



April 22, 2013

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

VIA Mail and Email

Re: Comments on Proposed Delta Plan Modified Rulemaking Documents to the Text of the Proposed Regulations (email to: modifiedrulemakingprocess.comment@deltacouncil.ca.gov)

Dear Ms. Messer and Council Members:

Our organizations, the Environmental Water Caucus, Friends of the River, California Sportfishing Protection Alliance, California Water Impact Network, AquAlliance, and Restore the Delta object to approval of the Delta Plan (DP), RDPEIR, Regulations, and to approval of the modified text of the Regulations made available for a 15 day written comment period commencing April 8, 2013. We adopt and incorporate by this reference the Environmental Water Caucus (EWC) comment letter of January 14, 2013, Friends of the River's prior comment letters of January 11, 14, and 24, 2013, and the CSPA, C-WIN, and AquAlliance Comment letter of January 14, 2013.

The comment letters referenced above establish the numerous violations of the California Environmental Quality Act (CEQA) that will take place if the Council proceeds to adopt the Delta Plan, Regulations and modified text of the Regulations including calls for improved, meaning new, upstream conveyance as proposed in the Bay Delta Conservation Plan.

VIOLATIONS OF DELTA REFORM ACT AND FAILURE TO USE CRITICAL INFORMATION ESSENTIAL FOR CEQA COMPLIANCE

Adoption of the Regulations, including the recent modifications to the Regulations, would violate the Delta Reform Act. That act requires in pertinent part that “For the purpose of *informing planning decisions for the Delta Plan* and the Bay Delta Conservation Plan, the board [SWRCB] *shall, pursuant to its public trust obligations, develop flow criteria for the Delta ecosystem necessary to protect public trust processes*. In carrying out this section, the board shall review existing water quality objectives and use the best available scientific information. The flow criteria for the Delta ecosystem shall include the volume, quality, and timing of water necessary for the Delta ecosystem under different conditions.” California Water Code § 85086(c)(1)(emphasis added). The SWRCB did what is required by the Delta Reform Act by filing with the Delta Stewardship Council its 2010 flow report. Inexplicably, the DSC did not use this information required by state law to inform the planning decisions for the Delta Plan. This failure to follow the process established in the Delta Reform Act for formulating the Delta Plan, and in fashioning and evaluating the alternatives considered in the CEQA analysis for the Plan, make the CEQA impact analysis invalid and make the proposed Regulations unlawful.

The Council’s own Initial Statement of Reasons (SOR, filed in January, 2013) furnishes additional support for the need for the Council to either not adopt the Regulations and Delta Plan until the SWRCB “flow criteria for the Delta ecosystem necessary to protect public trust processes” are used to analyze the new conveyance proposed in BDCP, which has not been done, or drop the Plan’s call for improved, meaning new, conveyance before the Regulations and Delta Plan are adopted. The SOR included a statement that “the best available science suggests that the currently required flow objectives within and out of the Delta are insufficient to protect the Delta ecosystem. Additionally, uncertainty regarding future flow objectives for the Delta impairs the reliability of water supplies that depend on the Delta or its watershed.” The predictability of water exports cannot be improved and the Bay Delta Conservation Plan cannot be implemented without timely DSC action to utilize the SWRCB 2010 flow objectives in designing the Delta Plan. Proposed Section 5007 fails as a regulation because it too ignores the 2010 flow report of the SWRCB that has already determined the instream flow needs of the Delta for the purposes of facilitating the planning decisions that are required to achieve the objectives of the Delta Plan (Water Code section 85086).” (SOR pp. 5-6). The DSC has therefore failed to use the “best available scientific information” in formulating the Delta Plan.

Those statements appear to be both clear and indisputable. That being the case, it would be directly contrary to those statements to proceed now to make planning decisions calling for or facilitating new, upstream conveyance for the exporters. No such planning decisions can be considered rationally, let alone made, until *after* the DSC makes the determinations which the

Council's own Statement of Reasons declares are essential to the making of such planning decisions. To do otherwise "would put the cart before the horse."

In addition to constituting a violation of the Delta Reform Act, this rush to adopt the Delta Plan and Regulations before the DSC considers flow criteria for the Delta pursuant to its public trust obligations also constitutes a violation of CEQA's command to all public agencies to find out and disclose all that they reasonably can about the proposed project and its environmental impacts. Adoption of the Delta Plan and Regulations prior to the required action by the DSC will constitute failure to proceed in the manner required by law required by both the Delta Reform Act and CEQA.

VIOLATION OF CEQA'S COMMANDS TO PROVIDE AN "ACCURATE, STABLE AND FINITE PROJECT DESCRIPTION" AND TO NOT POSTPONE OR SEGMENT ENVIRONMENTAL REVIEW FROM PROJECT APPROVAL

In the EWC comment letter of January 14, 2013, EWC pointed out that: "[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, and 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." (EWC comment letter p. 43). The EWC comment letter pointed out in detail how the Delta Plan, Regulations and CEQA process have violated that straightforward CEQA command. (EWC comment letter pp. 43- 46). As set forth there, the true project ever since the announcements by the Governor and Resource Agency in the summer of 2012 has been the Delta Water Tunnels project. As pointed out, the Recirculated Draft Program EIR (RPDEIR) failed to disclose, let alone evaluate the environmental effects of the Delta Water Tunnels project.

The Friends of the River comment letter of January 14, 2013 specifically addressed the fact that the Delta Plan and Regulations CEQA process has unlawfully postponed and segmented or piecemealed, the analysis of the impacts of the actual diversions and conveyance of all that freshwater before it reaches the Delta from the decision whether to adopt the Delta Plan and Regulations calling for establishing new upstream conveyance.

"[P]ostponing environmental analysis can permit 'bureaucratic and financial momentum' to build irresistibly behind a proposed project, 'thus providing a strong incentive to ignore environmental concerns.'" *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 135-6.

The violations of the CEQA requirements to provide an accurate stable and finite project description of the true project and to not segment or postpone environmental analysis of the true project have now been amplified and repeated by the fact that the State has actually commenced releasing chapters of the proposed BDCP Plan. According to the March 14, 2013 release by the California Natural Resources Agency, “The newly-released chapters also detail the proposed operation of a new system of pumping plants and tunnels to carry water from the Delta. A new water project diversion point on the Sacramento River near Sacramento and 35 miles of underground tunnels. . . .” is the true project. According to Chapter 4 of the BDCP Plan the project will include three new water intake facilities on the east bank of the Sacramento River between Clarksburg and Courtland each having a diversion capacity of 3000 cubic feet per second (cfs). (BDCP Plan p. 4-6). The Delta Water Tunnels would be 45 miles long, have a conveyance capacity of 9000 cfs with each of the two Tunnel bores having an inside diameter of 40 feet. (BDCP Plan p. 4-8). [The actual capacity of the Tunnels is 15,000 cfs]. The water would be conveyed approximately 35 miles from a new intermediate forebay to a new Byron Tract Forebay, adjacent to Clifton Court Forebay. (BDCP Plan p. 4-9).

The Delta Plan, Regulations and EIR process and modification of the text of Regulations process continue to violate the CEQA commands to provide an accurate, stable, and finite description of the true project, and to not postpone or segment environmental analysis of the project from project approval. We provide one of many possible examples of the myriad environmental issues unlawfully evaded and postponed by the failure of the Delta Plan and Regulations environmental review process to provide the required accurate description of the true project and to analyze the environmental effects of that project. On April 4, 2013 the National Marine Fisheries Service (NMFS) provided its “Progress Assessment and Remaining Issues Regarding the Administrative Draft BDCP Document”. According to the NMFS under the heading “Cumulative Effects Show Long-term viability Concerns for Salmon (Critical)” including “Update: The current efforts to develop a fully ‘aggregated’ effects analysis should address the analytical concerns related to this issue, but the fact that the cumulative effects of the project when combined with effects of climate change and other baseline conditions is showing the potential extirpation of mainstream Sacramento River populations of winter-run and spring-run Chinook salmon over the term of the permit remains as a serious concern.” (NMFS Issues, Section 1.17, p. 12).

The CEQA Guidelines (14 Cal. Code Regs. 15,000 et seq.) define a “project” to mean “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. . . .” Guideline § 15378. “All phases of a project must be considered when evaluating its impact on the environment: planning, acquisition, development, *and operation*.” Guideline § 15126. (emphasis added). Instead of doing what CEQA requires, the Delta Plan and Regulations

unlawfully make the most fundamental planning decision ever to be made in the history of the Delta— calling for improved, meaning new, upstream conveyance— without any CEQA analysis of the impacts of that new, upstream conveyance in all phases of the project including **operation**. “CEQA’s informational purpose ‘is not satisfied by simply stating information will be provided in the future.’” *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 441.

“The notion that the project itself must directly have such an effect was effectively scotched in *Friends of Mammoth*. The granting of a conditional use permit—a piece of paper— does not directly affect the environment any more than an annexation approval—another piece of paper. *Friends of Mammoth*, of course, said that the word “project” appears to emphasize activities **culminating** in physical changes to the environment, . . .” *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 279. The Delta Plan and Regulations would **culminate** in the Delta Water Tunnels and the resulting massive and myriad physical changes to water quality and quantity in the Delta and the Sacramento River.

As we have said before, unless the Council drops the call for improved meaning new conveyance upstream from the Delta, it will be necessary for the Council to require preparation and recirculation of a new Draft EIR. That is required because “The draft EIR [and RDPEIR] was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.” Guideline § 15088.5(a)(4).

The most important and fundamental planning decision made in the history of the Delta will be whether or not to develop massive, new upstream conveyance from the Delta, for the benefit of the exporters and to the detriment of the Delta. That is a planning decision that can only be considered rationally, let alone made, after comprehensive CEQA analysis and public trust doctrine analysis have been performed.

Please call if you have any questions about our comments.

Sincerely,

A handwritten signature in black ink that reads "Nick DiCroce". The signature is written in a cursive, flowing style.

Co-Facilitator