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VIA E-MAIL and CERTIFIED MAIL RETURN RECEIPT REQUESTED

Delta Stewardship Council
Attn: Terry Macaulay
980 Ninth Street, Suite 1500
Sacramento, CA 95814
E-mail: eircomments@deltacouncil.ca.gov

Re: *Comments of the California Sportfishing Protection Alliance (CSPA), California Water Impact Network (C-WIN), and AquAlliance to the Revised Draft Delta Plan Program Environmental Impact Report*

Dear Ms. Macaulay,

C-WIN, CSPA, and AquAlliance, hereinafter the groups, appreciate the opportunity to provide comments to the Recirculated Draft PEIR (RDPEIR) for the Delta Plan project. Unfortunately, most of the deficiencies we addressed in our comments to the first draft PEIR remain unaddressed by the DRPEIR. Therefore, in addition to incorporating our original comments by reference, we provide additional comments on the revised recirculated draft, attached hereto.

s/MICHAEL B. JACKSON
Michael B. Jackson
Attorney for the California Water Impact
Network (C-WIN), the California
Sportfishing Protection Alliance (CSPA),
and AquAlliance

C-WIN, CSPA, and AquAlliance, Comments to
the Recirculated Draft PEIR (RDPEIR) for the Delta Plan project
January 14, 2013

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I. The RDPEIR for the Delta Plan Project Fails as a Programmatic EIR

Using a programmatic EIR affords a lead agency no cover for a CEQA document that “does not provide decision-makers, and the public, with the information about the project required by CEQA.” (*Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 916.) A program EIR cannot rationalize vague or evasive analysis. The CEQA guidelines’ list of “advantages” to preparing a program EIR include a “more exhaustive” examination of effects and alternatives, “full consideration” of cumulative impacts, and allowance for analysis of “broad policy alternatives and program wide mitigation measures” at a time when the lead agency has the best opportunity to address them properly. (Cal. Code Regs., tit. 14, § 15168(b).)

Programmatic EIRs are intended to provide a broad look at policies and potential cumulative impacts of a series of actions. A program EIR may be prepared on a series of actions that are related either: (1) geographically, (2) procedurally (where the actions are a logical step in contemplated actions), (3) in connection with the issuance of rules, regulations, plans, etc. that govern the conduct of a continuing program, or (4) as individual activities carried out under the same authorizing statutory or regulatory authority and having generally similar environmental effects which can be mitigated in similar ways. (CEQA Guidelines, § 15168, subd. (a).) The benefits of Program EIRs include providing for an occasion for a more exhaustive consideration of effects and alternatives than would be practical in an EIR on an individual action, ensuring consideration of cumulative impacts that might be slighted in a case-by-case analysis, and avoiding duplicative reconsideration of basic policy considerations, among other things. Without an understanding of the types of projects that will follow, the PDEIR cannot possibly contain substantial evidence to support its conclusions (CEQA Guidelines, § 15384), thus failing to uphold the requirements of CEQA. (See *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 916) (CEQA not satisfied if document fails to provide decision-makers and the public with the required information about the project.)

The Vol.1 RDPEIR states that “[f]uture environmental documents would be completed by other agencies when they propose to implement projects that are subject to consistency reviews by the Council, or projects which are encouraged or otherwise influenced by the Delta Plan. Hence, this program EIR is not intended to provide project-level clearance for any specific project.” It is not clear whether the RDPEIR appears to permit an agency to determine that

unspecified future projects are “within the scope” of the Delta Plan, thereby sidestepping further environmental review. The DEIR should be revised to specify that it is not intended to be the sole environmental review for any future projects.

A. The RDPEIR Fails to Provide an Adequate Project Description

An adequate project description is vital to understanding the environmental setting, and concerns that arise therein. Without an adequate project description, crucial decisions regarding project impacts, and viable alternatives cannot be effectively determined by the agency, or the public reviewing the environmental documents. CEQA Guidelines § 15125 subdivisions (c) and (d) state that:

Knowledge of the regional setting is critical to the assessment of environmental impacts. Special emphasis should be placed on environmental resources that are rare or unique to that region and would be affected by the project. The EIR must demonstrate that the significant environmental impacts of the proposed project were adequately investigated and discussed and it must permit the significant effects of the project to be considered in the full environmental context. The EIR shall discuss any inconsistencies between the proposed project and applicable general plans and regional plans. Such regional plans include, but are not limited to . . . habitat conservation plans, natural community conservation plans and regional land use plans . . . In failing to provide an adequate description of upstream areas, the RDPEIR also violates CEQA mandates on establishing a baseline.

CEQA Guidelines 15124, requires *a statement briefly describing the intended uses of the EIR*, including the information known to the Lead Agency. The RDPRIR and DEIR fail to include a comprehensive statement of intended uses of the RDPEIR, leaving it vulnerable to misuse in the future and violating CEQA Guidelines, section 15124. The RDPEIR does not include a revised project description that delineates the geographic scope of upstream areas. CEQA Guidelines 15124 state that:

[t]he description of the project *shall* contain the following information... (a) The precise location and boundaries of the proposed project shall be shown on a detailed map, preferably topographic, [and] (c) A general description of the project's technical, economic, and environmental characteristics, considering the principal engineering proposals if any and supporting public service facilities.

Vol. I RDPEIR (Section 1.4.2) included a map of a vast “upstream” area, but did not include actual analysis of most of these areas. The RDPEIR does casually mention that “operation of

facilities within the rivers and streams upstream of the Delta or in the Delta could result in changes in salinity in the Delta by reducing Delta freshwater inflows during some periods of the year.” (p. 3-13.) However, by failing to revise the Project Description to describe the upstream areas in the impact analysis, it is impossible to determine the impacts on the project. The Revised Project (as well as the Proposed Project) supports certain projects without any quantitative justification on costs, yield, impacts on the environment, or evaluation of the public trust values involved. (CEQA Guideline 15126.5, “Discussion of Alternatives,” Guideline 15146, “Degree of Specificity.”) Further, “[l]ead agencies should define the geographic scope of the area affected by the cumulative effect and provide a reasonable explanation for the geographic limitation used.” CEQA Guidelines 15130. The RDPEIR claims to have expanded its scope into upstream areas, but fails to describe these areas or justify the parameters of its scope. While this RDPEIR states that the Revised Project includes upstream areas, it fails to establish the environmental setting for these areas; thus, its discussion of potential impacts to these areas is essentially speculation. It furthermore does not include a description of the relevant regulatory schemes in these areas and how such regulations would be reconciled with the policies and recommendations in the Delta Plan. This omission violates CEQA. (CEQA Guidelines, § 15125.) The current state of the Delta as well as its tributaries must be established in order to have a legitimate discussion of a project’s impacts.

B. The RDPEIR Fails to Provide an Adequate Disclosure of the Environmental Setting of the Project.

The Delta is a critically important natural resource for California and the nation. It serves Californians concurrently as both the hub of the California water system and the most valuable estuary and wetland ecosystem on the west coast of North and South America. (Water Code Section 85002). The Sacramento-San Joaquin Delta watershed and California's water infrastructure are in crisis and existing Delta policies are not sustainable. Resolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources. (Water Code Section 85001(a).)

1. Baseline

The Environmental Setting of the RDPEIR must be revised to reflect the state of drastic overextended entitlements of water coming from the Delta. An agency may not escape its duty

by ignoring that duty and then presenting the result as a *fait accompli* incorporated into an environmental baseline. *League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 739 F. Supp. 2d 1260, 1272 (E.D. Cal. 2010) *aff'd in part, vacated in part, remanded*, 469 F. App'x 621 (9th Cir. 2012). The DEIR and RDPEIR utterly fail to include a comprehensive analysis of the availability of water coming into the Delta. In order to demonstrate how such a comprehensive analysis could be done, we incorporate by reference the report prepared by Tim Stroshane for CSPA, CWIN, and AquAlliance in the State Board hearings regarding amendment of the Bay/Delta Water Quality Control Plan (Appendix 1 and 1a herein). This document, which includes 223 pages listing existing water rights, demonstrates that the Bay/Delta watershed is indeed grossly over-appropriated and that until this problem is resolved it is impossible for the DSC to approve a Delta Plan that can meet the requirements of the Delta Reform Act to recover the Bay/Delta and to improve reliability of the California water supply.

The average annual water supplies of the Sacramento and San Joaquin river watersheds between 1998 and 2005 totaled approximately 35 MAF. Tables 3-1 and 3-4, Volume 1 & 2. This includes groundwater extraction and agricultural return flows. The average combined unimpaired flow of the two watersheds has been identified as approximately 29 MAF. However, there are 153.9 MAF of legal claims to that water. Consequently, the watersheds are seriously over-appropriated. As California's water rights system is seniority based and restrained by Area of Origin and Watershed Protection statutes, any fair disclosure CEQA document addressing water supply reliability and Delta restoration would be seriously inadequate if it failed to extensively discuss and analyze the over-subscription of water and legal constraints on out-of-basin transfers of water.

The problem of over-appropriation has been known and well documented since the Central Valley Project Act was passed by the Legislature in 1933. Governor Earl Warren, testified in 1951 that those in State Government felt “for many years that there should be a complete adjudication of the water rights on the Sacramento River, and we believed it should be done before the Central Valley project was completed and in operation.”¹ The formal Findings of the 1951 Engle Congressional Committee held that:

¹ Appendix 2. *As quoted in*: Gleason, Walter M. 1960. Opinion of Attorney Walter M. Gleason Regarding Various Legal Aspects of Burns-Porter Act (SB 1106) (Proposition One), California Senate Interim Committee on Water Projects. 28 October 1960. p. 16.

1. “For all practical purposes, the developed water supplies of the Sacramento River are overcommitted and oversubscribed.”²
2. Without adjudication, “The State of California and Bureau of Reclamation officials may create a ‘legal Frankenstein,’ which would destroy all hope for State control of Central Valley water rights...”³
3. State and federal projects were claiming and depending upon the same Feather River water rights.⁴

Despite the clear problem, nothing was done to remedy the over-appropriation problem. In 1960, during consideration of the Burns-Porter Act (State Water Project), Senator Stephen Teale, Chairman of the California Senate Interim Committee on Water Projects asked legendary water rights attorney Walter M. Gleason to submit a legal assessment of the proposed State Water Project.⁵ In a 72-page opinion, Mr. Gleason, incorporated herein as Appendix 2, he observed that there wasn't “any accurate or proper administrative determination by the State of the extent of the ‘surplus’ water which is or will be available in the Central Valley for export.”⁶ He described the consequences of a failure to identify and quantify vested rights, said that the project would not protect the Delta and would aggravate the existing salinity and hydrology problems,⁷ and said the export schemes were based, “wholly and entirely in assumptions.”

Over-appropriation is a huge factor in determining impacts to the environment, especially in light of the current degraded condition of the Sacramento-San Joaquin Bay Delta. In 2009, the Delta Reform Act held that “[t]he Sacramento-San Joaquin Delta watershed and California's water infrastructure are in crisis.” Section 85001. For example, the Delta region has a severely depleted groundwater basin, yet the RDPEIR fails to reflect the SWRCB conclusions regarding how inadequate flows into and out of the Bay Delta are contributing to this environmental hazard. As it stands, the Delta aquifer is critically over drafted, causing a void that pulls in sea water from the Bay in an easterly direction. New diversions would reduce the natural flushing of the Delta and could eliminate the natural salt water barrier created by the freshwater inflows into the Delta, causing increased migration and intrusion of brackish water in the groundwater basin. The cumulative impacts of the diversion for the Revised Project, and other activities affecting groundwater including over drafting must be addressed in the EIR.

² Ibid. p. 22.

³ Ibid. p. 49.

⁴ Ibid. p. 50.

⁵ Ibid. pp. 1-3.

⁶ Ibid. p. 17.

⁷ Ibid. p. 39.

Resolving this crisis “requires fundamental reorganization of the state's management of Delta watershed resources.” Section 85001. This revised management of Delta resources requires pursuing the coequal goals of “providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” Section 85054. 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.” *Id.* For the purposes of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan, the Legislature required the State Water Resources Control Board to develop new flow criteria for the Delta ecosystem necessary to protect public trust resources. Section 85086(c)(1). The Delta Plan and its accompanying environmental documents fail miserably to implement the coequal goals required under the Delta Reform Act. From the beginning, the Stewardship Council has failed to define what it believes to be the “coequal goals” of this plan, nor has it established quantifiable goals, or measurements for achieving the goals of the plan. Instead, the Delta Plan only recommends, and the RDPEIR only evaluates, proposals that continue to violate existing environmental laws. The RDPEIR utterly fails to adequately analyze, discuss, disclose or compare defensible and quantifiable goals, yardsticks and mileposts for achieving the coequal goals and their effects on various alternatives. The RDPEIR merely proposes and analyzes a plan that perpetuates an unsustainable status quo. Further, the Stewardship Council declined to conduct a water quality analysis to evaluate the impacts to pollutant concentration and residence time from diverting additional dilution flows around an already degraded estuary. Central Valley waterways are polluted despite more than forty years of laws prohibiting pollution. Yet the Delta Plan assumes that agencies that have failed to prevent pollution will, somehow, in the future prevent pollution by implementing programs that failed to prevent pollution. The Delta Plan cannot assume, given the historical record, that continuation of programs that have failed to prevent pollution will, in fact, improve water quality. The RDPEIR is inadequate because it failed to adequately analyze, discuss and disclose how a continuation of existing and largely failed programs will produce different outcomes in the future and how continued pollution will affect various analyzed alternatives. The over appropriation of Central Valley waters has been long known and amply documented, and there can be no justification for not providing decision makers with this crucial information. Such information is fundamental for making intelligent

choices regarding water supply reliability or Delta restoration, and projects and plans cannot be evaluated properly without this information.

a) *An Overprescribed and Unhealthy Delta*

The Delta Reform Act specifically mandates a comprehensive review and analysis of the impacts of “possible changes in total precipitation and runoff patterns” due to climate change on the Proposed Project before incorporation into the Delta Plan. The Delta Plan must specifically address the requirements of the Delta Reform Act, and must describe a review process that will ensure that the Bay Delta Conservation Plan takes a sufficiently comprehensive look at how shifts in precipitation and runoff from climate change could affect the planned project and operations, as well as the environment. The Proposed Project, however, does not require specific water reliability projects. Rather, the project contains broad requirements and recommendations that make it unclear what types of projects will actually be implemented as a result of the Proposed Project policies and recommendations. The Delta Plan must clearly and specifically address how the Delta Stewardship Council will ensure adequate review of the BDCP climate change analysis prior to incorporation of BDCP into the Delta Plan. This is an essential duty of the Delta Stewardship Council as an independent agency and should not be delegated to the Department of Water Resources or any other agency.

In water resources planning, it is often assumed that future hydrologic variability will be similar to historical variability, which is an assumption of a statistically stationary hydrology. This assumption no longer holds true under climate change where the hydrological variability is non-stationary. Recent scientific research indicates that future hydrologic patterns are likely to be significantly different from historical patterns, which is also described as an assumption of a statistically non-stationary hydrology. In an article in *Science*, Milly et al. (2008) stated that “Stationarity is dead” and that “finding a suitable successor is crucial for human adaptation to changing climate.” A growing number of climate change studies have projected an increase in the frequency and severity of droughts in the Sierras and the Central Valley, and particularly under the higher greenhouse gas emissions scenarios. Major shifts in precipitation and runoff could have huge impacts on yields of proposed storage and conveyance projects, as well as huge environmental impacts. It is essential that information on potential flows and diversions under

drier climate change scenarios be made available so that the risk can be evaluated by the public trust agencies, and the public.

The lengthy analysis of water supply, for instance, barely addresses the State Board's Delta flow recommendations. These recommendations underscore the imperative to reduce water exports to sustain the Delta's ecosystem, as well as beneficial uses and public trust values. The State Board recommended flow criteria to protect these values in August 2010: "Recent Delta flows are insufficient to support native Delta fishes for today's habitats...." In order to preserve the attributes of a natural variable system to which native fish species are adapted, many of the criteria developed by the State Board are crafted as percentages of natural or unimpaired flows. These criteria include:

- 75% of unimpaired Delta outflow from January through June;
- 75% of unimpaired Sacramento River inflow from November through June; and
- 60% of unimpaired San Joaquin River inflow from February through June.⁸

It is inconceivable that in thousands of pages of Delta Plan and EIR that is no serious effort to disclose, analyze or discuss water availability and the over appropriation of water in the Central Valley. It is the failure to undertake these assessments that has led to the present crisis. Failure to undertake them now will simply perpetuate an unsustainable status quo that will only exacerbate an already dire situation. The Delta Stewardship Council must ensure that these deficiencies are remedied, prior to incorporation of the Bay Delta Conservation Plan into the Delta Plan, and should ensure that adequate analysis of potential drought impacts of climate change is done for all projects incorporated into the Delta Plan.

b) Necessary Economic Considerations

The Legislature has required that the Delta Protection Commission to prepare and submit to the Council an economic sustainability plan for the Delta. Section 29759. However, the Stewardship Council rejected conducting a comprehensive socioeconomic cost/benefit analysis indispensable for maximizing the use of limited resources for the greatest good for all Californians. The last time a significant water body underwent a public trust balancing in California was by the court in *Mono Lake*, which held economic analysis to be of critical

⁸ Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem, State Water Resources Control Board, Aug. 3, 2010, p. 5, *available at* http://www.swrcb.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow.

importance in performing a public trust analysis. Although the evaluation of economic effects is optional under CEQA Guidelines (15131), the economic balancing of public trust values is so important that they should be evaluated in this RDPEIR. The economic impact of not paying for a \$12 to \$15 billion tunnel project is so significant that should be considered. Further, the DRPEIR does not include estimates for jobs lost, when CEQA requires such a description. (CEQA Guidelines, § 15131, *Citizens Association for Sensible Development of Bishop Area v. County of Inyo* (4th Dist. 1985) 172 Cal.App.3d 151, 170, (even if economic effects are not to be considered significant impacts in isolation, the EIR must determine the relationship between economic impacts and potentially significant environmental impacts.) These deficiencies must be remedied.

Therefore, at a minimum, the DPEIR must set forth basic costs and clearly defined baseline conditions so that the Proposed Program can be measured against the various Alternatives, which it does not do. To this end, C-WIN/CSPA has attached “Bay/Delta Water-Economics of Choice,” a report from ECONorthwest, that showcases the critical necessity of economic analysis to the informed balancing of the public trust. This report is incorporated herein as Appendix 3. The RDPEIR is inadequate because it failed to adequately analyze, discuss, disclose or compare the economics of California’s current water distribution scheme, and failed to evaluate the socioeconomic benefits and costs of various alternatives.

C. The RDPEIR Fails to Provide an Adequate Impact Analysis

Under CEQA, a “project” includes the whole of an action that may result in either a direct or *reasonably foreseeable indirect* physical change in the environment. (CEQA Guidelines, § 15278, subd. (a) (emphasis added.) The discussion following Section 15152 states that there will be some effects for which mitigation will not be feasible at an early step of approving a particular development project, and the section would allow a Lead Agency to defer mitigation of that kind of effect to a later step. While a Program EIR need not analyze impacts that would be better addressed in a site-specific analysis, the RDPEIR fails to identify significant effects of the projects it proposes with any specificity. Moreover, the RDPEIR makes significance determinations on these impacts that for which it admittedly has little to no information.

For example, the RDPEIR notes that the projects the Delta Plan encourages will result in long-term environmental impacts, many of which will likely be significant. The DRPEIR fails, however, to describe these types of impacts, much less offer any proposed mitigation. This approach violates CEQA. Even if the RDPEIR need not analyze each potential project in detail, it can evaluate reasonably foreseeable impacts given the general type of project and given the type of terrain and habitat in the Sierra Nevada region. For example, the DSC failed to take into account the water needs of water rights holders within the Delta watershed, and failed to consider the water needs sufficient to sustain beneficial uses, including environmental needs, in the watersheds that are protected by the “area of origin.” CEQA Guidelines require “direct and indirect significant effects of the project on the environment” to be “clearly identified and described, giving due consideration to both the short-term and long-term effects. . . [including the] [s]ignificant irreversible environmental changes which would be caused by the proposed project should it be implemented.” Section 15126.2, subd (a), (c). Additionally, “[i]rretrievable commitments of resources should be evaluated to assure that such current consumption is justified.” *Id.* The RDPEIR utterly fails to analyze reasonably foreseeable significant effects of the project, even for projects that have already been formulated and or analyzed. (See for example the Shasta Dam raise, the Temperance Flat Reservoir, and the Sites Reservoir.) The Delta Plan incorporates and encourages the completion of the BDCP, and yet fails to provide a meaningful discussion on how this historically mammoth and expensive infrastructure would affect Californians into the future. The irretrievable commitment of upstream resources without any real analysis, and the lack of analysis of the large scale infrastructure (the BDCP) violate Section 15126.2 of CEQA.

The Legislature noted that the 2009 Delta Reform Act did not, “...diminish, impair, or otherwise affect in any manner whatsoever any area of origin, watershed or origin, county of origin, or any other water rights protections, including, but not limited to, rights to water appropriated prior to December 19, 1914, provided under the law.” Section 85031. Yet, the RDPEIR lists many reservoir projects that would be affected by the Delta Plan without conducting even a superficial analysis of these projects, other than to say that certain impacts may be “significant and unavoidable.” A “Significant and Unavoidable” conclusion can only properly be reached after an agency has made a determination with respect to the feasibility of mitigation measures and alternatives. Public agencies may *not* approve projects with significant

environmental effects if there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects. (Pub. Resources Code, § 21002, *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 134.) Therefore, absent an analysis of the feasibility of the mitigation measures disclosed, the conclusion that certain impacts are “significant and unavoidable” is erroneous and should be eliminated from the document.

The RDPEIR fails to include substantial evidence to support its conclusion. CEQA Guidelines section 15384 defines substantial evidence as:

enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. *Argument, speculation, unsubstantiated opinion or narrative*, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. (Subds. (a) and (b), emphasis added.)

The RDPEIR has admitted that no details are known about most of its encouraged projects, and yet claims that it has substantial evidence to support its conclusions. This constitutes mere speculation in violation of the statute. With no quantification, there is no substantial evidence to justify this conclusion.

Water users upstream from the Delta are understandably concerned that their long-standing water rights will be seized to subsidize increased inflow in the Delta in order to maintain maximum water exports to junior water rights users that are served by the state and federal project pumps in the Delta. Such a result would directly conflict with the Delta Reform Act, which admonishes against interference with area of origin laws and the system of water rights seniority. The looming BDCP process, and the umbrella authority for BDCP built into the Delta plan, needs to be disclosed and analyzed within the DPEIR, with alternatives compared and watershed needs mitigated. The omission of these important discussions in the present draft of the DPEIR will result in a skewed and incomplete understating of potential environmental effects on the Delta, which at a minimum will serve to exacerbate water rights litigation throughout the state.

D. The RDPEIR Fails to Properly Consider the Public Trust

In pursuing the coequal goals set out in the 2009 Delta Reform Act, the Legislature held that “[t]he longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management and are particularly important and applicable to the Delta.” Section 85023. “The longstanding constitutional principle of reasonable use and the *public trust doctrine* shall be the foundation of state water management policy and are particularly important and applicable to the Delta.” Water Code Section 85023. In the seminal California Supreme Court case of *National Audubon Society v. Superior Court of Alpine County*, (1983) 33 Cal.3d 419 in which the court held that the state has “an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust whenever feasible.” The Supreme Court further quoted, with favor, that “the requirements of the California Environmental Quality Act (Public Resources Code 21000 et. seq.) impose a similar obligation.”

The planning and allocation of limited and oversubscribed resources implies that there has been an analysis and balancing of the competing demands on these resources. Inexplicably, the Fifth Draft of the Delta Plan makes no effort to balance the public trust and resolve these competing demands for limited resources. The Stewardship Council refused to undertake a water availability analysis that is essential to separating real water from paper water, addressing the legal rights to it and providing the information necessary for informed decision-making. The state has over-promised and over-distributed scarce water resources to a historic degree. Water rights granted to divert water from the Central Valley are now more than five (5) times the average unimpaired water runoff per year, and exceed the total amount of water produced in the wettest year in California history by more than double that number. The Final Draft of the Plan contains no water availability analysis that would show, at a minimum, what water will be available to meet the Reform Act’s goals. The Stewardship Council rejected multiple comments from various groups to develop a public trust analysis to ensure that the common property rights of all Californian’s are protected and balanced against those of special interests. Yet, despite the California Supreme Court’s holding that the state must balance the public trust in water supply planning decisions, the RDPEIR fails to do so. The RDPEIR is therefore inadequate because it fails to adequately analyze, discuss, disclose or compare how a public trust balancing would

affect various alternatives. A public trust balancing of the present unbalanced system will inevitably affect both of the coequal goals and must be analyzed and disclosed. Further, the RDPEIR is inadequate because it fails to adequately analyze, discuss, or disclose the realities of the oversubscribed California water system, thereby failing to compare projects and alternatives within the framework of a water system already in heavy deficit. The Plan and its DEIR do none of these things. Our groups dispute the DSC's position that an analysis of the public trust doctrine is unwarranted, and request an analysis of whether it is feasible to protect the trust under each of the proposed alternatives.

E. The RDPEIR Fails to Properly Consider Climate Change

The DPEIR fails to use the latest information on changing hydrology in the Delta watershed, thereby invalidating its “no project” assessment. The “harms associated with climate change are serious and well recognized.” (*Massachusetts v. Environmental Protection Agency* (2007) 127 S. Ct. 1438, 1455). In 2006, the California Legislature passed Assembly Bill 32, which states that “[g]lobal warming poses a serious threat to the economic well-being, public health, natural resources, and the environment of California,” including a “reduction in the quality and supply of water to the state from the Sierra snowpack, a rise in sea levels resulting in the displacement of thousands of coastal businesses and residences, damage to marine ecosystems and the natural environment, and an increase in the incidences of infectious diseases, asthma, and other human health-related problems.” (Health & Saf. Code, § 38501(a).) The Legislature went on to list multiple uses of water it expects to be reduced or threatened by global warming, including the quality and supply of water from Sierra snowpack, hydropower generation, the protection of recreational uses, fisheries, marine life, and public health. Health & Saf. Code, § 38501(b).

In addition to the Legislature's recognition of the perils of climate change, several studies sponsored by the California Climate Change Center have been published that directly address the effects of climate change on California hydrology in the future. And while an agency is not expected to foresee the unforeseeable, it is expected to use its “best efforts to find out and disclose all that it reasonably can.” (CEQA Guidelines § 15144; see also *City of Richmond*, 184 Cal.App.4th at p. 96; *Vineyard*, 40 Cal.4th at p. 428.) Yet, despite the seeming recognition of climate change by the Legislature, the courts, and other organizations, climate change goes

virtually unmentioned in the PDEIR's discussion of the program, its potential facilities, and the existing environmental setting. The RDPEIR fails to perform cumulative impact analysis in the RDPEIR of how revised and related projects would affect water availability, environmental conditions, and fisheries throughout the Sacramento River and San Joaquin River watersheds upstream from the Delta now and in the future. These climate change projections need to be an essential part of cumulative impact evaluation of the Revised Project, together with other diversions and with actions to maintain sufficient flows to protect the Delta as well as upstream waters under the public trust doctrine.

The DSC DPEIR should therefore include climate data available to its sister agencies, such as DWR's *California Water Plan Update, 2005*. This report finds that "evaluating impacts of global climate change on the management of the SWP can be done with existing resources" and that "state government must help predict and prepare for the effects of global climate change on our water resources and water management systems." (Maurice Roos, *Accounting for Climate Change*, in DWR, *Water Plan 2005*, appendix 4.) This DWR report surveys the "large number of potential effects on California water resources infrastructure due to global warming." (*Id.* at p. 4-616.) While the EIR notes its reference to some uncertainty, that uncertainty is "primarily on the degree of change to be expected," and that the report found that "[r]esponsible planning requires that the California planning community work with climate scientists and others to reduce these uncertainties and to begin to prepare for those impacts that are well understood, already appearing as trends, or likely to appear." (Roos, *op cit.*, at 4-612.) The failure of the DPEIR to disclose and analyze potential climate change effects on the hydrology upon which the Delta Plan relies is stunningly incompetent. This omission makes it impossible for the public and the decision-makers to evaluate the alternatives, the mitigations, and the true nature of the environmental impacts of the proposed DSC program, all of which are violations of CEQA's fair disclosure requirements.

Finally, having recognized that global climate change is likely to have an enormous impact on future water supply (including a 4.5 to 6 million acre-foot reduction in snowpack), the EIR inconsistently applies that insight. Incredibly, the EIR cites climate change in its discussion of the disadvantages of Alternative 2 (due to its additional "facilities") but fails to apply climate change concerns to the Delta Plan's core issue: whether sufficient water supply will exist to serve the "reliability" component without severely compromising the Plan's ability to protect the

“paramount concern” of enabling “permanent protection” of the Delta’s resources. (Wat. Code § 85022(c)(2).) This failure also makes it impossible for the DPEIR to evaluate alternatives, potential mitigations, or to provide the disclosure necessary to allow the public and the DSC decision-makers to evaluate the effectiveness of the proposed Delta Plan.

F. The RDPEIR Fails to Properly Consider Available Science

The RDPEIR fails to incorporate or consider readily available science to analyze the significance of environmental impacts of the project. The Stewardship Council largely ignored the Delta Protection Commission’s Economic Sustainability Analysis, the Department of Fish and Game’s flow criteria and biological objectives report and the State Water Resource Control Board’s flow criteria for the Delta. These reports were mandated by the Legislature to inform the Delta planning process and their results must be discussed and incorporated into the Delta Plan.

The California Legislature, in the Delta Reform Act, (as specified above) tasked the SWRCB to gather the best available science and develop flow criteria for the Delta ecosystem necessary to protect public trust resources, including the volume, quality, and timing of water needed under different conditions. The SWRCB conducted a proceeding in the matter. An astonishing assemblage of biologists and scientists from resource and water agencies, academia and the NGO community testified and presented evidence in the hearing. A final report was issued on August 3, 2010. The report observes that “[t]he combined effects of water exports and upstream diversions reduced average annual net outflow from the Delta from unimpaired conditions by 33% and 48% during the 1948 – 1968 and 1986 – 2005 periods, respectively and that Sacramento River inflows over the last 18 to 22 years have been about 50% on average between April through June compared to unimpaired conditions.”⁹ The report determined that “[r]ecent Delta flows are insufficient to support native Delta fishes for today’s habitats.” The report’s criteria for flows include, among many other measures, “75% of unimpaired Delta outflow from January through June and 75% of unimpaired Sacramento River inflow from November through June.”¹⁰ Existing water criteria fails to address many issues that must be considered in considering impacts on aquatic life. For example, during the SWRCB’s Delta flow hearing, Dr. G. Fred Lee pointed out that:

⁹ SWRCB. 2010. Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem. 3 August 2010. 3.3.2, page 28.

¹⁰ Ibid. 1.2 Summary Determinations, Flow Criteria and Conclusions, page 5.

The current US EPA criteria development approach only considers some and in some cases a small part of the impacts of chemical contaminants on aquatic life. For example, the approach currently used to develop water quality criteria does not include additive/synergistic properties of regulated chemicals that occur in concentration below the water quality criteria allowing unanticipated adverse impacts to aquatic life. Adverse impacts of chemicals to aquatic life that occur for especially sensitive species, such as zooplankton which serve as fish food organism were not included in the development of the water quality criteria. These criteria are only applicable to protecting about 90% of the species. Therefore there could readily be fish species in the Delta and its tributaries that are more sensitive to a chemical than those used to establish the water quality criterion value. There is also very limited information on chronic exposure to sub-lethal impacts of a chemical and mixtures of chemicals to fish populations. Another issue is that other stressor such as low DO, ammonia etc. that can impact the lethal and especially sub-lethal impacts of chemicals. It has been well known for over 40 years through biomarker studies that fish and other organisms show organism biochemical responses to chemical exposures at concentrations well below the water quality criterion. The significance of these biomarker responses to an organism or group of organisms is largely unknown. Chemicals can adversely impact the health of the fish and other aquatic life that weaken their ability to resist adverse impact of stressors such as low DO, elevated temperature and predation as well to disease. It's been known for over 40 years that very low levels of copper affect the "breathing" rate of some fish.¹¹

Dr. Lee went on to point out, "many thousands of unregulated chemicals, including pharmaceuticals and personal care products, industrial chemicals, and other potentially hazardous chemicals, are discharged to waterways, including the Delta and its tributaries, in domestic wastewaters, agricultural runoff and waste waters."¹²

This data, and other volumes of relevant evidence are largely ignored or downplayed by the Delta Plan and the DPEIR. Relevant evidence necessary to determine whether or not the proposed Delta Plan and the alternative examined would arrest this dire situation, and whether mitigations could bring these impacts below a state of significance are not included. This is a CEQA failure of huge magnitude. In several instances, the RDPEIR notes that an impact may be "Less Than Significant" or "Significant" without any substantial evidence or science to support such a conclusion. For example, the discussion of Impact 3-3b states:

[b]ecause of the availability of alternative water supplies and continued availability of Delta water supplies, there is substantial evidence that this impact would not be significant. This conclusion is based on the inability to

¹¹ Ibid. Page 4.

¹² Ibid. Page 4.

identify a reasonably plausible scenario in which a potential significant impact would occur. It is therefore concluded that this impact would likely be less than significant. Future project specific analyses may develop adequate information to arrive at a different conclusion; however, for purposes of this program-level analysis, there is no available information to indicate that another finding is warranted or supported by substantial evidence.

Simply because there is not substantial evidence to support a significance determination does not imply that there is substantial evidence to support a *less than* significant determination. This example is particularly egregious considering the host of information provided by countless environmental groups demonstrating plausible scenarios in which this impact would be significant. The RDPEIR is therefore inadequate because it fails to adequately analyze, discuss and disclose the findings and information contained in the above entitled scientific reports, and how the information from these reports affects the various alternatives.

G. The RDPEIR Fails to Properly Mitigate Impacts

CEQA Guidelines 15126.4 states, “[w]here several measures are available to mitigate an impact, each should be discussed and the basis for selecting a particular measure should be identified. Formulation of mitigation measures should not be deferred until some future time.” However, measures may “specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way.” *Id.* The problem is that the mitigation measures discussed in the RDPEIR are general, rather than specific, making it impossible to determine if they will be able to effectively mitigate the impacts of the project. For example, the Revised Project allegedly adds performance measures to assist in implementation of the policies and recommendations in the Plan (RDPEIR p. ES-1) but it is not clear whether (1) some or all of the proposed mitigation must be adopted in order to be considered a “Covered Action” or “Recommended Action,” (2) whether the stated mitigation measures would reduce impacts to a less than significant level, or (3) when or how the mitigation measures are to be implemented. For example, in several instances, the RDPEIR offers potential land purchases or water transfer purchases as mitigation measures without conducting any analysis on the availability of such mitigation. This approach violates CEQA, as there can be no assurance that such mitigation measures are either available or adequate. (See *Kings County Farm Bureau v. City of Hanford* (5th Dist. 1990) 221 Cal.App. 3d 692.)

Further undermining the effectiveness of the mitigation measures is the lack of measurable performance standards. The Legislature decreed that the 2009 Delta Plan “shall include performance measurements that will enable the Council to track progress in meeting the objectives of the Delta Plan.” Section 85211. The performance measurements include “quantitative or otherwise measurable assessments of the status and trends of the following: (a) The health of the Delta’s estuary and wetland ecosystem for supporting viable populations of aquatic and terrestrial species, habitats, and processes, (b) The reliability of California water supply imported from the Sacramento River or the San Joaquin River watershed.” Section 85211. “The use of performance standards is particularly appropriate in connection with ‘first tier’ approvals or other planning decisions that will necessarily be followed by additional, project-level environmental review.” (Remy, et al., Guide to the California Environmental Quality Act (11th Ed. 2007), p. 552, internal citation omitted.) CEQA further requires that lead agencies describe the impacts that will result from the mitigation measures themselves. (15126.4, subd. (a)(1)(D).)

The RDPEIR fails to identify the impacts that would arise from mitigation measures, such as purchases of additional water for transfer and land purchases. With respect to water transfers being ameliorated due to releases from upstream reservoirs, the RDPPEIR fails to include a description of the multitude of impacts that will result from this drawdown. Lead agencies must analyze not only the impacts of their proposed projects, but also of their proposed mitigation measures if such measures may have a significant effect on the environment. (CEQA Guidelines, § 15126.4; *Save Our Peninsula Committee v. Monterey County Bd. Of Supervisors* (6th Dist. 2001) 87 Cal.App.4th 99.) Mitigation measures must be directly connected to an impact. Assigning mitigation measures to a group of impacts defeats the intention of demonstrating whether the measures will actually mitigate the impacts. The use of group mitigation measures should be revised and tied to specific impacts. These flaws must be remedied so the decision-makers and the public can adequately analyze whether any of the mitigation measures are reasonable.

H. The RDPEIR Fails to Provide Adequate Alternatives

CEQA Guidelines 15124 (b) requires a statement of objectives sought by the proposed project, because “[a] clearly written statement of objectives will help the lead agency develop a *reasonable range of alternatives* to evaluate in the EIR and will aid the decision makers in

preparing findings or a statement of overriding considerations, if necessary.” (emphasis added) The projective objectives set out in the RDPEIR are invalid because they overlook the statutory mandate to achieve coequal goals, does not reduce reliance on the Delta, and are otherwise so vague and ambiguous that project alternatives cannot be reasonably assessed. When project objectives are incorrectly described, there is a substantial risk that potentially feasible alternatives and mitigations that would reduce or eliminate significant environmental impacts will not be considered. (See *Habitat and Watershed Caretakers v. City of Santa Cruz* (2012)_Cal.app.6th_Case No. H037545). For example, the objectives of the RDPEIR overlook the statutory mandate that “coequal goals 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.” (Water Code Sec. 85054) This impacts the consideration of projects under the BDCP, as well as project alternatives that could more properly protect and enhance the value of the Delta.

One of the coequal goals of the Delta Plan is providing a more reliable water supply. Achieving a more reliable water supply is one of the five categories of the Delta Plan’s policies and recommendations. The Delta Reform Act prohibits inclusion of the BDCP into the Delta Plan unless BDCP includes a comprehensive review and analysis of “[t]he resilience and recovery of Delta conveyance alternatives in the event of catastrophic loss caused by earthquake or flood or other natural disaster.” Section 85320(b)(2)(F). Throughout the Delta Plan, there are numerous references to the seismic vulnerability of Delta levees and the hypothetical potential that earthquakes could cause a major disruption in California’s water supply system in the Delta and San Francisco Bay area. A theoretical earthquake is one of the major justifications for isolated conveyance facilities.

Unfortunately, the Delta Plan only considers seismic disruption in the Bay and Delta. It fails to examine the potential for seismic disruption along the several hundred miles of aqueduct that runs parallel to and crosses documented major active earthquake faults. Nor does it evaluate the potential for seismic disruption of San Luis Reservoir. For example, the San Luis Dam (now called the B.F. Sisk Dam) was completed in 1967 and almost failed in 1981.¹³ The documents referenced in this section can be found in Appendix 4, 5, and 6. The U.S. Bureau of Reclamation found that the dam is in a seismically active area (actually there are two faults that cross the

¹³ Appendix 4. Park, D., 2008. Dam Safety in California.

reservoir) and could fail during an earthquake and inundate hundreds of square miles including Santa Nella and parts of Stockton.¹⁴

Seismic failure of the California Aqueduct or San Luis Reservoir could cause the same or similar disruptions to the reliability of the state's export water delivery system as a hypothetical failure in the Delta. Yet, the Delta Plan, DPEIR and DRPEIR focuses almost solely on potential seismic disruptions in the Bay and Delta and ignores the threats to the aqueduct, San Luis Reservoir or terminal facilities in Southern California that could pose equal, if not greater threats, to water supply reliability. The Delta Plan fails to comply with the Delta Reform Act and the DPEIR and DRPEIR fail to comport with CEQA requirements by failing to adequately analyze, discuss and disclose these other potential seismic threats to water supply reliability. What could be the justification of spending billions of dollars constructing an isolated conveyance facility that would change the hydrology of the Delta with unknown consequences while ignoring equal or similar threats south of the Delta?

Engineers who routinely work on Delta levees have suggested that the doomsday predictions of seismic failure of Delta levees are vastly overstated.¹⁵ They believe that improvements can be made to upgrade levees to PL 84-99 or above criteria that would significantly reduce any threat of seismic failure at a fraction of the cost of an isolated conveyance facility. These upgrades would also protect against rising sea levels and would provide protection to people, Delta communities, farmlands and infrastructure; something not accomplished by an isolated conveyance. However, these alternatives were essentially ignored in the Delta Plan and not adequately evaluated in the DPEIR or DRPEIR. Consequently, the Delta Plan is inconsistent with requirements in the Delta Reform Act to "reduce risks to people, property and state interests in the Delta," which the Legislature said was inherent in the coequal goals for management of the Delta. The DPEIR and DRPEIR are inadequate by failing to disclose, analyze, compare and discuss these viable cost-effective alternatives.

Under the current RDPEIR, the revised project would encourage new or expanded reservoirs, groundwater production facilities, groundwater production facilities, ocean

¹⁴ Appendix 5. Bureau of Reclamation. 2007. Letter to Central Valley Project Water Contractors titled Actions to Address Dam Safety Issues at B.F. Sisk Dam, Central Valley Project (CVP, California).

¹⁵ Appendix 6. Pyke, R. 2012. Letter to Governor Brown titled The Truth About Delta Levees or The Shaky Justification for the BDCP.

desalination facilities, recycled water facilities, and the BDCP, among other things. The BDCP will have many significant environmental effects and must be considered as a cumulative project. It is improper for the DSC to encourage projects without even a minimal look at the impacts associated with these types of projects. Rather, the RDPEIR should provide at least a general description of these projects and the types of impacts that are anticipated, propose suggested mitigation measures, and indicate how these encouraged projects and their associated projects can be reconciled with the goals of the Delta Reform Act. For example, the RDPEIR could include a goal of achieving the numerical anadromous fish doubling requirements mandated by the Central Valley Project Improvement Act or define specific numerical water quality improvements required by the Clean Water Act. Instead, the Delta Plan's quantifiable performance measures consist largely of recommendations for actions and programs by other agencies. Many of these actions and programs are already underway and have been unsuccessful in preventing fisheries decline and water quality impairment.

The Delta Plan fails to comply with requirements of the Delta Reform Act by not including specific quantifiable performance measures. Instead, the RDPEIR states that “[t]his EIR assumes that the Delta Plan will be successful and will lead to other agencies taking the encouraged actions.” ES-2. As we show below, this unwarranted assumption ignores reality and undermines the legal adequacy of the document. For example, the Delta Plan recommendation ERP1 says that the State Water Resources Control Board should update the Bay-Delta Water Quality Control Plan and by June 2, 2014, adopt and implement updated flow objectives for the Delta that are necessary to achieve the coequal goals. However, deferring updated flow objectives does not historically achieve quantifiable performance measures.¹⁶ In the analysis of

¹⁶ In 1978 the State Water Board adopted D-1485 and a water quality control plan. The Board stated that “protection all fishery species in the Delta would require the virtual shutting down of the project export pumps.” In 1986, Judge Racanelli ruled that D-1485 was inadequate and, in the next year, USEPA notified the Board that the water quality control plan was inadequate under the federal Clean Water Act. In October 1988, following hundreds of days of hearings, the State Water Board released a draft Water Quality Control Plan for Salinity. It called for significant reductions in Delta exports. In response to protests from exporters, Governor Deukmejian ordered the Board to withdraw the proposed order. In December 1992, the State Board released draft Water Right Decision 1630. It called for numerous measures including a significant reduction in exports. Internal documents from the State Water Contractors revealed that they believed that D-1630 would have required, at least, a 25-50% reduction in exports. In response to pleas from exporters, Governor Wilson ordered the Board to withdraw D-1630 in 1993. In 1995 the State Board released a Water Quality Control Plan for the Bay-Delta and essentially readopted it with minor changes in 2006 (8 years late). The 1995 plan was implemented though Water Rights Decision D-1641 in late 2000. The requirements in both the 1995 plan and D-1641 are seriously deficient, as evidenced by increasing exports and plummeting fisheries. Further, all of the protective standards in D-1641, including the Vernalis flow objective, interior Delta salinity standards, outflow objectives and the inflow/export ratio have been routinely

various evaluated alternatives, the Stewardship Council refused to address the historic failure to implement and enforce existing environmental laws and regulations by agencies responsible for the prevention of fishery and water quality declines. This is significant because, without disclosure of the failings of these agencies to implement and enforce existing environmental laws, the public cannot understand how likely it is that the laws will be ignored in the future. The RDPEIR fails to fully inform the public when it fails to adequately analyze, discuss, and disclose the chronic failure to implement and comply with legal requirements of the responsible agencies, and the consequences of those failures as they pertain to the various evaluated alternatives.

The DPEIR and RDPEIR are therefore inadequate because they fail to adequately identify, analyze, discuss, disclose or compare defensible and quantifiable goals, yardsticks and mileposts for achieving the coequal goals and their effects on the various alternatives.

I. The RDPEIR Fails to Provide an Adequate Cumulative Impact Assessment

CEQA defines “cumulative impacts” as “two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.” Guideline § 15355. The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project “when added to other closely related past, present, and reasonably foreseeable probable future projects.” Guideline § 15355(b). The discussion of cumulative impacts in an EIR is required to reflect “the severity of the impacts and their likelihood of occurrence.” Guideline § 15130(b). Required contents include either a list of past, present, and probable future projects producing related or cumulative impacts, or a summary of projections that describe and evaluate the conditions contributing to the cumulative effect. Guideline § 15130(b)(A), (B). It is clear that all projects within the watershed must be assessed, given that the Guideline section uses as an example: “Location may be important, for example, when water quality impacts are at issue since projects outside the watershed would probably not contribute to a cumulative effect.” Guideline § 15130(b)(2).

In *Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, an EIR was held to violate CEQA for failing to consider possible curtailment in obtaining water

violated without consequence. Last year was no exception. Vernalis flow was violated in the spring, salinity standards were violated most of the summer and I/O standard was being violated as recently as late October, when 68% of inflow was being diverted. Exports have increased, water quality has worsened and fisheries have continued their precipitous decline following every State Water Board Delta water quality or water right decision over the last 30-plus years.

from a river and the cumulative impacts of that effect. 108 Cal.App.4th at 871. Pursuant to Guideline § 15130(b)(1)(A), CEQA requires an agency to assess the changing environment resulting from the incremental impacts of the project “when added to other closely related past, present, and reasonably foreseeable probable future projects.” “The Agency must interpret this requirement in such a way as to ‘afford the fullest possible protection of the environment.’” *Friends of the Eel River*, 108 Cal.App.4th 859, 868. In clear violation of the requirements of Guideline § 15130(b)(1), there is neither a list nor summary of projections of past, present, and reasonably foreseeable probable future diversions in the RPDEIR or Draft EIR.

Here, there has been complete failure to identify and evaluate the impacts of the BDCP Delta Tunnels which would have the capacity to divert 15,000 cfs of water from the Sacramento River upstream from the Delta. The BDCP is mentioned in a sentence including 11 other items under the Water Resources portion of the Cumulative Impact Assessment. (RDPEIR 22-2). The only cumulative impact information about the BDCP project is provided in the Cumulative Impact Assessment in the Draft EIR. There, a brief description in a table states that the BDCP permits and related EIR/EIS were scheduled to be completed by December 2012. That, of course, has not happened. The only additional information provided in the table is “modify SWP and CVP Delta water conveyance facilities and operations in the Delta.” (RDPEIR 22-24).

The RPDEIR has failed to take into account the impact of diverting 15,000 cfs upstream from the Delta on whether existing and future water supplies and minimum stream flow requirements can be satisfied, and has failed to evaluate the environmental impacts of diverting 15,000 cfs. Having claimed that the BDCP project is a cumulative project, the Council must evaluate cumulative impacts including those caused by the cumulative project. Moreover, this is *not* a defect that can be cured by responses to comments in a Final EIR. Consequently, neither the public nor the decision-makers have before them basic, foundational information on which to enable one to even start in evaluating the cumulative impacts of this project together with other related projects. In order to comply with CEQA, a new Draft EIR must be prepared that includes the necessary information and analysis to allow the public and decision-makers to conduct informed review of the cumulative impacts of this project and other related projects. This RDEIR fails to do so with respect to the reasonably foreseeable effects of the BDCP as currently proposed (including 23.6.5: Agriculture and Forestry Resources, 23.6.13: Noise, 23.6.16:

Recreation.) Further, the RDEIR does not address the potential of the major new diversions on the Sacramento River to interfere with recreation, both during and after construction.

II. Conclusion

The absence of these analyses has sabotaged the entire Delta planning process. As previously discussed, the Delta Reform Act states, [t]he Sacramento-San Joaquin Delta watershed and California's water infrastructure are in crisis and existing Delta policies are not sustainable. Resolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources.” The Delta Plan was envisioned to be that “fundamental reorganization.” Instead, it simply kicks the status quo can down the road.

The Delta has declined because water projects have deprived the estuary of half its flow; turned the natural hydrograph on its head; reduced temporal and spatial variability; eliminated crucial habitat, complexity and diversity and deprived the estuary of dilution necessary to assimilate increased pollutant loading. No estuarine ecosystem in the world has survived this level of abuse. California’s water supply system is in crisis because the state has over promised, over-allocated, wasted and inequitably distributed scarce water resources. The Delta Plan and RDPEIR are fundamentally inadequate because they have avoid addressing tough questions, such as:

1. What does water supply reliability mean in an arid state where we have granted rights to far more water than actually exists?
2. What is the definition of co-equal goals and what are the yardsticks by which they are measured?
3. Does water supply reliability apply to both public trust resource needs and consumptive uses?
4. Are statutory requirements to protect water quality and listed species equivalent to water supply reliability for lawns or surplus, subsidized and non-food crops?
5. Is the standard by which we measure water supply reliability the same for junior and senior appropriators?
6. Does efficient and multiple use of water have higher priority over waste, inefficient and unreasonable use?
7. Should we prioritize consumptive use on the basis of economic benefit?
8. Does health and safety take precedence over certain agricultural uses of water?
9. Are food crops more important than non-food commodities?
10. Is it reasonable that the Westside of the San Joaquin Valley, comprising 0.3 % of the state’s economy and population, should receive two-thirds of Delta exports while urban areas representing half the state’s population and economy get one-third?

11. Is protection of a “national treasure” and one of the world’s great estuaries more valuable to society than irrigating impaired soils, that by the nature of being irrigated, discharge prodigious quantities of toxic wastes back to our waterways?
12. If someone uses water that generates pollutants that eliminate assimilative capacity and beneficial use of water for others, should the degraded water be deducted from the water supply provided the polluter?
13. Should water supply reliability be conditioned upon specific and quantitative requirements to maximize reclamation, reuse, conservation and development of alternative local sources of water?
14. Do uses of water that require vast public subsidies have the same priority as uses that don’t require subsidy of public funds and are uses that internalize adverse impacts equal to uses that externalize them?

Because the Delta Plan and RDPEIR have failed to address the root causes of the Delta’s decline and our water supply crisis, they are inadequate as fair disclosure documents and fail to comport with CEQA, the Delta Reform Act and are inconsistent with numerous statutes. The RPDEIR and Draft EIR are so fundamentally and basically inadequate and conclusory in nature with respect to disclosure and analysis of cumulative impacts that meaningful public review and comment have been precluded. We urge you to prepare and circulate a new Draft EIR so that the public and decision-makers are afforded the information and analysis with respect to cumulative impacts that they must have pursuant to CEQA.

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s/MICHAEL B. JACKSON
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