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January 14, 2013

Mr. Phil Isenberg, Chairman, and Council Members  
Delta Stewardship Council  
980 Ninth Street, Suite 1500  
Sacramento, CA 95814

Submitted electronically to [recirculateddpeircomments@deltacouncil.ca.gov](mailto:recirculateddpeircomments@deltacouncil.ca.gov)

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**Subject: Sacramento Regional County Sanitation District Comments on the November 2012 Recirculated Draft Delta Plan Program Environmental Impact Report, Volume 3.**

Dear Chairman Isenberg and Council Members:

The Sacramento Regional County Sanitation District (SRCS D) appreciates the opportunity to review and comment on the Delta Stewardship Council's (Council) Recirculated Draft Delta Plan Program Environmental Impact Report (RDEIR). We have actively participated in the Final Draft Delta Plan (Delta Plan) development by attending meetings, reviewing and commenting on documents, and meeting with Council members and Council staff. This participation in the development of the Delta Plan has provided us with a wide knowledge base to evaluate the RDEIR. However, SRCS D remains concerned that the RDEIR for the Delta Plan does not adequately describe the project or its alternatives, does not provide adequate information to identify the potential environmental impacts of the project, and ignores likely impacts to SRCS D and many other stakeholders throughout the region and the state.

**Board of Directors Representing:**

- County of Sacramento
- County of Yolo
- City of Citrus Heights
- City of Elk Grove
- City of Folsom
- City of Rancho Cordova
- City of Sacramento
- City of West Sacramento

Our comments are focused on the RDEIR's analysis of the Revised Project. To the extent the Revised Project does not differ from the Proposed Project, many, if not most, of the comments we have submitted on the prior Draft Delta Plan and Draft EIR apply equally to the RDEIR 's analysis of the Revised Project Alternative. We note that most of those comments were not addressed in the November 2012 Delta Plan, or the analytical scope or approach to evaluating impacts associated with the Revised Project and therefore still apply to the Plan, DEIR, and RDEIR.<sup>1</sup> We thus incorporate by reference, our prior comments (including our February 2, 2012 comment letter on the November 2011 Draft EIR) as comments on the Revised Project Alternative and accompanying analysis. Additionally, we have attached specific comments for the November 2012 RDEIR and Delta Plan.

- Stan Dean  
District Engineer
- Ruben Robles  
Director of Operations
- Prabhakar Somavarapu  
Director of Policy & Planning
- Karen Stoyanowski  
Director of Internal Services
- Joseph Maestretti  
Chief Financial Officer
- Claudia Goss  
Public Affairs Manager

<sup>1</sup> For example, one of the District's primary concerns with the Proposed Project and Draft EIR analysis was the DEIR's failure to explain and address the effects of incorporation of the Bay Delta Conservation Plan (BDCP) into the Delta Plan. That key issue remains unaddressed, as noted further in these comments.

Our general comments on the RDEIR focus on the following themes.

- Project Description - Scope of Revised Project
- Environmentally Superior Alternative - Foundation of Determination
- Mitigation - Existing South Delta exports
- Financing - Project Feasibility
- BDCP - Incorporation into the Delta Plan

Based on the substantive comments provided below, in the attachments, and those of the other Delta stakeholders, SRCSD believes that the DEIR and RDEIR fail to meet CEQA's informational mandate. In accordance with CEQA Guidelines Section 15088.5, SRCSD respectfully requests that the entire Draft EIR be modified to more adequately evaluate the Delta Plan's scope, regulatory effect, and potential significant environmental impacts and that it then be recirculated for a 90-day notice public review and comment period.

### **Project Description**

The description of the Revised Project Alternative is confusing, and the RDEIR analysis is misleading about the scope of the Revised Project. According to the RDEIR, the Revised Project includes the entire Delta watershed area, and the RDEIR implies that all facets of the Delta Plan apply to this larger area. (See, e.g., page 2-4, lines 40-43 [Project Description: Revised Project would extend application of recommendations to all water users in the Delta watershed]; p. 3-2 [Water Resources: "The Revised Project would apply to areas upstream of the Delta, unlike the Proposed Project."].) The RDEIR repeatedly discusses impacts of potential projects that might occur within the watershed, such as water recycling and stormwater projects.

However, by statute, the Delta Plan applies only to "covered actions." Covered actions are defined, in pertinent part, as plans, programs or projects (as defined under CEQA) that occur, in whole or in part, within the boundaries of the Delta and that are covered by one or more provisions of the Delta Plan policies. (Water Code, § 85057.5(a) (1), (3).) It is unclear how the Revised Project extends the coverage of the Delta Plan to areas upstream of the Delta (at least as to Delta Plan recommendations that are not policies), unless the Revised Project seeks to expand the definition of covered action, which can only be done by the Legislature. The EIR should be revised to clarify under what specific circumstances the Delta Plan would apply outside the Delta itself. The lack of clarity regarding the Revised Project scope compromises the impact analyses, as the RDEIR repeatedly addresses impacts that could occur in the watershed outside of the Delta. (See, e.g., page 3-3, lines 14-16, page 3-4 lines 11-13 as page 25-6, lines 22-24.) If these impacts are not actually likely to occur, because they result from the hypothetical implementation of projects that are not within the regulatory scope of the Delta Plan, the impact analyses addressing out of Delta watershed projects would appear to be misleading, if not meaningless and render the entire EIR inadequate as an informational document.

The proposed project includes the policies and recommendations described in Appendix C. This finite list of specific policies and recommendations were taken from the fifth version of the draft Delta Plan. The RDEIR should clearly state that any other policies or recommendations beyond

those included in Appendix C, or any other changes to the Delta Plan (e.g. future incorporation of the BDCP) are not divulged and/or addressed by this RDEIR and must be covered in a future PEIR prior to implementation.

Regarding the new water quality recommendations, we have concerns that the Delta Plan is overlapping with independent responsibilities of EPA and the State and Regional Water Boards for implementing the Clean Water Act and the Porter Cologne Water Quality Control Act. For example WQ R1 states that water quality should be maintained at a level that enhances beneficial uses, which may not be a feasible or reasonable recommendation. We are requesting that the word “enhance” be eliminated or qualified to reflect the notion that enhancement may only be possible in limited circumstances. Further, the Porter-Cologne Water Quality Control Act (Porter-Cologne) requires “reasonable” protection of beneficial uses. To the extent that enhancing beneficial uses would not be reasonable, this recommendation is inconsistent with Porter-Cologne.

WQ R3 is another example where the recommendation suggests that State and Regional Boards should evaluate and propose “special water quality protections” in undefined areas of the Delta. There is a concern with the open-ended nature of this statement. Any “special water quality protections” may only be adopted in accordance with Porter-Cologne by amending applicable water quality control plans. To ensure that the proper process is understood, we request that the statement in question be modified to clarify that a public-process pursuant to Porter-Cologne will be followed in the event a shift in water quality management or regulation from adopted approaches is proposed. The RDEIR should recognize that even though recommendations are not regulatory, they will be used in the future to guide actions taken in the Delta and the Delta watershed.

The Delta Plan RDEIR presumes that the Proposed Project (Delta Plan implementation) will create long term ecosystem benefits, as a matter of course. An element of the Proposed Project is to encourage and influence more restrictive requirements on various source categories, including wastewater treatment facilities. In the water quality and ecosystem restoration area, the benefits of increased wastewater treatment beyond the currently permitted level have not been established. The benefits of “stressor reduction,” as a general concept, are implied, but not articulated or defended.

The general concept that stressor “reduction,” at any level, will produce net positive outcomes is problematic. Projects required on the basis of “stressor reduction” may, in fact, provide little benefit to beneficial uses. On page ES-7, it is stated that “the Delta Plan involves an environmental tradeoff between short-term construction impacts and long-term impact reductions related to water reliability, water quality, flood risk and ecosystem health.” This statement presupposes that all of the projects proposed in the Delta Plan will, with certainty, accomplish the long term impact reductions, that such reductions have been clearly defined, and that the improvement is measurable. At least with regard to water quality and ecosystem health, such certainty does not exist.

## **Environmentally Superior Alternative**

Like the analysis of the Proposed Project in the Draft EIR, the RDEIR does not provide clear evidence to support its determination that the Revised Project would be environmentally superior to the No Project Alternative. Throughout the RDEIR it is stated that the Revised Project would merely "encourage" actions that "could" lead to what are very general categorizations of environmental benefit or improvement. An EIR's determinations must be based on substantial evidence. Substantial evidence is defined as "facts, reasonable assumptions predicated on facts, and expert opinion supported by facts." (Pub Resources Code, §§ 21080(e), 21082.2(c); CEQA Guidelines, §§ 15064(f) (5), 15384). Speculation and unsubstantiated opinion or narratives are *not* substantial evidence. (*Id.*) The EIR in various areas gives the environmental "edge" to the Revised Project. For example, in the discussion comparing water resources impacts of the alternatives, the RDEIR states, "Over the long term, the Revised Project, the Proposed Project Alternative and Alternatives 1 and 2 would provide benefits to water quality because they would include facilities to prevent further declines in surface water quality." (RDEIR, page 25-6, lines 38-40.)

The No Project Alternative includes numerous ongoing regulatory processes designed to address the issues identified in the Delta Plan, as well as planned and mandated upgrades to wastewater treatment facilities throughout the Delta watershed. By contrast, the RDEIR acknowledges that the Delta Plan will not directly result in the construction of any specific projects or adoption of any regulations designed to address water quality. Although it imposes an expansive new regulatory process as well as increased cost and risk of delay and litigation for agencies and entities that have any interest in the Delta or Delta resources, the Delta Plan appears to add nothing of substance to the No Project condition. Due to the admitted lack of any real regulatory effect, conclusions that the Delta Plan will lead to measurable improvements over existing conditions amounts to mere speculation or unsubstantiated narrative. For these reasons, the RDEIR's conclusion that the Revised Project is the environmentally superior alternative lacks foundation.

## **Mitigation**

The RDEIR should identify mitigation for the continued use of the South Delta pumps into the future. Such continued use will occur under any of the alternatives considered, and is recognized to have caused significant long term impacts (losses far exceeding the 110 million fish that were "salvaged" through entrainment, pre-screen predation and salvage operations during past operation of the State and federal water projects). Implementation of a north Delta intake under the BDCP is not mitigation for the significant loss of fish that will continue to occur in the South Delta, since exports from the South Delta is projected to still represent the vast majority of water exported by the State and federal projects (BDCP Effects Analysis, Appendix 5.B, Entrainment, 3-30-12).

Mitigation for the continued operation of the South Delta pumps must also address the indirect effects of South Delta exports, altered flow regime, modified salinity regime, increased residence

time all, of which increase the suitability of the Delta to invasive species, Microcystis, and impact the Delta food web.

Since one of the co-equal goals of the Delta Plan and its enabling legislation is “water supply reliability,” the RDEIR needs to clearly state that water supply reliability is not in any way synonymous or equivalent to the concept of increasing Delta exports. The RDEIR also needs to address whether reducing exports to levels which result in a sustainable Delta ecosystem will enhance the reliability of those reduced export amounts.

### **Financing**

We also have a serious concern regarding the project feasibility due to the lack of adequate funding. The RDEIR should disclose key elements of a Finance Plan and discuss the likelihood that Delta Plan funding will be available and the timing of any such funding. Without this information the public cannot understand the relative feasibility and thus merits, of the proposed and revised project and the alternatives. SRCSD believes the overarching principles for developing a viable finance plan include identifying programs and projects and their respective funding sources, establishing an equitable assignment of costs based on a clear nexus, avoiding duplication (entities should not have to pay more than once), and encouraging through incentives investment in monitoring, research, and enhanced projects that provide an extra benefit to the Delta.

### **BDCP**

Significant questions regarding the effect of automatic incorporation of the BDCP into the Delta Plan remain. Given that the BDCP is required by law to be incorporated into the Delta Plan, it cannot be considered a "potential" project or a cumulative project; it is a reasonably foreseeable future element of the Delta Plan itself. The RDEIR should explain how the regulatory effect of the BDCP will change if it is incorporated into the Delta Plan, including the question of whether provisions of the BDCP will be deemed to constitute "provisions" of the Delta Plan with which all covered actions under the Plan will need to demonstrate consistency. If so, then the BDCP's incorporation into the Delta Plan would dramatically expand the scope of both the BDCP and the Delta Plan, converting what was intended to be voluntary participation in an Habitat Conservation Plan into a mandatory regulatory program affecting a much wider range of actions within the Delta. The environmental impacts of the proposed conveyance (in so far as it is currently described in the draft BDCP documents) should be evaluated in detail in the Delta Plan EIR, and the environmental impacts of the associated conversion of land and water to restored natural habitat should be fully described, using maps and acreage already known to be targets of restoration in the BDCP.

To the extent the RDEIR does attempt to evaluate the BDCP, the analyses are confusing and inconsistent with CEQA's requirements for evaluation of a cumulative impact. The RDEIR lists the BDCP as a cumulative project in the Cumulative Impact section (Section 22), but also includes a section devoted only to the BDCP (Section 23), which purports to conduct a cumulative impact analysis of the Revised Project compared to the BDCP. CEQA requires that

an EIR assess whether a project's incremental contribution to a cumulative impact is cumulatively considerable, based on an assessment of the project's incremental effects viewed in connection with the effects of *past projects, the effects of other current projects, and the effects of probable future projects.*" (CEQA Guidelines, §§ 15065(a) (3) 15355(b)). An adequate cumulative impact analysis is not limited to the effect of the proposed project compared with just one other project (i.e., the Revised Project and BDCP) as appears to be the approach in the RDEIR. The RDEIR seems to be attempting two different cumulative impact analyses -- one in which the project's effects are compared to a suite of other cumulative projects, including the BDCP (Chapter 22 ), and one in which the project is compared only to the BDCP. (Chapter 23, and p. 23-3). Because the BDCP is a realistically foreseeable future phase of the Delta Plan, neither approach is appropriate. However, the second approach is also legally incorrect because it does not comply with CEQA's requirement that an EIR consider a project's contribution to the impact caused by past, current and probable future projects considered in total. Because the Draft EIR utilized the same approach, its treatment of the BDCP and cumulative impact analysis is also deficient.

### Conclusion

SRCS D appreciates the efforts of the Delta Stewardship Council and the magnitude of the tasks that lie ahead. However, SRCS D remains concerned that the RDEIR for the Delta Plan does not adequately describe the project or its alternatives, does not provide adequate information to identify the potential environmental impacts of the project, and ignores likely impacts to SRCS D and many other stakeholders throughout the region and the state. Moreover, the RDEIR fails to account for the inclusion of BDCP into the Delta Plan and the associated environmental impacts as a result of implementing the BDCP. SRCS D requests the Council not approve the DEIR and RDEIR and that the EIR be modified to more adequately evaluate the Plan's scope, regulatory effect and potential significant environmental impacts, then recirculated for a 90-day noticed public review and comment period. If you have any questions, please contact me at (916) 876-6092 or [mitchellt@sacsewer.com](mailto:mitchellt@sacsewer.com) or Linda Dorn at 916-876-6030 or [dornl@sacsewer.com](mailto:dornl@sacsewer.com).

Sincerely,



Terrie L. Mitchell  
Manager, Legislative and Regulatory Affairs

Attachment One: SRCS D Specific Comments on November 2012 Recirculated Draft Delta Plan Program Environmental Impact Report Volume 3  
Attachment Two: SRCS D Comments on the Final Draft Delta Plan November 2012  
Attachment Three: SRCS D Comments on November 2012 Proposed Rulemaking Package, Delta Plan

cc: Prabhakar Somavarapu  
Stan Dean  
Linda Dorn

## **Attachment One: SRCSD Specific Comments on November 2012 Recirculated Draft Delta Plan Program Environmental Impact Report Volume 3**

### **Executive Summary**

Table ES-1 has two different conflicting definitions for the abbreviation “S”.

**Page ES-9, lines 33-36:** The characterization that the revised project encourages more projects to improve water quality in habitat restoration areas, Suisun Marsh, and the Stockton Deep Water Ship Channel, indicates that these types of projects will only occur in these areas of the Delta. However, water quality improvement projects could occur in other areas of the Delta outside the habitat restoration areas.

### **Description of Revised Project-Section 2**

**Page 2-3, Lines 24-26:** The RDEIR refers to “improving water quality criteria” for several of the resource sections, including habitat restoration. It is not clear what the RDEIR intends by this statement. Does improving water quality criteria refer specifically to water quality improvements from flow requirements or water quality criteria used for the purpose of protecting beneficial uses and implementation of National Pollutant Discharge Elimination System (NPDES) permits. The term “water quality criteria” can have specific meaning in NPDES programs. The RDEIR should more clearly define what is meant by improving water quality criteria. Furthermore, in this section and others the RDEIR states that “The Revised Project could lead to more potential changes in the Delta...” indirectly excluding the Delta Watershed, which is confusingly included in other discussions of the Revised Project area.

**Page 2-12, Table 2-2:** The RDEIR table includes an entry “Workshops to Address Stressor Impacts.” The description in the table refers to item “ER R7,” which is a requirement for hatcheries managing listed species. Please provide clarification if these workshops are intended only for hatchery authorities and regulators or if it is intended as a more general Delta and Delta watershed “stressor” workshop.

**Page 2-17, Lines 22-23 and Page 2-18, Lines 1-3:** Revised Project WQ R3 recommends that the State and Regional Water Boards enact special protection status to Delta waters when regulating NPDES discharges. While we recognize the critical importance of Delta water quality, enacting such protections without an open, reasonable, and scientifically based process may have unintended impacts. In some cases, specific controls and regulations can benefit removal of one pollutant, but may have unintended consequences on other pollutants or consume more energy and create greenhouse gases. The RDPEIR should clarify the specific nature of the proposed “protections”, the rationale for the establishment of such protections, the special authority to be granted to regulatory agencies, and the potential environmental impacts resulting from this new designation status.

The language in WQ R3 “...or other areas of the Delta where new or increased discharges of pollutants could adversely impact beneficial uses” implies the whole Delta is potentially subject to special water quality protections. The Water Boards should follow existing basin planning processes for establishing any special water quality protections in the Delta.

**Page 2-24, Section 2.1.8:** The Funding Principles to Support the Coequal Goals section should clearly identify all sources of funding (existing and proposed) that will be used to finance programs and projects at the local, regional, state, and federal level in the Delta. Moreover, the RDEIR does not address the potential environmental impacts that may arise as a result of the development of a financing plan. The financing plan ultimately selected may have potentially significant impacts on what Delta projects will be funded; that should be evaluated as part of the RDEIR. For example, to the extent that the proposed “stressor fees” place a significant fiscal burden on local governments, those agencies may be forced to defer or forego other improvements or programs designed to improve water quality or protect the environment. It is also important for the RDEIR to discuss legal limitations on funding sources, including Propositions 218 and 26.

The RDEIR should include a broader discussion of Funding Principles, to help guide the development of a more comprehensive finance plan. For example funding principles to support the coequal goals should include the following:

- Clear delineation and prioritization of local, regional, state, and federal Delta projects/programs and funding sources
- Clear nexus between the paying entity and the project/program expenditure providing an equitable assignment of costs
- Duplication should not occur, entities should not pay twice
- Incentives for useful actions
- Opportunity for local agencies and NGO partners to obtain funding sources such as grant and loans, including support for projects that are required by NPDES permits.

**Page 2-25, lines 7-15:** FP R1 (Conduct Current Spending Inventory) Local and regional entities provide funding for many Delta projects/programs that work towards achieving the co-equal goals. A complete inventory all the local, regional, state, and federal projects/programs in the Delta and the Delta watershed should be conducted before developing a finance plan.

FP R2 (Develop Delta Plan Cost Assessment) It is important that cost assessments recognize funding already provided by local governments on the same environmental issues, to ensure that costs are not duplicated. This can also be used to determine if there are duplicative costs that can be eliminated, thereby creating a cost saving to be used on Delta projects.

RF R3 (Identify Funding Gaps) Revenue that has not been approved should not be assumed to be available.

#### **Biological Resources-Section 4**

Overall the mitigation measures (as they are tabulated in Table ES-1 and detailed at the end of Section 4) appear overly focused on mitigating for construction-phase impacts or loss of habitat in the project footprint (i.e., physical extent of habitat). Mitigation measures should be discussed that would alleviate longer-term (potentially far field) consequences for biological resources owing to changes in water quality or biogeochemical processes, primary production, predator-

prey interactions, food web structure, and other ecosystem functions, that might result from the long term operation and maintenance of projects.

**Page 4-37, lines 4-6:** This mitigation measure leaves out effects of flow patterns and water quality effects for non-migratory aquatic life. It is confusing why pollution is listed as potentially causing disruption in fish migration because the method of migratory cue is not discussed in the RDEIR. Certain pollutants (metals) can result in more adult fish straying into adjacent rivers when they return to spawn. Non-toxic water discharges that do not significantly affect water temperature, DO, pH, or salinity, are unlikely to interfere with fish migration. This is the only mitigation measure that attempts to address longer-term effects not specifically involved with amount of habitat.

### **BDCP-Section 23**

The RDEIR needs to clarify, through direct statements, that the certification of the Delta Plan (so far as it is currently described in the draft BDCP documents) should be evaluated in detail in the DEIR and RDEIR. The RDEIR should fully describe, using maps and acreage already known to be targets of restoration in the BDCP, the environmental impacts of the associated conversion of land and water to restored natural habitat.

### **Other CEQA Impacts-Section 24**

**Page 24-3, Lines 31-41:** The RDEIR states that the Revised Project would “include recommendations to the SWRCB, Department of Water Resources (DWR), and the California Department of Public Health to develop aggressive schedules for the completion of ongoing studies to improve drinking water quality.” The Central Valley Drinking Water Policy is nearly complete with their assessment and recommendations for a pathogen related narrative objective. That workgroups found in their “Synthesis Report” that future urbanization in the Central Valley would not increase the net load of drinking water constituents of concern under existing regulatory programs. By requiring further “aggressive” schedules, the Revised Project would effectively divert local agency resources from higher priority areas.

### **Appendix D – Regulatory Framework**

**Footnote f Table D-:** This footnote implies that 0.06 ng/l MeHg has been adopted as an enforceable objective in the Delta Mercury TMDL Basin Plan amendment. This statement is inaccurate and the table should be modified to clarify that this value is not an adopted water quality objective.

## **Attachment Two: SRCSD Comments on November 2012 Final Draft Delta Plan**

Comments on the Final Draft Delta Plan should be answered in the Response to Comments on the RDEIR. SRCSD appreciates the Delta Stewardship Council's (Council) recognition that the Delta Plan will evolve over time and that it will be informed by science and adaptive management. Overall, the Delta Plan has improved substantially from previous drafts and is written in a fashion that will be easier for the general public to review.

Although many of our specific comments on the previous drafts have been addressed in the Draft Delta Plan, there still remain some issues that were not addressed or corrected. As a result, we would like to re-state those concerns by incorporating by reference our previous comments that have been submitted and that were not addressed or incorporated into the Draft Delta Plan. Our overarching concerns that remain with the Draft Delta Plan are focused on the discussion of scientific certainty regarding water quality compared to other factors (i.e., invasive species, water exports, entrainment, direct mortality, etc.) that impact the Delta ecosystem and with the proposed funding options to achieve the co-equal goals and implement the Delta Plan. We also have attached specific comments on Chapter 6 water quality, that more accurately reflect the current scientific understanding of water quality and the Delta.

### *Certainty of Science*

The Final Staff Draft lacks a robust discussion on the certainty of the science in the Delta that would help policy makers prioritize their efforts, understand the significance of their decisions (including potential costs and benefits) and be aware of the relative certainty of the expected outcome. For instance, the certainty discussion could address the question: How important are known fish losses due to entrainment versus hypothetical losses due to other stressors? Without the certainty discussion, both policy makers and the public may be misled into thinking that many of the statements included in the Draft Delta Plan are factual.

For example, there are many statements of "fact" within the Final Staff Draft that overstate the certainty of the science related to specific water quality issues. An example is the assumption that increasing urbanization has altered water quality and thus the ecosystem (page 15, line 38). According to the February 2012 technical report prepared by the Central Valley Drinking Water Policy Work Group, degradation of water quality in terms of drinking water constituents of concern (with the exception of salt) is not expected to occur as a result of wastewater, urban runoff (related to urbanization), or agricultural sources through 2030. Another example is the constant portrayal of nutrients as contaminants, when in fact nutrients are required for a productive Delta ecosystem.

The Draft Delta Plan also fails to strike the appropriate balance between discussing contaminants and discharges and the significant role that exports, non-native species and entrainment have on the deterioration of the Delta ecosystem, food web and water quality. The overall approach contained in the Draft Delta Plan seems to overemphasize contaminants and discharges as "stressors" to the Delta ecosystem and simultaneously fails to adequately discuss the significant role of exports and entrainment on that same ecosystem. For instance, on Page 44, the "Science in the Delta – Why Does it Matter" text box tends to imply that climate change, drought and

pollutants are the major driver for Delta ecosystem issues, with little or no discussion on the effects of entrainment, flow regimes or invasive species.

### Funding Mechanisms for the Delta Plan

SRCS D appreciates the Final Staff Draft's recommendation for a strong stakeholder role in the development of short and long-term financing plans. We look forward to being an active stakeholder in the development and review of a Delta Finance Plan. SRCS D requests the opportunity for wastewater agencies to participate in any ad hoc workgroup formed by the Delta Plan Interagency Implementation Committee for development of a finance plan. Our knowledge of rate and fee structures of local/regional wastewater agencies that manage projects in accordance with the Clean Water Act and experience with Proposition 218 would be an asset to any such workgroup.

SRCS D still has significant concerns with the current Funding Principles, specifically in relationship to the funding options identified in Appendix O. The recommendation that stressor fees will be based on the volume of discharge, or pollutant loading, is inherently causing permitted dischargers to pay twice. National Pollutant Discharge Elimination System (NPDES) permittees are already paying into a "stressor fee" program by complying with the Clean Water Act. NPDES permittees effectively "pay" by complying with regulatory requirements that require investments in capital and operational enhancements to mitigate their impacts, and as a result, beneficial uses of water are protected. Therefore, any new stressor fees should be based on the degree to which a stressor is affecting beneficial uses and should not be based on the volume of effluent.

The Funding Principles to Support the Coequal Goals section should clearly identify all sources of existing and proposed federal, state and local funding that will be used to finance programs and projects in the Delta. In addition, we recommend that the Delta Plan include a more detailed outline of the fee authorization framework (including the public review process) that would include legislative oversight. As currently written, the proposed Funding Principles Chapter and companion Funding Options appendix provides too much discretion to the Council in establishing a fee structure and does not fairly evaluate all potential funding possibilities.

### Chapter 6: Improve Water Quality to Protect Human Health and the Environment

We commend the Council for only including water quality recommendations in the Final Staff Draft, thereby avoiding redundancy with existing regulatory programs. We support the Central Valley Clean Water Associations (CVCWAs) comments regarding the Water Quality Recommendations in their June 13, 2012, comment letter, as well as their January 14, 2013 letter and incorporate them by reference.

## **Attachment Three: SRCSD Comments on Rulemaking Package, Delta Plan**

The Sacramento Regional County Sanitation District (SRCSD) appreciates the opportunity to review and comment on the Delta Stewardship Council's (Council) Rulemaking Package submitted to the Office of Administrative Law on November 16, 2012. These comments are also provided in a January 14, 2013 letter to the Council.

### **Background**

California's Administrative Procedure Act (APA) provides, among other things, that the California Office of Administrative Law (OAL) must review all regulations adopted and proposed for publication for compliance with the APA. (Gov. Code § 11349.1.) In doing so, the OAL is directed to use the following standards in its review: necessity, authority, clarity, consistency, reference, and non duplication. (Gov. Code § 11349.1(a).)

SRCSD believes the Policies contained in the Delta Plan, that constitute the "regulations" contained in the Regulatory Package being submitted to OAL for approval, fail to satisfy the standards set forth in the APA. As a general matter, the proposed regulations include a significant amount of unnecessary narrative language and statements of policy that make it difficult for the potentially regulated entities to discern precisely what is required of them.

### **Specific Comments on Proposed Regulations**

#### **Section 5001(d) – Definition of "best available science."**

The definition of "best available science" is overly restrictive and inconsistent with Appendix 1A in that it requires best available science to have "all" of the attributes listed in subparagraphs (d)(1)-(3). Very little available science will have all of these attributes, though they should. Appendix 1A acknowledges that "There are several sources of scientific information and tradeoffs associated with each" and that although "peer-reviewed publications" are the "most desirable," there are other sources of scientific information that may qualify as best available, including "science expert opinion" and "traditional knowledge." The inclusion of subparagraphs (d)(1)-(3), which summarize some of the information found in the appendix, but are not consistent with the appendix, make it difficult for the reader and the regulated community directly affected by the proposed regulations to understand the scope and nature of the requirements. As an example, subparagraph (d)(3)(F) would require the science to be peer reviewed in order to be considered "best available science." That concept is not consistent with the language or intent of Appendix 1A.

#### **Section 5003. Covered Action Defined**

Covered Action is already specifically defined in Water Code section 85057.5. It is not clear why the proposed regulation repeats, verbatim, portions of Water Code section 85057.5 and changes and adds other language. In this regard, Section 5003 fails the Clarity, Nonduplication, and Necessity standards of the APA. Instead of attempting to redefine "Covered Action," the

regulations, if anything, should simply define terms contained within the statutory definition. Additional confusion arises from phrases and words like “unusual circumstances” contained in Section 5003(b)(2)(D), and the narrative examples provided in Section 5003(b)(2)(D)(i) and (ii).

In addition, Section 5003 conflicts with those provisions of the Public Resources Code governing projects that are exempt from CEQA (Pub. Res. Code §§21080 et seq.). Water Code section 85075.5 uses CEQA’s definition of “project,” yet the regulations purport to only incorporate *some* of the CEQA exemptions. The conflict it creates is that various projects are exempt from CEQA (require no environmental review) and, by making them subject to the Council’s “consistency” determinations, those projects that should be exempt from environmental (CEQA) review will nonetheless have to undergo significant environmental review in the context of consistency with the Delta Plan. This at least appears to be a consequence of using CEQA’s project definition but only including a limited number of CEQA’s exemptions. The regulations should more clearly delineate what will be subject to environmental review, and the Council should explain why not all CEQA exemptions are included.

#### Section 5004. Certifications of Consistency

Subdivision (a) is narrative and appears unnecessary. Subdivision (b) is unclear. It provides, among other things, that “[c]overed actions must be consistent with the coequal goals, as well as with each of the regulatory policies contained in Article 3 implicated by the covered action.” First, it is not clear how, if at all, the “regulatory policies” contained in the Delta Plan are different from the “coequal goals.” Presumably, the Delta Plan’s regulatory scheme is in furtherance of the coequal goals. Water Code section 85225 provides that a written certification of consistency must include detailed findings as to whether the covered action is consistent with the *Delta Plan*. The regulation is confusing because a local agency cannot determine whether consistency with the Delta Plan is also consistent with the coequal goals. This provision suggests that a covered action could be consistent with the Delta Plan but be inconsistent with the coequal goals.

Subdivision (b) (4) provides mandatory language regarding adaptive management related to ecosystem restoration and “water management covered actions.” However, it is unclear what is meant by “water management covered actions.” Subdivision (b) (4) also provides that these actions must “include adequate provisions, appropriate to the scope of the covered actions, to assure continued implementation of adaptive management.” The regulations, however, do not explain what “adequate provisions” are; explain what is meant by “appropriate to the scope of the covered actions,” or what is needed to “assure” continued implementation. Local agencies cannot be left to guess precisely what needs to be included in Certifications of Consistency. As such, Section 5004 fails to comply with the Necessity and Clarity standards contained in the APA.

### Section 5007. Update Delta Flow Objectives

Section 5007, subdivision (a), provides a “recommendation” to the SWRCB that it “should update the Bay-Delta Water Quality Control Plan objectives” within certain time frames. Subdivision (a) is unnecessary, as it simply provides a suggestion to another State agency. Subdivision (d) provides that certain policies cover “a proposed action that could affect flow in the Delta.” It is unclear, however, what is meant by “could affect flow.” For example, the construction of a bridge abutment “could affect flow.” The construction of a dam could also “affect flow,” as could the diversion or discharge of water. It is entirely unclear what this regulation is intended on impacting. It is also unclear whether this regulation seeks to regulate activities that affect the timing, magnitude, quality, or frequency of flow. Section 5007 does not comply with the Clarity or Necessity standards in the APA.

### **Comments on Cost Analysis for Proposed Regulations**

The Council has prepared a Cost Analysis as required by Government Code sections 11346.3 and 11346.5. The Cost Analysis, however, appears to suffer from substantial deficiencies.

First, the discussion regarding the ability of local agencies to “recover costs” associated with the implementation of the Delta Plan is wrong and out of date. In this regard, the Cost Analysis relies on the case of *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4<sup>th</sup> 421, to suggest that “regulatory fees” can simply be imposed to recover costs. This case, however, is based on the law prior to the passage of Proposition 26 – a proposition that further restricted the ability of state and local agencies to raise revenue and recover certain costs. (See *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4<sup>th</sup> 421, 428 (fn.2) [“[o]n November 2, 2010, the voters approved Proposition 26, which requires a two-thirds supermajority vote of the Legislature to pass certain fees. None of the parties have asserted that the law enacted by Proposition 26 applies to this case”].) The Cost Analysis, to be accurate and informative, should consider the ability to local agencies to recover costs in light of Proposition 26.

Moreover, the Cost Analysis assumes that most of the regulatory components of the Delta Plan will have no costs associated with implementation. This is somewhat surprising, given the Cost Analysis recognizes that “the Delta Plan policies will become regulations that all State and local agencies, as they are identified within each policy, must observe.” (Cost Analysis, p.12.) Yet, the Cost Analysis argues that Section 5005 “does not mandate substantial new costs on water suppliers” because those water suppliers are already subject to the water management planning and implementation of existing laws set forth in Section 5005. For Section 5006, the Cost Analysis states that this provision simply provides that contracting “will follow [already] established procedures” and therefore “imposes no new costs to state or local agencies or on private entities.” (Cost Analysis, p.14.) For Section 5007, the Cost Analysis states that “no mandates are made” through the proposed regulation and, therefore, there are no additional costs on any state or local agencies or on private entities. (Cost Analysis, p.14.) The discussion of Section 5008 is remarkably similar, explaining that Section 5008 “does not mandate any

additional habitat restoration actions nor is it likely to significantly alter future restoration plans” and therefore “imposes no new costs.” (Cost Analysis, Page 14.)

The same is true for Section 5010 (policy only requires *consideration* of alternatives and therefore is not anticipated to impose additional costs); Section 5011 (policy would already be covered by required CEQA mitigation and therefore imposes no new costs); Section 5012 (policy imposes no direct costs); Section 5013 (“[t]his policy does not differ significantly from existing conditions”); and Section 5014 (recognizes existing efforts underway and claims no additional costs).

The analysis used in the Cost Analysis appears to contradict the Delta Plan, the Proposed Regulations, and the Initial Statement of Reasons supporting the regulations. The Initial Statement of Reasons argues that “[t]he adoption of these regulatory policies is necessary to carry out the legislative requirement that the Council adopt a legally enforceable long-term management plan for the Delta” and “are necessary to carry out the legislative intent of achieving the coequal goals and objections specified” in the Water Code. (Initial Statement of Reasons, p.1) The Cost Analysis, however, argues that the Regulations impose no additional costs on anyone, in part, because existing law already imposes the same mandates contained in the Regulations. The Council cannot have it both ways. Either the proposed regulations are indeed necessary to effectuate the legislation – and the associated costs are attributable to the regulations – or, as argued in the Cost Analysis, they are not necessary.