From: Jeffrey Michael
Sent: Thursday, February 16, 2012 5:52 PM
To: Ray, Dan@DeltaCouncil
Cc: Machado, Michael@DPC
Subject: comments regarding staff recommendations for the DPC proposal

Dan,

As you suggested, I have attached the brief comments written by myself and Dr. Robert Pyke, consultants for the Delta Protection Commissions's Economic Sustainability Plan, regarding Agenda Item 7a from the February 9-10, 2012 meeting of the Delta Stewardship Council. The agenda item is the Delta Stewardship Council staff's initial evaluation of the Delta Protection Commission's Proposal to Protect the Delta as an Evolving Place.

These comments are regarding the information in the first nine pages of the DSC staff memo that describe the ESP and present the argument for the consistency findings regarding the ESP recommendations that are at the end of the memo. There are several important instances where staff did not accurately conveyed the findings of the ESP or the Independent Review Panel. The attachment quotes some important parts of the staff memo, and our comments appear below in *italics.* We understand that DSC staff had a very short time to review the final, revised ESP and prepare this initial evaluation, and hope these comments are useful to you as the DSC continues to review and evaluate the details of the ESP.

With respect to the specific recommendations and the consistency findings, Mike Machado will follow up with additional suggestions of how the ESP recommendations could be effectively integrated into the Delta Plan.

Thanks to you and everyone at the Stewardship Council for your time and consideration of the ESP.

Jeff

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Ray, Dan@DeltaCouncil

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Attachments: response to DSC staff comments on the ESP proposal.docx

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Response to specific DSC Staff Comments on the DPC's Proposal to Protect the Delta as an Evolving Place

Planning for the Delta's economic sustainability (page 4-5): "The *Economic Sustainability Plan* examines these alternatives' effects on the primary zone's economy and concludes that the baseline scenario, enhanced with 100 year flood protection for legacy communities and some features from the Delta Vision scenario, offers the best prospects for the Delta. It is preferred because DPC's analysis concludes it has less economic impact on agriculture and recreation/tourism in the primary zone and offers the best prospects for the legacy communities."

This evaluation falsely suggests that the DPC analysis does not recommend enhancements to habitat or conveyance. In fact, the ESP actually recommends most of the habitat proposals even though they have significant costs on the Delta economy. With the notable exception of large areas of tidal habitat, they are recommended because they further the co-equal goals, and the costs on the Delta, although significant, can be accommodated within the framework economic sustainability of the Delta as an evolving place. Further, this summary ignores the fact that the ESP recommends seismic upgrades to lowland levees beyond the baseline PL 84-99 recommendation, in large part because such upgrades are a viable, and cost effective strategy to achieve water supply reliability and improved habitat. Finally, none of the analysis in the ESP is limited to the primary zone as stated by DSC staff.

Process (page 5)
The majority of this section repeats complaints made by the Department of Water Resources and Water Contractors regardless of their validity. The section does not reference the DPC's response to comment letter from state agencies. Even more significant, the section ignores the Science Program's Independent Review Panel. It is significant that the review panel commended the exact components of the ESP's economic analysis that are criticized by DWR.

Protecting the Delta as an Evolving Place Doesn't Stop Change (page 6)
This entire section has nothing to do with the DPC proposal or ESP, and makes no reference to it. The ESP lays out a vision of profound change in the Delta, including large ecosystem improvements, a transformation to a more stable and ecologically friendly levee system, and a reinvigoration of legacy communities.

Economic Sustainability Plan (pages 7-9): *Multiple comments in this closing section are false and misleading.*

1. "Proposals to upgrade all levees to uniform PL 84-99 standard and to further improve most rural levees and selected other levees to higher standards is not consistent with the Delta Reform Act's requirement that the Delta Plan establish priorities for levee improvement (Water Code section 85305(a))."

Recommending the improvement of all levees to PL 84-99 is in fact establishing an important and feasible, short-term priority. Neither the Delta Reform Act nor the charge to the ESP consulting team required that the ESP establish priorities for levee improvement. The failure of the DSC staff and consultants to do that does not mean that it has to be done by the DPC. The more critical place for prioritization is selecting levees for upgrade beyond PL 84-99. However, the ESP does make a significant start on that task by defining and emphasizing the importance of "lowland levees" and by providing an appendix that shows graphically those islands for which levee failures have the greatest impacts on infrastructure and energy facilities. Finally, the term "rural levees" is not used in the ESP report or the Proposal.

2. "In addition, there is significant disagreement about whether improvements to meet these standards are feasible. Comments of the Natural Resources and Business and Transportation agencies and Department of Food and Agriculture say that "the ESP does (not)[1] include economic analysis to support their recommendations regarding comprehensive Delta levee improvements."

The ESP includes significant discussion of the economics of levee upgrades that is ignored by these agencies and the DSC staff. Among these arguments are the findings of the DRMS reports which found improving levees to PL 84-99 an essential part of every strategy and that improving levees had the highest benefit-cost ratios of all risk reduction strategies. The standing of these agencies to make such comments is questionable and they appear not to have actually read the ESP report or their own DRMS research.

3. "Both DWR and the Delta Science Program's independent review panel have criticized the Economic Sustainability Plan for underestimating these improvements' costs. The significant potential for cost overruns, the lack of economic justification, and the uncertainty about a long term fund source for these improvements suggests that it

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[1] The word "not" is included in the agencies letter but is missing in the staff report. The full quote should read "The ESP does not include the economic analysis needed to support to their recommendations regarding comprehensive Delta levee improvements. In addition, the costs associated with these recommendations appear to be significantly underestimated, which weakens the conclusion of the ESP that these recommendations are fiscally feasible." The first sentence is wrong and the second sentence is an opinion not supported by the actual costs of levee construction in the Delta.

may not be implemented in a reasonable period of time when economic factors are taken into account."

As discussed above, the ESP contains economic justification. The DWR comments on the ESP included no meaningful data on costs. The cost estimates in the ESP are consistent with DRMS, PPIC, and current levee construction projects. In addition, it is important to note that the levee assessment on miles below the PL 84-99 standard is also consistent with the new DWR data, showing that the ESP did not underestimate the miles of levees requiring upgrades as claimed by some critics. The IRP certainly questioned whether the ESP cost estimates were overly optimistic but that was largely based on a comparison to post-Katrina reconstruction costs in New Orleans. The final ESP report addressed this issue. The feasibility and the cost of constructing "fat levees", as recommended in the ESP has recently been confirmed by construction of such levees on Lower Jones Tract as part of the Aqueduct Protection improvements.

4. "In addition, the recommendation that additional funding be provided for levee maintenance may also be economically infeasible given other demands for the limited State funds available for Delta programs and the fundamental responsibility of local reclamation districts for maintenance of non-project levees. The Legislature has found in the Delta Reform Act that "property ownership in the Delta continues to depend on landowners' maintenance of ... non-project levees, and does not include any right to state funding of levee maintenance and repair" (Water Code 85003b)."

That paragraph of the Act simply confirms that landowners in the Delta have a responsibility to maintain the levees (which they do) and asserts that they do not necessarily have a right to State funding. However, that does not mean that the State has no responsibility. When the State accepted federal lands under the terms of the Swamp and Overflowed Lands Act, the state assumed certain obligations which it cannot pass to the reclamation districts. See footnote number 43 in the ESP report. Ever since the Way Bill, the State has in fact been contributing to levee maintenance and because of that, and because of the Kimball decision, the State has Paterno liability regardless of what the Chairman might think. In fact, any reduction in State spending or failure to complete the previously agreed plan to improve Delta levees to the delta-specific PL 84-99 standard, increases the State's Paterno liability rather than reducing it.

Even if were true that the state does not have the responsibility to help local reclamation districts, it should choose to do so because it is good policy. Delta levees provide many benefits to third parties, including water exporters, who do not contribute to their maintenance. Although privately owned, most of the services provided by the levees

are what economists' call public goods, and every basic text in public policy and economics states that it is good public policy for the government to subsidize the provision of such goods.

5. "The Act provides that flood protection should rely on structural and nonstructural means to ensure increased public safety (Public Resources Code Section 29702), rather than relying primarily on levees as recommended is the DPC's proposal."

The ESP report and the Proposal go to some pains to explain that there is a trade-off between investments in building more robust levees and investing in emergency preparedness, response and recovery.

6. "Current biological opinions about protecting threatened and endangered fish and the CALFED Ecosystem Restoration Program Plan (Vol II) are urgent and consistent in their call for restoration of significant acreage of tidal wetlands in the Delta. DPC's recommendation that tidal marsh habitat plans should be significantly reduced would be contrary to the goal of restoring the Delta ecosystem."

The ESP is quite clear that it is calling for significant reductions in the draft BDCP proposal of 65,000 acres of tidal habitat, not the biological opinions or CALFED. In fact, the biological opinions call for less than 10,000 acres of tidal habitat, an amount that is significantly less than the draft BDCP. Thus, the biological opinion plan for tidal habitat would be consistent with the ESP. It would have some costs for agriculture, but unlike the BDCP proposal, the level of costs would be consistent with economic sustainability as an evolving place. Thus, this statement greatly misrepresents the ESP recommendation.

7. "Prior studies indicate that, if levees fail, reclamation of some islands may not be cost effective. Because of the uncertainty about implementing DPC's recommendation to upgrade all Delta levees, avoiding some increase in open-water habitat may be unavoidable in the event of an earthquake, flood, or other major levee failure. Analyses by the Public Policy Institute of California suggest that it is likely that many islands could not be cost effectively reclaimed if they were to fail in an earthquake or flood, (*sic*)"

An increase in the area of open-water habitat is avoidable if that is the agreed policy. The claim regarding cost-effectiveness is in a single study originally published by the PPIC, not many studies as suggested in the staff report. In fact, many engineering assessments, including two by the Department of Water Resources criticize the approach utilized in the PPIC analysis. More importantly, the ESP itself explains the flaws in the economic argument in this study in detail.

8. The Delta Science Program's review panel recommended that plans should be made for flooding islands whose levees are not needed to provide a reliable water supply or restore the ecosystem, rather than leave those decisions to be dealt with after an unplanned levee failure.

This greatly misrepresents the statements of the review panel. The exact quote that is incorrectly paraphrased above says, "For areas where the public agrees that levees are not needed for achievement of the coequal goals, removal of the levees, and hence flooding of the protected land, should be a planned event and not left to nature." The panel emphasized the involvement of the public in decision making and that the co-equal goals include protecting and enhancing the Delta. What they mean, is that something like the conversion of McCormack-Williamson Tract to wetland should be planned. While that is likely true, the non-planned flooding of Liberty Island is generally taken to have been a great success.

In addition, the DSC staff is ignoring the context set in the sentences immediately preceeding this quote. The independent review panel clearly recommends that non-urban levees that protect human life from flooding should be improved above PL 84-99! It then says that areas that only protect property may be below urban standards, and it is clear in other comments that they concur that PL 84-99 is a minimum standard. Although the review panel raised concerns that our cost estimates could be optimistic, they do not recommend less levee investment than the ESP because of it. In fact, they recommend more investment in many if not most instances. They also recommend assessments be made to raise the necessary funds and overcome the free rider problem that results in underinvestment in levee systems.