



COUNTY OF YOLO

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June 13, 2012

VIA ELECTRONIC MAIL ONLY

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

Re: Comments of Yolo County—Final Staff Draft of the Delta Plan

Dear Chair Isenberg and Council Members:

This letter sets forth the comments of the Yolo County Board of Supervisors on the “Final Staff Draft Delta Plan” (“Draft Plan”), released on May 14, 2012.

Overall, the Board of Supervisors observes that Draft Plan tends to address many of the County’s concerns with prior drafts of the Delta Plan. In comparison with earlier drafts, we note in particular that the Draft Plan now contains a more narrow and sensible range of restrictions on projects within floodplains. We are particularly encouraged by the Draft Plan’s approach to projects serving local agriculture, tourism, or recreation. We also note that the Draft Plan responds to our concerns with the breadth of policies intended to balance future habitat restoration with other land uses, including Policy ER P3.¹ Further, we recognize that the Draft Plan incorporates many recommendations of the Delta Protection Commission relating to economic sustainability and related matters. These are all good and notable changes.

At this point in its development, our remaining concerns generally relate to the Draft Plan’s response to the legislative directive that the “coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.” This is the focus of Section I, below, which includes five targeted critiques and recommendations in subparts (A) through (E) thereof. Section II and III of this letter are more brief but also concern very important issues. Section II discusses the improper application of Delta Plan EIR mitigation measures to “covered actions,” as currently set forth in Policy G P1. Section III responds to the Draft Plan’s intrusion into the covered action determination process that, as the Plan itself so carefully explains, is the sole province of state and local agencies responsible for approving or carrying out a proposed action.

¹ We note, however, that Policy ER P3 may still exceed the Council’s authority to the extent it restricts activities throughout the entire Yolo Bypass, as the Bypass extends beyond the legal Delta and the geographic scope of the Council’s jurisdiction.

Section I. The Need for Greater Emphasis on Protecting and Advancing the Fundamental Values of the Delta.

The Draft Plan devotes considerable attention to the coequal goals of "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem." This emphasis is appropriate, but the Delta Reform Act also dictates that the "coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place." (Public Resources Code § 29702(a); Water Code § 85054.) This concept is not merely an afterthought. Rather, it appears repeatedly throughout the Delta Reform Act and shapes the basic responsibilities of the Delta Stewardship Council, Delta Conservancy, and the Delta Protection Commission.² As a matter of law, an overarching strategy for achieving the coequal goals--which the Delta Plan certainly is--must therefore assure the protection and enhancement of these fundamental values and other objectives "inherent in the coequal goals" in the course of its implementation. (Water Code § 85020.)

Against this policy dictate, however, the Draft Plan fails to measure up. The Draft Plan lacks a specific, implementable strategy for protecting and enhancing the fundamental values of the Delta. It relies instead on a suite of measures that collectively shift the burden of addressing the fundamental values to other agencies, including Delta cities and counties, on the apparent hope that a viable strategy will somehow emerge over time. Importantly, the Delta Plan also lacks any meaningful deadlines or milestones to assure that the protection and enhancement of these fundamental values will proceed roughly in tandem with achievement of the coequal goals. In short, the Draft Plan's strategy for addressing these fundamental values falls well short of what the Legislature intended. It effectively places the protection and enhancement of the fundamental values in a secondary role, consigned to an uncertain future.

Time still remains, however, to correct this basic problem. The County recommends the following approach:

(A) Properly Constitute the Implementing Committee.

Chapter 2 of the Draft Plan proposes an "interagency implementation committee" that will play a lead role in the implementation of the Delta Plan, including development of the Delta Finance Plan proposed in Chapter 8. (Draft Plan at p. 36.) This proposal finds support in the Delta Reform Act, which calls for the Council to "oversee a committee of agencies responsible for implementing the Delta Plan." (Water Code § 85204.) The Draft Plan, however, explains that only state agencies will be eligible for committee membership. And while federal agencies are assured a significant advisory role, the Draft Plan ignores local agencies in describing both the membership and proposed operation of the interagency implementation committee.

This approach appears contrary to the intent of the Legislature. Water Code § 85204 does not express or imply that the "committee of agencies" should consist only of state agencies. It

² In addition to Public Resources Code § 29702(a) and Water Code § 85054, language reflecting this concept also appears at (among other places) Public Resources Code §§ 32320(i) and 32322(a), as well as Water Code §§ 85020(b) and 85301.

contains no language limiting committee membership whatsoever. Notably, the Delta Reform Act requires the Delta Plan to be developed in consultation with “federal, state, and local agencies with responsibilities in the Delta.” (Water Code § 85300(b).) It is therefore reasonable to conclude that, in requiring the creation of a “committee of agencies responsible for implementing the Delta Plan,” the Legislature contemplated a similarly inclusive approach to Delta Plan implementation. Lastly, as a policy matter, including local agencies in committee membership would avoid further perpetuating the polarizing “state versus local” dichotomy that has influenced Delta water and regulatory debates for many decades.

The County thus encourages the Council to include the Delta counties and other affected local agencies in the interagency implementation committee. While the Draft Plan proposes to include the Delta Protection Commission and Delta Conservancy on the committee, neither state agency is an adequate substitute for direct participation by affected local agencies. At the very least, the Delta counties and other local agencies should be afforded a formal advisory role in connection the interagency implementation committee. Local agencies should not (once again) be denied a seat at the table where matters of significant regional importance are at issue.

(B) Express Strong Support for Local Participation in the BDCP and Related Efforts.

The County acknowledges that the Draft Plan contains some language favoring the inclusion of affected local governments and stakeholders in planning processes for a host of Delta projects. For example, at page 177, the Draft Plan states as follows:

Some necessary water facilities, ecosystem restoration projects, or flood management facilities may need to be located on farmlands or in other locations that are inconsistent with local land use plans. State and federal agency projects are not required to secure approvals from local governments or the DPC, but ought nevertheless to avoid conflicts with existing and planned land uses when feasible.... Fully considering local residents’ views and local governments’ positions can minimize misunderstandings, reduce avoidable conflicts, and build trust and cooperation.

When it comes to directing such an inclusive approach, however, the Draft Plan stops short. In Policy DP P2, it simply requires project proponents to “consider” comments from local agencies and the Delta Protection Commission regarding potential conflicts with existing or planned land uses. (Draft Plan at p. 193.) And on the vital topic of local participation in the BDCP, the Draft Plan expresses support—somewhat oddly—only for coordination with “local mosquito abatement districts.” (Recommendation ER R1, Draft Plan at p. 151.)

Consequently, the County reiterates its comments on this issue in response to the Fifth Staff Draft of the Delta Plan. (*E.g.*, Yolo County’s September 30, 2011 letter, Attachment p. 5.) Particularly for major projects, a local stakeholder forum that actively participates in the project planning, design, and environmental review process should be supported. An example of one such outreach effort is the Yolo Bypass Fisheries Enhancement planning team, convened by the Natural Resources Agency in mid-2011. Support for efforts like this should be integral to the

final Delta Plan, especially for the major habitat restoration objectives included in Recommendation ER R1.

(C) Expand the Scope of Chapter 8 ("Funding Principles to Support the Coequal Goals").

Chapter 8 of the Draft Plan, as its title implies, focuses on funding achievement of the coequal goals and pays only scant attention to protecting and enhancing the fundamental values of the Delta. This emphasis appears to be premised on a misunderstanding of relevant provisions of the Delta Reform Act. For example, Chapter 8 begins with the following statement:

In establishing the coequal goals, the Delta Reform Act affirmatively reset spending priorities for the Delta ecosystem and water management. Inherent in the coequal goals is a new governance structure (primarily the Delta Stewardship Council), which the Legislature intended to have the "authority, responsibility, accountability, scientific support, and adequate *and secure funding to achieve these objectives.*" (Draft Plan at p. 285.)

This statement implies that the statutory "objectives" that require "adequate and secure funding" are those relating to the coequal goals (i.e., "Delta ecosystem and water management"). This is not the case. Read in the legal context in which the quoted language appears (*see* Water Code § 85020), it is clear that the "objectives" at issue are not just the coequal goals. Rather, the Legislature carefully placed equal emphasis on "adequate and secure funding" for a host of policy objectives set forth in Section 85020, *including* protecting and enhancing the fundamental values of the Delta.

Chapter 8 never makes up the ground lost by this misstep. For example, it assigns top priority to "[u]rgent expenditures for water [supply] reliability and ecosystem protection." (Draft Plan at p. 291.) Any doubts about whether such expenditures could advance the fundamental values of the Delta are quickly allayed by the following sentence, which explains that such expenditures are "to protect the existing Delta water export system from flood risks and carry out ecosystem improvements being implemented pursuant to existing mitigation commitments of the SWP and the Central Valley Project." (*Id.*) In other words, these expenditures are intended to protect the flow of water to out-of-Delta users and nothing more. Nor does Chapter 8 otherwise support the provision of near-term funding to projects that protect and enhance the fundamental values of the Delta. Rather, it emphasizes the importance of funding the operations of certain "key Delta agencies"—defined as including only state agencies like the Council—and scientific research. (Draft Plan at pp. 291-92.) Other portions of the Draft Plan, including Chapter 2, are similarly bereft of any meaningful strategy on such issues.

To address similar deficiencies in the Fifth Staff Draft of the Delta Plan, the County proposed a series of recommendations in its September 30, 2011 comment letter. The recommendations included in that proposal, if adopted, would establish an appropriate framework with four key parts: (1) individual County economic sustainability plans; (2) strong support for appropriations to the Delta Investment Fund; (3) an assessment of BDCP-related economic impacts on the Delta region, both positive and negative; (4) support for implementation of economic mitigation programs. The first two elements of this proposed framework, in particular, are relevant to

protecting and enhancing the fundamental values of the Delta and provide a starting point for a comprehensive strategy. The third and fourth elements are also critical parts of such a strategy, as reflected in the following section of this letter.

The County urges the Council to draw upon this proposal and include a robust strategy for addressing the fundamental values of the Delta in Chapter 8. This strategy should be reflected in both the "guiding principles" and "near-term and annual funding requirements" sections of Chapter 8, as each section guides the content of the Delta Finance Plan that is proposed therein. In addition, as explained in more detail above, Delta counties should be included in the "interagency implementation committee" described in Chapter 2 or otherwise actively included in developing the Delta Finance Plan. In these and other ways, the final Delta Plan can properly articulate a strategy to protect and enhance the fundamental values of the Delta. The final Delta Plan should clearly recognize that the Legislature intended for the Delta to be protected *and* enhanced in concert with achievement of the coequal goals.

(D) Protect the Delta Economy.

Related to the prior discussion, the final Delta Plan should take a far more aggressive position regarding economic mitigation than is expressed in the current draft. The following text is representative of the Draft Plan's tentative approach:

Because BDCP and new levee investment priorities are not yet complete, the magnitude of any impacts to farmland, other uses, or the Delta's economy cannot reasonably be forecast. If significant adverse impacts to the Delta economy do result from farmland losses or other impacts due to habitat restoration, water conveyance, or revised levee investment priorities, *then measures to compensate for these losses may warrant consideration*. This consideration should include recommendation of a regional agency to implement and facilitate economic development efforts, guided by the DPC's ESP. (Draft Plan at p. 197.)

Redress for the regional and local economic impacts of BDCP and related initiatives is not merely a moral or fiscal issue (though it is both), but a legal issue as well. As discussed, the Delta Reform Act emphasizes protecting and enhancing the fundamental values of the Delta in connection with achievement of the "coequal goals." This objective is central to the statutory mission of both the Delta Conservancy and the Delta Protection Commission. It also appears in provisions of the Act covering the contents of the Delta Plan. Saying simply that "measures to compensate for these losses may warrant consideration"—particularly when coupled with the absence of a substantive economic mitigation and development strategy—is an affront to affected communities and contrary to the express intent of the Legislature.³

On this basis, the County and the Delta Protection Commission (among others) have emphasized the importance of Council support for an economic mitigation strategy to address the local economic effects of the BDCP or a similar program of water supply improvements, Delta exports, and habitat restoration. To date, however, these requests appear to have been dismissed on the basis that economic mitigation is not required by the Delta Reform Act (except to a

limited extent in Water Code § 85089) and that, somewhat ironically, economic mitigation may be financially infeasible.

These arguments against including an economic mitigation strategy in the Delta Plan have always been weak and unpersuasive. The Council appears to liberally construe its authority to establish policies and recommendations that exceed (and in limited instances, even conflict with) requirements appearing in the Delta Reform Act and elsewhere in California law.⁴ Accordingly, the absence of a legal mandate is hardly a credible basis for dismissing calls for an economic mitigation strategy. Concerns about the financial feasibility of economic mitigation are similarly difficult to accept. If the state and water agencies pursuing improved water supply reliability truly cannot absorb related economic burdens on the Delta economy, this is a powerful argument against the very wisdom of the coequal goals (as well as the BDCP and related initiatives).

Regardless, neither the law nor fundamental considerations of equity support leaving the Delta to bear such a burden. The County thus reiterates the need for an economic mitigation strategy as a central component of the Delta Plan, starting with the third and fourth elements of the framework proposed in the County's comment letter on the Fifth Staff Draft of the Delta Plan (discussed in the preceding section of this letter).

(E) Establish Timeframes for Action.

The Draft Plan strongly supports near-term action on a number of habitat restoration, water conveyance, and related matters within the immediate scope of the “coequal goals,” going so far as to retain the controversial deadline for completion of the BDCP expressed in prior drafts. As explained above, however, the Delta Reform Act is drafted to require that efforts to achieve the “coequal goals” proceed roughly in concert with efforts on other “inherent objectives,” including protecting and enhancing the fundamental values of the Delta.

The Draft Plan seems to ignore this legal reality. It places no deadlines or other urgency on the development and implementation of plans, programs, and projects that protect and advance the fundamental values of the Delta. While a deadline is not required for every action directed or recommended in the final Delta Plan, the County observes that specific timeframes may be helpful or even necessary in some instances to ensure that the “inherent objectives” are given due priority. Some proposed timeframes for certain actions were included in the four-part framework included in the County’s comments on the Fifth Staff Draft of the Delta Plan, and we encourage your consideration of these timeframes (or something similar) as the Council completes the final Delta Plan. (*See* Yolo County’s September 30, 2011 letter at pp. 1-2.)

Section II. The Improper Application of Delta Plan EIR Mitigation Measures to All Covered Actions.

³ For example, the Draft Plan requires 200-year flood protection for covered actions that include subdivisions of five or more homes *outside of* urban and urbanizing areas. (Policy RR P2, Draft Plan at p. 273.) This requirement conflicts with existing state law, which requires 200-year flood protection—referred to in the Water Code § 65007 as an “urban level of flood protection—only *within* urban and urbanizing areas, and specifically authorizes a lower level of flood protection in rural areas. (Water Code § 65962.)

Policy G P1 of the Draft Plan requires agencies approving or undertaking a covered action to incorporate mitigation measures that will eventually be adopted in connection with certification of the Delta Plan EIR. (Draft Plan at p. 56.) This requirement is legally untenable. Under CEQA, mitigation measures adopted as part of the overall “program” studied in the Draft EIR apply only to projects undertaken in furtherance of that program by state or local agencies acting in a “responsible agency” capacity. Many covered actions, however, are primarily *regulated by* the Delta Plan rather than undertaken *in furtherance* thereof. State or local agencies will typically serve as lead agencies, not responsible agencies, for such projects under CEQA. For agencies acting in this capacity, mitigation measures adopted by the Council based on the Delta Plan EIR are legally irrelevant.

In addition, this element of Policy G P1 exceeds the legal authority of the Delta Stewardship Council. Under CEQA, a lead agency (such as the Council) cannot compel other agencies acting in a responsible agency capacity to implement specific mitigation measures in approving individual projects. This is because, in part, only “feasible” mitigation can be required under CEQA as part of project approval. The Draft EIR for the Delta Plan acknowledges this basic legal reality, stating “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.*” (Draft EIR at p. 2B-3, n.4.)

For both of these reasons, this policy should be deleted or modified to clarify that it applies only to the extent that responsible agencies determine such mitigation to be feasible.

Section III. The Draft Plan’s Intrusion into Covered Action Determinations.

Despite the great care taken in Chapter 2 of the Draft Plan to explain what constitutes a “covered action,” various other provisions of the Draft Plan muddle the issue considerably. It is critical to correct these provisions and present a consistent, lawful approach to “covered action” determinations in the final Delta Plan.

For instance, Policy G P1 states, in pertinent part: “This policy only applies after a ‘proposed action’ has been determined to be a covered action *because it among other things is covered by one or more of the policies contained in Chapters 3 through 7.*” The italicized language is vague and could be read to imply that a project is a “covered action” if it is within the scope of a policy appearing in Chapters 3-7 of the Delta Plan.⁵ However, this is only one part of the determination of whether a project is a “covered action” and the Delta Plan cannot limit local agency discretion in such matters—discretion carefully reserved in the Delta Reform Act itself. In the County’s view, resolving this problem is as simple as deleting the italicized language.

CONCLUSION

The Yolo County Board of Supervisors appreciates the opportunity to comment on the Draft Plan. We look forward to continued involvement in the planning and environmental process, and

⁴In fact, Council staff have advised the County that this interpretation is precisely what is intended.

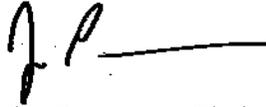
Phil Isenberg, Chairman, et al.

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we commend the Council and its staff for their efforts to address many of the County's concerns with prior drafts.

Sincerely,

A handwritten signature in black ink, appearing to be "J. Provenza", followed by a horizontal line extending to the right.

Jim Provenza, Chair
Yolo County Board of Supervisors