

Delta Plan Program Environmental Impact Report (PEIR)

Summary: Before the Council adopts the Delta Plan, it will need to approve the plan's Program Environmental Impact Report (PEIR). Staff expects that action to occur in May 2013. To prepare the Council for that action, this staff report provides an overview of the basic requirements of the California Environmental Quality Act, a review of the EIR/CEQA process to date for the Delta Plan, a summary of what was learned from the Delta Plan PEIR and public comment process, and a description of next steps for completing the Final PEIR for Council certification in May 2013.

This is an action item. Staff recommends that after receiving the staff's report on the matter, the Council open the public hearing on it, accept any public testimony, and after Council deliberation, direct the staff to continue its preparation of the Final PEIR.

Overview of CEQA's Basic Requirements

The California Environmental Quality Act (CEQA) requires government agencies to evaluate the potential direct and indirect significant adverse environmental consequences of their proposed discretionary actions, and to mitigate those consequences if feasible. The evaluation step is the "information disclosure" and "informed decision making" part of CEQA – decision makers must make decisions with their eyes open to significant adverse environmental consequences. This includes preparation of an Environmental Impact Report (EIR) or other statement describing a project's effects on the environment. The measures proposed to mitigate the project's consequences on the environment are the substantive part of CEQA. They allow an agency to move forward with a project, provided that significant adverse environmental impacts are lessened or avoided to the extent feasible.

CEQA allows an agency to design its desired project in the first instance to meet the agency's objectives, informed by their policies, desires, needs, experience, science, and other criteria. Then, as stated above, the agency evaluates the potential environmental consequences of that desired project to determine whether the project's purpose can still be achieved with less damage to the environment through (a) mitigation measures or (b) an alternative but less environmentally damaging way to accomplish the project's purpose. Public input is helpful to that evaluation, as it has been in the case of the Delta Plan.

Review of the Delta Plan's CEQA Process to Date

The Fifth Staff Draft Delta Plan, released in August 2011, served as the "Proposed Project" for the Delta Plan's Draft Program Environmental Impact Report (DPEIR). Its

two-volumes evaluated the draft plan's potential adverse environmental impacts. The DPEIR also evaluated four alternatives to the proposed Delta Plan. The DPEIR was issued in November 2011 for a 90-day comment period, twice the 45 day review period that the law requires.

Based on various factors, including extensive public input, the Council revised the Fifth Staff Draft Delta Plan in 2012 through the preparation of additional public drafts. The 6th and 7th draft resulted, ultimately leading to the Final Draft Delta Plan released in November 2012, together with an additional volume of the DPEIR focused on that Final Draft Delta Plan. This Recirculated DPEIR (Volume 3) was made available for public comment for 45 days.

These DPEIR documents have been available for review on the Council's website since they were issued. The November 2011 DPEIR (Volumes 1 and 2) is available at <http://deltacouncil.ca.gov/delta-plan/delta-plan-draft-peir-volumes-1-and-2>. The November 2012 Recirculated DPEIR (Volume 3) is available at <http://deltacouncil.ca.gov/delta-plan/recirculated-draft-programmatic-eir-vol-3>. These DPEIR volumes' executive summaries are especially useful and comprehensive. They include a chart (a) identifying and classifying (by level of significance) each potential adverse environmental impact of the Delta Plan and (b) listing mitigation measures to reduce those impacts. The EIR process will conclude with issuance of a Final PEIR prior to the Council's May meeting (discussed in more detail below).

Objectives of the Delta Plan

The Delta Reform Act requires the Council to adopt a Delta Plan that achieves the State's coequal goals. It also specifies: (i) eight objectives that are "inherent" in the coequal goals (see Water Code section 85020), (ii) a related statewide policy to reduce reliance on the Delta in meeting the State's future water supply needs through improved regional water self-reliance (Water Code section 85021); and (iii) certain specific subjects and strategies that must be included in the Delta Plan (see Water Code sections 85301–85309).

Consequently, for purposes of the PEIR, the project objectives are 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, (3) is implementable in a comprehensive, concurrent, and interrelated fashion, and (4) is accomplished as rapidly as realistically possible without jeopardizing ultimate success.

The Act requires the Council to adopt a "legally enforceable" Delta Plan to further the achievement of the State's coequal Delta goals. Consequently, the Delta Plan includes a significant, but targeted regulatory component – fourteen regulatory policies – that are

enforceable with regard to “covered actions”.¹ These regulatory policies, together with a complementary suite of 71 nonbinding recommendations about important matters over which the Council generally does not have enforcement authority, and the Plan’s description of the Council’s statutorily-established coordination role, ensure that the Delta Plan will provide the unified direction for resources management in the Delta that is required by the Act. Taken together, these policies and recommendations meet the legislature’s directive to “further the coequal goals” and their inherent objectives and related requirements. Attachment 1 provides additional analysis about how the Final Draft Delta Plan meets the Council’s objectives.

What Did We Learn From the PEIR and Public Comment?

- *The Final Draft Delta Plan is the Environmentally Superior Alternative.* CEQA requires an EIR to identify the environmentally superior alternative. The Recirculated PEIR identifies the November 2012 Final Draft Delta Plan as the environmentally superior alternative. The underlying rationale is summarized in the Recirculated PEIR’s Executive Summary (pages ES-8 to ES-11) and explained in detail in the Recirculated DPEIR’s Section 25.

Public comment on the Recirculated DPEIR has not changed the conclusion that the Final Draft Delta Plan is the environmentally superior alternative. Numerous comments about DPEIR’s Alternative 2 questioned this conclusion, given that Alternative 2 was based on a submittal from environmental groups, leading many commenters to assert that Alternative 2 was environmentally superior. Alternative 2 would sharply reduce exports from the Delta and would encourage retirement, fallowing and/or inundation of approximately 700,000 acres of agricultural land, including approximately 320,000 acres at the Tulare Lake basin (currently in agricultural production, which Alternative 2 would convert into a reservoir). CEQA considers certain agricultural land to be an environmental resource requiring protection (per CEQA Guidelines Appendix G), similar to protection of special-status species and their habitats, and other valuable resources. Alternative 2 has some advantages over other stake-holder based alternatives, but is inferior to the proposed Delta Plan because of Alternative 2’s significant adverse effects on agricultural land and water supply.

- *Delta Plan’s Benefits Will Come at the Cost of Short-Term Impacts Caused by Construction.* Arresting the decline of the Delta ecosystem and improving water supply reliability will require physical actions. These actions include, for example, construction of local water supply projects (e.g., desalination plants, water recycling plants, new water storage facilities, etc.), setting back levees to provide more riparian habitat, etc. Construction has physical impacts. While most of these

¹ “Coequal goals”, “covered action” and other terms are defined in the Glossary to the existing Final Staff Draft Delta Plan available at <http://deltacouncil.ca.gov/delta-plan/current-draft-of-delta-plan>.

impacts can be mitigated, it is not certain that all will be mitigated. For additional information, this trade-off between the long term and the short term is explained in more detail on pages ES-3 and ES-8 of the Executive Summary to the Recirculated DPEIR (Volume 3).

- *EIR-Identified Mitigation Measures are Part of the Delta Plan and Will Help Reduce Impacts of the Delta Plan.* The main value that the EIR has provided is identification of measures to avoid or reduce the Delta Plan's environmental effects. Although the Delta Plan does not directly require any physical actions, it does encourage other agencies to take such actions. Accordingly, the PEIR identifies numerous mitigation measures (listed in the EIR Executive Summary) to help reduce the potentially significant adverse environmental impacts of those potential actions. The mitigation measures are incorporated into the Delta Plan (as CEQA requires) through Policy GP1 and substantially improve the Delta Plan by lessening its potential adverse impacts.
- *Public Comment has Improved the Mitigation Measures.* Public comment about the mitigation measures will result in some minor modifications to the mitigation measures. The modifications generally improve the measures by clarifying intent, elaborating on the means to implement the measures, requiring additional coordination/consultation (e.g., with Native American tribes) and further reducing impacts. The full list of all mitigation measures from the existing DPEIRs is attached (Attachment 3); the track-changes wording represents the new and improved wording for these measures that staff recommends in response to public comment and which will be included in the May 2013 Final EIR.

Proponents of covered actions will have to implement these mitigation measures, which raised some concern among commenters. However, the mitigation measures are required only if they are (a) factually applicable to the specific covered action and (b) feasible. Moreover, the proposing agency will be able to substitute alternate mitigation as long as it is equally effective. This flexibility is inherent in the PEIR, and built in to the Delta Plan's Policy GP1. In other words, the PEIR itself and Delta Plan Policy GP1 provide flexibility to proposing agencies without undermining the environmental protection the mitigation measures provide.

- *The EIR's Analysis was Accurate; Written Responses to Public Comment Will Improve the EIR's Discussion.* Public comment on the PEIR helped staff identify analytical areas of particular stakeholder and public focus. Responses to those comments, which staff is preparing, will augment the PEIR's discussion and improve its informative value. This will be reflected in the Final PEIR. Examples of common comments include:
 - a. PEIR Should Have Evaluated BDCP Options in Detail. Staff disagrees. The PEIR explains in great detail, in its own stand-alone chapter (Section 23), that BDCP is not the Council's project, as the Delta Reform Act makes clear. Rather,

it is a still-in-gestation project of another agency. Because it is a reasonably foreseeable future project that may cause related impacts with the Delta Plan, the PEIR includes extensive discussion of BDCP as a “cumulative” project, which is what CEQA requires.

- b. Mitigation Measures are Too Vague. Staff has improved the measures, as noted above.
- c. Mitigation Measures Usurp Other Agencies’ Authority. As described above, flexibility in selecting mitigation measures is built into the Delta Plan’s Policy GP1. Responses to comments in the Final DPEIR will further explain agencies’ flexibility in selecting mitigation measures.
- d. Upstream Impacts of Natural Flows Were Not Analyzed. The PEIR adequately evaluated these impacts, but the Final PEIR’s responses to comments will provide additional discussion to make that evaluation and analysis more obvious and clear.
- e. PEIR’s Detail Not Sufficient. Staff disagrees. The Delta Plan is a high-level planning document. Accordingly, this EIR is a program–level EIR. The environmental impacts of projects that could be encouraged by the Delta Plan are analyzed, by general type of project, as indirect impacts of the Delta Plan. The site-specific details of these projects are not known at this time nor does this PEIR provide environmental clearance for such projects. The detail commenters seek will be provided in project-level EIRs that agencies proposing actions in response to the Delta Plan will prepare. CEQA Guidelines section 15146 is clear that “[t]he degree of specificity required in an EIR will correspond to the degree of specificity involved in the underlying activity” proposed for approval – the Delta Plan, in this case.
- f. Specific Alternative Submitted by Commenter Not Analyzed. Staff disagrees with the premise of these comments. The PEIR includes a reasonable range of alternatives, as CEQA requires. CEQA requires an agency to use its own judgment to develop the reasonable range of alternatives, which can be informed (as it was here) by alternatives submitted by commenters.
- g. More Natural Flow Regime and WR P1 Would Reduce Water Supply. The PEIR adequately evaluated this, but the Final PEIR will explain again (a) that a more natural flow regime instituted through the SWRCB’s adoption of new flow objectives could result in long-term fallowing and conversion of agricultural lands in some areas, (b) that existing water rights would not be affected, (c) that more local and regional water supplies and increased efficiency would compensate for loss of Delta water for non-agricultural users (but not for all agricultural users), and (d) that the SWRCB will balance all beneficial uses taking into account local needs, and WR P1 will not affect any supplier that has met existing water-use efficiency and water planning requirements, begun implementation of feasible

local/regional supply projects, and set out expected outcomes for measurable its reduction in Delta reliance and improvement in regional self-reliance.

- h. Draft PEIR Should Have Included a Discussion of the Ability of Delta Plan Alternatives to Meet Project Objectives. CEQA does not require Draft EIRs to contain such a discussion. Such a discussion will be part of the CEQA Findings the Council will consider for adoption in May. Accordingly, staff has prepared a draft for Council information now, which is attached as Attachment 2.

Next Steps in the Delta Plan PEIR Process

- *Complete Final PEIR*. The Final PEIR will consist of the three DPEIR volumes, plus a fourth volume containing responses to public and agency comments on the EIR and any EIR text changes (like the mitigation measures modifications mentioned above). The Final PEIR will be released at least 10 days prior to the Council's May meeting for public and agency information; CEQA does not require a Final EIR comment period. The Final PEIR will cover any final Delta Plan changes the Council directs at the March meeting, assuming they are minor and do not require recirculation. Staff will present the Final PEIR to the Council at its May meeting.
- *Council Considers Final PEIR for Certification*. CEQA requires that the Council "certify" the Final PEIR before the Council may approve the Delta Plan. In effect, the Council would "certify" that:
 - a. The Council reviewed and considered the information in the Final PEIR
 - b. The Final PEIR reflects the Delta Stewardship Council's independent judgment and analysis
 - c. The Final PEIR has been completed in compliance with CEQA
- *Council Considers Delta Plan for Approval, and Adopts CEQA "Findings"*. If the Council has certified the PEIR, and desires to adopt the Delta Plan, the Council must make CEQA "findings" that include:
 - a. A finding about each significant environmental impact of the project that was identified in the PEIR, stating (1) whether mitigation has been required; (2) whether the mitigation is within the jurisdiction of the Council or another agency; or (3) whether mitigation is infeasible.
 - b. Adoption and incorporation into the Delta Plan of the mitigation measures identified in the PEIR for each significant impact.
 - c. Adoption of a Mitigation Monitoring and Reporting Program.
 - d. Reasons for rejecting the alternatives (if Council does so) based on findings of infeasibility, a greater environmental impact and/or failure to achieve a project objective.
 - e. Adoption of a Statement of Overriding Considerations, which is a finding that specific benefits of the Delta Plan outweigh its significant adverse effects on the environment. Besides environmental benefits, the benefits may include economic, legal, social, technological or other benefits.

Findings will reflect predominantly the DPEIRs the Council has already seen, aided by the Final PEIR the Council will see and which staff will summarize at the May meeting.

Staff Recommendation

Staff recommends that, after the Council receives the staff's report on this matter, the Council open the public hearing on it, accept any public testimony, and after Council deliberation, direct the staff to continue its preparation of the Final PEIR

List of Attachments

- Attachment 1: How the Delta Plan Meets the PEIR Project Objectives
- Attachment 2: Comparison of Alternatives Ability to Satisfy Project Objectives
- Attachment 3: Draft Delta Plan PEIR: Compilation of Mitigation Measures (including planned language refinements)

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