

LO232 SLDMWA SWC

Response to comment LO232-1

Comment noted.

Response to comment LO232-2

Comment noted.

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February 2, 2012



Delta Stewardship Council
Attn: EIR Comments
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Re: *Delta Plan Draft Program Environmental Impact Report*

Council Members:

The San Luis & Delta-Mendota Water Authority and State Water Contractors (collectively, the "Public Water Agencies")¹ write on their own behalf and on behalf of their member agencies to express significant concerns with the Delta Plan Draft Program Environmental Impact Report (Delta Plan Draft Program EIR) the Delta Stewardship Council (DSC or Council) prepared for its Delta Plan. These concerns reflect deficiencies under the California Environmental Quality Act (CEQA). Specifically, the EIR lacks actual identification and analyses of environmental impacts that would result from implementation of the proposed project – the policies and recommendations included in the Fifth Staff Draft Delta Plan, published on August 2, 2011 and including in Appendix C to the Delta Plan Draft Program EIR.²

LO232-1

The Public Water Agencies.

The Public Water Agencies represent 56 agencies, 54 of which receive water from the federal Central Valley Project (CVP) and/or State Water Project (SWP). Collectively, the Public Water Agencies deliver water to more than 25,000,000 people in California and almost

¹ The Public Water Agencies are described and their members are identified in Attachment 1 to this letter.

² Under California Code of Regulations, title 14, section 15148, the Delta Plan Draft Program EIR must cite all documents used in its preparation, and, under Public Resources Code section 20192 and California Code of Regulations, title 14, section 15150, the DSC must make available to the public all documents referenced in or incorporated by reference into the draft environmental impact report. The Delta Plan Draft Program EIR and DSC fail to meet these legal requirements. Other than including a list of referenced environmental impact reports, the Delta Plan Draft Program EIR does not identify the documents relied upon to support the analyses contained therein. And, the DSC has not made cited or referenced documents available to the public. The Public Water Agencies submit concurrent with this letter a number of documents, many of which are referenced herein and are hereby incorporated herein by this reference, that the DSC must consider as it revises the Delta Plan Draft Program EIR. The Public Water Agencies request that a copy of each document be included in the administrative record for the proposed project and the Delta Plan Program EIR.

LO232-2

2,000,000 acres of prime farmland. Almost every Public Water Agency relies upon water that falls within the Sacramento River watershed and that is conveyed through the Sacramento-San Joaquin River Delta. And, several of the Public Water Agencies, along with the California Department of Water Resources, are the proponents of the Bay Delta Conservation Plan (BDCP), which is intended to accelerate ecosystem restoration in the Delta while also restoring and improving CVP and SWP water supplies lost to the Public Water Agencies as a consequence of regulatory constraints imposed in recent decades – goals that mirror, even though determined years prior to, the Legislature’s establishment of the coequal goals as state policy in the Delta Reform Act. Ultimately, the expected outcome of the development and implementation of the BDCP is to support take permits for species protected under the federal and state Endangered Species Acts as an incident to authority for operation of the CVP and SWP in-Delta facilities. Pursuant to the Delta Reform Act, the BDCP shall be incorporated into the Delta Plan if specific criteria are satisfied. Consequently, the Public Water Agencies have a vital, unique, and vested interest in the proposed project and the Delta Plan Draft Program EIR.

LO232-2

Summary of the Public Water Agencies’ Overarching Concerns with the Delta Plan Draft Program EIR.

The Delta Plan Draft Program EIR is legally deficient for at least four principle reasons:

- o The Delta Plan Draft Program EIR frustrates the CEQA core policy of informed public involvement and decision-making;
- o The Delta Plan Draft Program fails to present a sufficient environmental analysis of the proposed plan and its alternatives;
- o The Delta Plan Draft Program EIR supports a proposed project that would impede, rather than further, the achievement of the coequal goals; and
- o The Delta Plan Draft Program EIR supports a proposed project that would be inconsistent with the effective implementation of the BDCP.

LO232-3

First, the Delta Plan Draft Program EIR does not foster, and in fact hinders, informed public comment and decision-making. It is very difficult, if not impossible, to determine if the proposed project will satisfy the Project objectives or whether significant impacts of the proposed project will be substantially lessened or avoided by any of the alternatives. Those results are expected given the DSC staff October 27, 2011 presentation to the Council on the status and summary of approach for the Delta Plan Draft Program EIR. At that time, the DSC staff explained that the:

EIR does not evaluate whether the Project or Alternatives will meet the coequal

LO232-4

Response to comment LO232-3

Please refer to responses to comments LO232-4 through 7 below.

Response to comment LO232-4

Please refer to Master Response 3.

goals... [and that the] Ability of Project and Alternatives to meet the coequal goals is something staff will evaluate later and Council ultimately will decide.

LO232-4

(DSC Staff October 27, 2011, Presentation.)³ This directly contravenes the intent of CEQA to ensure informed decision making when selecting the best alternative to *achieve the project objectives*; here, at least the furtherance of the coequal goals.

Second and third, the Delta Plan Draft Program EIR fails to adequately evaluate the proposed project and the alternatives. The proposed project encourages substantial reductions in the water supplies developed in the watersheds of the Sacramento and San Joaquin rivers that are beneficially used for environmental, municipal, industrial and agricultural purposes. The Delta Plan Draft Program EIR assumes those reductions will be offset by "programs and projects that will improve self-reliance." (Delta Plan Draft Program EIR, p. 2A-6, lines 10 through 12.) The impacts of that paradigm are not adequately presented in the Delta Plan Draft Program EIR and the paradigm is difficult to reconcile with the legal mandate that the Delta Plan "include measures to promote a more reliable water supply that [meets] the needs for reasonable and beneficial uses of water." (Water Code, § 85302(d)(1).) Most simply put, water supplies conveyed through the Delta were developed because local and regional water supplies were insufficient to meet then existing or projected uses. There is no basis to assume sufficient programs or projects can be implemented, particularly within the time periods suggested, to offset reductions in the quantity of water conveyed through the Delta or to meet the needs of present, let alone future, reasonable and beneficial uses of water, water necessary to "sustain the economic vitality of the state." (Water Code, § 85302(d)(2).)

LO232-5

Fourth, the proposed project's approach to the "water supply" element of the coequal goals, its approach to alternatives, and its impacts analyses are inconsistent with the BDCP. In the Delta Reform Act, the Legislature respected the on-going BDCP process, providing that the BDCP shall be included in the Delta Plan if the BDCP meets certain specified criteria (Water Code, § 85320 (e).) Thus the Delta Plan must be consistent with the BDCP, particularly with respect to water supply and ecosystem objectives. As established by its Planning Agreement, the water supply goal for the BDCP is to "[a]llow for projects [within the Delta] to proceed that restore and protect water supply..." (BDCP Planning Agreement, § 3.)⁴ The BDCP's Notice of Preparation and the Notice of Intent expressed this goal in more detail:

Restore and protect the ability of the SWP and CVP to deliver up to full contract amounts, when hydrologic conditions result in the availability of sufficient water,

LO232-6

³ Available at <http://deltacouncil.ca.gov/delta-plan-draft-eir>. (See "The Draft EIR Status and Summary of Approach Power Point".)

⁴ On October 5, 2009, the California Bay-Delta Authority, by its Director Joe Grindstaff, signed the First Amendment to the Planning Agreement. The First Amendment extended the duration of the agreement and affirmed that "[a]ll other terms and conditions of the Planning Agreement shall remain in full force and effect during the Extension Period." Through Water Code section 85034, the DSC assumed from the California Bay-Delta Authority "all of the administrative rights, abilities, obligations, and duties of that authority."

Response to comment LO232-5

Please refer to Master Response 5.

Response to comment LO232-6

Please refer to Master Response 1.

consistent with the requirements of State and federal law and the terms and conditions of water delivery contracts and other existing applicable agreements.

(NOP for BDCP Joint EIS/EIR (Purpose and Project Objectives)/NOI for BDCP Joint EIS/EIR (Purpose and Need for Action).)

The project objectives for the Delta Plan as stated in the Delta Plan Draft Program EIR are inconsistent with the legislatively mandated objectives and the need for consistency with the BDCP.⁵ As a result, neither the proposed project nor its alternatives will achieve the purposes of the BDCP. The proposed project also includes proposed policies that are directly counter to the goals of the BDCP – a pre-existing program the Legislature has determined should be a central component of the Delta Plan, subject to procedural requirements in the Delta Reform Act.

Summary of the Public Water Agencies' Specific Concerns with the Delta Plan Draft Program EIR.

The California Legislature presented the DSC with a challenge – to develop and implement a plan to guide state agencies and better coordinate their activities to further the achievement of what are commonly seen as competing goals. The Legislature authorized and directed the DSC to develop a Delta Plan that furthers the restoration of the Delta ecosystem and promotes a more reliable water supply – a water supply that meets the needs for reasonable and beneficial uses of water. (Water Code, § 85302(d).) The Legislature intended the Delta Plan further those coequal goals in a manner that protects and enhances the unique cultural, recreational, natural resources and agricultural values of the Delta, as an evolving place. Unfortunately, the Delta Plan Draft Program EIR does not provide sufficient information to allow the public or the DSC to assess whether the proposed project or its alternatives will accomplish that Legislative directive.⁶ The Delta Plan Draft Program EIR is lacking in every critical substantive area. The following are some key deficiencies, which we elaborate on further throughout this letter:

Defective Project Objectives: The Project objectives in the Delta Plan Draft Program EIR are not consistent with the Legislative mandate that the Delta Plan further the restoration of the Delta ecosystem and a reliable water supply – the coequal goals. The Project objectives ignore important Legislative findings and declarations – specifically the finding to provide a more reliable water supply for the state. (Water Code, § 85004.) The Project objectives thus create an

⁵ One of the EIR's stated project objectives includes being "consistent with specific statutory content requirements for the Delta Plan (Water Code sections 85302(c) through (e), and 85303-85308)". This objective omits reference to the requirement under section 85320(e) that the Delta Plan must also include the BDCP, provided specific criteria are satisfied.

⁶ The Public Water Agencies have submitted to the DSC comments on each draft of the Delta Plan (some individually and collectively through the State and Federal Contractors Water Agency), including the fifth draft, which forms the basis for the proposed project. Among other comments raised, the Public Water Agencies explained that elements of the draft Delta Plan, if included in the final Delta Plan, would be unlawful because they are not consistent with the legal authority the Legislature delegated to the DSC. Those comments are relevant to the Delta Plan Draft Program EIR, in part, because they raise defects in the proposed project and present alternatives that would substantially lessen the impacts of the proposed project.

Response to comment LO232-7

Please refer to the responses to comments below.

Response to comment LO232-8

As stated in the Revised Draft PEIR at page ES-4, the Project's objectives are: "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." These objectives reflect the priorities and goals that the Legislature set for the Delta Plan and the Delta Stewardship Council in the Delta Reform Act, including the coequal goals (Public Resources Code § 29702(a)), the objectives inherent in those goals (Water Code § 85020), and the statewide policy to reduce reliance on the delta (Water Code § 85021).

Regarding the incorporation of the BDCP into the Delta Plan, please refer to Master Response 1.

imbalance between the Legislatively mandated coequal goals that effectively provide a priority for ecosystem improvements. That error leads to the formation of skewed CEQA alternatives that do not meet the legislatively mandated objectives. The result is the antithesis of CEQA, which is intended to ensure an objective and balanced overview of the environmental impacts of a proposed project and alternatives, prior to choosing a preferred project. As previously noted, the Delta Plan Draft Program EIR's Project objectives are also not consistent with the Legislative mandate that the DSC incorporate the Bay Delta Conservation Plan into the Delta Plan, provided the BDCP meets specific criteria.

LO232-8

Defective Project Description: The DSC is proceeding with the Delta Plan Draft Program EIR knowing the description of the proposed project is unstable and ultimately misleading. First, elements of the proposed project are not reasonably certain to occur and thus are not likely to satisfy the statutory Project objectives. DSC staff has and will continue to modify the proposed project over the course of the next three or more months. Second, the proposed project assumes actions and responses will occur without explaining what the underlying assumptions are. For example: (1) the proposed project assumes, without any support, the State Water Resources Control Board will require water right holders to divert substantially less water from the watersheds of the Sacramento and San Joaquin Rivers despite the State Water Board's process occurring independent of the Delta Plan; and, (2) the proposed project assumes, again without any support, that regional or local actions will not only off-set supplies assumed lost from the action by the State Water Board but will sufficiently augment supplies and meet all existing and future reasonable and beneficial uses.

LO232-9

Defective Alternatives: The description of alternatives is wholly lacking. The Delta Plan Draft Program EIR does not describe complete and proper alternatives to the proposed project. Instead, it presents alternatives by comparing elements of them to the proposed project. This approach to alternatives does not result in the Delta Plan Draft Program EIR evaluating a range of reasonable alternatives. Also, the Delta Plan Draft Program EIR ignores reasonable alternatives that reflect better policy and avoid potentially significant impacts of the proposed project. As a result, the approach leads a reader to believe that the DSC has already determined that the proposed project should be adopted as its "preferred project."

LO232-10

Defective Impact Analyses: The impact analyses (including cumulative) are as deficient. There is not proper assessment of how the proposed project (as a whole) will affect environmental resources. Instead of focusing on the strategies, policies and recommendations of the proposed project as an integrated management plan, the analysis focuses on project-specific examples from existing environmental impact reports. In other words, the Delta Plan Draft Program EIR looks to those prior reports for explanations for *project-level* physical impacts of the proposed project. In this way, the Delta Plan Draft Program EIR does not evaluate the effects of the proposed project, but instead is in effect "second

LO232-11

Response to comment LO232-9

Regarding the ability of the Delta Plan to meet its objectives, please refer to Master Response 3.

Regarding revisions to the Delta Plan, the Revised Draft PEIR analyzes the environmental impacts of the Final Draft Delta Plan, which the Council will consider for approval.

Regarding the analytical assumption that the Delta Plan will be successful, please refer to Master Response 2. Regarding the availability of local and regional water supplies, please refer to Master Response 5.

Response to comment LO232-10

Please refer to Master Response 3.

Response to comment LO232-11

Please refer to Master Response 2.

guessing" determinations made by the lead agencies in those other reports. The DSC is the lead agency on the Delta Plan, and by its own admission has no local or state land use or regulatory authority. While the DSC was delegated limited authority to determine whether "covered actions" are consistent with the Delta Plan, the final decision to proceed with a project remains with the lead agency – the project proponent.

LO232-11

Defective Thresholds of Significance: The thresholds of significance are unclear and may result in arbitrary impact conclusions. The Delta Plan Draft Program EIR provides that the impacts of the proposed project will be deemed significant if there are "substantial" impacts to water supply or biological resources. Those thresholds need but do not appear to reflect the DSC's Legislative directive and authorization – the mandate that the DSC develop a Delta Plan that furthers the coequal goals.

LO232-12

Defective Mitigation: The Delta Plan Draft Program EIR lacks mitigation measures that would address the overall impacts of the Delta Plan. It also improperly attempts to require other agencies which undertake a covered action to incorporate the Delta Plan Draft Program EIR's specifically delineated mitigation measures into their projects.

LO232-13

1. **CONTEXT FOR THE MANDATE TO DEVELOPMENT A DELTA PLAN.**

A. **Previous Regulatory Actions that have Reduced Water Supply for Public Water Agencies.**

From 1987-1992, California experienced drought conditions. During that period, statewide precipitation and annual stream flow was only about 75 percent and 50 percent of average respectively. By the fall of 1992, storage in California's major reservoirs was under 12 million acre-feet, almost 10 million acre-feet less than the annual average at that time. The drought increased urban water rationing, caused land fallowing and crop shifting, and stressed environmental resources.

During the 1987-1992 drought, declines of the Delta smelt and winter-run salmon resulted in both species being listed under the federal Endangered Species Act (ESA). Spring-run salmon, steelhead, and green sturgeon were also ultimately listed under the ESA. In efforts to protect these listed species, the National Marine Fisheries Service (NMFS) and United States Fish and Wildlife Service (FWS) imposed additional regulations on the CVP and SWP to further constrain their operations.

LO232-14

In October 1992, Congress enacted the Central Valley Project Improvement Act (CVPIA). Among other changes, the CVPIA added to the purposes of the CVP: (1) protection, restoration and enhancement of fish, wildlife, and associated habitats in the Central Valley and Trinity River basins of California; and (2) addressing impacts of the CVP on fish, wildlife, and associated habitats. Through implementation of the CVPIA, the Department of the Interior has been dedicating at least 800,000 acre-feet of dedicated CVP yield annually for fishery purposes.

Response to comment LO232-12

Please refer to Master Response 2.

Response to comment LO232-13

Please refer to Master Response 4.

Response to comment LO232-14

Comment noted.

No comments

- n/a -

and hundreds of thousands of acre-feet of additional water for refuges and waterfowl. (See CVPIA, 10 Years of Progress, Fiscal Years 1993 – 2002, U.S. Department of the Interior, Bureau of Reclamation U.S. Fish & Wildlife Service (February 2004).)

At the end of the 1987-1992 drought, California also announced a comprehensive water management policy that facilitated additional regulations under the federal Clean Water Act (CWA) and the State Porter-Cologne Water Quality Control Act (Porter-Cologne) and new efforts to improve the Bay-Delta. In May 1995, the State Water Board adopted its 1995 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin River Delta. The 1995 Bay-Delta Plan imposed new water quality objectives/standards intended to protect fish and wildlife beneficial uses.

To date, the regulations imposed pursuant to ESA, CVPIA, CWA, and Porter-Cologne have significantly reduced the long-term average delivery capabilities (quantity and reliability) of the SWP and CVP by hundreds of thousands of acre-feet per year.

In addition to water problems, the 2005 devastation of the Gulf Coast and New Orleans caused by Hurricane Katrina heightened California's awareness of the public safety and water supply risks presented by seismic events and levee stability concerns. As the Department of Water Resources (DWR) explained when it prepared its Delta Risk Management Strategy:

The U.S. Geological Survey estimates that an earthquake of magnitude 6.7 or greater has a 62 percent probability of occurring in the San Francisco Bay Area between 2003 and 2032..... Such an earthquake is capable of causing multiple levee failures in the Delta Region which could result in fatalities, extensive property damage and the interruption of water exports from the Delta for an extended period of time. Potential earthquakes on the Hayward, Calaveras or San Andreas faults pose the highest risk to Delta Region levees.

LO2332-14

(Delta Risk Management Strategy, Executive Summary for Phase I Report, p. 10.)

Sea level rise and changes in precipitation patterns induced by long-term climate changes are expected to further erode the reliability of California's water supply if no actions are taken to adapt and improve the resiliency of state, regional, and local water systems. Higher sea levels would increase salinity levels throughout the Delta, dramatically reducing the value of water conveyed through the Delta for environmental, municipal, industrial, and agricultural uses as a result of increased treatment costs and soil salt loading, respectively. Similarly, long-term changes in temperature could result in more variability in precipitation and run-off from year to year and season to season. Some estimates indicate that California will experience an increase in winter runoff and a decrease in spring and summer runoff, with a resultant decrease in water supply reliability. Shorter and more intense periods of run-off will also increase flood pressures in the Delta and further stress in-Delta levees. Moreover, the loss of snowpack to increased rainfall will shift run-off timing which will have significant effects on water management since the timing and need for water will not similarly shift in an equivalent fashion.

Response to comment LO232-15

Comment noted.

Due to the concurrent risks to the Bay-Delta ecosystem and water supply and reliability, several efforts have been undertaken to identify a solution, including the CalFed Bay-Delta Program, Delta Vision process, the Delta Risk Management Strategy, the BDCP, and the Delta Stewardship Council's preparation of a Delta Plan.

LO232-14

B. CalFed Bay-Delta Program.

Starting in the mid-1990s, the CalFed Bay-Delta Program (CalFed Program) was the effort by which state agencies, federal agencies, and stakeholders were working to improve the Bay-Delta ecosystem and water management capability. In August 2000, the CalFed Program Record of Decision for the CalFed Program PEIS/EIR presented a broad 30-year plan to meet those objectives and a more detailed "Stage 1" implementation plan to guide program development for its first seven years. Through CalFed, agencies and stakeholders worked together to invest billions of dollars for actions within the Delta, in the upstream watersheds, and in the water service areas, primarily in the Bay Area and southern California.

In April 2006, the CalFed Program issued a 10-Year Action Plan to refocus the CalFed Program based on evolving science and changing conditions in the Delta. The Plan responded to earlier independent reviews by the Little Hoover Commission, the Department of Finance, and management consultant KPMG. (CalFed Program, 10-Year Action Plan, Apr. 2006, available at www.calwater.ca.gov/content/Documents/10_Year_Action_Plan_Final.pdf, p. 13.) Those reviews had been called for by the Governor and largely focused on CalFed financing and governance issues. The 10-Year Action Plan noted that, in addition to changes in governance, a new direction for the CalFed Program is needed to respond to new scientific information becoming available and significant changes occurring in the Delta, including:

LO232-15

- (1) Delta Sustainability: Scientific information collected and research that is currently under way indicates that the current physical configuration of the Delta is not sustainable. Increasing risk of a significant seismic event in the Delta, coupled with sea level rise associated with global warming, puts Delta levees at high risk; and
- (2) Decline of Pelagic Organisms in the Delta: Population levels for pelagic organisms in the Delta, including important food web species and the listed delta smelt, are at record low levels and declining.

(*Id.*, p. 7.)

A major priority element of the 10-Year Action Plan was the development of a voluntary planning agreement and Habitat Conservation Plan/Natural Community Conservation Plan(s) for Delta and anadromous species. (*Id.*, pp. 52-53.) The 10-Year Action Plan notes that "several Bay-Delta system users...are working cooperatively to explore preparation of one or more Habitat Conservation Plans..." (*Id.*, p. 52), and notes the first step is negotiation of a Planning Agreement. (*Id.*, p. 53.) This recommendation of the 10-Year Action Plan resulted in the BDCP, currently under development.

Response to comment LO232-16

Comment noted.

C. Delta Vision.

Delta Vision was created by Executive Order of the Governor on September 17, 2006, to “develop a durable vision for sustainable management of the Delta” so it can support environmental and economic functions important to the people of state. (Delta Vision Final Report, Nov. 30, 2007, pp. 68-69 [Appendix II containing Executive Order] [available at www.deltavision.ca.gov/BlueRibbonTaskForce/FinalVision/Delta_Vision_Final.pdf].) The Executive Order called for creation of an independent Blue Ribbon Task Force charged with completing a “vision” report and a “strategic plan” by October 31, 2008. (*Id.*, p. 70.) The Executive Order specifically directed that the Delta Vision process “inform and be informed by current and future Delta planning decisions such as those pertaining to the CalFed Program, Bay Delta Conservation Plan” and others. (*Id.*, p. 69.) The Task Force issued its Delta Vision report, “Our Vision for the California Delta,” in December 2007, which restated as a primary recommendation the restoration of the Delta’s ecosystem function as an integral part of a healthy estuary, including expanded areas of seasonal and tidal wetlands. (*Id.*, p. 9.) In October 2008, the Blue Ribbon Task Force issued the Delta Vision Strategic Plan, which contains specific recommendations for implementing the Delta Vision to “sustain the Delta in future decades while ensuring a reliable [Delta] water supply.”⁷ The Strategic Plan contains recommended strategies and actions, including restoration of tidal and riparian habitats and increased frequency of floodplain inundation, improving migratory corridors, addressing invasive species, relocating diversions and implementing conveyance improvements, revising flow standards and operating criteria, and improving water quality. (*Id.*, pp. ix-x.) Many of these recommended actions are now being pursued through the BDCP.

The Governor’s 2006 Executive Order also charged a Committee of Cabinet Secretaries, the Delta Vision Committee, to review the completed work of the Task Force and make their own implementation recommendations to the Governor and the Legislature by December 31, 2008. (Delta Vision Final Report, Nov. 30, 2007, pp. 69-70.) On that date, the Committee issued the Delta Vision Committee Implementation Report summarizing its review of the Task Force’s recommendations and proposing a timeline of fundamental actions to be taken in the next two years. The Committee agreed with all of the Task Force’s basic recommendations, or “strategies,” with the exception of the creation of the new recommended long-term governance structure, instead recommending creation of an interim Delta Policy Group. (*Id.*, pp. 13-14.) The Committee recommended eight fundamental actions to be pursued in the near term:

- (1) A new system of dual water conveyance through and around the Delta to protect municipal, agricultural, environmental, and the other beneficial uses of water;
- (2) An investment commitment and strategy to restore and sustain a vibrant and diverse Delta ecosystem including the protection and enhancement of agricultural lands that are compatible with Plan goals;

⁷ See Blue Ribbon Task Force, Delta Vision Strategic Plan, Oct. 2008, p.v. (available at deltavision.ca.gov/StrategicPlanningProcess/StaffDraft/Delta_Vision_Strategic_Plan_standard_resolution.pdf).

No comments

- n/a -

- (3) Additional storage to allow greater system operational flexibility that will benefit water supplies for both humans and the environment and adapt to a changing climate;
- (4) An investment plan to protect and enhance unique and important characteristics of the Delta region;
- (5) A comprehensive Delta emergency preparedness strategy and a fully integrated Delta emergency response plan;
- (6) A plan to significantly improve and provide incentives for water conservation – through both wise use and reuse – in both urban and agricultural sectors throughout the state;
- (7) Strong incentives for local and regional efforts to make better use of new sources of water such as brackish water cleanup and seawater desalination; and
- (8) An improved governance system that has reliable funding, clear authority to determine priorities and strong performance measures to ensure accountability to the new governing doctrine of the Delta: operation for the coequal goals.

LD232-16

(*Id.*, pp. 1-2.)

It was becoming clear that the then-existing approach to managing the Delta was failing. By 2009, the reduction in and instability of water supply caused by regulation, in conjunction with hydrologic drought, was having devastating effects. There were substantial losses of permanent crops, thousands of acres of productive land fallowed, and destruction of farming businesses.⁸ There was also social disruption and dislocation as well as environmental harms caused by, among other things, increased groundwater consumption and overdraft, land subsidence, and impairment of air quality. Urban economic losses among all agencies that rely upon water conveyed through the Delta have been estimated to range from \$858 million per year for a 10 percent reduction in end water use to \$6.7 billion per year for a 30 percent reduction.⁹

⁸ Economists from U.C. Davis and the University of the Pacific concluded that in 2009, as a result of a relatively dry hydrology and water supply restrictions imposed on the SWP and CVP, the San Joaquin Valley population lost as many as 7,434 jobs, more than \$278 million in income, and more than \$368 million in overall economic output. (Michael J., et al. 2009. A Retrospective Estimate of the Economic Impacts of Reduced Water Supplies to the San Joaquin Valley in 2009 (Sep. 28, 2010).) Additional support can be found in several court decisions. (*Consolidated Delta Small Cases*, 717 F. Supp. 2d 1021, 1052 (E.D. Cal. 2010); *Consolidated Salmonid Cases*, 713 F. Supp. 2d 1116, 1148 (E.D. Cal. 2010); *San Luis & Delta-Mendota Water Authority v. Salazar*, 2009 WL 1575169 at *5-6 (E.D. Cal. 2009).)

⁹ Berkeley Economic Consulting, Inc. 2010, "Residential Losses from Urban Water Shortages in California."

Response to comment LO232-17

Comment noted.

Response to comment LO232-18

Comment noted.

D. Delta Risk Management Strategy.

Through Water Code section 139.2 et seq., the California Legislature directed DWR to evaluate the potential impacts on water supplies from the Sacramento-San Joaquin Delta based on 50-, 100-, and 200-year projections for each of the following possible impacts on the delta: (1) Subsidence, (2) Earthquakes, (3) Floods, (4) Changes in precipitation, temperature, and ocean levels, (5) A combination of the impacts specified in paragraphs (1) to (4), inclusive. (Water Code, § 139.2.) To complete that evaluation and develop of "Delta Risk Management Strategy", DWR (1) assessed the performance of Delta and Suisun Marsh levees (under various stressors and hazards) and evaluate the economic, environmental, and public health and safety consequences of levee failures to California as a whole (Phase 1); and (2) developed and evaluated risk reduction strategies (Phase 2). At the end of each phase, DWR published reports. (Final Phase 1 Report, March 2009; Final Phase 2 Report, June 2011.)

The Phase 2 Report identifies three significant impacts that result of major flood or seismic events in the Delta and Suisun Marsh. They are (1) in-Delta losses, (2) loss of transportation and utility services, and (3) loss of water for out-of-Delta urban and agriculture users. The Phase 2 Report considered four scenarios to reduce the risk of those impacts occurring, which were compared on benefit-versus-cost valuations. The Phase 2 Report ranks the scenarios as follows:

- (1) Isolated Conveyance Facility: Lowest cost for the highest economic benefit;
- (2) Dual Conveyance: Second lowest cost for the second highest economic benefit;
- (3) Through-Delta Conveyance: Third lowest cost for the third highest economic benefit; and
- (4) Improved levees: Fourth lowest cost for the fourth highest economic benefit.

E. Bay Delta Conservation Plan.

At the recommendation of the U.S. Fish and Wildlife Service, DWR, the U.S. Bureau of Reclamation, many of the Public Water Agencies, U.S. Fish and Wildlife Service, National Marine Fisheries Service, the California Bay-Delta Authority, and the California Department of Fish and Game executing a Memorandum of Agreement (MOA) on July 28, 2006. Through the MOA, they agreed to develop a joint Natural Communities Conservation Plan/Habitat Conservation Plan – what has now become the BDCP. Roughly two months after the MOA was signed, those same entities were joined by other water users, and some non-governmental organizations in execution of the Planning Agreement Regarding the Bay Delta Conservation Plan. The fundamental purpose of the BDCP is to allow Reclamation and DWR to operate in-Delta facilities of the CVP and SWP consistent with the federal ESA and the California Natural Community Conservation Planning Act (NCCPA). The BDCP is intended to achieve that

Response to comment LO232-19

Comment noted.

purpose within specific Planning Goals, one of which is to "[a]llow for projects to proceed that restore and protect water supply, water quality, and ecosystem health within a stable regulatory framework." The purpose and goals were informed by past efforts within the Bay-Delta estuary and impacts to the water supplies conveyed through the Delta, including those described in this letter. A final EIR/EIS, Notice of Determination, and Record of Decision for the BDCP are projected to be complete in early 2013. LO232-18

F. Delta Reform Act, Delta Stewardship Council, and the Delta Plan.

The Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act) presented important legislative findings and declarations regarding the Delta. It also created the Delta Stewardship Council and authorized and provided specific direction to the Council to prepare the Delta Plan.

i. Findings, Declarations, Policies.

In the Delta Reform Act, the Legislature found that the "Delta watershed and California's water infrastructure are in crisis and existing Delta policies are not sustainable. Resolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources." (Water Code, § 85001(a).) The Legislature did not expect the solution to that crisis to come with decreases in water used within or imported from the watersheds of the Sacramento and San Joaquin Rivers. Rather, the Legislature recognized the importance of that water:

The economies of major regions of the state depend on the ability to use water within the Delta watershed or to import water from the Delta watershed. More than two-thirds of the residents of the state and more than two million acres of highly productive farmland receive water exported from the Delta watershed.

(Water Code, § 85004(a).)¹⁰ It thus found:

Providing a more reliable water supply for the state involves implementation of water use efficiency and conservation projects, wastewater reclamation projects, desalination, and new and improved infrastructure, including water storage and Delta conveyance facilities. LO232-19

(Water Code, § 85004(b).)

The Legislature presented its policy on how to balance between the need for Delta watershed water on the one hand and the need for efficiency and conservation projects, wastewater reclamation projects, and desalination on the other hand. That policy direction is provided in Water Code section 85021 which states:

¹⁰ "Delta watershed" is a term defined in the Delta Reform Act of 2009. It defines "Delta Habitat" as "the Sacramento River Hydrologic Region and the San Joaquin River Hydrologic Region as described in the department's Bulletin No. 160-05." (Water Code, § 85086.)

No comments

- n/a -

The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts. [emphasis added].

The view, apparently adopted by the DSC, that "reduce reliance" means to reduce the quantity of water conveyed through the Delta below existing levels is inconsistent with Legislative intent reflected in the Delta Reform Act, inconsistent with the BDCP, and represents a wholly improper approach for the Delta Plan and the Delta Plan Draft Program EIR.

As an initial matter, the "reduced reliance" language, irrespective of how it is interpreted, is not one of the objectives the Legislature declared inherent in the coequal goals for management of the Delta. (Water Code, § 85020.) It is also not part of the authorization and direction the Legislature provided to the DSC in carrying out its limited mandate to develop a Delta Plan. "Reduced reliance" does not appear in Water Code section 85300 et seq., the sections of the Water Code that detail the Legislative direction for the Delta Plan. The contribution by the DSC and its Delta Plan to the achievement of the state policy to "reduce reliance" is to make recommendations that "promote" development of, and investment in, additional alternative water supplies as part of a "statewide strategy."

LO232-19

Further, an interpretation of the "reduce reliance" language means to reduce the quantity of water conveyed through the Delta below existing levels is inconsistent with the legislative history. The present statutory language resulted from negotiation and significant changes from earlier versions of the Delta Reform Act. Below is a strike-out/addition version of the earlier Water Code section 85021 language:

The policy of the State of California is to reduce reliance dependence on water from the Delta Watershed over the long term for statewide water supply reliability in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water-use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts.

(Compare Preprint Assembly Bill No. 1 (California Legislature—2009–10 Regular Session), Aug. 4, 2009, at p. 4 with Water Code, § 85021.) These changes represent policy choices by the Legislature.

There are four major legislative policy choices embedded in the revisions to the language of Water Code section 85021 from the preprint versions of the Delta Reform Act to that which

No comments

- n/a -

was ultimately signed by the Governor, related to water management in the areas that rely upon water developed in the Sacramento River watershed and conveyed through the Delta:

- (1) *Substitution of "reliance" for "dependence"*. The change represents an important distinction. Reduced "dependence" would require permanent, alternative supplies. Reduced "reliability" and "reliance" reflect management variables that agencies consider in developing their water supply portfolios and year-to-year operational scenarios, to allow for absorbing uncertainty in meeting demands.
- (2) *Substitution of "future water supply needs" for reduction "over the long term"*. Combined with the change to "reliance" from "dependence", the substitution of "to meet California's future water supply needs" reflects the Legislature's intent to (a) acknowledge the ongoing importance of agencies continuing to receive water at levels they received historically, and (b) admonish agencies to invest in new alternative supplies to offset their future water supply needs, rather than to expect to increase supplies with water conveyed through the Delta to meet all of those needs.
- (3) *Addition of "statewide strategy of investing"*. An addition reflecting legislative intent that meeting the policy and related directives set forth in section 85021 can only be achieved on a "statewide" basis and that the "strategy" should be established through a "statewide" process.
- (4) *Addition of Delta "Watershed"*. The only change in the second sentence of the section is also one with import. Agencies within the Delta watershed cannot reduce their "dependence" on it for their water supplies. However, they can "improve" their "regional self-reliance" to better buffer the impact of drought or regulatory requirements that may at times necessitate their diverting less water from the system, consistent with Area of Origin and water rights provisions of law. The Legislature determined that Water Code section 85021's "improve [] regional self-reliance" directive thus was applicable to "[e]ach region that depends on water from the Delta watershed" rather than only those areas served water conveyed through the Delta.

LO232-19

As a result, through Water Code section 85021, the Legislature explained that California must continue to invest in regional supplies, conservation, and water use efficiency, not to meet existing needs, but to ensure sufficient supplies exist, given instability in reliability, to meet "California's future water supply needs." (Water Code, § 85021.) And, the Legislature made plain it was looking for improvements in "regional self-reliance for water", not by creating water supply deficits by pressing for reductions in deliveries of water from the watersheds of the Sacramento and San Joaquin Rivers, but through each region dependent upon water from the watershed investing "in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts." (Water Code, § 85021.)

Response to comment LO232-20

Comment noted.

ii. The Delta Plan Authority and Directive,

The Delta Plan is intended to be "the comprehensive, long-term management plan for the Delta." (Water Code, § 85059.) Implementation of the Delta Plan must improve the Delta ecosystem and water supply. The scope of the Delta Plan is limited:

The geographic scope of the ecosystem restoration projects and programs identified in the Delta Plan shall be the Delta, except that the Delta Plan may include recommended ecosystem projects outside the Delta that will contribute to achievement of the coequal goals.

(Water Code, § 85302(b).)

To achieve improvements in the Delta ecosystem, the Delta Plan must include measures that promote:

- (1) Viable populations of native resident and migratory species;
- (2) Functional corridors for migratory species;
- (3) Diverse and biologically appropriate habitats and ecosystem processes;
- (4) Reduced threats and stresses on the Delta ecosystem; and
- (5) Conditions conducive to meeting or exceeding the goals in existing species recovery plans and state and federal goals with respect to doubling salmon populations.

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(Water Code, § 85302(c)(1)-(5).) And, the Delta Plan must address the following, to promote a more reliable water supply:

- (1) Meeting the needs for reasonable and beneficial uses of water.
- (2) Sustaining the economic vitality of the state.
- (3) Improving water quality to protect human health and the environment.

(Water Code, § 85302(d)(1)-(3).) The Legislature directed the DSC to comply with these mandates by using "best available science." (Water Code, §§ 85302(g), 85308(a).)

The Legislature mandated that the Delta Plan not only promote "statewide water conservation, water use efficiency, and sustainable use of water", but also "options for new and improved infrastructure relating to the water conveyance in the Delta..." (Water Code, §§ 85303, 85304.)

No comments

- n/a -

The DSC has no discretion whether to include the Bay Delta Conservation Plan in the Delta Plan, provided the California Department of Fish and Game determines that the BDCP:

- (1) Satisfies the Natural Community Conservation Planning Act;
- (2) Satisfies the California Environmental Quality Act, including:
 - (A) An analysis of a range of flow criteria, rates of diversion, and other operational criteria...;
 - (B) An analysis of a range of Delta conveyance alternatives, including through-Delta, dual conveyance, and isolated conveyance alternatives and including further capacity and design options of a lined canal, an unlined canal, and pipelines;
 - (C) Consideration of the potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the environmental impact report;
 - (D) Consideration of the potential effects on migratory fish and aquatic resources;
 - (E) Consideration of the potential effects on Sacramento River and San Joaquin River flood management;
 - (F) Consideration of the resilience and recovery of Delta conveyance alternatives in the event of catastrophic loss caused by earthquake or flood or other natural disaster; and
 - (G) Consideration of the potential effects of each Delta conveyance alternative on Delta water quality.

LO232-20

(Water Code, § 85320(b).)

Once complete, the DSC's role shifts to that of an appellate body. The DSC will hear appeals from:

Any person who claims that a proposed covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, the action will have a significant adverse impact on the achievement of one or both of the coequal goals or implementation of government-sponsored flood control programs to reduce risks to people and property in the Delta, may file an appeal with regard to a certification of consistency submitted to the council.

Response to comment LO232-21

Comment noted.

(Water Code, § 853225.10(a).) The DSC may deny the appeal or remand the matter to the agency proposing the action. In this latter event, the agency may continue with its action as originally planned, even if inconsistent with the Delta Plan, or modify the action to respond to the findings of the DSC. (Water Code, § 853225.25.) In either case, the agency, prior to proceeding with the action, must file a revised certification of consistency that addresses each of the findings made by the Council and file that revised certification with the DSC. (Water Code, § 853225.25.) The Council's determinations regarding consistency with the Delta Plan are subject to judicial review.

LO232-20

2. LEGAL STANDARDS FOR PROGRAM ENVIRONMENTAL IMPACT REPORT.

"The purpose of an environmental impact report is to give the public and government agencies the information needed to make informed decisions, thus protecting not only the environment but also informed self-government." (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162, quotations and citation omitted.) "The [environmental impact report] is the heart of CEQA, and the mitigation and alternatives discussion forms the core of the EIR." (*Ibid.*) The environmental impact report "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." (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26, citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.)

The same considerations that apply to a project environmental impact report apply to a program environmental impact report. A program environmental impact report is designed to "(1) Provide an occasion for a more exhaustive consideration of effects and alternatives than would be practical in an [environmental impact report] on an individual action, [¶] (2) Ensure consideration of cumulative impacts that might be slighted in a case-by-case analysis, [¶] (3) Avoid duplicative reconsideration of basic policy considerations, [¶] (4) Allow the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts, [and] [¶] (5) Allow reduction in paperwork." (CEQA Guidelines, § 15168(b).)¹¹ A less detailed analysis is not automatically permitted because a program environmental impact report is used as opposed to a project environmental impact report. The "semantic label accorded to the [environmental impact report]" does not determine the level of specificity required. (*Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners of the City of Long Beach* (1993) 18 Cal.App.4th 729, 741-742.) Instead, the "degree of specificity required in an [environmental impact report] will correspond to the degree of specificity involved in the underlying activity which is described in the [environmental impact report]" (*In re Bay-Delta, supra*, 43 Cal.4th at 1176, citing CEQA Guidelines, § 15146.) As such, the detail in the Delta Plan Draft Program EIR must reflect the level of detail in the Plan.

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¹¹ California Code of Regulations, title 14, division 6, chapter 3 constitute the "CEQA Guidelines."

No comments

- n/a -

An environmental impact report from which subsequent environmental impact reports will draw, or “tier,” should not be used as a device to defer analysis of present issues. “Tiering is properly used to defer analysis of environmental impacts and mitigation measures to later phases when the impacts or mitigation measures are not determined by the first-tier approval decision but are specific to the later phases.” (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431, italics added.) “[T]iering” is not a device for deferring the identification of significant environmental impacts that the adoption of a specific plan can be expected to cause, and “fundamental and general ‘general matters’” should be addressed in the first-tier EIR. (*Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 199.) The Delta Plan Draft Program EIR, therefore, must identify and consider foreseeable significant environmental impacts that will result from the adoption of the Delta Plan itself.

Both project and program environmental impact reports must include “accurate, stable and finite” project descriptions. (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 370 (finding that program EIR for a hazardous waste management plan must have “[a]n accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR”) (italics added, quotations and citations omitted).)

Additionally, CEQA requires an EIR to evaluate impacts compared to a defined set of baseline conditions. The baseline for analysis is normally the existing physical conditions at the time of the issuance of the Notice of Preparation, or at the start of the environmental review process. (CEQA Guidelines, § 15125(a).) Baseline assumptions underlying the analysis in an environmental impact report must be apparent and must not be based on hypothetical scenarios. A failure to “clearly and conspicuously identify the baseline assumptions” in the environmental impact report degrades the usefulness of an environmental impact report and contributes to its inadequacy. (*See San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 659.) Although previous established levels of a particular use have been considered part of the existing environmental setting, “the baseline environmental setting must be premised on realized physical conditions on the ground, as opposed to merely hypothetical conditions allowable under existing plans.” (*Id.*, p. 658 (citations omitted).) Consequently, an EIR’s analysis of the project may not assume that an unenforceable project design feature or mitigation measure will actually be implemented. (*Sunnyvale West Neighborhood Ass’n v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, 1380.) Thus, the project description for the Delta Plan Draft Program EIR, on which all other parts of the environmental impact report analysis are based, must be accurate, stable, and finite and the analysis must use an established, not a hypothetical, baseline.

The discussion of mitigation and alternatives is “the core of an EIR.” (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) Without a discussion that adequately identifies and analyzes both feasible mitigation measures and feasible alternatives, an environmental impact report cannot implement CEQA’s key policy of avoiding or reducing the project’s significant environmental impacts. (*See Pub. Resources Code, §§ 21002, 21002.1(a), 21100(b)(4), 21150.*)

A lead agency may not rely on mitigation measures to mitigate a project’s potential impacts unless the measures are enforceable. (Pub. Resources Code, § 21081.6(b); CEQA

Response to comment LO232-22

Please refer to Master Response 2.

Guidelines, § 15126.4 (a)(2).) In addition, “a mitigation measure cannot be used as a device to avoid disclosing project impacts.” (*San Joaquin Raptor Rescue, supra*, 149 Cal.App.4th at 663-664 (citations omitted).)

The environmental impact report must set forth alternatives to the project “necessary to permit a reasoned choice” and examine in detail “the ones that the lead agency determines could feasibly attain most of the basic objectives of the project.” (*See In re Bay-Delta, supra*, 43 Cal.4th at 1163, quotations and citation omitted.) An environmental impact report’s alternatives analysis “must contain sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project” and “must explain in meaningful detail ... a range of alternatives to the proposed project and, if [the agency] finds them to be infeasible, the reasons and facts that [the agency] claims supports its conclusion.” (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 546, citing *Laurel Heights Improvement Ass’n. v. Regents of the University of California* (1988) 47 Cal.3d 376, 406, quotations and citations omitted; CEQA Guideline, § 15126.6(d).) Furthermore, the analysis of alternatives may not be “devoid of substantive factual information from which one could reach an intelligent decision as to the environmental consequences and relative merits of the available alternatives to the proposed project” and may not omit “relevant, crucial information.” (*Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 873.)

LO232-21

3. ADDITIONAL CEQA DEFICIENCIES OF THE DELTA PLAN DRAFT PROGRAM EIR.

The Public Water Agencies offer the following, additional comments on the Delta Plan EIR.

A. The Delta Plan Draft Program EIR Fails to Evaluate Impacts of the Entire Proposed Project and Its Alternatives.

The Delta Plan Draft Program EIR’s overall approach to evaluating the impacts of the Delta Plan is inadequate because it fails to comprehensively assess the impacts of the entirety of the plan and its purported alternatives. CEQA requires an environmental impact report to evaluate the significant environmental impacts of the “proposed project.” (CEQA Guidelines, § 15126.2.) Here, the Delta Plan is the proposed project. An environmental impact report prepared for a broad, policy-level plan such as the Delta Plan is known as a program environmental impact report. According to the CEQA Guidelines, a program environmental impact report is intended to:

LO232-22

- (1) Provide an occasion for a more exhaustive consideration of effects and alternatives than would be practical in an environmental impact report on an individual action;
- (2) Ensure consideration of cumulative impacts that might be slighted in a case-by-case analysis;
- (3) Avoid duplicative reconsideration of basic policy considerations;

- (4) Allow the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts; [and]
- (5) Allow reduction in paperwork.

(CEQA Guidelines, § 15168(b). *See also id.*, subd (c) (“a program EIR will be most helpful in dealing with subsequent activities if it deals with the effects of the program as *specifically and comprehensively* as possible) (italics added).)

Essentially a program environmental impact report is designed to analyze program-wide effects, broad policy alternatives, programmatic mitigation measures, and cumulative impacts and basic policy considerations, as opposed to the impacts of specific projects within the program. (CEQA Guidelines, § 15168(b).) Even though a program environmental impact report is typically more general than a project environmental impact report, it still must include all of the required contents of an environmental impact report and must foster meaningful public involvement and informed decision making. (CEQA Guidelines, §§ 15120-15132.)

Rather than evaluating the entire plan or alternatives, the Delta Plan Draft Program EIR generically predicts various types of individual projects that might be developed in the future under the Delta Plan by other agencies and generically discusses the types of impacts that might occur on any given individual project. By focusing on the individual future projects, the Council has essentially segmented the Plan into individual components in violation of CEQA, thereby abdicating any attempt to determine the Plan’s overall impact if multiple future projects are developed under the Plan - which is the most likely future scenario. Since the Delta Plan Draft Program EIR does not evaluate the Plan’s overall impacts, it achieves none of the five objectives for a program EIR as set forth in the CEQA Guidelines. Additionally, the Delta Plan Draft Program EIR is counter to the legislative intent of CEQA which “[r]equires governmental agencies at all levels to consider qualitative factors as well as economic and technical factors and long-term benefits and costs, in addition to short-term benefits and costs and to consider alternatives to proposed actions affecting the environment.” (Pub. Resources Code, § 21001(g).)

To make the Delta Plan Draft Program EIR adequate, the Council should identify the reasonably foreseeable future projects and a reasonable range of alternatives, and then evaluate at a program level the overall impacts of all such projects. In other words, the Council should develop a “build-out” scenario for all reasonable foreseeable actions that are within the proposed project. Once such assumptions and scenarios are developed, then reasonable, and in some cases quantitative, predictions about the impacts to each resource area would be possible. Without such an approach, the Delta Plan Draft Program EIR does not evaluate the impacts of the whole plan.

As an example, the Delta Plan Draft Program EIR fails to evaluate the incremental impact that implementation of the Delta Plan would have on the resources of the Delta. CEQA requires an environmental impact report to identify and focus on the significant environmental effects of the proposed project. (CEQA Guidelines, §15126.2(a).) Notwithstanding this requirement, in chapter 2B, Section 2.2, the Delta Plan Draft Program EIR states that it “does not seek to evaluate the environmental impacts of the incremental change in those actions, activities

Response to comment LO232-23

Please refer to Master Response 2

Response to comment LO232-24

Please refer to Master Response 2.

and projects that could result from the Delta Plan” because the Delta Plan will only “nudge” already proposed projects and the “degree of influence on future, unknown projects, is unclear.” These statements are inconsistent with the intent that the Plan’s policies are to affect the outcome of future “covered actions.”

LO232-24

One of CEQA’s fundamental purposes is to ensure that public agencies take responsibility for the impacts that their projects will have on the environment. Courts have held that CEQA “requires public officials, in approving environmentally detrimental projects, to justify their decisions based on counterbalancing social, economic or other benefits, and to point to *substantial evidence* in support.” (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 124, italics added.) CEQA includes such a purpose in order to “enable the public to determine the environmental and economic values of their elected and appointed officials, thus allowing for appropriate action come election day should a majority of the voters disagree.” (CEQA Guidelines, § 15003(e), citing *People v. County of Kern* (1974) 39 Cal.App.3d 830.) Despite these requirements, the Delta Plan Draft Program EIR attempts to obfuscate the true impacts of the Delta Plan, by repeatedly claiming that the Council’s action is “merely” the adoption of the Delta Plan and that it is really only the later activities of “other agencies” that will cause impacts on the environment. (e.g., Delta Plan Draft Program EIR, p. 2B-1 *et seq.*)

LO232-25

In fact, in section 1.4, the Delta Plan Draft Program EIR states that “the adoption of the Delta Plan by the Council could influence the nature, timing, or other aspects of decisions and actions by other agencies (particularly when those actions are ‘covered actions’ under the Delta Reform Act).” For example, the Delta Plan Draft Program EIR states that “agencies undertaking covered actions must incorporate [the mitigation measures identified in the Delta Plan Draft Program EIR] into their projects or plans in order for any such covered action to be consistent with the Delta Plan.” (Delta Plan Draft Program EIR, p. 2B-2.)

The failure to identify and evaluate the Delta Plan’s incremental effect on Delta resources contravenes one the main purposes of an environmental impact report, which is to determine the effect of a project on the environment in the future. While the future impacts resulting from the adoption of the Delta Plan may not be easy to predict, CEQA allows reasonable assumptions to be the basis for the determination of future outcomes. CEQA recognizes that “drafting an EIR necessarily involves some degree of forecasting and that while foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can.” (CEQA Guidelines, §15144.) The Delta Plan Draft Program EIR’s blanket statement that the degree of the unknown excuses any attempt to determine the proposed project’s incremental effect on future actions and activities is an inadequate approach to CEQA compliance and defeats the purpose of CEQA. (Pub. Resources Code, §§ 21002.1 & 21003.) Indeed, as demonstrative in subsection (I) below, there are significant impacts that will result from implementation of the proposed project that are not identified in the Delta Plan Draft Program EIR.

LO232-26

Additionally, the Delta Plan Draft Program EIR inappropriately uses a handful of prior environmental impact reports that were prepared from certain categories of water-related projects to extrapolate the conclusions in those limited-in-number and narrowly-applicable environmental impact reports to any potential future projects that might occur under the Plan. This approach is

LO232-27

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Please refer to Master Response 2.

Response to comment LO232-26

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Please refer to Master Response 2.

inadequate for several reasons. First, the universe of prior environmental impact reports considered is very small and does not represent a broad spectrum of project types or locations that are likely to be developed under the Delta Plan. Additionally, the analyses in those prior environmental impact reports are project level and thus even the most general analyses are not likely to apply to every future project, even those of the same category. Thus, this whole approach is inadequate.

LO232-27

Moreover, the Delta Plan Draft Program EIR's approach in describing representative projects and their environmental impact reports does not even disclose with any specificity the environmental impacts that would occur. To the extent that certain known projects are identified (e.g., Los Vaqueros Reservoir), there should be more specific discussion of the impacts – especially for those for which prior CEQA or NEPA documents have been prepared. In most places in the Delta Plan Draft Program EIR, the only thing utilized from those prior environmental impact reports are the conclusions regarding whether the impacts were significant. There is no attempt to actually summarize the impacts from those prior documents and incorporate them by reference. Finally, as discussed above, the emphasis on individual future projects ignores the overall impacts of the Plan's implementation on each resource topic.

LO232-28

In effect, the DSC attempts to meet its CEQA obligations by treating the Delta Plan Draft Program EIR as if looking through the lens of a subsequent responsible agency (assessing future project-level effects) rather than meeting its responsibility to articulate the impacts of its own plan as the lead agency. Throughout the Delta Plan Draft Program EIR, the text repeats a mantra in one form or another apparently intended to inoculate the Council and the Delta Plan Draft Program EIR from criticisms regarding fundamental CEQA compliance and the adequacy of the "analysis" undertaken in the document: "the proposed project does not direct the construction of specific projects, nor would projects be implemented under the direct authority of the Council." Public Resources Code section 21067 clearly states that, "Lead agency means the public agency which has the principal responsibility for carrying out or approving a project which may have a significant effect upon the environment" [emphasis added]. Therefore, as the lead agency, the DSC should be addressing the impacts of the Delta Plan's actions to further the coequal goals within the context of the broader DSC strategies, programs, and projects that will become part of the Plan. Comments and analyses on project-specific activities by other agencies should be reserved for CEQA processes where the DSC would act as a responsible agency.

LO232-29

B. The Delta Plan Draft Program EIR does not Contain an Accurate and Clearly Written Statement of Project Objectives.

An EIR must include a "statement of objectives" sought by the proposed project which includes the underlying purpose of the project. (CEQA Guidelines, § 15124(b).) The Delta Plan's objectives are provided in the legislation and include the two coequal goals (i.e., providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem), as well as several specified sub-goals and strategies. (See Wat. Code, §§ 85020 and 85300 et. seq.) However, the Delta Plan Draft Program EIR does not use those clear statutory objectives as the objectives for CEQA purposes. Instead, it develops a separate set of objectives that are different from the statutory objectives. (Delta Plan Draft Program EIR, p. 1-4.) This deviation from the legislative objectives is confusing and distracts from the actual, legislative mandated Delta Plan objectives. Moreover, the inconsistency with the actual Project

LO232-30

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Please refer to Master Response 2.

Response to comment LO232-29

Please refer to Master Response 2.

Response to comment LO232-30

Please refer to response to comment LO232-8.

objectives is of particular concern with respect to the BDCP, which the Legislature mandated would be incorporated into the Delta Plan if specific criteria are met. (Water Code, § 85320(b).) While one of the Delta Plan Draft Program EIR's stated Project objectives includes being "consistent with specific statutory content requirements for the Delta Plan (Water Code sections §§ 85302(c) through (e), 85303-85308)", no reference is made to the requirement under section 85320(e) that the Delta Plan must also include the BDCP. As a result of the following arbitrarily derived Project objectives, neither the proposed project nor its alternatives will achieve the statutory objectives, which included the purposes of the BDCP.

LO232-30

C. The Project Description is not Stable and is Subject to Change.

The Delta Plan Draft Program EIR violates CEQA because it contains an unstable and constantly changing project description. An accurate, stable, and finite project description is the *sine qua non* of CEQA. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 185; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645.) It allows the lead agency to identify the proper environmental baseline, to evaluate the no-project alternative, to develop a range of reasonable and viable alternatives, to consider mitigation measures, and to balance a project's benefits against its environmental costs. (*Id.*, pp. 192-193.)

LO232-31

The proposed project is inconsistent and misleading. It does not maintain a stable or accurate description of the DSC's authority and influence in implementing the Delta Plan. For example, the Delta Plan Draft Program EIR discusses how the DSC "interprets" its discretionary action, beyond that of the Delta Plan adoption. On page 1-13, lines 30-33, the Delta Plan Draft Program EIR states, "However, adoption of the Delta Plan by the Council could influence the nature, timing, or other aspects of decisions and actions by other agencies (particularly when those actions are "covered actions" under the Delta Reform Act)." As discussed below and elsewhere in this letter, the DSC's authority extends to that of a responsible agency during the CEQA process, by commenting on other agencies' notices of preparation and draft environmental impact reports, along with providing presentations at public meetings and hearings. The other mandatory requirements fall with the certification of consistency. As noted in Water Code section 85225, "A state or local public agency that proposes to undertake a covered action, *prior to initiating the implementation of that covered action*, shall prepare a written certification of consistency..." (Italics added.) As noted in this section, the certification of consistency would be submitted prior to that agency initiating project implementation. However, CEQA approval is not necessarily the same as initiating project implementation. Hence, the influence the DSC has over the project when the agency submits its certification (as opposed to commenting during the CEQA process) is not as substantial as the Delta Plan Draft Program EIR section would otherwise indicate. The process of the certification of consistency would actually fit within the parallel processes of regulatory permits and other approvals required for projects by local and state public agencies, after CEQA approval. Yet, the project description in the Delta Plan Draft Program EIR misrepresents the authority of the DSC in this matter.

LO232-32

With respect to its authority under the Water Code to impose project-level mitigations on lead agencies, the description of the proposed project is completely misleading and inconsistent with law. The Delta Plan Draft Program EIR states that, "If the covered action is found to be

LO232-33

Response to comment LO232-31

Please refer to response to Master Response 2.

Response to comment LO232-32

Please refer to Master Response 1.

Response to comment LO232-33

Please refer to Master Responses 1 and 4.

Response to comment LO232-34

Please refer to response to comment LO232-9.

inconsistent, the action or project may not proceed until it is revised so that it is consistent with the Delta Plan.” (Delta Plan Draft Program EIR, p. 1-4, lines 30-31.) Later in the Delta Plan Draft Program EIR, it states similarly:

If, after hearing the appeal, the Council finds that the action is not consistent with the Delta Plan, the State or local agency may not proceed with the project unless it submits a revised certificate of consistency, which in turn could be challenged by any person through an appeal to the Council (Water Code § 85225.25).

(Delta Plan Draft Program EIR, p. 2A-1, lines 25-28.) This statement does not comport with Water Code sections 85225 through 85225.30. It is the responsibility of agencies with covered actions to submit their certificates of consistency to the Council prior to initiating the implementation of those actions. If an appeal occurs or if the Council deems that the covered action is not consistent, then the agencies:

may determine whether to proceed with the action. If the agency decides to proceed with the action or with the action as modified to respond to the findings of the council, the agency shall, *prior to proceeding with the action*, file a revised certification of consistency that addresses each of the findings made by the council and file that revised certification with the council.

(Water Code, § 85225.25 (emphasis added).) Thus, nothing in Water Code section 85225.25 or any other provision of the Delta Reform Act prohibits a local agency from proceeding with its project or allows for a further appeal to the Council. Nothing in the Delta Reform Act allows the DSC to place mandatory requirements on the agencies regarding mitigation or to delay the implementation of the project, other than the mandatory process of submittal/revocal of the certificate of consistency.

Third, the proposed project itself has been under continuous revision while the Delta Plan Draft Program EIR has been prepared and further changes to the proposed project are underway *at the same time the public is reviewing this Draft EIR*. The DSC released its 5th draft of the Delta Plan in August, 2011. The DSC has announced that there will be a 6th draft Delta Plan issued in mid-March for public comment prior to the DSC’s reviewing a 7th version in mid-April and subsequently adopting a Final Delta Plan. DSC staff and DSC members have stated publicly that there will likely be “significant” changes included in the 6th Draft Delta Plan when compared to the 5th Draft, which is the “proposed project” for purposes of the Delta Plan Draft Program EIR. Consequently, it is possible, and apparently *expected*, that the “proposed project” – the 6th Draft and ultimately the Delta Plan approved by the Council – will be materially different than that described in the 5th Draft Delta Plan and supposedly “analyzed” in the Delta Plan Draft Program EIR. Even though a program environmental impact report may contain a more general project description than a project-level environmental impact report, it must nevertheless be stable throughout the CEQA review process to provide the public and other agencies of a meaningful opportunity to comment on the actual plan that will be proposed for adoption.

D. The Delta Plan Draft Program EIR does not Adequately Present the Baseline.

An environmental impact report must include a clear statement of what the existing setting, i.e., baseline condition, was used for purposes of determining the significance of environmental impacts. (See, e.g., CEQA Guidelines, § 15125. See also *Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48 and *Sunnyvale West Neighborhood Association v. City of Sunnyvale* (2010) 190 Cal.App.4th 1351.) The Delta Plan Draft Program EIR states that, “[t]he baseline for assessing the significance of impacts of the Proposed Project is the existing environmental setting.” (Delta Plan Draft Program EIR, p. 2A-85.) However, the Delta Plan Draft Program EIR gives no description of what those existing conditions actually are or how those existing conditions were determined. Specifically, the Delta Plan Draft Program EIR does not make clear what the assumed hydrologic or regulatory conditions were, or what were the assumed conditions of water storage and conveyance facilities (i.e., surface/groundwater storage). Absent such a description, the Delta Plan Draft Program EIR’s baseline usage cannot be supported by substantial evidence. Most simply put, it is not based on any discrete facts. (See CEQA Guidelines, § 15384 [“substantial evidence” includes facts, but not mere opinions or unsupported conclusions].)

Further, what description of the environmental setting is presented is inaccurate and misleading. For example, under the Water Resources section and in an apparent attempt to support its overreliance on development of alternative local water supplies to meet existing and future reasonable and beneficial uses of water, the Delta Plan Draft Program EIR states that “[h]istorically, local water resources constituted the backbone of California’s water supply reliability.” (Delta Plan Draft Program EIR, p. 3-6.) This statement has no support. Historically, local supplies in many areas of the State were insufficient to meet the then existing demand. Inadequate and unreliable supplies resulted in significant environmental impacts, mitigated by the development of imported supplies. (See also Delta Plan Draft Program EIR, p. 3-4 [recognizing the CVP and SWP were constructed and operated to provide supplemental water].)

Also, the study area for water resources is divided into sections that are not scientifically based and results in undue repetition, confusion, and inaccuracies. As presented in the Water Resources section, the study area “includes three main areas: the Delta and Suisun Marsh, the Delta watershed, and the areas outside of the Delta that use Delta water. The Delta watershed includes the tributary rivers that flow into the Delta from the Sacramento River watershed and the San Joaquin River watershed.” (Delta Plan Draft Program EIR, p. 3-1.) A technically accurate division of hydrologic regions is presented in the California Water Plan, Update 2009. (California Water Plan, Update 2009, p. 4-10.)

Examples of how the current division of the study area led to duplication and a lack of clarity, and incorrect statements are numerous. For example, on page 3-13, the Delta Plan Draft Program EIR discusses “the major users of Delta surface water are the CVP and SWP.” (Delta Plan Draft Program EIR, p. 3-13.) However, the water used by the CVP and SWP is not water that originates in the Delta. It is water conveyed through the Delta. Likewise, page 3-16 presents the Sacramento River and San Joaquin River as “tributary” to the Delta. That is not correct. The Delta is a formation occurring because of the confluence of the Sacramento River,

Response to comment LO232-35

Sections 3 through 21 of the EIR each describe the existing environmental and regulatory conditions relevant to the resource under discussion, including in Section 3, the criteria of SWRCB Decision 1641 and the current biological opinions issued by the U.S. Fish and Wildlife Service and National Marine Fisheries Service. Because of the programmatic nature of the analysis, as described in Master Response 2, quantitative description of hydrologic or hydraulic conditions or the conditions of water conveyance and storage would not be helpful and thus was not included.

Response to comment LO232-36

The Bulletin 160 series published by the Department of Water Resources explains that a majority of the total amount of water used throughout the state for municipal, industrial, and agricultural uses is derived from groundwater, local surface water supplies, and recycled wastewater and stormwater (California Department of Water Resources. 2009. *California Water Plan Update 2009*). As the EIR acknowledges following the quoted sentence, in many areas of the state imported water is the primary water supply due to the lack of local surface waters and groundwater (Draft PEIR at 3-6).

Response to comment LO232-37

The study area was delineated in the manner described in Section 1 of the Draft Program EIR because the impacts of the Delta Plan may be roughly divided and described along those geographic lines. For example, the impacts of Delta ecosystem restoration projects within the Delta will include impacts associated with the construction and operating footprint of the projects, while the impacts of such projects in the Delta watershed and in areas outside the Delta that use Delta water will primarily relate to changes on water supply. Because Central Valley Project and State Water Project water flows through the Delta, many changes to the management or delivery of such water would “occur, in whole or in part, within the boundaries of the Delta,” would therefore potentially be a “covered action” under Water Code section 85057.5, a key legal and analytical distinction for the Delta Plan and the EIR. “Delta water” is thus a useful shorthand term in the context of the Delta Plan. The San Joaquin and Sacramento rivers flow into the Delta and therefore a reasonably considered “tributaries.”

San Joaquin River, and the San Francisco Bay. Also, important elements of the environmental setting on water resources are missing. For example, the description of the Sacramento River watershed water use and infrastructure is incomplete. Absent is a discussion of non-CVP and non-SWP water users and infrastructure. (See Delta Plan Draft Program EIR, pp. 3-20 to 3-21.)

LO232-37

The Delta Plan Draft Program EIR is inconsistent with CEQA because it does not account for the rapidly changing circumstances affecting water supply within the State of California. Where, as here, changing conditions may affect an agency's significance conclusions, (see Section 1, Context For The Development Of A Delta Plan, herein), courts have held that the lead agency must take some account of those changing conditions by considering a range of circumstances in the baseline. (*Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552.) Accordingly, the DSC's failure to describe the physical baseline conditions used is compounded by its admitted use of one moment in time – which is not representative of overall water supply conditions in California – as a baseline, rather than the consideration of overall water supply conditions.

LO232-38

E. The Delta Plan Draft Program EIR contains an Inadequate Description and Scope of Alternatives.

The Delta Plan Draft Program EIR is inadequate because it does not contain an adequate range of alternatives, the alternatives presented do not lessen the impacts of the proposed project to less than significant, and the descriptions of the alternatives are incomplete.

An environmental impact report must describe a range of reasonable alternatives to the proposed project, which would feasibly attain most of the basic project objectives but would avoid or substantially lessen one or more of the significant environmental impacts of the project (CEQA Guidelines, § 15126.6(a).) The Supreme Court has clearly stated that one of an environmental impact report's major purposes is to ensure that the lead agency thoroughly assesses all reasonable alternatives to a proposed project. (*Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376.) The Supreme Court has also held that the alternatives discussion is the core of an environmental impact report and that the range of alternatives in an environmental impact report is intended to provide the public and decision makers with meaningful choices. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553.)

LO232-39

First, the alternatives analyzed in the Delta Plan Draft Program EIR do not constitute a range of reasonable alternatives as required by CEQA (See CEQA Guidelines, §15126.6(a)) because they assume decreasing the amount of water available, and thus do not meet the project objectives – specifically, they are not compatible with one of the Delta Reform Act's coequal goals of increasing water supply reliability and the Bay Delta Conservation Plan's Goals, which include the protection and restoration of water supplies. Indeed, the proposed project and alternatives 2 and 3 appear to significantly reduce the amount of water conveyed through the Delta (although how much these deliveries will be reduced is not disclosed in the Delta Plan Draft Program EIR).

LO232-40

An alternative that does meet CEQA's definitional requirements was proposed by a coalition of water users. On June 10, 2011, the "Ag-Urban Coalition" submitted an Alternate

Response to comment LO232-38

Pursuant to Public Resources Code § 15126.2(a), the EIR analyzes the Project's impacts as compared to the physical environment as it existed at the time of the publication of the Notice of Preparation (December 10, 2010). Projecting future conditions for the purposes of this analysis would require inappropriate speculation.

Response to comment LO232-39

Please refer to Master Response 3.

Response to comment LO232-40

Please refer to Master Response 3.

Delta Plan to the DSC for its consideration and inclusion as a "stand-alone" alternative for analysis in the Delta Plan Draft Program EIR. This alternate plan: (a) is consistent with its limited delegated authorities and jurisdiction; (b) results in concurrent furtherance of the coequal goals; (c) promotes the Council's clearly designated role as a facilitator/coordinator of state agency actions related to the Delta; (d) pursues the development of a robust science program and plan for improving Delta management; (e) kick-starts an aggressive approach to prioritizing levee investments in the Delta to protect lives and state interests; and, (f) supports, rather than impedes, incorporation and implementation of the BDCP. While the Delta Plan Draft Program EIR asserts that Alternative 1B is the Ag-Urban Coalition Alternate Plan, the description of Alternative 1B significantly mischaracterizes various components of the Coalition's proposal and fails to include the full suite of near, medium, and long-term actions proposed by the Ag-Urban Coalition in Alternative 1B. While Alternative 1B may reflect an "alternative" in the eyes of the DSC staff, it should not and cannot be considered the same as the Ag-Urban Coalition's alternative.

LO232-40

Second, there is no analyses that even indicate that the alternatives decrease significant environmental effects of the proposed project.

LO232-41

Third, the alternatives included in the Delta Plan Draft Program EIR have not been determined to result in any truly meaningful differences in environmental impacts. An environmental impact report must include sufficient information about each alternative to allow a meaningful evaluation, analysis, and comparison with the proposed project. (CEQA Guidelines, §15126.6(d).) The courts have held that general qualitative comparisons such as "greater than" or "lesser impacts" than the proposed project are not adequate. (*Kings County Farm Bureau v City of Hanford* (1990) 221 Cal.App.3d 692.) Nevertheless, the Delta Plan Draft Program EIR relies completely on a "greater impacts/lesser impacts" approach to alternatives with no attempt to quantify the differences for any of the resource topics. Consequently, the alternatives discussions are overly generalized and do not allow for a useful comparison as required by CEQA.

LO232-42

F. **The Delta Plan Draft Program EIR contains an Inadequate Evaluation of the Cumulative Impacts and does not Identify the Proposed Project's Incremental Contribution to those Impacts.**

An EIR must discuss cumulative impacts when a project's incremental effect is cumulatively considerable. (CEQA Guidelines, § 15130(a).) A "cumulative impact" is defined as the:

[C]hange in the environmental from the incremental impact of the (proposed) project when added to other closely related past, present and reasonably foreseeable probably future projects. Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time.

LO232-43

(CEQA Guidelines, § 15355(b).) Here, the impacts of the proposed project must be combined with those of other past, present, and reasonably foreseeable future projects causing related impacts. However, because the Delta Plan Draft Program EIR does not describe the overall

Response to comment LO232-41

Please refer to Master Response 3.

Response to comment LO232-42

Please refer to Master Response 3.

Response to comment LO232-43

Please refer to Master Response 2.

impact of the proposed project, any attempt to combine the impacts of the proposed project with other actions, would be inherently flawed. Although the cumulative analysis lists dozens of related actions, programs, and projects (Table 22-1), it does not adequately add the impacts of the proposed project to those listed items. Nor is there any meaningful evaluation of the overall impacts of the proposed project together with the other the listed projects. The result is the failure to actually describe the overall cumulative effect.

The Delta Plan Draft Program EIR also fails to identify the appropriate geographical boundaries for each environmental category in which to consider applicable related projects for the cumulative impact analyses. (CEQA Guidelines, §§ 15130(a)(2) & 15130(a)(3)). For example, a watershed's geographical boundaries with its particular set of related projects would be far different than that for related projects found in certain air basins, in order to conduct hydrological and air quality cumulative impact analyses, respectively. LO232-43

Additionally, since the impacts of the proposed project are not identified in a meaningful way, there is no identification of the incremental contribution of the proposed project to the cumulative impacts for any of the resources.

Finally, the analysis and discussion is so general and qualitative that it does not capture the magnitude or intensity of the cumulative problems that might occur if the proposed project and all of the projects in Table 22-1 were ever implemented.

G. The Delta Plan Draft Program EIR contains Conflicting and Confusing "Significance" Conclusions which Deprive the Document of its Value to the Public and Decision-Makers.

CEQA requires decision-makers to prepare findings for each significant impact identified in an EIR. (CEQA Guidelines, § 15091.) To enable decision-makers to effectively prepare findings, every impact disclosed in an EIR must be identified as either being significant or less-than-significant. Without correctly identifying the significance of each impact, the decision-makers will be unable to make the proper findings. Additionally, the significance conclusions must be supported by substantial evidence. Based on these requirements, the significance conclusions in the Delta Plan Draft Program EIR are inadequate. For many of the impacts discussed in the Delta Plan Draft Program EIR, the analysis reveals that the impacts of future projects could be mitigated to less-than-significant but the Delta Plan Draft Program EIR nevertheless concludes that all impacts are significant. Other analyses appear to support a "less-than-significant" conclusion, yet the Delta Plan Draft Program EIR conclusions that the impacts are significant. And in all cases, conclusions are not compared to or analyzed in relationship to the stated significance thresholds in each chapter. As a result, the "significance" conclusions are confusing and may not be supported by substantial evidence. LO232-44

H. The Delta Plan Draft Program EIR's Mitigation Measures Fail to Comply with CEQA.

The Delta Plan Draft Program EIR's mitigation measures fail to comply with CEQA in two respects. First, the Delta Plan Draft Program EIR lacks mitigation measures that would address the overall impacts of the Delta Plan. Second, the Delta Plan Draft Program EIR LO232-45

Response to comment LO232-44

Please refer to Master Response 4.

Response to comment LO232-45

Regarding the Project's "overall impacts," please refer to Master Response 2.

Regarding the role of the Delta Stewardship Council and other agencies in mitigation, please refer to Master Response 4.

improperly attempts to require other agencies which undertake a covered action to incorporate the Delta Plan Draft Program EIR's mitigation measures into their project in the future. This is done without any attempt to make such mitigation part of the Delta Plan itself.

LO232-45

i. The Delta Plan Draft Program EIR lacks Mitigation Measures that would Address the Overall Impacts of the Proposed Project.

An EIR must describe feasible measures which would mitigate any significant environmental impacts of the proposed project. (CEQA Guidelines, § 15126.4(a)(1).) Mitigation includes avoiding, minimizing, rectifying, reducing, or compensating for the significant impact. (CEQA Guidelines, § 15370.) In a program EIR, the mitigation measures must be "program-wide mitigation measures" that address the cumulative nature of the Plan's overall impacts at an early time in the CEQA process when an agency has greater flexibility to deal with the impacts. (CEQA Guidelines, § 15168(b)(4).) As discussed above, the Delta Plan Draft Program EIR does not evaluate the overall impacts of the entire Plan. Thus, it does not present any mitigation measures that address overall impacts that might occur if the Plan were implemented. Rather, most of the mitigation measures listed in the Delta Plan Draft Program EIR are merely project-level measures applied to individual future projects. For example in Section 3 – Water Resources, the first mitigation measure calls for very project-specific, best management practices (BMPs) to be developed in the future by local governments approving projects, throughout California. (Delta Plan Draft Program EIR, Sec. 3.4.3.6.1.) These are the types of mitigation measures typically applied to individual projects, not broad policy-oriented programs such as the Delta Plan. Similar project-specific measures are found in every chapter of the program EIR.

LO232-46

This entire approach to mitigation is inadequate because it does not provide any uniformly developed policies or approaches to mitigate the overall impacts of the Delta Plan. Additionally, such measures are generally outside the authority of DSC to adopt and there is no guarantee that the future, unidentified lead agencies will have the power, or inclination to adopt them. Despite this uncertainty about the enforceability and efficacy of future mitigation, many of the conclusions as to the non-significance of impacts are premised on the assumption that these measures "will do the job." Consequently to make the mitigation measures adequate, the Council must revise the Delta Plan Draft Program EIR to include broad, uniform mitigation policies that will address the overall impacts of the Delta Plan.

ii. The Delta Plan Draft Program EIR Improperly Attempts to Require an Agency which Undertakes a Covered Action to Incorporate the Delta Plan Draft Program EIR's Mitigation Measures into its Proposed Project.

The Delta Plan Draft Program EIR states that "agencies undertaking covered actions must incorporate [the mitigation measures identified in the EIR] into their projects or plans in order for any such covered action to be consistent with the Delta Plan." (Delta Plan Draft Program EIR, p. 2B-2.) However, the DSC lacks authority to require other agencies to incorporate specific mitigation measures into their projects. While the Legislature granted the DSC authority to determine whether a covered action is consistent with the Delta Plan, such authority does not include the ability to impose specific mitigation measures on local agencies. As noted in the

LO232-47

Response to comment LO232-46

Please refer to Master Response 4.

Response to comment LO232-47

Please refer to Master Response 4.

Delta Plan Draft Program EIR, “whether the identified mitigation is feasible for any particular project or action proposed by another agency can only be definitively determined at the time that project or action is defined, and would be determined by that agency and *not the Council*.” (Delta Plan Draft Program EIR, p. 2B-3, footnote 4, italics added.) Regarding non-covered actions, the Delta Plan Draft Program EIR correctly recognizes that the DSC cannot impose mitigation measures on other agencies. (Delta Plan Draft Program EIR, p. 2B-2; *see also* Water Code, § 85032(f), which does not enlarge the DSC’s authority under CEQA.) The DSC should revise the Delta Plan Draft Program EIR to state that the DSC lacks authority to impose project-specific mitigation measures on other agencies for both covered and non-covered actions.

LO2332-47

I. The Delta Plan Draft Program EIR’s Impact Analysis is Deficient.

i. The Delta Plan Draft Program EIR Fails to Properly Analyze Impacts of the Proposed Project on Areas Outside the Delta.

Every section of the Delta Plan Draft Program EIR states that the analysis focuses on a “study area defined as the geographic area in which the majority of the potential impacts are expected to occur.” (e.g., Delta Plan Draft Program EIR, pp. 9-1, 10-1, 11-1.) The Delta Plan Draft Program EIR goes on to make clear that this area of analysis consists of the “Delta and Suisun Marsh.” (e.g., Delta Plan Draft Program EIR, pp. 9-1, 10-1, 11-1.) Although the Delta Plan Draft Program EIR claims to also take a general look at other areas, the Delta Plan Draft Program EIR admits that those areas are analyzed “to a lesser extent.” (e.g., Delta Plan Draft Program EIR, p. 9-1.) For example, the visual resources and geology section, among other sections, have no analysis for areas outside of the Delta, despite the high likelihood of significant impacts in those areas due to cutting Delta water deliveries, since increased water conservation is a likely result of the Plan, which would likely reduce landscaping and greenery, and subsidence would likely result from increased pumping of groundwater. Other examples include the failure to disclose the special status species in areas outside the Delta that could be impacted by reductions in Delta water deliveries. The repeated admission that the impacts within the Delta region are the ones upon which the Delta Plan Draft Program EIR focuses constitutes a violation of CEQA. Specifically, CEQA case law makes clear that a lead agency has the obligation to analyze all reasonably foreseeable impacts, even if they occur hundreds of miles away. (*See, e.g., County Sanitation District v. Kern County* (2005) 127 Cal.App.4th 1544.) For the DSC to imply that impacts further away from the Delta are somehow less important and thus in less need of analysis or mitigation is improper and seeks to obscure the true impact of the proposed project. The DSC should revise the Delta Plan Draft Program EIR to identify all impacts at the same level of detail, without regard for where they occur.

LO2332-48

ii. The Delta Plan Draft Program EIR Improperly Defers the Analysis of Nearly Every Impact.

The Delta Plan Draft Program EIR is premised on the assumption that other agencies will conduct additional CEQA review at a later time and will work out what the proposed project’s impacts are and what mitigation is appropriate for those impacts at a future date. This failure to provide any meaningful or detailed analysis of the proposed project’s impacts violates CEQA. (*See, e.g., Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 206.) Since the proposed project advocated reducing water supply conveyed through the

LO2332-49

Response to comment LO232-48

The impact analysis in Sections 3 through 21 focuses on areas where potential physical environmental changes under the Delta Plan are anticipated. For example, the Recirculated Draft PEIR projects significant adverse impacts to biological and recreation resources (Sections 4 and 18 of the Draft Program EIR) in areas outside of the Delta that use Delta water due to potential reduction or changes in SWP and CVP water supplies. The RDPEIR also analyzes impacts related to geology and visual resources throughout the project area. See, e.g., RDPEIR at 8-14 (visual resources), 11-4 (geology).

Response to comment LO232-49

Please refer to Master Response 2.

Response to comment LO232-50

Please refer to Master Response 2.

Delta, it is incumbent upon the DSC to fully analyze the impacts that would occur as a result of water suppliers having to obtain that water from other sources or the impacts of an absolute reduction in available water supplies. The Delta Plan Draft Program EIR totally fails to do this, instead repeatedly stating that “the implementation and enforcement of these [future actions] would be within the responsibility and jurisdiction of public agencies other than the Delta Stewardship Council.” (Delta Plan Draft Program EIR, p. 3-91.) The Delta Plan Draft Program EIR’s impermissible deferral of impacts is evident in every section of the Delta Plan Draft Program EIR. Thus, the DSC should revise the Delta Plan Draft Program EIR to provide the full public disclosure and analysis that CEQA requires, or remove the proposed policies that result in these unanalyzed impacts from the Delta Plan itself. (See, e.g., Delta Plan Draft Program EIR, pp. 3-85 [water supply impacts may be determined to be significant by other agencies at a future date]; 9-35 [construction impacts would be analyzed by other agencies at a later time]; 9-41 [odors to be analyzed at a later time]; 9-41 [health risks to be analyzed at a later time]; 10-46 [cultural impacts to be determined at a later time].) LO232-49

iii. The Delta Plan Draft Program EIR Fails to Disclose the Impacts of the Proposed Project or its Alternatives.

The Delta Plan Draft Program EIR repeatedly states that the proposed project’s impacts may be mitigated to a level of less than significant or be significant and unavoidable, but that the DSC does not know what the impact will actually be since other agencies will be implementing specific projects. (e.g., Delta Plan Draft Program EIR, p. 9-27.) As one example, the Delta Plan Draft Program EIR states:

[I]t is possible that air quality impacts of projects encouraged by the Delta Plan may be less than significant, or could be mitigated to a less-than-significant level... and it is possible that significant and unavoidable impacts on air quality could occur. LO232-50

(Delta Plan Draft Program EIR, p. 9-27.) This is not an impact analysis, but rather simply a catalog of possible outcomes that does not inform the DSC or the public in any meaningful way. CEQA obligates the DSC, as the lead agency, to analyze the impacts of its proposed project and to obtain the information needed to reach a factually-supported significance conclusion rather than merely speculate as to any number of potential outcomes. (See, e.g., CEQA Guidelines, §§ 15083, 15086 [consultation with affected agencies and the public is required to assist in the determination of impacts].) Where, as here, an environmental impact report fails to provide a “meaningful assessment of the true scope of numerous potentially serious adverse environmental effects,” courts have struck down the CEQA document as inadequate. (See, e.g., *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1220-21.)

iv. **The Delta Plan Draft Program EIR Fails to Consider Significant Indirect Impacts.**

a. The Delta Plan Draft Program EIR Fails to Consider Effects of Reduced Water Supplies Conveyed Through the Delta.

With respect to water supply, the Project proposes a decrease in Delta water supplies conveyed through the Delta but nowhere does the Project description provide a public disclosure of how large of a decrease that may be – not even in general terms. This fundamental feature of the Plan must be clearly described in the Project description, especially since it is impossible to understand the likely impacts of the Project on the 96% of Californians who rely on water derived from the Delta watershed (Delta Plan Draft Program EIR, p. 1-5) without knowing how much Delta water deliveries will be reduced. Further, only Alternative 2 discusses how much water deliveries would be reduced if that alternative were selected (See, e.g., Delta Plan Draft Program EIR, p. ES-6 [Alternative 2 potentially limits the water of water conveyed through the Delta to 3 million acre-feet per year]; cf. p. 1-6 [annual quantity of CVP and SWP water conveyed through the Delta to 3 to 6.5 million acre-feet per year]), and therefore, other than that alternative, it is impossible to adequately compare the proposed project and the other alternatives, and the discussion of alternatives is inadequate as well.

Further, the Delta Plan Draft Program EIR makes no attempt to assess and analyze the environmental consequences of reducing the quantity of water conveyed through the Delta, such as from the development of alternative water supplies or from the consequences of suffering water shortages. The proposed project, Alternative 2 and Alternative 3 would significantly reduce the quantity of water conveyed through the Delta, yet the Delta Plan Draft Program EIR concludes that the amount of water supplied will remain the same because other agencies will build wells, desalination plants, and recycled water facilities, and will engage in water transfers. The ability to replace the water supply conveyed through the Delta with these other sources is wholly speculative and actually conflicts with the other information disclosed in the Delta Plan Draft Program EIR. For example, groundwater wells will not be an adequate replacement because, as the Delta Plan Draft Program EIR acknowledges, almost all areas that receive water conveyed through the Delta are in a state of overdraft and currently rely heavily on water conveyed through the Delta to prevent the worsening of this overdraft and other environmental impacts, such as subsidence. (See, e.g., Delta Plan Draft Program EIR, pp. 2A-16, 3-29 to 3-31, 3-34, 3-37, 3-41, 3-44, 3-56, etc.; other pages fail to disclose the status of the relevant groundwater basins, see p. 3-58.) The Delta Plan Draft Program EIR recognizes this, and that surface water is needed to recharge existing wells, and yet, in direct contradiction, continues to claim that additional groundwater wells will help achieve a more secure water supply for California. In addition, desalination plants take years – often, decades – to plan and develop. (See Delta Plan Draft Program EIR, p. 3-49, noting that Marin Municipal Water District has been investigating desalination since the 1990s, with no resulting facilities, p. 3-74, noting that there are enormous obstacles to large-scale desalination, due to difficulties with land acquisition, treatment, operational costs, environmental review and permitting processes involving more than 20 local, state, and federal agencies, and that of all of the proposed desalination plants, only a single one has actually progressed to the construction phase, more than five years after the Delta Plan Draft Program EIR was released [p. 4-61], and will only deliver 56,000 acre-feet once fully completed and operational). Further, depending on their size, which is often limited, they do not

Response to comment LO232-51

Please refer to response to comment Master Response 5.

Response to comment LO232-52

The Delta Plan encourages, and in certain circumstances would require, water supply agencies to reduce reliance on the Delta water through implementation of local and regional water supplies, including water use efficiency, water recycling, and groundwater conjunctive use programs to meet water demands. Regarding the ability of these supplies to meet demand, please refer to Master Response 5. The Reliable Water Supply subsection of sections 3 through 21 of the Recirculated Draft PEIR analyzes the environmental impacts of developing such supplies. The RDPEIR recognizes that agencies may use different approaches to local and regional water supplies, potentially resulting in different types of impacts. For example, the RDPEIR notes that recycled water projects are more likely than groundwater projects in some Delta watershed areas. See, e.g., RDEIR at 11-2. The Draft Program EIR also recognizes that the some locations, including agricultural areas in the San Joaquin Valley, may not be able to obtain additional water transfers or other water supplies, and thus finds that there could be significant adverse impacts to agricultural resources (Section 7 of the Recirculated Draft Program EIR).

produce very large amounts of water once they are operational. Scientific papers, including one released November 2011 by Fresno State University's Center for Irrigation Technology, acknowledge that even existing amounts of water are insufficient to stave off economic and environmental disaster. This directly contradicts the Delta Plan Draft Program EIR's unsupported conclusion that sufficient, feasible replacement water sources exists.

LO232-52

The Delta Plan Draft Program EIR should analyze how many replacement sources would be required to make up for any loss of water currently conveyed through the Delta and the environmental impacts of the different types of replacement sources. The following are some of the foreseeable impacts that must be addressed in the Delta Plan Draft Program EIR to satisfy CEQA:

- If all the replacement water were supplied by desalination, how many plants would be required?
- How long would it take to design, permit, and build all such plants? Desalination plants have enormous energy requirements, so this will also need to be taken into account?
- If all of the lost water supplies were replaced by groundwater wells, how many wells would be required?
- How much would the additional pumping further depress already overdrafted groundwater basins?
- How much subsidence and other issues would this likely cause?
- How much water is available for transfer, and what areas would it be available for transfer to?
- How many recycled water facilities would have to be built to replace the lost water?
- What would the environmental impacts be of using recycled water in place of likely higher quality water conveyed through the Delta?

LO232-53

In violation of CEQA, these foreseeable impacts that would directly and indirectly result from the proposed project are not disclosed in the Delta Plan Draft Program EIR.

Unlike desalination, wells, and the other sources the Delta Plan Draft Program EIR identifies as sources of replacement water for lost Delta deliveries, which are wholly speculative except in very limited amounts and areas, recycled water facilities are a potential future source of water for some locales. However, Southern California already recycles more than 35% of all of its wastewater, (Delta Plan Draft Program EIR, p. 3-74), many recycled water facilities usually do not produce large amounts of water, and, because of its high salt content, the resulting water cannot be used for the same purposes as the high-quality Delta water that is being taken away. Such recycled water may not be usable for drinking water, but may be limited in use to irrigation

LO232-54

Response to comment LO232-53

Regarding the EIR's analysis of the environmental impacts of developing local and regional water supplies, please refer to response to comment LO232-52. As described in Section 2B of the Draft Program EIR, the Delta Stewardship Council does not propose or contemplate directly authorizing any physical activities. Rather, through the Delta Plan, the Delta Stewardship Council seeks to influence the actions, activities, and/or projects of other agencies, the details of which would be under the jurisdiction and authority of the agencies that will propose them in the future and conduct future environmental review. Without specific details of future projects, it is not possible for the EIR to provide quantitative analysis of the impacts of such projects, nor is it possible for the EIR to project the specific water-supply developments that the Delta Plan may encourage. As further explained in Master Response 2, the EIR does not speculate as to the particular combinations of water-supply strategies that various agencies may pursue in response to the Delta Plan. Any recycled water, whether for agricultural, municipal, or any other use, would be required to meet any applicable legal or regulatory water quality standards, thus avoiding environmental impacts related to quality of the recycled water.

Response to comment LO232-54

Please refer to Master Response 5.

where purple pipes or other, similar infrastructure is available, or for groundwater recharge. However, even these uses are threatened in some areas if there is not adequate amounts of Delta water for blending since water with high salt content, such as recycled water, groundwater from many areas, and Colorado River water, needs to be blended with high quality water (which is almost always Delta water) in order to be usable in any form. (See Delta Plan Draft Program EIR, p. 3-63.) Recycled water, Colorado River water, and groundwater in many areas cannot be used for recharge in many areas because it is too high in salts without blending with high quality Delta water. None of these issues are disclosed or analyzed in the Delta Plan Draft Program EIR, in violation of CEQA. While the Delta Plan Draft Program EIR states that (unidentified) Urban Water Management Plans describe the existing use of recycled water and identify the potential for increased use by 2020, there is no incorporation by reference of these documents or analysis of their contents, so the feasibility or amount of these is unknown. In addition, the Delta Plan Draft Program EIR admits that the State Water Board mandates the increased use of recycled wastewater by 200,000 acre-feet per year by 2020 (Delta Plan Draft Program EIR, p. 2A-21), so such increase would not be as a result of the proposed project, but would properly be part of the baseline or No Project alternative.

LO232-51

This failure to disclose the full and actual impacts of the Project is also tantamount to piecemealing the project, i.e., avoiding the analyses of the Delta Plan as a whole. Where the project description omits key aspects of the project, such as in this example the reduction in the quantity of water conveyed through the Delta, important ramifications of the proposed project remain hidden from view at the time the project is being discussed and approved.

LO232-55

b. The Delta Plan Draft Program EIR Fails to Consider Effects of Possible Changes From State Water Board Action.

The proposed project pressures the State Water Board to take action that would increase the amount of flow into and out of the Delta. In the Delta Plan Draft Program EIR, the DSC advocates for "a more natural flow regime in the Delta." (Delta Plan Draft Program EIR, p. 2A-39.) There are potential significant impacts of this aspect of the proposed project that are not analyzed in the Delta Plan Draft Program EIR, including on the following resources: Biological, Agriculture and Forestry, Climate Change, and Green House Gases. Expected impacts would include, but are not limited to: (1) reduced reservoir storage and thus limited cold water for temperature requirements for salmon downstream; (2) reduced previously stored and unappropriate water to meet terms and conditions in water rights and other regulatory requirements (i.e., Biological Opinions); (3) reduced water supply for municipal, industrial, and agricultural uses, and likely causing land fallowing, increased land subsidence, increased dust emissions; (4) reduced water supply for environmental purposes (in-stream needs in areas otherwise served water from the Delta, refuges); (5) reduced hydropower generation; (6) instability in California's energy grid caused by reduced summertime hydropower production; and (7) increased reliance on fossil fuel production due to a loss of hydroelectric generation, and resulting air quality impacts. Some of those impacts are identified in a "Water and Power Policy Group" paper entitled: "Hydrologic Modeling Results and Estimated Potential Hydropower Effects Due to the implementation of the Sacramento Water Resources Control Board Delta Flow Criteria."

LO232-56

Response to comment LO232-55

Please refer to Master Response 2.

Response to comment LO232-56

As described on page 2A-39, Lines 38 through 40, of the Draft Program EIR, it is anticipated that implementation of future water quality and flow objectives by the State Water Resources Control Board (SWRCB) under the Proposed Project could increase Delta outflow, reduce reverse flow conditions in the south Delta, and increase flows in restored Delta floodplains; and in general result in a more "natural flow regime" in the Delta. The EIR determines that while such change could reduce water supply reliability, the local and regional self-reliance encouraged under the Delta Plan would prevent environmental impacts related to reduced water supplies. RDPEIR at 3-9. Master Response 5 discusses the ability of such projects to meet demand and the impacts of the encouraged changes in flow.

v. **The Delta Plan Draft Program EIR's Analysis regarding Water Resources is Insufficient.**

The Delta Plan Draft Program EIR does not analyze the water supply impacts to the CVP and SWP. While the Delta Plan Draft Program EIR states the raw numbers of water conveyed through the Delta from 2007 through 2009, it does not disclose how the quantity of water varied over time (i.e., water year type), or how the quantity has been impacted by the relevant biological opinions and other restrictions. The Delta Plan Draft Program EIR also fails to disclose or analyze the environmental impacts resulting from changes in CVP and SWP water supplies. LO2332-57

Regarding Southern California, the Delta Plan Draft Program EIR notes that existing water supplies are fully used, further groundwater development is limited due to declining and poor quality groundwater, and existing reductions are already challenging the area's ability to meet its water needs. (Delta Plan Draft Program EIR, pp. 3-69 to 3-70.) Similar statements can be made for water use within the San Joaquin Valley and Silicon Valley. Despite this, the Delta Plan Draft Program EIR simply assumes that Delta water deliveries can be decreased under the Delta Plan and unidentified new wells, desalination, water storage, recycled water, and transfers can easily make up this loss of water, without any disclosure or analysis of how this would be possible. Assertions in the Delta Plan Draft Program EIR without support do not constitute substantial evidence. LO2332-58

The Delta Plan Draft Program EIR contains no conclusion of significance for Impact 3-3a, the fact that it will "Substantially Change Water Supply Availability to Water Users That Use Delta Water." The two-sentence discussion of this (Delta Plan Draft Program EIR, p. 3-82) is inadequate because it does not disclose how much Delta water will be cut, and merely assumes the feasibility of the replacement of such water, despite the fact that the Delta Plan Draft Program EIR elsewhere notes the lack of groundwater, near impossibility of constructing new dams or desalination plants, and other problems that will prevent the development of new water sources. LO2332-59

The Delta Plan Draft Program EIR's discussion of the availability of Colorado River water supplies and the Quantification Settlement Agreement (QSA) (Delta Plan Draft Program EIR, p. 3-69) is also deficient, as it does not describe where or how such supplies are used or acknowledge that the QSA and related agreements are currently in litigation. The Delta Plan Draft Program EIR should recognize this, and disclose the uncertainty and possible loss of Colorado River water deliveries to certain areas, such as San Diego which relies overwhelmingly on Colorado River and SWP deliveries, further reducing the existing available water supply in those areas. LO2332-60

vi. **The Delta Plan Draft Program EIR's Analysis of Air Quality Impacts is Insufficient.**

Although the Delta Plan Draft Program EIR states that any quantification of air quality impacts would be too speculative to provide in the Delta Plan Draft Program EIR (Delta Plan Draft Program EIR, p. 9-18), the Delta Plan Draft Program EIR fails even to provide an adequate qualitative discussion of impacts. It does not provide the thresholds of significance that are used in air basins and fails to give a potential magnitude of impacts as a result of the proposed project. LO2332-61

Response to comment LO232-57

Regarding the EIR's discussion of water conveyed through the Delta, please refer to response to comment LO232-38. Regarding the impacts of the Delta Plan's policies and recommendations related to water supply, please refer to Master Response 5 and response to comment LO232-52.

Response to comment LO232-58

Please refer to Master Response 5.

Response to comment LO232-59

Regarding the EIR's programmatic approach to analyzing environmental impacts, please refer to Master Response 2. Regarding the ability of local and regional water supply projects to meet demand, please refer to Master Response 5.

Response to comment LO232-60

In response to this comment, please see text change(s) in Section 5 in this FEIR.

Response to comment LO232-61

Regarding the EIR's programmatic approach to analyzing environmental impacts, please refer to Master Response 2. The EIR discusses the Project's regulatory setting related to air quality at pages 9-5 through 9-12 of the Draft PEIR; CEQA does not require an EIR to discuss thresholds of significance used by other agencies.

Further, the Delta Plan Draft Program EIR provides no analysis of the types of impacts that might occur within each air basin, instead providing just a couple of paragraphs of general discussion to describe significant impacts that might occur state-wide. For example, is the Central Air Basin at more risk for particulate emissions as a result of the potential fallowing of thousands of acres of agricultural lands due to the proposed project's reductions in supplies of water conveyed through the Delta? Would the San Diego Air Basin experience a proportionally greater impact than other air basins due to the fact that the bulk of the water supply in that area is conveyed through the Delta – and thus a proportionally large amount of replacement facilities would have to be built to replace that water? Are certain air basins (i.e., coastal basins) more likely than others to bear the impacts of desalination plants? The DSC should significantly expand its discussion to actually analyze on a basin-by-basin level what impacts are likely to result.

LO232-62

Furthermore, the Delta Plan Draft Program EIR provides no real discussion of sensitive receptors or what specific pollutants those receptors may be exposed to. Although the Delta Plan Draft Program EIR states that impacts to sensitive receptors may be significant (or insignificant), the Delta Plan Draft Program EIR does not clarify what those actual impacts are. The Delta Plan Draft Program EIR should disclose which criteria pollutants, hazardous materials, and/or toxic substances may result from the proposed project's implementation at the local level and, further, to disclose what medical conditions (asthma, cancer, lung development problems, etc.) may result from those emissions. It is not enough to merely state that significant impacts may result – the DSC must describe the connection between the potentially significant emissions and the actual health risks that may occur. (See *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1219 [EIR struck down where it “failed to correlate the identified adverse air quality impacts to resultant adverse health effects”].) Further, the Delta Plan Draft Program EIR should identify whether certain communities or schools are at more risk than others for being exposed to such pollutants based on those communities' proportionate need for replacement water facilities.

LO232-65

vii. The Delta Plan Draft Program EIR's Analysis of Greenhouse Gases (GHG) is Insufficient.

The Delta Plan Draft Program EIR states that any quantification of greenhouse gases (GHG) emissions would be too speculative because of the DSC's uncertainty in terms of what would be built (Delta Plan Draft Program EIR, p. 21-11.) Yet, again, the Delta Plan Draft Program EIR fails even to provide an adequate qualitative discussion of impacts. As examples, the Delta Plan Draft Program EIR fails to discuss how the fallowing of thousands of acres of agricultural lands (lands which previously grew crops or trees which remove CO2 from the air) would contribute to climate change. Similarly, the Delta Plan Draft Program EIR mentions the possibility of the construction and operation of desalination or water reclamation plants as potential sources of replacement drinking water, yet the Delta Plan Draft Program EIR fails to discuss the fact that both of these require massive amounts of electricity to process and treat water – electricity generation being one of the primary ways that GHGs are generated. As yet another issue, if the proposed project is going to generate mass quantities of GHGs through the construction and operation of replacement water supply facilities, those GHG emissions will worsen the already existing global warming phenomenon. The Delta Plan Draft Program EIR does not mention this fact and does not analyze the true on-the-ground impacts of that worsened

LO232-64

Response to comment LO232-62

As described in Section 2B of the Draft Program EIR, the Delta Stewardship Council does not propose or contemplate directly authorizing any physical activities. Rather, through the Delta Plan, the Delta Stewardship Council seeks to influence the actions, activities, and/or projects of other agencies, the details of which would be under the jurisdiction and authority of the agencies that will propose them in the future and conduct future environmental review. Without specific details of future projects, it is not possible for the EIR to provide quantitative analysis of the impacts of such projects, nor is it possible for the EIR to project the location of the projects that the Delta Plan may encourage, as further explained in Master Response 2.

Response to comment LO232-63

Please refer to Master Response 2.

Response to comment LO232-64

The EIR considers the contributions to greenhouse gas emissions from potential actions including land fallowing, water supply reliability projects, as well as long term operation of some potential projects including conversion or fallowing of agricultural land in Section 21, and concludes that the impact of these contributions would be significant and unavoidable.

As Section 21 of the EIR explains, climate change is a cumulative problem that occurs on a global scale. Describing the specific impacts of the Project's contribution to greenhouse gas emissions is impossible.

climate change condition. The DSC should revise the Delta Plan Draft Program EIR to provide a much more detailed discussion of climate changes around the state, including discussing what impacts certain communities may see (i.e., the impacts of global warming are different depending on whether one lives in a coastal community, the Delta area, the central valley, or the mountains).

LO232-64

viii. The Delta Plan Draft Program EIR's Analysis of Biological Resources is Insufficient.

The Delta Plan Draft Program EIR ignores or downplays major historical changes to the system. In particular, the extraordinary increase in the cross section and volume of the Sacramento River from the confluence up to Rio Vista. The San Joaquin River has also been engineered to be deeper than it was historically. The effect of these changes has been to significantly alter the salinity/flow relationships. Much more water is needed now to achieve the same salinities as before development. Additionally, suspended sediments are lower in recent years. However, the decline in Suisun Bay turbidity in the summer and fall should largely be attributed to reductions in phytoplankton densities, resulting from the invasion of the clam *corbula* and increased nitrogen: phosphorus ratios. The best available science suggests that food, predators, and temperature have driven delta smelt populations. (See Maunder, Mark and Deriso, Richard, *Can. J. Fish. Aquat. Sci.* Vol. 68, 2011. 1295 – 1306.) The Delta Plan Draft Program EIR should include this information rather than relying upon speculation.

LO232-65

i. The Structure and Format of the Delta Plan Draft Program EIR Do Not Allow for Informed Public Review and Decision Making.

The fundamental purpose of an environmental impact report is to inform the public and agency decision-makers of the potentially significant environmental effects of a project, to identify ways to minimize those effects, and to describe reasonable alternatives to the proposed project. (CEQA Guidelines, §15121.) A well-organized and readable environmental impact report is essential to achieving these fundamental purposes. The Supreme Court has held that an environmental impact report must be readily understandable by the public and agency decision-makers. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412.) To help achieve these purposes and to reduce paperwork and delay, CEQA further suggests that agencies eliminate repetitive discussions of the same issue in an environmental impact report by using environmental impact report on programs, policies, or plans and tiering from report of broad scope to that of a narrower scope. (CEQA Guidelines, §§ 15006(m) & 15152.)

LO232-66

The Delta Plan Draft Program EIR includes extensive repetitive discussions of the same impacts for different aspects of the proposed project which results in the inclusion of hundreds of unnecessary pages. Under each topical section of the Delta Plan Draft Program EIR (e.g., biology, air quality, noise, etc.), there are separate discussions of components of the proposed project (e.g. Reliable Water Supply, Delta Ecosystem Restoration, Water Quality Improvement, Flood Risk Reduction, Protection and Enhancement of Delta as an Evolving Place) and the likely types of projects that could potentially occur under each. Generally, this might be an acceptable approach to evaluating the impacts of a plan. However, in this case, the discussion under each of these topics is virtually the same. The extreme redundancy within the document means that the

Response to comment LO232-65

Comment noted; the requested change would not affect the evaluation of impacts and determination of significance.

Response to comment LO232-66

Please refer to Master Response 2.

public and decision-makers have to read and digest hundreds of unnecessary pages, just to reach the same, repetitive conclusions. This greatly diminishes the usefulness of the Delta Plan Draft Program EIR to the public and decision-makers.

LO232-66

However, Section 13 on Mineral Resources takes a different approach in which components are lumped into single discussions under each topical resource. This section is far easier to read and understand with apparently little or no loss of substance. The entire Delta Plan Draft Program EIR should be re-written using this approach to make the document less redundant.

LO232-67

Additionally, the Delta Plan Draft Program EIR relies excessively on lists of cross-references to various aspects of the proposed project and to other sections of the Delta Plan Draft Program EIR. One of many such examples is found on page 2A.5, line 23 of the Delta Plan Draft Program EIR. This approach of using excessive cross references requires the reader to constantly jump back and forth from place to place, diminishing the Delta Plan Draft Program EIR's usefulness. Instead, the document should provide summaries of the key policies that are relevant to the discussion.

LO232-68

Finally, the Delta Plan Draft Program EIR includes a massive amount of unnecessary background information which makes the document difficult to read and which is never used in the discussion of the Plan's impacts. CEQA provides that agencies should reduce delay and paperwork in preparing EIRs. Specifically, the CEQA Guidelines state that EIRs should be analytic rather than encyclopedic and that documents should mention only briefly issues other than significant ones. (CEQA Guidelines, §§ 15006(o)-(p) & 15143.) The CEQA Guidelines also provide that the description of the environmental setting shall be no longer than is necessary to provide an understanding of the significant effects of the proposed project and its alternatives. (CEQA Guidelines, § 15125(a).)

LO232-69

Notwithstanding these admonitions, the Delta Plan Draft Program EIR contains extensive and repetitive discussions of unnecessary background information. In several chapters, the extent of the environmental setting information far exceeds that necessary to discuss the environmental impacts. For example in Section 17 - Public Services, more than half the material consists of a description of the environmental setting even though there are no significant impacts expected on any those resources. This unfocused, encyclopedic approach to the EIR, along with the numerous substantive problems identified above, overwhelms the reader with unnecessary information and contributes to the document's lack of value as a public disclosure and decision-oriented document.

LO232-70

The inadequate overall structure and format of the Delta Plan Draft Program EIR, as well

LO232-71

Response to comment LO232-67

Please refer to Master Response 2.

Response to comment LO232-68

Please refer to Master Response 2.

Response to comment LO232-69

Please refer to Master Response 2.

Response to comment LO232-70

Please refer to Master Response 2.

Response to comment LO232-71

Please refer to Master Response 2.

as the extensive redundancy of discussions precludes meaningful public review and makes the document essentially useless as an informational decision-oriented tool.

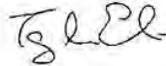
10232-71

Thank you again for the opportunity to submit these comments.

Sincerely,



Daniel G. Nelson
Executive Director
San Luis & Delta-Mendota Water Authority



Terry L. Erlewine
General Manager
State Water Contractors

Attachment

No comments

- n/a -

Response to comment LO232-72

Comment noted.

Attachment 1

The San Luis & Delta-Mendota Water Authority

The San Luis & Delta-Mendota Water Authority is a joint powers authority formed pursuant to California Government Code section 6500 et seq. The Authority consists of 29 member public agencies, 27 of which contract with Reclamation for water supply from the federal Central Valley Project for distribution and use within areas of San Joaquin, Stanislaus, Merced, Fresno, Kings, San Benito, and Santa Clara Counties, California. Collectively, the member agencies of the Authority deliver water to more than 1 million residents and more than 2,000,000 acres of agricultural lands. The Authority's member agencies are: Banta-Carbona Irrigation District; Broadview Water District; Byron Bethany Irrigation District (CVPSA); Central California Irrigation District; City of Tracy; Columbia Canal Company (a Friend); Del Puerto Water District; Eagle Field Water District; Firebaugh Canal Water District; Fresno Slough Water District; Grassland Water District; Henry Miller Reclamation District #2131; James Irrigation District; Laguna Water District; Mercy Springs Water District; Oro Loma Water District; Pacheco Water District; Pajaro Valley Water Management Agency; Panoche Water District; Patterson Irrigation District; Pleasant Valley Water District; Reclamation District 1606; San Benito County Water District; San Luis Water District; Santa Clara Valley Water District; Tranquillity Irrigation District; Turner Island Water District; West Side Irrigation District; West Stanislaus Irrigation District; Westlands Water District.

State Water Contractors, Inc.

The State Water Contractors, Inc. is a non-profit association of 27 public agencies from Northern, Central and Southern California that purchase water under contract from the California State Water Project. Collectively, the member agencies of the SWC deliver water to more than 25 million residents throughout the state and more than 750,000 acres of agricultural lands. The SWC's member agencies are: Alameda County Flood Control and Water Conservation District Zone 7; Alameda County Water District; Antelope Valley-East Kern Water Agency; Casitas Municipal Water District; Castaic Lake Water Agency; Central Coastal Water Authority; City of Yuba City; Coachella Valley Water District; County of Kings; Crestline-Lake Arrowhead Water Agency; Desert Water Agency; Dudley Ridge Water District; Empire-West Side Irrigation District; Kern County Water Agency; Littlerock Creek Irrigation District; Metropolitan Water District of Southern California; Mojave Water Agency; Napa County Flood Control and Water Conservation District; Oak Flat Water District; Palmdale Water District; San Bernardino Valley Municipal Water District; San Gabriel Valley Municipal Water District; San Geronimo Pass Water Agency; San Luis Obispo County Flood Control & Water Conservation District; Santa Clara Valley Water District; Solano County Water Agency; Tulare Lake Basin Water Storage District.

LO232-72