



CVCWA

Central Valley Clean Water Association

Representing Over Fifty Wastewater Agencies

MICHAEL RIDDELL – CHAIR, CITY OF RIVERBANK
JEFF WILLETT – SECRETARY, CITY OF STOCKTON

TERRIE MITCHELL – SACRAMENTO REGIONAL CSD
ED CROUSE – TREASURER, RANCHO MURIETA CSD

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Sent via electronic mail to: recirculateddpeircomments@deltacouncil.ca.gov

Phil Isenberg, Chairman and Council Members
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

SUBJECT: Comments on the Recirculated Draft Delta Plan Program Environmental Impact Report, Volume 3, November 2012, SCH No. 2010122028

Dear Mr. Isenberg:

The Central Valley Clean Water Association (CVCWA) appreciates the opportunity to provide comments on the Delta Stewardship Council's Recirculated Draft Delta Plan Program Environmental Impact Report (RDPEIR). CVCWA is a nonprofit association of Publicly Owned Treatment Works (POTWs) throughout the Central Valley whose primary mission is to represent wastewater agencies in regulatory matters while balancing environmental and economic interests. CVCWA members have a deep commitment to the protection of beneficial uses in the waters of the Central Valley, and have a special interest in the recovery of the Delta ecosystem. Many of CVCWA's members will be directly impacted by the Delta Plan and have a significant interest in its development and implementation.

In general, CVCWA is concerned regarding inadequacies of the November 2012 RDPEIR and the November 2012 Final Draft Delta Plan upon which the RDPEIR is based. CVCWA has provided previous comments on the Draft EIR and on different versions of the Delta Plan.

CVCWA has consolidated the most recent versions of those comments into this comment letter to facilitate the development of responses to comments.

A. Comments on the RDPEIR

I. The Project Description in the RDPEIR Is Inadequate and the Environmental Impacts of the Proposed Project are not Fully Articulated

As a preliminary matter, CVCWA finds the project description in the RDPEIR to be incomplete and insufficient to comply with the mandates of the California Environmental Quality Act (CEQA). Specifically, the RDPEIR fails to provide CVCWA, and others, with an adequate understanding of the consequences of implementing the Final Draft Delta Plan. Without an accurate and complete project description and portrayal of its effects, stakeholders and those affected by the Revised Project are unable to adequately evaluate the actual impact of the policies and recommendations in the Delta Plan on the environment. On the one hand, the RDPEIR asserts that the Final Draft Delta Plan is a plan for “creating a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem”. (RDPEIR, p. 2-2, lines 2-6.) However, the RDPEIR also characterizes the Delta Plan as being comprised of a suite of “regulatory policies” that have the force of law and “non-binding recommendations,” that “...work to encourage other public agencies to take certain actions...” or to “...provide standards with which other agencies actions must be consistent.” (RDPEIR, p. ES-2, lines 6-8) Further, the RDPEIR states that the “Delta Plan does not “approve or mandate the construction of any specific physical projects.” (RDPEIR, p. ES-2, lines 5 and 6.) Accordingly, the RDPEIR appears to indicate that the Delta Plan, in and of itself, will not mandate any physical changes in the environment. If that is true, then it is uncertain how the Delta Plan will actually achieve its co-equal goals. This lack of information regarding how the Delta Plan will affirmatively achieve the project objectives prevents CVCWA and others from being able to fully analyze the positive and negative environmental impacts of the Revised Project. In addition, if the policies and recommendations in the Delta Plan are merely speculative and will not necessarily result in any physical actions, it is unclear how the Revised Project will achieve any more quantifiable benefits than the No Project Alternative.

Regarding the distinction between the policies and recommendations contained in the Revised Project (the Final Draft Delta Plan), the RDPEIR fails to acknowledge the probability that recommendations to regulatory agencies, despite qualifications to the contrary, will be the basis for future regulatory requirements that will lead to environmental impacts. In essence, the RDPEIR seems to imply that “recommendations” have low probability of causing regulatory responses and associated impacts. In fact, it is probable that such recommendations, while not directly enforceable, could have a high (90 percent plus) probability of being treated as regulatory mandates. The RDPEIR must address the full range of possibilities regarding the impact of Final Draft Delta Plan recommendations.

The Revised Project’s general concept that stressor “reduction,” at any level, will produce net positive outcomes is also problematic, as projects required on the basis of “stressor reduction” may, in fact, provide little benefit to beneficial uses. On the other hand, the adverse

environmental impacts of construction and operation of facilities by municipalities and other parties to achieve “stressor reduction” are tangible. The RDPEIR states that “the Delta Plan involves an environmental tradeoff between short-term impacts resulting from construction and long-term reductions in pre-existing adverse effects related to water reliability, water quality, flood risk and ecosystem health.” (RDPEIR, p. ES-3, lines 32-35.) This statement presupposes that all of the projects proposed in the Delta Plan will, with certainty, accomplish the long-term impact reductions, that such reductions have been clearly defined, and that the improvement is a measurable net positive. At least with regard to water quality and ecosystem health, such certainty does not exist and the foundation for such belief is not contained in the RDPEIR. The RDPEIR’s failure to include an adequate project description and full disclosure of the effects of the Revised Project prevents an adequate analysis of the environmental impacts of the Revised Project, which is implementation of the Final Draft Delta Plan.

II. The RDPEIR Fails to Establish the Environmental Benefits of Increased Wastewater Treatment, and Also Fails to Account for Potential Adverse Environmental Impacts of Such Actions

The RDPEIR presumes that the Revised Project (Delta Plan implementation) will create long-term ecosystem benefits, as a matter of course. One stated component of the Revised Project is to encourage and influence more restrictive requirements on various source categories, including wastewater treatment facilities. Specifically, the RDPEIR states that “[t]he Revised Project Delta Plan... seeks to improve water quality by encouraging various actions which, if taken, could lead to construction and/or operation of projects that could improve water quality”. Such project could include...wastewater treatment plants...” (RDPEIR, p. 2-18, lines 10-17) However, the RDPEIR fails to quantify or establish the asserted benefits of increased wastewater treatment beyond the currently permitted levels or how those actions would contribute to the achievement of the dual goals, and fails to provide a complete analysis of the adverse operational impacts of those projects. The benefits of “stressor reduction”, as a general concept, are implied, but not articulated or specifically defended. These issues need to be adequately addressed in the RDPEIR. Instead, issues identified in the DPEIR are unresolved in the RDPEIR.

As one example, the DPEIR infers that installation of state-of-the-art reverse osmosis (membrane) treatment at wastewater treatment facilities is a plausible/desired outcome of the Delta Plan. (DPEIR, pg. 2A-44; pg. 4-74) However, the DPEIR fails to address the well-understood and significant adverse environmental impacts of membrane treatment, which include dramatically increased energy use and greenhouse gas impacts, as well as the long-term commitment of finite local community resources required by such treatment. The DPEIR also states that recycled wastewater projects encouraged by the Delta Plan may include modification of existing wastewater treatment plants to add filtration, membrane filtration, reverse osmosis, and/or disinfection. (DPEIR, p. 2A-22; DPEIR p. 2A-44.) Membrane treatment and reverse

osmosis are not commonly applied in recycled water projects because of the exorbitant capital and energy costs associated with such levels of treatment. Thus, the RDPEIR and DPEIR are incomplete and inaccurate in their assessment of the net environmental impact (i.e. undefined and uncertain intended benefits versus certain adverse environmental impacts) of specific actions such as membrane treatment. The Delta Plan must identify the significant environmental impacts and energy requirements of such extreme levels of treatment to avoid reckless encouragement of these wastewater treatment options. Without performing such an analysis, the RDPEIR fails to accurately characterize the true environmental tradeoffs between the benefits that are asserted to be achieved by the Revised Project and the impacts of the individual projects that are presumed to create those benefits.

Moreover, the DPEIR improperly implies that inadequate wastewater treatment is causing contamination of surface water and/or ground water in many areas of the Central Valley. (DPEIR, p. 2A-44.) As a general statement, this implication is both unsupported and inaccurate. The DPEIR also states that wastewater treatment “could improve drinking water and environmental quality”, though this generalized statement is not supported by findings of fact in the DPEIR. In fact, reports prepared for the Drinking Water Policy Work Group and posted on the Central Valley Regional Water Quality Control Board website contain information that contradicts this statement. A technical report prepared for the Drinking Water Policy Work Group (West Yost, 2011) provides a current assessment of loadings from existing and planned wastewater treatment plants in the Central Valley, and shows that future combined municipal wastewater treatment plant and urban runoff loadings of organic carbon and nitrogen compounds will be *less* than current loadings, despite population growth. This report is highly relevant, contradicts the statements highlighted above, and should be reviewed and cited in the RDPEIR. In addition, a report prepared for the Drinking Water Policy Work Group by Malcolm Pirnie in 2011 indicates that Delta drinking water uses are not adversely impacted by current ambient organic carbon or pathogen levels in the Delta. Finally, the Work Group Synthesis report dated February, 2012 reaffirms that “organic carbon concentrations at drinking water intakes will not likely increase in the future and may even decrease slightly ...due to anticipated land use transitions and regulation of point and nonpoint sources.” [pg. 45] and “...*Cryptosporidium* levels are sufficiently low so additional treatment is not required.” [pg. 47]

III. The Evaluation of the No Project Alternative in the RDPEIR is Internally Inconsistent and Not Supported by Substantial Evidence

The RDPEIR's discussion of the No Project Alternative is internally inconsistent and contradicted by evidence in the RDPEIR itself. For example, the RDPEIR states that: “The No Project Alternative would do nothing to stem the increasing and compounding environmental impacts in the Delta” [Page ES-9, lines 1-2]. The RDPEIR also states that “Under the No Project Alternative, conditions related to...water quality... would continue to degrade”(RDPEIR, p. ES-5) However, the RDPEIR does not contain any specific support for this assessment that water

quality is deteriorating, and should provide citations to the ambient data analysis that was used as the basis for this statement. This should also include references to specific water quality parameters and associated data analysis. Without such additional information, the DEIR's assertion that water quality will "continue to degrade" is inappropriate and should be modified or eliminated.

In fact, these statements are directly contradicted by information in the RDPEIR and DPEIR. Specifically, the DPEIR cites the ongoing efforts of the State and Regional Water Quality Control Boards to develop more stringent and comprehensive water quality objectives. (RDPEIR, p. 2A-40 – 2A-43.) These ongoing efforts are recognized in the numerous sections of the RDPEIR and the Final Draft Delta Plan. These statements also are in conflict with available information that should be considered in the RDPEIR, including information that many wastewater treatment facilities that discharge into the Delta are already in the process of planning for or constructing upgraded treatment facilities (West Yost 2011). Thus to assert for the No Project Alternative, as the RDPEIR and DPEIR do, that drinking water will "continue to be impaired" and water treatment facility upgrades and construction would not be expected to occur in the absence of the Revised Project, is contrary to the weight of evidence before the Council [see www.swrcb.ca.gov/centralvalley/water_issues/drinking_water_policy/index.shtml/].

IV. The RDPEIR Fails to Adequately Discuss and Evaluate the Alternatives

The RDPEIR provides an overview of Alternatives 1A and 1B in the executive summary, but unfortunately, Alternatives 1A and 1B do not achieve the co-equal goal of ecosystem protection since they would result in an increase in Delta exports from the system over current levels. As noted in the August 2010 SWRCB Delta flow criteria report, the Delta ecosystem will be better sustained by an increase in flow through the Delta, which implies a decrease in Delta export volumes as compared to current levels. Alternatives such as 1A and 1B, which increase exports from the system, should not be considered to be valid alternatives, in that they fail to achieve the co-equal goal of ecosystem protection. Moreover, there are sub-alternatives to Alternative 2 that may be more feasible/ reasonable than the other described alternatives. For instance, the specific means to address habitat or flood control measures can be disconnected from measures to decrease Delta exports, as each measure can be undertaken separately. (See RDPEIR, p. 25-4, lines 35-36.) The RDPEIR analysis of this alternative should de-couple these elements in order to reflect this reality.

In addition, many of the statements regarding Alternative 2 are incorrect and not supported by substantial evidence. Specifically, the RDPEIR states that Alternative 2 is "slightly environmentally inferior" to the Revised Project because "of its impacts on water supply reliability." (RDPEIR, p. 25-17 and 25-18ES-8.) However, water supply uncertainty is not an "environmental impact" and should not be treated as such in the RDPEIR. In elevating these

impacts above actual impacts to the Delta ecosystem, the RDPEIR fails to account for the environmental benefits to the Delta ecosystem resulting from reduced exports.

V. The RDPEIR Contains Numerous Misstatements With Respect to Other State Policies and Guidelines

In addition to its failings to comply with the principles of CEQA, the RDPEIR fails to correct problems in the DPEIR, which makes incorrect or misleading references to other state policies and guidelines. For example, the DPEIR states that “[t]he types of projects to reduce stressors can best be seen by looking at the recommendations in the Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento-San Joaquin Valley Regions.” (DPEIR, p. 2A-36.) The word “draft” was left off this statement, and the DEIR fails to properly identify that this is still a draft document. The Department of Fish & Game (DFG) is still in the process of reviewing comments and making changes to the final document; as such, the Delta Plan should not rely on its content.

In another example, the DPEIR incorrectly states that current Central Valley Regional Water Quality Control Board (Central Valley Water Board) policies and plans “do not include strategies to effectively protect drinking water.” (DPEIR, p. 2A-41.) In fact, the results of the technical investigations by the Drinking Water Quality Work Group indicate that drinking water uses are being effectively protected in the Delta based on an assessment of current and future ambient levels of organic carbon and pathogens. The DPEIR also incorrectly identifies the date of initiation of the Drinking Water Quality Work Group process as 2008. In fact, the process began in 2002. Finally, the 2010 Central Valley Water Board resolution referenced in the RDPEIR was not describing a new process; it referred to actions and deadlines to develop a Drinking Water Policy that were associated with the Work Group process initiated in 2002.

The RDPEIR and revised project do not adequately state that the Sacramento River water is currently the highest quality water supply for a large portion of California, including local and Southern California users. In fact, this is a primary justification for BDCP proposed diversion projects. Through extensive technical analysis, including modeling, the Central Valley Drinking Water Policy Workgroup, a stakeholder group that includes water exporters, found that existing Sacramento River and Delta water quality is of sufficiently high quality to protect drinking water uses. Furthermore the Work Group has determined that future urbanization through 2030 is not expected to degrade conditions sufficiently to require additional water treatment. These results are reported in the Workgroup’s Synthesis Report¹, which examined a range of control options and future urban growth in the Delta Watershed. The Work Group has concluded that drinking water supply quality appears to be well protected under current regulatory programs and additional control measures are not necessary beyond these existing programs to protect this

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http://www.waterboards.ca.gov/rwqcb5/water_issues/drinking_water_policy/dwp_wrkgrp_synthesis_rpt.pdf

beneficial use. Acknowledgement of this finding can better focus potential projects in the Revised Project and their environmental impact to support flow requirements and aquatic life beneficial uses.

VI. The RDPEIR and DPEIR Fail to Adequately Discuss the Impact of Diversions on the Delta Ecosystem and Fails to Acknowledge the Impact of Known Stressors on the Effectiveness of Proposed Actions

The section of the DPEIR addressing biological resources (Chapter 4) contains accurate statements regarding impacts to the Delta ecosystem from invasive species and diversions, though there is insufficient analysis of a number of the issues raised, and in some instances failure to acknowledge how existing impacts affect the viability of proposed actions. For instance, the DPEIR correctly states that two clam species from Asia currently dominate the benthos of Suisun Marsh and the Delta and alter habitat suitability, consume vast volumes of primary and secondary producers, and alter species composition and the food web structure. (DPEIR, p. 4-7, citing Lund et al. 2007, p. 71.) However, neither the RDPEIR nor the DPEIR properly articulates or addresses the larger consequences of these effects. The RDPEIR should acknowledge that these observed significant impacts in Suisun Bay may greatly moderate the effect that ammonium, nutrients or other water quality stressors may have in the Delta.

As another example, the DPEIR states that “net flows in the southern Delta have strong north-to-south directionality (toward the CVP and [SWP] South Delta export pumps)...” (DPEIR, p. 4-7) and also that “current flow conditions favor resident freshwater invasive organisms such as largemouth bass and Brazilian waterweed.” (DPEIR, p. 4-7, citing Moyle et al. 2010b, p. 14.) However, neither the RDPEIR nor the DPEIR indicates whether and how the Final Draft Delta Plan will address or mitigate these impacts. The RDPEIR should acknowledge whether the Final Draft Delta Plan will remedy these effects, which may significantly impact the realization of the co-equal goal of ecosystem protection.

The DPEIR also acknowledges that significant entrainment and export of vital biological materials will continue to occur as a result of the Final Draft Delta Plan, but does not contain an analysis or evaluation of the significance of these impacts. Specifically, the DPEIR states that “...large numbers of fish are lost to the CVP and SWP water export facilities located in the South Delta...” as a result of the “...entrainment effects caused by the Banks and Jones pumping plants.” (DPEIR, p. 4-8.) The DPEIR also notes that the 110 million fish that were “salvaged” over a 15-year period “...greatly underestimates the actual number of fish entrained” and that “diversions may also create conditions that increase the risk of predation by trapping fish in diversion forebays.” (DPEIR, p. 4-8.) However, the DPEIR should also reference the findings of studies by Grimaldo (2009) and Kimmerer (2011) and others which confirm that pre-screen predation greatly outweighs the fish lost at the screening facilities and in the salvage operations. The DPEIR states that the CVP and SWP water export facilities and other diversions export

phytoplankton, zooplankton, nutrients and organic material that would otherwise support the base of the food web in the Delta (DPEIR, p. 4-8, citing Jassby and Cloern, 2000, p. 348.). However, neither the RDPEIR nor the DPEIR sufficiently evaluates the impact of these diversions. The RDPEIR must evaluate the significance of these effects, since these indirect effects on the Delta ecosystem food web that result from continued CVP and SWP diversions will persist under the Final Draft Delta Plan.

The DPEIR makes the generalized statement that contaminants have been identified as “an important driver of declines in ecosystem function in the current Delta and Suisun Marsh.” (DPEIR, p. 4-9.) However, there is no citation or supporting analysis for this statement, and no acknowledgement that contaminants are but one potential driver (of unknown importance) of declines in ecosystem function. This statement should be modified to clarify that contaminants have been identified as but one of a number of stressors that may be impacting the Delta ecosystem, but that the importance to ecosystem function has not been established. In addition, in the listing of “primary” threats to delta smelt, the DPEIR does not differentiate between stressors with known impacts (habitat loss, entrainment in South Delta export facilities) and stressors with potential impacts (toxic chemicals). (DPEIR, p. 4-16.) In other words, the RDPEIR fails to distinguish between observed and potential impacts. This is an important distinction that should be clarified in the RDPEIR.

The DPEIR also describes numerous actions and projects that “could improve water quality”, which may include “implementation of plans/programs that lead to reduced constituents from agricultural runoff and wastewater treatment plants.” (DPEIR, p. 4-72.) However, the reduction in constituent loadings (over and above current permitted loadings) will not necessarily result in (a) significant changes in ambient water quality, (b) improved protection of ecosystem health, (c) improved protection of beneficial uses, or (d) net environmental benefit, when the adverse environmental impacts of implementing new or increased treatment is considered in comparison to the benefit of a reduction in loadings. The RDPEIR fails to acknowledge these facts in its analysis of the environmental impacts of the various actions and projects that the Final Draft Delta Plan seeks to “encourage”. The RDPEIR does acknowledge that the projects encouraged by the Revised Project (e.g. construction of new wastewater treatment plants) could result in substantial adverse effects that are considered to be significant. (RDPEIR, p. 4-24.) However, the RDPEIR fails to describe mitigation to be performed by the proponents of the Revised Project to offset these significant impacts. Such mitigation must be described in the RDPEIR. Finally, the RDPEIR states that operation of facilities intended to improve water quality such as discharges from wastewater treatment plants or the discharge of brine waste are not expected to produce significant impacts, since such discharges will be regulated by the State and Regional Water Boards. (RDPEIR, p. 4-24.) However, the RDPEIR fails to address the significant operational impacts associated with greenhouse gas emissions, power use, and chemical use associated with the use of membrane treatment in Central Valley wastewater treatment plants. These impacts must be addressed in the RDPEIR in order to

provide an accurate and complete picture of how the operation of such facilities will ultimately impact the environment.

The RDPEIR states that projects encouraged by the Revised Project would be addressed in future site-specific environmental analyses conducted at the time such projects are proposed by lead agencies (RDPEIR, p. 4-24 and 20-6). This statement appears to seek to transfer responsibility for any projects “encouraged” by the Revised Project to local communities, including the mitigation of adverse impacts and the burden of demonstrating that such projects are reasonable, cost-effective, or otherwise create a net environmental benefit. This apparent transfer of the responsibility for mitigation of the adverse environmental impacts of membrane treatment and other projects to local communities, rather than the Council taking responsibility for such mitigation as the project proponent, is inconsistent with CEQA requirements.

VII. The RDPEIR Fails To Identify Appropriate Mitigation Measures for Continued Use of South Delta Export Pumps

According to the DPEIR, in order to meet the co-equal goals, continued use of the South Delta pumps into the future will need to occur. However, the RDPEIR fails to identify mitigation measures for the continued use of the existing South Delta pumping facilities. Such continued use will occur under any of the alternatives considered, and is recognized to have caused significant long-term impacts (losses far exceeding the 110 million fish that were “salvaged” in the Delta pump fish screening facilities in a fifteen year period). As described previously, significant losses above the “salvage” number occur due to entrainment, pre-screen predation and salvage operations) during the operation of the State and federal water project pumps. Implementation of a north Delta intake under the Bay Delta Conservation Plan (BDCP) is not sufficient mitigation for the significant loss of fish that will continue to occur in the South Delta, since exports from the South Delta are projected to continue representing the majority of water exported by the State and federal projects. Moreover, mitigation in the RDPEIR for the continued operation of the South Delta pumps must also address the indirect effects of South Delta exports, including food web effects, altered flow regime, modified salinity regime, increased residence time that increase the suitability of the Delta to invasive species and adversely impact the Delta food web.

VIII. The RDPEIR Contains an Insufficient Discussion of How the Bay Delta Conservation Plan (BDCP) Will Impact Implementation of the Delta Plan

There is an important interplay between the implementation of Delta Plan and requirements of the BDCP, if ultimately adopted and incorporated into the Delta Plan. Unfortunately, the RDPEIR does not clearly articulate how the incorporation of the BDCP into the Delta Plan will change the scope and regulatory effect of the Delta Plan, and contains no discussion of the resultant environmental impacts. The absence of any significant discussion of

the BDCP impacts on the Revised Project makes it unclear to CVCWA and other affected entities how the regulatory effect of the BDCP will change if it is incorporated into the Delta Plan, and more specifically, whether provisions of the BDCP would be considered "policies" of the Delta Plan and thus subject to consistency determinations. The DPEIR indicates that this would be the case, noting that "[i]f BDCP is incorporated into the Delta Plan, it will become part of the Delta Plan and, therefore, part of the basis for future consistency determinations." (DPEIR, p. 2A-24.) However, if this occurs, then the BDCP's incorporation into the Delta Plan would dramatically expand the scope of both Plans, converting what was intended to be voluntary participation in a Habitat Conservation Plan (HCP) into a mandatory regulatory program affecting a much wider range of actions within the Delta. The RDPEIR's brief discussion of the BDCP in Section 23 fails to discuss how the BDCP will be used for future consistency determinations, and what the environmental impacts associated with that circumstance will be.

CEQA requires that an EIR evaluate the whole of the action that will be approved, including the reasonably foreseeable indirect physical changes to the environment that will occur from the project. The BDCP, to the extent that it must be incorporated into the Delta Plan, should be treated as a reasonably foreseeable future element of the Project. The RDPEIR does not treat it as such. The RDPEIR should provide a full and complete discussion of the BDCP and its effects on the Delta Plan in the project description, and should evaluate the impacts of the BDCP as part of the project and all alternatives. Without such a description and evaluation, the RDPEIR fails to adequately describe the actual scope of the Revised Project and cannot provide an adequate discussion of its environmental impacts. The lack of information in the RDPEIR regarding the regulatory and environmental consequences of incorporating the BDCP into the Final Draft Delta Plan makes it impossible for the public to evaluate and understand the environmental consequences of adoption of the Final Draft Delta Plan. The RDPEIR must be revised so that both the project description and impacts analysis clearly and thoroughly explain the scope of the Plan with respect to the BDCP and evaluate the resulting environmental impacts. The RDPEIR must be revised to fully explain the BDCP's role in the Delta Plan and the type and significance of environmental effects that will occur if all covered actions are required to comply with the BDCP. In addition, the RDPEIR needs to clarify, through direct statements, that the certification of an EIR for the Delta Plan will in no way override, negate, or otherwise influence the process for review and approval for the BDCP or the BDCP EIR.

IX. The RDPEIR and DPEIR Indicate that Projects Undertaken to Implement Regulatory Actions of Other State Agencies May Not be Exempt From Consistency Determinations

The DPEIR contains a statement indicating that the Revised Project will involve the regulation (under the Delta Plan) of certain actions taken as a result of regulatory actions of other state agencies, a situation that may result in unnecessary delay in the implementation of projects that would likely have a positive impact on the environment. While the Final Draft Delta

Plan excludes certain activities from the definition of a covered action, including regulatory actions by other state agencies, the DPEIR states that the underlying actions regulated by those agencies would not be exempt (DPEIR, p. 2A-2 – 2A-4). This apparent failure to exempt projects undertaken to implement regulatory requirements, such as wastewater treatment plant upgrades necessitated by a NPDES permit issued by the Central Valley Water Board, may have significant adverse consequences for these projects. Entities implementing regulatory requirements of other state agencies will be required to prepare detailed findings of consistency with the Delta Plan, and environmentally beneficial projects will inevitably be delayed. Such delays are unreasonable, counterproductive, and will have adverse environmental impacts that are not discussed in the RDPEIR. Instead of subjecting such actions to consistency determinations that will result in additional cost and unreasonable delay, the Delta Plan should do everything possible to facilitate and encourage projects that implement regulatory requirements. The Final Draft Delta Plan should be revised to clearly exempt projects that implement NPDES permits and similar regulatory requirements adopted for the protection of the environment, and, at a minimum, acknowledge and discuss the adverse environmental impacts that would result from not granting such an exemption.

XI. Information About the Financing of Delta Plan Projects Is Necessary to Understand the Feasibility of the Revised Project in Relation to RDPEIR Alternatives

The RDPEIR and DPEIR fails to address the Finance Plan within the Final Draft Delta Plan, noting only that “[t]he Finance Plan Framework relies upon other agencies to authorize or to establish mechanisms for the development of funding and/or collection of funds, steps which would not result in changes in physical conditions in the environment in addition to those that are already discussed and analyzed in this EIR.” (DPEIR, p. 2-56.) While the Finance Plan itself may not directly impact the physical environment, information regarding the Finance Plan is critical to understanding the feasibility of the Final Draft Delta Plan, particularly as it relates to the alternatives in the RDPEIR. The assumption built into the Finance Plan and only superficially referenced in the DPEIR is that entities identified as “stressors” will be successful in procuring funding for Plan projects. Given the realities of Proposition 218 and the existing scarcity of local, state or federal funds for such projects, such an assumption is highly questionable. The RDPEIR should disclose the important elements of the Finance Plan, discuss the likelihood that funding will be available for such projects, and address the timing of any such funding. Without this information, the public cannot understand the relative feasibility, and thus merits, of the Revised Project and its alternatives.

XII. There Are No Adopted Water Quality Objectives for Methylmercury in the Delta

Footnote f in Table D-1 of Appendix D of the DPEIR (which is retained intact in the RDPEIR) implies that a water column concentration of 0.06 ng/L MeHg has been adopted as an enforceable water quality objective in the Delta Mercury TMDL Basin Plan amendment. This statement is inaccurate and the table should be modified in the RDPEIR to clarify that this value is not an adopted water quality objective.

XIII. The Recommendation to Provide Special Water Quality Protection Status in Areas of the Delta Is Unsupported and Not Properly Assessed in Terms of Environmental Impacts

Revised Project WQ R3 recommends that the SWRCB or regional water quality control board evaluate and, if appropriate, propose special water quality protections for priority habitat restoration areas...or other areas of the Delta where new or increased discharges of pollutants could adversely impact beneficial uses. Enacting ambiguous water quality protections may have unintended adverse impacts and may not produce offsetting positive impacts on beneficial uses. In some cases specific controls and regulations can have unintended impacts such as increases in other pollutants, or increased energy consumption and greenhouse gases. The RDPEIR should clarify the specific nature of the proposed "protections", the rationale for the establishment of such protections, the special authority to be granted to regulatory agencies, and the potential environmental impacts resulting from this new designation status.

Conclusions regarding RDPEIR and DPEIR

CVCWA appreciates the work of the Delta Stewardship Council and staff in assembling this RDPEIR in support of the Final Draft Delta Plan. CVCWA members are communities with a strong track record of environmental protection in the Central Valley and in the Delta. We are supportive of a Delta Plan that is strategic and effective in resolving the major problems that are impairing the Delta ecosystem. However, we remain concerned that the RDPEIR contains deficiencies that prevent members of the public from adequately understanding the true environmental impacts of the proposed project, and believe that a number of the statements contained in the RDPEIR are misleading and are not supported by substantial evidence. The RDPEIR contains an incomplete project description, an inaccurately characterized no project alternative, and an inadequate discussion of the remaining alternatives. Moreover, the RDPEIR fails to account for major changes in scope that may be brought about by incorporation of the BDCP into the Delta Plan, and fails to acknowledge or analyze the environmental tradeoffs between the perceived benefits to be achieved by the Revised Project and the adverse environmental impacts of individual projects (e.g. state-of-the-art wastewater treatment facilities) that are suggested as a means to create those benefits. These issues need to be thoroughly addressed before the RDPEIR can be considered adequate under CEQA.

B. Comments on the Final Draft Delta Plan that should be answered in the Response to Comments on the RDPEIR

To the extent that CVCWA's comments on the previous drafts of the Delta Plan, including the most recent comments regarding the Fifth Staff Draft Delta Plan, have not been incorporated into the Final Draft Plan, we reiterate our concerns stated therein and incorporate them by reference. Specifically, there are still a number of problems with provisions contained in several previously identified chapters, including most notably *Chapter 6: Improve Water Quality to Protect Human Health and the Environment* (Chapter 6), which have not been addressed. However, in addition to the concerns highlighted in previous comments, there have been several notable changes to the Final Draft Plan that also pose significant concerns for CVCWA and its members. CVCWA's comments with respect to the Recommendations contained in Chapter 6 are provided here.

WQ R1: The statement that water quality should be maintained at a level that, among other things, "enhances" beneficial uses may not be a feasible or reasonable recommendation. It is requested that the word "enhance" be eliminated or qualified to reflect the notion that enhancement may only be possible in limited circumstances. Further, the Porter-Cologne Water Quality Control Act (Porter-Cologne) requires "reasonable" protection of beneficial uses. To the extent that enhancing beneficial uses would not reasonable, this recommendation is inconsistent with Porter-Cologne.

WQ R3: This recommendation suggests that State and Regional Water Boards should evaluate and propose special water quality protections in undefined areas of the Delta. CVCWA is very concerned with the open-ended nature of this statement. Any "special water quality protections" may only be adopted in accordance with Porter-Cologne by amending applicable water quality control plans. To ensure that the proper process is understood, CVCWA's recommends that the statement in question be modified to clarify that a public-process pursuant to Porter-Cologne will be followed in the event a shift in water quality management or regulation from adopted approaches is proposed.

Additionally, no information is referenced in the Delta Plan to support the need for this recommendation for "special" or "extraordinary" water quality protections, above and beyond the "normal" levels of protection that are provided in the Water Code. Such designations open the door to the application of unknown and unanticipated regulatory discretion, unstated levels of regulatory conservatism, and a host of unspecified precautionary policies and decisions.

WQ R6: CVCWA previously objected to the Fifth Staff Draft Plan's recommendation (former WQ R3), which specified that the State Water Resources Control Board (State Water Board) and/or the Central Valley Water Board should complete development of a Strategic Workplan for protection of groundwater beneficial uses, including groundwater use for drinking water, by December 31, 2012. This recommendation is still generally contained in the Final Draft Plan,

identified as WQ R6. However, the recommendation has been modified to remove reference to the Central Valley Water Board. By removing the reference to the Central Valley Water Board, the Delta Plan appears to be making a recommendation for a new policy that would apply statewide. While CVCWA does not know if such an action is necessary for other regions of the state, to the extent this revised recommendation would apply in the Central Valley, CVCWA reiterates that this recommendation is unnecessary, contains an unrealistic timeline for development, and duplicates efforts already undertaken by the Central Valley Water Board and valley stakeholders. The statement should be revised to acknowledge the Central Valley Water Board's current ongoing efforts, including the CV-SALTS effort, and should recommend a coordinated effort to achieve specified goals within a reasonable time frame, consistent with the CV-SALTS program schedule referenced in WQ R7.

WQ R8: This recommendation in fact includes several different recommendations associated with various regulatory processes currently under way by either the State Water Board or the Central Valley Water Board. With respect to nutrient policy development for inland surface waters by the State Water Board, the proposed timeline of completion by January 1, 2014 is overly aggressive. The Nutrient Policy for Inland Surface Waters is a complicated undertaking by the State Water Board that will need extensive work to arrive at a sound policy. It is requested that the recommended date for completion of this effort be changed to 2018 to be consistent with the nutrient criteria development efforts in the Bay and Delta.

WQ R9: CVCWA supports the development of a Delta Regional Monitoring program and is an active participant in the process to try and make this happen. With respect to this recommendation, CVCWA recommends that language be added to emphasize that the Delta Regional Monitoring Program should be coordinated with efforts to develop and implement ecosystem modeling tools for the Delta. Additionally it is requested that the Delta Science Program provide financial support for this tool development and coordination with regional monitoring efforts.

WQ R10: CVCWA previously objected to the Fifth Staff Draft Plan's recommendation (former WQ R8) specifying that that the Central Valley Water Board should require responsible entities that discharge wastewater treatment plant effluent or urban runoff to Delta waters to evaluate whether all or a portion of the discharge can be recycled, otherwise used, or treated in order to reduce contaminant loads to the Delta by January 1, 2014. This recommendation is still contained in the Final Draft Plan, identified as WQ R10. As noted previously, the addition of this recommendation suggests that such discharges, which are subject to state and federal permitting laws, should be evaluated outside of the normal permitting process, and be subject to requirements that may not be consistent with determining compliance with adopted water quality standards. It also suggests that the Central Valley Water Board needs to consider application of water rights law in its NPDES permitting determinations. Although we are supportive of recycled water projects where they make local and economic sense, CVCWA continues to object to this recommendation for several reasons. First, compliance with water

quality standards is an essential function as part of the NPDES permitting process, which is implemented continuously, with renewals every five years for NPDES dischargers. It is not necessary to arbitrarily re-evaluate NPDES permits outside of their normal five-year renewal process. Second, the Central Valley Water Board does not have the authority to require “treatment.” The Central Valley Water Board must adopt permit limits to ensure compliance with water quality standards. It is then up to the permittee to determine the best mode of compliance. For some, this may include treatment, for others it may be more effective to implement source control methods, recycling or alternative methods of disposal. It is inappropriate to suggest that the Central Valley Water Board should evaluate treatment options as part of the permit renewal process. Third, the Central Valley Water Board has no authority with respect to “water rights laws.” Based on these reasons, WQ 10 needs to either be removed in its entirety, or be revised to be consistent with existing NPDES permitting processes.

Funding Principles to Support the Co-equal Goals: As noted in CVCWA’s previous comments, the “stressor fee” concept and funding structure contained within the Fifth Staff Draft Plan, previous drafts of the Delta Plan, and included as part of the Final Draft Plan continue to be a major concern for CVCWA and its members. (See Final Draft Plan at p. 308, lines 32-40.) CVCWA has commented extensively on the underlying flaws in the “stressor fees” approach in its comments to each draft of the Delta Plan in the past, and need not reiterate those comments in full here. However, we would like to again point out the following fundamental flaws in the stressor fee approach: (1) the fee proposal is not inclusive of all stressors; (2) the stressor fee concept fails to account for numerous fees already paid by dischargers; and (3) no credit is given to stressors who spend funds to reduce impacts in the Delta. As it relates to the financing provisions, however, we appreciate that the Final Draft Plan has seemingly eliminated the previous proposal to procure ten years of up-front funding for the Council and Conservancy, an issue CVCWA had previously noted was virtually unprecedented and inappropriate.

Performance Measures: It is requested that the second Output Performance Measure on page 248 (lines 9-10) be modified to state “Progress toward reducing concentrations of inorganic nutrients...in Delta Waters over the next decade, to the degree such reductions are determined to be necessary to improve the health of the Delta ecosystem through studies that meet the scientific standards established in the Delta Plan and which consider the balance between a healthy food web and unacceptable eutrophication effects.”

Other Comments

Page 247, line 1: It is requested that the words “Sources and” be deleted from the bullet pertaining to pathogens to make it consistent with all of the other bullets on this page.

Page 247, line 2: It is requested that the bullet pertaining to water quality models be expanded to include the development of integrated models for the ecosystem, covering hydrodynamics, water quality, food web, nutrient cycling and other ecosystem processes.

Finally, as described in CVCWA's previous comments, the Final Draft Plan fails to address the significant role of exports, non-native species, and entrainment on the deterioration of the Delta ecosystem, and does not strike the appropriate balance between identifying contaminants and discharges as "stressors" and discussing the role of exports as a stressor in the Delta. The overall approach contained in the Final Draft Plan seems to overemphasize contaminants and discharges as a "stressor" to the Delta ecosystem and simultaneously fails to adequately discuss the significant role of exports and entrainment on that same ecosystem.

We look forward to working with the Council and staff in the future to assist in the resolution of issues raised in this comment letter. Please feel free to contact me if you have additional questions or concerns.

Sincerely,



Debbie Webster
Executive Officer, CVCWA

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