



April 4, 2011

Chairman Phillip Isenberg
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA
95814

Re: Recommendations Regarding the Second Staff Draft Delta Plan

Dear Chairman Isenberg,

On behalf of the Natural Resources Defense Council, I am writing to submit comments and recommendations regarding the Council's second staff draft Delta Plan. This draft contains an excellent framework of components for an effective Delta Plan. However, in order to ensure that the Council achieves its ambitious goals, the final plan will require significant additional detail. Our comments are designed to provide modest additional detail in the areas of ecosystem restoration, water management and finance.

These recommendations include proposed language that may be inserted in the third draft plan. These comments also include brief discussions of the rationale for each recommendation. Please do not hesitate to contact us if additional explanation of our proposals or rationale would be helpful.

Manage Water Resources (Chapter 4)

Proposal: Insert a new policy after WR P8 on page 31.

The development of the BDCP shall include the following analysis and plan elements, in order to ensure its compliance with the NCCPA and SB 7X 7, its consistency with the co-equal goals, its ability to be financed and its consistency with the best available science. The BDCP shall:

- Focus on improving the reliability and predictability of Delta supplies, rather than focusing narrowly on increasing Delta diversions – a project purpose that is inconsistent with the co-equal goals and the state mandate to reduce reliance on the Delta.

- Analyze the public trust flow criteria that were developed by the State Water Board to inform the analysis of the BDCP. This analysis should include flow and operational criteria that would reduce Delta diversions in comparison with current requirements, consistent with the State Water Board's CEQA scoping comments.
- Include an analysis of water supply investments, such as water use efficiency, groundwater management, water recycling and stormwater capture, which could reduce reliance on Delta supplies.
- Analyze a full range of conveyance capacities, under a full range of operational criteria. The analysis should also model the potential impacts and benefits of increased South of Delta storage.
- Focus on the cost-effectiveness of water conveyance capital investments, particularly regarding the water supply and economic performance of conveyance capacities and designs under operational criteria that provide significant improvement in estuarine habitat conditions.
- Provide for timely, independent scientific review at critical points in the planning process, such as the development of biological objectives, operational criteria, methodology to evaluate potential effects, the Effects Analysis and the adaptive management program.
- Include a permit and governance structure that is consistent with the co-equal goals (i.e. provides all major stakeholder groups with equal access to and influence over the program).

Rationale: The BDCP and the DSC are parallel planning efforts. To maximize the BDCP's likelihood of success, these proposals are intended to assist the BDCP in designing a plan that can be integrated into the Delta Plan. The above recommendations are consistent with the requirements provided to the Council and the BDCP by SB 7X 7. In addition, the discussion of the legislative requirement to reduce reliance on the Delta is consistent with the Council's November 15, 2010 letter to Byron Buck, Executive Officer of the State and Federal Contractors Water Agency.

Proposal: Insert the following new recommendation on page 32.

The Bureau of Reclamation should analyze the CVP's exceedence curve to identify the amount of water that Project deliveries will exceed in 25 percent of years. The Bureau should renegotiate expiring CVP contracts to reflect realistic contract totals that do not exceed this amount. The reliability of deliveries should be calculated based on the regulatory requirements and the levels of demand and development at the time the contract is signed.

Proposal: Insert the following new policy on page 31, at line 19.

The Department of Water Resources should analyze the State Project's exceedence curve to identify the amount of water that Project deliveries will exceed in 25 percent of years. DWR should renegotiate SWP contracts to reflect realistic contract totals that do not exceed this amount. The reliability of deliveries should

be calculated based on the regulatory requirements and the levels of demand and development at the time the contract is signed.

Rationale: The water resources in the Bay-Delta are over-allocated substantially. For example, the State Board has determined that total water rights in the watershed are approximately eight times the average flows in the system. In addition, the 2009 State Water Project Delivery Reliability Report determined that the State Project's maximum deliveries, under historic hydrological conditions, are 81 percent of contract amounts (p. 43). Excessively high water diversions have damaged the Bay-Delta ecosystem. In addition, unrealistically high contract totals encourage unnecessary conflicts. To help achieve the co-equal goals, water contract totals should be adjusted to a level that reflects realistic deliveries under anticipated hydrology and environmental protections. In short, CVP and SWP contracts should be honest about how much water they can deliver.

It is also important to note that these modifications in CVP and SWP contract totals would not represent de facto diversion caps. Both the CVP and SWP have programs that provide for surplus water deliveries, when conditions allow. Thus, this proposal would provide more reliable deliveries under CVP and SWP contracts, as well as surplus water deliveries, when available.

Ecosystem Recommendations (Chapter 5)

Proposal: Insert the following new policy on page 35, at line 5.

The Bay-Delta Conservation Plan shall develop a comprehensive set of specific, measurable and time bound biological objectives to guide the development of the plan, inform the evaluation of effects, shape ongoing monitoring efforts, serve as the basis of ongoing adaptive management, and allow an objective evaluation of BDCP performance over time. These objectives should be developed pursuant to the April 29, 2010 federal agency "White Paper on Application of the 5-point Policy to the Bay Delta Conservation Plan."

Rationale: The BDCP process has not yet completed the task of establishing biological objectives to drive that process. These objectives are essential to the success of the BDCP, to achieving the co-equal goals, and to the BDCP's ability to meet the requirements of the NCCPA.

Proposal: Convert ER R2 to a policy, rather than a recommendation. Also insert the following language at the end of ER R2.

This adaptive management program should include a decision-making process and assurances designed to assure prompt, science-driven decision-making and the achievement of biological objectives.

Rationale: The NCCPA and SB 7X 7 require adaptive management programs,

therefore, this should be treated as a policy, not a recommendation. The BDCP will only succeed over the long-term if it includes a well-developed adaptive management program designed to respond to changing conditions in a highly complex and dynamic ecosystem. The success of this adaptive management program will be dependent upon its decision-making process and its ability to take action promptly and decisively to ensure the achievement of biological objectives.

Proposal: Insert the following language on page 34 at line 29, after the word “standards”.

“for the Bay-Delta estuary by 2014 or prior to the Board’s approval of the BDCP, whichever is earlier, and”

Rationale: The current State Board flow requirements (e.g. outflow objectives and export limits) were developed nearly 20 years ago. The past two decades have clearly demonstrated that these requirements are inadequate to ensure adequate protection of public trust resources. As a result, water management is now driven to a significant extent by requirements under ESA and CESA. These current requirements are designed only to prevent jeopardizing the survival of listed species. As a result, other important beneficial uses, such as water quality, non-listed species and commercial and recreational fishing, are not adequately protected under existing State Board requirements. Achieving the co-equal goals, specifically the restoration of a full suite of ecosystem values, will require a more comprehensive and adequate set of State Board flow requirements. Given the potential of the BDCP to reshape the estuary, the State Board should establish these new flow requirements prior to the completion of the BDCP process.

Finance Plan (Chapter 9)

Proposal: Insert the following language in place of the first sentence in FP R7 on page 60.

Continue exploration of a water diversion fee and a Delta export feet by the Council and the State Water Resources Control Board.

Proposal: Insert the following language following the words “the Delta Protection Commission.” in FP R7 on page 60.

The top priority of such a diversion and export fees should be to support ecosystem restoration efforts. This system of fees should be founded on the responsibility of all water users under the public trust to contribute to ecosystem restoration. Development of these fees should consider the following:

- Long-term habitat restoration funding required to achieve the co-equal goals.

- An appropriate share of public funding for ecosystem restoration efforts, as well as likely state and federal funding, given the pressures on the state and federal budgets.
- Contributions by water users to other system-wide ecosystem restoration efforts. Site specific, water agency local mitigation costs (e.g. the installation of fish screens) should not be considered for crediting in the development of these user fees.

These water fees should not be used for the purchase of water to achieve compliance with regulatory requirements.

Rationale: Given the anticipated benefits of the BDCP, diversion fees to support habitat restoration are consistent with the beneficiary pays principle. Assured funding for the BDCP is also required by the NCCPA. In addition, diversions fees are consistent with the “stressors pay” principle discussed in the draft plan. These fees should support a system-wide program to restore ecosystem health and mitigate for the cumulative impacts of water diversions. Finally, given the failure of the Environmental Water Account, these funds should not be used to purchase water in order to comply with regulatory requirements. Such market-based mechanisms can be useful in other settings, but the EWA and other similar efforts have not proven to be effective, long-term tools in the Bay-Delta.

Proposal: Insert the following specific financing principles to the discussion of general principles on page 48, at line 35.

Financing Principles

- The finance plan should be based on clear guidelines and a transparent, analytically-based process.
- State and federal public funds should be reserved for public benefits.
- The development of information related to financing (such as the identification of beneficiaries and stressors and detailed financing scenarios) should be undertaken simultaneously with the development of major capital decisions, in order to inform planning efforts. The development of finance plans should not be delayed until the conclusion of capital planning efforts.
- The finance plan should include mechanisms to ensure that user fees remain dedicated to their intended purpose. Given state and federal budget constraints, care must be taken to assure users that their contributions will not be diverted to other purposes.
- Targeted finance plans should be developed for major Delta Plan activities (e.g. habitat restoration, flood management, regional water supply investments and water conveyance.) Beneficiaries and stressors should be identified in each of these areas, and user fees should be developed to match these stressors and beneficiaries with planned investments in each of these areas.

- Existing contributions for closely related activities should be considered for crediting. Site specific contributions by agencies should not be credited (e.g. the installation of fish screens and waste treatment costs.)
- To the extent possible, user fees should be volumetrically based – both with regard to water diversions and the discharge of contaminants.

Rationale: Several years ago, the legislature considered a proposal to create an all purpose “Resource Investment Fund”. The RIF proposal was widely opposed by water users and defeated soundly, as a result of several understandable objections. In particular, water users objected to the lack of an investment strategy for the RIF. Many water users were concerned that their contributions could be invested in tools from which they would receive no benefit. For example, users upstream of the Delta did not want to be forced to contribute to the maintenance of Delta levees, and water agencies that do not receive water from the state and federal water projects did not want their contributions to be invested in CVP and SWP improvements. By contrast, a system of targeted fees could be clearly linked to benefits and impacts. Such fees would be more clearly justifiable and more politically viable. Such a financing strategy also may be treated as a fee under state law.

A successful financing plan should match stressors and beneficiaries with specific activities. For example, we recommend that the Council consider the following approaches to financing

- Financing for Delta flood management should consider user fees based on the benefits received by Delta communities and agriculture, Delta infrastructure (e.g. highways, railroads, gas and power lines and aqueducts) and Delta water exports.
- Financing for habitat restoration should be based on contributions from all water users in the watershed.
- Pursuant to state law, any new Delta conveyance facilities should be financed by the users receiving water exported through the facility.
- Regional investments in water supply tools designed to reduce reliance on imported water should be financed by water users who receive benefits from those investments. (See discussion below of a public goods charge.)

Proposal: Insert the following language prior to the sentence beginning “A key advantage” on line 2, page 60.

The primary purpose of a public goods charge should be to fund investments in efficiency, water recycling, groundwater clean-up, stormwater capture and other tools that can reduce reliance on imported supplies.

Proposal: Insert the following language prior to the sentence beginning “A public goods charge” on line 39, page 60.

A public goods charge could ensure a minimum investment by all urban and

agricultural water agencies in water user efficiency and other tools that can reduce reliance on imported water. It could also provide consistent funding over time.

Rationale: The top priority of the CPUC public goods charge (PGC) created by the legislature in 1996 is to provide financing for energy efficiency. This tool has been a major success, helping California to lower its per capita kWh consumption to 33 percent lower than the national average. Likewise, the CPUC's recommended water public goods charge is focused on water efficiency – broadly defined -- including agricultural and urban water use efficiency, water recycling, stormwater capture and groundwater clean-up efforts. We strongly support the language in the draft that would require a volumetric approach to such fees as well as contributions by both agricultural and urban water users.

As the second draft Delta Plan indicates (p. 60) a PGC could also provide funding for ecosystem restoration and other costs. However, the State Board might be the most appropriate vehicle for an ecosystem restoration fee, given its focus on protecting beneficial uses and its water rights and public trust authorities. In addition, ecosystem restoration funding would be most appropriately linked with diversions and exports, rather than to end of water use state-wide. The state should carefully determine the approach that would be most likely to be seen as a fee, rather than a tax.

Another important difference between a PGC related to reducing reliance on imported water and one focused on ecosystem restoration is that PGC contributions to finance water supply investments could remain in the hands of regional and local water agencies (see the discussion of the Resource Investment Fund, above). On the other hand, ecosystem restoration funding should be controlled by the state and directed to a comprehensive Bay-Delta restoration effort. This funding need is highly compatible with a State Board diversion fee.

Conclusion

Thank you for considering the above proposals. We look forward to continuing to work with you to develop a practical and ambitious Delta Plan.

Sincerely,

A handwritten signature in black ink, appearing to read "Barry Nelson", written in a cursive style.

Barry Nelson
Senior Policy Analyst