earth LAW CENTER
AWAKENING TO EARTH RIGHTS

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January 10, 2012

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

Re: Comments on Final Draft Delta Plan (deltaplancomment@deltacouncil.ca.gov) and Recirculated Draft Programmatic Environmental Impact Report (recirculateddpeircomments@deltacouncil.ca.gov)

Dear Ms. Messer:

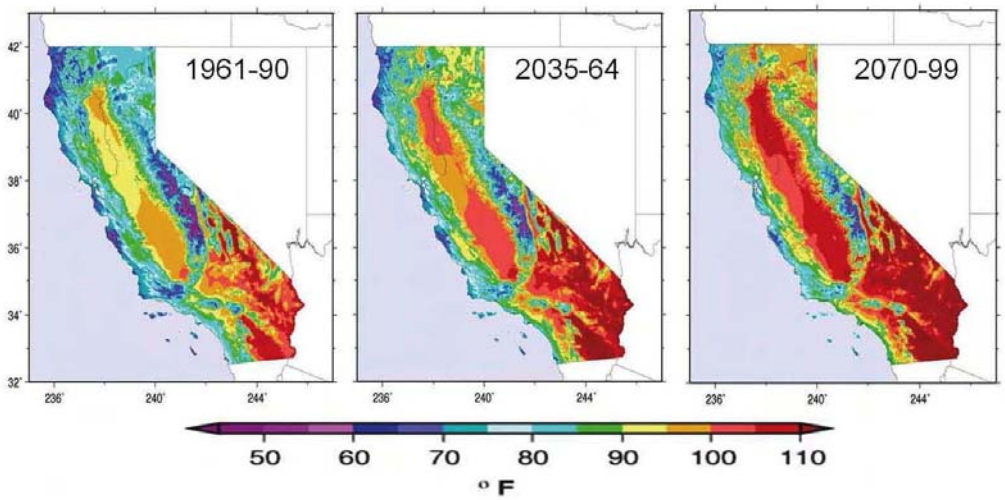
Earth Law Center works to advance legal rights for ecosystems and species to exist, thrive and evolve. On behalf of Earth Law Center, we welcome the opportunity to comment on both the Delta Stewardship Council's Final Draft Delta Plan and Recirculated Draft Programmatic Environmental Impact Report. We incorporate by reference our February 2012 comments on the Draft Environmental Impact Report (included below), as well as the February 2012 Environmental Water Caucus (EWC) DEIR comments. We further incorporate by reference the "Scoping Comments on Draft Environmental Impact Report for the Delta Plan" submitted by California Coastkeeper Alliance on January 28, 2011, and the Scoping Comments on the DEIR submitted by the EWC on January 25, 2011.

Our current comments on the Final Draft Delta Plan and Recirculated Draft PEIR reiterate the point – yet unaddressed – of our February 2012 DEIR comments, a point also emphasized in the comments incorporated by reference above. That is: the Delta Plan, which affects much of the state and extends outward with a fifty-year time horizon, must include a process for establishing, in law, water rights for waterways to the clean flows needed for the Delta ecosystem to be healthy. The law currently allocates water rights only for diversions for human uses. Waterways' flows are "protected" only tangentially, through conditions on permits and various statutes that do not equate to actual water rights. If the Council intends to achieve the adopted "co-equal" goals of water supply and environmental integrity of the Delta ecosystem, it must address this fundamental imbalance in the law, which makes one goal far more equal in practice than the other.[1]

[1] As noted in our February 2012 comments, we disagree that a "co-equal goals" approach will achieve the desired results of reliable water supply and healthy ecosystems. Only by recognizing our dependence on a healthy Delta, and the importance for us to live within its constraints, can we ensure that we have a reliable supply of water for our needs. A "co-equal goals" approach perpetuates the fiction that we can have both results without meaningfully adjusting our current relationship with water. This fiction borne out in fact by the Draft Final Plan's and Draft PEIR's failure to take up the law's granting of water rights for human diversions over the (still unrecognized) rights of waterways.

This ongoing failure to address the law's clear preference for human water use over environmental needs will continue to drive over-diversion, the impacts of which will escalate as climate change raises temperatures and increases evapo-transpiration, desiccating soils and further pressuring waterways to give up more water than they can spare. This not only impacts the Delta ecosystem – it also impacts the tens of millions of Californians dependent on water flowing through this system.

Figure 1. California Historical & Projected July Temperature Increase 1961-2099



Cayan, Dan, *et al.*, *Climate Change Scenarios and Sea Level Rise Estimates for the California 2008 Climate Change Scenarios Assessment*, PIER Research Report, CEC-500-2009-014 (Sacramento, CA: California Energy Commission) (2009).

Given the decades-long time frame of the Delta Plan and the looming threat of climate change, among other stressors, California cannot wait to address this legal imbalance. We urge the Council to revise the Delta Plan and PEIR to include a clear process for establishing and implementing, in law, water rights for waterways. Waterways must be granted water rights to the instream flows and water quality needed to ensure waterway and system health. The Delta Plan and its accompanying environmental review documents must include analysis and recommendations advancing "water rights for waterways" to ensure their compliance with CEQA and their ultimate success.

We look forward to working with the Council to safeguard California's Delta and connected ecosystems, on which we all depend. Thank you.

Regards,

Linda Sheehan
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attachment

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February 2, 2012

Delta Stewardship Council
980 Ninth Street, Suite 1500
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Attn: Terry Macaulay

VIA ELECTRONIC MAIL: RulemakingProcessComment@deltacouncil.ca.gov

RE: Comments on "Draft Delta Plan Program Environmental Impact Report" (Nov. 2011), available at: http://deltacouncil.ca.gov/delta-plan-draft-eir

Dear Ms. Macaulay:

Earth Law Center works to advance legal rights for ecosystems and species to exist, thrive and evolve. On behalf of Earth Law Center, we welcome the opportunity to comment on the Delta Stewardship Council's Draft Environmental Impact Report (DEIR). We incorporate by reference the February 2012 joint DEIR comments submitted to the Delta Stewardship Council (Council) on behalf of the Environmental Water Caucus (EWC DEIR Comments). We also incorporate by reference the "Scoping Comments on Draft Environmental Impact Report for the Delta Plan" submitted by California Coastkeeper Alliance on January 28, 2011, and the Scoping Comments on the DEIR submitted by the EWC on January 25, 2011.

In brief, as articulated in the EWC DEIR Comments, we call on the Delta Stewardship Council to revise the DEIR to meet CEQA requirements and ensure a legally enforceable Delta Plan that protects the health of the Delta ecosystems. By failing (among other lapses) to ensure necessary reductions in water exports as recommended by the State Water Board in their adopted flow criteria for the Bay-Delta Estuary, the DEIR and proposed Delta Plan will not achieve even the legislatively mandated "co-equal goals." More broadly, the DEIR and proposed Delta Plan fail to ensure the necessary review of strategies to advance water supply reliability consistent with the better standard of achieving an *overarching* goal of environmental sustainability. Given its decades-long time frame, the revised DEIR must assess all reasonable alternatives that will advance environmental sustainability over the long-term, a goal essential to protecting current and future interests in water sustainability.

Specifically, we ask that the DEIR be revised to ensure the adequacy of its alternatives analysis by adding to Alternative 2 the necessary strategy, recommended in both sets of Scoping Comments referenced above, of establishing water rights for waterways. This legal tool would give the Delta's waterways the equivalent legal standing needed to effectively enforce the flows that science has shown the waterways need in order to survive. Finally, the revised DEIR should be re-circulated for public review and comment before adoption, so that the public and

decisionmakers may fully exercise their stewardship responsibilities over the Delta and connected ecosystems.

THE DEIR MUST ANALYZE A REASONABLE RANGE OF ALTERNATIVES

Under CEQA, an EIR must analyze a reasonable range of alternatives to the project, or to the location of the project, that would feasibly attain most of the basic objectives while avoiding or substantially lessening the project's significant impacts.[2] A public agency must consider a "reasonable range" of alternatives, which is determined by a "rule of reason."[3] While there is no set number that constitutes a "reasonable range," the range should be sufficient to permit a reasonable choice of potentially feasible alternatives that present possible environmental advantages.[4] The rule of reason requires that the environmental documents set forth the alternatives necessary to permit this reasoned choice. The key issue is whether the selection and discussion of alternatives fosters informed decision-making, as well as informed public participation.[5]

In addition to the flaws described in the EWC DEIR Comments (incorporated by reference), the DEIR fails to comply with CEQA's "range of alternatives" requirement by failing to also examine the establishment of water rights for waterways as a critical legal tool for managing our use of the Delta. The Delta Plan is characterized as a statewide plan with *at least* a 50-year horizon.[6] In light of this time frame and the need for strong, effective action on behalf of the Delta's health, the issue of whether water rights for waterways may be an available management tool in the near term is not dispositive to the decision on whether this tool should be included in the alternatives for analysis. By law, the alternatives must foster informed decision-making and informed public opinion. As discussed further below, development and implementation of water rights for waterways is necessary to ensure Delta health and water supply reliability, and so it must be examined in the DEIR alternatives analysis to ensure the DEIR's adequacy under CEQA.

THE DEIR ALTERNATIVES ANALYSIS MUST INCLUDE ASSESSMENT OF "WATER RIGHTS FOR WATERWAYS" AS A CORE DELTA MANAGEMENT TOOL

Despite the Legislature's call for a "co-equal goals" approach to water management, the current water rights allocation system effectively places the environment's access to water on a second tier status, below essentially all human uses. Water rights are now allocated only to human uses; a waterway currently has no equivalent statutory right to keep necessary water in its system. This governance system conflicts with ecological science, which demonstrates that the water needs of Californians and our environment must be considered together. If water rights are to be the accounting system by which water is allocated, then the law must reflect the science:

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[2] *See* Pub. Res. Code § 21100(b)(4); 14 Cal. Code Regs. § 15126.6(a); *Citizens for Quality Growth v. City of Mount Shasta*, 198 Cal.App.3d 433, 443-45 (1988).
[3] 14 Cal. Code Regs. § 15126.6(a); *Village Laguna of Laguna Beach, Inc. v. Board of Supervisors* 134 Cal. App.3d 1022, 1028 (1982); *Foundation for San Francisco's Architectural Heritage v. City & County of San Francisco*, 106 Cal.App.3d 893, 910 (1980).
[4] *San Bernardino Valley Audubon Soc'y v. County of San Bernardino*, 155 Cal.App.3d 738, 750 (1984).
[5] *Mann v. Cmty. Redevelopment Agency*, 233 Cal. App. 3d 1143, 1150 (1991).
[6] DEIR, p. 2A-57.

legal water rights must be developed, allocated and enforced to support water needs for healthy aquatic ecosystems and a healthy California.

Our water governance system currently addresses ecosystem water needs only indirectly, through such methods as conditions in permits, mandates (currently unimplemented) to prevent "waste and unreasonable use," Water Code Section 1707 water transfers, the public trust doctrine, and application of the Endangered Species Act (ESA). None of these otherwise important tools are actual water *rights*, however, at a level equivalent to currently-allocated water rights for human uses. The result to date has been that ecosystem water needs are consistently relegated to a tangential role in state water planning, until the ecosystems and/or their non-human inhabitants are at the brink of collapse. That is when the ESA hammer falls – abruptly, with little foresight, controversially, and often too late.

Unless California is willing to write off fish and Delta-dependent wildlife for our children and grandchildren,[7] California needs a legal system that allows the state to plan effectively for the water needs for *both* Californians and California's ecosystems. The dangerously well-trod path of "use, overuse, environmental decline, then hasty and unplanned reaction" can begin to be broken by granting ecosystems 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 is done. Again, if the state is committed to "co-equal" goals, and if water rights are to be the legal measure by which water is allocated for human uses in the state, then ecosystems also must be granted equivalent water rights.

The process for developing and allocating necessary water rights for waterways can be accomplished well within the time frame of the Delta Plan. The process could begin immediately with collection of the data needed to assess the amount and timing of water needed by Delta waterways to maintain their health. The State Water Resources Control Board's flow criteria, adopted to protect Delta ecosystems,[8] are the key starting point. Significant additional research has been done over the years in assessing overall fish and ecosystem needs in the Delta and connected systems elsewhere in the state;[9] this too could be compiled. At the same time, statutory changes to clarify the rights of waterways to the water that science demonstrates they need can begin to be debated and eventually adopted. Along with this discussion should be a process for enforcing these ecosystem water rights; for instance, the rights can be held and enforced by independent legal guardians or trusts. The state should also develop a process for selecting and funding (*e.g.*, through fees on water diversion and use) such independent guardians and meeting program costs overall.

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[7] *See, e.g.*, NOAA/NMFS, "NMFS Biological and Conference Opinion on the Long-Term Operations of the Central Valley Project and State Water Project" (June 4, 2009), available at http://swr.nmfs.noaa.gov/ocap.htm. NMFS' final Opinion concludes that the CVPISWP operations are, among other things, likely to jeopardize the continued existence of federally listed endangered Sacramento River winter-run Chinook salmon, threatened Central Valley spring-run Chinook salmon, threatened Central Valley steelhead, and even federally listed Southern Resident killer whales.

[8] SWRCB, "Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem," (Aug. 3, 2010), at: http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow/docs/final_rpt080310.pdf.

[9] *See, e.g.*, Ocean Protection Council instream flow analyses at: http://www.opc.ca.gov/category/projectsbytopic/, and DFG instream flow reports at: http://www.dfg.ca.gov/water/instream_flow_docs.html.

This process also must include pairing the above-identified legal water rights for ecosystems with identified water sources. Water rights that implement scientifically identified water needs could be accounted for through such strategies as: reviewing unexercised rights, making "waste and unreasonable use" determinations, conducting adjudications, working with the federal government regarding effective allocation of federal water rights, assessing rights and sources associated with "new" water, raising fees on diversions to encourage voluntary release of unneeded rights, as well as other approaches. Given the significant over-allocation of water rights in the state on paper, and the unknown amount of water diverted under riparian and pre-1914 rights, this task may be complex and take some time. It is not, however, insurmountable in light of the numerous existing legal tools that the state could use if it chooses to plan wisely, rather than continue to react to the courts as the effective arbiters of the state's water policies. Further, the time frame of the Delta Plan is more than sufficient to allow this necessary exercise to begin, complete, and achieve positive results in protecting the health of the Delta through the force of law.

In summary, formalizing and effectuating water rights for ecosystems will ensure that waterway needs are considered up front, that planning is effective and certain, that implementation and enforcement is clear, and that water is shared in a way that ensures that the needs of the state and its ecosystems are met. The DEIR's failure to include any discussion of this essential legal balancing effort, which is necessary to meet the state's minimum co-equal goals mandate, renders the DEIR inadequate. Accordingly, we ask that the DEIR be revised to add to Alternative 2 the establishment of water rights for waterways as a tool to advance the well-being of the Delta, and the current and future Californians who depend on it. This strategy should be analyzed in a revised document, which should then be recirculated for further public comment.

* * *

The Delta Plan is a *de facto* statewide plan with at least a 50-year time frame. It accordingly must reflect a statewide vision and commit to a necessary suite of actions whose time frames are commensurate with the sweep and importance of this Plan. "Water rights for waterways" is one such action that must be included in the Plan and its DEIR to ensure the DEIR's compliance with CEQA, and the effectiveness of this critical initiative.

We look forward to working with the Council to safeguard California's Delta and connected ecosystems and to ensure clean, abundant waters for the benefit of California's people and natural world, now and in the future. Thank you.

Regards,

Linda Sheehan
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