



# COUNTY OF YOLO

## Board of Supervisors

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April 12, 2011

### VIA E-MAIL ONLY

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

Re: Comments of Yolo County—Second Draft of the Delta Plan

Dear Chair Isenberg:

This letter provides the comments of the Yolo County Board of Supervisors on the March 18, 2011 “Second Staff Draft Delta Plan” (the “Second Draft”). The purpose of this letter is to describe the County’s concerns with certain policies and recommendations in the Second Draft and, in some instances, to propose their deletion or amendment. The letter is organized in the same manner as the Second Draft and utilizes headings that identify the specific policies and recommendations at issue.

Overall, the County is very disappointed by the Second Draft for two basic reasons. First, it is replete with vague and overly broad directives that propose to greatly curtail local land use authority and private property rights. Despite the drastic nature of these measures, however, the Second Draft largely omits any explanation of why they are necessary or appropriate. Second, these components of the Second Draft ignore that the Sacramento-San Joaquin Delta Reform Act (the “Act”), and not the Delta Plan, is determinative of Delta law and policy. These two concerns apply to a wide array of policies and related discussion throughout the document, which is seriously flawed as a consequence.

The County strongly encourages the Delta Stewardship Council to resolve these problems by providing appropriate direction to Council staff and consultants. The final Delta Plan must conform to the fundamental policy decisions and accompanying delegation of legislative authority set forth in the Act. Future drafts of the Delta Plan should reflect this legal reality. Many of the following comments attempt to specifically address the manifestations of this basic problem—including vast overreaching in some instances and, conversely, inattention to vital issues in others—throughout the Second Draft.

### **Comments on Chapter 1** **“The Delta Plan”**

The County has a handful of comments and concerns with Chapter 1, as follows:

**Emphasize the “Delta as a Place.”** In the Act, the Legislature repeatedly emphasized “protect[ing] and enhance[ing] the unique cultural, recreational, and agricultural values of the California Delta as an evolving place.” For example, this goal is identified as the second leading objective in the statement of

“inherent objectives” in Water Code Section 85020. In the Second Draft, however, it is relegated to barely one page of discussion—virtually none of which is calculated to actually assist in achieving the objective—near the very end of the document in Chapter 8. This basic oversight begins in Chapter 1; for example, the preservation of a robust agricultural industry is not even mentioned in the several paragraphs that comprise the discussion of “The Vision for What the Delta Plan Will Achieve by 2100.” (Second Draft at pp. 3-4.)

Consistent with the Legislature’s emphasis on this component of the Delta Plan, the “Delta as a Place” chapter should appear near the beginning of the document. Of course, as discussed in detail below, the Council should direct its staff and consultants to begin meaningful work on the chapter. The County is concerned that a draft Delta Plan for environmental review is due in two months and, to date, this chapter has not yet been developed. As the Independent Science Advisors said with respect to the “Delta as a Place” chapter in the First Draft, “this chapter is highly redundant yet not solid at all, flab all through.” The Second Draft is even worse in its coverage of this issue, lacking any relevant substance at all.

**Emphasize protection of farmland and other existing habitats.** The Second Draft heavily emphasizes habitat restoration, particularly the restoration of aquatic habitat types. (*E.g.*, Second Draft at pp. 3-4.) The reality, however, is that the working landscape of the Delta *currently* provides valuable habitat for a wide variety of species, including migratory waterfowl and a diverse array of endangered, threatened, and other special status species covered by local Habitat Conservation Plan (“HCP”) and Natural Community Conservation Plan (“NCCP”) efforts. This needs to be recognized and emphasized in future drafts of the Delta Plan. (The County previously raised this issue in its March 11, 2011 comment letter.)

**Accurately describe the mandate to incorporate the economic sustainability plan.** On page 7, the Second Draft discusses the inclusion of other plans in the Delta Plan. Much of this discussion focuses on BDCP; other plans, such as the economic sustainability plan of the Delta Protection Commission, are ignored in this discussion (and for that matter, throughout much of the rest of the document). Future drafts of this Chapter should recognize and discuss the economic sustainability plan. Such discussion should also state that the Council is not merely authorized but *required* to incorporate the economic sustainability plan into the Delta Plan if certain findings are made. (Public Resources Code § 29773.)

### Comments on Chapter 2

#### **“Science and Adaptive Management for a Changing Delta”**

As an initial matter, this Chapter recites but then largely ignores the limited scope of the “adaptive management” mandate that appears in the Act. Water Code § 85308(f) states unambiguously that the adaptive management strategy to be included in the Delta Plan is confined to “ongoing ecosystem restoration and water management decisions.” Chapter 2 of the Second Draft, however, sets this aside and declares that “*all* proposed covered actions will be required to adhere to this adaptive management framework.” (Second Draft, p. 9.) Other language in Chapter 2 appears to qualify this declaration, but it remains clear that adaptive management strategies are intended to apply far beyond the limited context described by the Legislature.

The County encourages the Council to resolve this issue by confining adaptive management to “ongoing ecosystem restoration and water management decisions,” as the Legislature directed. No reason appears

in the Second Draft for extending adaptive management to flood protection projects and other activities that customarily—and for good reason—are not subject to adaptive management. The County takes no comfort in the Second Draft’s vague assurance that adaptive management will not apply to some projects “based on the nature of the covered action.” (Second Draft, p. 10.) There is no need for such uncertainty given the clear direction provided in Water Code § 85308(f).

Aside from this general issue, the County observes that Chapter 2 is a work in progress. It currently summarizes some principles of adaptive management and sets out an overall strategy framework. In its current iteration, however, this framework is very general and may be difficult for project proponents to integrate into their planning and long-term management efforts. To the extent feasible, the “strategy” should be distilled into a more concrete framework—perhaps with policies and recommendations, consistent with other elements of the Delta Plan—that is sufficiently specific to provide clear direction to project proponents while at the same time preserving their ability to design an adaptive management strategy that is appropriate for individual projects. A starting place for a more specific framework may be the discussion that appears in Chapter 3 of the Second Draft, which concisely summarizes the “minimum” adaptive management requirements for individual covered actions. (Second Draft, p. 23.)

Finally, the County notes with interest the following statement on page 13 of the Second Draft: “The ‘decide’ area of adaptive management includes one step, the respond/adapt step. Under the Act, formal decision making is the responsibility of the Council and all other processes should be structured to provide strong support for Council decisions.” It is unclear what this means. It could be read, however, to indicate that the Council intends to take the lead role in adaptive management of projects. If this is the case, it appears to conflict with Water Code § 85308(f) and the legal authority of the Council to act in this capacity should also be described. If it is not the case, then this language should be deleted or clarified.

### **Comments on Chapter 3** **“Governance Plan to Support Coequal Goals”**

The County has a handful of comments on Chapter 3, which recites statutory provisions pertinent to governance and sets forth criteria for submissions of certification for proposed covered actions. Those comments are as follows:

**Improve the “box” on application of Delta Plan policies and recommendations.** Starting in Chapter 3 and continuing throughout the balance of the Second Draft, there is a text box with a lengthy paragraph regarding the application of Delta Plan policies and recommendations. This language is somewhat confusing and need not be repeated in every Plan chapter that includes a policy or recommendation. It can instead be discussed clearly and comprehensively in a single place in the Delta Plan.

**Accurately describe criteria for incorporating the economic sustainability plan.** On page 21, the discussion regarding the incorporation of other plans into the Delta Plan should recognize that the Legislature has provided specific criteria for determining whether to incorporate the Delta Protection Commission’s economic sustainability plan into the Delta Plan. (Public Resources Code § 29773.) Those criteria, and not the general yardstick of promoting the “coequal goals,” apply to the potential incorporation of the economic sustainability plan.

**Reconsider the criteria for submissions of certification of consistency, including related policies (i.e., GP P4 and GP P9).** Overall, the criteria set forth on pages 22-23 of the Second Draft will be difficult or impossible to apply to many covered actions likely to be considered by local agencies. For example, assuming theoretically that a small winery project may be a covered action, a county would have to produce evidence of, among other things, all of the following:

- A description of project financing, including “identified funding sources”;
- An “allocation of costs and risks in relationship to benefits received,” whatever that may mean;
- An assessment of the “capacity” of the project proponent to “implement the proposed covered action”;
- A “warranty” that the project proponent has “[c]ontinuing responsibility for full implementation of the covered action . . . , including provisions that guarantee continuing legal and financial responsibility or their equivalent if the proposed covered action is transferred to another party”;
- Potentially, an adaptive management strategy “unless adaptive management concepts are inapplicable based on the nature of the covered action,” whatever that may mean; and
- An economic analysis and financing plan for any covered action “with a useful life of more than 10 years or a total capital and operating cost of more than \$10 million dollars over a ten year period . . . ,” apparently to “facilitate Council understanding of the action’s impacts on the state’s economic vitality.”

These requirements should not be applied to most private development projects. In particular, requiring counties to delve extensively into the financial capacity of project proponents is highly intrusive and unnecessary. The Council does not, for example, need to burden individuals, farmers, and small businesses with the obligation to produce an economic analysis and financing plan for any project with a useful life of more than 10 years. This threshold would be triggered by *any project that includes a structure*. The “more than \$10 million dollars over a ten year period” threshold also appears inappropriate for private projects; for example, even a small agricultural industrial project would exceed this threshold.

The County encourages the Council to thoroughly reevaluate these requirements in consultation with the planning departments for each county and city within the Delta. If this consultation cannot occur due to the timeframe for completing the Delta Plan, these requirements should be deleted. Among other things, the Council does not need—and cannot reasonably require—individuals, farmers, and small businesses to produce information of this nature for every project meeting one of the minimal thresholds described in the Second Draft. Further, the notion that obtaining such information for virtually every project would “facilitate Council understanding of the action’s impacts on the state’s economic vitality” is questionable at best. The Council should instead look to the economic sustainability plan of the Delta Protection Commission and other resources for such information.

**Comments on Chapter 4**  
**“Manage Water Resources”**

The County is very concerned with certain policies included in Chapter 4 of the Second Draft, particularly the following:

**WR P1.** Subsection (c) of this policy establishes a moratorium on all “new projects or covered actions” if the State Water Resources Control Board fails to adopt “public trust flow standards for the Delta that are necessary to achieve the coequal goals,” as described in subsection (a) of this policy. There is no basis for such a moratorium, particularly on “new projects” that do not qualify as “covered actions” and are thus outside of the Council’s legal authority. Nor is there any clear reason to halt all covered actions—many of which will have little or no impact on state water resources—in the event the State Board is unable to timely perform a task of such remarkable complexity. This policy and parallel language in ER P5 in the Ecosystem Restoration Chapter (Second Draft, p. 34) should be deleted.

**WR P6.** This policy prohibits any “project . . . within the alignment of a conveyance facility or Ecosystem Restoration Opportunity Area, as described in Water Code section 85057.5(c), unless the project is consistent with the intent of the plan or the construction is required to avoid a regulatory taking.” The County strongly objects to this moratorium.

Even aside from whether this moratorium may subject the state to damage claims for inverse condemnation (notwithstanding the savings language that is included), it is overbroad and unnecessary. The Council, as noted, has no legal authority to impose a moratorium on any activity that constitutes a “project.” Its authority is confined instead to “covered actions.” Even as to those actions, the Council does not clearly have affirmative authority to impose a moratorium. Nor does the discussion in this Chapter—or for that matter, the legislative findings included in the Act—furnish a proper basis for a moratorium on any development within the areas described in WR P6. Finally, the precise location of proposed conveyance facilities and Ecosystem Restoration Opportunity Areas is impossible to determine based on available maps and other information.

As the moratorium described in WR P6 lacks any legal or factual basis, this policy should be deleted.

**Comments on Chapter 5**  
**“Ecosystem Restoration”**

In its March 11, 2011 comment letter on the First Staff Draft of the Delta Plan, the County raised several concerns with the Ecosystem Restoration chapter therein. Briefly, those concerns were: (a) the lack of any discussion of the tradeoffs inherent in ecosystem restoration; (b) the lack of relevant discussion of certain goals, such as promoting viable populations of native resident and migratory species, establishing migratory corridors, and reducing threats and stressors; (c) the lack of consideration of local HCPs and NCCPs, such as the Yolo Natural Heritage Program; and (d) the lack of any significant discussion of terrestrial species and their habitats, including the habitat values of farmland and open space. These concerns remain applicable to the Ecosystem Restoration chapter in the Second Draft, which remains incomplete and poorly conceived.

In addition to the foregoing concerns, the County is (once again) troubled by the overly broad nature of many of the policies included in Chapter 5. Of greatest concern are the following policies:

**ER P1.** This policy requires “[c]overed actions that have ecosystem implications” to consider and avoid or minimize impacts on the potential for ecosystem restoration within vast areas of the Delta and Suisun Marsh, as shown on certain figures in other state plans. This policy thus prescribes a more nuanced approach to such projects than the broad moratorium imposed by WR P6. (Second Draft, p. 31.) The resulting conflict between these policies, however, must be resolved. Certainly, the County prefers the more tailored approach set forth in ER P1, as it appears to allow covered actions to proceed so long as their impacts on overall ecosystem restoration potential within this large area are addressed.

**ER P3.** In obvious conflict with the measured approach described in ER P1, this policy bars any activity that will convert “[f]loodplains that are critical to support the sustainability of fish species that use the Delta . . . to uses that preclude ecosystem restoration[.]” This policy is remarkably flawed. It is vague, failing to define these “critical” floodplains by location or other objective criteria. It is overbroad, extending to not only “covered actions” but apparently any other use or activity that will impact some sort of undefined ecosystem restoration that may or may not proceed in the future. It is also utterly unnecessary and well beyond even the most generous reading of the Council’s legal authority. The County urges the Council to delete this policy.

**ER P5.** As noted earlier in this letter with respect to WR P1, the conditional moratorium on “projects” described in the final sentence of ER P5 is inappropriate and should be deleted.

**ER P6.** This policy requires local governments to ensure that their “land use plans” do not preclude “opportunities for ecosystem restoration, habitat creation, channel modification for ecosystem benefit, or increased connectivity between water and land; or direct such uses away from their most effective locations.” Like ER P3, this policy is flawed in many respects. For example, it does not define the “most effective locations” of ecosystem restoration, habitat creation, and other activities. It is unlikely that local governments will be able to identify such locations if the final Delta Plan contains such a vague directive. Also, the need for this policy is unclear. The Second Draft does not contain any findings or discussion indicating that the so-called “most effective locations” for habitat restoration are presently threatened by development or, conversely, that local governments are precluding appropriate ecosystem restoration projects. In the absence of a clear, specific, and significant need for such a policy, it should be deleted.

As the foregoing discussion makes clear, Chapter 5 of the Second Draft is seriously deficient and needs to be revisited in its entirety. Curtailing local government authority over vast, unspecified areas of the Delta is neither a necessary nor appropriate means of achieving the broad habitat restoration objectives set forth in the Act. The County looks forward to reviewing a significantly revised version of Chapter 5.

**Comments on Chapter 6**  
**“Improve Water Quality”**

The County has no comments on this chapter at the present time.

**Comments on Chapter 7**  
**“Reduce Delta Flood Risk to People, Property, and State Interests”**

This chapter, like many others in the Second Draft, is replete with vague directives that greatly intrude on local land use authority without any accompanying demonstration of reason or need. The following policies and recommendations are of significant concern to the County:

**Policies**

**RR P1.** The County agrees that, as this policy dictates, no covered action should “reduce the level of flood flow capacity through and/or around the Delta.” But this language—the only language that remotely address the maintenance of existing levels of flood protection in the Second Draft—is merely a starting point. A more meaningful policy could incorporate the following points:

- The level of flood protection provided by existing facilities and related infrastructure cannot be adversely affected. This means, among other things, that flood protection facilities cannot be directly (e.g., modified structurally in a manner that impairs their flood protection function) or indirectly (e.g., continued operation and maintenance are jeopardized) impaired as a consequence of any covered action.
- The potential restoration of existing flood protection facilities to meet their original design function, capacity, and level of protection cannot be jeopardized by a covered action.
- The opportunity to implement reasonably foreseeable improvements to flood protection facilities must be preserved. Where feasible, improvements should be implemented as part of a covered action. Improvements described in a local plan of flood protection or other local documents and improvements necessary to ensure at least a 100-year level of flood protection for small communities and a 200-year level of flood protection for urban areas should be considered “reasonably foreseeable” in the context of this policy.

**RR P2.** This policy contains some reasonable elements, but it begins by reciting a portion of the Delta Protection Act stating that the statutory Delta “. . . is inherently a floodprone area wherein the most appropriate land uses are agriculture, wildlife habitat, and, where specifically provided, recreational activities . . . .” It then continues to say that covered actions “coming before the Council and other matters within the Council’s jurisdiction shall apply this finding.” This is so vague as to be meaningless. For example, if a county is considering the approval of a small winery, how is it to “apply this finding”? This language needs to be clarified or deleted, and it may make little sense to require counties to “apply this finding” to every covered action. A more appropriate approach may be to leave this matter to the Delta Protection Commission, which is vested with both the authority and responsibility to address this legislative finding in its Land Use and Resource Management Plan.

In addition, the final bullet of RR P2 states that a proposed covered action “shall include legally-enforceable ‘hold harmless’ provisions for the benefit of the State, if applicable.” Yet again, the intended meaning and application of this language is impossible to discern. Assuming it is intended to require project proponents to insulate the state from liability (as in the *Paterno* decision) arising from deficiencies in its flood protection system, the County doubts that the Council has legal authority to

enforce such a requirement. The “if applicable” language also creates considerable vagueness and should be clarified.

**RR P3.** This policy places a moratorium on all covered actions after January 1, 2015 if the approving agency has failed to “bring its policies and plans into conformity” with Table 7-1 in the Second Draft. It is unclear what this means; the County cannot provide any comments until this policy is clarified.

**RR P6.** This policy identified three geographic areas, including the Yolo Bypass, and declares that “[n]o covered action [therein] . . . shall diminish existing or potential value as flood plains except as provided in this Delta Plan.” This begs many questions. For instance, what does it mean to “diminish existing or potential value as flood plains”? “Value” means what, exactly, in the context of this policy? The County also questions the exception for actions “provided in this Delta Plan,” which apparently *can* diminish the “value”—whatever that may be—of the identified flood plains.

In summary, this policy is unintelligible and requires significant clarification.

### **Recommendations**

**RR R2 and R3.** Recommendations RR R2 and RR R3 propose the elimination of any state liability—whether based on tort theories, inverse condemnation, or other grounds—for damages arising from the failure of a state flood control project. The County recognizes that these are merely recommendations. Nonetheless, particularly in the absence of any supporting discussion, this call for a landmark change in state policy seems inappropriate. These recommendations should be eliminated.

### **Comments on Chapter 8**

#### **“Protect and Enhance the Unique Cultural, Recreational, Natural Resources, and Agricultural Values of the California Delta as an Evolving Place.”**

Of all the chapters in the Second Draft, Chapter 8 is the greatest disappointment to the County. It is intended to address an issue that the Legislature placed second on its list of “inherent objectives” relating to the coequal goals: protecting and enhancing “the unique cultural, recreational, and agricultural values of the California Delta as an evolving place.” Yet in the Second Draft, this important chapter is barely a page in length and contains nothing that is pertinent to the stated legislative objective.

It is well past time to assemble a meaningful discussion of this topic. Resources addressing a similar range of issues are widely available (e.g., local general plans, the Land Use and Resource Management Plan of the Delta Protection Commission, and other existing documents). County staff are also available to share information, guidance, and ideas with Council staff and consultants on strategies for addressing this important topic. The County urges the Council to immediately prioritize such efforts. Given the ambitious timetable for completion of a Draft Delta Plan for environmental review, however, the County is concerned that the “Delta as a Place” chapter will remain incomplete and ineffectual at best.

As for the content of Chapter 8 in the Second Draft, the County is perplexed. Neither of the two policies included in Chapter 8 does anything to advance the objective of this chapter. The County’s specific comments on the policies and recommendations included in Chapter 8 are as follows:

## **Policies**

**DP P1.** Without any apparent justification, DP P1 bars all covered actions “involving municipal, industrial, and/or agricultural development activities” in the Delta until the Delta Protection Commission completes its economic sustainability plan and, in addition, the Council determines the plan (apparently, in its entirety) to be consistent with the coequal goals. Depending on the interpretation of the word “municipal,” only habitat projects appear to be spared from the scope of this Delta-wide moratorium of indefinite duration.

The County again repeats many of the same fundamental concerns it has raised in connection with other bans on covered actions, projects, and activities appearing throughout the second draft. At the very least, a restriction of this nature should have a sound policy basis—but no supporting discussion is offered. Further, the Council cannot create new requirements for the economic sustainability plan—i.e., the requirement that it be consistent with the coequal goals—through the Delta Plan. The Legislature has already defined the components of the economic sustainability plan and the criteria for Council evaluation thereof. (*See* Water Code § 29773, which requires the Council to adopt recommendations in the economic sustainability plan provided they are “feasible and consistent with the objectives of the Delta Plan and the purposes of this division.”) And more generally, the Council’s legal authority to impose a moratorium of this nature does not appear within the Act. The policy is therefore unlikely to be enforceable even its other significant flaws are resolved.

Altogether, this policy should be deleted and replaced by a set of policies that actually address the important objective of this chapter.

**DP P2.** Adding (somewhat redundantly) to DP P1, DP P2 prohibits all covered actions within the “legacy towns” such as Clarksburg until the Delta Protection Commission takes certain actions that appear largely subsumed within the task of preparing its economic sustainability plan. As to this policy, the County reiterates all of its comments with regarding to DP P1.

## **Recommendations**

The County is more encouraged by the three recommendations included in this chapter. It supports DP R1, which encourages funding for implementation of the economic sustainability plan. The County also supports DP R2—calling for creation of a system of payments in lieu of taxes for “the removal of properties from property tax rolls for ecosystem restoration or water supply purposes.” Lastly, the County also supports DP R3, relating to federal designation of the Delta and Suisun Marsh as a National Heritage Area.

With regard to DP R2, the County urges the Council to make the implementation of a system of payments in lieu of taxes a mandatory prerequisite to any significant ecosystem restoration or water supply project. There is no legal or equitable reason for local governments in the Delta to effectively subsidize projects that sustain agricultural activities and urban development in other parts of the state. Payments in lieu of taxes should simply be a component of the cost of such projects. This is a very important issue to the County—which is currently owed over \$1 million for unpaid payments in lieu of taxes for lands within the Yolo Bypass Wildlife Area—and it will be discussed in more detail in a future letter.

Mr. Phil Isenberg, Chair

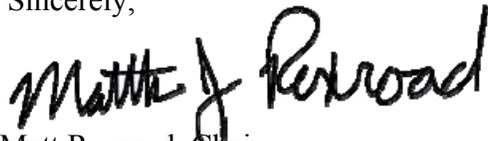
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The Yolo County Board of Supervisors appreciates the opportunity to provide comments on the Second Draft of the Delta Plan. We look forward to continued involvement in the planning and environmental review processes.

Sincerely,

A handwritten signature in black ink that reads "Matt Rexroad". The signature is written in a cursive, slightly slanted style.

Matt Rexroad, Chair

Yolo County Board of Supervisors