

January 14, 2013

VIA EMAIL

Delta Stewardship council
980 Ninth Street
Suite 1500
Sacramento, CA 95814

Re: Comments in response to Notice of Proposed Rulemaking
Delta Plan

Dear Chairman Isenberg and members of the Council:

These comments are submitted on behalf of Save the California Delta Alliance (“STCDA”). As detailed below, STCDA respectfully requests that major revisions be made to the regulations in order to bring them into legal compliance with the Delta Reform Act. Many aspects of the regulations are compliant and, in fact, are good public policy. We congratulate the Council on its achievements thus far. We also applaud the Council for incorporating suggestions made in public comments into many aspects of the Plan.

However, the most important function of the Delta Plan has not yet been addressed. To be a success the Plan must take account of the peripheral canal (currently proposed in the form of tunnels) and build a plan that will provide the Council adequate criteria to assess the canal when it comes before the Council for approval and to insure adequate protection of the Delta after the canal goes into operation. The Plan is legally deficient because it takes the view that the Council’s regulatory authority over conveyance is merely “*contingent* regulatory authority.” Delta Plan, Appendix G at G-2. In our comments of February 2, 2012, on the 5th Staff Draft, we pointed out that this reading is contrary to the express provisions of the Delta Reform Act. *See* STCDA comments of February 2, 2012 at 11. We incorporate our comments of February 2, 2012, in their entirety here by reference. As the final regulations continue to be built around the view that the Council’s authority is only contingent, we renew and explain further our objections here.

We also provide suggestions for textual revisions to three sections following our comments on Conveyance.

I. The Council’s Decision Not to Adopt Regulatory Policies Governing Conveyance Is Contrary to the Mandate of The Delta Reform Act and Makes the Regulations Inadequate as a Matter of Law.

A. The Council’s Authority Over Conveyance, Including The BDCP, Is Not Contingent.

Water Code section 85320 provides that the BDCP “shall be considered for inclusion in the Delta Plan in accordance with this chapter” [Cal. Water Code Division 35, Part 4, Chapter 2]. Thus, the criteria for inclusion are those set forth in Chapter 2. Water Code section 85320(a) then provides that “The BDCP shall not be incorporated into the Delta Plan ... unless the BDCP does all of the following.” Sub-paragraphs (1) and (2)(A)–(G) then set forth the list of requirements. Thus, in addition to considering all the criteria set forth in Chapter 2, the Council is prohibited from incorporating the BDCP unless it meets the requirements set forth in sub-paragraphs (1) and (2)(A)–(G). Subparagraph (e) then provides the process by which the Council will review DFG’s determinations with regard to the BDCP:

(e) If the Department of Fish and Game approves the BDCP as a natural community conservation plan pursuant to Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code and determines that the BDCP meets the requirements of this section, and the BDCP has been approved as a habitat conservation plan pursuant to the federal Endangered Species Act (16 U.S.C. Section 1531 et seq.), the council shall incorporate the BDCP into the Delta Plan. The Department of Fish and Game's determination that the BDCP has met the requirements of this section may be appealed to the council.

The structure of the Delta Reform Act sets up the Council as an appellate body. That is how it exercises almost all of its regulatory authority. The legislature wanted to be sure that the Council would exercise that regulatory authority over the BDCP so it reiterated that DFG’s determination could be appealed to the Council. Sub-paragraph (e) is aimed at foreclosing exactly the construction that the Council has put on the Delta Reform Act: that it does not have regulatory authority over BDCP conveyance. To say that the Council’s regulatory authority over the BDCP is “contingent” because it only arises on appeal proves too much: in that case almost all of the Council’s regulatory authority is contingent.

Some of the criteria to be considered in evaluating the BDCP are expressed in specific terms. However other crucial criteria are expressed in broad and general terms: “other operational requirements and flows necessary for recovering the Delta;” “a reasonable range of alternatives;” “in a timely manner;” “a reasonable range of flow criteria [and] rates of diversion;” “a reasonable range of Delta conveyance alternatives;” etc. Water Code section 85210(i) provides that the Council has a responsibility to “adopt regulations or guidelines as needed to carry out the powers and duties identified in this division [Div. 35].” Government Code section 11342.600 provides in pertinent part that a regulation is designed to “implement, interpret, or make specific the law enforced or administered.” No doubt the Council enforces and administers section 85320, as its purpose is for the BDCP to “be considered for inclusion in the Delta Plan.” Cal. Water Code § 85320. However the notice of proposed rulemaking pointedly omits section 85320 (and 85321) from the list of code sections that the regulations “implement, interpret, and make specific.” Notice of Proposed Rulemaking at 1. These sections are not exempted from the Council’s regulatory authority and any assessment of the BDCP in fact requires that these general terms be made specific so the Council has an intelligible framework and adequate information against which the BDCP can be judged. The legislature’s intent that the Council

make these terms specific is confirmed by the fact that the Delta Reform Act contains definitions sections, but none of these terms are included therein.

Does a “reasonable range of Delta Conveyance alternatives” mean that only one point of diversion need be considered but that alternatives for capacity and design of the canal and or tunnel(s) need to be considered? Or does it mean that more than one point of diversion must be considered? This is an important question discussed in more detail below. The BDCP has interpreted it to mean the former. Our reading of Cal. Water Code § 85320(b)(2)(B) convinces us that the latter is the case. The Council needs to address this question through a conveyance regulatory framework that make this general statement specific. And it needs a lot of information that it doesn’t have to promulgate conveyance regulations.

The Council has acknowledged that “the 2012 Delta Plan does not include any regulatory policies regarding conveyance.” Delta Plan, Appendix G at G-2. It has further acknowledged that it can include these policies only after it conducts “extensive analysis of the conveyance options and associated detailed environmental review.” Since the Council has acknowledged that it has not yet conducted the required analysis and has therefore not included the necessary regulatory policies, its informed consideration of the BDCP’s proposed conveyance is not possible. The Delta Plan should guide the BDCP not the other way around. Once the appropriate analysis is conducted and required policies adopted, the Council can of course exercise discretion in determining if the proposed conveyance complies with the adopted regulatory policies.

B. Because The Council Has Not Adopted Conveyance Regulatory Policies It Cannot Evaluate Whether BDCP Has Considered A Reasonable Range of Alternatives.

We respectfully disagree with the factual predicate underlying the Council’s decision to not study conveyance options: that, within the meaning of the Delta Reform Act, “[c]onveyance options are currently being studied” by the BDCP. Delta Plan, Appendix G at G-2. As to a new point of diversion, the BDCP has considered only diverting water from a point on the Sacramento River upstream of the myriad sloughs of the Delta so that water that would otherwise flow through the Delta is diverted around or under the Delta. Water code section 85320(b)(2)(B) requires that in assessing the BDCP the Council must consider whether the BDCP has evaluated “[a] reasonable range of Delta Conveyance alternatives ... including isolated conveyance alternatives.”

It is obvious to even the casual observer that considering only one concept for the point of diversion concept does not represent a reasonable range of options. We have previously pointed out to the Council and to the BDCP that the flood control structures on the Sacramento Rive north of the proposed point of diversion already divert millions of acre feet of water from the Sacramento River that does not then flow through the Delta. Installing the new point of diversion, for example, within the Yolo Bypass, or at the Fremont Weir, or at the Sacramento weir would present a true alternative. We have also previously pointed out that at times of peak flow each one of the half dozen flood control weirs diverts enough water in a few days to satisfy all the water needs of southern California for a year. When a member of STCDA made this point at a recent meeting of the Delta Independent Science Board, the Chair of the Science Board leaned forward to his microphone and corrected our member. He said that a few days flow over just one of the weirs would meet all of southern California’s water needs “for several years.”

The opportunity to harvest storm flows is common knowledge in the scientific community.

We have also pointed out that the CVP and SWP canals currently do not operate at all during times of peak water abundance. We have also pointed out that transporting water available at times of peak abundance and storing it in severely depleted groundwater aquifers throughout the state is feasible and could provide storage for millions of acre feet of water. Everyone agrees that the problem in California is not that there is a shortage of water. It is that we get too much water all at once, at the wrong time, in the wrong place, erratically—and that we have no way to capture or store the abundant water that nature gives to us in this way. The concept sketched out above actually addresses the heart of the problem. It does so in a way that would benefit the co-equal goal of restoring the Delta because it takes *no* water from the Delta and eliminates the need to take at least some of the water that is now taken.

Dr. Robert Pyke has sketched a concept that he calls the Western Delta Intakes Concept that would locate the point of diversion at Sherman Island in the western Delta and would divert water that has already completed its passage through the Delta. Dr. Pyke's concept paper is attached.

The currently proposed point of diversion concept in the BDCP (take water that would otherwise flow through the Delta), the point of diversion concept we just sketched above (take water that would not otherwise flow through the Delta), and Dr. Pyke's concept (take water after it has flowed through the Delta) would represent a reasonable range of alternatives. We do not claim that our option or Dr. Pyke's are the best available. They are general sketches and both need far more study. Likely other alternatives that follow the same general range would emerge from appropriate study. They do demonstrate that the BDCP is not considering a reasonable range of alternatives. Are these alternative feasible? Do they meet the requirements of the Delta Reform Act in ways that the BDCP concept does not? Would it be better to locate an intake upstream of the Fremont weir to serve the dual function (as envisioned by the CVP authorizing act) of flood control and water supply in the same piece of infrastructure? Could the upstream point of diversion then allow the Fremont Weir to be operated solely, or mostly, for conservation values? The Council cannot know the answers to these questions because the BDCP does not evaluate them.

We find nothing in the Delta Reform Act that specifies the location of the new point of diversion. The only mentions of the location of the point of diversion we are aware of are found in Water Code § 85086(c)(2) and § 85088, which both use terminology discussing a change in the point of diversion “from the southern Delta” to “a point on the Sacramento River.” We find no further specification as to where on the Sacramento River. The Yolo Bypass alternative, Sacramento Weir alternative, and Western Delta Intake alternative are all located at points on the Sacramento River and none are located in the southern Delta.

The CVP/SWP is the largest contiguous piece of water delivery infrastructure in the world. The BDCP contemplates spending tens of billions of dollars on new conveyance. With that scale of infrastructure and expenditure it is self-evident that considering only one idea for a new point of diversion is inadequate. The law requires, and the people of California deserve, for the Council to conduct the extensive analysis and environmental review necessary for the adoption of regulatory policies. Only then can the Council make an informed decision as to whether the BDCP sufficiently evaluates a reasonable range of alternatives. The BDCP itself does not, and will not, contain adequate information for a judgment to be made as to whether or not it has evaluated an appropriate range of alternatives.

C. The Regulations Are Inadequate Because The Council Has Not Considered Statutorily Mandated Factors In Formulating Them: The Delta Reform Act Requires That SWRCB Flow Criteria Be Applied When Formulating The Delta Plan.

The only way for the Council to determine if the BDCP contains “operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions,” Cal. Water Code § 85320(b)(2)(A), is to first conduct the analysis and adopt the regulatory framework that will allow it to consider the BDCP in the context of the Delta Plan’s larger statutorily mandated purposes—with the informed benefit of the flow criteria mandated by Cal. Water Code § 85085(c)(1).

Water Code section 85086 provides that the State Water Resources Control Board (“SWRCB”) shall “develop new flow criteria for the Delta ecosystem necessary to protect public trust resources.” Cal. Water Code § 85086(c)(1). These new flow criteria are necessary “for facilitating the planning decisions that are required to achieve the objectives of the Delta Plan” and for “informing the planning decisions for the Delta Plan and the Bay Delta Conservation Plan.” Cal. Water Code. § 85086(c)(1). The legislature mandated that the flow criteria be promulgated “within nine months of the enactment” of the Delta Reform Act. Cal. Water Code § 85086(c)(1). The Delta Reform Act became effective on February 3, 2010. Therefore the deadline for the flow criteria was November 3, 2010. The criteria have not been promulgated and the latest estimate is that they will not be ready until some time in 2014. The Delta Reform Act required that the Council adopt and implement the Delta Plan on or before January 1, 2012.

Both deadlines have been missed, the SWRCB’s egregiously so. However, the legislature clearly contemplated that the flow criteria would be promulgated relatively early in the process of formulating the Delta Plan and would be relied on by the Council to determine the contents of the Delta Plan. This is true as a matter of law and a matter of common sense. Perhaps the most frequent comment received by the Council has been that the regulatory policies with regard to water quality, water system reliability, and restoration of the Delta ecosystem are so amorphous and vague as to not constitute any plan at all. This is so because the Council is proceeding without the guidance of the essential science that was supposed to be available to the Council in the flow criteria. This also perhaps explains why the Council has chosen not to adopt any regulatory policies for conveyance: it simply didn’t have the information needed to do so—information that the legislature mandated it would have before completing the Delta Plan.

We are well aware that the Council is frustrated with the SWRCB’s lack of progress on the flow criteria. However, the Delta Reform Act provides no provisions allowing the Council to proceed without the criteria. The Council has acknowledged that it has the capacity to develop equivalent criteria on its own and has on occasion considered threatening to do so in order to push the SWRCB forward. Water Code section 85300 provides that the “council shall report to the Legislature no later than March 31, 2012, as to its adoption of the Delta Plan.” Perhaps the Council could have sought amendment of the Delta Reform Act to address its standoff with the SWRCB. However, absent legislation, the regulations are legally inadequate because the Council has failed to consider statutorily mandated factors (the flow criteria) in promulgating them.

Likewise the BDCP has put the cart before the horse by developing the BDCP without the benefit of the flow criteria. No doubt, once the criteria are issued BDCP will declare that the plan meets the criteria or can be adjusted to do so. But that is post hoc rationalization and is not

what the legislature ordained. The BDCP has already decided on the point of diversion concept without considering the flow criteria. Using the criteria only to calibrate operation of the canal, with a predetermined point of diversion is, again, putting the cart before the horse. We would not be surprised if the BDCP adopts its ROD and NOD before the flow criteria are issued. Likewise, the Council considering the flow criteria for the first time when the BDCP comes before the Council deprives the council of the regulatory framework by which the BDCP must be judged and that must be built on the foundation of the flow criteria.

Proposed regulation § 5007(c) does not address these issues because the legislature mandated *new* flow criteria specifically aimed at achieving the co-equal goals and specifically intended to assess and control the BDCP.

D. Lack Of Conveyance Regulatory Policies Undermines The Council's Responsibility To Periodically Review And Update The BDCP.

Water Code section 85300 provides that “[t]he council shall review the Delta Plan at least once every five years and may revise it as the council deems appropriate.” Cal. Water Code § 85300(c). As the BDCP will be incorporated into the Delta Plan, the Council undoubtedly has authority to revise the BDCP after incorporation “as it deems appropriate.” The only constraint that can be inferred with regard to revision of the BDCP after incorporation is that revision will not “change the terms and conditions of the permits issued by state and federal regulatory agencies.” *see* Cal. Water Code § 85320(g). Although section 85320(g) deals with recommendations that the Council may make about implementation of the BDCP rather than its separate authority to revise the BDCP it is likely that revisions to the Plan would be restrained by the same concept. We interpret this provision to require the Council to review and revise the Plan as conditions change or information indicates the need to do so—the five year requirement states the maximum time that the plan can go without review not the minimum. Because the Council will not have the benefit of the required evaluation and regulatory policies it cannot make an informed review of the BDCP portion of the Plan and cannot determine what revisions to the BDCP would be appropriate. It cannot, therefore, meet its statutory requirement to periodically review the Plan.

E. Lack Of Conveyance Regulatory Policy Frustrates The Council's Duty To Evaluate The BDCP's Real-Time Operational Decisionmaking Process.

In addition to exercising its regulatory authority in an appellate posture with regard to DFG's findings pursuant to Cal. Water Code § 85320(e), the Council is required to consider whether the BDCP complies with Cal. Water Code § 85321 in the first instance. The review of DFG's findings is to determine if the BDCP “meets the requirements of this section §[85320].” Cal. Water Code § 85320(e). In addition the Council must consider the BDCP “in accordance with this chapter [Cal. Water Code Division 35, Part 4, Chapter 2].” Cal. Water Code § 85320(a). Cal Water Code § 85321 is part of Chapter 2 but not part of § 85320, so the Council considers compliance with § 85321 in the first instance. Section 85321 provides:

85321. The BDCP shall include a transparent, real-time operational decisionmaking process in which fishery agencies ensure that applicable

biological performance measures are achieved in a timely manner with respect to water system operations.

That legislature singled out section 85321 for special consideration by the Council because the “transparent, real-time operational decisionmaking process” that will govern water system operations is at the heart of the controversy over the canal. The entire battle over the canal can be summarized as “once the canal is built how will we every wrest control the faucet form the water contractors?” So far the BDCP has ducked the issue and promised compliance with section 85321 later. Section 85321 was intended to provide for “real-time” management of the canal in response to its measured effects on the Delta in order to address the (well founded) fear that once the canal is built there won’t be adequate means to control it. The BDCP acknowledged in July 2012 that, despite tens of millions of dollars spent on modeling, it still didn’t know how to operated the canal to achieve the statutory objectives, including the co-equal goal of restoring the Delta.

The need for the Council to specify minimum requirements for real-time management through appropriate regulatory policy is palpable and acute. To be adequate, the BDCP’s real-time monitoring must be capable of producing an output that would indicate when the canal faucet would need to be immediately shut off in response to real-time monitoring. Real-time means real-time, as in “if conditions x, y, and z are met” then diversion will be automatically suspended or curtailed in a pre-specified way as the case may be. We would expect the trigger conditions would include pre-specified parameters such as movement of fish populations, physical criteria with regard to water chemistry, such as dissolved oxygen and electrical conductivity, the behavior of X-2, etc. It does not mean appointing a committee to study the effects of the canal and making recommendations from time to time or making decisions about operations for the following water year.

The regulatory policy could include such things as requirements for which conditions must be monitored and minimum disbursement of monitoring stations, how quickly the rate of diversion must be modified in response to monitored conditions, who would get notice and the kind of notice that would be required in response to changes in monitored conditions of specified magnitude or description, provisions for independent audit and oversight of real-time management, provisions governing emergency situations, etc.

F. The Conveyance Regulatory Framework Should Be As Specific As the Levee Regulatory Framework.

Proposed § 5014, dealing with Levees is highly specific and one can tell that the Council means business about getting something done and specifying the standards for future actions. The Council knows how to promulgate a regulation with concrete standards to guide future actions. We respectfully request that the same rigor be brought to regulations specifying conveyance requirements.

II. Other Comments.

§ 5005(e)(1) add the following after subparagraph (C);

“(D) “No later than January 1, 2020, demonstrated an actual significant reduction in the amount of water used, or in the percentage of water used, from the Delta.”

§ 5005(e)(2): Add the following:

“projects designed to take advantage of abundant water available at times of peak flows by capturing and transporting peak flows and storing transported water in depleted groundwater aquifers for beneficial use at times of scarcity.”

§ 5014: Change § 5014(b)(2)(G) to read “ Existing ecosystem values and ecosystem restoration opportunities including the use of vegetated levees.”

III. Conclusion

Thank you for providing the opportunity for us to comment and for considering our views.

Sincerely,

/s/Michael A. Brodsky