

LO191 SJRGA



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SENT VIA E-MAIL

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Delta Stewardship Council
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Attn: Terry Macaulay
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RE: Comments of the San Joaquin River Group Authority on the
Delta Plan Draft Environmental Impact Report

Dear Councilmembers:

Thank you for the opportunity to comment on the Delta Plan Draft Environmental Impact Report ("DEIR"). The following comments on the Delta Plan ("Plan") DEIR are submitted on behalf of the San Joaquin River Group Authority ("SJRGA") and each of its individual members¹ for your consideration. After review and consideration of the DEIR, the SJRGA and its members urge the Council to reject it because it does not comply with the California Environmental Quality Act ("CEQA") for several reasons.

- A. The DEIR Project and Alternative descriptions and analyses are inadequate and contain improper conclusory statements, precluding meaningful public review.

"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." (Cal. Code Regs., tit. 14 § 15151; Pub. Res. Code § 21061.) Conversely, the DEIR does not define several key definitions, it makes conclusory statements, and analysis of potential impacts from encouraged actions and alternatives is absent in many sections.

CEQA requires that an EIR provide accurate and sufficient information to allow the public to understand and meaningfully consider environmental issues raised by a proposed project such as the

¹ Modesto Irrigation District, Turlock Irrigation District, Merced Irrigation District, South San Joaquin Irrigation District, Oakdale Irrigation District, Friant Water Authority, San Joaquin River Exchange Contractors, and the City and County of San Francisco.

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Response to comment LO191-1

Comment noted.

Response to comment LO191-2

Please refer to Master Response 2. The comment regarding covered actions is a comment on the project, not on the EIR. Please refer to Master Response 1.

Plan. (*Laurel Heights Improvement Ass'n v. Regents of University of California* (1988) 47 Cal.3d 376, 405 ["An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project."]; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 655 ["An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR. [citation omitted] ... Only 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."].) LO191-2

Several crucial terms and phrases are left undefined in this DEIR, leaving true environmental implications resulting from the proposed Plan undeterminable. For instance, the DEIR provides the statutory definition of "covered actions" in Section 2A (pp. 2A-2 – 4), but follows with a qualification that underlying agency actions, otherwise statutorily exempt, are in fact "covered actions" without further description. This simply confuses the otherwise plain statutory language and casts uncertainty as to the reach of covered actions beyond the Delta, and which actions would be considered "mandatory policy" or merely a "recommendation." (DEIR, p. 2A-5.)

Additionally, "natural flow regime" is not defined in the Project Description or elsewhere throughout the DEIR and yet it is a foundational element of the Plan, especially with respect to the "Delta Ecosystem Restoration" element. (See, e.g., pp. 3-85, 4-68, 6-50.) It is uncertain how much water would be necessary to "make up" for reductions in water as a result of a more "natural flow regime." (See, e.g., pp. 3-84, 85.) Without knowing what is considered "natural flow" it is impossible to analyze any impacts resulting from restoration of "natural flow" and understand why establishment of a "natural flow regime" is preferable to any alternative. LO191-3

Also, "Delta water" is used throughout the entire DEIR but is undefined as to whether it refers to water upstream of the Delta, water exported from the Delta, water used within the Delta, some combination thereof, or other definition altogether. It is thus also ambiguous who "water users that use Delta water" (or similar) might be. "Delta water" and "water users that use Delta water" as undefined is particularly troublesome because parties and entities cannot know what, if any, responsibility might be derived. In short, the scope of impacts to undefined water users cannot be known and analyzed by the public and interested parties.

This is principally important because the DEIR places the responsibility of investigating, researching and conducting environmental analysis on "local and regional" water suppliers to "make up for [the] reduction in water" the DEIR anticipates. (See, e.g., DEIR, p. 3-85.) One of the specific "Thresholds of Significance" states that the DEIR considers an impact significant if it "[s]ubstantially change[s] water supply availability to water users located outside of the Delta that use Delta water." (DEIR, p. 3-77.) Are the public and interested parties supposed to understand "Delta water" to mean water prior to entering the Delta, while it is within the geographic perimeter of the Delta, or after it flows through and out of the Delta? Clarifying such vagueness is essential to truly understand environmental impacts of the Plan. LO191-4

Meaningful comprehension and analysis is practically impossible with such vague terms and phrases at work. For example, Impact 3-3a reads in its entirety:

LO191-5

Response to comment LO191-3

Please refer to Master Response 5. "More natural flow regime" is discussed on pages 136-142 and 155-156 of the Final Draft Delta Plan and on pages 2A-38 through 2A-39 and section 4 of the Draft Program EIR.

Response to comment LO191-4

The term "Delta water" as used in the EIR refers to water within the Delta and the water diverted directly from within the Legal Delta, as described in Section 1 of the EIR. The EIR analyzes all impacts of the Delta Plan's policies and recommendations, including those that may occur in the Delta, the Delta watershed, and areas outside the Delta that use water diverted from or transferred through the Delta.

Response to comment LO191-5

As described in Section 2B of the Draft Program EIR, the Delta Stewardship Council does not propose or contemplate directly authorizing construction or operation of any physical activities. Rather, through the Delta Plan, the Delta Stewardship Council seeks to influence the actions, activities, and/or projects of other agencies, including local and regional water supply projects. The Reliable Water Supply subsection of each of sections 3 through 21 discusses the impacts of the construction and operation of such projects.

“The Proposed Project encourages a variety of actions to improve local and regional water reliability while reducing the use of Delta water, including actions to increase the use of recycled wastewater and stormwater, groundwater and surface water facilities, surface water and wellhead treatment facilities, water use efficiency and conservation actions, water transfers, and ocean desalination plants. Such water supply reliability projects would provide a benefit to water supply availability to water users that use Delta Water.” (DEIR, p. 3-82.)

LO191-5

The DEIR does not analyze potential impacts of the suggested “variety of actions” and in conclusory fashion determines the variety of projects would provide a benefit. The DEIR does not explain how reducing the use of Delta water will increase reliability, and it does not quantify how much water it will take for suggested actions to make up for the Delta water reduction because no metric is given. Indeed, no metrics are provided in this section or elsewhere in the DEIR.² Such a conclusory nature of the DEIR renders it inadequate. (Preservation Action Council v. City of San Jose (2006) 141 Cal.App.4th 1336 [Court held FEIR inadequate because of ambiguous alternative analysis.]; Santiago Cty. Water Dist. v. Cty. of Orange (1981) 118 Cal.App.3d 818, 831 [“The EIR must contain facts and analysis, not just the bare conclusions of a public agency.”].)

The DEIR also states that the Plan’s primary objective is to achieve the coequal goals in a manner that, among other things, is accomplished as rapidly as realistically possible. (See, e.g., DEIR, p. ES-3 (emphasis added).) The DEIR does not state how “accomplishment” is measured and does not discuss the realistic nature of the Plan and the Alternatives.

LO191-6

For example, the Plan sets deadlines of years 2014 and 2018 for the State Water Resources Control Board (“SWRCB”) to complete flow objectives and criteria, notwithstanding the lack of authority to enforce SWRCB action. These deadlines have been seriously questioned as unrealistic at several DSC meetings, yet the DEIR assumes these are realistic measures and misrepresents the feasibility of their achievement.

The DEIR, though, uses the non-accomplishment of flow objectives and criteria in an expedient manner as the basis to declare Alternatives 1a and 1b environmentally inferior because those Alternatives “would be less aggressive in moving toward minimum standards for water flow in the Delta necessary for a healthy fishery and ecosystem.” (DEIR, p. 25-11.) Furthermore, despite such reliance on flow criteria and objectives, the DEIR does not describe or analyze why the standards are necessary and, more importantly, how realistic they are and what impacts will result should they not be accomplished.

LO191-7

“To sum up, the omission of required information constitutes a failure to proceed in the manner required by law where it precludes informed decision-making by the agency or informed participation by the public.” (California Native Plant Society v. City of Santa Cruz, supra, 177 Cal.App.4th at p. 987.) The public and interested parties must better understand what impact, if any, will be felt as a result of the Plan; the DEIR does not provide the required information or analysis, and without both, the public and interested parties cannot reasonably be expected to understand and meaningfully consider issues raised by the Plan. (California Native Plant Society v. City of Santa Cruz (2009) 177

LO191-8

² For instance, the DEIR project description states that the DEIR “assumes the Delta Plan will be successful and lead to other agencies taking physical actions.” (DEIR, p. ES-2, fn. 3.) The DEIR, though, neither defines what constitutes success nor provides a metric to measure success.

Response to comment LO191-6

The Recirculated Draft EIR restated the Delta Plan’s objectives as “Furthering 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” (RDEIR at ES-4). Regarding the Delta Stewardship Council’s consideration of the Delta Plan’s ability to meet the coequal goals, please refer to Master Response 3.

Response to comment LO191-7

Delta Plan Recommendation ER R1 recommends that the SWRCB adopt and implement flow objectives for the Delta by 2014 and for high-priority Delta tributaries by 2018. The purpose and necessity of this policy is the subject of Chapter 4 of the Delta Plan, not this EIR. The EIR assumes, as CEQA requires, that the Delta Plan’s policies and recommendations will be successfully implemented, and analyzes the environmental impacts of such implementation. Alternatives 1A and 1B include a policy and recommendation, respectively, related to Delta flow, but neither recommends that the SWRCB adopt flow objectives on the same aggressive schedule as ER R1, as further explained in Master Response 3. The analysis of those alternatives thus did not assume the success of the SWRCB’s flow objectives efforts. The EIR’s analysis of the No Project Alternative considers the environmental results of a failure to adopt the recommended flow objectives.

Response to comment LO191-8

Please refer to Master Response 2.

Cal.App. 4th 957; Bakersfield Citizens for Local Control v. City of Bakersfield (2004) 124 Cal.App. 4th 1184.)

B. Mitigation measures could result in unconsidered impacts.

The DEIR found that mitigation measures for Change in Water Supply Availability to Water Users that Use Delta Water (Impact 3-3) are not necessary because it assumes that water users will undertake projects to “make up” for water reduction resulting from the SWRCB’s flow objectives. (See, e.g., DEIR, p. 3-84 – 85.) What the DEIR does not at all discuss is the environmental impacts of the “water user” projects needed to make up water.

“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.” (Cal. Code Regs., tit. 14, § 15126.4(a)(1)(D); see also Stevens v. City of Glendale (1981) 125 Cal.App.3d 986 [The appellate court affirmed the EIR did not properly analyze impacts of a mitigation measure which would extend an existing street.])

The DEIR analysis for Reliable Water Supply found that the Plan proposes to reduce the use of Delta water, but the reduction will be offset by the variety of actions the Plan proposes. The DEIR did not make an explicit finding of impact (significant, less than significant, or otherwise). It can be inferred, though, that the “variety of actions” proposed to offset and “provide a benefit to water supply availability” are themselves mitigation measures because the actions are used to reach the conclusion that water supply availability will benefit from implementing these projects. (DEIR, p. 3-82.) The DEIR did not analyze impacts from these actions individually or in the aggregate as a mitigation measure. In effect the Plan and Project Description are incomplete in the sense that it would appear that the speculated mitigations are integral to the Plan’s success.

As to Ecosystem Restoration, the DEIR recognized that water supply availability would be reduced for agricultural, municipal, and industrial water uses because the assumed flow objectives seek to return to a “natural flow regime.” The DEIR, though, concludes this impact is less than significant because “water users would undertake the projects and actions encouraged by the [Plan] to improve water supply reliability, as discussed in Section 2A, Proposed Project and Alternatives, and summarized in Section 3.4.3.1.” (DEIR, p. 3-85) In other words, the DEIR assumes that water users will conceive solutions (such as the “variety of projects”) to mitigate the reduced water supply availability. The DEIR does not analyze impacts that would arise from these mitigation measures.

C. The DEIR lacks analysis and reasoning for dependence on projects unrelated to the Delta Plan as examples of potential environmental effects.

While CEQA discourages duplicative analysis, this DEIR goes too far by entirely avoiding analysis. The DEIR relies on multiple EIRs for wholly unrelated projects. This DEIR assumes that similar impacts would occur if or when “similar” projects are completed as encouraged by the Plan. The DEIR concludes that mitigation measures would be the same to reduce impacts to less than significant in most cases.

Response to comment LO191-9

As explained in Master Response 4, the Delta Plan’s policies and recommendations encouraging the development of local and regional water supplies are part of the Project, not mitigation measures. The environmental impacts of such projects are discussed in the Reliable Water Supply subsection of each of sections 3 through 21 of the EIR.

Response to comment LO191-10

Please refer to response to comment LO191-9.

Response to comment LO191-11

Please refer to response to comment LO191-9.

Response to comment LO191-12

Please refer to Master Response 2.

For example, the DEIR frequently relied on the Davis-Woodland Water Supply Project EIR to identify potential impacts and related mitigation measures to reduce impacts to less than significant. The DEIR does not explain its reasoning, does not identify similarities of the Davis-Woodland project to the Plan, and/or how environmental impacts and mitigation measures could be—or would be—similar. Ironically, this particular project (that the DEIR heavily relies on) is meeting significant resistance and its fruition is threatened because of the substantial burden placed on ratepayers.³

The core purpose of CEQA is to “inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities.” (Cal. Code Regs., tit. 14, § 15002(a)(1).) Relying on projects in different geographic locations for different objectives creates suspicion that the DEIR does not analyze the true impacts from the Plan. It is as though the Plan DEIR is tiering off of unrelated project EIRs.

While a lead agency can use an EIR from an earlier project, the earlier EIR must have been prepared “in connection with an earlier project to apply to a later project, if the circumstances of the projects are essentially the same.” (Cal. Code Regs., tit. 14, § 15153(a).) The projects and EIRs this DEIR relies upon are entirely unrelated and the DEIR does not identify similar circumstances, geographic conditions or otherwise to make the projects “essentially the same.” Tiering from other and unrelated project EIRs is therefore improper.

D. The DEIR improperly defers analysis to a later DEIR or negative declaration.

This DEIR is a program-level EIR and it anticipates that agencies will prepare separate environmental documents as they propose specific projects encouraged by the Plan, however EIRs cannot simply defer all analysis to a later environmental document.

Tiering is a method CEQA allows to analyze general matters in a broader EIR to eliminate repetitive environmental analyses. (Cal. Code Regs., tit. 14, § 15152.) Tiering, though, cannot be used for the purpose of deferring environmental analyses to later more specific projects and avoid adequate analyses of environmental impacts of the broader project. (Cal. Code Regs., tit. 14, § 15152(b), (c).) Here, the DEIR defers virtually all environmental impact analyses to other agencies encouraged to implement projects suggested in the Plan. No environmental analysis is available in this DEIR that an agency can later tier from. In fact, this DEIR is essentially seeking to improperly tier from other wholly unrelated EIRs. This DEIR is seeking to approve a Plan, but defer any analysis whatsoever of environmental impacts to later DEIRs; in essence, this DEIR is “putting the cart before the horse.” (*Stanislaus Nat’l Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 200.)

E. The DEIR is encyclopedic rather than analytic and excessively long.

CEQA requires that EIRs, among other things, (i.) are prepared in a clear and plain language format, (ii.) are analytical rather than encyclopedic, (iii.) are meaningful to the public, and (iv.) emphasize alternatives and feasible mitigation measures rather than unnecessary project description. (Cal. Code Regs., tit. 14 §§ 15000 et seq., Pub. Res. Code § 21003.) The DEIR fails to accomplish any of these.

³ See, e.g., <http://www.sacbee.com/2012/01/30/v-print/4224312/water-systems-need-fixes-badly.html>

Response to comment LO191-13

Please refer to Master Response 2.

Response to comment LO191-14

The EIR is not tiering from the analogous projects. Rather, the analogous EIRs and/or EISs from similar projects provide analogous information about potential impacts of future projects to be implemented by other agencies and entities and encouraged under the Delta Plan. Please refer to Master Response 2.

Response to comment LO191-15

The Delta Plan was not developed to be used for future tiered environmental documents. Please refer to Master Response 2.

Response to comment LO191-16

Please refer to Master Response 2.

The DEIR is approximately 2200 pages, far exceeding the recommended number of pages: 150 pages, 300 in unusual circumstances.⁴ (Cal. Code Regs., tit. 14, § 15141.) This creates a considerable burden for interested parties and the general public in sorting through the DEIR to find worthwhile analyses to comment on, frustrating the very purpose of EIR review.⁵

CONCLUSION

Commenting on the DEIR is a daunting task because it does not analyze an actual project and the sheer volume made it nearly impossible to cite each inadequacy. The above analyses and citations are examples and not intended as exhaustive of each inadequacy. The public and interested parties require much more analysis of environmental impacts before this DEIR can be meaningfully reviewed and deemed sufficient.

Very truly yours,
O'LAUGHLIN & PARIS LLP


VALÉRIE C. KINCAID

VCK/tlb
cc: San Joaquin River Group Authority

LO191-16

LO191-17

Response to comment LO191-17

Comment noted.

⁴ Additionally, the Executive Summary "should not normally exceed 15 pages," yet the Executive Summary to the DEIR is 57 pages. (Cal. Code Regs., tit. 14, § 15123(c).)

⁵ "The purposes of review of EIRs ... include: (a) Sharing expertise, (b) Disclosing agency analyses, (c) Checking for accuracy, (d) Detecting omissions, (e) Discovering public concerns, and (f) Soliciting counter proposals." (Cal. Code Regs., tit. 14, § 15200.)