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DELTA STEWARDSHIP COUNCIL

June 28, 2010

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Director
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Subject: Scoping Comments on February 13, 2009 Revised Notice of Preparation of a Draft Environmental Impact Report and Environmental Impact Statement for the Bay-Delta Conservation Plan

Dear Director Cowin:

This letter provides scoping comments to the California Department of Water Resources (DWR) on its February 13, 2009 Revised Notice of Preparation (NOP) of a Draft Environmental Impact Report and Environmental Impact Statement (EIR/S) for the Bay Delta Conservation Plan (Revised NOP).

Background

The Delta Stewardship Council (Council) was established, effective February 3, 2010, by SB X7 1 (see the Sacramento-San Joaquin Delta Reform Act of 2009, new Water Code Div.35 (commencing with Section 85000) (the Delta Reform Act)). The Council's primary duty is to prepare, adopt, and commence implementation, by January 1, 2012, of a comprehensive resources management plan for the Delta, referred to as the Delta Plan (see Water Code Section 85300 et seq.). The Delta Plan must further the "co-equal goals", which are defined in Water Code Section 85054, as follows:

"'Coequal 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."

The Delta Plan will include various components described in the Delta Reform Act, including the BDCP, if it meets certain specified conditions. It may also incorporate other completed Delta-related plans to the extent that the other plans promote the co-equal goals.

The Council has been designated in the Delta Reform Act as a responsible agency under the California Environmental Quality Act (CEQA) in the development of the BDCP EIR/S (see Water Code Section 85320(c)). Although the Council was not in existence at the time DWR issued the Revised NOP, it is providing the following scoping comments on the Revised NOP pursuant to its statutory duty as a responsible agency, consistent with relevant CEQA guidelines (see 14 CCR secs. 15082(b), 15083, and 15086). Given its unique role in the BDCP process, the Council greatly appreciates DWR agreeing

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- State Water Code §85054

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to accept and consider these comments, without the need to reopen the formal comment period on the Revised NOP.

As you know, the Council is in the process of hiring independent consultants to advise it in its role as a responsible agency relative to BDCP, and in its potential appellate role (see Water code sec. 85320(e)), should any person appeal a Department of Fish and Game determination that the BDCP has met the statutory requirements set out in Water Code section 85320(b).

This letter outlines preliminary comments and issues identified by the Council. Future letters will contain more detailed comments and discussion of relevant points.

A. Project Purpose and Need

*** BDCP Must Further the Co-Equal Goals to Satisfactorily Address the Statutory Criteria for CEQA Review.**

The Delta Reform Act makes the co-equal goals, as defined in Water Code Section 85054, the cornerstone of water policy in the Delta. The co-equal goals are the foundational principles underlying and harmonizing all provisions of the Delta Reform Act, including the comprehensive nature of the criteria for CEQA review applicable to the BDCP EIR. Consequently, in order to satisfactorily address the criteria for CEQA review, the co-equal goals must be prominently reflected in the fundamental structure of the BDCP and corresponding EIR.

*** The Project Purpose and Range of Reasonable Alternatives Analyzed in the BDCP EIR Must Reflect the Co-Equal Goals.**

The Revised NOP includes as one of the project purposes and objectives, to "restore and protect the ability of the SWP and CVP to deliver up to full contract amounts, when hydrologic conditions result in the availability of sufficient water, consistent with the requirements of state and federal law and the terms and conditions of water delivery contracts and other existing applicable agreements."

As mentioned above, the Delta Reform Act establishes as one of the coequal goals "providing a more reliable water supply for California". The Delta Reform Act also provides, among its other provisions, that the policy of the State is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency (see Water Code sec. 85021). *The Council believes that, in order to satisfactorily address the statutory criteria for CEQA review, the BDCP must address this State policy in the EIR.*

B. Alternatives

*** The BDCP EIR must satisfactorily address the criteria for CEQA review specified in the Delta Reform Act**

The Delta Reform Act requires that, for the BDCP to be considered for inclusion in the Delta Plan (and for the public benefits associated with the BDCP to be eligible for state funding) the CEQA EIR must include a "comprehensive review and analysis of" seven specifically described items concerning flow

and other operational criteria, conveyance alternatives, climate change, fish and aquatic resources, flood management, natural disasters, and Delta water quality (see Water Code sec. 85320(b)(2)).

These statutory criteria for CEQA review must be satisfactorily addressed, even though the Revised NOP (which obviously predated the Delta Reform Act) does not include this language. By way of example, the Delta Reform Act has specific requirements—not in the Revised NOP-- regarding the necessary analysis of a reasonable range of flow criteria, the potential effects of possible sea level rise up to 55 inches, and the potential effects on Sacramento River and San Joaquin River flood management. (see Water Code secs. 85320(b)(2)(A), (C), and (E))

C. Mitigation/Conservation Measures

*** Projects Included in the BDCP to Further the Co-Equal Goals Must be Implemented in a Balanced Manner.**

The Council believes that inherent in the co-equal goals is the concept that projects to improve water supply reliability and ecosystem restoration must move ahead in a concurrent, comparable, and fully-funded manner. The Council would expect to see this vitally-important concept clearly reflected in a firm schedule that specifies the nature and timing of implementation of all plan components (and shows how they relate to one another) and the commitments for long-term funding adequate to implement each of those components.

*** BDCP Must Be Structured as a Robust, Natural Community Conservation Plan (and Habitat Conservation Plan).**

The Revised NOP provides that one of the goals of the BDCP is to obtain an incidental take permit under either Fish and Game Code section 2081 (normal state endangered species process) or the Natural Community Conservation Planning Act (NCCPA)(commonly referred to as the "gold standard" of species and habitat conservation planning). The Delta Reform Act, however, is clear that BDCP must meet the NCCPA to be included in the Delta Plan and be eligible to receive public funds for associated public benefits (see Water Code sec. 85320(b)(1)).

To successfully structure BDCP as an NCCP and a federal HCP—which will obviously affect the nature and scope of the CEQA review-- the Council recommends that BDCP consider incorporating the principles outlined by the federal agencies in their "White Paper on Application of the 5-point Policy to the Bay-Delta Conservation Plan, April 29, 2010"; namely, that the plan include clearly defined and scientifically supported biological goals and objectives, an adaptive management plan that tests alternative strategies for meeting those biological goals and objectives, and a framework for adjusting future conservation actions, if necessary, based on what is learned.

***BDCP Must Include an Effective Operational Decision making Process**

The Delta Reform Act requires the BDCP to "include a transparent, real-time operational decision making process in which fishery agencies ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations."(see Water Code sec.85321). Incorporation of such a process into the BDCP is not only required by state law, it is in

the Council's view, key to the ultimate success of BDCP in meeting its biological goals and objectives.

*** BDCP Must Take into Account the Flow Criteria and Quantifiable Biological Objectives Developed by the State Water Board and/or Department of Fish and Game.**

The Delta Reform Act requires the State Water Resources Control Board (State Water Board), for the purpose of informing planning decisions for the Delta Plan and the BDCP, to develop by August 2010, pursuant to its public trust obligations, new flow criteria for the Delta ecosystem necessary to protect public trust resources. (see Water Code section 85086(c)(1)). [This is consistent with Water Code sec. 85023, also contained in the Delta Reform Act, which reiterates the foundational importance of the public trust doctrine to water management policy, with particular importance and applicability to the Delta.] The flow criteria are subject to change over time based on science-based adaptive management.

Any order approving a change in the point of diversion of the State Water Project or the federal Central Valley Project from the southern Delta to a point on the Sacramento River must include appropriate Delta flow criteria and must be informed by the flow criteria developed by the State Water Board pursuant to the Delta Reform Act (see Water Code section 85086(c)(2)).

Similarly, but in addition to the above requirements, the Delta Reform Act requires the Department of Fish and Game (in consultation with federal fisheries agencies) to develop and recommend to the State Water Board, Delta flow criteria and quantifiable biological objectives for aquatic and terrestrial species of concern dependent on the Delta (see Water Code section 85084.5).

Although these flow criteria and biological objectives, by themselves, will not have any regulatory or adjudicative effect, they will be extremely valuable tools in ultimately determining operational requirements, flows, and adaptive management strategies necessary for ecosystem and fisheries recovery, as well as identifying remaining water available for export and other beneficial uses. Moreover, any order approving a change in the point of diversion, as described above, must be informed by the flow criteria developed by the State Water Board.

The Council therefore believes that to satisfactorily address the criteria for CEQA review, the BDCP must take into account the flow criteria and quantifiable biological objectives developed by the State Water Board and/or Department of Fish and Game. This would include taking into account any subsequent or follow-up recommendations made by those agencies on a timely basis prior to final approval of the BDCP and issuance of the CEQA Notice of Determination.

D. Overall Sufficiency

*** BDCP Should Consider Including Independent Scientific Review at Several Key, Up-Coming Stages.**

The NCCPA requires the inclusion of independent scientific input in the development of an NCCP, like the BDCP (see Fish and Game Code secs. 2820(a)(1) and 2810(b)(5)). In addition, the Delta Reform Act requires DWR to consult with the Delta Independent Science Board during the development of the BDCP (see Water Code sec. 85320(c)).

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The Council strongly believes—as is reflected in these statutory provisions-- that independent scientific review is critical to the success of a conservation planning effort as complex and monumentally important as the BDCP. It could be especially important, in the Council's view, at certain key, upcoming stages of the BDCP—such as with regard to the “effects analysis”, and later, the draft BDCP (and critical to whether BDCP ultimately complies with the CEQA review criteria).

The BDCP should determine as soon as possible where independent scientific review would be most beneficial, and, if appropriate, should consider engaging the services of highly-regarded entities like the Delta Science Program (which has the ability to establish on relatively short notice, independent expert review panels) and/or the National Academy of Sciences. In the Council's view, independent scientific review at key, upcoming stages of the BDCP could add considerable value to the process and help to ensure that the tough decisions BDCP needs to make in the immediate future are not delayed and are based upon the best available science.

The Council appreciates the opportunity to provide these scoping comments in its role as a responsible agency pursuant to CEQA, as required by the Delta Reform Act. Kindly note that the Council staff stands ready to assist DWR and other BDCP participants in a “consultative” role pursuant to Water Code section 85320(c).

Sincerely,



P. Joseph Grindstaff
Interim Executive Officer

cc: Bay-Delta Conservation Plan Steering Committee
David Nawi
Karen Scarborough
Lester Snow