.

a. *It is unclear whether and when the BDCP will be completed and what the forecasted timeline is for future projects.*

The current Delta Plan intends to move forward with its stated goals and acknowledges that other components - some quite large - can play catch-up at a later time.

“The study period to be considered in this EIR is defined by the purposes and uses of the Delta Plan . . . The policies will serve as the [?] [sic] basis for future findings of consistency with the Delta Plan by State and local agencies with regard to Delta-related projects that are ‘covered actions’, and for subsequent evaluation of those findings by the council on appeal, pursuant to Water Code section 85225 . . .”

(DPEIR at p. Section 1.4.1, p. 1-14.)

Several critical components hinge on the completion of the BDCP. As noted in the Delta Plan, several policies involve updated flow objectives and the development of flow criteria for certain watersheds. (Delta Plan, Ch. 4 at p. 86.) More problematic, however, is the timing of these documents. The Draft Delta Plan expressly states that “[t]he BDCP process is not expected to be completed until after the first Delta Plan is adopted by the Delta Stewardship Council . . . [and in turn, the BDCP] will become part of the Delta Plan.” (Delta Plan, Ch. 5 at p. 125.) Therefore, it is unclear how the “revised” flow requirements (as well as any other quantitative measure that will provide the lead agency with some context) will be incorporated into the Delta Plan if they will not be determined in the BDCP until after the Delta Plan is adopted.

Another irreconcilable conundrum is the State Water Resources Control Board’s underlying jurisdiction, authority, and obligation to determine the proper and reasonable balancing required to determine flow criteria under the Porter-Cologne Act. Accordingly, the Delta Plan and the Council are without legal authority to establish the priorities and level of balancing.

b. *The DPEIR Misstates Key Language Regarding Covered versus "Statutory Exemptions of a Covered Action".*

The DPEIR, Section 2.1.2.2, entitled "Administrative Exemptions of a Covered Action" states that certain types of projects, such as "emergency" projects and temporary water transfers of up to 1 year in duration are not "covered actions" under Water Code section 85057.5, subdivision (a)(4). This is a gross misstatement. In the 2009 Delta Reform Act, Section 85057.5 states:

"(a) 'Covered action' means a plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code that meets all of the following conditions:

(4) Will have a significant impact on 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."

(Wat. Code, § 85057.5, subd. (a)(4)).

There are no other provisions in the 2009 Delta Reform Act that create such administrative exemptions for "short-term" water transfers, transfers that could have significant impacts on the co-equal goals.

c. *The Water Reliability and Water Quality Sections are Impermissibly Vague.*

The DPEIR readily acknowledges the lack of any specificity in the Delta Plan - a critical deficiency that handcuffs any practical analysis:

"The Proposed Project does not require specific water reliability projects; rather it contains broad requirements and recommendations such as the identification by water suppliers or specific programs and projects that will improve self-reliance. Given both the general nature of the Proposed Project policies and recommendations and the uncertainty concerning the extent to which the Proposed Project will result in any particular action, it is unclear what types of projects will actually be implemented as a result of the Proposed Project policies and recommendations. Nevertheless, this EIR assumes that the Proposed Project will lead to an increase in local and regional water reliability projects."

(DPEIR at Section 2.2.1.1, p. 2A-6, emphasis added.)

An EIR that has to make such assumptions falls well short of the measured analysis that is foundational to the CEQA and NEPA process. Some projects have been identified, including the: (1) north-of-the-Delta off stream Storage Investigation, which includes 8 initial options, including the possible construction of sites reservoirs with two major dams; (2) Los Vaqueros Reservoir Expansion Investigation; and (3) Upper San Joaquin River Basin Storage investigation. Simply identifying projects does little in the way of balancing alternatives when there is no tie-in discussion of how these various projects will fit into what remains as nothing more than lofty policy goals, tied to an accelerated timeline, both of which seek justification from after-the-fact science.¹²

What results is the Delta Plan's determination to develop flow criteria before the BDCP has been completed. The process is circular by design: the BDCP findings will likely have a significant impact on flow modeling assumptions; this in turn undermines the foundation for the previously produced flow criteria. This methodology begs the question: How can impacts of future "covered actions" be adequately assessed when the critical metrics are unknown and "best available science" undefined?

6. Inconsistencies with Delta Related Legislation.

a. *The Watershed Protection Act (Wat. Code, §§ 11460, et seq.) and the Delta Protection Act of 1959 (Wat. Code, §§ 12200 et seq.)*

The Watershed Protection Act and the Delta Protection Act of 1959 impose fundamental limitations on the SWP and the federal CVP's ability to transfer surplus water from the Delta watershed to dry areas to the south and west of the Delta. The Delta Protection Act among things, places primacy upon salinity control, existing water rights within the Delta and requires operation of through Delta water flows to achieve

¹² Just one example from the DPEIR illustrates the point. "The DWR report, CALFED Surface Storage investigations Progress Report . . . , projects completion and environmental documentation by mid-2013 and decisions on the investigations by December 2014. The progress report stated that because many of the planning, biological, and regulatory conditions have changed since the Initial Alternatives Information reports and Plan Formulations Reports were completed, the final range of options to be considered in 2014 could be substantially different." (DPEIR at Section 2.2.1.2.4, p. 2A-12, emphasis added.)

these objectives, “to the maximum extent possible.” (Wat. Code, §§12202, 12203, and 12205.)

The Council’s primary responsibility is to develop, adopt, and implement a long-term management plan for the Delta and the Suisun Marsh that achieves the coequal goals. According to the Proposed Project, “[c]oequal goals means the two goals of providing a more reliable water supply for California and protecting, restoring and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource and agricultural values of the Delta as an evolving place (Water Code section 85054).” (DPEIR at Section 1.1, p. 1-4.) For the reasons set forth above, the DPEIR does not achieve the coequal goals of providing a more reliable water supply and restoring the Delta ecosystem in a manner that *protects and enhances* the agricultural values of the Delta.

Under the proposed Delta Plan, it is virtually impossible to reconcile competing interests to achieve these coequal goals. For instance, the Delta Plan’s interpretation of the “coequal goals” as to require a more reliable water supply only for the SWP and CVP exports from the Delta (to the detriment of the various areas of origin) is in direct contravention of several keys statutes. For example, Section 85031 of the Water Code states that:

“(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. This division does not limit or otherwise affect the application of Article 1.7 (commencing with Section 1215) of Chapter 1 of Part 2 of Division 2, Sections 10505, 10505.5, 11128, 11460, 11461, 11462, and 11463, and Sections 12200 to 12220, inclusive.”

(Wat. Code, § 85031, emphasis added.)

Moreover, Water Code sections 12200 through 12205 are clear as to the legal requirements needed to provide salinity control for the Delta and provide an “adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban

and recreational development.”¹³ Therefore, the Delta Plan and its DPEIR violate the 1959 Act by degrading these protections and relegating them to a less than co-equal status with water exports.

¹³ For ease of reference, the relevant provisions of the Water Code sections are provided, as follows:

§12200. Legislative findings and declaration

The Legislature hereby finds that the water problems of the Sacramento-San Joaquin Delta are unique within the State; the Sacramento and San Joaquin Rivers join at the Sacramento-San Joaquin Delta to discharge their fresh water flows into Suisun, San Pablo and San Francisco bays and thence into the Pacific Ocean; the merging of fresh water with saline bay waters and drainage waters and the withdrawal of fresh water for beneficial uses creates an acute problem of salinity intrusion into the vast network of channels and sloughs of the Delta; the State Water Resources Development system has as one of its objectives the transfer of waters from water-surplus areas in the Sacramento Valley and the north coastal area to water-deficient areas to the south and west of the Sacramento-San Joaquin Delta via the Delta; water surplus to the needs of the areas in which it originates is gathered in the Delta and thereby provides a common source of fresh water supply for water-deficient areas. It is, therefore, hereby declared that a general law cannot be made applicable to said Delta and that the enactment of this law is necessary for the protection, conservation, development, control and use of the waters in the Delta for the public good. *(Added by Stats. 1959, c. 1766, p. 4247, §1.)*

§12201. Necessity of maintenance of water supply

The Legislature finds that the maintenance of an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban, and recreational development in the Delta area as set forth in Section 12220, Chapter 2, of this part, and to provide a common source of fresh water for export to areas of water deficiency is necessary to the peace, health, safety and welfare of the people of the State, except that delivery of such water shall be subject to the provisions of Section 10505 and Sections 11460 to 11463, inclusive, of this code. *(Added by Stats. 1959, c. 1766, p 4247, §1.)*

§12202. Salinity control and adequate water supply; substitute water supply; delivery

Among the functions to be provided by the State Water Resources Development System, in coordination with the activities of the United States in providing salinity control for the Delta through operation of the Federal Central Valley Project, shall be the provision of salinity control
(footnote continued)

The reliability of water supply for California is enhanced by improving Delta levees and assuring that levee breaks be immediately repaired and flooded areas dewatered. The levee systems are critical to the efficient repulsion of salinity intrusion and avoidance of the evaporative losses from flooded areas and swampland which are significantly higher than the consumptive use resulting from typical Delta farming.

b. Federal Reclamation Act of 1902.

Section 8 of the Federal Reclamation Act of 1902 provides that "nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, . . ." (*Id.*) Contrary to the laws set forth in the Federal Reclamation Act, the Delta Plan seeks to transfer water rights away from the Delta and other areas of origin.

c. Coastal Zone Management Act.

The CZMA encourages states to preserve, protect, develop, and where possible, restore or enhance valuable natural coastal resources. (16 U.S.C., §§ 1451, *et seq.*) These resources include wetlands, floodplains, and estuaries, as well as the fish and wildlife using those habitats.

and an adequate water supply for the users of water in the Sacramento-San Joaquin Delta. If it is determined to be in the public interest to provide a substitute water supply to the users in said Delta in lieu of that which would be provided as a result of salinity control no added financial burden shall be placed upon said Delta water users solely by virtue of such substitution. Delivery of said substitute water supply shall be subject to the provisions of Section 10505 and Sections 11460 to 11463, inclusive, of this code. (*Added by Stats. 1959, c. 1766, p 4247, §1.*)

§12203. Diversion of waters from channels of delta

It is hereby declared to be the policy of the State that no person, corporation or public or private agency or the State or the United States should divert water from the channels of the Sacramento-San Joaquin Delta to which the users within said Delta are entitled. (*Added by Stats. 1959, c. 1766, p 4249, §1.*)

In its reauthorization of the CZMA in 1990, Congress identified nonpoint source pollution as a major factor in the continuing degradation of coastal waters. The policies set forth in the Delta Plan and DPEIR are not congruent with the CZMA by degrading water quality due to reduced flows.

d. NEPA.

Section 1.4 of the DPEIR provides generally that:

“This EIR is being prepared to be consistent with most of the requirements of the National Environmental Policy Act (NEPA) in anticipation that a federal agency will consider this document in preparation of a NEPA environmental analysis. Therefore, all of the alternatives analyzed in this EIR, including the Proposed Project and No Project Alternative, are evaluated at an equal level of detail (while avoiding unnecessary repetition) consistent with NEPA requirements.”

(DPEIR at Section 1, p. 1-14.)

Under CEQA, the lead agency is strongly encouraged to prepare a combined EIS/EIR that satisfies both NEPA and CEQA for projects. (Pub. Res. Code, § 21083.6; CEQA Guidelines, § 15222.) Though the Council specifically recognized the federal component to the environmental analysis, it failed to prepare a combined EIS/EIR document. Similar to its state counterpart, NEPA is intended to provide sufficient and a transparent process to vet and consider certain projects that could have an adverse environmental impact. Since both CEQA and NEPA apply coequally to the DPEIR, the same shortcomings addressed in the CEQA portion of this comment letter apply to the NEPA analysis as well.

e. Public Trust Doctrine.

The historic purpose of the Public Trust Doctrine was to ensure that the state's lands and submerged waters were held in trust and protected for the people of the state. (*Illinois Central R.R. Co. v. Illinois* (1892) 146 U.S. 387, 452.) After over a century, the underlying legislative intent remains the same today. In *Nat'l Audubon Soc'y v. Superior Court* (1983) 33 Cal.3d 419 (“*Aubudon*”), the Supreme Court stated that “the core of the public trust doctrine is the state's authority as sovereign to exercise a continuous

supervision and control over the navigable waters of the state and the lands underlying those waters.” (*Id.* at p. 425.)

Under the Public Trust Doctrine, the Council has no authority to put off sound environmental analysis, place expediency before sound science, and otherwise ignore existing environmental protections secured under both state and federal law. In accordance with the general sense of ambiguity that runs constant throughout the DPEIR, the Delta Plan and DPEIR are silent on whether the Council intends to provide an analysis under this doctrine. The sweeping nature and scope of the Delta Plan necessarily implicates California’s public trust obligations pertaining to water rights, rights that share equal footing with the reasonable use and appropriative rights doctrines and the Final PEIR must address these substantive obligations. (*Audubon* at pp. 446-448.)

7. Impacts on Agriculture are Not Addressed.

The DPEIR does not adequately address the potential impacts that ecosystem restoration can have on neighboring agricultural lands. Overall, the DPEIR fails to identify, discuss, or mitigate many of the Proposed Project’s very significant impacts on agriculture. More importantly, the DPEIR is in direct contradiction of the San Joaquin County’s Right to Farm Ordinance¹⁴, which provides that reasonable, continued agricultural operations are not public or private nuisances. The underlying purpose of this ordinance is to protect agricultural operations.

The EIR’s total lack of recognition of Delta’s agriculture is abundantly evident by the statement found in the DPEIR that describes the Delta Plan’s goals: “Fundamentally, the Delta Plan seeks to arrest (and ultimately improve) declining water reliability and declining environmental conditions related to the Delta ecosystem, flood risk, and water quality, as well to improve recreation opportunities in the Delta and protect Delta legacy towns.” (DPEIR at Section 25.4, p. 25-2, lines 12-14.) Agriculture, the Delta’s largest land use and economic contributor, is conspicuously left out of the fundamental goals of the Delta Plan.

¹⁴ Codified at Division 9 of Title 6 of the Ordinance Code of San Joaquin County.

As required by Water Code section 85054, the Delta Plan does nothing to protect or enhance agriculture in the Delta. The DPEIR totally ignores this fact and does not address the issue. The DPEIR only discusses noise, access constraints, dust, etc. from ecosystem projects as potential impacts to agricultural lands. However, there are a number of other more serious impacts that the DPEIR does not mention. A few examples are as follows:

- Farmers next to ecosystem restoration projects that are designed to provide endangered species habitat may have to alter their farming practices to protect the newly established habitat.
- Special restrictions and conditions required by ecosystem projects may prohibit certain neighboring farming practices that are necessary for cost effective food production.
- Neighboring natural habitats could serve as a reservoir for weeds, insects, diseases, and rodents at levels that would make farming in the area impossible.
- Serious invasive weeds detrimental to agriculture that are presently aggressively controlled in the Delta could quickly once again become very troublesome and costly if left unchecked in natural ecosystem.

When agriculture is encroached upon by conflicting land uses and historical farmland is converted from private to public lands, the result can have severe economic impacts on the County. For instance, local farming generates revenues for the County through fee assessments to compensate the County for services provided. The reduction or elimination of such revenues over time could result in devastating impacts on the County if substantial acres of farmland are retired.

In terms of public safety, reclamation districts throughout the State are charged with the important task of maintaining levees to lessen flood risks. Reclamation districts are typically funded by special assessments on the landowners for levee maintenance. When private land is converted to public ownership, those lands are typically not subject to special assessments or County property taxes. In addition to the loss of food production, the end result is that assessments become too expensive for farmers within the impacted reclamation district and the County's tax base is further eroded.

In addition, the DPEIR does not adequately address the on-farm impacts that would result under the Delta Plan. The Plan's goals are to substantially limit any development in the Primary Zone. The problem is that a modern farming operation is not just a field of produce. It is a system of buildings that complements and supports the field operation. These buildings include maintenance and storage shops, packing sheds, worker housing, and other related structures. The need for these support facilities, especially for on-site worker housing, which includes substantial equipment theft deterrence, has not been adequately considered.

C. THE PUBLIC AGENCIES' SPECIFIC COMMENTS TO DPEIR AND THE FIFTH DELTA PLAN.

1. Section 1- Introduction.

- Section 1-1, line 9: "The... (Delta Reform Act), requires the development of a legally enforceable, comprehensive, long-term management plan for the Delta..." However, the current document is not a plan, but a description of objectives. To be a master plan for the Delta, it is necessary to include comprehensive guidance to achieve the objectives.
- Section 1-3, line 3: The Council should make use of "all available science", not "best available science," which indicates a preference/opinion and/or biased exclusion of data.
- Section 1, pages 1-3, lines 15 - 18: The Council, in consultation with the Central Valley Flood Protection Board, is required to incorporate in the Plan priorities for state investments in project and non-project levees. The challenge with this is that the first version of the Central Valley Flood Protection Plan does not address needed improvements to non-project levees. This information is not expected to be available until the next update of the Plan which is due in 2017. So, it is unclear where the Council could derive this information.
- Section 1-3, lines 30-31: In order for the Independent Science Board to truly give independent science advice for the Delta Plan, scientists must have no monetary ties and/or material interests in the Delta Plan or the Delta Stewardship Council.
- Section 1-4, line 4: The document states, "Achievement of the coequal goals and eight "inherent" objectives, in a manner that: (1) furthers the statewide policy to reduce reliance on the Delta in meeting the State's future water supply needs through regional self-reliance,..." this should be the number one focus of this document and for the State. Currently, the State has not implemented any enforceable policy to encourage sustainable water supply to meet current

needs. In addition, the Delta Plan does not promote regional self-reliance or provide guidance to achieve regional self-reliance.

- Section 1-5, line 31: Add "to" to the sentence: "... deliver water to cities and irrigated farmland..."
- Section 1-15, line 3: In figure 1-1 the Delta Watershed Area is depicted as ending above Fresno; this figure is flawed. Any water that reaches the Delta by natural or manmade means is part of the Delta watershed, including waters from the Kings River that drains through Fresno Slough according to the State of California Department of Conservation Watershed Portal.
- Section 1-16, line 15: Add "are" to the sentence: "...the alternatives that are evaluated in this EIR are as described in Section 2A ..."
- Section 1-17, line 3: Change "Appendix F: Biology Appendixes" to "Appendix F: Biological Appendices".

2. Sections 2A and 2B - Proposed Project and Alternatives and Introduction to Resource Sections.

- Section 2A-1, line 11: Based on San Joaquin County's experience with the Federal Government, we recommend reevaluating the statement "provide guidance" regarding the federal agencies.
- Page 2A-17, line 5: General Comment - Somewhere in the discussion concerning alternatives for wells and other groundwater storage facilities, there should be a reference that any proposed well and pump installation and construction activity must comply with State and local well construction, permitting and inspection standards.

San Joaquin County ("SJC") Ordinance Code and Well Standards (shown below) prescribe the requirements regarding the location, construction, repair, maintenance and destruction of all types of water wells and borings (test wells, subsurface borings, monitoring, geotechnical, geophysical, recharge, reconditioning, deepening, cathodic protection, injection, extraction and vapor probes) to ensure protection of water quality and potability of underground water sources.

Sources:

- SJC Ordinance Code, Title 5, Health and Sanitation Division 4 - Wells and Well Drilling
- SJ Ordinance Code, Title 9, Division 11 Infrastructure Standards and Requirements
Chapter 9-1115 - Water Well and Well Drilling Regulations
- SJC Standards for Well Construction and Destruction

- Section 2A-24, line 16: The Delta Plan recommends that the Bay Delta Conservation Plan (BDCP) be completed by December 31, 2014, after the Delta Plan. The paragraph describes that “the BDCP is likely to be a major project involving large-scale improvements in water conveyance and large-scale ecosystem restorations in the Delta.” These actions are “covered actions” as the Delta Plan is written; this BDCP should adhere to the Delta Plan and not be incorporated into the Delta Plan. If the Delta Plan is the guidance document, then the BDCP should follow the guidance document.
- Section 2A, Page 2A-46, Lines 17 - 24: The Flood Risk Reduction Improvements listed here should include the construction and expansion of flood bypasses. These improvements are specifically addressed elsewhere in the document, including in the bottom paragraph on this page (in lines 34, 40 and 41).
- Section 2A, Page 2A-47, Lines 7 - 10: Development in non-urban areas outside of legacy communities would be required to achieve a higher level of flood protection, from 100-year to 200-year. However, this is inconsistent with and exceeds the requirements of SB 5. The document does not discuss the rationale for requiring this higher level of protection, particularly given its inconsistency with State law.
- Section 2A, Page 2A-47, Lines 14 -18: The Proposed Project encourages DWR to complete its report providing guidance on investment strategies for Flood Management by January 1, 2013. It should be noted that the implementation plan associated with the CVFPP is not expected to be available until 2017. Therefore, encouraging an earlier completion of the report on investment strategies guidance may not result in any earlier implementation of Flood Management improvements in the Delta.
- Section 2A, Page 2A-49, Lines 9 - 10. This statement restates a recommendation in the Plan (RR R9) regarding flood insurance purchases. Specifically, it states “RR R9 encourages mandatory participation in flood insurance programs in flood prone areas.” It should be noted that this mandate already exists for areas identified to be subject to inundation in a 100-year event through FEMA and the NFIP. However, to avoid confusion, “flood prone” should be defined or reference should be made that the intent is to be consistent with current mandates of FEMA and NFIP.
- Section 2A, Page 2A-49, Lines 42 - 44: This statement describes one of the assumed “principles” under which the Plan’s recommendations are based for Flood Management investments. Specifically, this assumed principle is that DWR will “leverage” its investments by securing federal and local cost-sharing. Unfortunately, due to recent policy changes with the Corps of Engineers regarding federal funding participation commitments, it appears that it will become more difficult to obtain federal cost sharing commitments for future projects. This “principle” should be re-worded to recognize this.
- Section 2A, Page 2A-50, Lines 13 - 17: A recommendation of the Plan is that funding priority should be given for the improvement of levees that protect water

quality and water supply over those of flood water conveyance. This statement should be reconsidered given that the adequate conveyance of flood waters is likely more critical for the immediate safeguarding of lives when near urban areas than the protection of water quality and water supply facilities.

- Section 2A, Page 2A-50, Section 2.2.4.3, “Stockpiling of Materials:” It should be acknowledged that this activity is exempt under the Delta Plan (as a covered action) since it is directly related to a maintenance function (refer to third “bullet” on Page 2A-3). It still may result in impacts, but it is not regulated under the Plan.
- Section 2A, Page 2A-50, beginning with Line 36: This statement refers to the following as “new facilities,” yet two of the following three “bullets” don’t include new facilities.
- Section 2A, Page 2A-55, Section 2.2.5.3: This Section discusses possible construction of additional retail stores and restaurants in Legacy Towns to support tourism. Unfortunately, the construction of buildings for such businesses may not be permitted under current building restrictions mandated by FEMA for areas within 100-year floodplains. Many of the Legacy Towns are located within such areas.
- Section 2A-67, line 14: This document needs to provide more information about the alternatives analysis to support the findings. Otherwise, it is difficult to determine if the alternatives are true alternatives and not a diversion to help support a staff recommendation for the Delta Plan.
- Table 2B-1, Page 2B-7, “Flood Risk Reduction,” under the heading “Named Projects, Plans, Programs:” Consideration should be given for specifically listing the proposed Lower San Joaquin River Bypass. This project is mentioned by name throughout the document, and was recently presented to the CVFPB.

3. Section 3 - Water Resources.

- Page 3-10, Section 3.3.3.2. The discussion of a variety of influences on surface water quality within the Delta fails to properly discuss or evaluate what is considered to be the main cause of salinity problems within the southern Delta. The State Water Resource Control Board has studied this issue and concluded that “[s]alinity problems in the southern Delta result from low flows in the San Joaquin River and discharges of saline drainage water to the river.” (SWRCB Decision D 1641 at p. 89.)
- Page 3-11, line 26. Paragraph modified to read: “A variety of bioaccumulative contaminants are found throughout the Delta, resulting in the development of numerous fish consumption advisories. The Office of Environmental Health Hazard Assessment (OEHHA) has issued, and continues to update, fish consumption advisories for many parts of the Delta to provide safe eating

information for fish that are known to be high in mercury or other contaminants fish advisory limits such as these for the Port of Stockton stating that no fish or shellfish should be consumed because of contamination from mercury, dioxins, furans, and polychlorinated biphenyls (PCBs) (OEHHA 2007). A statewide study of fish that included the Delta concluded that mercury and PCBs were the most common contaminants bioaccumulated into fish at levels of concern; the other detectable contaminants in tissue included selenium, dieldrin, DDT, chlordane but generally low in concentration (Davis et al. 2010). Links to the OEHHA fish consumption safe eating guidelines can be found at [http://oehha.ca.gov/fish/so callindex.html](http://oehha.ca.gov/fish/so%20callindex.html).”

- Page 3-27, Lines 36-42. The reference to the Northeastern San Joaquin County Groundwater Banking Authority is outdated, as the most recent groundwater management document produced is the 2007 Eastern San Joaquin Integrated Regional Water Management Plan and the Eastern San Joaquin Integrated Conjunctive Use Program Environmental Impact Report.
- Page 3-90, Lines 41-42. Sentence modified to read: “Increased boating would cause an the increase in engine emissions exhaust-aricl-fuel-spills and the potential for fuel and sewage discharges, which could affect water quality.”

4. Section 4 - Biological Resources.

- Section 4-2, line 13: Gathering information by summarizing or quoting from existing documentation is adequate for general discussion within the document; however, there is no mention or reference to any self-obtained empirical data to support the findings of the Delta Plan.
- San Joaquin County has an adopted Multi-Species Habitat Conservation Plan (HCP) in place that is administered by the San Joaquin Council of Governments. Implementation of the Delta Plan may potentially impact the HCP and biological resources. Implementation of the BDCP and other projects called for in the Plan could impact land with existing habitat conservation easements, as well as limit the land available for future habitat easements.

5. Section 5 - Delta Flood Risk.

The following are specific comments on the EIR description of the current emergency management system set forth in Section 5.3.7: Emergency Management:

- Section 5, Page 5-69, Line 17 - 18: This mitigation measure discusses taking measures to limit flooding from conveyance facility failure. This should be expanded to include taking additional safeguards when a facility is near populated areas, particularly schools, hospitals and residences.

- Section 5, Page 5-70, Line 20: As a mitigation measure, add: "Prohibit in-channel construction activities during the flood season."
- Replace Section 5.3.7.1.1, Preparation, on Page 5-25, Lines 10-18, with the following:

"Preparation involves emergency management activities undertaken in advance of an emergency. These activities include developing risk assessments, operational capabilities, training programs, plans, flood contingency and evacuation maps, and improving public information and communications systems. Development of plans and procedures, and collection of critical information for decision making, during this phase is critical. During the preparation phase, emergency managers need to determine the best methods of responding to various sizes and types of disasters. For flood events, this includes collection of critical topographical, infrastructure, and other information upon which risk assessments and coordination and decision making protocols will be based. This process, in turn, involves the development of complex maps and other documents and systems to display this critical information.

Most local emergencies, such as structure fire, traffic accidents, and small-scale hazardous materials spills are less complex and can be handled by local agency resources through routine coordination procedures. Larger emergencies, such as a major oil spill resulting from a commercial shipping accident in the Delta, are more complex and involve the need to coordinate not only larger numbers of resources from different disciplines but the actions of multiple, separate, jurisdictions. Catastrophes require large scale coordination of larger amounts of resources from multiple jurisdictions in an environment where the local response and coordination capability may be greatly degraded.

It is important to note that the preparation phase, particularly for complex disaster events such as large floods, is a continuing process involving ongoing expenditures to maintain systems and plans put in place. Completed risk assessments, plans, and procedures need ongoing update and revision based on how the environment within which they will be used changes. Extensive changes in the topography and other characteristics of the area will require increased levels of expenditures to ensure that the capability of the emergency response system is maintained or improved to meet additional demands."

- Add the following paragraph to Section 5.3.7.4 Mitigation on Page 5-26, after Line 11:

In building, modifying, or expanding physical infrastructure within the area of interest, mitigation actions to protect such infrastructure, particularly critical infrastructure upon which the health and welfare of large populations depend, can lessen the effects of future disasters. Mitigation of critical infrastructure whose loss would impact the safety of regional populations, such as treatment plants, should as a matter of policy for the Project extend beyond placement of a single protective primary levee regardless of its level of protection. Secondary protections from

effects of flooding, e.g. ring levees, should be included in mitigation actions for such critical infrastructure. Mitigation of existing critical infrastructure and proposed new or modified facilities to the highest level of protection possible are important elements of sustainable community development.

- Section 5, Page 5-67, Line 27: As a mitigation measure, add: "Prohibit in-channel construction activities during the flood season."
- Modify following paragraphs starting on Page 5-30, Line 35 to Page 5-31, Line 6:

The mission of DWR's Division of Flood Management is to prevent the loss of life and reduce property damage caused by floods. As a component of the Division of Flood Management, DWR coordinates flood *fight* operations with various federal, State, and local agencies and operates the State-Federal Flood Operations Center (FOC) in Sacramento, ~~which provides the necessary components for a statewide emergency response in the event of a natural disaster.~~ *which coordinates State response to flood control and water transfer facilities in the State in the event of a natural disaster.* The National Weather Service and DWR monitor storm weather systems for forecasted or actual flooding. Under the guidance of the SEMS, the FOC will be activated during such flood warnings or events to carry specific functions such as the following:

Management: The FOC is responsible for overall policy and coordination of flood fight response management and response to impacts to the State water project. The FOC is the clearinghouse of requests for emergency support by DWR resources and other resources under direct control of DWR, especially for flood fighting as well as the repair and rehabilitation of flood damaged flood control and water transfer infrastructure such as levees.

Operations: The FOC will coordinate the DWR field operation units dispatched at the request of local agencies for flood fights and emergency repairs. Operations will also dispatch flood fight incident commanders responsible for DWR personnel operating within areas defined by the Department.

Planning: Responsible for disseminating flood emergency information through preparations of reports and formulation of action plans for DWR personnel.

Logistics: Makes available necessary services and support personnel as well as equipment and facilities under the control of DWR in support of all operations of the FOC.

- Rewrite Paragraphs under heading "Delta Multi-Hazard Coordination Planning (Senate Bill 27), Page 5-32 to 5-34:

This description of the SB27 process is so flawed that editing it would be too difficult. The discussion focuses on single meetings out of context with the extended process, equates the task force report with other unrelated planning activities, and has a rambling discussion of the report contents and the activities leading up to SB27. A simple rewrite is, as follows:

In 2007, the five Delta counties formed the Sacramento-San Joaquin Delta Flood Response Group through written agreement to coordinate regional efforts to improve flood response. This group issued a white paper in 2008 providing recommendations for improving response including the creation of a multi-agency coordination system (MACS) for the Delta. The Flood Group subsequently issued an operations manual in 2009 for establishing a Delta MACS. In 2008, the Delta Protection Commission (DPC) and the Governor's Office of Emergency Services (now CalEMA) together issued their Phase I Report on "A Strategy for Collaborative Emergency Response Planning in California's Delta Region" (CCP 2008). The Phase 1 Report provided a draft work plan for further collaboration on an emergency planning process. Subsequent to these efforts, Senate Bill 27 was passed establishing a Sacramento-San Joaquin Delta Multi-Hazard Coordination Task Force to be facilitated by CalEMA. The Task Force included representatives from the five Delta counties, the Department of Water Resources (DWR), and the Delta Protection Commission. Senate Bill 27 directed the Task Force to:

Make recommendations to the OES relating to the creation of an interagency unified

Command system organizational framework in accordance with the guidelines of the NIMS and SEMS.

Coordinate the development of a draft emergency preparedness and response Strategy for the Delta region for submission to the Director of the OES. Where Possible, the strategy shall utilize existing interagency plans and planning processes of the involved jurisdictions and agencies that are members of the Delta Protection commission.

Develop and conduct an all-hazard emergency response exercise in the Delta, designed to test regional coordination protocols already in place.

The Task Force was to submit its report to the Secretary of CalEMA who was to forward it to the Governor and Legislature on or before January 1, 2011. This deadline was extended to January 1, 2013 by Senate Bill 1443 (2010). The report is finished but has not been forwarded yet to the Governor and legislature.

- Revise Paragraph on Page 5-34, Lines 11-15 as follows:

Although the DPC does not have emergency management authority or responsibility, it has been assisting with the collaboration among the five counties, DWR, and Cal EMA to develop an integrated and unified approach for

emergency preparedness in the Delta. Its initial efforts culminated in a Phase I Report authored by the Center for Collaborative Policy (CCP 2008). ~~The effort is being continued through the Delta Multi-Hazard Coordination Task Force. The DPC continued its involvement through participation on the Delta Multi-Hazard Coordination Task Force established by SB27.~~

The DPC is currently sponsoring an effort to develop a regional application for a new DWR grant for emergency preparedness projects involving jurisdictions in the Delta responsible for flood response. The regional application and subsequent joint implementation of flood response projects will be completed with the assistance of Cal EMA and DWR. DPC will serve as lead applicant to facilitate joint preparedness funding efforts by the separate Delta jurisdictions.

- Section 5.4 - Impacts Analysis of Project and Alternatives. The document does not adequately identify potential impacts on emergency response resulting from implementation of the Project. The primary potential changes affecting Impact 5-4 mentioned are: (1) increasing the rate or probability of levee failure, (2) changing flood flows, patterns, and fill times, and (3) changing response times of emergency responders. The discussions of the Project and Alternate Projects also seem to indicate that the importance of emergency response services may be increased or decreased in general by implementation of specific alternates.

The following potential impacts on emergency response must be added throughout the document and mitigation actions identified.

1. Impact on the cost and time required to revise and keep current flood contingency maps, emergency plans, and emergency response systems developed before and during project implementation.
2. Increase in complexity of response due to construction of new facilities whose loss would have catastrophic impacts on public health and safety unless adequately mitigated making its loss by flooding virtually impossible.
3. Increase in the need for development of regional response systems and protocols due to the construction of new critical facilities that extend across multiple jurisdictions in the Delta.
4. Impact on the cost and time required to update risk assessments as specific areas of the Delta are changed by implementation of the Project.

It should also be made clear that implementation of the Project or of any of the Alternate Projects would not reduce the need for a high quality and complete emergency response system. Implementation may improve risk of levee failure or otherwise possibly reduce the overall demands on emergency response systems during an event. However, a complete and high quality response system would need to be maintained for all alternatives into the future to deal with residual risk. The cost of maintaining a high quality and complete flood response system would not be reduced by any action

resulting from implementation of the Project unless it could be shown that all risk of flooding has been eliminated.

- 5.4.3.1 - Reliable Water Supply.

This section lists several general types of projects that could result from the Delta Plan recommendations and policies. The most likely changes to occur in San Joaquin County from implementation of reliable water supply projects would be additional or modified treatment facilities and a new conveyance facility. The following impacts should be added to the EIR.

1. Costs associated with revising flood contingency and evacuation maps and other emergency plans as projects are constructed changing the topography or other characteristics of the area.
2. Costs associated with developing regional response systems for protection of a new conveyance facility crossing multiple jurisdiction boundaries.
3. Degradation of local ability to protect the public by placement of new or enlarged treatment plants serving regional areas where catastrophic health conditions to regional populations could be created by their loss.
4. Costs associated with updating risk assessments and response priorities as the Project implementation changes topography and other local conditions.

If the EIR does not provide a mitigation action to address the additional costs of maintaining accurate and up-to-date flood contingency and evacuation maps and other plans and procedures as the Project changes the characteristics of the area then public safety and the possibility of exposing people and structures to a higher risk of loss are increased.

If the EIR does not provide a mitigation action that would require a second line of defense (ring levee, etc.) for any new or modified treatment facilities arising from Project implementation where the health and safety of regional populations could be affected by its loss then the exposure of people to significant risk of loss or injury from a flood would be increased.

If the EIR does not provide a mitigation action to cover the costs of developing security and regional response systems to address the safety, security, and emergency protection of new facilities crossing county lines, such as a conveyance facility, during a disaster event then the exposure of people to significant risk of loss or suffering is increased.

5.4.3.2-Delta Ecosystem Restoration. Potential facilities listed in this section would have the following additional impacts from those identified in the document.