



DELTA WETLANDS PROJECT

June 21, 2011

Mr. Phil Isenberg, Chair
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA. 95814

RE: Fourth Staff Draft Delta Plan Comments

Dear Chairman Isenberg and Members,

The following are our comments on the Fourth Staff Draft Delta Plan. It is an update of our comments on the Third Staff Draft, reflecting the progress that has been made. We continue to be impressed by your open process and the opportunity to participate in the drafting of the Delta Plan in a meaningful way.

Standard of Review/Waiver Provision for Consistency Determinations

Because of the complexity and scope of the Delta Plan, we suggested that there needs to be room for flexibility in determining whether a covered action was consistent with the Plan as a whole, in spite of some deviations from some portions of the Plan. The Fourth Staff Draft recognizes that need and the DSC has embraced the need for some kind of “waiver” provision. The specific language in the Fourth Staff Draft, however, provides such “waiver” authority only for the non-implementation of policies that are not possible to implement. That is not really a waiver at all, in that the impossible wouldn’t have happened in any event. We recommend that the structure of your current language on page 45 remain the same, but that the word “possible” be replaced by “feasible.” The rest of the language provides that consideration of feasibility, both by project proponents and the DSC, will be robust.

As required by Water Code section 85225 and by the Council’s procedures governing appeals, local or State agencies must include in their written certifications of consistency detailed findings as to whether the covered action is consistent with the

Anson B. Moran, General Manager
1660 Olympic Blvd., Suite 350
Walnut Creek, CA 94596
Telephone (415) 730-5637

Delta Plan. Those detailed findings must address consistency with each of the regulatory policies in the Plan that is implicated by the covered action. The Council acknowledges that in some cases, based upon the nature of the covered action, full consistency with all relevant policies may not be ~~possible~~feasible. In those cases, project proponents must clearly identify areas where consistency is not ~~possible~~feasible, establish that consistency with those areas is not ~~possible~~feasible, and explain how the covered action nevertheless, on whole, is consistent with and/or furthers the coequal goals. In such cases, the Council may determine, on appeal, that the covered action is consistent with the Delta Plan.

Best Available Science/Adaptive Management

The discussion of best available science and adaptive management include in Chapter 2 provides a conceptual framework that makes a lot of sense for large scale resource management projects such as the Delta Plan and BDCP. The examples cited in Chapter 2 are similarly large programs, with many parts and projects that interact in complex ways. Application of these concepts on a project level, however, will not always make sense because of how specific projects are developed and financed. Further, the environmental regulatory approvals for a project may constrain the range of potential adaptive management.

For example, it may be possible for CDFG to acquire property in the Delta for a wildlife preserve in a way that may fund basic maintenance costs, but would not cover future adaptive revisions to the structure and purpose of the preserve. In that case, adaptive management would consist of a follow-on project with separate sponsorship, structure and financing. It should be possible for the initial acquisition of land for the wildlife preserve to take place, even though it would not meet the mandate of Delta Plan Policy G P1 where it requires “documentation of access to adequate resources and delineated authority by the entity responsible for the implementation of the full adaptive management process.”

The discussion on page 26 of the Fourth Staff Draft acknowledges the need for a tailored application of adaptive management to specific projects. We recommend that the discussion be expanded to more fully describe that need as follows:

Proposed covered actions should include an adaptive management plan ~~that considers all nine steps of this framework~~appropriate to the scope, purpose, regulatory terms and conditions, and financing of the covered action. Some covered actions will have limited scope and adaptive management will take the form of subsequent projects rather than alterations to the covered action. Most covered actions will have some adaptive elements and some will include extensive adaptive management elements. Therefore, adaptive management, when applied at the project level,;~~however, they~~ need not be rigidly included and implemented in the order described here. The intent is to build logical and transparent information flows

and decision points into management actions that increase management options and improve outcomes, not to add a new layer of rigid processes and bureaucracy.

G P1 on page 47 of the Fourth Staff Draft, however, retains the rigid application of adaptive management requirements at the project level. We recommend that it be modified to conform with the discussion on page 26.

- G P1 Certifications of consistency with the Delta Plan must address the following:
- ◆ All covered actions must be fully transparent by disclosing all potentially significant adverse environmental impacts and mitigations of those adverse impacts.
 - ◆ As relevant to the purpose and nature of the project, all covered actions must document use of best available science (as described in Chapter 2) and information.
 - ◆ Ecosystem restoration and water management covered actions must include adequate provisions appropriate to the scope, purpose, regulatory terms and conditions, and financing of the covered action to assure continued implementation of adaptive management consistent with the Delta Plan. This requirement shall be satisfied through:
 - a) an adaptive management plan appropriate to the scope, purpose, regulatory terms and conditions, and financing of the covered action that describes the approach to be taken ~~for each of the nine steps of to implement the-an~~ adaptive management framework ~~of~~generally described in Chapter 2, and
 - b) documentation of access to adequate resources and delineated authority by the entity responsible for the implementation of the ~~full~~ proposed adaptive management process.

Consequences of the SWRCB not meeting its deadlines

We acknowledge and support the Fourth Staff Draft's recommendation for dealing with the eventuality of the SWRCB not meeting its deadlines. While a recommendation may feel like less of a sanction for non-performance than a policy, in this case it will have the effect of applying more effective pressure on the SWRCB by holding it directly accountable for its actions rather than applying sanctions on third party proponents of covered actions.

ERP Conservation Strategy

We continue to be concerned about the misuse of the ERP Conservation Strategy as a prescriptive policy for land uses in the Delta. A careful reading of the Strategy makes it clear

that it was developed as a set of alternative conservation tools that could be applied opportunistically with willing partners, not as a rigid set of regional land use controls. It constitutes a set of sensible but not exhaustive recommendations, not a specific land use plan based on best available science that should be used to preclude other sensible and beneficial land uses that support the coequal goals.

For Example, a habitat management plan developed by the CDFG would likely include site specific land uses that provide the best match between existing resources and public needs, but may not follow the ERP Conservation Strategy in every detail. Specifically, hunting, boating and ecotourism are not part of the ERP Conservation Strategy for deeply subsided islands, but could be part of a habitat management plan that supports the coequal goals in a more complex and beneficial way.

Accordingly, we recommend the following modifications to the Fourth Staff Draft to use the ERP Conservation Strategy in an advisory rather than a prescriptive manner.

ER P2 Habitat ecosystem restoration actions shall, except where site specific conditions provide more appropriate or more comprehensive alternatives, be consistent with the habitat type locations shown on the elevation map in Figure 5-3, and accompanying text shown in Appendix D, based on the Ecosystem Restoration Program's Conservation Strategy for Stage 2 Implementation for the Sacramento-San Joaquin Delta Ecological Management Zone (DFG et al. 2010), with minor alterations. The Council may amend the Delta Plan to incorporate revised figures and text from the Ecosystem Restoration Program's Conservation Strategy as the strategy is revised.

ER P3 Actions other than habitat restoration, including new or amended local or regional land use plans, shall demonstrate that they have, where feasible, avoided or substantially minimized the adverse impacts to the opportunity for habitat restoration at the elevations shown in Figure 5-3.

ER P4 State and local agencies constructing new levees, or substantially rehabilitating or reconstructing existing levees in the Delta shall evaluate and, where feasible, incorporate alternatives (including use of setback levees) that would increase the extent of floodplain and riparian habitats. Setback levees in the west and central Delta and on heavily subsided Delta islands are presumptively infeasible and need not be evaluated.

Flood Insurance

Flood insurance is not always available or appropriate for non-residential land uses.

For Example, flood insurance may not be available for habitat areas and, in any event, it may be better for a habitat island to invest in levee improvements than flood insurance.

Accordingly, we recommend the following revisions to RR R6

RR R6 The Legislature should require, where appropriate, available and affordable, an adequate level of flood insurance for individuals, businesses, and industries in flood prone areas, excluding agriculture, protected habitat and uses that include intentional or non-destructive flooding.

Again, thank you for your open process and this opportunity to provide comments and suggestions.

Sincerely



Anson B. Moran
General Manager

CC: Joe Grindstaff
Chris Stevens