



State of California – Natural Resources Agency
DEPARTMENT OF FISH AND WILDLIFE
Ecosystem Conservation Division/Water Branch
830 S Street
Sacramento, CA 95811
www.wildlife.ca.gov

EDMUND G. BROWN JR., Governor
CHARLTON H. BONHAM, Director



January 10, 2013

Cindy Messer, Delta Plan Program Manager
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

**Subject: Recirculated Draft Program Environmental Impact Report (Volume 3)
and Proposed Regulations**

Dear Ms. Messer:

The California Department of Fish and Wildlife (CDFW) appreciates the opportunity to review and comment on the Recirculated Draft Program Environmental Impact Report (RDPEIR) (Volume 3), which analyzes the November 2012 Final Draft Delta Plan (Delta Plan), and the Proposed Regulations, dated November 16, 2012, through which the policies of the Delta Plan will become enforceable state regulations.

CDFW recognizes the tremendous resources and energy you and your staff have committed to develop this important plan for the Delta and the associated environmental documents and regulations. CDFW recognizes the profound challenges associated with managing the Delta to achieve the co-equal goals of protecting, restoring, and enhancing the ecosystem and providing a more reliable water supply for California, as mandated by the Sacramento-San Joaquin Delta Reform Act of 2009. As a Trustee Agency, a potentially Responsible Agency, and the State implementing agency for the Ecosystem Restoration Program, CDFW is committed to playing an active role in the effort to achieve the coequal goals. In addition, CDFW is committed to providing the Delta Stewardship Council with monitoring data and scientific information to inform the adaptive management decision-making process during implementation of the Delta Plan.

As of January 1, 2013, our name has changed to the California Department of Fish and Wildlife, pursuant to legislation passed in 2012. This change should be reflected throughout the Proposed Regulations, Delta Plan, and Final PEIR. In addition, the description of the CDFW's responsibilities in the Delta, included in Table 2-1 of the Delta Plan (see Final Draft Delta Plan, p. 41), does not accurately reflect our authorities or management responsibilities. The description should be changed to read as follows: Fish and wildlife protection and management, including management of wildlife areas and ecological reserves, public access, conservation planning, permitting, and implementation of the Ecosystem Restoration Program.

We are providing several specific comments to the RDPEIR and the proposed regulations, below.

Proposed Regulations

- The Delta Plan states that conservation measures taken to implement Natural Community Conservation Plans (NCCPs) or Habitat Conservation Plans (HCPs) approved and permitted by CDFW prior to the effective date of the Delta Plan are presumed to be consistent with the ecosystem restoration policies of the Delta Plan (see Final Draft Delta Plan, p. 156). However, this is not stated in the proposed regulations, and the process for invoking the presumption is unclear. We suggest explicitly describing this presumption and its process in the regulations. We recommend that this administrative exemption be included in the list of administrative exemptions under section 5003(b)(2) of the proposed regulations.
- We recommend that the proposed regulations clarify that updates or amendments to the Delta Plan shall not trigger mandatory updates to a permitted NCCP/HCP.
- The proposed regulations do not describe the "short form" certification of consistency that applies to qualifying "covered activities" under the Bay Delta Conservation Plan (BDCP) if it is approved and incorporated into the Delta Plan (see Final Draft Delta Plan, p. 59). We suggest including a subsection under section 5004 of the proposed regulations that describes the process for "short form" certifications of consistency.
- With respect to section 5004, for purposes of the ecosystem restoration policies of the Delta Plan, the short-form certification of consistency should also apply to qualifying "covered activities" and measures taken to implement landscape level, multi-species NCCPs and/or HCPs developed by local governments in the Delta and approved after the approval and effective date of the Delta Plan. In addition, we emphasize that any Delta Stewardship Council review of an NCCP approval would be limited to its consistency with the Delta Plan, and would not modify the regulatory effect of the underlying determination by CDFW that the NCCP complies with the Natural Community Conservation Planning Act.
- The proposed regulations and text of the Final Draft Delta Plan (see Final Draft Delta Plan, pp. 52-53) remain unclear as to whether existing certifications of consistency must be revisited when the Delta Plan is amended. We recommend that the regulations make it clear that amendments do not require new certifications.
- The cross-reference in section 5003(b)(2)(D) of the proposed regulations appears to be incorrect. We believe it should cross-reference section 5001(s).

- Section 5008 of the proposed regulations stipulates that “[h]abitat restoration must be carried out consistent with Section II of the Draft Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions [Conservation Strategy] (Department of Fish and Game 2011), with minor alterations.” CDFW, in collaboration with its federal Ecosystem Restoration Program implementation partners (National Marine Fisheries Service and U.S. Fish and Wildlife Service), is currently revising the Conservation Strategy in response to comments received during the public review period. We have concerns about the Draft Conservation Strategy creating mandatory standards through these regulations. Therefore, we recommend the use of a statement similar to that found in the 5th Staff Draft Delta Plan, which noted “The Delta Stewardship Council may amend the Delta Plan to incorporate updated figures and text from the Ecosystem Restoration Program’s Conservation Strategy as the strategy is revised.”
- We recommend that section 5008(a) of the proposed regulations, as well as ER P2 in the Delta Plan, provide that if a proposed habitat restoration action is not consistent with Section II of the Conservation Strategy (Appendix 3 to the proposed regulations, Appendix H of the Delta Plan) or the elevation map (Appendix 4 to the proposed regulations, Figure 4-5 of the Delta Plan), “proposals shall provide sufficient scientific rationale for such deviations.”
- Section 5013 of the proposed regulations requires ecosystem restoration to be sited to avoid or reduce conflicts with existing or planned uses when feasible. We recommend that the first sentence be restated as a recommendation, rather than a mandatory requirement. For example, we suggest the following: “When siting water management facilities, ecosystem restoration, and flood management infrastructure, project agencies should seek to avoid or reduce conflicts with existing or planned uses and should consider comments from local agencies and the Delta Protection Commission.” We also recommend clearly defining what constitutes “planned uses.”

Recirculated Draft PEIR

- Portions of Volumes 1 and 2 of the Draft PEIR have been incorporated by reference into this RDPEIR (Volume 3). For example, the background and applicable standards for the BDCP are referenced in Section 23. The RDPEIR does not include responses to comments CDFW previously submitted on Volumes 1 and 2 of the Draft PEIR. To the extent that portions of the Draft PEIR remain effective or are unchanged in this recirculated draft, we incorporate our prior comments dated February 6, 2012, titled, “Submission of Comments on the Draft Delta Plan Program Environmental Impact Report.”

Cindy Messer, Delta Plan Program Manager
Delta Stewardship Council
January 10, 2013
Page 4

- Chapter 23, section 23.4. If BDCP is incorporated into the Delta Plan, activities to implement the BDCP are subject to a "short form" consistency certification that is different from the process that applies to other "covered actions." Section 23.4 references policies and recommendations applicable to covered actions and the purpose of the discussion is unclear. We recommend clarifying at the outset of this section that if the BDCP is approved and incorporated into the Delta Plan, activities to implement the BDCP that otherwise meet the "covered action" definition will go through a "short form" consistency certification process, separate from the process applicable to other covered actions. Consistency for these purposes shall be presumed if the certification filed by the agency includes a statement from CDFW that the covered action is implementing the BDCP.
- Chapter 23, page 23-3, lines 1-2. We recommend changing this sentence to read "However, if CDFW approves the BDCP as a NCCP pursuant to the Fish and Game Code and determines that the BDCP meets the requirements of Water Code section 85320, and the BDCP is approved as a federal HCP..." This more accurately represents the approvals necessary and the language of Water Code section 85320(e).

If you have any questions or require clarification regarding our comments, please contact David S. Zezulak, Ph.D., at (916) 445-3690 or Dave.Zezulak@wildlife.ca.gov

Sincerely,



Scott Cantrell
Chief, Water Branch

cc:

Chris Knopp, Executive Officer
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

ec: California Department of Fish and Wildlife

Sandra Morey, Deputy Director
Ecosystem Conservation Division
Sandra.Morey@wildlife.ca.gov

Cindy Messer, Delta Plan Program Manager
Delta Stewardship Council
January 10, 2013
Page 5

Carl Wilcox, Advisor to the Director
Director's Office
Carl.Wilcox@wildlife.ca.gov

Thomas Gibson, General Counsel
Office of the General Counsel
Thomas.Gibson@wildlife.ca.gov

Scott Wilson, Acting Regional Manager
Bay Delta Region
Scott.Wilson@wildlife.ca.gov

David Zezulak, Ph.D., Program Manager
Water Branch, Ecosystem Restoration Program
Dave.Zezulak@wildlife.ca.gov

