# ENVIRONMENTAL WATER CAUCUS RESPONSE LETTER TO THE FINAL DELTA PLAN, RECIRCULATED DRAFT PEIR, AND RULEMAKING PACKAGE

## JANUARY 14, 2013

PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS
PCFFA
STEWARDS OF THE FISHERIES

RESTORE THE DELTA
Fishable, Swimmable, Drinkable, Farmable by 2010

CALIFORNIA SPORTFISHING PROTECTION ALLIANCE
CSPA
* Since 1983 *

FRIENDS OF THE RIVER

california water impact network

AQUALLIANCE
DEFENDING NORTHERN CALIFORNIA WATERS

CLEAN WATER ACTION
CALIFORNIA

CENTER for BIOLOGICAL DIVERSITY
Because life is good.

GREAT SEAL OF THE KARUK TRIBE

Winnemem Wintu Tribe
Middle River People

PLANNING AND CONSERVATION LEAGUE

sacramento river preservation trust

SOUTHERN CALIFORNIA WATERSHED ALLIANCE

CALIFORNIA COASTKEEPER ALLIANCE
A Statewide Voice for Our Waters

CALIFORNIA RURAL LEGAL ASSISTANCE FOUNDATION

Foothill Conservancy

***CA Save Our Streams Council***

Lower Sherman Island Duck Hunters Association

Santa Clarita Organization for Planning and the Environment (SCOPE)

BEC
Serving Butte County since 1975

Tuolumne River Trust

earth LAW CENTER

Desal Response Group

Institute for Fisheries Resources
Unite. Protect. Restore.

food&waterwatch

SIERRA NEVADA ALLIANCE

NORTHERN CALIFORNIA COUNCIL
CATCH and RELEASE
FEDERATION OF FLY FISHERS

Environmental Justice Coalition For Water

CALIF. STRIPED BASS ASSOC.

citizens water watch of Northern California

California Water Research

The Fish Sniffer

CALIFORNIA DELTA CHAMBERS & Visitors Bureau

MOUNT SHASTA BIOREGIONAL ECOLOGY CENTER

Via email to: recirculateddpeircomments@deltacouncil.ca.gov
RulemakingProcessComment@deltacouncil.ca.gov

Via USPS and personal delivery to: Cindy Messer, Delta Plan Program Manager

From: Environmental Water Caucus

Subject: Comments on Final Draft Delta Plan, Recirculated Draft Program EIR, and Rulemaking Process

January 14, 2013

The Environmental Water Caucus and its affiliated organizations have provided comments to each of the iterations of the Delta Plan since the original scoping comments January 2011 and we are pleased to continue; however, since so many of the comments discussed in our responses to the previous Draft Delta Plans and the Delta Plan DEIR are not considered with this Final Delta Plan, we include them again by reference in this set of comments to this Final Draft Delta Plan.

This comments letter is organized into three sections, as follows, and in keeping with the Delta Stewardship Council (DSC) document organization:

Section 1. Final Draft Delta Plan Comments
Section 2. Recirculated DPEIR Comments (RDPEIR)
Section 3. Rulemaking Package Comments

As you will see, we object to approval of this Final Draft Delta Plan, Recirculated DPEIR, and Rulemaking Package because the Council has not addressed the root cause of Delta water "unreliability" and the "Delta crisis," which is the unwillingness of public agencies to examine realistic California water supply availability. The current contracts are not consistent with what the environment can provide and the contracts should be reduced in line with what is available, thus reducing the continuous demands for more water. The Final Draft Delta Plan sidesteps this critical issue and fails to address these current over-promises embedded in state water rights and SWP and CVP contracts. Failure to address these undeliverable demands will result in exceptionally high costs to ratepayers and the environment.

The benefits and costs of the Delta Plan are not analyzed. A proper Cost-Benefit analysis of the Plan and its regulations should not be confused with the so-called "Cost Analysis" accompanying the Proposed Regulation, which provides only general narrative, and omits a

discussion of benefits. Without this information, decision makers cannot make informed decisions. A Cost-Benefit Analysis is an accepted method for financially evaluating proposed projects. If a Cost/Benefit analysis will be prepared for a proposal, NEPA provides guidelines to accomplish it. (See 40 CFR Sec. 1502.23) A fair and accurate Cost-Benefit Analysis provides assurances to agencies and the public that the expenditure of funds will in fact provide benefits that make the project a worthwhile undertaking, and a full consideration of the co-equal goals demands it. A valid consistency determination that weighs future habitat and conveyance projects cannot be made without a Cost-Benefit Analysis. In addition to performing this analysis on the Plan itself, the Delta Stewardship Council, through the Proposed Plan and Regulation, must require a Cost-Benefit Analysis for all major projects submitted for consistency determinations under the Delta Plan. Without such an analysis, the Delta Stewardship Council cannot make an informed decision as required by CEQA.

The Public Trust Doctrine is an affirmation of the duty of the state to protect the people's common heritage in streams, lakes, marshlands, and tidelands. The application of the Public Trust Doctrine requires an economic and sociological analysis of the public trust values of competing alternatives, as was directed by the State Water Board in the Mono Lake Case. Its applicability to alternatives for the Delta, where species recovery, ecosystem restoration, recreation and navigation are being pitted against damage from water exports, is exactly the kind of situation suited to a Public Trust analysis, which should be required by the Delta Plan. The Council clearly has trustee responsibilities in balancing the public trust. The final document fails in meeting this responsibility with gratuitous mention of the public trust in the Final Draft Delta Plan but with no analysis and dubious policies and regulations on this critical subject.

These three types of analyses should be accomplished for the Final Delta Plan as well as subsequent covered actions that become part of the Delta Plan. We recommend that these three analyses and the SWP and CVP contract revisions discussed above be incorporated into Delta Plan Policies.

The failure to adequately define and quantify "water supply reliability" renders this document legally insufficient. CEQA requires that an EIR inform the public and decision-makers about the adverse consequences of a project. Absent an accurate definition of the project – water supply reliability – one cannot know what such consequences might be because the document fails to accurately define the project or provide an accurate baseline for measuring either water supply reliability or the other project goal – ecosystem restoration. Relying on "theoretical water rights or water contracts" renders this document useless to the public or decision-makers; without an accurate definition they cannot make an informed decision. The document fails to translate this theory into quantifiable, actual water available for human consumption or ecosystem restoration and mitigation as required by law. Of course, such a quantity determination must be developed by the State Water Board as a component of its Delta flow determination, but the Council should require that water supply reliability be tied to meeting the numeric limits set by the anticipated Board actions. For example, a land use planner relying on this document could not determine the impacts from the failure to provide water supply because it is not defined. Failure to define and quantify an accurate real water supply and instead relying on theoretical or paper water, merely creates a fog or an illusion of water supply that is not only unreliable, but also does not exist.

It is critical that any plan adopted by the DSC has clear enforcement mechanisms and actions to ensure that any plans or activities approved by the Council do not degrade the waters of the state and nation, do not violate existing water quality laws and regulations, and ensure that these standards are not eroded through cumulative actions that will degrade the Sacramento-San Joaquin-San Francisco Bay Delta Estuary.

The EWC has presented clear alternatives for achieving water supply reliability and Delta ecosystem restoration (Alternative 2 in the Final Draft Delta Plan). The EWC Reduced Exports Plan contains numerous actions that compensate for reduced exports. This reasonable alternative has not been fully or fairly evaluated in the Final Draft Delta Plan or in the Recirculated DPEIR; the plan is misinterpreted, as discussed in our specific comments. The EWC alternative has relied on strict enforcement of water quality laws, adoption of the State Water Resources Control Board and Fish and Game flow recommendations, shoring up of existing levees, ceasing the unreasonable use of water to irrigate toxic soils that return pollution to the estuary, while also providing for exports and water supply along with statewide water conservation and efficiency measures to ensure existing supplies are extended to meet demand.

We object to the Delta Stewardship Council strategy of not responding to the 5th and 6th Draft Delta Plan comments and apparently not giving consideration to the contents or being influenced by any of the constructive comments from many responders. Since the Council's plan is to respond to those previous comments and these Final Draft comments only with the release of the Final PEIR, it is clear that the Council's actions and directions are and have been pre-decisional and clearly violate the intent of the CEQA process, which makes a mockery of the Council's promises of transparency.

David Nesmith
Co-Facilitator
Environmental Water Caucus

Nick DiCroce
Co-Facilitator
Environmental Water Caucus

CONTENTS

Logos of Supporting Organizations ……. 1

Cover Letter ……..... 4

Table of Contents ……. 7

Final Draft Delta Plan Comments
- Executive Summary ……..... 8
- Chapter 1. Introduction. The Delta Problem …….. 8
- Chapter 2. The Delta Plan ……. 9
- Chapter 3. A More Reliable Water Supply ……... 13
- Chapter 4. Restore the Delta Ecosystem …….. 24
- Chapter 5. Delta as Place …….. 30
- Chapter 6. Water Quality …….. 31
- Chapter 7. Reduce Risks in the Delta …… 35
- Chapter 8. Funding Principles …….. 36

Recirculated Draft Program EIR Comments
- Section 25. Comparison of Alternatives …… 39
- Section 1. Introduction ……. 67
- Section 2. Description of Revised Project …… 75
- Section 3. Water Resources …….. 76
- Section 4. Biological Resources …… 81
- Section 5. Delta Flood Risk …….. 86
- Section 6. Land Use and Planning ……. 87
- Section 7. Agricultural and Forestry Resources …… 88
- Section 11. Geology and Soils ……. 89
- Section 14. Hazards and Hazardous Materials …… 89
- Section 21. Climate Change and Greenhouse Gas Emissions ……. 90
- Section 22. Cumulative Impact Assessment …… 95
- Section 23. Bay Delta Conservation Plan …… 99

Rulemaking Package Comments ……. 102

List of Supporting Organizations and Names …….. 109

## SECTION 1. FINAL DRAFT DELTA PLAN COMMENTS.

### EXECUTIVE SUMMARY.

As indicated in this section: "The Delta Plan seeks first to arrest declining water reliability and environmental conditions." As also indicated in our comments to the Sixth Delta Plan: "The Delta Stewardship (Council) has been given a golden opportunity, through the Delta Reform Act of 2009, to provide a progressive and forward looking plan for California's water future; during all the iterations of the Delta Plan during 2010 and 2011, the EWC has looked forward to that kind of plan." We feel that the current Final Draft Delta Plan has failed to seize that opportunity; it provides institutionalized thinking and solutions and it continues a status quo which refuses to recognize the root causes of the "water supply reliability" problem so often discussed.

### CHAPTER 1. INTRODUCTION. THE DELTA PROBLEM.

As we indicated in our comments to the Fifth Delta Plan, California's water system is seriously oversubscribed, operating in deficit, and incapable of meeting competing demands on the system. The Council's charge should be to resolve this imbalance which is a major contributor to water supply *unreliability*. In the near term, it's largely a zero sum game. More water to protect public trust values translates to less water for consumption values. Over the longer term, redefining the CVP and SWP contracts to reflect legally available water supplies and align water rights with available water supplies can significantly alleviate but likely not completely eliminate water shortages. Since our Fifth Delta Plan comments, multiple EWC organizations have presented information to the State Water Resources Control Board (State Board) which shows that water rights in the Delta watershed exceed unimpaired flow by a factor of more than five times the available water. The State Water Board cannot continue to tolerate these over appropriated water rights in the state; the CVP and SWP cannot continue to tolerate contract amounts that do not reflect a realistic and reliable yield. And the Delta Stewardship Council cannot evade the recognition of this imbalance, both in water rights and water contracts, and must call out those agencies whose actions have created these imbalances, and specify what they can do to create a better balance and a more "reliable water supply." Although the issue of CVP and SWP contract amounts is recognized in Chapter 3 of the Final Draft Delta Plan, the magnitude of the problem and the development of solutions are not addressed. By not recommending the difficult actions that must be taken to solve our "water supply reliability" issues, the Delta Stewardship Council is evading its responsibilities and thereby continuing the status quo. *The Delta Plan's Policies and Recommendations are the appropriate venue to reflect these needed changes*.

Instead of facing these kinds of root causes of unreliability and developing Policies and Recommendations that address those causes, the Final Draft Delta Plan hides behind the legislated co-equal goals of water supply reliability and Delta ecosystem restoration, which are inherently contradictory goals, so long as water supply "reliability" is undefined and assumed by water agencies and the Delta Stewardship Council to mean more water supply from the Delta. The Delta cannot be recovered while more water is exported from the Delta. This fundamental conclusion, which the Delta Stewardship Council has not faced, is this: more water for export

will continue the degradation of the Delta ecosystems and is the leading reason why the Delta Plan will maintain the status quo of a declining Delta. The predictions contained in the section entitled "What the Delta Plan Will Achieve by 2100," which seeks to "arrest declining water reliability and environmental conditions related to the Delta ecosystem, and ultimately to improve them," cannot be achieved with this Final Draft Delta Plan.

## CHAPTER 2. THE DELTA PLAN

Since the Delta Plan is expected to incorporate the BDCP should state and federal wildlife agencies certify it, we recommend that the Council provide specific, consistent, and regular guidance to the BDCP on what would be required for BDCP to be consistent with the mandates from the legislature in the Delta Plan. An example of the current inconsistency is: The Delta Plan mandates the state water board to establish Delta flows and major tributary flows by 2014 and 2018, respectively. It is stated that this is key to the achievement of the co-equal goals. Yet, there is no such policy in BDCP, since petitioning partners in the BDCP are opposed to establishing these flow standards. If the BDCP does not incorporate or use these flow standards in the plan, it would then NOT meet the co-equal goals required by the Delta Plan. It is hard to understand how the BDCP could be incorporated with this current inconsistency, and if it were, the Delta Plan would likely be challenged in court.

The Delta Plan continues to assume that a permitable BDCP is on its way and will be incorporated into the Delta Plan. It makes no allowance for the damming science reviews presented by the National Academy of Science[1] or the "Red Flag" documents[2] produced by the fishery agencies or the critical report produced by the Bay Institute[3], which make the case for misleading and "cherry picked" science. We have seen no indication that the BDCP is responding meaningfully to these criticisms. These referenced reports show that BDCP, as presently constituted, is clearly not a permitable project, and does not have the appropriate science to proceed on the present path. The numerous mentions within the Delta Plan of being "informed by best available science" sound hollow in view of the current condition or presumed acceptance of BDCP "science."

The current BDCP project kicks the science down a fifteen year cycle and is based on a currently undefined "Decision Tree" concept – which appears to be the heart of BDCP's Adaptive Management Plan. The current BDCP is attempting to move toward permitting a project without defined biological goals and objectives, without operating criteria for the new conveyance, without a well- defined range of exports that will permit recovery, and has little of the necessary framework which would include an adaptive management plan, a financing plan, and best available science-based actions, nor meet the consistency policies described in the Delta Plan. After five years of study and analysis, the BDCP project has not yet produced a CEQA-legal plan, and it is unlikely to do so in the foreseeable future.

---

[1] Ibid., The National Academies Press.

[2] http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Effects_Analysis_-_Bureau_of_Reclamation_Red_Flag_Comments_and_Responses_5-31-12.sflb.ashx

[3] The BDCP Effects Analysis: A Briefing Paper. February 2012. http://www.bay.org/assets/BDCP%20EA%20Briefing%20Paper%2022912.pdf

The Delta Reform legislation of 2009, which created the Delta Stewardship Council, also legislated an obligation to comment on upcoming plans prior to being accepted by the Delta Stewardship Council. The Council is woefully negligent in not living up to that responsibility related to BDCP. We understand the political difficulty of preemptive criticism of BDCP plans; however, without any action on the part of the Council, both the Council and BDCP will be participating in a charade of huge proportions and with damaging consequences for the state of California.

- As an example of a pertinent challenge to the tunnel alternative which would protect against flood, sea level rise, and earthquake risk, the recommendation in the Economic Sustainability Plan to reinforce Delta levees above the PL84-99 standard at far less than the $15 billion tunnel cost is being ignored. The Delta Stewardship Council would be wise to raise the question why this isn't a better alternative than new conveyance to accomplish these same ends.

- Another example is that the Delta Reform Act requires that the Delta Independent Science Board "shall provide oversight of the scientific research, monitoring, and assessment programs that support adaptive management of the Delta." The independence of the science and adaptive management component is crucial to a project of the magnitude of the Delta Plan. However, current proposals of BDCP would circumvent the authority of the Delta Stewardship Council in this regard, and should not be tolerated by the Council.

GOVERNANCE

The entire document, while professing to espouse an understanding of the Delta cannot be complete without recognition that as a cultural area the first people of the state are not included or discussed in the document and that the water rights of the California Indians are still to be mitigated at this late date. Tribal uses of water must be considered in order to begin to embrace the failure of agencies to acknowledge tribal water rights as well as cultural rights guaranteed under treaty to access and use water ways and estuaries for tribal existence. California water law has refused to include the mitigation of tribal water rights as senior to all other, as well as the non-abrogation of water rights under treaty, despite the continued inference of the government to the Winters decision.[4]

The Delta Plan must include actual consultation and planning that includes California tribal nations, federally and non-federally recognized, in order to include tribal needs and concerns for the uses of the waters into and out of the delta and how the transfer and use of these waters affects tribes and the inherent, non-abrogated rights of the tribes to these waters.

While the Delta Reform Act provides broad narrative goals for the Delta Plan, it does not provide clear, specific, and measurable objectives as called for in this Chapter. The Delta Plan must not defer this next necessary step of Adaptive Management. The Plan must begin to establish clear and measurable goals, objectives, and performance measures; it must quantify goals and provide specific accomplishment dates; it must model linkages between objectives and

[4] http://www.focuswest.org/law/winters.cfm. Winters vs. United States (2008)

proposed actions; it must select and evaluate actions for implementation; it must design implementation actions with appropriate monitoring; and it must be peer reviewed. If the plan cannot be enforced, it is illegal.

SCIENCE

(Page 44). The EWC agrees that science must guide the process for ecosystem restoration and water management decisions. Since this is a 50 year plan, and the Independent Science Board (ISB) will be the over-seeing entity on how well science is being used within Plan actions, we would recommend including a 5 year audit process on science. By this we mean having an independent and credible outside science group, like the National Science Foundation, review and evaluate actions that have been taken, and to make some recommendations to the ISB that could be helpful in better implementing how science is being used within the Plan. The focus here should be on balancing the ecosystem, species recovery and developing science based actions that assist ecosystem adaptation to known stressors and changing environmental conditions, be they drought, climate change, or others yet unknown. (Lines 1-2) The completion date of December 31, 2013 from G R1 should be included as part of this statement.

(Page 45) We recommend that the Delta Plan discussion include Performance measures as a key part of the work the Delta Science Program will be responsible for implementing. Relative to ecosystem recovery, these performance measures should be described as biological objectives, or in some cases population goals as described in the CVPIA AFRP salmon doubling goals.

(Page 47, Lines 27-30) Consistency with the Central Valley Project Improvement Act needs to be added to this statement.

(Page 47, Line 32) Under *"Incorporation of BDCP into the Delta Plan," change 'improvements' to 'changes'* We have no way of knowing now if the changes in diversion and other infrastructure will be improvements or not.

(Page 47, Line 33) The statement says that BDCP "must" be incorporated into the Delta Plan if it meets certain statutory requirements. We recommend changing this line to say, "BDCP will be incorporated into the Delta Plan if it meets the requirements described in the Delta Reform Act, and meets any legal or other challenges in the appeals process within the Delta Plan, or other legal challenges specific to the BDCP independent of the Delta Plan."

(Page 52) We recommend that the Council focus attention on the 'California Statewide Groundwater Elevation Monitoring'. To date, the state does not have a groundwater management program, only monitoring, which has no level of legal authority to require change in any groundwater program. Since groundwater has been, and continues to be, a mismanaged resource for water, the Council can act as a credible source of policy recommendations. We would hope that the Council will initiate a process to help the legislature establish a groundwater management plan in the future.

(Page 52-53) In the process of a 5 year review, it is the appropriate time to require the scientific audit discussed previously in these comments. Again, for credibility reasons, an independent

science audit of both actions and proposed future work is appropriate. Everyone engaged in the Delta and state water management should want the best outcomes based on science, and all scientists who are continually working on this process need an "outside" evaluation periodically. Currently, there is no mention of any "outside" review of actions or science based recommendations. This needs to be changed to include an outside review at least every 5 years.

(Page 53) In this section, outside review of 'Performance Measures' is discussed, but this should not be confused with what we are asking for as an independent outside review of actions and future recommendations. We agree that reviewing success or failure on Performance Measures is important, but so is an independent look at the work and actions taken, how they were done, and the results achieved. We see this 5-year independent review as more comprehensive than just reviewing performance measures.

COMMENTS ON POLICIES AND RECOMMENDATIONS

As mentioned in the cover letter to these comments, the Delta Plan must include a Water Supply Analysis for each certified project in order to insure the availability of adequate water for the restoration of Delta; it should require a detailed Cost-Benefit Analysis in order to assure the financial viability of a covered project, and; it must include a Public Trust Analysis as indicated in the Delta Reform Act which cites the Public Trust as the foundation of California water policy. We therefore recommend that an additional regulatory policy be created for the Delta Plan which requires these three actions be accomplished prior to the certification of consistency for any major Delta Plan project. Alternatively, three separate new policies could be created within the applicable chapters specific to each of these actions (Chapter 1 for the Public Trust Analysis, Chapter 3 for the Water Supply Analysis, and Chapter 8 for the Cost-Benefit Analysis).

(Pages 59-62) G P1. Detailed Findings to Establish Consistency with the Delta Plan Section (b), first item, page 60. We recommend that the type of covered action described (that which does not meet "full consistency" obligations) should ALWAYS be reviewed by the Council**.** Because this is a complex and conflicting type of covered action, the Council should always do a review, and not have to go through the appeal process. These types of actions may not be reviewed by Council members, and as such, never be appealed. Hence, this type of action, which has conflicts in meeting "all relevant policies", could slip by without any Council review, which we feel would be a mistake.

(Page 61) G R1. Development of a Delta Science Plan. Because this process will result in the over-arching science program for many years to come, we feel it appropriate that the "final product" not only pass the Independent Science Board, but be sent out to another credible science group, like the National Science Foundation, to review this plan. Of huge importance is the need to all interested parties to have confidence in the science plan, and to agree that it meets the requirements to achieve both protections of the Delta's fish and wildlife, as well as recovery for listed species. Public credibility is very important for the over-all Delta Plan, and the most important part of that credibility is based on the strength of the science program, and its ability to achieve stated goals. We feel that December 31, 2013 is a good target date for completion of the Science Plan.

(Page 62). Timeline for Implementing Policies and Recommendations.
Development of a Delta Science Plan (G R1). This should be consistent with the stated target date of December 31, 2013. A variable date of 2012 - 2017 is not consistent, nor acceptable.

(Page 50, line 18 & 19). Establish Delta Plan Interagency Implementation Committee. We feel strongly, as we did with the development of the science plan, that a variable timeframe of 5 years is much too long for this committee. We would recommend that the same date used for the science plan be used with the interagency implementation committee – no later than December 31, 2013. Interagency coordination is critical to success, and the process to coordinate it is necessary sooner than later.

## CHAPTER 3 – A MORE RELIABLE WATER SUPPLY

We view an aggressive statewide water efficiency and conservation program as a primary requisite toward reducing reliance on the Delta, as prescribed in the legislative mandate. A program that reduces overall water consumption throughout the state, especially in the intensive farming areas and major population centers relying on the Delta, makes possible the achievement of this critical mandate of reduced Delta reliance. The mandate likely will not be met without this cost effective water supply program.

One of the best – and unrecognized – opportunities for reducing reliance on the Delta is by accomplishing a thorough economic analysis of Public Trust values, since this would require the examination of the alternatives to exported water. The alternatives to a continued high level of Delta exports are many, and they are contained in the efficiency and water use reduction solutions that are recommended in the EWC report: *California Water Solutions Now*, which is one of the alternatives being examined by the Council.

The Delta Flows Criteria promulgated by the State Water Resources Control Board clearly indicates that the state has reached – and exceeded – the amount of water that can responsibly be diverted from the Bay Delta. As a result, the Council should anticipate future limitations on Delta exports below the level of the 2000-2007 time periods in its Delta plan to meet the Delta ecosystems restoration goals. Those future reductions, at whatever levels they turn out to be, can only be accomplished if consumption levels are simultaneously decreased.

The major flaw with the Delta Plan continues to be unwillingness to address the root causes of the failing Delta ecosystem and what are referred to as “unreliable” water supplies. The root causes include:

- Unwillingness of public agencies to examine realistic California water supply availability and to adjust export contract amounts downward for junior appropriators in keeping with reliable yields. The current over promises in the SWP and CVP contracts allow water exporters to claim disappointment in planned exports and to continue to pressure for increased exports and new export conveyance.
- Unwillingness of the Delta Plan to require a cost-benefit analysis for all projects submitted for Delta Plan approval (including BDCP – although that project has recently indicated that it will accomplish a cost-benefit analysis) in order to in order to assure that public monies are spent on the most cost effective projects among reasonable

alternatives. This unwillingness on the part of the state and public agencies to accomplish a meaningful financial analysis constitutes abrogation of fiscal responsibilities to California citizens, taxpayers, and ratepayers.

- The Council as well as other public agencies has trustee responsibilities to perform Public Trust Doctrine balancing as part of a process of actually attempting to save the threatened Delta. The Public Trust Doctrine establishes the state's duty to protect the peoples' common heritage in waterways including the Delta and rivers, streams, marshlands and tidelands. However, there is no balancing of public trust obligations and resolution of competing demands on the Delta in the Delta Plan. Nor could there be given the failure to obtain essential information and perform required analysis. As pointed out below, the Plan itself admits that critical information including actual water availability is absent. Without obtaining and analyzing essential factual information, it is not possible to perform Public Trust Doctrine analysis and balancing. Examining the alternatives to exported water would be a significant step in accomplishing an economic analysis of Public Trust values. The alternatives to continuing a high level or increasing the already high level of Delta exports are many. These alternatives are contained in the efficiency and water use reduction solutions that are recommended in the EWC report: *California Water Solutions Now*, which is an alternative that should be subject to extensive consideration and analysis by the Council.

The Delta Flows Criteria promulgated by the State Water Resources Control Board indicate that the state has reached, and exceeded, the amount of water that can be responsibly diverted from the Delta. The Council should, consequently, anticipate future limitations on Delta exports below the level of the 2000-2007 time periods in its Delta Plan to meet Delta ecosystems restoration goals.

One of the surest ways to improve water supply *reliability* is to reinforce key Delta levees above the PL 84-99 standards, which is recommended in the Delta Protection Commission's Economic Sustainability Plan. We fail to see why this significant recommendation is being ignored by both the Delta Plan and the BDCP, since it is a far more cost effective protection against earthquake, sea level rise, and flooding than the BDCP tunnels plan. Ignoring this recommendation related to the levees is verified in Appendix N, "Projected Budgets for…Delta Protection Commission…" whereby no budget is allocated for implementation of the Delta Protection Commission's Economic Sustainability Plan (Table N-1).

We summarize below some key issues and deficiencies in the Delta Plan. Following that, we reiterate some specific recommendations that we have made to you in the past.

<u>Lack of Essential Information And Analysis</u>

The Plan itself contains its own admissions that a useful and valid Plan cannot be prepared at this time. As the Plan says in a heading, "informed decision making requires information." (105). (All page number references are from the Final Draft Delta Plan unless otherwise indicated). Yet the Plan concedes that "California does not have a clear understanding of its water demands, the amount of water available to meet those demands, how water is being managed, and how that management can be improved to achieve the coequal goals." (112-113). Further, "One of the greatest challenges to California water management is a lack of consistent, comprehensive, and

accurate estimates of actual water use by the type of use (agricultural, urban, and environmental) and by hydrologic region." (105, 112). The Plan lists numerous science and information needs including understanding of the hydrologic systems, patterns of water use, and effects of climate change as being "essential to improving the management of California's water supplies to achieve the coequal goals." (114).

There is more. The Plan concedes that "The amount of water used in California's stream systems is not fully known because water users under pre-1914 and riparian water rights have not been required, until recently, to submit annual reports accounting for their diversions." (83). After mentioning that "the SWRCB has the authority to determine when a river or stream has been 'over-appropriated'" the Plan goes on to state that "Understanding and reconciling the human demands for water to the supply available, while providing enough water to ensure desired and legally protected environmental and water quality goals, is a difficult process. This process is nonetheless essential to achievement of the coequal goals." (83).

The Plan admits that the original SWP and CVP contracts assumed greater water export quantities than consistently can be delivered. (91) In fact, a recent workshop conducted by the State Water Board has shown that legitimate claims to water flowing into the Bay Delta exceed the available water supply by more than five times in most years. In the absence of what the Plan concedes to be essential information, the Plan at this point in time is a classic case of putting the cart before the horse. As previously mentioned, it is necessary to first conduct detailed analysis and study of how much water is actually available for export from the Delta, a valid cost-benefit analysis to determine what project or projects might make economic sense, and environmental analysis and public trust balancing in order to protect the public interest and the environment.

In short, it is necessary to obtain information and perform analysis before making policy, and then establish policy before deciding on what if any plumbing to do. The Council is proceeding in the dark like a city or county would be doing if it attempted to adopt a General Plan without obtaining basic factual and environmental baseline information such as how much and what type of development, open space, and other land uses already exist, along with their placements and locations within the area to be governed by the General Plan.

The Plan is not ready for adoption because essential information has not been obtained and essential analysis has not been performed. Likewise, it is not possible at this time to lawfully authorize or approve development of the Delta Tunnels that would divert massive quantities of freshwater around the Delta because of the absence of essential environmental information and analysis.

<u>Catastrophic Decline And Environmental Baseline Not Dealt With</u>

The Plan concedes that "the long-term impacts of these diversions, on the Delta and its watershed, in combination with many other factors, are causing native fisheries to decline. In recent years the populations of salmon and several other fish species have reached their lowest numbers in recorded history and many of California's salmon runs are now listed as endangered by the State or federal government." (71). The simple fact is that the Delta is in grave danger of being turned into a salty, stagnant pond lethal to fish, and gravely impaired as an agricultural and

recreational resource. The Delta requires more freshwater, not less freshwater. Exports must be reduced, not increased. Two recent state agency reports, establish that an increase in Delta outflow is necessary to protect and restore the estuary's aquatic ecosystem.

There are already significant diversions of water from the Sacramento River and its tributaries before the water gets to the Delta. For the other major river extending to the Delta, most of the water from the San Joaquin, is diverted upstream, following the construction of Friant Dam. The Plan indicates that about 60% of inflows into the Delta are already diverted. (87). These diversions include 31% of the flow from the Delta watershed, about 4% for use within the Delta, and about 24% for the CVP and SWP export systems. The true environmental baseline is that the quantities of water already diverted before reaching the Delta are so great, that the Delta is in crisis such that further massive diversions should not be permitted. The Delta is not a clean slate. The water situation-shortage-in the Delta is far worse than it was decades ago.

For the Delta Plan to meet legislatively mandated goals, it is necessary that the Plan meet existing water quality laws including those pertaining to salt, selenium, temperature, flow, and contaminants harmful to public health and ecosystem health. In prior EWC submissions and comments to previous drafts, all adopted here by reference, the EWC has provided comments and evidence regarding the importance of meeting water quality standards, flow requirements, and temperature standards for the health of the ecosystem. The Plan as, it presently exists, fails to enforce existing water quality laws, and fails to ensure that any future covered actions will be required to meet flow requirements, water quality constraints, and protect public trust values. The Delta is in crisis. The Plan by its weakness is in denial.

<u>Salinity Intrusion Is Bad Now And Will Worsen With Climate Change And New Massive Upstream Diversions</u>

The Plan concedes that one of the problems water exports are causing is that the Delta experiences salinity intrusion. "A portion of the water flowing into the Delta is specifically allocated to Delta outflow to help repel salinity intrusion from the San Francisco Bay and to maintain low salinity water near the western edge of the Delta. This means that water that might otherwise be used for exports must be released from upstream reservoirs to help control salinity (NRC 2012)." (91).

A different portion of the Plan admits that as a result of climate change, "Sea level rise, as much as 55 inches by 2100 (OPC 2011), will result in high salinity levels in the Delta interior, which will impair water quality for agricultural and municipal uses and change habitat for fish species. Maintaining freshwater conditions in the Delta could require unanticipated releases of water from storage, which will reduce available water supplies for fish." (80).

The Plan fails to connect even the most obvious dots within it. Given that salinity intrusion is already a huge problem now for the Delta, and will greatly worsen as a result of changing conditions including climate change, adding new massive diversions of freshwater upstream from the Delta to export to regions south of the Delta would have the effect of further exacerbating the already bad and worsening problem of salinity intrusion in the Delta.

Two Of Three BDCP Conveyance Options Will Induce Diversions Of Greater Quantities Of Water And Will Exacerbate Conflicts Between The Delta And Exporters

The Plan refers to the BDCP process and those options for conveying water through or around the Delta as being: through-Delta Conveyance by continuing to divert water in the southern Delta; Isolated Conveyance by massive new diversions upstream from the Delta through proposed 35 mile-long Delta Tunnels; and Dual Conveyance, by continuing through-Delta conveyance and adding the massive new diversions upstream from the Delta and the 35 mile-long Delta Tunnels. (97). The Plan, with no supporting facts or analysis as pointed out above, calls in its Policies and Recommendations for exporting larger quantities of water from the Delta during wet years and expanding conveyance capacity (111-112), meaning development of the Delta Tunnels.

At present, despite existing conflicts, both the Delta and the exporters have a common interest in minimizing the worsening of salinity intrusion. That is true because the exporters have an interest in having water of not too low quality water in the southern Delta, as that is the location for their existing diversions. However, if either the Isolated Conveyance or the Dual Conveyance projects – the Delta Tunnels – are carried out, the exporters will have no interest at all in keeping any kind of lid on salinity in the southern Delta. The exporters' water would be taken out near Clarksburg, miles upstream from the Delta. The reality which must be addressed by the Plan is that constructing the Delta Tunnels project would create a situation in which extremely wealthy and powerful interests including Westlands Water District and Kern County Water Agency users would have a strong incentive to divert huge quantities of water upstream from the Delta while having no corresponding interest in preventing salinity intrusion as well as other water quality issues from worsening in the Delta and southern Delta. And all of this would take place accompanied by climate change which as stated above, will result in high salinity levels in the Delta due to sea level rise by as much as 55 inches by 2100. Given the already desperate straits that the Delta is in with respect to water quality, salinity intrusion, and declining and endangered fish populations, along with other certainties including the sea level rise resulting from climate change, going forward with the Delta Tunnels would be a prescription for completing the destruction of the Delta environment.

The Council has an obligation under the Delta Reform legislation of 2009 to comment on upcoming plans. The Council needs to rise above politics and tell the truth about the Delta Tunnels plan. As an example, the recommendation in the economic Sustainability Plan to reinforce Delta levees above the PL 84-99 standard would cost far less than the $15 billion Delta Tunnels project. The Delta Plan fails as an informational document by failing to raise the question of why that would not be a better alternative than the Delta Tunnels to accomplish the same ends.

Another example of bias and predetermination in pushing the Delta Tunnels project is that the Delta Reform Act requires the Delta Independent Science Board to "provide oversight of the scientific research, monitoring, and assessment programs that support adaptive management of the Delta." The independence of the science and adaptive management component is crucial to a project of the magnitude of the Delta Plan. However, current proposals of BDCP would circumvent the authority of the Council in this regard and should not be tolerated by the Council.

The Plan is woefully deficient in failing to clearly and succinctly set forth basic, undisputed facts, such as that adding massive new diversions upstream from the Delta to export water south of the Delta would lead to greatly worsened saltwater intrusion in the Delta. To be blunt, the state is wittingly or unwittingly aiding and abetting the effort by wealthy and powerful special water interests to be able to take massive quantities of freshwater away from the Delta, upstream, while no longer having any concern about or interest in limiting the worsening salinity intrusion and water quality in the Delta.

<u>The Delta Tunnels Would Be In Conflict With Both Of The "Co-Equal Goals" As Well As The Policy Of Reducing Reliance On The Delta</u>

The Delta Reform Act establishes "coequal goals" which "mean 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." (67, quoting Water Code § 85054). As already shown, the Delta Tunnels with new, massive upstream diversions, would further damage to the point of destroying the Delta ecosystem. That is contrary to the goal of protecting and restoring the Delta ecosystem.

The other goal, of providing a more reliable water supply, should be met by gathering the missing information and performing the absent analysis of actual water demands, amount of water available to meet those demands, and improvement of water management as set forth above. Again, the Plan admits that the "original SWP and CVP contracts" "assume greater water export quantities than consistently can be delivered." (91). Excess contractual amounts should be limited in the contracts and in the meantime should be disregarded for planning purposes. There is no rational reason to construct massive new public works projects or exacerbate the salinity and water quality conditions in the Delta by attempting to export unrealistic quantities of water from the Delta. A more reliable water supply would be provided by identifying, and then seeking to provide a water supply that is realistic taking into account what is actually available as well as environmental constraints including the needs of Delta users, fish populations, climate change, and ever worsening salinity and water quality conditions in the Delta.

The state has established through the Delta Reform Act "a new policy for California of reducing 'reliance on the Delta in meeting California's future water supply needs' (Water Code section 85021)." (73). Establishing massive new diversions upstream from the Delta by way of constructing the Delta Tunnels would be contrary to that policy. The Tunnels, a massive public works project costing billions of dollars, would increase reliance on the Delta by taking even more freshwater away from the Delta before the water even gets to the Delta. The concept of the Delta Tunnels is to take water through the Tunnels to those same water interests south of the Delta that are presently taking the water from the southern Delta. At present, at least the water being taken by the southern exporters passes through the Delta and is available for Delta fisheries, and other Delta uses, before it is taken.

Reinforcing the above paragraph, Appendix P, "Demonstrating Consistency with……..Reduced Reliance on the Delta…" does not take the required step of reducing SWP Table A amounts,

which would be a true indicator of compliance with WR P1 and the statuary requirements of SB X7 7.

Falsification of Project Purposes And Project Description

The Plan attempts to set the stage for the Delta Tunnels by asserting that the Delta ecosystem will be protected by development "to optimize diversions in wet years when more water is available and conflicts with the ecosystem less likely, and limit diversions in dry years when conflicts with the ecosystem are more likely." (72).

Studies have shown that there is not enough water available to justify the cost of more storage north or south of the Delta, such as the proposed Sites and Los Banos Grande reservoirs. In addition, evaporation and other losses would take a large portion of any additional storage. Thus the claim that "Delta water that is stored in wet years will be available for water users during dry years" ignores the reality that there is not enough water to justify the cost of more storage.

The Plan fails to make any kind of environmental full disclosure. As set forth above, construction of the Delta Tunnels would allow special water interests south of the Delta to divert massive quantities of freshwater while those interests would not be affected by increasing salinity and decreasing water quality in the Delta. Those interests are presently affected by increasing Delta salinity and worsening Delta water quality because they now divert water from the southern Delta. The true purpose of the Delta Tunnels is to increase reliance on and exports away from the Delta contrary to the Delta Reform Act and contrary to the patently false claims that the Delta Tunnels project is intended to help rather than further damage the Delta.

The description of the project is false. The project, including the Delta Tunnels, is to allow greatly increasing exports of water away from the Delta, upstream, to powerful special water interests south of the Delta that are presently constrained by inability to divert as much water as they would like to divert from the southern Delta because diversions there draw in greater salinity from the Bay.

The claim about optimizing diversions in wet years also is made in the absence of any analysis of the adverse impacts resulting from reducing the flushing of southern San Francisco Bay by Delta outflows (84), and from reducing the flushing of the Delta by large freshwater flows in wet years. Studies have shown that with increasing upstream diversions, "the historical 'flushing' of the Delta with freshwater is no longer occurring. This lack of flushing can also allow waste from urban and agricultural development upstream of and within the Delta to accumulate. Contaminants and toxics have been identified as factors in the decline of the Delta ecosystem. (Baxter, et al., 2007)." (Historical Fresh Water and Salinity Conditions in the Western Sacramento-San Joaquin Delta and Suisun Bay, Water Resources Department, p. 41, Contra Costa Water District, February 2010, Tech. Memo. WR 10-001). Further reduction of flushing during wet years would further damage the Delta.

Because Of Climate Change There Will Be More Dry Years And Fewer Wet Years Making The Stated Objective Of Optimizing Diversions In Wet Years Absurd Given The Facts

The Plan now admits under the heading "Climate Change Complicates Management of California's water" that "Since 1906, California has seen 'dry or critically dry' years one-third of the time. This trend is increasing (California Data Exchange Center 2011)." (80). "Warmer temperatures throughout the state will cause higher evaporation rates, particularly during the hot summer and early fall months, contributing to reduced stream flows, drier soils, reduced groundwater infiltration, higher losses of water from surface reservoirs, increased urban and agricultural demand for irrigation water, and more water needed for ecosystem protection (California Natural Resources Agency 2008)." (80).

Recent studies sponsored by the California Climate Change Center, released in support of the 2012 and 2009 California Climate Change Assessments demonstrate that there will be a significant increase in dry and critically dry years by the latter half of this century, with a corresponding decrease in wet and above normal years. Given the reality of what is actually happening with respect to climate change, the stated objective of developing massive, costly Tunnels "to optimize diversions in wet years when more water is available" (72) is absurd. There are not going to be very many wet years in the future. Moreover, as shown above, climate change will also result in a significant rise in the sea level, worsening the already serious salinity intrusion in the Delta. Climate change, consequently, constitutes at least a double whammy establishing the absurdity of creating massive new diversions upstream from the Delta. As the climate warms up and dries out worsening environmental conditions, the Delta is going to need every last drop of remaining freshwater that it can get.

The Recirculated Draft PEIR states that "there is no reasonably plausible scenario in which a potential significant impact would occur. It is therefore concluded that this impact would be less than significant. Future project-specific analyses may develop adequate information to arrive a different conclusion; however for purposes of this program-level analysis, there is no available information to indicate that another finding is warranted or supported by substantial evidence."

Previous DEIR comments by the EWC noted a plausible scenario in which a potentially significant impact could occur. Those comments were:

> "There are potentially significant statewide, cumulative impacts to the [BDCP] Proposed Project, which could increase exports of water from the Sacramento Valley watershed through the Delta to Southern California. Because water supply ultimately drives growth, one of the biggest impacts would be a shift in growth from the Sacramento Valley watershed, which includes the western Sierras as well as the Sacramento Valley, to the San Joaquin Valley, the Inland Empire, and coastal southern California. Temperature projections from the state's Climate Adaptation strategy show that inland Southern California regions will be some of the hottest areas in the state, with mean peak daily temperatures in July as high as 110 degrees by 2070.[5]

[5] 2009 California Climate Change Adaptation Strategy, California Natural Resources Agency, p i. Available at http://resources.ca.gov/climate_adaptation/docs/Statewide_Adaptation_Strategy.pdf. Incorporated by reference.

> "No analysis has been done of the increased greenhouse gas emissions from shifting development to these regions, or of the increased GHG emissions from an increase in demand for air conditioning. For this and other reasons, we disagree with the conclusion that projects implemented under the Delta plan would not conflict with other plans adopted by the state for the purpose of reducing GHG emissions, as long as the individual projects were evaluated for conformance to statewide and regional policies."

The initial economic analysis performed by David Sundig for BDCP also specifically referenced the assumption that the state should attempt to sustain the explosive mid-2000s level of growth in inland Southern California, and to provide water for lawns in the resulting subdivisions in the desert. The economic analysis did not look at GHG impacts of subsidizing the use of fossil fuels to ship water 400 miles south to water lawns in the desert, and such an analysis would not be done in determining consistency with local GHG emission reduction plans. The state needs to perform a top-level evaluation of whether constructing a large project to meet such needs are consistent with AB 32,[6] or with optimal allocation of increasingly scarce water supplies.

These are plausible scenarios that show a significant impact of the proposed BDCP project on GHG emissions that could be in conflict with existing state policies. For this reason, the conclusion that this impact is less than significant is not correct. This impact must be reclassified to significant for this RDPEIR to be valid.

Failure to Perform Cost Benefit Analysis And Public Trust Balancing

The reason the state has so far failed to perform cost benefit analysis or conduct public trust balancing with respect to the Delta Tunnels project is that the special water interests are in control of the process and know that a candid, honest process would result in the Delta Tunnels not being developed. Two thirds of the water taken away from the Delta would go to mega farming interests including those in Westlands Water District and the Kern County Water Agency which already get subsidized water to grow unsustainable crops on drainage-impaired land. They are growing cotton, almonds and other permanent water-intensive crops on arid-desert land. In addition, "these project rights are junior in priority to the rights held by water users in the Delta and within the Delta watershed." (82). In contrast to those water interests, many urban, residential, commercial, and industrial users are making great strides in terms of water conservation, water recycling, use of water from local and other sources, and use of other mechanisms to reduce reliance on the Delta as well as to save the costs of exporting water from the Delta.

Up to this point, the state has only conducted cost-benefit analysis in terms of whether benefits to the exporters would exceed cost to the exporters. There has been no true state-wide cost-benefit analysis, or cost-benefit analysis considering impacts on the Delta and Delta watershed interests and users because the exporters controlling the process know that the costs of the project would exceed any benefits. The recent indication by the BDCP to conduct a cost-benefit analysis, while seemingly encouraging, is also discouraging due to the apparent biases already being built into the cost-benefit analysis.

[6] PPIC report lawns

Likewise, there has been failure to perform balancing as required by law, under the Public Trust Doctrine. The state "has an affirmative duty to take the public trust into account in the planning and allocation of water resources and to protect public trust uses whenever feasible." (82, citing *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983). The Plan explains that in the cited case the California Supreme Court "unanimously affirmed that the state's navigable lakes and streams are resources that are held in trust for the public and are to be protected for navigation, commerce, fishing, recreational, ecological, and other public values." (82). Because of the absence of information and analysis as discussed above, including absence of information on how much water is actually available for export, and absence of cost-benefit analysis to determine what project or projects might make economic sense, together with the deteriorating water quality, increasing salinity, and declining fish populations in the Delta, the state presently lacks the information necessary to accomplish the required public trust balancing.

The state should not rush to develop the Delta Tunnels to funnel massive quantities of fresh water around the Delta to the special water interests south of the Delta which are junior appropriators that should be last in line in terms of obtaining water from the Delta. The state needs instead to obtain the essential factual information and perform the necessary analyses in order to protect the Delta as required by the Delta Reform Act and the Public Trust Doctrine.

<u>EWC Reduced Exports Plan</u>

The EWC Reduced Exports Plan contains numerous actions to compensate for reduced exports. These actions include alternatives for achieving water supply reliability and Delta ecosystem restoration. This alternative relies on strict enforcement of water quality laws, adoption of the SWRCB and Fish and Game flow recommendations, shoring up existing levees, ceasing the unreasonable use of water to irrigate toxic soils that return pollution to the estuary, while also providing for exports and water supply along with water conservation measures to ensure existing supplies are extended to meet demand. This is a reasonable alternative that has not been adequately considered in the Delta Plan or the Delta Plan DPEIR.

Unless the state is willing to write off vibrant Delta waterways, fish and wildlife, the state needs a system that allows it to plan effectively for the water needs of both Californians and California ecosystems. The dangerously well-trod path of "use, overuse, environmental decline, then hasty and unplanned reaction" can begin to be broken by granting waterways the right to be at the planning table from the beginning, at a level truly "co-equal" to human water uses, rather than at the end when the damage has been done.

If the state is actually committed to "co-equal" goals, and if water rights are to be the legal measure by which water is allocated for human uses of the state, then waterways also must be granted equivalent water rights that reflect the flows and water quality necessary to ensure waterway and larger ecosystem health, with a margin of safety. That would be the process by which the Delta Plan would fill responsibilities under the Public Trust Doctrine, and environmental and species protection laws. The Plan must include an analysis of this "water rights for waterways" option to ensure compliance with law and the Public Trust Doctrine.

Comments on  Policies And Recommendations

The single most significant and negative policy change is that the Revised Project WR P1 changes the definition of "Reduced Reliance on the Delta".  The prior definition included a policy calling for a reduction of net water used from the Delta watershed.  The new definition omits references to water use in the Delta watershed and only applies to water "exported from, transferred through or used in the Delta."  The ramification of this change in definition is that it appears that all diversions upstream of the Delta would not be required to comply with the proposed prohibitions on Delta exports, or the legally mandated requirement to reduce reliance on the Delta, because they are not using water exported from, transferred through or used in the Delta.

Policy WR P1 (108) limits exports from the Delta depending on three apparent findings. The third finding requires for limitation, that "the export, transfer, or use would have a significant adverse environmental impact in the Delta." These Policies turn proper planning upside down. Existing exports have already a significant adverse environmental impact in the Delta. The Delta needs more freshwater, not less freshwater. Instead of attempting to turn burdens upside down, placing burdens on those seeking to preserve the Delta, a limit needs to be set on exports, with no water being exported above the set limits. Whether or not water suppliers have instituted conservation or improved regional self-reliance, exports must be limited to amounts consistent with restoring the Delta.

Recommendation WR R3 calls on the SWRCB to evaluate applications that would result in new or increased uses of water from the Delta for consistency with the constitutional principle of reasonable and beneficial use.  First, such applications are not ready for consideration unless and until informational needs including actual water availability discussed above, have been met. Second, such applications must also be evaluated in light of the Public Trust Doctrine for protection of the Delta.

The Plan in its policy sections calls for improving, meaning increasing, conveyance. (111-112). As shown above, there is no existing informational or analytical basis supporting development of the Delta Tunnels. There is no basis for the Plan's assumption that "The completion of the BDCP.... are needed but may take many years to implement". (111-112). It would take many years to complete the Delta Tunnels, but they are not needed. Moreover, as shown above, with increasing salinity resulting from climate change and diversions, and increasing dry years and fewer wet years as result of climate change, there would be no need or viable use for the Delta Tunnels by the time they would be constructed. As pointed out above, findings in the Plan such as "The State does not have sufficient information to assess the current reliability of its water supplies or to meaningfully measure progress toward achievement of more reliable water supplies for California" (113) demonstrates that nothing other than pre-decisional bias supports the conclusory statements that the BDCP should be completed (112, WR R12), and that larger amounts of water should be exported from the Delta during wet years requiring expansion of conveyance capacity, meaning the Delta Tunnels. (111).

We incorporate by reference the 18 Recommendations made in the EWC Comments on the Fifth Staff Draft of the Delta Plan (September 30, 2011) dealing with water supply subjects such as:

water efficiency and conservation; flow criteria; overturning the provisions of the Monterey Agreement; protections for Northern California groundwater supplies; cautions on conjunctive use; and protections for the Trinity River and Native American Tribes.

CHAPTER 4 – RESTORE THE DELTA ECOSYSTEM

In general, this chapter makes many valid and accurate points regarding the relationship between natural flows and species viability in the Delta. EWC commends the DSC on its astute observations of the need for drastic measures to help restore natural habitat for native species and to ensure flows which resemble historic flows to the extent possible. At times the Plan fails, however, to link these sound conclusions with the policies proposed in this Plan. There are critical gaps in linking these scientific conclusions to Delta Plan and especially to the BDCP. The following are specific examples of such inadequacies:

- Page 129. This section states that to restore the Delta ecosystem, Californians will need to place greater reliance on reservoirs, and the development of alternatives supplies, and modern water diversions that protect fish while providing reliable water supplies. "For these reasons, restoring the Delta ecosystem will require new investment in water facilities and alternative supplies, not just regulation of water project operations or restoration of habitats for fish and wildlife."

    - Did the authors consider the need for enhanced water conservation as part of this suite of measures needed for future Delta uses? Development of strong conservation measures and well as incentives for local water supply development should be added to this section.
    - Also, to what extent has the construction of additional reservoirs been evaluated in this Plan and its PEIR? If the policies in this Plan are encouraging such additional water storage, the impacts must be evaluated.

- Page 132. The Plan states, "Nearly all the rivers historically flowing to the Delta were dammed, creating Shasta, Folsom, Millerton, and Oroville lakes and other impoundments described in Chapter 3. These dams, together with levees constructed to prevent flooding, blocked access to spawning areas and other habitats critical to salmon, splittail, and other fish. . . ."

    - EWC appreciates the acknowledgment of this reality and hopes that DSC will consider that many of the policies proposed in the Delta Plan and in the BDCP will alter operations of these existing dams and also encourage the development of new dams that will further hinder the success of these fish species. Dams are not a mere problem of the past, and should be evaluated as an indirect effect of this Plan.

- Page 134. The Plan states, "[R]estoration seeks to return areas to a close approximation of their natural potential, including reestablishing natural habitat and ecosystem functions, as feasible, within the context of the current configuration of the Delta, the

current biological communities, and the permanent modifications to Delta land forms and hydrology.

  - EWC agrees with this conclusion and hopes for additional clarification. How can construction of facilities that divert a large portion of the flow from the Sacramento River achieve a close approximation of the natural potential of the Delta? Also, what does DSC consider to a "permanent modification of the Delta forms"? How have you determined that some impacts to the Delta are irreversible?

- Page 135. Under the sidebar Delta Ecological Principles, Principle 2, the Plan states that a management implication of the fact that the Delta ecosystem is part of a large ecosystem means the following: "Management of the Delta cannot occur independently of structures and events upstream and in the ocean, in regional and state economies, or in the wider governance context."

  - EWC agrees with this principle and management implication. How are structures and events upstream addressed in this Delta Plan and in its PEIR? Have you considered how the changes to reservoir operations could affect the policies contained herein? Have you considered how the corresponding agencies with jurisdiction over these structure who have various ESA, CEQA, NEPA obligations of their own will interplay with the policies herein and the policies encapsulated by the BDCP?

- Page 137. In the sidebar, Bay Delta Conservation Plan Delta Ecosystem Restoration" the Plan notes that if approved the BDCP will be a Natural Community Conservation Plan pursuant to Chapter 10 of the Fish and Game Code, a Habitat Conservation Plan under the federal ESA, and will be incorporated in the California Water Code. The Plan then states, "The Council has a potential appellate role regarding the inclusion of the BDCP in the Delta Plan."

  - Please explain this last sentence. In what sense does the Council play an "appellate role" regarding the inclusion of the BDCP in the Delta Plan?

- Page 139. The Plan notes "Flows sometimes have not reflected the Fish and Game Code Section 5937 requirement that dam owners should allow sufficient water at all times to pass through a fishway. . . ."

  - EWC agrees with this conclusion and asks that you add a statement regarding the current compliance with the other legal constraints on Delta operations. For example, it would be helpful to add a small section on SWRCB decision (D-1641) and the Delta Smelt Consolidated cases ("Wanger decision"). Please add a section on how the Public Trust Doctrine obligates the DSC to restore and protect the Delta for the use of the citizenry. As required by Water Code §85203: "[t]he longstanding constitutional principle of reasonable use and the public trust

doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta."

  - Please explain how the DSC plans to address these currently degraded, and often illegal conditions, in the baseline analysis. Degraded conditions are often subsumed in the baseline, thereby minimizing the appearance of a project's impacts and artificially inflating its benefits. To do so, however, would greatly compromise the DSC's mission of restoring the Delta to a close approximation of natural potential. Please explain how the DSC plans to address this issue.

- Page 141. Regarding timing of the updated Delta Flow Objectives, the SWRCB is not scheduled to complete these objectives until 2014. (ER P1) This deadline cannot be reconciled with the Delta Plan's goal of being complete by early 2013 or with the BDCP goal of being complete by the end of 2013. Neither the Delta Plan nor BDCP should be approved without valid flow criteria approved by SWRCB, and the DSC cannot enforce SWRCB's deadline. This chapter should analyze alternative scenarios for ensuring flows "to protect the Delta ecosystem and the reliability of the Delta's water supplies" (as called for on page 141).

- Page 142. "Greater reverse flows caused by pumping in the south Delta increase the numbers of fish entrained."

  - Please provide a more detailed description of how this Plan will ameliorate this impact. Is it imperative that South Delta pumps cease operating altogether in order to address this impact?

- Page 144. There are important discrepancies between "Land elevations in the Delta and Suisun Marsh" as shown in Figure 4 of Appendix H and "Habitat Types Based on Elevation" as shown in Figure 4-5 of the Delta Plan final draft. The map in Appendix H distinguishes among five different "subtidal" elevations, a term that usually refers to zones that are submerged most of the time. By contrast, Figure 4-5 combines these five areas in a single area identified as "subtidal". The Plan then fails to refer to subtidal in the text at all, instead referring (on page 144) to "subsided" land. The implication is that this entire region of the Delta is uniformly subsided, if not actually submerged, a serious misrepresentation of the situation.

- Page 144. Figure 4-5, "Habitat Types Based on Elevation," should reflect a range of subsided areas as shown in Figure 4, "Land elevations in the Delta and Suisun Marsh," on page 32 of Appendix H. "Subtidal" refers to zones below low tide that are submerged all or most of the time. This is not an accurate description of any subsided area in the Delta. Therefore, the designation of any area of the Delta as "subtidal" or "intertidal" is misleading to any reader not personally familiar with the Delta region. The use of either term should be accompanied by a description of what distance below sea level it refers to, as in Figure 4 in Appendix H.

- Page 144, lines 13-14 should read as follows: As described in Chapter 5, some of the Delta cannot be restored to its original ecological functions because of the degree of its

subsidence. Figure 4-5 shows degrees of subsidence and refers to zones as "intertidal" or "subtidal" based on their distance below sea level, although in the case of the Delta, these subsided lands are not submerged.

- Page 144. The Plan states that "the most promising [habitat] restoration opportunities are found in the less-subsided flood basins, river corridors, and brackish tidal marshes on the Delta's perimeter" (lines 20-21). The Plan then identifies the Lower San Joaquin floodplain between Stockton and Manteca as a promising area for habitat restoration (page 147 and map on page 159). This is prime farmland currently under cultivation, not sufficiently subsided to escape scrutiny as a "promising" area for habitat restoration, including tidal marsh. Appendix H notes (page 30) that "Existing non-urban land uses, infrastructure, and other constraints of these locations [restoration opportunities] were not considered for this map" [Figure 4]. The Plan does not contain sufficient detail to indicate that these constraints have been considered in the final draft of the Delta Plan or that habitat benefits there have been balanced against the costs of loss of that land for agriculture or as part of the local tax base.

- Page 144. Another area identified for habitat restoration is the Cache Slough Complex (see map on page 159). This project has complicated hydraulic impacts on groundwater and septic systems on Ryer Island, which have already been affected by testing for the project. In addition, the proposal to expand the Yolo Bypass will impact transportation on Ryer Island when the Bypass is flooded, affecting recreation consumers, farm equipment, and emergency vehicles from Rio Vista.

- Page 155, Policy 1. "Development, implementation, and enforcement of new and updated flow objectives for the Delta and high priority tributaries are key to the achievement of the coequal goals. . . By June 2, 2014, adopt and implement updated flow objectives for the Delta that are necessary to achieve the coequal goal."

    - Please explain how this Plan affects the speed or effectiveness of SWRCB's policies and approvals. Also, please explain how the 2014 deadline can be reconciled with the 2013 deadlines for the Delta Plan and the BDCP.
    - Are these policies intended to completely offset the problem statement? What are the metrics of success?
    - This policy and many of those that follow defer specifics until a time that DFG can provide input. Without these specifics, the policies are rendered largely useless. For example, under ER P3, it is unclear what is meant by "Protect Opportunities to Restore Habitat." A discussion of protection of "opportunities" to restore habitat is a vague to say the least. We need specific performance measures, and specifics on how each effort will directly result in survival and recovery of endangered and threatened species.

- Page 157, ER R1. The Plan lists restoration projects that should be prioritized by the BDCP and implemented.

- Please describe the specific species that would be recovered by each project and how this assures that each endangered species in the region will benefit. There is only one mention of a specific species, the Chinook Salmon, next to the Yolo Bypass project.

- Page 158, ER R2. "Complete and Implement Delta Conservancy Strategic Plan." The Plan states that as part of its Strategic Plan, it will "Develop and adopt processes for ownership and long-term operations and management of land in the Delta and Suisun Marsh acquired for conservation or restoration". . . "Develop, in conjunction with the Wildlife Conservation Board, the Department of Water Resources, Department of Fish and Game and Bay Delta Conservation Plan implementers and other State and local agencies, a plan and protocol for acquiring the land necessary to achieve ecosystem restoration consistent with the coequal goals and the Ecosystem Restoration Program Conservation Strategy."

    - How are these two bullets different? Does the DSC plan to acquire land separate and apart from land acquisition efforts made in concert with the other agencies mentioned? Has there been any analysis of land availability or cost? Does the State plan to use condemnation procedures? How will land acquisition specifically improve the survival and recovery rates for each endangered species in the region?

- Page 165, under Output Performance Measures. "The SWRCB implements Delta flow objectives by June 2, 2014."

    - If the SWRCB adopts weak flow objectives, then the restoration policies of the Delta Reform Act would potentially be rejected or compromised. It would be more helpful if the Plan provided more guidance as to what would constitute favorable flow objectives in terms of ecosystem restoration.

- Page 165, under Outcome Performance Measures. "Progress toward restoring in-Delta flows to more natural functional flow patterns to support a healthy estuary. Metrics: results from hydrological monitoring and hydrodynamic modeling. (ER P1)."

    - Please provide a more robust description of what hydrological monitoring and hydrodynamic modeling would pass muster under the Delta Plan. Again, this Plan could benefit from specific metrics of success and performance measures.

- Page 179. The DPC's *Economic Sustainability Plan* (ESP, Figure C) estimates an annual crop loss of up to $20m resulting from the BDCP proposal for habitat restoration in the San Joaquin River Floodplain. Yolo Bypass Fishery Enhancements involve losses of $7m to $10m annually, dependent on flood duration. Restoring 65,000 acres of tidal marsh would involve $18m to $77m in crop losses, with the highest losses in the South Delta. Selection of agricultural land in the Lower San Joaquin River Floodplain and other areas of the Delta for conversion to any habitat not compatible with agriculture is

inconsistent with the core strategy to "Maintain Delta agriculture as a primary land use, a food source, a key economic sector, and a way of life." (lines 27-28)

Comments on Policies and Recommendations

- Earlier comments by the EWC recommended adding "establish an enforceable mechanism to ensure water exports from the Delta and water transfers are consistent with the flow standards established by SWRCB recommendations and, until they are issued, the current Biological Opinions for Delta Smelt and Salmon/steelhead should apply." (ER P1) This addition has not been made.
- Earlier comments by EWC recommended incorporating into the Delta Plan consideration of water use and diversions north of the Delta. This has not been done. The recently released report by Fish Agencies on how to operate conveyance under BDCP to benefit combined species (CS5) makes it clear that species recovery can only be achieved with reoperation of upstream storage. The Delta Plan states (page 135, Principle 2) that "Management of the Delta cannot occur independently of structures and events upstream and in the ocean, in regional and state economies, or in the wider governance context." In addition to acknowledging this, the Plan should consider how changes to reservoir operations could affect the policies in the Plan.
- We still see no recommendations in this chapter that are specific to the recovery of endangered fish species or the CVPIA requirement for doubling of salmon populations. Measurable goals for species recovery need to be included as part of ecosystem recovery actions. (ER R1)
- If the intent of ER R5 and ER R6 (Page 162) is to reduce populations of Striped Bass in order to reduce predation by introduced fish, we refer you to the ruling by the California Fish and Game Commission which defeated proposed fishing regulations which would have increased the take of Striped Bass in order to accomplish this goal. Predation by Striped Bass on salmon was shown not to be significant and the long term tradition of having Striped Bass available in the Delta for recreational fishing was deemed more important. The Delta Stewardship Council should be guided by this policy decision of the Fish and Game Commission.

General Comments on the Bay Delta Conservation Plan

The BDCP has not defined "greater water supply reliability," but it is well know that the applicants and their contractors are working to remove more water from the Delta System. Additionally, incorporation of the BDCP into the Delta Plan is anticipated if DFG, FWS, and NMFS certify it as meeting their biological standards. We ask the DSC to provide guidance to the BDCP on what is required to meet the legislative mandates of Delta ecosystem recovery, improved water quality in the system for fish and wildlife, as well as the Delta human needs, and the need to factor in the State Water Board's Delta and tributary flow requirements coming in the future.

The definition of "water supply reliability" is important and can impact economic sustainability of the Delta. The Delta Plan acknowledges multiple strategies or objectives referenced in the Delta Reform Act that must be addressed to improve water supply reliability. A more specific

definition of water reliability allows for economic analysis or at least the presentation of factors relevant to economic sustainability. For example, if water reliability is defined as export levels prior to 1970, reduced by the effects of climate change and needs within the watershed, this might represent the average level of exports which could realistically be more reliable. This level had less of an impact on fish populations than the impact of exports from 1970 to 2010. The 1970 level of export is conceivably sustainable with through Delta conveyance and this would have a different impact on economic sustainability than that of expanded exports. Expanded exports utilizing isolated facilities, which has been proposed in the BDCP, would have a footprint that takes farmland out of protection, off local tax rolls, and could alter channel flows threatening the salinity of the Delta. These conflicts with the Plan's proposed performance measure in Chapter 8, which states that progress toward improving economic sustainability of Delta land uses and protection of the Delta's agricultural values should be measured by "total agricultural acreage and gross revenue in the Delta (that) will be maintained or increased in the future." A more precise definition of "water supply reliability" could avoid these kinds of conflicts.

With reference to the Delta Flow Criteria adopted by the State Water Board, the Council should determine specific maximum quantities of water that can be exported under varying water type years and hydrological conditions in order to provide measurable criteria for the goal of "water supply reliability." We cannot manage what is not measured.

CHAPTER 5 – DELTA AS PLACE

This Delta Plan includes some performance measures, but they are still lacking in quantitative specificity, as noted in the EWC comments on an earlier draft. There is still no clear recognition that water quality and improved water flow through the Delta are an integral part of the Delta as Place. The plan mentions the importance of including Delta residents and Delta communities in planning for the Delta's future but is vague regarding mechanisms for ensuring this inclusion. Every process mentioned operates from the top down, in keeping with the colonizing of the Delta by the state and federal water projects.

The Plan acknowledges the primacy of agriculture as an economic driver but still hedges on the difficult choices necessary not just to protect the Delta but to increase its general prosperity, as required by the Swamp and Overflow Land Act, and to ensure an adequate water supply for the Delta, as required by the California Water Code.

- Page 179. Selection of agricultural land in the Lower San Joaquin River floodplain and other areas of the Delta for conversion to habitat, especially tidal marsh is not consistent with the value of: "Maintain(ing) Delta agriculture as a primary land use, a food source, a key economic sector, and a way of life" as stated in lines 27-28.

- Page 187. "Impacts on agriculture, such as decreasing revenues, are also likely if Delta water supplies increase in salinity . . . and water demand increases." (lines 13-14) Although no one can predict the actual consequences of climate change, the Delta Plan should be more than just descriptive of those possible consequences. The Plan should take a more affirmative position to protect Delta agriculture, guard against increased salinity, and manage water demand. In fact, that is part of the DSC's mandate.

- Page 192, (lines 21-22). This sentence suggests that water from the Delta is now and will continue to be abundant and of high quality. That depends upon how the Delta Plan is implemented. It would be more accurate to say: "Water-dependent industries like those in Collinsville, Rio Vista, Pittsburg, and Antioch require abundant and high-quality water from the Delta."

- Page 179, (lines 27-28). Selection of agricultural land in the Lower San Joaquin River Floodplain and other areas of the Delta for conversion to any habitat not compatible with agriculture is inconsistent with the core strategy to "Maintain Delta agriculture as a primary land use, a food source, a key economic sector, and a way of life."

Comments on Policies and Recommendations

- We concur that conflicts with local land use must be avoided or reduced when siting water management or flood facilities or restoring habitats (DP P2). The phrase "when feasible" on line 25 is meaningless in this context and should be deleted. One example of a conflict with existing uses is the Cache Slough Complex and expanding the toe of the Yolo Bypass, both of which will adversely impact groundwater and septic systems of landowners on Ryer Island and any resort or other property with waterfront on Steamboat Slough.

- The Problem Statement for "Maintain Delta Agriculture" (page 207) lists threats to Delta agriculture, including changing water quality, but the Plan includes no recommendation regarding safeguarding Delta water quality. This section should reference Policy ER P1, Update Delta Flow Objectives (Chapter 4). In protecting the Delta, the DSC has an obligation to advocate for adequate flows for the Delta itself as it considers the effect of SWRCB flow objectives on the achievement of the coequal goals.

- For Sustain a Vital Delta Economy, please clarify what entity or entities should support the ports of Stockton and West Sacramento (DP R18).

- Under Issues for Future Evaluation and Coordination, please clarify what entity or entities should compensate for losses to the Delta economy from habitat restoration, water conveyance, or revised levee investment priorities (page 211, lines 11-15). Compensation would NOT be adequately addressed by, for example, branding and marketing the Delta or encouraging agritourism.

CHAPTER 6 – IMPROVE WATER QUALITY TO PROTECT HUMAN HEALTH AND THE ENVIRONMENT WATER QUALITY

SBX7 1, the Sacramento-San Joaquin Delta Reform Act of 2009, set state policy to "improve water quality to protect human health and the environment," a goal declared to be "inherent in the coequal goals for management of the Delta." (Water Code § 85020(e).) The Act further identified the foundation of state water management policy as the "longstanding constitutional principle of reasonable use and the public trust doctrine," mandates "particularly important and

applicable to the Delta." (Water Code § 85023.) To advance implementation of its goals and mandates, the Act states that the Delta Plan "shall" include specific measures to meet the "needs for reasonable and beneficial use of water" and "improv[e] water quality," with required "performance measurements that will enable the Council to track progress." (Water Code § 85302(d).) The Act further requires that the Delta Plan "shall…[d]escribe the methods by which the council shall measure progress toward achieving the coequal goals" using these performance measurements and other means. (Water Code § 85308(d).)

Once again, we incorporate by reference all prior submitted comments by EWC on earlier iterations of draft Delta Plans. These comments found, as we again do now, that the current draft Delta Plan continues to fail to meet the Act's legal mandates and the needs of the Delta.

In prior comments, EWC provided analysis and evidence to demonstrate the necessity for swift, decisive action to address water quality and flow issues in the Delta, described the limitations of the then-draft Delta Plans to meet the mandates of the Act, and offered clear alternative actions that would meet Delta challenges. Once again, the Delta Plan fails to ensure implementation of existing water quality laws, take action to evolve the law where needed, or provide assurances that future covered actions will be required to meet necessary flow requirements, water quality constraints, public trust values, or reasonable use mandates.

The additions and changes to the water quality recommendations, commented on previously, fail to rise to the level of meaningful action to advance healthy waterways as mandated by the Act. For example, WQ R1 merely restates existing state and federal water quality law, which already requires protection of beneficial uses. WQ R2 simply corrects an oversight in requiring covered actions to identify significant impacts to water quality, which is essential to meeting the Act's mandate to improve water quality. WQ R3 requires nothing, stating only that the Water Board "should" evaluate and "if appropriate, propose" additional water quality protections where discharges could adversely impact beneficial uses. This entirely voluntary recommendation fails to even apply to the whole Delta, most of which is *already* impaired by pollutant discharges that adversely impact beneficial uses. Rather, WQ R3 applies only to "priority" habitat restoration areas (again, not even all restoration areas), raising the question of how the Delta Plan views the state's responsibility to address discharges that impair now the beneficial uses in the Delta as a whole.

The continued refusal to include policies in the Delta Plan to address water quality concerns further evidences the Plan's emasculation of the Act's mandate to actually *improve* water quality, rather than continue the status quo. Despite the serious and broadly recognized impacts that deteriorating water quality poses to the viability of the Bay-Delta, Chapter 6 calls for no new, meaningful actions to address this threat. Rather, Chapter 6 simply reiterates existing efforts and already-planned initiatives that will do little to reverse the ongoing slide. At a minimum, R1, R2, and R3 should all be incorporated into the Delta Plan as regulatory Policies rather than Recommendations.

Further, the Plan is essentially silent on how it will meet the Act's requirement to build programs – including water quality programs – on a foundation of reasonable use of water and protection of the public trust. Consistent with this flawed approach, the Delta Plan fails to meet the Act's

mandates to meaningfully "[d]escribe the methods by which the council shall measure progress toward achieving the coequal goals" or provide necessary "performance measurements that will enable the Council to track progress" towards water quality. The Plan cannot measure the progress of actions to which it has not fully committed and/or that go beyond the status quo of continued degradation.

Specific quantifiable timetables, performance measures, endpoints, and consequences for failure are the necessary drivers of any meaningful plan that realistically expects to improve water quality. For example, monitoring results need to trigger automatic actions prior to violation of standards to prevent irreversible ecosystem damage and degradation of beneficial uses. Given the extensive information on pollution impacts in the Delta, a credible Delta Plan must provide the yardsticks to evaluate progress (including mass loading reductions), end points, and citizen enforcement tools to hold all polluted dischargers to account and provide consequences for failure. The Plan should include such specific accountability measures.

We urge the Council to review EWC's proposed alternative, which addresses such continued failures of the Plan to comply with the Act. EWC proposed alternative includes strict enforcement of water quality laws, adoption of the State Water Board and Fish and Game flow recommendations, shoring up of existing levees, ceasing the unreasonable use of water (including but not limited to irrigation of toxic soils that return pollution to the Delta), and providing water supply solutions that ensure existing supplies are extended to meet necessary demand. This reasonable alternative has not been fully considered in the current Delta Plan or in the Delta Plan DEIR, and must be part of the dialogue both to meet the Act's mandates and to ensure the health of the Delta, and all of us who depend on it.

In reviewing the EWC's already-submitted comments, we call on the Council to incorporate our specific recommendations for enhancing the development, implementation, and enforcement of water laws to protect the well-being of the Delta. These recommendations include, but are not limited to, the following:

- The weak Central Valley Irrigated Lands Regulatory Program has failed, and will continue to fail as currently written, to protect the health of the Bay-Delta Estuary. The inadequacies of the existing Central Valley Irrigated Lands Regulatory Program have been exhaustively documented and referenced in EWC prior comments. The Delta Plan must specifically address these inadequacies in controlling contaminated agricultural runoff, and ensure that the changes outlined in EWC comments are implemented and enforced.
- Chapter 6 briefly references permits issued pursuant to the National Pollutant Discharge Elimination System (NPDES) and "encourages" the timely development and enforcement of the Program, under the unquestioned – and mistaken – assumption that this program is working. We urge the Council to include in the Delta Plan specific oversight strategies that will ensure the Central Valley Regional Board fully complies with NPDES permitting regulations, including anti-degradation requirements and allowance for mass loading and additive and synergistic interactions.
- State and federal anti-degradation requirements are routinely ignored and, consequently, the Central Valley Regional Board has little idea of the total mass loading of pollutants in

a watershed. For example, the Regional Board issued a permit granting Linda County Water Agency all of the remaining assimilative capacity for salt in the Feather River. Subsequently, Yuba City was granted the *same* assimilative capacity in their permit renewal. The California Court of Appeals recently (since the release of the current Draft Plan) found the Central Valley Regional Board's dairy waste discharge program violated anti-degradation requirements, with potential implications for many of the Regional Board's existing water quality programs. (*Asociacion de Gente Unida por el Agua et al. v. Central Valley Regional Water Quality Control Board (CA App. Ct., 3rd Dist., Nov. 6, 2012.)*) We strongly urge the Council to include in the Delta Plan a process for ensuring that the Regional Board fully complies with anti-degradation requirements in its permitting and all other applicable pollutant control activities.

- The Council should further require in the Delta Plan that the Central Valley Regional Board prepare pollutant-specific mass load estimates for the Delta and tributary watersheds, with documented estimates of reductions in mass loadings required to be provided to the Council on a yearly basis, applicable to discharges controlled under both state and federal law. The Plan should specifically require the Regional Board to increase controls in NPDES permits, WDRs, and waivers if meaningful mass loading reductions are not being achieved.
- The Council should do more than simply recommend that the Water Boards conduct special studies of selected emerging contaminants. It should make the funding and implementation of aggressive suite of such studies a condition of approval of covered actions, and should ensure that the State and Regional Water Boards actually implement controls on emerging contaminants as needed to protect the health of the Delta.
- It is not enough to simply measure progress in protecting water quality by the number of programs initiated or TMDLs written. The Plan must include specific measures that the Council will take in the event that relevant state agencies cannot annually demonstrate actual progress in implementation of these programs and associated reductions in contamination. Demonstration must include interim yardsticks with specific quantifiable load reductions. This should apply to all sources of impairing pollutants, including municipal and industrial stormwater/wastewater, and irrigated agriculture return flows.
- Additionally with respect to TMDLs, we strongly recommend that the Plan specifically call on the State and Regional Water Boards to immediately (beginning with the 2012 Clean Water Act Section 303(d) impaired water bodies list) start identifying water bodies that are threatened or impaired due to low flows, rather than just chemical or biological pollution. Healthy flows are essential to ensuring good water quality, and numerous other states already identify waterways impaired by altered flows. Flows must be incorporated into relevant Total Maximum Daily Loads to restore the water bodies to health. (*See* http://www.waterboards.ca.gov/board_info/agendas/2012/aug/linda_sheehan.pdf).
- Finally, waterways must be granted water rights to the instream flows and water quality needed to ensure waterway and system health. The Final Delta Plan and its PEIR should include an analysis and recommendation of this "water rights for waterways" alternative to ensure the Final PEIR's compliance with CEQA, and the Plan's compliance with the Act.

The Delta Plan is characterized as a statewide plan with at least a 50-year horizon. Given its decades-long time-frame and the deep, systemic challenges facing the state in turning around the trend of Delta health, the Delta Plan must take action to address the root causes of these challenges through progressive recommendations that mandate action and accountability. It also must assess all reasonable alternatives that will advance environmental sustainability over this lengthy projected period, including water rights for waterways. The current Delta Plan fails to consider a reasonable range of alternatives in light of either this time frame or the major water challenges before the state. We urge the Council to review the EWC's prior submitted comments and construct a Delta Plan that will lead the state in effective governance of its relationship with the Delta ecosystem throughout the 21st century.

CHAPTER 7 – REDUCE RISKS IN THE DELTA

We find the Final Draft Delta Plan to be less acceptable than previous versions of the Delta Plan when it comes to reducing risks. Because of reduced Delta levee standards, the Revised Project will result in even less levee investment than the Proposed Project of approximately a year ago. The Revised Project does not meet the requirements or intent of Water Code Section 85305(a) to "reduce risks to people, property and state interests in the Delta"… "by promoting"…."strategic levee investments." For example, despite a recommendation from the Delta Protection Commission and a policy from CALFED, the Delta Plan still doesn't include a policy or recommendation for Delta levees to meet the PL 84-99 levee standard.

The description of risks does not include both seismic and ground subsidence threats to the California Aqueduct and Delta-Mendota Canal. For instance, the January 2009 Newsletter of the International Water Resources Association[7] stated the following regarding B.F. Sisk Dam (San Luis Dam):

*"The dam and reservoir are located in an area of high potential for severe earthquake forces from identified active faults, primarily the Ortigalita Fault that crosses the reservoir. It is also near two major seismic faults: 45 kilometers (28 miles) from the San Andreas Rift Fault, and kilometers (23 miles) from the Calaveras-Hayward Fault. Reclamation has identified several conditions that require action to reduce risks. Studies and deformation analysis conducted indicated that during a major earthquake, crest settlement greater than freeboard, or cracking associated with embankment deformation, could occur and lead to dam failure. Failure of the dam could inundate hundreds of square kilometers including the town of Santa Nella and numerous farms and houses along the San Joaquin River, including some areas of Stockton."*

Geologic Fault Maps by the California Geologic Survey[8] clearly show greater fault risks to San Luis Reservoir/Dam and the California Aqueduct than risks in the Delta.

Catastrophic failure of San Luis Dam would inundate the California Aqueduct, Clifton Court Forebay, the Delta Mendota Canal and other water conveyance facilities. The San Joaquin

[7] "IRWA Update" Newsletter of the International Water Resources Association, January 2009, Volume 22, Issue 1, page 15. http://www.iwra.org/doc/iwraupdatejanuary2009.pdf
[8] http://www.conservation.ca.gov/cgs/cgs_history/Pages/2010_faultmap.aspx

County Dam Emergency Plan[9] inundation timeline for San Luis Dam failure estimates that it will reach Clifton Court Forebay in 50 hours and Brannan and Staten Islands in 100 hours. It describes the area affected as "San Joaquin River Areas, West Stockton and Delta Islands" with an estimated 165,000 people threatened.

A map of the entire San Luis Dam inundation area[10] shows an inundation zone throughout most of the southern and central Delta.

Land subsidence along the Delta Mendota Canal (DMC) is well-documented. The intertie between the DMC and the California Aqueduct was necessary because subsidence from groundwater overdraft reduced the capacity of the DMC. Groundwater overdraft continues rampantly along and near the route of the DMC and California Aqueduct. However, the Delta Plan does not disclose this risk in the "Subsidence" section nor are there any policies or recommendations to regulate the risk of aqueduct failure or reduced capacity from subsidence as a result of ongoing groundwater overdraft.

How can it be that the risk section of the Delta Plan completely omits the risks of San Luis Dam failure and aqueduct subsidence to central and southern California's Delta water supply reliability? We can only conclude that the focus on earthquake risk to Delta levees is part of the scare tactics to promote the Peripheral Tunnels. However, it is not supported by existing scientific information.

We recommend that the Reduce Risk Chapter of the Delta Plan be rewritten to include the relative risks to reliable water supplies from hazards such as San Luis Dam failure and aqueduct subsidence. We also recommend policies and recommendations to reduce those risks such as mandatory groundwater regulation for areas adjacent to important water conveyance facilities such as the DMC and California Aqueduct.

Overall the Reduce Risk chapter of the Delta Plan to be woefully inadequate. This is exemplified by the Plan's omission to evaluate all risks to Delta water supplies, failure to adopt a minimum PL 84-99 levee standard and a reduced emphasis on levee protection for many Delta lands. One can conclude that the Delta Plan is not intended to evaluate and reduce Delta risks, but instead is intended to promote the Peripheral Tunnels project by using unsubstantiated scare tactics about Delta levee failure from earthquakes. The real risks to south of Delta water supplies are not disclosed or addressed in any way whatsoever because they are inconvenient truths that might distract from the push to build the Twin Tunnels.

## CHAPTER 8 – FUNDING PRINCIPLES TO SUPPORT THE CO-EQUAL GOALS

This chapter is wholly lacking in any substantial recommendations or policies to determine whether plans for substantial public investments in new Delta conveyance and ecosystem restoration are worth it. As mentioned previously in EWC comments, a Public Trust balancing

[9] Page 21 http://www.sjgov.org/oes/getplan/Dam_Emergency_PLAN.pdf

[10] http://www.cityofripon.org/DisasterManagement/Figures/Ripon%20Inundation%20Fig%208A%20A%20size.pdf

must occur along with an independent cost/benefit analysis and a water availability analysis. It is foolhardy to move ahead with multi-billion dollar investments in new infrastructure without knowing how much water is available pay for the project and whether or not the costs are less than the benefits.

We repeat the EWC recommendation that you promote three critical actions that have been missing from all versions of the Delta Plan and BDCP as follows:

- A Water Availability Analysis for the Central Valley and Trinity River in order to determine the extent of water rights claims from Delta tributary watersheds compared to the actual availability of water from those rivers for export south of the Delta. Recently the California Water Impact Network (C-WIN) presented testimony[11] to the State Water Resources Control Board (SWRCB) showing that the San Joaquin and Sacramento Rivers have water rights claims exceeding actual supplies by a factor of over five. C-WIN also presented information indicating that the Central Valley Project and State Water Project are junior water right contractors with little available water during drought or as a result of reallocation to implement the SWRCB's 2010 Bay-Delta Outflow Decision. The Delta Plan and BDCP must include a Water Availability Analysis in order to be useful planning documents. The Delta Stewardship Council should include such criteria for BDCP as a condition of approval.

- A Cost/Benefit Analysis is a standard way of doing business for any major construction project. CEQA guidelines suggest that it may be accomplished if warranted. If a Cost/Benefit analysis will be prepared for a proposal, NEPA provides guidelines to accomplish it. (See 40 CFR Sec. 1502.23) Given the history of significant cost overruns for major construction projects, a cost/benefit analysis only makes sense. The State of California and the federal government would be negligent to not include a legitimate cost/benefit analysis for BDCP and the Peripheral Tunnels.

- The Public Trust Doctrine is an affirmation of the duty of the state to protect the people's common heritage in streams, lakes, marshlands, and tidelands. The application of the Public Trust Doctrine requires an economic and sociological analysis of the public trust values of competing alternatives, as was directed by the State Water Board in the Mono Lake Case. Its applicability to alternatives for the Delta, where species recovery and ecosystem restoration are being pitted against further water exports, is exactly the kind of situation suited to a Public Trust balancing, which should be required by the Delta Plan. As required by Water Code §85203: "[t]he longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta." The Council, therefore, clearly has trustee responsibilities in balancing the public trust, but you have punted on that responsibility to date. Planning and allocation of limited and oversubscribed resources implies analysis and balancing of competing demands. Inexplicably, we

[11] http://www.c-win.org/webfm_send/265

find no effort whatsoever to balance the public trust obligations and resolve competing demands in previous drafts of the Delta Plan. The Delta Stewardship Council must include a Public Trust balancing for both the Delta Plan and BDCP as a condition of approval of BDCP and other projects submitted for the Delta Plan.

In addition to the above deficiencies in the Delta Plan, there is no mention of the concept of "price elasticity" and how it will affect the ability of participating water agencies to pay their share of costs. It is blindly assumed that ratepayers can continue to assimilate increased rates and that water consumption and agency revenues will remain the same. We have seen this not to be the case in many instances where water rates have risen and agency revenues have declined due to decreased consumption. The Montecito Water District is a classic example of price elasticity.[12] Montecito is spending 39% of its budget on State Water Project water, yet is using none of it in 2012-2013 because demand has reduced to the point that SWP water is no longer needed because of price increases. Local sources are meeting all demands.

A cost/benefit and Public Trust analysis for the Delta Plan and BDCP should take into consideration price elasticity in determining whether the project beneficiaries can actually afford the project. Many local water agencies are already experiencing budgetary difficulties due to continual cost increases that result in rising water rates and declines in revenue. The costs of personnel, materials, and energy are continually rising and causing rate increases. It is questionable whether many water agencies can afford the cost of the Peripheral Tunnels project.

Finally, any economic analysis such as cost/benefit and Public Trust analyses must include the subsidies provided to agricultural interests, including but limited to Central Valley Project agricultural service contractors. For instance, the Environmental Working Group has identified significant public subsidies to San Luis Unit CVP contractors in the form of water, crop and energy subsidies.[13] The Bureau of Reclamation also estimated a net loss of $5-15 million/year[14] to provide drainage to the San Luis Unit and recommends that Congress authorize additional subsidies for the San Luis Unit. We are confident that the costs of providing water to south of Delta subsidized agricultural interests would not be worth the benefit and would, in some cases, increase subsidies.

---

[12] See "Why We Cannot Afford the Peripheral Canal/Tunnel: The Santa Barbara County Experience." California Water Impact Network, July 2012 http://www.c-win.org/webfm_send/248

[13] See reports by the Environmental Working Group on Central Valley agricultural subsidies "Throwing Good Money at Bad Land", "Power Drain" and "Soaking Uncle Sam" at http://ewg.org/featured/10

[14] See National Economic Development Act Analysis of Alternatives, Appendix N from Final Environmental Impact Statement for San Luis Feature Re-Evaluation, Table N-10. http://www.c-win.org/webfm_send/275

# EWC SECTION 2 –RECIRCULATED DPEIR COMMENTS

In addition to the comments below, we incorporate by reference the following comments, as they are consistent with these EWC comments, by:

- CSPA, C-WIN, AquAlliance Comments on Recirculated Draft PEIR, dated January 14, 2013
- Friends of the River Comments on Recirculated Draft PEIR, dated January 11 and January 14, 2013
- Previous Delta Plan and Delta Plan DEIR Comments submitted on June 10, 2012 and February 2, 2012

Due to the importance of Chapter 25 and the importance of the EWC comments for this chapter, we have presented it first, although it is numerically out of sequence with the remaining chapter numbers.

## CHAPTER 25 – COMPARISON OF ALTERNATIVES

### INTRODUCTION

Like Prince Hamlet's "To Be or Not To Be" choice between two opposite alternatives, the two basic alternatives here, "To Dig or Not To Dig," are also opposites. The Delta Plan, the previous DEIR, the Policies and Recommendations, the RDPEIR, and the Rulemaking Package call for new conveyance. What that means is the construction and operation of two tunnels that would have the capacity to divert 15,000 cubic feet per second (cfs) out of the Sacramento River upstream from the Delta between Freeport and Walnut Grove. The water taken would not flow through the Delta. Instead, the water taken would be transported directly through the tunnels to the South Delta State Water Project (SWP) and Central Valley Project (CVP) pumping plants. That would be done even though all responsible public agencies and organizations have found that exports from the Delta must be ***reduced***, not ***increased***, because of the environmental crisis in the Delta that has resulted from ever increasing diversions and exports of fresh water. That is the "To Dig" alternative which is called the Revised Project by the RDPEIR. The "Not To Dig" alternative is presented by Alternative 2 submitted by the Environmental Water Caucus (EWC). Alternative 2 calls for no new conveyance, with continued use of the conveyance facilities and diversions at the South Delta. That allows freshwater to flow through the Delta, maintaining some balance given ever increasing water pollution from many sources and also salinity intrusion from the Bay. Alternative 2 would serve to help preserve what is left of the fisheries, agricultural uses, commercial uses, and recreational uses in the Delta. Alternative 2 would also reduce exports from the Delta serving to commence the restoration of the Delta whereas by massively increasing the capacity for exports the Revised Project would hasten the accelerating environmental destruction of the Delta. Just as Hamlet's choice of his "To Be" alternative led to tragedy, so too would the choice of the "To Dig" Revised Project alternative lead to tragedy. The Revised Project would likely turn the Delta into a polluted and salty stagnant pond and further accelerate the already rampant decline of numerous fish species.

This epic "To Dig or Not To Dig" choice and the environmental consequences of both alternatives should be the focus of the Draft EIR and RDPEIR. Instead, the silence on this epic choice is deafening. Unlike Hamlet, there is not even a soliloquy to analyze the issues and consequences of this fateful choice.

The Draft EIR and RDPEIR are so deficient, indeed, to the point of being environmental frauds, that Orwellian falsification along the lines of "peace is war, war is peace" is perpetrated. The Delta Plan ("DP" at page 72, all number references are to page numbers unless otherwise indicated) and Regulations (5005(a) admit that the Delta Reform Act has established a new policy in Water Code section 85021 "of ***reducing reliance on the Delta*** in meeting California's future water supply needs." The Council is supposed to be preparing a Plan pursuant to the Delta Reform Act. The RDPEIR actually claims the Revised Project will lead to "reduced reliance on Delta exports." (RDPEIR ES-2). Calling for the creation of massive new capacity to divert more water before it even gets to the Delta is, in the real world outside the water exporters' dream world, ***increasing not reducing reliance on the Delta*** in meeting California's future water supply needs.

Because of the magnitude of the epic choice made by the Delta Plan to increase conveyance as well as the enormous volume of the planning and environmental documents thrust upon the public, for the public to attempt to digest in a 45 day review period these comments are lengthy and pertain to other chapters of the RDEIR as well as Chapter 25's comparison of alternatives. For example, the failure of the EIR preparers to develop an accurate, stable, and finite project description does make it impossible to make an environmentally informed comparison of the alternatives. However, the failure to develop the required accurate project description is also a separate and independent violation of CEQA. The same is true of other issues raised such as the failure to address the environmental impacts of diverting so much water upstream from the Delta. This portion of the comments is lengthy because the "To Dig or Not To Dig" choice is the starting point that will guide all further decisions. Nothing of value has been supplied by the RDPEIR or Draft EIR to aid the decision-makers or the public in understanding ***why*** the Delta Plan process has chosen improved, meaning new, conveyance, and ***what*** and ***how severe*** the environmental effects of creating ***and operating*** that new conveyance will be.

A brief summary of some of the comments to follow include:

- The DSC (including what has been set forth in the Delta Plan, Draft EIR, RDPEIR and Regulations) has failed to provide the accurate, stable, and finite description of the true project in violation of CEQA.
- The DSC has failed to provide an adequate description of the environmental setting of the Delta environmental crisis.
- The DSC has failed to focus the Draft EIR and RDPEIR on the significant and admitted adverse environmental effects of the Revised Project including degradation of water quality in the Delta and adverse impacts on fish species that are already endangered.
- The DSC has failed to provide any real environmental information or analysis pertaining to the critical issues of how and why and to what extent the Revised Project will result in

the significant adverse environmental consequences for Delta water quality and endangered fish species.

- The DSC has failed to provide a consistent and coherent description of the future demand for new water and the amount of surface water that is potentially available to meet that demand.
- The DSC has failed to analyze the environmental impacts of utilizing the particular sources of long-term water supply for the proposed new diversions.
- The DSC has failed to address the environmental effects resulting from creating new points of diversion, upstream from the Delta, for 15,000 cfs of water.
- The DSC has failed to provide decision-makers and the public with sufficient facts to evaluate the pros and cons of supplying the amount of water that the new conveyance would take.
- The DSC has failed to provide any of the quantification that is necessary to comply with CEQA in analyzing water supply issues.
- The DSC has failed to provide decision-makers and the public with sufficient facts and analysis to make a meaningful comparison between the alternatives.
- The DSC has failed to disclose and analyze the environmental effects, including reducing necessary flushing of the Delta and Bay by optimizing meaning increasing diversions in wet years.
- The DSC has failed to assess the "double whammy" on the Delta by creating massive new diversions upstream coupled with climate change induced 55 inch rise in sea level further exacerbating the salinity intrusion in the Delta.
- The DSC has unlawfully attempted to defer and/or "tier" to future environmental documents and processes that have not been completed such as the BDCP process and the State Water Resources Control Board duties yet to be performed under the public trust doctrine to determine water availability, cost benefit analysis, flows, and standards to protect the Delta.
- By calling for development of new conveyance without assessing the true project, meaning the BDCP Delta Tunnels, The DSC has unlawfully segmented the project which is a *per se* violation of CEQA.
- The DSC has failed to defer calling for new conveyance until adequate CEQA analysis, cost benefit analysis, and public trust doctrine analysis have been performed to attempt to ensure protection of the Delta.
- The DSC has failed to address in the RDPEIR the fact that the recent and only cost benefit analysis of new conveyance to date has demonstrated that costs will would exceed benefits by 2.5 times and that new conveyance therefore makes no economic or financial sense.
- The DSC has failed to address in the RDPEIR the fact that the exporters in control of the BDCP process are attempting to shift all possible direct and indirect costs of mitigating the environmental disaster that would be caused by new conveyance to the taxpayers.

- The DSC has failed to address in the RDPEIR the fact that the exporters are trying to impose 75% of the new conveyance project costs that would be paid by exporters on the ratepayers of the Metropolitan Water District of Southern California, even though those ratepayers would only receive 25% of the water resulting from the new conveyance.
- The DSC has called for developing massive new conveyance capacity diverting freshwater upstream from the Delta in violation of the co-coequal goals calling for reduced exports under which you are developing the Delta Plan.
- The DSC has misrepresented Alternative 2 calling for no new conveyance and reduced exports of water from the Delta and, arbitrarily without supporting substantial evidence, reached the desired conclusion that Alternative 2 is "slightly environmentally inferior" to the Revised Project.
- The DSC has failed to develop a reasonable alternative that would not call for new conveyance and that would call for reducing exports from the Delta even if the reductions would be less than the reductions that would take place under Alternative 2.
- The DSC has produced a Draft EIR and RDPEIR so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment have been precluded.
- You must prepare and circulate a new Draft PEIR so that the public and decision-makers are afforded the information and analysis that they must have pursuant to CEQA in order to make a reasoned and meaningful comparison of alternatives.

Each of the above failures as well as other failures discussed below, constitute a violation of CEQA. The concluding words of the California Supreme Court in its landmark CEQA water supply decision in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412 should be instructive to you in complying with CEQA by withdrawing the Delta Plan, Regulations, Draft EIR and RDPEIR in so far as they call for new conveyance. "The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. The EIR's function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account. For the EIR to serve these goals, it must present information in such a manner that the foreseeable impacts of pursuing the project can actually be understood and weighed, and the public must be given an adequate opportunity to comment on that presentation before the decision to go forward is made. On the important issues of long-term water supply and impacts on migratory fish, the County's actions in the present case fell short of these standards." 40 Cal.4th 412, 449-450.

The Delta Plan Draft EIR and RDPEIR have not presented "information in such a manner that the foreseeable impacts of pursuing the project [new conveyance] can actually be understood and weighed." Therefore, you must withdraw the Delta Plan, Regulations, RDPEIR and Draft EIR in so far as they call for new conveyance and embark upon the full disclosure, environmental analysis, and development of a reasonable range of alternatives required by CEQA.

THE DELTA PLAN, REGULATIONS, DRAFT EIR AND RDPEIR FAIL TO ACCURATELY DESCRIBE THE TRUE PROJECT

It is essential to understand what the project actually is in order to be able to assess alternatives. "[A]n accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199. "A curtailed, enigmatic or unstable project description draws a red herring across the path of public input." 71 Cal.App.3d at 197-198. "[O]nly through an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives." *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1454.

All that the Draft Plan reveals is that the BDCP process is considering a range of options for conveying water through or around the Delta. (Delta Plan 97). Those options are, first, "Through-Delta Conveyance: Continue to divert water in the southern Delta at existing or modified intakes/diversions for SWP and CVP operations." Second, "Isolated Conveyance: Divert water from the Sacramento River at new intakes/diversions and convey the water to the existing SWP and CVP pumping plants through a pipeline/tunnel." Third, "Dual Conveyance: Combine through-Delta conveyance and isolated conveyance to allow operational flexibility." (DP 97).
The water resources (Section 3) portion of the RDPEIR reveals that the Revised Project would encourage certain types of actions including "Conveyance facilities (pipelines and pumping plants)." (RDPEIR 3-11). The Policies and Recommendations portion of Section 3 of the Draft Plan on water resources in a short, conclusory statement, says that "The timing and pattern of Delta diversions must be shifted so that more water can be exported during wet years, when there is significantly more water available for diversion, and less is taken in dry years, when the water is needed for in-Delta water quality and ecosystem protection. The ability to export larger amounts of water from the Delta during wet years will require improved conveyance to increase operational flexibility as well as more storage both North and South of the Delta so that this water can be captured, stored, and ultimately delivered to meet the water needs of both people and fish. With these improvements, Delta operations and, importantly, Delta export deliveries will become more predictable." (DP 111). The Proposed Regulations restate these policies in nearly identical language. (Regs 2, § 5001 (e) (1) (A) and (C).

The Plan asserts that the Delta ecosystem will be protected by development "to optimize diversions in wet years when more water is available and conflicts with the ecosystem less likely, and limit diversions in dry years when conflicts with the ecosystem are more likely." (DP 72).

The Plan recommends "Complete Bay Delta Conservation Plan", reciting that "The relevant federal, State, and local agencies should complete the Bay Delta Conservation Plan, consistent with the provisions of the Delta Reform Act, and receive required incidental take permits by December 31, 2014." (Draft Plan 112). The Plan claims that "The state's interconnected network of surface and groundwater storage is insufficient in volume, conveyance capacity, and flexibility to achieve the coequal goals. The completion of the BDCP and the implementation of

major new surface and groundwater storage facilities are needed but may take many years to implement." (DP 111-112).

All that the RDPEIR discloses in this regard is that the Revised Project "seeks to improve water supply reliability by encouraging various actions which, if taken, could lead to construction and/or operation of projects that could provide a more reliable water supply." (RDEIR 2-5). The pertinent description is "Surface water projects (water intakes, treatment and conveyance facilities, reservoirs, hydroelectric facilities)." (RDEIR 2-5). Similarly, the Executive Summary of the RDPEIR describes the project in pertinent part as "improved management of Delta water supplies using increased storage and improved Delta conveyance." (RDPEIR ES-2).

The project description is not only inaccurate; it actually descends to the level of hiding the ball by way of intentional omission of material facts. Deputy Director Jerry Meral of the Department of Water Resources described the BDCP project at the June, 2012 public meeting on the BDCP. On July 25, 2012, the Governor announced at his special press conference that he was going to get this $14 billion Delta Tunnels project done. The project would be the dual conveyance option and is actually referred to as the Delta Tunnels. The peripheral canal, rejected in a referendum by 63% to 37% of the voters in California, has risen again. The true conveyance project would consist of two 35 mile-long tunnels taking water from new diversions near Clarksburg on the Sacramento River upstream from the Delta to divert water around the Delta to pumping plants south of the Delta. Each tunnel would be 33 feet in diameter. The tunnels would have the capacity to transport 15,000 cubic feet per second (cfs) of water. That is an enormous quantity in comparison to the Sacramento River, equivalent to the average entire summer water flow of the Sacramento River in that area. Though the BDCP has reduced the number of proposed intakes from 5 to 3, claiming a reduction in capacity to 9000 cfs of water, it would be easy to add two more intakes in the future to achieve the 15,000 cfs capacity of the tunnels.

The RDEIR conceals rather than discloses the Red Flag warnings from federal fishery agencies issued during the first half of 2012 about the proposed BDCP project. Also concealed rather than disclosed is the conclusion by the National Academy of Sciences that the BDCP process had put the cart before the horse by pre-determining that new conveyance should be constructed and operated without first determining whether that was the best alternative.

The RDPEIR also evades discussion of the BDCP project by simply incorporating by reference sections in earlier volumes of the Draft EIR as opposed to disclosing that key information in the RDPEIR. (RDPEIR 23-1, ¶ ¶ 23.2, 23.3). Consequently, it is necessary at this time to discuss Section 23 which described the relationship of the Delta Plan to the BDCP in the incorporated document, the Draft Delta Plan Program Environmental Impact Report ("Draft EIR").

According to the Council, as required by the Delta Reform Act (Water Code § 85320 et seq.) the BDCP if completed, and approved by DFG, ***must*** be included in the Delta Plan. (Draft EIR 23-1). Moreover, according to the RDPEIR "This EIR ***assumes*** that the Delta Plan will be successful and ***will lead to other agencies taking the encouraged actions***." (RDEIR ES-2) (emphasis added). In other words, the BDCP is not just some speculative contingency. According to the Council, inclusion of the BDCP in the Delta Plan upon completion and approval, ***is mandatory***. The Draft EIR declares that "It is anticipated that the BDCP will include

actions to. . . modify SWP and CVP Delta water conveyance facilities and operations in the Delta. . . ." (Draft EIR 23-2).

The Draft EIR describes the Delta conveyance concepts as construction of "New intakes/diversions constructed along the Sacramento River between Freeport and Walnut Grove with an isolated conveyance to the existing South Delta SWP and CVP pumping plants." (Draft EIR 23-18). The project would also include "a new intermediate forebay with a pumping plant would be constructed in the northern Delta to provide temporary storage prior to continued conveyance to the new forebay near Clifton Court Forebay." (Draft EIR 23-19). The conveyance concepts considered capacities up to 15,000 cfs per second. (Draft EIR 23-20). Further description is given in the Draft EIR as "15,000 cfs  Five 3000-cfs intakes/diversions from Freeport to Courtland; all intakes/diversions upstream of Sutter and Steamboat Sloughs". (Draft EIR 23-22).  In other words, the project would grab the freshwater far enough upstream to keep it from flowing into the Delta through the sloughs, as well as through the Sacramento River.

The RDPEIR preparers are hiding the ball as opposed to making environmental full disclosure by simply incorporating by reference back to the Draft EIR. At the BDCP public meeting in June 2012, as set forth above, the DWR Deputy Director stated that the BDCP is going forward, and that the project will be the Delta Tunnels with a capacity of 15,000 cfs (though initially only three intakes of 9000 cfs would be constructed). The preparers of the RDPEIR have attempted to evade their responsibilities to set forth an accurate, stable, and finite description of the actual project and assess the environmental impacts of the true project, by not addressing the fact that both the Governor and the head of the BDCP process have announced what the project will be, and then addressing that project.

The preparers of the EIR also seek to minimize the dominating status of the BDCP by referring to it as a "cumulative project". (Draft EIR 23-28). The BDCP is ***the*** project, not a ***cumulative*** project.

The Executive Summary of the RDPEIR asserts that the Delta Plan "is a suite of regulatory policies that would have the force of law and nonbinding recommendations, all aimed at achieving the coequal goals. The policies and recommendations do not approve or mandate the construction of any specific physical projects.  Instead, they work to encourage other public agencies to take certain actions or they provide standards with which other agencies' actions must be consistent." (RDEIR ES-2). Under "reliable water supply" the Executive Summary asserts that "The Revised Project would improve management of California's water resources through increased reliance on local and regional water supplies, reduced reliance on Delta exports, and improve management of Delta water supplies using increased storage and improved Delta conveyance." (RDEIR ES-2). This is mere conclusory argument by the EIR preparers attempting to have their cake and eat it. They call for new conveyance but do not do the work required by CEQA to justify that decision in an EIR.

Far from reducing "reliance on Delta exports," the true project would create massive new diversion facilities with the capacity to divert enormous quantities of fresh water upstream from the Delta and consequently, ***increase***, rather than ***reduce***, reliance on Delta exports.

CEQA requires that "an agency must use its best efforts to find out and disclose all that it reasonably can" about the project being considered and its environmental impacts." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova,* 40 Cal.4th 412, 428 (2007); 14 Cal. Code Regs. 15144. "CEQA requires full environmental disclosure." *Communities for a Better Environment v. City of Richmond,* 184 Cal.App.4th 70, 88 (2010).

A primary goal of CEQA is "transparency in environmental decision-making." *Save Tara v. City of West Hollywood,* 45 Cal.4th 116, 136 (2008).

A person reviewing the Delta Plan and its EIR is not told that the actual project consists of the enormous new upstream diversion capacity accomplished by the Delta Tunnels capable of taking enormous quantities of freshwater away from the Delta by diverting it in tunnels around the Delta.

"While it might be argued that not building a portion of the project is the ultimate mitigation, it must be borne in mind that the EIR must address the project and assumes the project will be built.'" *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 444. (This decision will be cited throughout in short form as *Vineyard Area Citizens.*) A new Draft EIR must be prepared and recirculated for public review that addresses the BDCP project and assumes that the diversion tunnels with a capacity of 15,000 cfs will be developed and will be operated at capacity. Guideline § 15088.5(a) includes as events requiring an agency to recirculate an EIR changes in the project. After the Draft EIR but before issuance of the RDEIR the landscape has changed as both the Governor and the DWR Deputy Director have announced that the Delta Tunnels are the BDCP project and that they will carry out that project. Consequently, the RDPEIR is not relevant as it does not pertain to or evaluate the true project.

To proceed in a manner required by law, the Council must either unequivocally drop the plan to develop new conveyance at this time, or withdraw the Draft Plan, Regulations, and RDPEIR in order to prepare and issue new documents for public review containing an accurate, stable, and finite description of the true project. The true project is the BDCP Delta Tunnels with enormous diversion capacity.

## THE RDPEIR FAILS TO ADDRESS THE ENVIRONMENTAL BASELINE THAT THE DELTA IS ALREADY IN CRISIS BECAUSE OF THE DIVERSIONS AND EXPORTS OF FRESH WATER AND THAT THE CRISIS WILL BE WORSENED BY CLIMATE CHANGE AND WOULD BE WORSENED EVEN MORE BY INCREASING DIVERSIONS UPSTREAM FROM THE DELTA

The Plan concedes that "the long-term impacts of these diversions, on the Delta and its watershed, in combination with many other factors, are causing native fisheries to decline. In recent years the populations of salmon and several other fish species have reached their lowest numbers in recorded history and many of California's salmon runs are now listed as endangered by the State or federal government." (DP 71). The simple fact is that the Delta is in grave danger of being turned into a salty, stagnant pond lethal to fish, and gravely impaired as an agricultural and recreational resource. The Delta requires more freshwater, not less freshwater. Exports must be reduced, not increased. Two recent state agency reports, establish that an increase in Delta outflow is necessary to protect and restore the estuary's aquatic ecosystem.

There are already significant diversions of water from the Sacramento River and its tributaries before the water gets to the Delta. As to the other major river extending to the Delta, most of the water from the San Joaquin is diverted upstream. The Plan indicates that about 60% of inflows into the Delta are already diverted. (DP 87). The true environmental baseline is that the quantities of water already diverted before reaching the Delta are so great, that the Delta is in crisis such that further massive diversions should not be permitted. The Delta is not a clean slate. The water situation-shortage-in the Delta is far worse than it was decades ago.

The Draft EIR in section 23 (incorporated by reference in the RDEIR as explained above) contains some admissions in this regard. "Water resources and fish and wildlife resources throughout the Delta watershed and Delta have been impacted by... water resource projects that modified the flow patterns, changed water quality, removed native vegetation, entrained fish in water supply intakes/diversions, and enhanced conditions in which non-native invasive species and predators thrive. Reliance on water from the Delta watershed and Delta has been increasing over the past 40 years as municipalities and agricultural areas have grown and the groundwater basins that these users had previously relied upon have become depleted. These factors, and many others, individually and in combination, contributed to the decline of fish and wildlife resources in California over the past 150 years. (Draft EIR 23-6).

There is more. "Following implementation of the CVPIA and CALFED programs in 2000, several Delta aquatic organisms listed as endangered or threatened under the ESA, CESA, or both continue to decline, including Delta smelt and certain salmonids. In response to declining populations of threatened and endangered aquatic species, the USFWS and NMFS issued several biological opinions to modify operations of the SWP and CVP facilities, which resulted in reductions in export flows. . . The DWR studies also described potential adverse effects to levee integrity, water quality, and water supplies that would be caused by up to 55 inches of sea level rise, which could occur by 2100." (Draft EIR 23-6).

The California legislature in acting to require a Delta Plan has declared that "The Sacramento-San Joaquin Delta watershed and California's water infrastructure are in crisis and existing Delta policies are not sustainable. Water Code § 85001(a). Policies enacted by the Legislature include "Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem." Water Code § 85020.

Populations of Sacramento River and Delta native pelagic and salmonid fisheries and associated food webs are collapsing. This is not a surprise given that the estuary has been already deprived of half of its freshwater flow. The collapse of the fisheries is well-documented. After a long evidentiary hearing in 1978, the Board determined that "full mitigation of project impacts on all fishery species now would require the virtual shutting down of the project export pumps." (SWRCB 1978, D- 1485, p. 13). After another extensive evidentiary hearing in 1988, the Board stated "a safe level of exports is not known." (SWRCB 1988, Draft 1988 Water Quality Control Plan for Salinity, 7.3.2.5, pp. 7-32). By 1991, adult fall-run Sacramento River salmon escapement had been halved from its numbers in the late 1960s; spring-run Sacramento River salmon abundance was about 0.5% of historic runs; the San Joaquin River fall-run salmon escapement dropped from 70,000 in 1985 to 430 in 1991; adult striped bass declined from about

3 million in the early 1960s to about 590,000 in 1990; abundance of shrimp and rotifers declined between 67% and 90% in the 1970s and 1980s; white catfish populations declined severely since the mid-1970s and overall fish abundance in the Suisun Marsh has been reduced by 90% since 1980. (SWRCB, 1992, Draft Water Right Decision 16 30, p. 29).

The fisheries collapse has accelerated over the past decade. The Department of Fish and Game's (DFG) Fall Mid-water Trawl indices for 2009 revealed that young striped bass, Delta smelt, split tail and threadfin shad are at record historical lows and that longfin smelt and American shad are the second and third lowest levels in history. (DFG 2010, Fall Midwater Trawl, p. 3).

The greatest factors in causing the decline of these fisheries are the huge reductions in Delta inflow and outflow that have already taken place. The SWRCB conducted a hearing and then issued a final Report on August 3, 2010. (SWRCB 2010, Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem, August 3, 2010). The Report found that "the combined effects of water exports and upstream diversions reduced average annual net outflow from the Delta from unimpaired conditions by 33% and 48% during the 1948-1968 and 1986-2005 periods, respectively and that Sacramento River inflows over the last 18 to 22 years have been about 50% on average between April through June compared to unimpaired conditions. (Report, 3.3.2, p. 28). The Report determined that "recent Delta flows are insufficient to support native Delta fishes for today's habitats." The Report's criteria for flows include, "75% of unimpaired Delta outflow from January through June and 75% of unimpaired Sacramento River inflow from November through June." (Report, 1.2, p. 28).

Given the previous comments regarding many of these critical issues and changes, and the ignoring or downplaying in the Delta Plan and the RDPEIR of the extent of the crisis in the Delta, it appears that the Council has been engaged in a classic case of sweeping problems under the rug rather than performing the environmental full disclosure required by CEQA.

For the Delta Plan to meet legislatively mandated goals, it is necessary that the Plan meet existing water quality laws including those pertaining to salt, selenium, temperature, flow, and contaminants harmful to public health and ecosystem health. EWC in five prior submissions and comments to previous drafts provided comments and evidence regarding the importance of meeting water quality standards, flow requirements, and temperature standards for the health of the ecosystem. The Plan as it presently exists fails to enforce existing water quality laws, and fails to ensure that any future covered actions will be required to meet flow requirements, water quality constraints, and protect public trust values. The Delta is in crisis. The Plan and RDPEIR by omission and weakness are in denial.

<u>Salinity Intrusion is Bad Now and will Worsen with Climate Change and New Massive Upstream Diversions</u>

Recent research demonstrates that as bad as the straits the Delta is in now in terms of more salinity and pollution, and less freshwater, things are going to get a lot worse in the future. The Plan concedes that one of the problems water exports are causing is that the Delta experiences salinity intrusion. "A portion of the water flowing into the Delta is specifically allocated to Delta outflow to help repel salinity intrusion from the San Francisco Bay and to maintain low salinity

water near the western edge of the Delta. This means that water that might otherwise be used for exports must be released from upstream reservoirs to help control salinity (NRC 2012)." (DP 91).

A different portion of the Plan admits that as a result of climate change, "Sea level rise, as much as 55 inches by 2100 (OPC 2011), will result in high salinity levels in the Delta interior, which will impair water quality for agricultural and municipal uses and change habitat for fish species. Maintaining freshwater conditions in the Delta could require unanticipated releases of water from storage, which will reduce available water supplies for fish." (DP 80).

The Plan and RDPEIR fail to connect even the most obvious dots. Given that salinity intrusion is already a huge problem now for the Delta, and will greatly worsen as a result of changing conditions including climate change, adding new massive diversions of freshwater upstream from the Delta to export to regions south of the Delta would have the effect of further exacerbating the already bad and worsening problem of salinity intrusion in the Delta.

The plan to optimize diversions in wet years also is made in the absence of any analysis of the adverse impacts resulting from reducing the flushing of San Francisco Bay by Delta outflows (84), and from reducing the flushing of the Delta by large freshwater flows in wet years. Studies have shown that with increasing upstream diversions, "the historical flushing of the Delta with freshwater is no longer occurring. This lack of flushing can also allow waste from urban and agricultural development upstream of and within the Delta to accumulate. Contaminants and toxics have been identified as factors in the decline of the Delta ecosystem. (Baxter, et al. 2007)." (Historical Fresh Water and Salinity Conditions in the Western Sacramento-San Joaquin Delta and Suisun Bay, Water Resources Department, p. 41, Contra Costa Water District, February 2010, Tech. Mem. WR 10-001). Further reduction of flushing during wet years would further damage the Delta.

The Plan now admits under the heading "Climate Change Complicates Management of California's water" that "Since 1906, California has seen 'dry or critically dry' years one-third of the time. This trend is increasing (California Data Exchange Center 2011)." (DP 80). "Warmer temperatures throughout the state will cause higher evaporation rates, particularly during the hot summer and early fall months, contributing to reduced stream flows, drier soils, reduced groundwater infiltration, higher losses of water from surface reservoirs, increased urban and agricultural demand for irrigation water, and more water needed for ecosystem protection (California Natural Resources Agency 2008)." (DP 80).

Recent studies sponsored by the California Climate Change Center, released in support of the 2012 and 2009 California Climate Change Assessments demonstrate that there will be a significant increase in dry and critically dry years by the latter half of this century, with a corresponding decrease in wet and above normal years. Given the reality of what is actually happening with respect to climate change, the stated objective of developing massive, costly Tunnels "to optimize diversions in wet years when more water is available" (DP 72) makes no sense. There are not going to be very many wet years in the future. Moreover, as shown above, climate change will also result in a significant rise in the sea level, worsening the already serious salinity intrusion in the Delta. Climate change plus increasing diversions constitutes at least a

double whammy establishing the falsity of claiming that creating massive new diversions upstream from the Delta would somehow help the Delta. As the climate warms up and dries out worsening environmental conditions, the Delta is going to need every last drop of remaining freshwater that it can get.

In any event, the Delta Plan, Draft EIR, and RDEIR must be withdrawn, and the Council must prepare an adequate EIR dealing with the reality of the Delta already not getting enough freshwater while facing a surge of more salinity from the Bay due to rising sea levels plus loss of freshwater due to increasing diversions.

## THERE IS NO LAWFUL BASIS UNDER CEQA OR THE PUBLIC TRUST DOCTRINE TO ADOPT IMPROVING – MEANING NEW EXPANDED – CONVEYANCE AT THIS TIME GIVEN THE ABSENCE OF INFORMATION AND ANALYISIS REQUIRED BY CEQA AND THE PUBLIC TRUST DOCTRINE

### Absence of Environmental Information and Analysis

Again, CEQA requires that a public agency "must use its best efforts to find out and disclose all that it reasonably can" about the project being considered and its environmental impacts. Here, virtually no efforts have been undertaken to find out and disclose anything at all about the new conveyance and its impacts. The Council has failed to define the project as the BDCP 35 mile-long Delta Tunnels with the capacity to take 15,000 cfs of freshwater away from the Delta, before it would even reach the Delta, and evaluate the environmental consequences of doing so. And this would be done to the Delta even though the Delta is already in crisis as shown above.

The Plan itself contains its own admissions that a useful and valid Plan cannot be prepared at this time. As the Plan says in a heading, "informed decision making requires information." (DP 105). Yet the Plan concedes that "California does not have a clear understanding of its water demands, the amount of water available to meet those demands, how water is being managed, and how that management can be improved to achieve the coequal goals." (DP 112-113). Further, "One of the greatest challenges to California water management is a lack of consistent, comprehensive, and accurate estimates of actual water use by the type of use (agricultural, urban, and environmental) and by hydrologic region." (DP 105, 112). The Plan lists numerous science and information needs including understanding of the hydrologic systems, patterns of water use, and effects of climate change as being "essential to improving the management of California's water supplies to achieve the coequal goals." (DP 114).

There is more. The Plan concedes that "The amount of water used in California's stream systems is not fully known because water users under pre-1914 and riparian water rights have not been required, until recently, to submit annual reports accounting for their diversions." (DP 83). After mentioning that "the SWRCB has the authority to determine when a river or stream has been 'over-appropriated'" the Plan goes on to state that "Understanding and reconciling the human demands for water to the supply available, while providing enough water to ensure desired and legally protected environmental and water quality goals, is a difficult process. This process is nonetheless essential to achievement of the coequal goals." (DP 83).

The Plan admits that the original SWP and CVP contracts assumed greater water export quantities than consistently can be delivered. (DP 91). In fact, a recent workshop conducted by the State Water Board (SWRCB or Board) has shown that legitimate claims to water flowing into the Bay Delta exceed the available water supply by more than five times in most years. In the absence of what the Plan concedes to be essential information, the Plan at this point in time is a classic case of putting the cart before the horse. It is necessary to first conduct detailed analysis and study of how much water is actually available for export from the Delta, a valid cost-benefit analysis to determine what project or projects might make economic sense, and environmental analysis and public trust analysis in order to protect the Delta. "[B]ecause the State Water Project had never been fully constructed there is a huge gap between what is promised and what can be delivered, rendering State Water Project entitlements nothing more than hopes, expectations, water futures or as the parties refer to them, paper water. . .'" *Vineyard Area Citizens*, 40 Cal.4th 412, 430 (internal quotation marks omitted).

<u>The RDPEIR Admits the Revised Project would have Significant Adverse Environmental Impacts</u>

The RDEIR admits that the Revised Project would have significant and unavoidable environmental impacts including violation of water quality standards or substantial degrading of water quality and substantial adverse effects on special status species and on fish or wildlife species habitat and movement. (RDEIR 24-10). In *Vineyard Area Citizens*, the Supreme Court reminded that pursuant to CEQA Guideline § 15065(a)(1) "potential substantial impact on endangered, rare or threatened species is *per se* significant." 40 Cal.4th 412, 449.

The RDEIR concedes that: "Operations of new water supply facilities whether in-stream, such as storage reservoirs, or located near a waterway, such as pipelines, tunnels, canals, pumping plants, water intakes or diversions, may create long-term changes in local mixtures of source waters within water bodies." (RDEIR, water resources, 3-3). The RDEIR concedes that: "Operation of facilities within the rivers and streams upstream of the Delta or in the Delta could result in changes in salinity in the Delta by reducing Delta freshwater inflows during some periods of the year." (RDEIR 3-13). Similar admissions of the obvious are made in the Draft EIR (incorporated by reference in the RDEIR as set forth above). (Draft EIR 23-29, 30). The RDEIR gives no clue as to what those changes and their environmental impacts might be or how severe they might be. There is a difference between filling a water bottle from the river and diverting 15,000 cfs from the river. The RDEIR fails to explain why the Delta Plan Revised Project should "result in or encourage" development of new conveyance, when the need for new conveyance has not been demonstrated and the environmental consequences of providing it have not been identified let alone analyzed. Instead of thinking first, then acting, the Delta Plan and RDEIR constitute acting first, and then maybe, someday, someone will think. That turns CEQA upside down.

<u>The Draft EIR Admits that Necessary Environmental Analysis has Not Been Done</u>

And then there is Draft EIR section 23 (incorporated by reference in the RDPEIR as explained above). The earlier Draft admits that "Conveyance options are currently being studied in detail by the agencies and interested parties preparing the BDCP and the related EIR/EIS. A public draft of the BDCP and the related EIR/EIS is planned for release by mid-2012)." (Draft EIR 23-

3). In fact, the public draft of the BDCP and the related EIR/EIS has ***not*** been released. The DWR Deputy Director stated at the BDCP public meeting of December 18, 2012 that the public draft of the BDCP and the related EIR/EIS will not be released before the late spring of 2013. The Draft EIR states that a requirement for the BDCP includes that it comply with CEQA, "including a comprehensive review and analysis of all of the following:

> A reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy the criteria for approval of an NCCP (as provided in subdivision (a) of section 2820 of the Fish and Game Code), and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses.
>
> A reasonable range of Delta conveyance alternatives, including through-Delta, dual conveyance, and isolated conveyance alternatives and including further capacity and design options of a lined canal, an unlined canal, and pipelines.
>
> The potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the EIR.
>
> The potential effects on migratory fish and aquatic resources. . . The potential effects of each Delta conveyance alternative on Delta water quality." (Draft EIR 23-3, 4).

The Draft EIR is correct on those requirements. All of those subjects must be analyzed pursuant to CEQA. That analysis, however, has ***not*** been done. At this time, a reasonable range of flow criteria, rates of diversion, flows necessary for recovering the Delta ecosystem and restoring fisheries, the potential effects of climate change, and the potential effects of each Delta conveyance alternative on Delta water quality are unknown. ***Except***, it ***is known*** that Alternative 2 by calling for ***reducing exports*** and ***not*** developing new conveyance, would be better for Delta water quality and endangered fish species than the Revised Project. (RDEIR in the 25-6, 7). Consequently, the release of the Delta Plan and the RDPEIR is premature. The Delta Plan and RDPEIR, at least in so far as they encourage or recommend new conveyance, water intakes, conveyance facilities, exporting more water in the wet years, optimizing diversions in wet years, improved conveyance and the like, must be withdrawn. The public has no environmental full disclosure before it in order to be able to determine whether encouraging or recommending new conveyance facilities or exporting more water in the wet years, should be done, or even can be done.

<u>CEQA's Disclosure, Informational, and Analytic Requirements have not been met by the Draft EIR and RDPEIR</u>

The Supreme Court held an EIR pertaining to long-term surface water supply issues arising from a development project deficient in *Vineyard Area Citiz*ens, 40 Cal.4th 412. The water supply demands created by the development project were small in comparison to the enormous water

supply demands for the BDCP export project. Moreover, here, the massive new diversions constitute the project itself as opposed to a situation in which some development is going to require a water supply. Here, the new diversions ***are*** the project and the intended object of the project. The Council members must study, and must require the EIR preparers to study, the *Vineyard Area Citizens* decision as well as the earlier decisions it cites because it explains what public agencies must do in order to comply with CEQA when dealing with water supply issues. The decision sets forth many of the CEQA violations in that case which are also rampant throughout the Delta Plan CEQA process. The Supreme Court explained that the EIR "failed to disclose the impacts of providing the necessary supplies in the long term. While the EIR identifies the intended water sources in general terms, it does not clearly and coherently explain, using material properly stated or incorporated in the EIR, how the long-term demand is likely to be met with those sources, the environmental impacts of exploiting those sources, and how those impacts are to be mitigated." *Vineyard Area Citizens,* 40 Cal.4th 412, 421. The "EIR in this case was required to analyze the effects of providing water to this large housing and commercial development, and that in order to do so the EIR had, in some manner, to identify the planned sources of that water." 40 Cal.4th at 428.

An EIR must provide a "consistent and coherent description of the future demand for new water" and "the amount of new surface water that is potentially available" to meet that demand. *Vineyard Area Citizens* 40 Cal.4th 412, 439. An EIR must provide facts allowing the reader "to evaluate the pros and cons of supplying the [needed] amount of water", and must analyze the environmental impacts of utilizing the particular sources of long-term water supply. *Vineyard Area Citizens,* 40 Cal.4th 412, 429 (internal quotation marks omitted). CEQA's informational purposes are not satisfied by an EIR that simply ignores or assumes a solution to the problem of supplying water to a proposed project. "Decision-makers must, under the law, be presented with sufficient facts to 'evaluate the pros and cons of supplying the amount of water that the [project] will need.'" 40 Cal.4th at 430. "The ultimate question under CEQA, moreover, is not whether an EIR establishes a likely source of water, but whether it adequately addresses the reasonably foreseeable ***impacts*** of supplying water to the project." 40 Cal.4th at 434. (*Vineyard Area Citizens* was a "pure" CEQA case. Special Water Code requirements applicable to certain development projects were not at issue in the case. 40 Cal.4th at 433 fn. 8).

The Draft EIR and RDPEIR fail to adequately address the reasonably foreseeable ***impacts*** of supplying water for the new conveyance. In fact, beyond a few vague generalities, the impacts are not addressed at all. That omission violates CEQA.

The Delta Plan and EIR are vague and unquantified. ***Quantification*** is necessary to comply with CEQA in analyzing water supply issues. *Vineyard Area Citizens* 40 Cal.4th 412, 440. "An EIR that neglects to explain the likely sources of water and analyze their impacts, but leaves long-term water supply considerations to later stages of the project, does not serve the purpose of sounding an 'environmental alarm bell' before the project has taken on overwhelming bureaucratic and financial momentum." 40 Cal.4th at 441 (internal quotation marks and citation omitted). That is exactly what is going on here. The intent behind the Delta Plan and BDCP is to build up overwhelming bureaucratic and financial momentum before analyzing the environmental impacts of creating new, massive diversions upstream from the Delta. That violates CEQA. This "segmentation" of the true project and its environmental review violates

CEQA as well. "A fundamental purpose of an EIR is to provide decision-makers with information they can use in deciding *whether* to approve a proposed project, not to inform them of the environmental effects of projects that they have already approved. If postapproval environmental review were allowed, EIR's would likely become nothing more than *post hoc* rationalizations to support the action already taken. We have expressly condemned this use of EIR's." *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 394.

Expert Public Agencies have Tried to Explain the Deficiencies in its CEQA process to the Council

The State Water Resources Control Board attempted to explain some of the many deficiencies in the Council's environmental process in the Board's comment letter of February 2, 2012. "There is, in general, insufficient discussion of the potential environmental impacts of various project elements." (Board letter 3). With respect to the water resources and biological resources chapters "There is minimal discussion of the other [than construction] potential environmental impacts of the project." (Board 4). An issue that needs to be discussed is that "an impact of locating a new Delta conveyance system on the Sacramento River would be to increase the amount of San Joaquin River water that flows through the Delta to Suisun Bay ( water that is now re-entrained at the State and Federal pumping facilities and used for agriculture in the San Joaquin Valley). This will increase the loads of selenium exported out of the San Joaquin Basin to Suisun Bay. The section should evaluate whether these impacts are significant." (Board 7).

The Board stated in seemingly clear language as the Problem Statement, that "The State cannot effectively plan, finance, and build new conveyance and storage facilities to improve the reliability of water exports from the Delta watershed when future Bay-Delta Water Quality Control Plan objectives and flow requirements are not known." (Board 20). Moreover, "Development, implementation, and enforcement of new and updated flow requirements for the Delta and high-priority tributaries are key to the achievement of the coequal goals. The State Water Resources Control Board should update the Bay-Delta Water Quality Control Plan objectives and establish flows as follows: By June 2, 2014, adopt and implement updated flow objectives for the Delta. . . By June 2, 2018, develop flow criteria for high-priority tributaries in the Delta watershed that are necessary to achieve the coequal goals." (Board 20-21). Though the Board mentions using existing Water Quality Control Plan objectives to determine consistency with the Delta Plan (Board 21), at this point in time it would violate CEQA to make a decision calling for new conveyance, which entails a massive, costly, public works project with enormous environmental impacts prior to the Board adopting and implementing its updated flow objectives.

The RDEIR admits in the water resources section that "the new flow objectives could result in reduced export of water from the Delta, which would potentially affect water supplies for water users in the areas outside the Delta that use Delta water." (RDEIR 3-12). Again, it would violate CEQA to make a decision calling for new conveyance, when as the Council admits in its RDEIR, new flow objectives could result in reduced export of water from the Delta, which would preclude approval of new conveyance to export massive quantities of freshwater around and away from the Delta by way of the massive Delta Tunnels.

The San Francisco Bay Conservation and Development Commission ("Commission") also tried to explain some basic CEQA responsibilities to the Council in its letter of February 2, 2012. The Commission explained that "The Bay-Delta is a single estuary. . . The Bay should be included in the secondary planning area for the Final EIR, and the impacts of the Delta Plan on the Bay, including the impacts of the proposed water diversion and conveyance projects on fresh water and sediment flow to the Bay, should be analyzed." (Commission letter 2). The commission also explained, quoting from an earlier version of the DEIR that "Changes in flowing rivers that are tributary to the Delta might also influence the flow, currents, and temperature and salinity gradients in the Delta. These changes could reduce the quality and suitability of aquatic habitats for special-status fish species such as Delta smelt." (Commission 3). Also, "large Delta conveyance facilities (including canals, forebays, and intakes-diversions), in addition to the Delta Plan, could potentially increase interference with the movement of any native resident or migratory fish or wildlife species or with established native resident or migratory wildlife corridors." (Commission 3). And, "we recommend that the Final EIR include analysis of the freshwater flow needs of the entire estuary, not just the Delta. This includes the need for peak flows that transport sediment and nutrients to the Bay, increase mixing of Bay waters, and create low salinity habitat in the Suisun Marsh, Suisun Bay, San Pablo Bay and the upper part of central San Francisco Bay. The potential impacts on freshwater flows of new water infrastructure for both storage and conveyance should be included in this analysis." (Commission 4).

Preparation and Recirculation of a New Draft EIR are Required

The Delta Plan and RDEIR put the cart before the horse, charging ahead blindly in the dark, to adopt the Delta Plan, RDEIR and implementing regulations ***prior to*** the completion of the BDCP and its EIR, and ***prior to*** public trust doctrine analysis and setting of flow objectives and standards by the SWRCB. The Council must withdraw the documents it has issued, and prepare and issue a new Delta Plan and new Draft EIR so that that the public has an accurate, stable and finite project description, and full disclosure of environmental impacts of the true project to serve as the basis for informed public review in compliance with CEQA. ***This is not a defect that can be cured simply by responding to comments in a Final EIR.*** The public as well as public agencies and the Council itself, have not had the opportunity required by CEQA to review and comment on an accurate, stable, and finite project description and meaningfully evaluate the true project including environmental full disclosure and analysis of the project's environmental impacts, in comparison to reasonable alternatives.

Recirculation of a Draft EIR for public review and comment is required when significant issues are raised that were not adequately addressed in the previously circulated draft EIR. *Vineyard Area Citizens* establishes that "When several agencies and private organizations commenting on the Draft EIR raised concerns regarding such effects[on water flows and habitats in the. . . River and the resulting impacts on salmon migration, County staff responded in the FEIR that due to restrictions on the amount of water to be pumped from the Well Field and the limited hydrological connections between the Cosumnes River and the aquifer from which water would be taken, the impact on Cosumnes River flows would be small and insignificant. The County adopted that conclusion in its findings approving the project.

Plaintiffs contend, and we agree, that the County's finding is not supported by substantial evidence because the FEIR discloses a potentially significant impact of reduced River flows on aquatic species, including migrating salmon. . . Especially given the sensitivity and listed status of the resident salmon species, the County's failure to address loss of Cosumnes River stream flows in the Draft EIR 'deprive the public. . . of meaningful participation' in the CEQA discussion. " *Vineyard Area Citizens,* 40 Cal.4th 412, 447-448. The Supreme Court required recirculation for public review.

In short, it is necessary to obtain information and perform analysis before making policy, and then establish policy before deciding on what if any plumbing to do. The Council is proceeding in the dark. The Plan is not ready for adoption because essential information has not been obtained and essential analysis has not been performed. Likewise, it is not possible at this time to lawfully authorize or approve development of the Delta Tunnels that would divert massive quantities of freshwater around the Delta because of the absence of essential information and analysis. Moreover, it is not possible to lawfully call for new conveyance in the Plan and Regulations because of the absence of an accurate project description. In addition, information has not been provided about the environmental impacts of developing new conveyance which creates the capacity to increase exports. Analysis has not been done to show that exports from the Delta can be ***increased*** – when all the evidence demonstrates that the exports need to be ***reduced.***

<u>The Delta Plan CEQA Process Cannot Tier to Future Environmental Documents that have Not been Completed</u>

The Description of Revised Project, section 2, of the RDEIR contains confusing language seeking to justify failure to perform any meaningful environmental analysis of the proposed project. The statement is that "the Revised Project would not directly result in construction or operation of projects or facilities, and therefore would result in no direct impacts on many resources. The Revised Project could, however, result in or encourage implementation of actions or development of projects, including construction and operations of facilities or infrastructure. The severity and extent of project-specific impacts on the physical environment would depend on the type of action or project being evaluated, its specific location, its size, and a variety of project-and site-specific factors that are undefined at the time of preparation of this program-level study. Project-specific impacts would be addressed in project-specific environmental studies conducted by the lead agency at the time the projects are proposed for implementation." (RDEIR 2-26).

In *Vineyard Area Citizens* the Supreme Court held "To the extent the FEIR attempted, in effect, to tier from a *future* environmental document, we reject its approach as legally improper under CEQA." 40 Cal.4th 412, 440. The Supreme Court explained that a public agency could defer analysis and approval of a project, then tier the project FEIR from the programmatic analysis performed in a later process. "What the County could not do was avoid full discussion of the likely water sources for the Sunrise Douglas project by referring to a not yet complete comprehensive analysis in the Zone 40 master plan update. CEQA's informational purpose 'is not satisfied by simply stating information will be provided in the future.'" 40 Cal.4th at 441. "[A]nalysis of the project's impacts could not be deferred in this manner [as explained earlier]. An EIR cannot be tiered from another EIR if the latter is not yet complete." 40 Cal.4th 449.

"Tiering does not excuse the lead agency from adequately analyzing reasonably foreseeable significant environmental effects of the project and does not justify deferring such analysis to a later tier EIR or negative declaration." Guideline § 15152(b). "All phases of a project must be considered when evaluating its impact on the environment: planning, acquisition, development, and operation." Guideline § 15126.

A sufficient EIR, and also a sufficient draft EIR, considering such issues as water supplies, water availability, and addressing the environmental impacts of diverting massive quantities of water around and away from the Delta must be prepared and circulated for public review before a public agency enacts a Plan and Regulations calling for, encouraging, and recommending such new conveyance.

The Council has failed to proceed in a manner required by law. "The fundamental purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment." *Vineyard Area Citizens,* 40 Cal.4th 412, 428 (internal quotation marks deleted). Thus an EIR must adequately identify and analyze the significant environmental effects of the proposed project. CEQA Guidelines § 15126.2 (a). "In assessing the impact of a proposed project on the environment, the lead agency normally examines the changes in existing environmental conditions in the affected area that would occur if the proposed activity is implemented." *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 659-660 (internal quotation marks deleted). "Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects." CEQA Guidelines § 15126.2(a). "An EIR should be prepared with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences. An evaluation of the environmental effects of a proposed project need not be exhaustive, but the sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible . . . . The courts have looked not for perfection but for adequacy, completeness, and a good faith effort at full disclosure." CEQA Guidelines § 15151.

The CEQA Guidelines define a "significant effect on the environment" as a "substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance." Guidelines § 15382. The Sacramento-San Joaquin Delta is a natural resource of statewide, national, and international significance, containing irreplaceable resources, and it is the policy of the state to recognize, preserve, and protect those resources of the Delta for the use and enjoyment of current and future generations. Public Resources Code § 29701. Reducing flows of freshwater through the Delta resulting in increases of salinity and pollution degrading water quality and further endangering already endangered fish species, are obvious potential impacts requiring complete environmental analysis under CEQA. Pursuant to CEQA, projects deemed by law to be of statewide, regional, or area wide significance include projects "which would be located in and would substantially impact the following areas of critical environmental sensitivity" including specifically the Sacramento-San Joaquin Delta. Guideline § 15206(b)(4)(E).

That the RDPEIR is a "program EIR" does not furnish the Council with a cover to produce environmental documents that do "not provide decision-makers, and the public, with the information about the project required by CEQA." *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 916. Indeed, the CEQA Guidelines' list of advantages in preparing a program EIR include a "more exhaustive" examination of the facts and alternatives, "full consideration" of cumulative impacts, and allowance for analysis of "broad policy alternatives and program wide mitigation measures" at a time when the lead agency has the best opportunity to address them properly. Guidelines § 15168 (b). The most profound decision to be made regarding the Delta with far-reaching environmental consequences will be "To Dig or Not To Dig"; whether or not to develop new conveyance designed and intended to divert enormous quantities of freshwater upstream from the Delta for the benefit of exporters south of the Delta, causing enormous reduction of freshwater flowing through the Delta. That will be a fateful decision. The people of California passed a referendum in 1982 by a vote of 63% to 37% overturning the legislation authorizing the peripheral canal. There is enormous controversy over "new conveyance" around the Delta. An accurate description of the project and a thorough environmental analysis is necessary before the Council adopts a Plan and policy calling for new conveyance.

The RDEIR does not fit the Plan's adoption of policies calling for development of new conveyance. There is no identification of, let alone analysis of, the environmental impacts of new conveyance. Admitting the obvious that diversions and tunnels "may create long-term changes in local mixtures of source waters within water bodies" is not the adequacy, completeness, and good faith effort at full disclosure required by CEQA.

<u>Failure to Perform Cost Benefit Analysis and Public Trust Doctrine Analysis</u>
The reason the state has so far failed to perform cost benefit analysis or conduct public trust balancing with respect to the Delta Tunnels project is that the special water interests are in control of the process. As set forth in the Draft EIR, the BDCP is being developed through a collaboration of water exporters including DWR, the Kern County Water Agency, Westlands Water District, and the Metropolitan Water District of Southern California. "These entities, collectively known as the 'Potentially Regulated Entities,' are preparing the BDCP." (Draft EIR 23-5). The exporters believe that a candid, honest process would result in the Delta Tunnels not being developed. Two thirds of the water taken away from the Delta would go to mega farming interests including those in Westlands Water District and the Kern County Water Agency which already get subsidized water to grow unsustainable crops on drainage-impaired land. They are growing cotton, almonds and other permanent water-intensive crops on arid-desert land. In addition, "these project rights are junior in priority to the rights held by water users in the Delta and within the Delta watershed." (DP 82). In contrast to those water interests, some urban, residential, commercial, and industrial users are making some strides in terms of water conservation, water recycling, use of water from local and other sources, and use of other mechanisms to reduce reliance on the Delta as well as to save the costs of exporting water from the Delta.

Up to this point, the state, in the BDCP process has only conducted cost-benefit analysis in terms of whether benefits to the exporters would exceed cost to the exporters. There has been no true state-wide cost-benefit analysis, or cost-benefit analysis considering impacts on the Delta and

Delta watershed interests and users because the exporters controlling the process believe that the costs of the project would exceed any benefits.

The RDEIR fails to disclose, let alone discuss, the findings of the cost-benefit study by the Eberhardt School of Business, University of the Pacific (July 12, 2012) that the costs of the Delta Tunnels would be 2.5 times higher than the benefits, so that the project does not make economic or financial sense. That is essential information that the public should have in weighing the pros and cons of which alternative should be selected. That development took place after the Draft EIR and prior to issuance of the RDEIR and needed to be included in the RDPEIR.

The RDPEIR attempts to obscure any information with respect to funding the project. The Revised Project would encourage use of "available funds" and "new funding sources with new statutory authority such as State and federal funds for public benefits not otherwise required for project mitigation required by law for other purposes". (RDEIR 2-24). The public is entitled to factual information in attempting to weigh the pros and cons of the alternatives as to how much of the costs of the project will be borne by the ratepayers of the Metropolitan Water District of Southern California who would obtain 25% of the water, as compared to the large agricultural interests that would obtain 75% of the water. Moreover, the public is entitled to see the details of the attempt by the large agricultural interests to have MWD ratepayers pay 75% of the costs of the project though they would only receive 25% of the water. Likewise, the taxpayers are entitled to see the details of the extent to which the exporters are attempting to impose direct and indirect costs of mitigating the environmental disaster inflicted on the Delta by the project, on the taxpayers. What we have here is an attempt by the exporters to take huge quantities of water away from the Delta while imposing as many of the mitigation costs as they can get away with on the taxpayers. This kind of economic and financial information is essential to allowing meaningful public evaluation of the Revised Project alternative which would be a massive, expensive, public works project.

Likewise, there has been failure to perform analysis as required by law, under the Public Trust Doctrine. The state "has an affirmative duty to take the public trust into account in the planning and allocation of water resources and to protect public trust uses whenever feasible." (DP 82, citing *National Audubon Society v. Superior Court*, 33 Cal.3d 419 (1983). The Plan explains that in the cited case the California Supreme Court "unanimously affirmed that the state's navigable lakes and streams are resources that are held in trust for the public and are to be protected for navigation, commerce, fishing, recreational, ecological, and other public values." (DP 82). Because of the absence of information and analysis as discussed above, including absence of information on how much water is actually available for export, and absence of cost-benefit analysis to determine what alternative might make economic sense, together with the deteriorating water quality, increasing salinity, and declining fish populations in the Delta, the state presently lacks the information necessary to accomplish the required public trust analysis.

Instead of rushing to develop the Delta Tunnels to funnel massive quantities of fresh water around the Delta to the special water interests south of the Delta which are junior appropriators that should be last in line in terms of obtaining water from the Delta, the Council needs to obtain the essential factual information and perform the necessary analysis in order to protect the Delta as required by the Delta Reform Act, Public Trust Doctrine, and CEQA.

## THE REVISED PROJECT WILL INDUCE DIVERSIONS OF GREATER QUANTIES OF WATER AND WILL EXACERBATE CONFLICTS BETWEEN THE DELTA AND EXPORTERS

At present, despite existing conflicts, both the Delta and the exporters also have a common interest in minimizing the worsening of salinity intrusion. That is true because the exporters have an interest in having water of not too low quality in the southern Delta, as that is the location for their existing diversions. However, if the Delta Tunnels project is carried out, the exporters will have no interest at all in keeping any kind of lid on salinity in the southern Delta. The exporters' water would be taken out near Clarksburg, miles upstream from the Delta. The reality which must be addressed by the Plan and EIR is that constructing the Delta Tunnels project would create a situation in which extremely wealthy and powerful interests including Westlands Water District and Kern County Water Agency users would have a strong incentive to divert huge quantities of water upstream from the Delta while having no corresponding interest in preventing salinity intrusion as well as other water quality issues from worsening in the Delta and southern Delta. A new Draft EIR must be prepared and recirculated addressing the fact that the only logical reason to construct 35 mile-long tunnels costing billions of dollars with the capacity to divert 15,000 cfs of water away from the Delta is to actually do that. And all of this would take place accompanied by climate change which as stated above, will result in high salinity levels in the Delta due to sea level rise by as much as 55 inches by 2100. Given the already desperate straits that the Delta is in with respect to water quality, salinity intrusion, and declining and endangered fish populations, along with other certainties including the sea level rise resulting from climate change, going forward with the Delta Tunnels would be a prescription for completing the destruction of the Delta environment.

The RDPEIR is woefully deficient in failing to clearly and succinctly set forth basic, undisputed facts, such as that adding massive new diversions upstream from the Delta to export water south of the Delta would lead to greatly worsened saltwater intrusion in the Delta. To be blunt, the state is wittingly or unwittingly aiding and abetting the effort by wealthy and powerful special water interests to be able to take massive quantities of freshwater away from the Delta, upstream, while no longer having any concern about or interest in limiting the worsening salinity intrusion and water quality in the Delta. New conveyance would create both the capacity and the incentive to divert far more water than is presently diverted from the Delta. That basic fact is not dealt with in the Draft EIR and RDEIR. This catalyst effect and growth-inducing impact, in terms of increasing water exports, must be honestly and candidly addressed and dealt with in a new, recirculated Draft PEIR.

## THE REVISED PROJECT WOULD BE IN CONFLICT WITH BOTH OF THE "CO-EQUAL GOALS" AS WELL AS THE POLICY OF REDUCING RELIANCE ON THE DELTA

The Delta Reform act establishes "coequal goals" which "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." (DP 67, quoting Water Code § 85054). As already shown, the Delta Tunnels with new,

massive upstream diversions, would further damage to the point of destroying the Delta ecosystem. That is contrary to the goal of protecting and restoring the Delta ecosystem.

The other goal, of providing a more reliable water supply, should be met by gathering the missing information and performing the absent analysis of actual water demands, amount of water available to meet those demands, and improvement of water management as set forth above. Again, the Plan admits that the "original SWP and CVP contracts" "assume greater water export quantities than consistently can be delivered." (DP 91). Excess contractual amounts should be limited in the contracts and in the meantime should be disregarded for planning purposes. There is no rational reason to construct massive new public works projects or exacerbate the salinity and water quality conditions in the Delta by attempting to export unrealistic quantities of water from the Delta. A more reliable water supply would be provided by identifying, and then seeking to provide a water supply that is realistic taking into account what is actually available as well as environmental constraints including the needs of Delta users, fish populations, climate change, and ever worsening salinity and water quality conditions in the Delta.

The state has established through the Delta Reform Act "a new policy for California of reducing reliance on the Delta in meeting California's future water supply needs (Water Code section 85021)." (DP 73). Establishing massive new diversions upstream from the Delta by way of constructing the Delta Tunnels would be contrary to that policy. The Tunnels, a massive public works project costing billions of dollars, would increase reliance on the Delta by taking even more freshwater away from the Delta before the water even gets to the Delta. The concept of the Delta Tunnels is to take water through the Tunnels to those same water interests south of the Delta that are presently taking the water from the southern Delta. At present, at least the water being taken by the southern exporters passes through the Delta and is available for Delta fisheries, and other Delta uses, before it is taken.

These conflicts of the Revised Project with these laws must be addressed in a new, recirculated Draft PEIR.

## THE RDPEIR EVADES A GENUINE COMPARISON BETWEEN THE REVISED PROJECT AND ALTERNATIVES AND ARBITRARILY CONCLUDES THE REVISED PROJECT IS ENVIRONMENTALLY SUPERIOR BY MISREPRESENTATIONS AND FAILURE TO TAKE A HARD LOOK AT ALTERNATIVES AND THEIR ENVIRONMENTAL IMPACTS

The preparation and circulation of the Draft EIR and RDPEIR which are so fundamentally and basically inadequate and conclusory in nature have obscured the true project and made meaningful public review and comment on an accurately described project and its environmental impacts impossible. As set forth above, the crisis in the Delta, and absence of environmental information and analysis required by CEQA and the Public Trust Doctrine require you to withdraw the Revised Project in order to proceed in the manner required by law. To call for new conveyance given the crisis in the Delta and the absence of information and analysis is somewhat like the state of the medical profession several hundred years ago. The patient would be weak and declining, so the doctors of the day would prescribe bleeding the patient which unfortunately had the consequence of killing patients who might otherwise have recovered. What you propose

by way of the Revised Project would have a similar result by creating the capacity to take more fresh water away from the Delta when all relevant signs demonstrate that exports need to be reduced, not increased, to have any real chance to protect and restore the Delta. The Revised Project would likely be the last nail in the coffin for the Delta.

The RDPEIR Arbitrarily Concludes Without Proceeding in a Manner Required by Law and Without Substantial Evidence that Alternative 2 is "slightly environmentally inferior" to the Revised Project

The Comparison of Alternatives is set forth in Section 25 of the RDEIR. The RDEIR concedes that "an EIR is required to identify the environmentally superior alternative from among the range of reasonable alternatives that are evaluated." (RDEIR 25-16). The RDEIR description of Alternative 2 is that "Development of Alternative 2 was informed by proposals from environmental organizations led by the Environmental Water Caucus. It involves sharply decreased water exports from the Delta and its watershed to areas that receive Delta water (limited to a maximum of 3,000,000 acre-feet/year)." (RDEIR 25-4). Accordingly, the RDEIR concedes with respect to water resources, as it must, that "Overall, Alternative 2 would have less water quality impacts than the revised Project, because it involves fewer facilities and less diversions of water from the Delta and Delta watershed." (RDEIR 25-6).

With respect to biological resources, the RDEIR explains that "Biological resources in the Delta have been in decline for many years. That decline is expected to continue." (RDPEIR 25-7). The RDPEIR concedes, as it must, that "Alternative 2 contributes more to improving conditions for biological resources and arresting ecosystem decline than the Revised Project." (RDPEIR 25-7).

The RDPEIR also concedes that "Alternative 2 would do more than the Revised Project to reduce reliance on Delta water throughout California, including the Delta watershed, by requiring Urban Water Management Plans to include substantial water demand reduction, beyond the current statutory mandate of 20% by 2020." (RDEIR 25-18). In addition, "Alternative 2 would encourage new water flow objectives for the Delta and tributaries that emphasize meeting ecosystem needs ahead of all other beneficial uses of Delta waters; it would also eliminate the water quality impacts associated with agricultural runoff water from Tulare Lake Basin agriculture and areas with drainage constraints in the San Luis Drainage Area. It is thus environmentally superior to the Revised Project with respect to these types of impacts." (RDEIR 25-18; also, Executive Summary, ES-10).

The RDPEIR fails to disclose the findings of the Eberhardt School of Business, University of the Pacific (July 12, 2012) that the costs of the new conveyance would be 2.5 times higher than the benefits and that consequently, the project would make no economic or financial sense. That is a critical fact that The DSC has failed to address in reaching the arbitrary conclusion to adopt the Revised Project. It would surely be essential information for the decision-makers and the public to be made aware of the fact that Alternative 2 is not only environmentally superior to the Revised Project. Alternative 2 is also economically superior.

If any alternative other than 2 is adopted, the Council would have to make the specific findings required by Public Resources Code § 21081 and Guideline §§ 15092, 15093 required when a

project is approved that has one or more significant effects on the environment, including eliminating all significant effects on the environment where feasible, and what specific economic, legal, social, technological, or other considerations make infeasible alternatives avoiding the adverse environmental impacts. *See Vineyard Area Citizens,* 40 Cal.4th 412, 434. The Council has the duty to prevent or minimize environmental damage. Guideline § 15021©.

The RDPEIR fails to accurately characterize the EWC's proposed Alternative 2 and instead piles on "poison pills" intended to portray Alternative 2 as "slightly environmentally inferior" to the Revised Project. Thus, the Draft EIR fails to present Alternative 2 for serious consideration. The Environmental Water Caucus' superior alternative of ecosystem protection and water supply reliability should be more accurately reflected in Alternative 2 and then selected as the Preferred Alternative for this EIR. Some specific corrections necessary to the DSC mischaracterization of Alternative 2 are set forth below. Alternative 2 is environmentally superior and meets the legislatively defined objectives and definition of the project, as required by CEQA. This is based on the superior weight of the "less-than-significant" impacts and superior ratings of Alternative 2 in all areas, including but not limited to, Delta restoration, water supply reliability, flood risks, water quality, biological resources, hazardous materials, greenhouse gas emissions, and climate change impacts. Additionally, when economics are considered, these ecological and economic balancing requirements which are met by Alternative 2 would meet the legal requirements of a preferred Revised Project.

But of course, this is an applicant-driven project controlled by the junior appropriators who are exporters and who want to take more water which has the inevitable consequence of leaving less water for the Delta. So, the RDPEIR preparers deliberately looked for ways to avoid reaching the obvious conclusion that Alternative 2 is the environmentally superior alternative. They did that by claiming that "Alternative 2 is slightly environmentally inferior to the Revised Project primarily because of its impacts on water supply reliability. It would sharply reduce exports from the Delta, potentially creating a supply shortfall beyond the capacity of local and regional projects to meet demand." (RDPEIR 25-17, 18). The Executive Summary adds in addition to water supply reliability, "the substantial loss of agricultural land under Alternative 2." (RDPEIR, ES-10). The RDPEIR explains that as "Alternative 2 likely would lead to more conversion of agricultural land than the Revised Project because it would convert Tulare Lake (currently in agricultural production) to a reservoir, take farmland out of production in the San Luis Drainage Area, and potentially result in less water being available for agricultural uses in the San Joaquin Valley areas, which could in turn cause farmers to take land out of production." (RDEIR 25-9).

With respect to water supply reliability, it was pointed out in detail above, that the Delta Plan itself admits that the exporters' contracts assumed greater water export quantities than consistently can be delivered. (DP 91). All indications are that exports must be reduced to have any chance of preserving and restoring Delta water quality and freshwater balance. As shown above, there has not been any public trust doctrine analysis, or adequate CEQA analysis to determine how much water is actually available and how match water could or should be exported while maintaining and restoring Delta water quality and freshwater balance. Moreover, one of the statutory commands in the Delta Reform Act is "a new policy for California of reducing reliance on the Delta in meeting California's Peter water supply needs." (DP 73). Alternative 2 is the only alternative that does reduce exports and that would reduce reliance on

the Delta. Moreover, Alternative 2 would not develop new conveyance upstream from the Delta. Consequently, freshwater would continue to flow through the Delta and be able to provide environmental, habitat, agricultural, commercial, and other uses within the Delta before being taken and exported. That is an enormous difference between Alternative 2, and the Revised Project which calls for massive new conveyance and diversion of water upstream from the Delta. Beyond that, the RDEIR preparers have failed to produce any definition of "water supply reliability" consistent with the facts of the decline of the Delta, the law requiring public trust doctrine analysis, CEQA analysis, reducing reliance on the Delta for water supply, or common sense. Consequently, the issue of "water supply reliability" has not been demonstrated by analysis meeting the requirements of CEQA or the public trust doctrine sufficient to downgrade Alternative 2 to being "slightly environmentally inferior to the Revised Project." That downgrading is nothing more than conclusory, self-serving argument supporting the wishes of exporters.

The second main reason that Alternative 2 is not rated as a better alternative than either the previously Proposed Project or the Revised Project is due to the large amount of land retirement, including 380,000 acres in the San Luis Unit and 320,000 acres in the Tulare Basin for Tulare Lake Basin Reservoir, as well as potential land fallowing due to the limitation in Delta exports at 3 million acre feet (Section 25.5). However, it is clear that no solution is in place for the 380,000 acres of San Luis Unit drainage impaired lands either financially, technically or otherwise authorized by Congress at necessary funding levels. Ultimately, like the 100,000 acres already retired due to soil salinization, the full 380,000 acres (including the 100,000 acres already fallowed) will go out of production unless they are allowed to reopen the San Luis Drain and dump all of the San Luis Unit's pollution into the San Joaquin River. Continued irrigation of the 380,000 acres (actually 280,000 acres) of drainage impaired lands in the San Luis Unit will result in continued decline of soil productivity and will ultimately cause retirement of the land because it cannot support agriculture. Irrigation of these lands can only continue with huge subsidies and/or discharge of the toxins to the San Joaquin River and Delta. Therefore, continued irrigation of these lands does not meet the Delta Plan Financing Framework's key tenets for cost effectiveness and stressors. Taking into account the fact that Alternative 2's ultimate impact on agriculture by retirement of those 280,000 acres is really no different than Existing Conditions, the No Action Alternative, or the Revised Project, it removes another reason that Alternative 2 cannot be environmentally preferred to the Revised Project.

The finding related to the negative impact of the loss of farmlands in the Tulare Basin is incorrect (Section 25.5). EWC did not recommend eliminating those lands from production; the recommendation in the Fifth Draft is to study the feasibility of converting the land to a basin reservoir. Therefore, the negative impact finding is premature and will have to wait until such a feasibility analysis is completed.

While EWC concurs with the DSC interpretation that Alternative 2 would eliminate the use of Delta water on drainage-impaired farmlands, we support dealing with drainage problems in the least environmentally damaging manner and the most long-range, cost-effective manner by retiring the drainage-impaired farmland and converting to less environmentally significant uses. Those uses would include, but not be limited to, dry farming or energy production which would also be more cost-effective through the elimination of plants and infrastructure to recycle the drainage water. The U.S. Geological Survey (USGS), in Open File Report No. 2008-1210 states

that "*Land retirement is a key strategy to reduce drainage because it can effectively reduce drainage to zero if all drainage-impaired lands are retired*." (CEQA Guideline 15126.5, Discussion of Alternatives). Therefore, agricultural drainage treatment plants will not be part of Alternative 2 because the retirement of 380,000 acres of drainage impaired lands will eliminate the need for that type of facility and also the impacts those facilities will have, such as storage, transportation, and disposal of hazardous waste. Therefore, this negative finding is completely erroneous and has not been corrected in the RDEIR.

Some additional specific errors in the DSC characterization of Alternative 2 with necessary corrections are included here:

> EWC Alternative 2 is incorrectly characterized in the Fifth Draft as "Less emphasis than Proposed Project on ecosystem restoration throughout the Delta…" In our comments to the Fifth Draft of the Delta Plan, we indicated the following: "We agree with the Council's reliance on the *Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions* (DFG 2011). We also support most of the Ecosystem Restoration Program features of the CALFED program. The previous finding that Alternative 2 places less emphasis than the Proposed Project on ecosystem restoration throughout the Delta is in error and our recommendation on this subject should indicate that our emphasis on Ecosystem Restoration is the same as or similar to the Proposed and Revised Projects, since they are similar as indicated in the Draft PEIR (Section 25 3.1).
>
> The characterization that the EWC Alternative 2 "would do less to arrest the increasing flood risk" (Section 25.4.3) ignores the EWC recommendation to immediately initiate planning to upgrade core levees above the PL84-99 standard, in accordance with the recommendations of the Delta Protection Commission. This action is superior to both the Proposed and the Revised Project. If supported by the Delta Stewardship Council, this action would significantly reduce Delta earthquake, flooding, and sea level rise vulnerabilities, putting Alternative 2 on a superior rating to both the Proposed and the Revised Project (CEQA Guideline 15126.5, Discussion of Alternatives).
> With the exception of reinforcing core levees above the PL 84-99 standards and the installation of upgraded fish screens, Alternative 2 relies mainly on maximizing the use and improvement of existing facilities south of the Delta. Therefore, Alternative 2 can be shown to have far less significant impact on the Delta environment than any of the conveyance-oriented construction alternatives described or anticipated in the Draft PDEIR. Adding further to the beneficial effects of maximizing the use of existing conveyance is the probability that there will be little or no financing available for significant conveyance construction and that there in all probability will be no further water available from the Sacramento River as a result of a changing climate, as pointed out in numerous recent scientific journals.

The Fifth Draft Delta Plan improperly characterizes the EWC Alternative 2 as advocating more Ocean Desalination; the Draft PEIR indirectly indicates the same (Section 25.4.1). In all of our comments to the Delta Plans, beginning with the Scoping Documents, we have made no mention of Ocean Desalination. To be clear: EWC's view of Ocean Desalination is one of skepticism of this as an alternative for water supply because of the significant environmental and wildlife impacts caused by construction, by ocean intakes, by brine outflows, by the high energy usage, and by the high costs of the produced water. We also remain concerned about the significant impact on land use planning where desalinated water is used to induce growth. Lacking a comprehensive statewide policy on Ocean Desalination, it is premature to promote the most costly, energy intensive, and least reliable source of water supply. Before we reach the point of needing Ocean Desalination, we must exhaust the options of serious water conservation, by maximizing water reclamation, and capturing stormwater and urban runoff for water supply. By adding rainwater capture, graywater systems, and desalination for groundwater cleanup, it is possible to reduce per capita water demand to a level obtained by other countries before they even looked at Ocean Desalination. Spain, Israel, and Australia have each reduced per capita demand to 30 to 60 gallons per day per person, while California's statewide average is 174, with some areas of California using more than 300.

We would like to be on record that significantly favorable impacts to water supply reliability, especially for Southern California urban areas, would result with the return of the Kern Water Bank to public control, the return of the Article 18 urban preference, and the elimination of Article 21 surplus water from being sold as a private commodity. No mention of these provisions of the Monterey Amendments is made in this RDEIR.

The EWC Alternative 2 made no recommendation regarding abandonment of South Delta intakes. This error should be corrected.

The EWC Alternative 2 did not recommend expansion of Friant/Millerton reservoir; we made no comment related to Friant/Millerton. This reference still needs to be corrected.

## CONCLUSION

"The CEQA process is intended to be a careful examination, fully open to the public, of the environmental consequences of a given project, covering the entire project, from start to finish. This examination is intended to provide the fullest information reasonably available upon which the decision makers and the public they serve can rely in determining whether or not to start the project at all, not merely to decide whether to finish it. The EIR is intended to furnish both the roadmap and the environmental price tag for a project, so that the decision-maker and the public both know, before the journey begins, just where the journey will lead, and how much they-and the environment-will have to give up in order to take that journey.'" *Natural Resources Defense Council, Inc. v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 271.

The first step in determining whether to start the project is whether to call for new conveyance. That would be the start of the journey that we believe would strike the last nail into a coffin for the Delta. The reason we continue to work so hard to try to get you to perform the environmental analysis required by CEQA and the water availability, flow, and other Delta-preserving measures required by the public trust doctrine is that we believe that if this work required by law is actually done, that last nail will not be struck and the Delta can still be saved.

## SECTION 1 – INTRODUCTION AND GENERAL COMMENTS

EWC appreciates the opportunity to comment on this Recirculated Draft PEIR for the Delta Plan project. Most of the deficiencies outlined in EWC comments on the February DEIR remain. Many of these deficiencies pervade throughout the RDPEIR and DEIR; thus, we have provided a list of overarching comments that are generally applicable to the entire PDEIR, followed by specific citations to the RDPEIR by chapter. In light of the fact that "[The Revised Project] involves exporting similar amounts of water from the Delta and its watershed to areas that receive Delta water," the concerns that have been consistently raised by EWC and other environmental organizations regarding the inherent flaws in the proposed water deliveries remain unchanged.

### THE RDPEIR FAILS TO SATISFY THE REQUIREMENTS OF A PROGRAM EIR

a.) The Delta Plan RDPEIR must provide at least a general factual analysis of the anticipated projects that will occur as a result of the approval of the Delta Plan.

Program EIRs are intended to allow flexible analysis of a broad program or plans and can be useful in providing a broad look at overarching policies and also at looking at potential cumulative impacts of a series of actions. It can also lead to superficial analysis, however, that is never supplemented by specific, site-specific analysis. It also makes tentative significance determinations while simultaneously acknowledging that little information is available on the location and size and general nature of future projects.

A program EIR is an EIR which may be prepared on a series of actions that can be characterized as one large project and are related either: (1) Geographically, (2) A logical parts in the chain of contemplated actions, (3) In connection with issuance of rules, regulations, plans, or other general criteria to govern the conduct of a continuing program, or (4) As individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways. (CEQA Guidelines, § 15168, subd. (a).) The benefits of Program EIRs include providing for an occasion for a more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action, ensuring consideration of cumulative impacts that might be slighted in a case-by-case analysis, and avoiding duplicative reconsideration of basic policy considerations, among other things.

While the Delta Plan could logically be interpreted to be a "program" given that is chain of contemplated actions, the latter portion of the Guidelines clarifies that programmatic analysis of

vague principles as is found in the PDEIR will not further the goals of CEQA. The Program EIR is intended to help reduce duplicative analysis and to help capture the overall picture of the related cumulative impacts. If there are no details available on any of the projects or facilities, however, then such benefits cannot be reaped. Without even a broad understanding of the types of projects that will follow, the PDEIR cannot possibly contain substantial evidence to support its conclusions. (CEQA Guidelines, § 15384.) Using a program EIR does not satisfy CEQA if it is document that "does not provide decision-makers, and the public, with the information about the project required by CEQA." (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 916.)

b.) The DEIR and RDPEIR Fails to Explain How This Analysis Shall Be Incorporated in Future Projects.

The Project Description needs to be revised to clearly describe how future projects may rely on the analysis in the RDPEIR. The Vol.1 RDPEIR notes, "Future environmental documents would be completed by other agencies when they propose to implement projects that are subject to consistency reviews by the Council, or projects which are encouraged or otherwise influenced by the Delta Plan. Hence, this program EIR is not intended to provide project-level clearance for any specific project." The RDPEIR at least acknowledges that this analysis should not be understood to provide project-level "clearance", though the term "clearance" is not defined and it does not address how the information in the EIR shall be used.

The Delta Plan RDPEIR is vague enough that it allows for the possibility of future project applicants relying on the purely descriptive analysis contained in the RDPEIR without taking a hard look at the impacts of the projects the Delta Plan encourages. The RDPEIR is intended to serve as a Program EIR and yet fails to specify how this PEIR shall be relied upon in future analysis. These unsupported conclusions can be used in future environmental documents to justify decisions that never had any factual support in the first place.

CEQA Guidelines, section 15168, c(5) states, "A program EIR will be most helpful in dealing with subsequent activities if it deals with the effects of the program as specifically and comprehensively as possible. *With a good and detailed analysis of the program, many subsequent activities could be found to be within the scope of the project described in the program EIR, and no further environmental documents would be required*. (Emphasis added.)

The RDPEIR does not state whether future EIRs should tier from this document, and whether it anticipates that much of the analysis will be incorporated by reference. There is a close relationship between Program EIRs and First-Tier EIRs, and agencies carrying out the policies and recommendations of the Delta Plan should know whether this RDPEIR is a First-Tier document, the analysis in which will be incorporated in future EIRs or negative declarations. A First-Tier document can streamline later environmental review by allowing its relevant conclusions to be assumed in later EIRs. The policies embraced by the Delta Plan have not been given any quantitative analysis, however, and to avoid later consideration of these policies would be to completely bypass a true analysis. The fact that the RDPEIR anticipates future "environmental documents" does not guard against future superficial analysis, as a mere initial study determining that an individual project falls within the scope of the analysis in the Program

EIR could be construed as an "environmental document," leading to the omission of any meaningful environmental review. (See *Citizens for Responsible Equitable Enviornmental Development v. City of San Diego Redevelopment Agency* (4th Dist. 2005) 134 Cal.App.4th 598.)

The RDPEIR notes that it anticipates that future projects would conduct separate environmental documents, but it is not clear whether the RDPEIR appears to permit an agency to determine that unspecified future projects are "within the scope" of the Delta Plan, thereby sidestepping further environmental review. Given the superficial and at times non-existing analysis in this EIR, such a determination would be grossly inappropriate. The DEIR should be revised to specify that it is not intended to be the sole environmental review for any future projects.

THE RDPEIR MUST ANALYZE REASONABLY FORESEEABLE INDIRECT EFFECTS OF A PROJECT AS WELL AS IRREVERSIBLE COMMITMENT OF RESOURCES.

A project includes the whole of an action that may result in either a direct or reasonably foreseeable indirect physical change in the environment. (CEQA Guidelines, § 15278, subd. (a).) Just because the project does not approve or mandate any specific physical projects does not mean that the RDPEIR need not anticipate the types of impacts that the Delta Plan encourages by adopting these Policies and Recommendations. The Discussion following Section 15152 state that there will be some effects for which mitigation will not be feasible at an early step of approving a particular development project, and the section would allow a Lead Agency to defer mitigation of that kind of effect to a later step . . . *At the same time, this section makes clear that tiering does not excuse the Lead Agency from analyzing reasonably foreseeable significant effects, or justify deferring analysis to a later tier EIR or Negative Declaration*. (Emphasis added.) The Delta Plan must also include an analysis of reasonably foreseeable indirect impacts. While a Program EIR need not analyze impacts that would be better addressed in a site-specific analysis, the RDPEIR fails to identify significant effects of the projects it proposes with any specificity. Moreover, the RDPEIR makes significance determinations on these impacts that for which it has admittedly has little to no information.

The DEIR and RDPEIR fail to explain how the Delta Plan will result in the Irreversible Commitment of Resources. CEQA Guidelines section 15126.2, subd (a) states, "Direct and indirect significant effects of the project on the environment shall be clearly identified and described, giving due consideration to both the short-term and long-term effects. . . . (c) Significant Irreversible Environmental Changes Which Would be Caused by the Proposed Project Should it be Implemented. Uses of nonrenewable resources during the initial and continued phases of the project may be irreversible since a large commitment of such resources makes removal or nonuse thereafter unlikely. Primary impacts and, particularly, secondary impacts (such as highway improvement which provides access to a previously inaccessible area) generally commit future generations to similar uses. Also irreversible damage can result from environmental accidents associated with the project. Irretrievable commitments of resources should be evaluated to assure that such current consumption is justified."

The RDPEIR makes no attempt at analyzing reasonably foreseeable significant effects, even for projects that have already been formulated and have some degree of analysis that has been completed. (See for example the discussion below on the Shasta Dam raise, the Temperance Flat

Reservoir, and the Sites Reservoir.) The Delta Plan incorporates and encourages the completion of the BDCP, and yet fails to provide a meaningful discussion on how this unprecedented behemoth infrastructure would commit Californians to an unsustainable water delivery system for many generations to come. The irretrievable commitment of upstream resources without any real analysis, and the lack of analysis of the large scale infrastructure (the BDCP) violate Section 15126.2.

THE RDPEIR MITIGATION MEASURES VIOLATE CEQA IN THAT THEY IMPROPERLY DEFER MEANINGFUL ANALYSIS TO A LATER TIME WHILE FAILING TO INCLUDE ANY TYPE OF PERFORMANCE MEASURE.

The Mitigation Measures are general and not tied to specific impacts; therefore, it is impossible to determine whether they are or will be effective. The Revised Project allegedly adds performance measures to assist in implementation of the policies and recommendations in the Plan (RDPEIR p. ES-1) but the RDPEIR is still woefully inadequate in this regard. It is not clear whether some or all of the proposed mitigation must be adopted in order to be considered a "Covered Action" or "Recommended Action." In addition, given the generic discussion of mitigation measures, it is impossible to determine whether they would reduce impacts to a less than significant level. Any predictions made in the RDPEIR are misleading and will misguide future decisions. In many instances, formulation of mitigation measures are deferred to a later time. In many other instances, mitigation measures contain no performance standards. These fatal flaws must be remedied.

CEQA Guidelines 15126.4 states, "Where several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. Formulation of mitigation measures should not be deferred until some future time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way." "Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments. In the case of the adoption of a plan, policy, regulation, or other public project, mitigation measures can be incorporated into the plan, policy, regulation, or project design." The enforceability of all the offered mitigation measures remains unclear. There are only a few mitigation measures that offer anything resembling the required performance standards.

CEQA emphasizes the importance of performance standards at the Program level. "The use of performance standards is particularly appropriate in connection with 'first tier' approvals or other planning decisions that will necessarily be followed by additional, project-level environmental review. On the other hand, where a mitigation measure embodies nothing more than the hope that the agency or applicant with more effort or analysis, can somehow find a solution to a thorny environmental problem, an agency may violate CEQA in concluding that such a measure will render a significant effect less than significant." (Remy, et al., Guide to the California Environmental Quality Act (11th Ed. 2007), p. 552, internal citation omitted.)

The RDPEIR relies on vague mitigation measures and it's not clear whether future project proponents will need to adopt some or all of them. Furthermore, in several instances, the RDPEIR offers as mitigation potential land purchases or water transfer purchases without

conducting any analysis on the availability of such mitigation. This approach violates CEQA. There is no assurance that such mitigation measures are actually available or will be adequate, rendering this analysis meaningless. (*Kings County Farm Bureau v. City of Hanford* (5th Dist. 1990) 221 Cal.App. 3d 692.) While the Plan is admittedly broad and vague in scope and specific mitigation measures will not always be available as a result, the Plan should include performance standards to ensure that the projects that it encourages will be fully mitigated. ("Even when an agency prepares a program EIR with later EIRs or negative declarations in mind, the authors believe that the agency, to be prudent, should formulate and adopt performance standards or objectives (e.g., "no net loss of wetlands") that can function as "first tier mitigation" and then be translated into site-specific mitigation measures when site-specific CEQA analysis is prepared.") (Remy et al, supra, p. 638.)

Lastly, CEQA requires that lead agencies describe the impacts that will result from the mitigation measures themselves. CEQA Guidelines section 15126.4, subd. (a)(1)(D). If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the project as proposed, the effects of the mitigation measure shall be discussed but in less detail than the significant effects of the project as proposed. (*Stevens v. City of Glendale* (1981) 125 Cal.App.3d 986.) This RDPEIR fails to identify the impacts that would arise from mitigation measures, such as purchases of additional water for transfer and land purchases, much less mitigate for those impacts.

THE RDPEIR MAKES UNSUBSTANTIATED CONCLUSIONS REGARDING THE SIGNIFICANCE OF THE IMPACTS WHILE SIMULTANEOUSLY ADMITTING THAT IT HAS LITTLE TO NO INFORMATION ON THESE VERY SAME IMPACTS.

The RDPEIR states, "Environmental Impacts and Benefits of the Proposed Project. "In many regards, therefore, the Delta Plan involves an environmental tradeoff between short-term impacts resulting from construction (in areas including air quality, cultural and paleontological resources, noise, and transportation) and long-term reduction in pre-existing adverse effects related to water reliability, water quality, flood risk, and ecosystem health. This does not mean, however, that projects the Delta Plan encourages would have no long-term adverse environmental impacts. A new desalination plant on the Southern California coast, a new reservoir in the Sierra Nevada foothills, or a new wetland habitat area in the Delta, for example, could have long-term impacts to ocean views, riparian and oak woodland habitat, or Delta agricultural land, respectively." (RDPEIR, p. ES-3.)

EWC appreciates that admission that the projects the Delta Plan encourages will result in long-term environmental impacts, many of which will likely be significant. The DRPEIR fails, however, to describe these types of impacts, much less offer any proposed mitigation. This approach violates CEQA. The RDPEIR should also mention that these projects will also have impacts to fish species that are affected by reservoir operations in the Sierra Nevada foothills. Even if the RDPEIR need not analyze each potential project in detail, it can evaluate reasonably foreseeable impacts given the general type of project and given the type of terrain and habitat in the Sierra Nevada region. There is also no substantiation in the RDPEIR to support the claim that there would be a long-term reduction in pre-existing adverse effects related to water reliability, water quality, flood risk and ecosystem health.

In several instances, the RDPEIR notes that an impact may be Less Than Significant or Significant, depending on the circumstances of the individual project. It then makes a determination on the impacts significance without any substantial evidence to support such a conclusion. For example, the discussion of Impact 3-3b states, "Because of the availability of alternative water supplies and continued availability of Delta water supplies, there is substantial evidence that this impact would not be significant. This conclusion is based on the inability to identify a reasonably plausible scenario in which a potential significant impact would occur. It is therefore concluded that this impact would likely be less than significant. Future project specific analyses may develop adequate information to arrive at a different conclusion; however, for purposes of this program-level analysis, there is no available information to indicate that another finding is warranted or supported by substantial evidence."

This statement reflects a perversion of the substantial evidence. Just because there is not substantial evidence to support a significance determination does not imply that there is substantial evidence to support a less than significant determination. There is little to no evidence, much less substantial evidence, offered in this RDPEIR. This example is particularly egregious as environmental groups have provided plenty of scenarios demonstrating scenarios in which this impact would be significant.

The RDPEIR concludes in several occasions that certain impacts may be significant and unavoidable. While it does not make a determinative conclusion in this regard, to indicate that such a conclusion may be merited is without any justification given the analysis in this RDPEIR. The "Significant and Unavoidable" conclusion is only reached after an agency has made a determination with respect to the feasibility of mitigation measures and alternatives. Since this RDPEIR does not do any analysis of feasibility of mitigation measures, such a conclusion is premature. CEQA contains a substantive mandate that public agencies not approve projects with significant environmental effects if there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects. (Pub. Resources Code, § 21002, *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4$^{th}$ 105, 134.) Such conclusions regarding the "unavoidable" nature of impacts misleads the public and skews future analysis by site-specific projects.

## THE DEIR HAS INADEQUATE PROJECT OBJECTIVES

CEQA Guidelines section 15124, subdivision (b) requires a statement of objectives sought by the proposed project. "A clearly written statement of objectives will help the lead agency develop a reasonable range of alternatives to evaluate in the EIR and will aid the decision makers in preparing findings or a statement of overriding considerations, if necessary. The statement of objectives should include the underlying purpose of the project.

The RDEIR project objectives (largely unchanged from the former Proposed Project) are invalid. The RDEIR states:

> "Further achievement of the coequal goals and the 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, (2) is

> consistent with specific statutory content requirements for the Delta Plan (Water Code sections 85302(c) through (e), and 85303-85308), (3) is implementable in a comprehensive, concurrent and interrelated fashion, and (4) is accomplished as rapidly as realistically possible without jeopardizing ultimate success."

The DEIR confuses an objective of a project with the methodology use to carry out an objective. The objectives are largely just descriptions and modifiers of a single objective. These objectives are still far too vague to provide any meaningful way to shape alternatives. This error belies the entire analysis in the EIR and in particular renders the alternatives analysis invalid. The objectives also overlook the statutory mandate that "The coequal goals [] 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." (Wat. Code, § 85054.)

The faulty description of project objectives mimics the error observed in *Habitat and Watershed Caretakers v. City of Santa Cruz* (2012) 211 Cal.App.4th 429. The Sixth Appellate District found that the City of Santa Cruz's inaccurate description of its project objectives rendered its alternatives analysis and analysis of mitigation measures invalid. The City's primary objective was improper because it stated that the City was required to provide water and sewer services to a section of the University when truly the City was only required to initiate a LAFCO application for an amended Sphere of Influence under a settlement agreement between the parties. This misstatement resulted in a failure to consider potentially feasible alternatives that would have avoided the project's significant water supply impacts, such as a reduced-development or limited-water alternative. The Court pointed out that the stated objectives mistook the underlying purpose of the project with the general nature of the project.

Similarly, the Delta Plan project objectives merely describe the nature of the proposed project, and fail to outline the underlying purposes of the project upon which a reasonable range of alternatives could be developed.

## THE RDPEIR CLAIMS TO HAVE A NEW BROADER FOCUS ON UPSTREAM AREAS, AND YET FAILS TO DEFINE THE GEOGRAPHIC SCOPE OF THE ANALYSIS.

One of the distinctions of the Revised Project is that it considers "upstream areas." However, the RDPEIR does not include a revised project description that delineates the geographic scope of these upstream areas. Furthermore, the RDPEIR fails to revise the regulatory setting and environmental setting to include this new area of focus.
CEQA Guidelines 15124 states, "The description of the project shall contain the following information but should not supply extensive detail beyond that needed for evaluation and review of the environmental impact. (a) The precise location and boundaries of the proposed project shall be shown on a detailed map, preferably topographic. The location of the project shall also appear on a regional map. . . . (c) A general description of the project's technical, economic, and environmental characteristics, considering the principal engineering proposals if any and supporting public service facilities."

CEQA Guidelines 15130 states, “Lead agencies should define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used.”

The RDPEIR claims to have expanded its scope into upstream areas, but fails to describe these areas or justify the parameters of its scope. Vol. I RDPEIR (Section 1.4.2) included a map of a large area that includes what is likely considered “upstream areas” but did not include actual analysis of most of these areas so it is unclear how the analysis has changed in this RDPEIR. This section states, “The project area to be considered in this RDPEIR is defined by the purposes and uses of the Delta Plan. The project area, shown in Figure 1-1, includes the Delta, the Delta watershed that contributes water to the Delta, and areas outside of the Delta that use Delta water.” The DSC erred in failing to revise the Project Description to describe the upstream areas in the impact analysis and explain why certain tributaries to the Delta were excluded.

In failing to provide an adequate description of upstream areas, the RDPEIR also violates CEQA mandates on establishing a baseline. CEQA Guidelines § 15125 subdivisions (c) and (d) state, “Knowledge of the regional setting is critical to the assessment of environmental impacts. Special emphasis should be placed on environmental resources that are rare or unique to that region and would be affected by the project. The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context. The EIR shall discuss any inconsistencies between the proposed project and applicable general plans and regional plans. Such regional plans include, but are not limited to, . . . habitat conservation plans, natural community conservation plans and regional land use plans . . .

While this RDPEIR states that the Revised Project includes upstream areas, it fails to establish the environmental setting for these areas; thus, its discussion of potential impacts to these areas is essentially speculation. It furthermore does not include a description of the relevant regulatory schemes in these areas and how such regulations would be reconciled with the policies and recommendations in the Delta Plan. This omission violates CEQA. (CEQA Guidelines, § 15125.) The current state of the Delta as well as its tributaries must be established in order to have a legitimate discussion of a project’s impacts.
The RDPEIR gives a cursory mention of upstream projects and implies that little is known about these projects. In fact, there is substantial information available on these projects, and such information should have been incorporated in this RDPEIR. Regarding the Los Vaqueros Reservoir Project, the DWR web site states, “The Los Vaqueros Expansion Investigation is taking a two step approach. The CCWD Board certified a Final PEIR and approved an expansion from 100 TAF to 160 TAF on March 31, 2010. CCWD has completed design and is moving forward with construction scheduled to begin in 2011. With additional funding, local, state, and federal partners may choose to continue to study the feasibility of a 275 TAF expansion alternative in the context of other Delta initiatives to improve Delta conveyance and better protect Delta fisheries, including long-term programs being explored in the BDCP.”

In addition, DWR and U.S. Bureau of Reclamation are currently preparing a Plan Formulation Report for the Upper San Joaquin River Basin Storage Investigation. Simultaneously, surveys for environmental documentation and permit applications are being performed in the study area.

Surveys for engineering assessments, including drilling and other geotechnical work has been in progress since 2006.
As such, the RDPEIR erred in glossing over these projects and their related impacts.

THE REVISED PROJECT ENCOURAGES PROJECTS AND CONSTRUCTION OF FACILITIES WITHOUT MAKING A DETERMINATION THAT SUCH PROJECTS WOULD MEET THE GOALS OF THE DELTA REFORM ACT.

The Revised Project would encourage projects such as new or expanded reservoirs, groundwater production facilities, groundwater production facilities (wells and pipelines), ocean desalination facilities, and recycled water facilities, and above all the BDCP, among other things. It is improper for the DSC to encourage projects without even a minimal look at the impacts associated with these types of projects. Moreover, several such projects are in the pipeline already and the RDPEIR should not take a "head in the sand" approach by claiming that the nature of these projects is unknown. This is most notably true for the BDCP and the upstream reservoir projects that have already undergone agency analysis. Rather, the RDPEIR should provide at least a general description of these projects and the types of impacts that are anticipated, propose suggested mitigation measures, and indicate how these encouraged projects and their associated projects can be reconciled with the goals of the Delta Reform Act.

Moreover, each impact section states that the Project "does not direct the construction of specific projects and would not directly result in construction or operation of projects or facilities; therefore, it would result in no direct impacts on any resources." Yet WR R12 states that: "The relevant federal, State, and local agencies should complete the Bay Delta Conservation Plan, consistent with the provisions of the Delta Reform Act, and receive required incidental take permits by December 31, 2014." As is fully evident from records available to the Council and the numerous briefings provided to the Council by BDCP proponents, the BDCP is a specific project that proposes that specific diversion facilities and habitat be constructed. The BDCP will have many significant environmental effects and must be considered as a cumulative project.

SECTION 2 – DESCRIPTION OF REVISED PROJECT

CEQA Guidelines 15124, requires *A statement briefly describing the intended uses of the EIR*. (1) This statement shall include, to the extent that the information is known to the Lead Agency, (A) A list of the agencies that are expected to use the EIR in their decision-making, and (B) A list of permits and other approvals required to implement the project. (C) A list of related environmental review and consultation requirements required by federal, state, or local laws, regulations, or policies. To the fullest extent possible, the lead agency should integrate CEQA review with these related environmental review and consultation requirements. (2) If a public agency must make more than one decision on a project, all its decisions subject to CEQA should be listed, preferably in the order in which they will occur. The RDPRIR and DEIR fail to include a comprehensive statement of intended uses of the RDPEIR, leaving it vulnerable to misuse in the future and violating CEQA Guidelines, section 15124.

EWC reiterates its comments made on the February 2012 DEIR in that little substances has been added to this RDPEIR. The RDPEIR does not consider public trust doctrine and fails to

incorporate the conclusions made by the State Water Resources Control Board regarding adequate inflows and outflow to the Bay Delta. The DRPEIR does not include estimates for jobs lost, when CEQA requires such a description. (CEQA Guidelines, § 15131, *Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (4th Dist. 1985) 172 Cal.App.3d 151, 170, (even if economic effects are not to be considered significant impacts in isolation, the EIR must determine the relationship between economic impacts and potentially significant environmental impacts.) Most importantly, this Project does not meet goal of reducing reliance on the Delta.

Throughout the DEIR and RDPEIR the following statement appears, "At this time, it is not known which agency would implement any such projects, where the facilities would be located, or how the facilities would be operated. Therefore, for the purposes of this Environmental Impact Report (EIR), general types of projects and facilities are considered possible outcomes of implementation of the policies and recommendations." For purposes of a CEQA EIR, and although this is considered a Programmatic EIR, this statement and many more like it throughout the document are too vague and lacking the precision that would allow decision makers to proceed with evaluation, approval, public trust balancing of alternatives, or tiering of future EIR's (CEQA Guideline 15151, Standards of Adequacy for an EIR). This statement also evinces a "head in the sand" approach that is used throughout the analysis. The RDPEIR lists many reservoir projects that would be affected by the Delta Plan, and yet fails to conduct even a superficial analysis of these projects; it adds little value to the discussion to mention projects that are occurring but fail to discuss any of the impacts that are likely to occur in these vicinities. It actually damages informed decision-making when the agency takes it a step further and makes significance determinations on these very impacts.

(Page 2-9), Section 2.1.4, Line 40. If the intent of ER R5 is to reduce populations of Striped Bass in order to reduce predation by introduced fish, we refer you to the ruling by the California Fish and Game Commission which defeated proposed fishing regulations which would have increased the take of Striped Bass in order to accomplish the same goal. Predation by Striped Bass on salmon was shown not to be significant and the long term tradition of having Striped Bass available in the Delta for recreational fishing was deemed more important. The Delta Stewardship Council should be guided by this policy decision of the Fish and Game Commission.

SECTION 3 – WATER RESOURCES

The single most significant and negative policy change in the Final Delta Plan is that the Revised Project WR P1 changes the definition of "Reduced Reliance on the Delta." The prior definition included a policy calling for a reduction of net water used from the Delta watershed. The new definition omits references to water use in the Delta watershed and only applies to water "exported from, transferred through or used in the Delta." The ramification of this change in definition is that it appears that all diversions upstream of the Delta would not be required to comply with the proposed prohibitions on Delta exports, or the legally mandated requirement to reduce reliance on the Delta, because they are not using water exported from, transferred through or used in the Delta.

In spite of repeated requests for more information on upstream projects by DWR and EWC among others, the RDPEIR continues to provide vague and incomplete information on the projects encouraged by the Delta Plan.

The cited projects in progress include: North of Delta Offstream Storage Investigation (Sites Reservoir), Los Vaqueros Reservoir Project - Phase 2, the Upper San Joaquin River Basin Storage Investigation Plan (Temperance Flat Reservoir), and the next update of the Department of Water Resources (DWR) Bulletin 118 *California's Groundwater* (DWR 2003). The DSC has to decide whether it has enough information to evaluate these projects at least on a general level or not. If so, it must provide a description of the types of the impacts that could be anticipated from such projects. For all of these named projects, there is preliminary information available and such information should be summarized here. If DSC does not feel like it has enough information to merit a discussion on the impacts, then it cannot make any conclusions regarding the associated impacts and should not make any related Recommendations or Policies. It cannot have it both ways. However, given that DSC is clearly encouraging these types of projects and these projects have clearly gained shape and momentum, the RDPEIR is remiss in failing to include a comprehensive discussion of these projects and at least a high-level analysis of the likely impacts that would result from their implementation.

The RDPEIR also fails to include a meaningful discussion of the Shasta Lake Water Resources Investigation, but rather only briefly mentions it in the Cumulative Impacts chapter. The Draft Feasibility Report for the Shasta Reservoir Expansion and Dam Raise clearly anticipates BDCP as a related project. ("Other programs and projects currently in the planning phase could influence the [Shasta Lake Water Resources Investigation] in the future. Prominent examples include the Delta Plan and the Bay Delta Conservation Plan (BDCP). These projects and programs have not been included in the evaluation of the alternative plans for the SLWRI because there has not been a specific decision to implement them at this time.") (Draft Feasibility Report, Nov. 2011, ES -1.) Given that over a year has passed, many more details are available on this project and should be included in this RDPEIR as it is so closely connected with the BDCP.

As noted in our last round of comments, as a matter of environmental policy, many EWC organizations will oppose further surface storage projects that are included in the Proposed Project due to the significant negative environmental impacts that they have on California riverine habitat and due to the lack of any consideration of public trust values that should be associated with the questionable cost evaluations that accompany those projects. This includes but is not limited to: expansion of Shasta Dam, Sites Reservoir, and Temperance Flat Reservoir. The Revised Project (as well as the Proposed Project) supports these projects without any quantitative justification on costs, yield, impacts on the environment, or evaluation of the public trust values involved. (CEQA Guideline 15126.5, Discussion of Alternatives, Guideline 15146, Degree of Specificity).

The Environmental Setting should be revised to reflect the state of drastic overextended entitlements of water coming from the Delta. The DEIR/RDPEIR may not assume the past illegal water deliveries if the very activity that is being approved in the Delta Plan. An agency may not escape its duty by ignoring that duty and then presenting the result as a *fait accompli* incorporated into an environmental baseline. *League to Save Lake Tahoe v. Tahoe Reg'l*

*Planning Agency*, 739 F. Supp. 2d 1260, 1272 (E.D. Cal. 2010) aff'd in part, vacated in part, remanded, 469 F. App'x 621 (9th Cir. 2012).

The DEIR and RDPEIR erred in failing to include a comprehensive analysis of the availability of water coming into the Delta. It conclusions on water supply, among other impact areas, are utterly without justification without this basic analysis.

Impact 3-3b: Substantially Change Water Supply Availability to Water Users That Use Delta Water.

The RDPEIR states, **"**Because of the availability of alternative water supplies and continued availability of Delta water supplies, there is substantial evidence that this impact would not be significant. This conclusion is based on the inability to identify a reasonably plausible scenario in which a potential significant impact would occur. It is therefore concluded that this impact would likely be less than significant. Future project specific analyses may develop adequate information to arrive at a different conclusion; however, for purposes of this program-level analysis, there is no available information to indicate that another finding is warranted or supported by substantial evidence. This conclusion is not supported by substantial evidence because the RDPEIR does not include any quantification of water supplies that would occur from the projects it encourages. There is no evidentiary basis of this conclusion, and this should be omitted in the Final PEIR. All Less Than Significant determinations in this chapter suffer from this flaw. The discussion of "water efficiency and conservation programs" is undefined and unquantified, and DSC cannot provide any assurance that such programs would be implemented.

Section 3.4.2.1 – Reliable Water Supply

The RDPEIR states, "The Revised Project would apply to areas of the Delta watershed located upstream of the Delta unlike the Proposed Project. In most of this upstream area, groundwater supplies are not substantial, especially in the foothills and mountains that surround the Sacramento and San Joaquin valleys. In these areas, it is anticipated that projects to recycle wastewater and stormwater would predominate over groundwater projects. Thus, impacts related to the construction and operation of reliable water supply projects under the Revised Project would be greater than under the Proposed Project because of the newly-covered upstream area; these increased impacts would largely be the result of new storm water and wastewater recycling projects, while impacts related to groundwater projects would not increase over the Proposed Project." (Page 3-2)

These upstream areas are not delineated and the projects therein are described far too vaguely. There is no substantiation for the conclusion that groundwater projects would be minor compared with wastewater and stormwater. The RDPEIR erred by failing to provide a citation for this conclusion. See Appendix D, Section 1.3.2, "The counties that incorporate groundwater-related ordinances in the areas that might be affected by the Delta Plan are: Shasta, Tehama, Glenn, Colusa, Yolo, Sacramento, San Joaquin, Calaveras, Tuolumne, Madera, Fresno, Kern, Napa, Ventura, San Diego, San Bernardino. Local county ordinances vary by authority or agency and region, but typically involve provisions to limit or prevent groundwater overdraft, regulate

transfers, and protect groundwater quality." There should be a full description of the groundwater use, relevant policies and status in each of these counties.

There is no substantiation for the conclusion that impacts would be greater under the Revised Project because of the new storm water and wastewater recycling projects. There should also be an inclusion of impacts associated with reservoir construction and expansion.

The discussion regarding leakage from possible canals that would transfer water requires evidentiary substantiation. Describe and quantify these assertions regarding how leaky canals will help restore groundwater levels.

Section 3.4.1 – Assessment Methods.

The RDPEIR states, "The precise magnitude and extent of project-specific impacts on the physical environment would depend on the type of action or project, its specific location, its total size, and a variety of project-and site-specific factors that are undefined at the time of preparation of this program-level study. Project-specific impacts would be addressed to project-specific environmental studies conducted by the lead agency at the time the projects are proposed for implementation."

This conclusion is copied and pasted through the DEIR and RDPEIR. This approach violates CEQA. A lead agency need not just look at direct impacts of a project, it must also look at the reasonably foreseeable indirect impacts. This analysis cannot be deferred to an indefinite time because the approval of the Delta Plan will encourage certain projects to move forward and indeed may create an irreversible momentum for the approval of these projects.

This chapter fails to provide descriptions of the McCloud, Pit and Trinity Rivers, all part of the Sacramento River watershed. This oversight should be fixed.

Section 3.4.3.1.1. Impact 3-1a: Violate Any Water Quality Standards or Waste Discharge Requirements or Substantially Degrade Water Quality.

The RDPEIR states: "Water transfers to facilitate water supply reliability could influence water quality by producing temporary changes in flow that could affect the concentrations of regulated water quality constituents, including water temperature within the Delta watershed tributaries. However, as described in Section 3.4.3.1, Reliable Water Supply, of the Draft PEIR, those impacts would be less than significant following implementation of mitigation measures by the water purchasers to purchase additional transfer water that would be released from upstream reservoirs during drier periods to mitigate water quality impacts."

With respect to water transfers being ameliorated due to releases from upstream reservoirs, the RDPPEIR fails to include a description of the multitude of impacts that will result from this drawdown. Lead agencies must analyze not only the impacts of their proposed projects, but also of their proposed mitigation measures if such measures may have a significant effect on the environment. (CEQA Guidelines, § 15126.4; *Save Our Peninsula Committee v. Monterey County Bd. Of Supervisors* (6th Dist. 2001) 87 Cal.App.4th 99.)

Mitigation measures must be directly connected to an impact. Assigning mitigation measures to a group of impacts defeats the intention of demonstrating whether the measures will actually mitigate the impacts. The use of group mitigation measures should be revised and tied to specific impacts.

Section 3.4.3.1.3. Impact 3-3a: Substantially Change Water Supply Availability to Water Users that Use Delta Water.

"The Revised Project also would encourage actions within areas of the Delta watershed located upstream of the Delta as compared to the Proposed Project." This statement requires a significance determination and proposed mitigation. It also requires a description of what upstream areas it is referring to.

Section 3.4.3.2. Delta Ecosystem Restoration.

The RDPEIR states, "The Revised Project also encourages other actions . . . encouraging the SWRCB's update of the WQCP for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary and develop, implement, and enforce updated flow requirements for the Delta and high-priority tributaries in the Delta watershed."
The RDREIR should not only encourage SWRCB to adopt a revised WQCP but should encourage them to stick by the criteria they described in the 2010 report to ensure adequate flows for fish.

Section 3.4.3.2.3. Impact 3-3b: Substantially Change Water Supply Availability to Water Users that Use Delta Water.

The DEIR states, "It is anticipated that with implementation of these projects and actions, the total water supply available would remain the same or increase as compared to existing conditions depending upon the capacities of the facilities and extent of water transfers through a combination of continued use of Delta water, water use efficiency and conservation programs, and implementation of new local and regional water supplies."
This statement evinces an approach of taking into account all the beneficial impacts associated with future and yet undefined projects but failing to account for any of the environmental impacts of these projects. Such an approach fails to inform the public of the true nature of the projects impacts.

Section 3.4.3.4. Water Quality Improvement.

The Project encourages actions such as conveyance facilities, pipelines, and pumping plants to improve water quality. (RDPEIR p. 3-11.) The RDPEIR then lists several water quality plans that are anticipated. There is no description of the conveyance facilities and pipelines, however. This oversight should be remedied.

The RDPEIR states, "Operation of facilities within the rivers and streams upstream of the Delta or in the Delta could result in changes in salinity in the Delta by reducing Delta freshwater

inflows during some periods of the year." (p. 3-13.) This section should include a section on the impacts of these facilities to the upstream areas, not just the Delta.

Section 3.4.3.4.2: Impact 3-3d- Substantially Change Water Supply Availability to Water Users That Use Delta Water.

The RDPEIR states, "Because of the availability of alternative water supplies and continued availability of Delta water supplies, . . . there is substantial evidence that this impact would not be significant."

This statement and others like it throughout the RDPEIR contradicts CEQA's definition of "substantial evidence." CEQA Guidelines section 15384 defines substantial evidence as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. *Argument, speculation, unsubstantiated opinion or narrative*, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. (Subds. (a) and (b), emphasis added.)

The RDPEIR has admitted that no details are known about most of its encouraged projects, and yet claims that it has substantial evidence to supports its conclusions. This constitutes mere speculation in violation of the statute. With no quantification, there is no substantial evidence to justify this conclusion.

Section 3.4.3.6. Mitigation Measures

It is misleading and ineffective to do a general section on mitigation measures, rather than showing how each mitigation measure mitigates each impact. Given the lack of any specifics, it is impossible to determine that the measures listed in MM 3-1 will actually mitigate the impacts to a less than significant level. It is not clear whether these are enforceable mitigation measures or merely suggestions, nor is it clear how the local agencies will carry out the measures. This vague description fails to foster informed decision-making.

SECTION 4 – BIOLOGICAL RESOURCES

Sections 4.2—4.3. One of the differences between the Revised Project and the other Alternatives is that the Revised Project considers upstream areas. The Regulatory Framework and Environmental Setting should be revised to include the pertinent information for upstream impacts.

Section 4.4.3.1. The RDPEIR states "In most of the upstream area, groundwater supplies are not substantial, especially in the foothills and mountains that surround the Sacramento and San Joaquin Valleys. In these areas, it is anticipated that project to recycle wastewater and

stormwater would predominate over groundwater projects." Need a citation or some substantiation of the conclusions made in this Section.

Section 4.4.3.1.1- Impact 4-1a: Substantial Adverse Effects on Sensitive Natural Communities, including Wetlands and Riparian Habitat. Effects of Project Construction.

The RDPEIR states, "In addition to the types of potential impacts described above for reliable water supply projects, the large surface storage reservoirs encouraged by the Revised Project could result in the inundation of thousands of acres of habitat used by wildlife and the loss of sensitive natural communities. The impacts of these types of projects could depend on the ultimate location of the reservoirs and their proximity to sensitive natural communities. These projects would occur mostly outside of the Delta."

While outside of the Delta, these are the species that are also in the Delta, so to hurt their habitat is to also harm the Delta. The RDPEIR erred in failing to provide a broad and general analysis of the projects that have been specifically named, in addition to a full description of the Shasta Lake Water Resources Study.

Effects of Project Operations. "Water transferred from north of the Delta could result in a temporary increase in water in the rivers flowing into the Delta, which could provide benefits to adjacent wetlands and riparian communities…" This discussion fails to note how altered reservoir operations could affect the temperature of stored water in the upstream areas and how the upstream environment would suffer. Rather, it focuses on the Delta impacts. The Delta Reform Act does not encourage the DSC to trade Delta impacts for upstream impacts. Even if that were a responsible strategy, it would be ineffective because upstream areas are intimately connected to the Delta.

The RDPEIR states, "In most cases, compliance with required permits and approvals and implementation of mitigation measures would reduce impacts to a less than significant level." There is no justification for this statement, as the types of permits and approvals have not been described. This is especially true for upstream areas. One cannot merely assume that future agencies will comply with all pertinent regulations without any analysis of those regulations and an assessment of whether those regulations have been complied with in the past. There is no assurance or even description of whether it is even feasible to meet regulatory requirements while also delivering more water to Delta, as is contemplated by the BDCP. This oversight should be remedied.

The RDPEIR states, "Water transfers to facilitate water supply reliability could influence water quality by producing temporary changes in flow that could affect the concentrations of regulated water quality constituents, including water temperature within the Delta watershed tributaries. However, as described in Section 3.4.3.1, Reliable Water Supply, of the RDPEIR, those impacts would be less than significant following implementation of mitigation measures by the water purchasers to purchase additional transfer water that would be released from upstream reservoirs during drier periods to mitigate water quality impacts. (Page 3-3). . . These changes could reduce the extent of brackish or freshwater marsh in the Delta. Changes in water operations in the CVP and SWP and other water systems also could alter the timing and magnitude of water

fluctuations in the upstream reservoirs and adversely influence wetlands and riparian communities along the edges of the reservoirs. Other programs intended to improve water supply reliability, such as water conservation, could result in more water remaining in the rivers tributary to the Delta and less water removed from the Delta. This could potentially benefit wetlands and riparian communities along the rivers and Delta channels." (RDPEIR Page 4-4.)

We agree with these statements and believe the RDPEIR should explain how these impacts can be reconciled with the statutory objectives of the Delta Reform Act. This section should include fact-based information on the challenges of coordinating water delivery to the Delta and the water quality and ESA obligations for agencies involves in upstream reservoir operations. There should be more of a description of the types of impacts that will likely occur due to reservoir drawdown, particularly impacts related to coldwater fish habitat. The RDPEIR should offer at least broad level mitigation for such impacts. These obligations should have been enumerated in the regulatory setting chapter and analyzed in the impact analysis.

Impact 4-2a: Substantial Adverse Effects on Special-status Species.

The RDPEIR states, "Small storage reservoirs, regulating reservoirs, and groundwater percolation basins that might be constructed to improve water supply reliability could affect special-status species within the footprints of those facilities through disturbance, habitat loss, or direct injury. The extent of impact would be influenced by the size of the facility footprint and its location relative to populations of special-status species. Construction of large surface water storage reservoirs would largely occur outside the Delta. Disturbance and habitat loss associated with facilities construction might adversely affect terrestrial and aquatic special-status species if those species inhabit the affected areas. . ." Given these impacts, it is difficult to see how these projects and their associated impacts can be reconciled with the goals of the Delta Reform Act. The Final PEIR must explain how these projects achieve the statute's goals.

The RDPEIR states, "Changes in surface water storage operations could influence the timing and magnitude of flows and water temperature in downstream water bodies used by special status species, and temperature and salinity gradients in the Delta. These changes could reduce the quality and suitability of aquatic habitats for special-status fish species such as delta smelt." EWC agrees with this statement and thinks it merits a full discussion including the environmental setting of these areas in addition to an actual quantitative analysis that includes an analysis of all the pertinent fish species in the Delta and its tributaries and explanation of the optimal habitat for such species.

The RDPEIR states, "The details of many of the aspects of projects encouraged by the Revised Project are not currently known, however, and it is possible that significant and unavoidable biological resource impacts could occur. One or more of the reliable water supply projects encouraged by the Revised Project may result in significant and unavoidable biological resource impacts similar to the impacts described for the Proposed Project . . ." The prediction of significant and unavoidable impacts is belied by the fact that the impacts have associated with specific projects have not been identified and feasibility of potential mitigation measures have not been investigated. These whether significant impacts are "unavoidable" under CEQA will be entirely determined by local project lead agencies. To make any conclusions regarding

significance and efficacy of mitigation is misleading, as future projects may rely on these statements. This type of statement appears through the RDPEIR and all should be removed in the Final PEIR.

The impact on the CVPIA goal of the doubling of salmon populations must be considered as a part of this section.

Impact 4-3a: Substantial Adverse Effects on Fish or Wildlife Species Habitat

There is no justification for the conclusion that compliance with permits and mitigation measures would reduce to a less than significant level. This conclusion and those like it throughout the RDPEIR should be removed.

Impact 4-4a: Interfere Substantially with the Movement of Any Native Resident or Migratory Fish or Wildlife Species or with Established Native Resident or Migratory Wildlife Corridors.

The RDPEIR errs in discussing impacts of project operation on upstream tributaries to the Delta while failing to discuss the types of species that in these areas and the nature of the impacts. It also does not explain how can these impacts be reconciled with the goals with Delta Reform Act.

Impact 4-5a: Conflict with Any Local Policies or Ordinances Protecting Biological Resources or the Provisions of an Adopted Habitat Conservation Plan, Natural community Conservation Plan, or Other Approved Local, Regional, or State Habitat Protection Plan.

The RDPEIR should describe the local policies and regulations that apply to its anticipated projects and ways that those policies can be reconciled with the Policies and Recommendations in the Delta Plan. In doing so, the RDPEIR should have listed the parameters of the type of project the Delta Plan is encouraging. The RDPEIR errs in failing to provide any guide posts as to what types of projects Delta Plan would encourage.

Section 4.4.3.4. Water Quality Improvement.

Impact 4-5d: Conflict with Any Local Policies or Ordinances…
"Although projects encouraged by the Revised Project would not likely conflict with adopted HCPs, and NCCP's in the Delta, they could conflict with HDCPs and NCCPs in other areas of the Study Area as well as with local policies or ordinances.

The RDPEIR should have provided some description of the Plans and policies in upstream areas and how to reconcile this likely impact with the goals of the Delta Reform Act. This information should not be buried in an Appendix (and it doesn't appear to be in the Appendix either.)

Impacts 4-1e: Substantial Adverse Effects on Sensitive Natural Communities, Including Wetlands and Riparian Habitat.

"Impacts of levee modification and floodplain enhancement actions would result primarily in temporary, construction-related impacts. Reservoir reoperation, however, could result in long-

term impacts if the changes in operation to facilitate flood control adversely affect sensitive wetland and riparian habitats by altering the magnitude, duration and timing of flows."

The RDPEIR errs in failing to provide a broad analysis of these impacts and failing to reconcile this long-term impact with the goals of the Reform Act.

Impact 4-2e: Substantial Adverse Effects on Special-Status Species. "Reoperation of reservoirs to support flood risk reduction could adversely affect special-status species, such as Chinook salmon, if the flow changes scour or dewater spawning areas or lead to stranding of juvenile fish. Reoperation also could impact special-status fish if the flow changes adversely influence water temperatures."

EWC agrees with this conclusion and believe it merits more of a discussion. The RDPEIR should describe prime temperature ranges for endangered species in all Delta tributaries and as well as other prime habitat characteristics and how changed reservoir operations could impact that habitat. As discussed above, the RDPEIR erred in failing to include the reasonably foreseeable impacts for projects that are already in the pipeline.

Impact 4-3e: Substantial Adverse Effects on Fish or Wildlife Species Habitat.

The RDPEIR states, "The nature and severity of construction-related biological resources impacts for the project encouraged by the Revised Project will depend on the specific location and characteristics of the project at the time they are implemented, and the specific mitigation measures adopted by the implementing agencies. In most cases, compliance with required permits and approvals and implementation of mitigation measures would reduce impacts associated with projects to a less than significant level. In some cases, the potential for biological resource impacts could result in a significant, unavoidable impact. This situation is most likely to occur during construction and may be temporary in nature."

It is unclear what value this type of conclusion offers. It is essentially stating that any impact conclusion can be anticipated and makes general predictions with no factual substance. The RDPEIR has no way to substantiate the statement that most impacts would occur during construction because it has not done any analysis of operational impacts. The RDPEIR has no way to substantiate its claim that compliance with permits and mitigation measures would likely reduce impacts to a less than significant level because it has not evaluated those permits, nor how those permits interrelate with the Delta, nor whether it is even feasible to comply with local water quality and species protection regulations while also attaining Delta water supply goals. Without looking at specific impacts and specific mitigation measures, it is impossible to make any type of significance determination. To do so misleads the public and encourages superficial analysis by later agencies. These statements and others like it throughout the RDPEIR should be removed in the Final PEIR.

Impact 4-5e: Conflict with Any Local Policies or Ordinances Protecting Biological Resources. . .

This section fails to discuss Habitat Conservation Plans and other water quality regulations of upstream areas. The RDPEIR fails to convey how this Plan would comport with restrictions

upstream and how operations could be modified to ensure that upstream regulations are complied with.

Mitigation Measure 4-14.5
These mitigation measures are grouped together to address a series of impacts which is an inexact approach. One proposal includes, "Selecting project sites that would avoid sensitive and natural communities, including jurisdictional wetlands and other waters, vernal pools, alkali seasonal wetlands, riparian habitats, and inland dune scrub." How can this type of mitigation measure be offered when the RDPEIR itself notes that many of the proposals, such as new pipelines and new and expanded reservoirs would inevitably involve destruction of riparian habitats and wetlands. This measure also proposes compensating for impacts by purchasing in-kind preservation or restoration credits. The RDPEIR should have conducted a basic analysis to determine the availability of such credits and the cost to help later project lead agencies determine whether such a mitigation measures would be feasible. These mitigation measures offer suggestions including, "Select[ing] project sites that would avoid habitats of special-status species . . . The RDPEIR admits that most of its encouraged projects would harm the habitat of various endangered species; thus, this proposed mitigation offers little value. Because all the local ordinances and endangered species protection plans have not been evaluated it is possible to tell whether this mitigation would actually be effective at mitigating for potentially significant impacts.

SECTION 5 – DELTA FLOOD RISK

(Section 5.4.3.1, line 31) We strongly disagree with the statement "In most of this upstream area, groundwater supplies are not substantial…" The groundwater supplies of the Tuscan Aquifer underlying portions of the Sacramento Valley contain millions of acre-feet of water. Throughout this document, there is a failure to acknowledge the Tuscan Aquifer and what result the Delta Plan will have on this important resource.

Section 5.2, 5.3 As noted in the other chapters, these sections should have been revised to include the regulatory setting and environmental setting of upstream areas that this Revised Project allegedly includes

Section 5.4.3.1. Reliable Water Supply. "The number and location of most potential projects that would be implemented are not known at this time. However, the Revised Project like the Proposed Project, specifically names the Department of Water Resources (DWR) Surface Water Storage Investigation, which includes the North-of-Delta Offstream Storage Investigation, Los Vaqueros Reservoir Project (Phase 2), and the Upper San Joaquin River Basin Storage Investigation Plan as potential projects to be implemented. Both the Revised Project and the Proposed Project encourage the update of Bulletin 118 which could lead to improvements in groundwater management."
The DSC is on the right track by broadening the scope of its analysis to include these projects but such inclusion lacks meaningful value unless there is a full description of the projects, their habitat areas, and their likely impacts on these habitat areas. As noted above, there is quite a bit of information already available on Los Vaqueros Expansion Investigation, North-of-Delta Offstream Storage Investigation (Sites Reservoir), Temperance Flat Reservoir and the Shasta

Dam Water Storage Investigation. A comprehensive description of these projects should have been included in this RDPEIR.

Section 5.4.3.1. Reliable Water Supply

"The Revised Project would apply to areas of the Delta watershed located upstream of the Delta unlike the Proposed Project. . . . Thus, impacts related to the construction and operation of reliable water supply projects under the Revised Project would be greater than under the Proposed Project because of the upstream area; these increased impacts would largely be the result of the new storm water and wastewater recycling projects, while impacts related to groundwater projects would not increase over the Proposed Project."

There is no substantiation provided for this conclusion. The RDPEIR should be revised to include an analysis that compares potential impacts of each type of flood control project, discussing the types of impacts typical of such projects before it can reach such a conclusion.

Impact 5-1a: Substantially Alter the Existing Drainage Pattern of the Site or Area, Including Through the Alteration of the Course of a Stream or River, or Substantially Increase the Rate or Amount of Surface Runoff in a Manner which Would Result in Flooding On or Offsite. The Discussion of "Effects of Project Operation" mentions that modification of water supply flows through the Delta could result in upstream reservoir operation changes. This section could be greatly improved by an application of the facts that are known about the projects that currently exist. This section fails to describe any of the relevant permits or applicable mitigation measures; thus, it cannot reasonably state that compliance with such permits and measure would likely reduce impacts to a less than significant level.

Mitigation Measures 5-15-5

The RDPEIR states, "Design subsequent mitigation measures in accordance with the final study and with the applicable standards of FEMA, USACE, DWR, and CVFPB. The study would identify potential increase in flood risks, including those that may result from new facilities." This mitigation measure fails to include a performance measure and impermissibly defers any specific mitigation measures to a later time. While these measures would very like ameliorate the impacts discussed, there is no quantification of impacts, nor performance measures used, thus it is an error to say that "In many cases, they reduce significant construction-related flood management impacts to less than significant levels." These errors apply to Mitigation Measures 5-15-5.

SECTION 6 – LAND USE AND PLANNING

Regulatory Framework. 6.2

Local Land Use Plans. 6.2.1
The RDPEIR still does not mention local habitat conservation plans such as the Yolo Natural Heritage Program, a county-wide NCCP/HCP, and the San Joaquin County Multi-Species Habitat Conservation and Open Space Plan. As previously stated in the RDPEIR, this omission

gives the impression that local government has been negligent in dealing with habitat conservation issues and that plans put forward by outside interests should therefore take precedence. In fact, it is essential that local planning efforts of this kind be respected and taken into account in any project planning going forward for the Delta region.

Also missing is any mention of Delta reclamation, water, and levee districts. This document needs to recognize these local authorities and incorporate maintenance and other plans on an island-by-island basis.

### 6.4.3 Revised Project

The RDPEIR is incorrect that there are not substantial groundwater supplies within the Delta watershed upstream of the Delta. (RDPEIR, p. 6-2; cf. http://www.water.ca.gov/groundwater/bulletin118/sacramento_river.cfm, http://www.water.ca.gov/groundwater/bulletin118/san_joaquin_river.cfm (groundwater basin information).)

## SECTION 7 – AGRICULTURAL AND FORESTRY RESOURCES

The RDPEIR's analysis of impacts to agricultural resources and mitigation for farmland conversion is inadequate. The RDPEIR fails to describe the impacts of the continuation of supplying water to farms with selenium laden soils in the San Joaquin Valley and conversion of productive Delta farmland to water infrastructure, habitat, and other projects promoted by the Plan.

Due to the scale of impacts on agricultural resources on the Delta that would occur as a result of implementation of the Plan, additional detail should be developed in the agricultural resource mitigation measures. In particular, other tools besides easements are available that may provide mitigation for agricultural impacts. There are also some opportunities to maintain productive crops at the same time as providing wildlife habitat. The Department of Water Resources has developed a white paper discussing other options for mitigation of large scale agricultural impacts on Delta. The white paper includes additional potential mitigation measures that should be considered and potentially adopted. In addition to considering a wide array of mitigation options, further consultation with local agencies and farmers should accompany the development and implementation of agricultural mitigation measures.

The RDPEIR includes a mitigation measure requiring easements when agricultural land is converted, to mitigate for loss of high value farmland in the Delta due to creation of habitat or other projects, the mitigation ratio must be higher than 1:1. At a 1:1 mitigation ratio, a net loss of farmland is still occurring. The mitigation ratio for conversion of agricultural land should be at least 2:1 for prime farmland in the Delta; mitigation properties should also be located within the Delta to ensure that the Delta's agricultural productivity maintained.

## SECTION 11 – GEOLOGY AND SOILS

The evaluation of impacts in Chapter 11 is inconsequential. If a project were to be built, the geology is not going to change. Major impacts would be on the ecosystem, water supply, and disease vectors while impact rates of erosion could possibly be mitigated.

Regional and Local Seismicity. 11.3.2.2
Previously mentioned in this section of the RDPEIR are three earthquakes of magnitude 6.5 or greater. Despite the devastation caused by these earthquakes in the Bay Area and along the coast, there is no record of any levee failure in the Delta associated with these or other seismic events. This fact should be stated clearly. "A moderate, or moment magnitude 6.5 or greater earthquake on the major seismic sources in the San Francisco Bay region would affect the Delta with moderate to strong ground shaking and could potentially induce damage in these areas." There is no historic evidence to suggest that this ground shaking and damage would have more than local consequences.

Figure 11-3 in the RDPEIR shows hundreds of seismic events occurring along faults extending south from the San Francisco Bay Region. The California Aqueduct runs down the coast range parallel to the San Andreas Fault, and geologists predict the existence of many blind thrust faults along the east side of the coast range. This document considers blind thrust faults underlying the Delta with the idea that a seismic event could disrupt water deliveries. The analysis should be extended to the potential vulnerability of the California Aqueduct and the San Luis Reservoir, where damage could be equally disruptive of water supply.

## SECTION 14 – HAZARDS AND HAZARDOUS MATERIALS

Overall, this chapter overestimates the hazmat impacts from Alternative 2 under the incorrect assumption that the EWC alternative includes increased construction and use of ocean desalinization and agricultural drainage treatment facilities and therefore greater exposure to hazardous materials (greater impacts) compared to the Proposed Project. Alternative 2's reduction in selenium, salt, and boron production and elimination of the need for agricultural pollution treatment facilities more than offsets hazmat impacts from increased recycling and sewage treatment facilities compared to the Proposed Project. Using information from the Broadview Contract Assignment Draft Environmental Assessment (Reclamation, 2004)[15], and extrapolating the savings from retirement of 380,000 acres of drainage impaired lands in the San Luis Unit would result in the reduction of 98,800 AF/year of contaminated agricultural drainage to surface water and groundwater, including a reduction of 646,000 tons of salt, 57,000 pounds of selenium and 1.976 million pounds of boron. Clearly, Alternative 2 cleans up significant sources of surface and groundwater pollution for the Delta and San Joaquin/Tulare basins and is by far superior to any other alternative in this regard. The RDPEIR does not disclose the magnitude of this improvement in hazardous material production, storage, transport, and disposal, as a result of Alternative 2 because it lacks any quantitative analysis. Alternative 2 is environmentally superior for Hazards and Hazardous Materials.

[15] See http://www.c-win.org/webfm_send/195, page 4-2

## SECTION 21 – CLIMATE CHANGE AND GREENHOUSE GAS EMISSIONS

### 21.4.3.1 Reliable Water Supply

The Recirculated Draft PEIR states that "there is no reasonably plausible scenario in which a potential significant impact would occur. It is therefore concluded that this impact would be less than significant. Future project-specific analyses may develop adequate information to arrive a different conclusion; however for purposes of this program-level analysis, there is no available information to indicate that another finding is warranted or supported by substantial evidence."

Previous DEIR comments by the EWC noted a plausible scenario in which a potentially significant impact could occur. Those comments were:

> "There are potentially significant statewide, cumulative impacts to the [BDCP] Proposed Project, which could increase exports of water from the Sacramento Valley watershed through the Delta to Southern California. Because water supply ultimately drives growth, one of the biggest impacts would be a shift in growth from the Sacramento Valley watershed, which includes the western Sierras as well as the Sacramento Valley, to the San Joaquin Valley, the Inland Empire, and coastal southern California. Temperature projections from the state's Climate Adaptation strategy show that inland Southern California regions will be some of the hottest areas in the state, with mean peak daily temperatures in July as high as 110 degrees by 2070.[16]
>
> "No analysis has been done of the increased greenhouse gas emissions from shifting development to these regions, or of the increased GHG emissions from an increase in demand for air conditioning. For this and other reasons, we disagree with the conclusion that projects implemented under the Delta plan would not conflict with other plans adopted by the state for the purpose of reducing GHG emissions, as long as the individual projects were evaluated for conformance to statewide and regional policies."

The initial economic analysis performed by David Sundig for BDCP also specifically referenced the assumption that the state should attempt to sustain the explosive mid-2000s level of growth in inland Southern California, and to provide water for lawns in the resulting subdivisions in the desert. The economic analysis did not look at GHG impacts of subsidizing the use of fossil fuels to ship water 400 miles south to water lawns in the desert, and such an analysis would not be done in determining consistency with local GHG emission reduction plans. The state needs to perform a top-level evaluation of whether constructing a large project to meet such needs are consistent with AB 32,[17] or with optimal allocation of increasingly scarce water supplies.

These are plausible scenarios that show a significant impact of the proposed BDCP project on GHG emissions that could be in conflict with existing state policies. For this reason, the

---

[16] 2009 California Climate Change Adaptation Strategy, California Natural Resources Agency, p i. Available at http://resources.ca.gov/climate_adaptation/docs/Statewide_Adaptation_Strategy.pdf. Incorporated by reference.

[17] PPIC report lawns

conclusion that this impact is less than significant is not correct. This impact must be reclassified to significant for this RDPEIR to be valid.

21.4.3.2 Delta Ecosystem Restoration

With respect to habitat restoration projects, the RDPEIR again states "substantial evidence that there is no reasonably plausible scenario in which a potential significant impact would occur."

In the EWC comments on the Fifth Staff Draft Delta Plan, we stated:

> "…This analysis fails to take into account the cumulative impact of ending agricultural production in an area with moderate rainfall and proximity to a water supply needed for irrigation. Production could be shifted to regions within California that are heavily dependent on imported water supplies, and that will be subject to large temperature shifts, or there could be an increase in imports from out of state. We believe a cumulative analysis of GHG emission impacts is required."

This is a plausible scenario that shows a significant impact of the proposed BDCP project on GHG emissions that could be in conflict with existing state policies. It is not enough simply to consider consistency with local land use plans. There must be explicit, top-level consideration of the GHG impacts of the proposed shift in crop production.

For this reason, the conclusion that this impact is less than significant is not correct. This impact must be reclassified to significant for this RDPEIR to be valid.

The Delta Plan Must Ensure Adequate Analysis Of Climate Change Impacts

The Delta Reform Act specifically mandates a comprehensive review and analysis of the impacts of "possible changes in total precipitation and runoff patterns" due to climate change on the Proposed Project before incorporation into the Delta Plan:

> b) The BDCP shall not be incorporated into the Delta Plan and the public benefits associated with the BDCP shall not be eligible for state funding, unless the BDCP does all of the following:
>
> …(2) Complies with Division 13 (commencing with Section 21000) of the Public Resources Code, including a comprehensive review and analysis of all of the following:
>
> .. (C) The potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the environmental impact report.

The Delta Plan must specifically address these requirements of the Delta Reform Act, and must describe a review process that will ensure that the Bay Delta Conservation Plan takes a sufficiently comprehensive look at how shifts in precipitation and runoff from climate change could affect the planned project and operations, as well as the environment. The Delta Plan

must clearly and specifically address how the Delta Stewardship Council will ensure adequate review of the BDCP climate change analysis prior to incorporation of BDCP into the Delta Plan. This is an essential duty of the Delta Stewardship Council as an independent agency and should not be delegated to the Department of Water Resources or any other agency.

Recent experience with a prolonged, severe drought in the Southwest has shown the importance of preparing for mega droughts that have occurred historically.[18] A 2010 analysis of modeling of climate change in DWR planning studies, noted:

> "there is a lack of analysis of potential drought conditions that are more extreme than have been seen in our relatively short hydrologic record. There is significant evidence to suggest that California has historically been subject to very severe droughts and that climate change could result in droughts being more common, longer, or more severe. However, most current DWR approaches rely on an 82-year historical hydrologic record (1922–2003) on which GCM-generated future climate changed-hydrologic conditions are superposed. This record is likely too short to incorporate the possibility of a low frequency, but extreme, drought."[19]

The Bay Delta Conservation Plan modeling currently relies on mapping onto the 82 year historic record.[20] This loses a great deal of information from global climate models on the structure and persistence of droughts. In DWR's 2009 report, "Using Future Climate Projections to Support Water Resources Decision Making in California,[21]"the authors stated:

In water resources planning, it is often assumed that future hydrologic variability will be similar to historical variability, which is an assumption of a statistically stationary hydrology. This assumption no longer holds true under climate change where the hydrological variability is non-stationary. Recent scientific research indicates that future hydrologic patterns are likely to be significantly different from historical patterns, which is also described as an assumption of a statistically non-stationary hydrology. In an article in *Science*, Milly et al. (2008) stated that "Stationarity is dead" and that "finding a suitable successor is crucial for human adaptation to

---

[18] Five Key Lessons (and Challenges) from the Great Texas Drought, University of Texas, September 9, 2012. Available at http://www.utexas.edu/know/2012/09/10/great-texas-drought/

[19] Climate Change Characterization and Analysis in California Water Resources Planning Studies, Final Report, Abdul Khan and Andrew Schwarz. Department of Water Resources December 2010, p. xvi. Available at http://www.water.ca.gov/climatechange/docs/DWR_CCCStudy_FinalReport_Dec23.pdf Incorporated by reference.

[20] Comparison of CAT and CVP IRP Scenarios, Department of Water Resources. Presentation to Climate Change Technical Advisory Group meeting, May 11, 2012. Available at http://www.water.ca.gov/climatechange/docs/ClimateChangeModelingCAT-BDCP-CVP-IRP_Approaches.pdf. Incorporated by reference.

[21] Using Future Climate Projections to Support Water Resources Decision Making in California, Francis Chung et. al., California Climate Center, Final Report, May 2009. Available at http://www.water.ca.gov/pubs/climate/using_future_climate_projections_to_support_water_resources_decision_making_in_california/usingfutureclimateprojtosuppwater_jun09_web.pdf Incorporated by reference.

changing climate."

A growing number of climate change studies have projected an increase in the frequency and severity of droughts in the Sierras and the Central Valley, and particularly under the higher greenhouse gas emissions scenarios. The following section describes some key papers.

Several independent studies have been done using the climate change scenarios in the California Climate Change Scenarios Assessment. A 2012 study by Josh Viers and Sarah Null found a mean increase of dry and critically dry years in the Sacramento Valley Index to 23% of all years in the current period, and to 38% of all years by the latter half of the century, under the A2 scenario.[22] Dry and critically dry years in the San Joaquin Valley Index increased to 53% of all years in the current period, and to 69% of all years by the end of the century.

The US Geological Survey released a paper in February 2012 with a very detailed simulation using the A2 GHG scenario with the Global Fluid Dynamics Lab (GFDL) climate model.[23] The modeling projected a decrease of 16-17% in Sacramento River flows from 2020-2030 and 2040-2050, and a 34% reduction by 2080-2090. While the GFDL model is one of the drier climate change models, it should also be noted that the model projections in the Southwest were consistent with the recent mega drought.[24]

The U.S. Bureau of Reclamation did a much larger study for the 2011 Westwide Climate Risk Assessment, used an ensemble of 112 Global Climate Model / scenario combinations.[25] The ensemble median projected drying in Southern California and the Central Sierras by mid-century, as well as drying across the Southwest. By the 2070s, the ensemble median projected

[22] Water and Energy Sector Vulnerability to Climate Warming in the Sierra Nevada: Water Year Classification in Non-Stationary Climates, Sarah Null and Josh Viers, California Climate Change Center, July 31, 2012, p. 15. Available at http://www.energy.ca.gov/2012publications/CEC-500-2012-015/CEC-500-2012-015.pdf. Incorporated by reference.

[23] R.T. Hanson et. al., "A method for physically based model analysis of conjunctive use in response to potential climate changes," Feb 4, 2012. Available at http://ca.water.usgs.gov/projects/cvhm/Hanson_etal_2012_WRR.pdf. Incorporated by reference.

[24] Model Projections of an Imminent Transition to a More Arid Climate in Southwestern North America, Richard Seager, Mingfang Ting, Isaac Held, et. al., Science, Vol 316 no. 5828 p. 1181-1184, May 25, 2007. Available at http://www.sciencemag.org/content/316/5828/1181.short. Incorporated by reference.

[25] West-Wide Climate Risk Assessments: Bias-Corrected and Spatially Downscaled Surface Water Projections, U.S. Department of the Interior Bureau of Reclamation Technical Memorandum No. 86-68210-2011-01, March 2011. Available at http://www.usbr.gov/WaterSMART/docs/west-wide-climate-risk-assessments.pdf

drying throughout California.[26] The ensemble median projections are in agreement with regional trends in precipitation in the state. [27],[28]

Such major shifts in precipitation and runoff could have huge impacts on yields of proposed storage and conveyance projects, as well as huge environmental impacts. It is essential that information on potential flows and diversions under drier climate change scenarios be made available so that the risk can be evaluated by the public trust agencies, NMFS, USFWS, and DFG, as well as the Department of Interior, and water agencies in both areas of origin and export areas. The potential environmental impacts under these scenarios should also be available to stakeholders, including fishermen, Indian tribes, and NGOs.

Unfortunately, the Bay Delta Conservation Plan currently provides no analysis of the potential impacts of such major shifts in climate. The modeling also uses a non-peer reviewed technique to aggregate predictions from lower and higher GHG emissions scenarios, and wetter and drier climate change models into a single "Central Tendency" projection.[29] This projection masks the risks to both water supply and the environment under the drier climate change model/scenario combinations.[30]
The Delta Stewardship Council must ensure that these deficiencies are remedied, prior to incorporation of the Bay Delta Conservation Plan into the Delta Plan, and should ensure that adequate analysis of potential drought impacts of climate change is done for all projects incorporated into the Delta Plan. Addressing the risk of an increase in the frequency and severity of droughts in the Sacramento and San Joaquin River watersheds is essential to meeting the co-equal goals of "providing for a more reliable water supply for California" and "protecting and enhancing the Delta ecosystem."

---

[26] Ibid.

[27] Killam, D., A. Bui, S. LaDochy, P. Ramirez, W. Patzert and J. Willis. 2011. Precipitation trends in California: Northern and central regions wetter, southern regions drier. Unpublished. Cited in Temperature and precipitation trends in California: Global warming and Pacific Ocean influences, LaDochy and Ramirez et. al.

[28] Regional precipitation data with linear trends also available from Western Regional Climate Center, California Climate Tracker. Available at http://www.wrcc.dri.edu/monitor/cal-mon/frames_version.html

[29] Jamie Anderson, presentation on Climate Change Approaches, Department of Water Resources, March 2012. Available at http://www.water.ca.gov/climatechange/docs/CCTAG_climate_change_approaches%20final_3-28-12_Jamie%20Anderson_with%20extra%20slides.pdf

[30] Incorporating Drought Risk From Climate Change Into California Water Planning, comments on Department of Water Resources Draft Climate Change Adaptation Strategy, California Water Research, August 2012. Incorporated by reference.

## SECTION 22 – CUMULATIVE IMPACT ASSESSMENT

### CEQA Requirements

Although the evaluation of economic effects is optional under CEQA Guidelines (15131), the economics and social effects of the differing alternatives is so significantly different, and the economic balancing of public trust values so important, that they should not be optional for this RDPEIR. The possible elimination of a $12 to $15 billion expenditure, by not investing in a canal or tunnel around the Delta as anticipated with BDCP, is so significant to the environment of the Bay-Delta and the balancing of the public trust, that it must be considered. The longstanding constitutional principles of reasonable use and the public trust doctrine, which are foundational to state water management policy, are particularly important and applicable to the Delta (Water Code Section 85023).

### The Treatment Of Cumulative Impacts By The RDPEIR Is Inadequate And Fails To Comply With CEQA

CEQA defines "cumulative impacts" as "two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts." Guideline § 15355. The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project "when added to other closely related past, present, and reasonably foreseeable probable future projects." Guideline § 15355(b).

The discussion of cumulative impacts in an EIR is required to reflect "the severity of the impacts and their likelihood of occurrence." Guideline § 15130(b). Required contents include either a list of past, present, and probable future projects producing related or cumulative impacts, or a summary of projections that describe and evaluate the conditions contributing to the cumulative effect. Guideline § 15130(b)(A), (B). It is clear that all projects within the watershed must be assessed, given that the Guideline section uses as an example: "Location may be important, for example, when water quality impacts are at issue since projects outside the watershed would probably not contribute to a cumulative effect." Guideline § 15130(b)(2).

The decision in *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4$^{th}$ 859, held an EIR insufficient to comply with CEQA in analyzing cumulative impacts with respect to a proposed increase in an agency's withdrawal of water from the Russian River. By failing to consider possible curtailment in obtaining water from another River, the EIR failed to alert decision-makers and the public "to the possibility that the Agency will not be able to supply water to its customers in an environmentally sound way." 108 Cal.App.4$^{th}$ at 871.

### Failure To Assess The Impacts Of The BDCP Project Either Directly Or As A Cumulative Project

Other portions of these comments have demonstrated that there has been a complete failure to provide an accurate, stable, and finite description of the true project, and there has been a failure to identify and evaluate the environmental impacts of that project. As explained there, after release of the Draft EIR and prior to the release of the RDPEIR, the Deputy Director of DWR declared in June 2012 that the BDCP project is the Delta Tunnels that would have the capacity to divert 15,000 cfs from the Sacramento River near Clarksburg for delivery to the pumping plants

near Tracy for export south. The Governor confirmed that at his special press conference in July 2012. The EWC position is that the BDCP project ***is*** the Delta Plan project, and ***not*** a different, "cumulative" project. You, however, seek to minimize the dominating status of the BDCP by referring to it as a "cumulative project". (Draft EIR 23-28).

Either way, there has been complete failure to identify and evaluate the impacts of the BDCP Delta Tunnels which would have the capacity to divert 15,000 cfs of water from the Sacramento River upstream from the Delta. Only the vaguest generality has been mentioned in several words in the "Cumulative Impact Assessment" of the RDPEIR. The BDCP is mentioned in a sentence including 11 other items under the Water Resources portion of the Cumulative Impact Assessment. (RDPEIR 22-2). The sum total of information provided in this regard is that "examples of potential projects include the construction and operation of water and wastewater treatment plants; *water conveyance facilities, including pumping plants*; surface water or groundwater storage facilities; ecosystem restoration projects; flood control levees; or recreation facilities. *Implementation of these types of projects and construction and operation of these types of facilities could result in significant environmental impacts." (RDPEIR 22-1)* (emphasis added). An additional sentence then states: "Physical improvements associated with the Revised Project in combination with other water supply, ecosystem restoration, water quality, flood control, and Delta enhancement projects could violate water quality standards or waste discharge requirements, or otherwise degrade water quality." (RDPEIR 22-1).

With respect to another critical environmental issue related to water resources, similar vague generalities are provided with respect to "Biological Resources". The only information provided is that "changes in instream flow or water quality conditions" could result from construction and operation of projects including the BDCP. (RDPEIR 22-3, 4). The only cumulative impact information about the BDCP project is provided in the Cumulative Impact Assessment in the Draft EIR. There, a brief description in a table states that the BDCP permits and related EIR/EIS were scheduled to be completed by December 2012. That, of course, has not happened. The only additional information provided in the table is "modify SWP and CVP Delta water conveyance facilities and operations in the Delta." (RDPEIR 22-24).
The RPDEIR has failed to take into account the impact of diverting 15,000 cfs upstream from the Delta on whether existing and future water supplies and minimum stream flow requirements can be satisfied, and has failed to evaluate the environmental impacts of diverting 15,000 cfs. Having claimed that the BDCP project is a cumulative project, the Council must evaluate cumulative impacts including those caused by the cumulative project. Moreover, this is *not* a defect that can be cured by responses to comments in a Final EIR. There has been a complete failure to include sufficient description of the project and analysis of the cumulative impacts in the RPDEIR, and Draft EIR. No useful environmental document has been circulated to allow informed public review and informed decision-making. It will be necessary to prepare and recirculate a Draft EIR that meets requirements of CEQA to allow for informed public review.

<u>Failure to Identify, List, and Analyze the Cumulative Impacts of the Revised Project and Related Projects</u>
The project in terms of modifying "Delta water conveyance facilities and operations in the Delta" is, again, creation of the capacity to divert 15,000 cfs out of and away from the Sacramento River upstream from the Delta. Pursuant to Guideline § 15130(b)(1)(A), what is

required under CEQA is to assess the changing environment resulting from the incremental impacts of the project "when added to other closely related past, present, and reasonably foreseeable probable future projects." "The Agency must interpret this requirement in such a way as to 'afford the fullest possible protection of the environment.'" *Friends of the Eel River,* 108 Cal.App.4th 859, 868. The other related projects are the past, present, and reasonably foreseeable probable future diversions from the rivers reaching the Delta, including the Sacramento and San Joaquin rivers and their tributaries. In flagrant violation of the requirements of Guideline § 15130(b)(1), there is neither a list nor summary of projections of past, present, and reasonably foreseeable probable future diversions in the RPDEIR or Draft EIR. Consequently, neither the public nor the decision-makers have before them basic, foundational information on which to enable one to even start in evaluating the cumulative impacts of this project together with other related projects.

In addition, the upcoming proceedings before the SWRCB also constitute a related project because water availability may be curtailed in order to attempt to maintain or restore the Delta pursuant to the public trust doctrine. The court held in *Friends of the Eel River,* 108 Cal.App.4th 859, 869-872 that administrative proceedings that might lead to reducing diversions to protect fish constitute a related project that must be considered in cumulative impacts analysis. The upcoming Board proceedings to adopt updated flow objectives for the Delta and to develop flow criteria for high-priority tributaries in the Delta watershed (SWRCB comment letter, February 2, 2012 pp. 20-21) are related projects that could lead to curtailing diversions and should in any event serve to establish how much water is actually available for diversion, and can be diverted consistent with maintaining flows pursuant to the public trust doctrine. These proceedings also must be included in cumulative impacts analysis.

EWC has consistently throughout this process been calling on the Council to perform the essential water availability analysis, cost-benefit analysis, and public trust doctrine analysis before calling for new or "modified" conveyance. If the Council is unable or unwilling to do this work, it is necessary for the Council to await the performance of this work by the SWRCB or by the BDCP process. At this time, the necessary information has not been obtained and the analysis has not been done. The DSC's existing environmental documents have provided no cumulative impact information or analysis at all. Again, this is not a deficiency that can be corrected simply by responding to comments in a final EIR. In order to comply with CEQA you must prepare a new Draft EIR that includes the necessary information and analysis to allow the public and decision-makers to conduct informed review of the cumulative impacts of this project and other related projects.

<u>Failure To Perform Any Real Cumulative Impact Analysis</u>

The environmental documents provided so far contain no real cumulative impact analysis. All that is given is general, boilerplate information such as "Implementation of these types of projects and construction and operation of these types of facilities could result in significant environmental impacts." (RPDEIR 22-1). Also, "Physical improvements associated with the Revised Project. . .could violate water quality standards or waste discharge requirements, or otherwise degrade water quality." (RPDEIR 22-1). This type of information is vague, general, and unhelpful; it is questionable whether it would suffice to constitute an adequate Initial Study, which is a document prepared early in a CEQA process in order to determine what

environmental issues might exist and whether an EIR should be required. The most this work can be called is it has been an attempt to spot a few issues. More is required of an EIR. An EIR must identify, disclose, and evaluate the environmental impacts of the proposed project. No cumulative impact analysis has been prepared and circulated pertaining to developing new conveyance including operating facilities diverting 15,000 cfs of water upstream from the Delta. The Council needs to prepare and circulate a Draft EIR that furnishes information and analysis worthy of being called an EIR. As of now, that has not been done.

Failure to Evaluate Cumulative Impacts Upstream

As set forth in more detail elsewhere in these comments, as a result of climate change, sea level rise as much as 55 inches will result in high salinity levels in the Delta, degrading water quality for agriculture and municipal uses and changing habitat for fish species. (DP 80). Maintaining anything resembling freshwater conditions in the Delta, dewatered by the new diversion for the Revised Project, will likely require releases of water from storage reducing available water supplies for fish, and also for exports. (DP 80, 91). The massive new diversion for the BDCP project would thus cause change in storage and releases from upstream reservoirs such as Shasta, Trinity, Oroville, and Folsom, and affect and imperil all provisions already in place designed to maintain cold water storage and minimum flows upstream for fishery and other purposes. There would be dewatering not only in the Delta, but also upstream to meet the demands of the Revised Project and related projects. There is also the developing reality that climate change will increase dry and critically dry years while decreasing wet and above normal years as the century goes on. This development is reflected in the studies sponsored by the California Climate Change Center released in support of the 2012 and 2009 California Climate Change Assessments. There is a complete absence of any cumulative impact information and analysis of how the Revised Project together with related projects would affect water availability, environmental conditions, and fisheries throughout the Sacramento River and San Joaquin River watersheds upstream from the Delta. These climate change projections need to be an essential part of cumulative impact evaluation of the Revised Project, together with other diversions and with actions to maintain sufficient flows to protect the Delta as well as upstream waters under the public trust doctrine.

There is no *quantification* with respect to cumulative impacts. No information or analysis is provided as to the effect of the Revised Project and its "new conveyance" together with the related projects, with respect to water quality and water quality issues in the watershed. There is no *quantification* with respect to Delta outflows, instream flows, water quality standards, and other water resource and quality information. There will be enormous impacts given change in points of diversion, and new diversion with a capacity of 15,000 cfs. Moreover, the capacity for the new diversion is known, so that it is possible to provide *quantification*. There has been no compliance in the Delta Plan EIR process with the CEQA duty for the agency to find out and disclose all that it reasonably can about the project, related projects, and their cumulative impacts.

Creation of Political Pressure to Un-designate Wild and Scenic Rivers

The cumulative impacts of the Revised Project and related projects will create political pressure to un-designate the Trinity, Eel, Klamath, and Smith Rivers from Wild and Scenic River protections. The SWP was originally premised on damming the Eel River and diverting it to a peripheral canal. Originally it was presumed that after 1981, water would have to be imported

from North coastal streams to maintain an acceptable level of freshwater in the Delta if the peripheral canal were to be developed. Those prospective diversions were renounced and the northern rivers were included as Wild and Scenic Rivers. With the protection of those rivers, there is nowhere near enough water to develop the current version of the peripheral canal—the Delta Tunnels— and maintain sufficient freshwater in the Delta and maintain upstream cold water storage and minimum flows. Pressure to remove northern rivers from Wild and Scenic Rivers Act designation and protection must be assessed as a cumulative catalyst impact resulting from the Revised Project and related projects.

Groundwater Resource Impacts

The Delta region includes the severely depleted groundwater basin. The aquifer is critically over drafted including a cone of depression with a depth of 60 to 80 feet below sea level. The void pulls in sea water from the Bay in an easterly direction. Water levels are declining and chloride concentrations are increasing in water from wells in the Eastern San Joaquin Ground-Water Sub-basin caused by excess pumping and saline intrusion. Wells in Stockton have been abandoned. The new diversion would reduce the natural flushing of the Delta region and barrier to salinity intrusion which is created by freshwater inflows into the Delta. Reduction or elimination of this flushing and barrier will cause increased migration and intrusion of brackish water in the groundwater basin. The cumulative impacts of the diversion for the Revised Project, and other activities affecting groundwater including over drafting must be addressed in the EIR.

Summary

The RPDEIR and Draft EIR are so fundamentally and basically inadequate and conclusory in nature with respect to disclosure and analysis of cumulative impacts that meaningful public review and comment have been precluded. You must prepare and circulate a new Draft EIR so that the public and decision-makers are afforded the information and analysis with respect to cumulative impacts that they must have pursuant to CEQA.

## SECTION 23 – BAY DELTA CONSERVATION PLAN

It is unclear why there is a separate chapter in the RDEIR regarding the BDCP. The BDCP is not an impact area and would have a broad array of its own environmental impacts. Since the Delta Plan encourages completion and implementation of the BDCP (WR R12), and the BDCP is a defined project, the RDEIR should include consideration of BDCP impacts within each resource area section.

The basin components of BDCP are currently known and must be analyzed in this RDEIR. Inexplicably, the description of the BDCP in section 23.3 was not updated with readily available information regarding the BDCP preferred project released in July 2012.[31] BDCP is clearly a defined project for which applications have been submitted; the Plan moreover promotes completion of the BDCP through WR R12 and other Plan policies/recommendations. Thus, the RDEIR must analyze the BDCP as a cumulative project. The cursory stand-alone analysis of BDCP in Section 23 is patently inadequate in this regard.

[31] http://baydeltaconservationplan.com/news/news/12-07-25/Governor_Brown_and_Obama_Administration_Outline_Path_Forward_for_BDCP.aspx

The inconsistency in approach to the BDCP – to encourage its completion and at the same time never provide any guidance to BDCP regarding conveyance is a stark omission, which is contrary to the Delta Reform Act.

If the RDPEIR is correct that the BDCP is not yet a defined project, then the Council should not encourage completion and implementation of it in WR R12. Striking WR R12 and any other provisions that explicitly promote the project known as BDCP from the Plan would cure this defect.

Alternatively, policies on what the coequal goals require with respect to new SWP/BOR diversions in the Delta could be developed, as the Plan does for habitat and various other types of projects within the Plan area. For the Council to provide no guidance on arguably the most important part of BDCP – massive new diversions from the Sacramento River – shows a disregard for sound water supply planning. While the Council is not the lead agency for BDCP, as lead agency for the Delta Plan, the Council has the duty to disclose all it reasonably can about the impacts of implementation of the Delta Plan, which explicitly promotes the BDCP. This RDEIR fails to do so with respect to the reasonably foreseeable effects of the BDCP as currently proposed.

A few specific examples are provided below.

23.6.5 Agriculture and Forestry Resources

The RDEIR assumes without justification that construction impacts on agriculture from the BDCP would not be significant. In fact, the decade or more of construction required to complete the BDCP conveyance facilities would lead to significant interference with agricultural operations in the Delta and should be disclosed as such.

23.6.13 Noise

The RDEIR does not disclose the potential noise impacts of BDCP on biological resources, such as fish. Construction of the BDCP diversion intakes would include years of in-River construction and noise. Noise from construction could cause significant disturbance to listed fish species. (See, e.g., http://www.dot.ca.gov/hq/env/bio/files/Guidance_Manual_2_09.pdf.)

23.6.16 Recreation

The RDEIR does not address the potential of the major new diversions on the Sacramento River to interfere with recreation, both during and after construction. These impacts are potentially significant. Chapter 15 of the February 2012 Administrative Draft BDCP EIR/EIS discussed severe interference with recreational uses of the Sacramento River during the multi-year construction period. Also, after construction, BDCP conveyance facilities such as the intakes

and forebays, would continue to interfere with recreational uses such as bird watching. The RDEIR incorrectly focuses only on impacts from BDCP habitat projects on recreation to the exclusion of impacts from BDCP conveyance.

## RULEMAKING PACKAGE COMMENTS

The Environmental Water Caucus provides the following comments for the planned review of the Rulemaking Package dated November 16, 2012.

### Standard of Review

Under the state administrative procedure act, all regulations proposed by an agency must satisfy authority and reference standards. (Cal. Gov't Code 11349.) Each regulation to be adopted must be within the scope of authority conferred. (Cal. Gov't Code 11342.1) A regulation that is not within the scope of an agency's express or implied rulemaking authority is void and cannot become effective.

The proposed Delta Plan regulation exceeds these authority and reference standards by including regulatory provisions which exceed the statutory authority provided to the Delta Stewardship Council. As the title "Consistency with Regulatory Policies in the Delta Plan" suggests, the Proposed Regulation is to provide only the specific legal underpinnings to determine if "state and local land use actions identified as "covered actions" […are] consistent with the Delta Plan." (Water Code § 85022(a).)

The legislature envisioned a two-step decision-making process, which the Proposed Regulation facilitates:

> (1) Determine whether proposed actions are "covered actions" under the Delta Plan (Article 1);
> (2) determine whether "covered actions" are consistent with the Delta Plan (Articles 2 and 3).

In practice, the November 16, 2012 Proposed Regulation both excludes actions that should be classified as "covered," and seeks to enshrine regulatory policies that plainly fall outside of the scope of determining whether covered actions are consistent with the Delta Plan.

### (§ 5001) Definitions:

"Significant impact": this term is inappropriately defined as a "change in baseline conditions." Baseline is not defined, however, so this term is ambiguous and requires clarification to be legally valid. What are "baseline conditions"? If baseline conditions are the same as existing conditions, then a significant impact from a proposed covered action is possible even with no change in baseline conditions – if the action itself is considered part of the baseline. For example, a permit renewal would not be considered a significant impact under this definition because its impacts would be incorporated into baseline conditions, even though such a permit renewal would in fact have a measurable impact on one or more of the co-equal goals. The definition should be revised so that "significant impact" is measured on an absolute scale, so that its overall impact can be determined independently of its incorporation into baseline conditions. The result of limiting "significant impact" to a change in baseline conditions is to severely limit

the scope of actions considered covered by the Delta Plan under Section 5003(a)(4). This limitation does not appear anywhere in the Delta Reform Act, and exceeds that act's statutory authority.

An anticipated response to this criticism is that there is a baseline consideration made when considering CEQA projects. However, the use of baseline in CEQA is distinguishable from the proposed use in the Draft Regulation, because CEQA considers only environmental impacts, while the Delta Plan includes additional, non-environmental considerations.

(§§ 5002, 5003) Exemptions to Delta Plan exceed statutory authority.

The Delta Reform Act contains only four criteria to determine whether an action is covered by the Delta Plan: (1) It will occur in 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; and (4) Will have a significant impact on achievement of one or both of the co-equal goals. (Cal. Water Code 85057.5(a).) The exemptions to actions covered by the Delta Plan are then enumerated in Water Code section 85057.5 (b).

These exemptions are also included in the draft regulation at § 5003(b)(1), but they are improperly expanded upon in (b)(2):

(§§ 5003(b)(2)(B) and(D)) Use of CEQA Exemptions.

The Draft Regulation adopts much of the same exemption criteria as CEQA, but without CEQA's statutory basis for those exemptions – an impermissible conflating of the two statutes.

The statutory basis for the emergency exemption (§ 5003(b)(2)(B)) is not contained within the Delta Plan statute, though there in such an exemption in CEQA. But because the two statutes are not synonymous, and each has different goals, this provision should be removed from the regulation as it lacks statutory basis. There should be no emergency exemption for compliance with the Delta Plan without adequate statutory basis.

Likewise, the general exemption corresponding to CEQA exemptions (§ 5003(b)(2)(D)) should be removed from the Proposed Regulation, as it provides too much leeway for projects to claim CEQA exemption as the basis for exclusion from the Delta Plan. The Delta Plan does not stand as a proxy for CEQA; the two use different measures of impacts, with the Delta Plan's impacts going beyond those considered environmental, and it is reasonable to expect many projects to be covered by the Delta Plan but excluded from CEQA, and vice-versa. This provision lacks a proper statutory basis and should be removed.

(§5003(b)(2)(C)) Exclusion of Temporary Water Transfers.

It is not stated why these transfers are excluded, as they would otherwise be included as covered actions under the Delta Plan. The Proposed Regulation clearly anticipates problems with this provision as it sunsets after one year (unless renewed). The provision cites to the Delta Plan's Water Resource Recommendation No.15, but this recommendation simply re-states the need to

address the policy problem of temporary water transfers by other state agencies, which neither the Delta Stewardship Council nor the Delta Plan's enabling statute control. Temporary transfers can be very large, at least 100,000 acre-feet, and they can re-occur for many consecutive years, giving them the magnitude and effect of a permanent transfer. Were it not for this exclusionary provision, temporary transfers would be considered covered actions under Section 5005(c) of the Delta Plan; the change in ownership of the use rights of water, even though temporary, may have a significant economic and/or environmental impact on one or more of the co-equal goals. The exemption for temporary transfers exceeds the statutory authority for the Delta Plan, and should be removed.

(§ 5004) Certification of Consistent Actions
*Judicial Review and Administrative Appeal*

The Proposed Regulation allows, but does not provide specifics, as to how determinations by state agencies and the Council under the Delta Plan may be challenged through administrative appeal and judicial review. These details regarding appeal of a consistency determination, both to the Council and to court, should be explained in this section of the Proposed Regulation.

(§ 5005) Reduced Reliance on the Delta.
*Inclusion of Performance Measures*

Throughout the Proposed Regulation, but particularly in regards to reducing reliance on the Delta, a lack of measureable results (i.e. performance measures) undermine the legitimacy of consistency determinations with the Delta Plan.

The Delta Reform Act requires that the Delta Plan is "legally enforceable" (WC § 85001), and that the Plan include "performance measures that will enable the council to track progress in meeting the objectives of the Delta Plan," and "shall" include "quantifiable or otherwise measureable assessments" of improvements in the Delta ecosystem and water reliability. (WC § 85212.) If legal enforceability *and* performance objectives are required by the Delta Reform Act, then meeting these measureable objectives must be considered as criteria for consistency with the Delta Plan. In other words, the only practical means for the Plan to react to or promote measureable improvements is to make them conditions for consistency determinations by state and local agencies—so these conditions should be described in detail in the Proposed Regulation. Without such quantifiable assessments in the consistency determinations, the Plan will be neither legally enforceable nor will its consistency determinations be tied to achieving measureable results for the co-equal goals.

In order to fulfill the statutory mandates of the Delta Reform Act, the Delta Plan itself must contain suitable metrics, and the Proposed Regulation must contain provisions for how a project will meet these performance measures as a condition of a successful consistency determination. If the project does not make a quantifiable improvement in achieving the co-equal goals, then it simply should not receive a consistency determination from a local agency. These performance measures should be incorporated into §§ 5005, 5008, and 5009, and should be added as a requirement to make a consistency determination in § 5004.

(§ 5005(c)) Certifying "Reduced Reliance" on Delta Water Exports**.**

Reducing reliance on the Delta is one of the co-equal goals, and Section 5005 of the Draft Regulation explains that the intent of this policy is to make sure water suppliers are "taking appropriate actions to contribute to the achievement of reduced reliance on the Delta." This goal is fulfilled in part by Section 5005(C), which prohibits exports from or through the Delta unless certain conditions are met.

However, the prohibition on water exports contains two inappropriate clauses: for the prohibition on export to be triggered, not only must a water supplied have not adequately contributed to reduced reliance on the Delta (§ 5005(c)(1)), but the failure must have "significantly caused the need for the export, transfer or use" and the "export, transfer or use would have a significant adverse impact in the Delta." (§ 5005(c)(2) and (3).) These two limits on the export prohibitions make it difficult, if not impossible, to limit exports based on a demonstration (or failure thereof) to reduce reliance on the Delta.

First and foremost, there should be no express connection required for the failure to reduce reliance on the Delta to have actually caused the export or transfer of water to occur. As a policy matter, exports should not be allowed if the exporting agency has not reduced reliance on the Delta, *regardless* of whether a particular export was made necessary by this failure. Further, this requirement will be next to impossible, because a certifying agency will be unable to prove that the reduced reliance *caused* the export. This requirement at §5005(c)(2) is both unnecessary and destructive to the overall policy, and should be removed.

Second, the requirement at §5005(c)(3) that the export would have a significant impact on the *environment* is wrongly limited to environmental impacts, when the Delta Plan is supposed to consider economic and cultural impacts as well. This section should remove the term "environmental" so that it reads the export, transfer or use would have a significant adverse impact in the Delta on an absolute scale." As explained elsewhere, the "absolute scale" modifier is necessary because "significant impact" has been improperly defined as a change in baseline conditions, when an export to be considered under §5005 could have been incorporated into baseline conditions and would therefore not register as "significant" under this definition.

The regulation is also internally inconsistent: it states that the measurement of success of this provision is to achieve "a significant reduction in the amount of water used, or in the percentage of water used, from the Delta watershed."

(§5005(e)) Inadequate Demonstration of Reduced Reliance on Delta.

As explained above, the section on reduced reliance should contain more detailed metrics in subdivision (e)(1)(C). In particular, these metrics must go beyond reviewing whether there is an adequate Urban Water Management Plan, with a clear, measureable standard, so that an agency's consistency determination also certifies a project will actually reduce reliance on the Delta by a given percent. In contrast, the current phrasing "the expected outcome for measureable reduction in Delta reliance and regional self reliance" is ambiguous and confusing – what

measureable reduction is this provision referring to, and more importantly, *what measure* is considered an acceptable "measurable reduction"?

The requirement of §5005(e) (1) that agencies demonstrate reduced reliance on the Delta is good in theory, but practically accomplished nothing. What is the use of requiring that an Urban Water Management Plan comply with laws that it already must comply with—except if those plans *had* to reduce Delta exports, but UWMP's do not. In fact, there is no guarantee that a completed Urban Water Management Plan, even if reviewed by DWR, will in fact contain measures that reduce reliance *on the Delta,* because there is no necessary connection between reduced self-reliance and reduced exports from the Delta; the contracting agency could meet its conservation requirement and merely reduce its supply from, say, groundwater supplies instead. For this subsection to be effective, this subsection should be revised to require that the UWMP's conservation measures are being met *and* that these measures have, in fact, reduced reliance *on exports from the Delta, and* certify by what measure such deliveries have been reduced. Then, if an agency's reduction in actual, measured, Delta exports are commensurate with the metrics required to be created by the Council, then an action cannot be deemed consistent. Without such changes this section lacks measureable performance measures, and thus lacks the ability to ensure that covered actions are consistent with reductions in Delta exports mandated by the Delta Reform Act.

Finally, the delay in measuring reductions in Delta exports until 2015 is wholly without justification or any statutory basis in the Delta Reform Act. This provision exceeds the scope of the enabling statute and should be removed or altered so that the measurements become effective the same year the statute is enacted.

"(5005(E) Violations Of CEQA And Public Trust Doctrine And Conflicts With Substantive Laws.

The Regulations including calling for "improve Delta conveyance and operations", and "optimize diversions in wet years. . ." (5001)(e)(1)(A) and (C) cannot be lawfully adopted because there has been failure to comply with CEOA for all the reasons set forth in the portion of these comments pertaining to the RDPEIR. The Regulations calling for improved, meaning new, conveyance also cannot be lawfully adopted because there has been failure to perform cost benefit and public trust doctrine analysis to ensure protection of the Delta as set forth in other portions, including the RDPEIR portions of these comments. All portions of these comments pertaining to the Delta Plan and the RDPEIR are incorporated herein by this reference as reasons why Regulations 5001(e)(1)(A) and (C) cannot be lawfully adopted. Consideration for adoption must be deferred until there has been CEQA compliance including circulation of a Revised Draft EIR and completion of cost benefit and public trust doctrine analysis. Moreover, these Regulations cannot be adopted because they conflict with governing law as set forth elsewhere in these comments, including but not limited to, increasing rather than reducing reliance on the Delta in meeting California's future water supply needs and failing to develop a governing definition of "more reliable water supply" supported by substantial evidence and adequate findings."

(§ 5006) Transparency in Water Contracting**.**

This section calls for "improved transparency in water contracting." However, the stated requirements of this section only mandate compliance with already-existing requirements for contracting for water with the state Department of Water Resources and the Bureau of Recreation. The usefulness of this provision can be expressed as follows: if the DWR or USBR assert that a project meets their respective transparency measures, could the Council nonetheless declare an action inconsistent with the Plan on these grounds? On the one hand, there is no measure of "improvement" in achieving the status quo. But on the other hand, none of the statutory provisions cited by the Proposed Regulation actually discuss transparency in water contracting. The purpose of this provision is unclear and should either be strengthened or removed.

(§ 5007) Updated Flow Objectives**.**

The Delta Reform Act does not require that Delta flow objectives be updated as part of the Delta Plan, or that the Delta Stewardship Council direct, manage, or provide guidance for the State Water Board's setting of Delta flow requirements. Rather, the Delta Reform Act requires that the State Water Board update Delta flow objectives consistent with the public trust doctrine, based on recommendations from the Department of Fish and Game. (Water Code § 85086.) To emphasize this point, the Delta Reform Act clearly states that "nothing in this division expands or otherwise alters the State Water Board's existing authority to regulate the diversion and use of water" (Water Code § 85031), and furthermore, the Act "does not affect" the public trust doctrine. (Water Code § 85032(i).) As a result, the Council has no authority to propose a regulation that guides or places any conditions on the State Water Board's setting of Delta flow requirements. Instead, the State Water Board is required to "submit its flow criteria determinations pursuant to this section to the council."

Further, to the extent that this section of the Proposed Regulation purports to set out criteria to determine whether the Board's delta flow requirements are consistent with the regulatory policies of the Delta Plan, it is plainly contrary to the scope of the Act: the flow determination is a regulatory action excluded under Section 85057.5(b)(1). This section exceeds the scope of the enabling statute and should be removed.

Perhaps most critically, the Delta Reform Act does not permit the Board to set Delta flows that are "necessary to achieve the co-equal goals," as stated in § 5007(a)(1) and (2), because the Delta Reform Act and judicial precedent require the Board to set such goals consistent with the *Public Trust doctrine,* and the co-equal goals are *not* synonymous with the protection of Public Trust resources. Rather, the public trust doctrine protects traditionally navigable waters, related habitat, and dependent wildlife, which is why the Board is required by the Act to set flow requirements after consultation with the Department of Fish and Game, and not the Delta Stewardship Council. As written, this section perverts the express language of the Delta Reform Act regarding the Board's duty to abide by the public trust doctrine when setting Delta flows, and should be either removed or modified to read "necessary to protect Public Trust resources" in order to be in compliance with the Act.

Summary.

As explained above, the two central problems with the Proposed Regulation concern whether an action is considered a "covered" action, and whether a covered action is "consistent" with the Delta Plan. As mentioned in the cover letter to the EWC comments for the Final Delta Plan, covered actions must include a Water Supply Analysis for each certified project in order to insure the availability of adequate water for the restoration of the Delta; such an analysis must in turn require a detailed Cost-Benefit Analysis in order to assure the financial viability of a covered project, and; it must include a Public Trust Analysis as indicated in the Delta Reform Act which cites the Public Trust as the foundation of California water policy. We therefore recommend that an additional regulatory policy be incorporated into Section 5005 of the Delta Plan Proposed Regulation which require these three actions be accomplished prior to the certification of consistency for any Delta Plan project or the approval of this Rulemaking Package.

These three analytical actions are necessary in order to assure that: 1. Adequate water is actually available for the recovery of the Delta as well as other beneficial uses (Water Supply Analysis); 2. That each major project undertaken as part of the Delta Plan is a cost-effective activity for the state (Cost-Benefit Analysis) and; 3. That Public Trust values are considered and compared with other beneficial uses of water (Public Trust Analysis).

* * * * * * * * * * * *

The Environmental Water Caucus would like to thank the following members of the Document Response Committee who participated in creating and assembling the comments contained in the above Final Draft Plan comments, the Recirculated Draft PEIR comments, and the Rulemaking Package comments: Katy Cotter (Friends of the River); Dierdre Des Jardins (California Water Research); Marty Dunlap (Citizens Water Watch); Mike Jackson (C-WIN); Bill Jennings (CSPA); Adam Lazar (Center for Biological Diversity); Mark Rockwell (Northern California Council Federation of Fly Fishers); Linda Sheehan (Earth Law Center); Tom Stokely (C-WIN); Bob Wright (Friends of the River).

* * * * * * * * * * * *  *

*The following Environmental Water Caucus affiliated organizations support the findings and recommendations shown in the attached comment letters dated January 14, 2013.*
*The corresponding logos are shown at the front of this document.*

*Gary Adams*
*California Striped Bass Association*

*Sara Aminzadeh*
*Policy Director*
*California Coastkeeper*

*Dan Bacher*
*Editor*
*Fish Sniffer*

*Colin Bailey*
*Executive Director*
*Environmental Justice Coalition for Water*

*Barbara Barrigan-Parrilla*
*Executive Director*
*Restore the Delta*

*Lloyd Carter*
*President*
*California Save Our Streams Council*

*Jennifer Clary*
*Water Policy Analyst*
*Clean Water Action*

*Joan Clayburg*
*Executive Director*
*Sierra Nevada Alliance*

*Deirdre Des Jardins*
*California Water Research*

*Robyn DiFalco*
*Executive Director*
*Butte Environmental Council*

*Siobahn Dolan*
*Director*
*Desal Response Group*

*Marty Dunlap*
*Citizens Water Watch*

*Conner Everts*
*Executive Director*
*Southern California Watershed Alliance*

*Zeke Grader*
*President*
*Pacific Coast Federation of Fisherman's Associations*
*President*
*Institute for Fisheries Resources*

*Bill Jennings*
*Executive Director*
*California Sportfishing Protection Alliance*

*Carolee Krieger*
*Executive Director*
*California Water Impact Network*

*Adam Lazar*
*Staff Attorney*
*Center for Biological Diversity*

*Richard Lucas*
*President of the Board*
*Mt. Shasta Bioregional Ecology Center*

*Roger Mammon*
*President*
*Lower Sherman Island Duck Club*

*John Merz*
*President*
*Sacramento River Preservation Trust*

*Jonas Minton*
*Senior Water Policy Advisor*
*Planning and Conservation League*

*Lynne Plambeck*
*Executive Director Santa Clarita for Planning and the Environment*

*Louie Rocha*
*Commodore*
*Sportsmen Yacht Club*

*Mark Rockwell*
*Co-Conservation Director*
*Northern California Council Federation of Fly Fishers*

*Adam Scow*
*California Campaign Director*
*Food and Water Watch*

*Linda Sheehan*
*Executive Director*
*Earth Law Center*

*Caleen Sisk-Franco*
*Spirtual Leader & Traditional Chief*
*Winnemen Wintu Tribe*

*Esmeralda Soria*
*Legislative Advocate*
*California Rural Legal Assistance Foundation*

*Craig Tucker*
*Karuk Tribe*

*Barbara Vlamis*
*Executive Director*
*AquAlliance*

*Eric Wesselman*
*Executive Director*
*Tuolumne River Trust*

*Bill Wells*
*Executive Director*
*California Delta Chambers & Visitor's Bureau*

*Bob Wright*
*Senior Counsel*
*Friends of the River*

*Chris Wright*
*Executive Director*
*Foothill Conservancy*