

COMMENT LETTER TO THE DELTA STEWARDSHIP COUNCIL
REGARDING THE SIXTH DRAFT DELTA PLAN
JUNE 10, 2012



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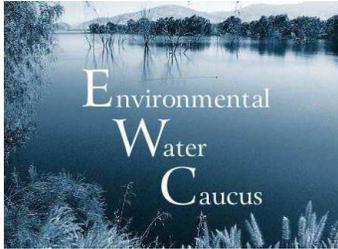
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SIERRA NEVADA ALLIANCE





To: Joe Grindstaff, Executive Officer, Delta Stewardship Council

From: Environmental Water Caucus

Subject: Delta Plan DEIR Comments

Via Email to: deltaplancomment@deltacouncil.ca.gov

June 13, 2012

The California Environmental Water Caucus (EWC) has commented in detail on the various versions of the Delta Plan since the original Scoping Documents. However, in this response we summarize critical overarching comments related to the Sixth Delta Plan rather than follow the Plan point by point as we have done in the past.

The Delta Stewardship has been given a golden opportunity, through the Delta Reform Act of 2009, to provide a progressive and forward looking plan for California's water future; during all the iterations of the Delta Plan during 2010 and 2011, the EWC has looked forward to that kind of plan. We feel that you have failed to seize that opportunity, and have produced a "plan" that provides institutionalized thinking and solutions, and continues a status quo that refuses to recognize the changes that have been occurring during the last year, especially in relation to the BDCP. Our disagreements and disappointments are summarized as follows:

1. The major flaw with the Delta Plan is the unwillingness to address the root causes of the failing Delta ecosystem and the purported "unreliable" water supplies. Those root causes are:
 - The unwillingness of public agencies to examine realistic California water supply availability and adjust contract amounts in keeping with reliable yields. The current overpromises embedded in SWP and CVP contracts

allows water exporters to be continually disappointed in planned exports and to continue to pressure for increased exports and export conveyance.

- The unwillingness of agencies and the legislature to require a cost/benefit analysis of the BDCP project in order to compare the exporters' objective of new conveyance with other alternatives that can provide similar benefits. The unwillingness of the state and public agencies, who are responsible for future water planning, to accomplish a meaningful financial analysis is the abrogation of their fiscal responsibilities to California citizens. The unwillingness of BDCP to consider other conveyance alternatives is pointed out in the National Academy of Sciences review of the BDCP.¹
 - The Public Trust Doctrine is an affirmation of the duty of the state to protect the people's common heritage in streams, lakes, marshlands, and tidelands. The application of the Public Trust Doctrine requires an economic and sociological analysis of the public trust values of competing alternatives, as was directed by the State Water Board in the Mono Lake Case. Although used infrequently, its applicability to alternatives for the Delta, where species recovery and ecosystem restoration is being pitted against further water exports, is exactly the kind of situation suited to a Public Trust analysis, which should be required by the Delta Plan. The Council clearly has trustee responsibilities in balancing the public trust, although you have punted on that responsibility to date. Planning and allocation of limited and oversubscribed resources implies analysis and balancing of competing demands. Inexplicably, we find little effort to balance the public trust obligations and resolve competing demands within this draft of the Delta Plan.
2. The Delta Plan continues to assume that a permissible BDCP is on its way and will be incorporated into the Delta Plan. It makes no allowance for the damming science reviews presented by the National Academy of Science² or the "Red Flag" documents³ produced by the fishery agencies or the critical report produced by the Bay Institute⁴, which make the case for misleading and "cherry picked" science. These reports show that BDCP, as presently constituted, is clearly not a permissible project, and does not have the appropriate science to proceed on the present path. The numerous mentions within the Delta Plan of being "informed by best available science" sound hollow in view of the current condition or presumed acceptance of BDCP "science."

¹ The National Academies Press. A Review of the Use of Science and Adaptive Management in California's Draft Bay Delta Conservation Plan. 2011. http://www.nap.edu/catalog.php?record_id=13148

² *Ibid.*, The National Academies Press.

³ http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Effects_Analysis_-_Bureau_of_Reclamation_Red_Flag_Comments_and_Responses_5-31-12.sflb.ashx

⁴ The BDCP Effects Analysis: A Briefing Paper. February 2012. <http://www.bay.org/assets/BDCP%20EA%20Briefing%20Paper%2022912.pdf>

3. The revised BDCP project, referred to as “BDCP Plus,” is a bizarre plan which seems to kick the science down a fifteen year cycle and is based on a currently undefined “Decision Tree” concept. The current “plan,” still undocumented, is attempting to move toward permitting a project without defined biological goals and objectives, without operating criteria for the new conveyance, without a well-defined range of exports that will permit recovery, and has little of the necessary framework which would include an adaptive management plan, a financing plan, and best available science-based actions. After five years of study and analysis, the project has not yet produced a CEQA-legal plan, and it is unlikely to do so in the foreseeable future.
4. The Delta Reform legislation of 2009, which created the Delta Stewardship Council, also legislated an obligation to comment on upcoming plans prior to being accepted by the Delta Stewardship Council. The Council is woefully negligent in not living up to that responsibility related to BDCP. We understand the political difficulty of preemptive criticism of BDCP plans, especially in view of the “BDCP Plus” plans; however, without any action on the part of the Council, both the Council and BDCP will be participating in a charade of huge proportions and with damaging consequences for the state of California.
 - As an example of a pertinent challenge to the tunnel alternative which would protect against flood, sea level rise, and earthquake risk, the recommendation in the Economic Sustainability Plan to reinforce Delta levees above the PL84-99 standard at far less than the \$15 billion tunnel cost is being ignored. The Delta Stewardship Council would be wise to raise the question why this isn’t a better alternative than new conveyance to accomplish the same ends.
 - Another example is that the Delta Reform Act requires that the Delta Independent Science Board “shall provide oversight of the scientific research, monitoring, and assessment programs that support adaptive management of the Delta.” The independence of the science and adaptive management component is crucial to a project of the magnitude of the Delta Plan. However, current proposals of BDCP would circumvent the authority of the Delta Stewardship Council in this regard, and should not be tolerated by the Council.
5. In the EWC Reduced Exports Plan (Alternative 2 “Plus”), which contains numerous actions that compensate for reduced exports, the EWC has presented clear alternatives for achieving water supply reliability and the Delta ecosystem restoration. Our proposed alternative has relied on strict enforcement of water quality laws, adoption of the State Water Resources Control Board and Fish and Game flow recommendations, shoring up of existing levees, ceasing the unreasonable use of water to irrigate toxic soils that return pollution to the estuary, while also providing for exports and water supply along with water

conservation measures to ensure existing supplies are extended to meet demand. This reasonable alternative has not been fully considered in this Sixth Delta Plan or in the Delta Plan DEIR.

6. Two recent state agency reports, developed through extensive public processes, conclusively establish that an increase in Delta outflow is necessary to protect and restore the estuary's aquatic ecosystem. One of the significant flaws of previous and unsuccessful Bay-Delta proceedings has been the absence of a comprehensive economic evaluation of the benefits of protecting the estuary and in-Delta beneficial uses compared to the benefits of diverting and exporting water from the estuary. This absence has deprived decision makers and the public of critical information fundamental to reaching informed and difficult decisions on balancing competing demands. As a result we strongly reinforce the Plan's recommendation for a SWRCB examination of flows during 2014.
7. 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. This Draft EIR does not come close to meeting these standards. At this stage, and with such a vague project to evaluate, the Draft EIR does not meet the requirements of a Programmatic EIR, nor can any future EIR's be logically tiered from this Proposed Project. *This Draft EIR should be significantly revised into a CEQA-qualified and legally enforceable Delta Plan that demonstrably meets the legislatively mandated co-equal goals, with permanent protection of the Delta's natural and scenic resources.*
8. Critical to the incorporation of any Delta Plan that meets the legislatively mandated goals is one that also meets existing water quality laws including those regulating salt, selenium, temperature, flow, and other contaminants harmful to public health and ecosystem health. In EWC's five submissions and comments to previous drafts, all adopted here by reference, comments and evidence were provided regarding the importance of meeting water quality standards, flow requirements, and temperature standards for the health of the ecosystem and its viability. The Sixth Delta Plan fails to enforce existing water quality laws or ensure that any future covered actions will be required to meet these flow requirements, water quality constraints, and protect public trust values, to ensure these beneficial uses are protected.
9. Unless California is willing to write off vibrant Delta waterways, fish and wildlife, the state needs a legal system that allows it to plan effectively for the water needs of *both* Californians and California ecosystems. The dangerously well-trod path of "use, overuse, environmental decline, then hasty and unplanned reaction" can begin to be broken by granting waterways the right to be at the planning table from the beginning, at a level truly "co-equal" to human water uses

– rather than at the end when the damage is done. If the state is actually committed to “co-equal” goals, and if water rights are to be the legal measure by which water is allocated for human uses in the state, then **waterways also must be granted equivalent water rights that reflect the flows and water quality necessary to ensure waterway and larger ecosystem health, with a margin of safety.** The Final Draft Plan must include an analysis of this “water rights for waterways” option to ensure its compliance with CEQA.



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