



715 P Street, 15-300
Sacramento, CA 95814

916.445.5511
DELTACOUNCIL.CA.GOV

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January 19, 2024

State Water Resources Control Board
Division of Water Rights
Attn: Bay-Delta & Hearings Branch
P.O. Box 100
Sacramento, CA 95812-2000

Delivered via email: SacDeltaComments@waterboards.ca.gov

RE: Comments on the Draft Staff Report in Support of Potential Sacramento/Delta Updates to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary

Dear Chair E. Joaquin Esquivel:

Thank you for the opportunity to review and comment on the Draft Staff Report (draft Staff Report) in Support of Potential Sacramento/Delta Updates to the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan). The Delta Stewardship Council (Council) appreciates the opportunity to review and submit comments on the draft Staff Report. The draft Staff Report describes a proposed update to the Bay-Delta Plan, focused on the Sacramento River watershed, Delta eastside tributaries, and the Sacramento-San Joaquin Delta (Delta) which has been anticipated for several years.

This letter provides background and describes connections between the Delta Plan and the proposed Bay-Delta Plan update, describes relevant Delta Plan policies and recommendations, highlights the importance of more natural, functional flows,

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highlights the importance of best available science and the Council's experience in adaptive management and science governance, and requests clarification and additional detail on several topics. Specifically, as discussed below, we request additional detail on aspects of the proposed update, alternatives, and proposed Voluntary Agreements, and offer comments concerning our experience with best available science and adaptive management. **These comments are intended to better connect the work being done by the Council to the update being contemplated by the Water Board, and in doing so help improve the final Staff Report and subsequent implementation actions.**

The Council is an independent state agency established by the Sacramento-San Joaquin Delta Reform Act of 2009, codified in Division 35 of the California Water Code, sections 85000-85350 (Delta Reform Act). The Delta Reform Act charges the Council with furthering California's coequal goals of providing a more reliable water supply and protecting, restoring, and enhancing the Sacramento-San Joaquin River Delta (Delta) ecosystem. (Water Code, § 85054.) The Delta Reform Act further states that the coequal goals are to 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. The Council is charged with furthering California's coequal goals for the Delta through the adoption and implementation of the Delta Plan. (Wat. Code, § 85300.) As part of the Council, the Delta Science Program is charged with providing the best possible unbiased scientific information to inform water and environmental management decisions for the Delta. This charge is carried out by funding research, synthesizing and communicating scientific information to policy-makers and decision-makers, promoting independent scientific peer review, and coordinating with Delta resource management agencies to promote science-based adaptive management. (Wat. Code, § 85280(b)(4).)

The Delta Plan contains regulatory policies, which are set forth in California Code of Regulations, Title 23, sections 5001-5015. Through the Delta Reform Act, the Council was granted specific regulatory and appellate authority over certain actions of State or local public agencies that take place in whole or in part in the Delta. (Wat. Code, §§ 85210, 85225.30.) A state or local agency that proposes to undertake a covered action is required to prepare a written Certification of Consistency with detailed findings as to whether the covered action is consistent with the Delta Plan and submit that Certification to the Council prior to initiation of the implementation of the covered action. (Wat. Code, § 85225.) As a regulatory action of a State agency, the proposed Bay-Delta Plan update is, by definition, not considered a covered

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action. (Wat. Code, § 85057.5(b)(1).) However, the coequal goals and one Delta Plan regulatory policy (**ER P1**: Delta Flow Objectives, (Cal. Code Regs., tit. 23, § 5005)) are concerned with how the Bay-Delta Plan is implemented, and we are therefore noting this nexus, discussed in more detail below.

Connections between the Delta Plan and the Bay-Delta Plan

As noted above, the Delta Reform Act established the Council and charged the Council with developing an enforceable long-term management plan for the Delta to ensure coordinated action at the federal, State, and local levels. The Delta Plan, adopted in 2013, includes both regulatory policies and non-regulatory recommendations. Chapter 4 of the Delta Plan: *Protect, Restore, and Enhance the Delta Ecosystem* includes a regulatory policy and a recommendation focused specifically on flows.

Delta Plan Policy **ER P1** “Delta Flow Objectives” (Cal. Code Regs., tit. 23, § 5005) states:

(a) The State Water Resources Control Board's Bay Delta Water Quality Control Plan flow objectives shall be used to determine consistency with the Delta Plan. If and when the flow objectives are revised by the State Water Resources Control Board, the revised flow objectives shall be used to determine consistency with the Delta Plan.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, the policy set forth in subsection (a) covers a proposed action that could significantly affect flow in the Delta.

ER P1 refers to and requires the use of Bay-Delta Plan flow objectives (currently described in Decision 1641) for covered actions to demonstrate consistency with the Delta Plan, and the use of revised flow objectives if and when these go into effect. Because the draft Staff Report describes a potential update to the Bay-Delta Plan and its flow objectives, it is directly relevant to ER P1 and future covered actions subject to ER P1. The Council requests that, in the final Staff Report, the Water Board **specifically identify what the applicable flow objectives described in ER P1 (Cal. Code Regs., tit. 23, § 5005) will be when the Bay-Delta Plan is updated.** While we understand implementation activities are a subsequent step, this level of detail is important for the Council to be able to evaluate the forthcoming final Staff Report, and the implications for **ER P1**.

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Delta Plan Recommendation **ER R1** "Update Delta Flow Objectives," revised as part of a Delta Plan amendment adopted in June 2022, states:

The State Water Resources Control Board (SWRCB) should maintain a regular schedule of reviews of the Bay-Delta Plan to reflect changing conditions due to climate change and other factors. The SWRCB should consult with the Delta Science Program on adaptive management and the use of best available science.

The draft Staff Report is broadly aligned with recommendation ER R1. We encourage Water Board staff to consult with the Delta Science Program and other Council staff regarding best available science and adaptive management.

Alternatives and the Proposed Voluntary Agreements

The draft Staff Report describes 10 alternatives that may be considered for adoption by the Water Board as part of the Bay-Delta Plan update. Alternatives 1-3 are standalone, whereas alternatives 4, 5, 6 are modular and include sub-alternatives. Alternative 6 describes the proposed Voluntary Agreements Program (proposed Voluntary Agreements) that the draft Staff Report characterizes as a potential implementation pathway for the Bay-Delta Plan, which could help meet requirements to protect beneficial uses in the watershed. Council staff understand the unimpaired flow approach to be the Water board proposal, and proposed Voluntary Agreements as a multiparty proposal that includes flow measures that would be in addition to a yet-to-be-determined amount of base flows. The proposed Voluntary Agreements include narrative objectives related to native fish populations, flow, and non-flow (wildlife habitat) measures. The proposed Voluntary Agreements also describe frameworks for governance, science and monitoring, and adaptive management. We understand more details will be forthcoming in these areas and look forward to reviewing the final Staff Report.

Council staff understand that as currently described, the proposed Voluntary Agreements could be implemented using a mix-and-match approach along with other alternatives under consideration. Given this, the final Staff Report should clearly identify what the effective flow objectives will be or how these will be determined through a future implementation plan. For example, if the proposed Voluntary Agreements are included, in part or in whole, it is crucial to **describe how applicable flow objectives will be measured and enforced.**

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Descriptions of how the proposed Voluntary Agreements would be implemented are general at this time. Council staff request additional details to those provided in Section 7.2 (Description of Alternatives) and Appendix G1 (Voluntary Agreement Proposal) that **describe the structure and implementation plans for the proposed Voluntary Agreements, what actions would take place after the initial eight-year monitoring period, and who will have the authority to carry out these actions.** Similarly, Council staff request information on habitat (non-flow) components (Appendix G1, PDF p. 52). **The final Staff Report should include additional information about these projects, including their size and locations.** If the proposed Voluntary Agreements are approved, one or more of these projects may be covered actions and would be subject to the Council's Certification of Consistency process pursuant to the Delta Reform Act (Wat. Code, § 85225).

Flows and Flow Objectives

The flow of water – including characteristics such as volume, timing, temperature, and water quality – is a critical component of a functioning Delta. As noted above, the State, through the Delta Reform Act, established coequal goals for the Delta of a reliable statewide water supply and a protected, restored, and enhanced Delta ecosystem to be achieved in a manner that preserves the values of the Delta as a place. Achieving these goals is contingent on what the Delta Plan describes as “more natural, functional flows”. The Delta Plan includes a focus on these functional flows, including recommendations to help achieve them. For example, ER R1 (described above) and components of recommendations WR R12e, WR R12f, and WR R12j related to functional flows¹. Chapter 4 of the Delta Plan establishes more natural, functional flows as its first core strategy, critical to the function of the Delta. This importance is supported by numerous peer-reviewed studies as well as the Water Board's 2017 Scientific Basis report.²

The importance of functional flows is highlighted in several of the early action items in the Delta Reform Act related to flow criteria and quantifiable biological objectives

¹ Please see Delta Plan Chapter 3: *A More Reliable Water Supply for California*. Available online: <https://deltacouncil.ca.gov/pdf/delta-plan/2018-04-26-amended-chapter-3.pdf>

² Please see Delta Plan Chapter 4: *Protect, Restore, and Enhance the Delta Ecosystem, Core Strategy 1: Create More Natural Functional Flows*, and *References* at the end of the chapter. Available online: <https://deltacouncil.ca.gov/pdf/delta-plan/2022-06-29-chapter-4-protect-restore-and-enhance-the-delta-ecosystem.pdf>

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for aquatic and terrestrial species of concern that are dependent on the Delta (e.g., Wat. Code, § 85084.5 and § 85085). The Delta Plan also establishes four performance measures for quantifying flow criteria relevant to the Delta and upstream tributaries³. These include measures for in-Delta flow, peak flow, recession flow, and inundation of the Yolo Bypass that were developed based on peer-reviewed scientific studies and expert interviews.

The Delta Reform Act also includes a requirement for the Delta Plan to include measures that would restore Delta flows and support a healthy estuary. (Wat. Code, § 85302(e)(4).) **The Bay-Delta Plan has been and remains the guiding, enforceable way to achieve these goals.**

Best Available Science

The Council and, specifically, the Council's Delta Science Program (DSP) acknowledges both the Water Board staff and the proposed Voluntary Agreements parties for developing recommendations based on detailed scientific analyses. Two key documents capture these scientific analyses:

- The **2017 Scientific Basis Report** which describes the science supporting the primary **non-Voluntary Agreements alternatives** evaluated in the draft Staff Report; and
- The **2023 Final Draft Scientific Basis Report Supplement** which documents the science supporting the **proposed Voluntary Agreements** and serves as a supplement to the 2017 Scientific Basis Report.

DSP appreciates the breadth and depth of these analyses, and the methods for developing proposed alternatives and implementation mechanisms.

Irrespective of the alternative that it chooses, the DSP urges the Board to ensure that the Bay-Delta Plan update and its implementation:

- Be rooted in **best available science**⁴;

³ Delta Plan Chapter 4: *Protect, Restore, and Enhance the Delta Ecosystem*, Appendix E. Performance Measures 4.2A, 4.2B, 4.2C, 4.2D, available online: <https://deltacouncil.ca.gov/pdf/delta-plan/2022-06-23-amended-appendix-e-performance-measures.pdf>

⁴ The Delta Plan defines best available science as science that is: a) relevant to the biological, physical or social components affected by the decision; b) inclusive of information and analyses across disciplines; c) objective and void of nonscientific influences; d) transparent and open to public

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- Include **adaptive management** as a means for incorporating new information as it becomes available;
- Leverage and build upon the wealth of **monitoring data** that exists for the Delta, largely thanks to the Interagency Ecological Program; and
- Seek independent external **scientific peer review** of its plans and progress to ensure scientific rigor and credibility.

DSP has served the Delta over the last fifteen years by carrying out the very principles and actions listed above. DSP stands ready to provide scientific support to the Water Board to aid in its decision-making and implementation of this Bay-Delta Plan update.

Closing Comments

Council staff are available to discuss comments offered in this letter as the Water Board prepares a final Staff Report and potential updates to the Bay-Delta Plan. Please contact Daniel Constable at 916-902-6470 or daniel.constable@deltacouncil.ca.gov with any questions.

Sincerely,



Jeff Henderson, AICP
Deputy Executive Officer

scrutiny; e) timely, both with respect to efficiency and current situations; f) subject to independent external scientific peer review. These criteria are described in Delta Plan Appendix 1A: <https://www.deltacouncil.ca.gov/pdf/delta-plan/2015-appendix-1a.pdf>