



## Delta Counties Coalition

Contra Costa County · Sacramento County · San Joaquin County · Solano County · Yolo County  
"Working together on water and Delta issues"

September 15, 2010

Delta Stewardship Council Members  
P. Joseph Grindstaff, Interim Executive Officer  
Chris Stevens, Chief Counsel  
Terry Macaulay, Deputy Executive Officer  
650 Capitol Mall, Fifth Floor  
Sacramento, CA 95814

by E Mail

### **Subject: Delta Counties Coalition Comments Regarding Revised Administrative Appeals (Parts I, II and III), Interim Delta Plan Provisions and BDCP Appeals Process**

Dear Council Members, Mr. Grindstaff, Mr. Stevens and Ms. Macaulay:

The Delta Stewardship Council (Council) at its meetings of August 26 and 27, 2010, adopted the Interim Delta Plan, but withheld final adoption of the recommended Administrative Appeals Procedures relating to the Bay Delta Conservation Plan (BDCP). The Council also provided direction to staff to make sure the Interim Delta Plan language was consistent with the recommended Administrative Appeals Procedures when it referenced common topics.

We are requesting that the staff and Council consider the following as you take final action on the recommended appeals procedures:

1. The issues and positions of the Delta Counties Coalition as contained in our letter of August 17, 2010 to the Council.
2. That language in the Interim Plan be consistent and harmonize with the recommended Administrative Appeals Procedures. Examples of this are contained in the Final Draft of the Interim Plan on pages 32 and 33 (red line version).
3. That the Council procedures require a de novo hearing on the inclusion of the BDCP in the Delta Plan.

With regard to the BDCP the Delta Counties Coalition supports the Council's de novo review of BDCP appeals and encourages the Council to maintain that provision in the Administrative Procedures. This independent review by the Council is appropriate, especially since the Council is responsible for preparation of the Delta Plan and for incorporating the BDCP in the Delta Plan.

The process described in the Delta Reform Act calls on the Department of Fish and Game (DF&G) to initially determine whether the BDCP complies with Section 85320 of the Water Code. The process also allows for this initial determination to be appealed to the Council,

which is the only body responsible for deciding if such an appeal has merit. The statutory criteria for BDCP compliance go beyond the Natural Communities Conservation Planning Act (NCCP Act) and the California Environmental Quality Act (CEQA). In addition, the Delta Reform Act mandates a "comprehensive review and analysis" of:

- Other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses.
- A reasonable range of Delta conveyance alternatives, including through-Delta, dual conveyance, and isolated conveyance alternatives and including further capacity and design options of a lined canal, and unlined canal, and pipelines.
- The potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the environmental impact report.
- The potential effects on Sacramento River and San Joaquin River flood management.
- The resilience and recovery of Delta conveyance alternatives in the event of catastrophic loss caused by earthquake or flood or other natural disaster.
- The potential effects of each Delta conveyance alternative on Delta water quality.

The plain meaning of the statute is that, if the DF&G approves the BDCP as an NCCP and determines the BDCP meets the requirements of Section 85320, and if the BDCP has been approved as a Habitat Conservation Plan, the Council should incorporate the BDCP into the Delta Plan, unless DF&G's determination that the BDCP meets the requirements of Section 85320 is appealed to the Council. In that case, if the Council upholds the appeal, the BDCP would not be included in the Delta Plan. Such a decision by the Council would not affect the permits granted by state or federal regulatory agencies or affect the legal adequacy of the BDCP's Environmental Impact Report.

While DF&G may make an initial determination that the BDCP meets the requirements of Section 85320, the Delta Reform Act designates the Council as the ultimate arbiter of that determination. Any appellant should be able to rely on the Council to fulfill this supervisory role in an objective, independent manner, which can only be accomplished through de novo review. The plain meaning of the Delta Reform Act grants the Council broad discretion in deciding on BDCP appeals and necessarily so. If the BDCP is to be included in the Delta Plan, there must be some provision to ensure the BDCP is compatible with the Delta Plan. The criteria set forth in Section 85320 are entirely consistent with the co-equal goals that the Delta Plan is meant to further.

The potential exists for the BDCP to be developed in a manner that complies with CEQA and the NCCP Act, but creates a fundamental conflict with the Delta Plan. This conflict can result from failing to provide a sufficiently comprehensive review and analysis of the criteria in Section 85320. Such facts can be brought to the Council through an appeal, in which case it is entirely appropriate for the Council to go beyond the administrative record used by the DF&G to determine the BDCP compliance with Section 85320. The compliance decision is not a legal decision or a regulatory decision; it is a policy decision. The Delta Reform Act does not require the Council to defer to a regulatory agency

(DF&G) for this policy decision. The Council should adopt the de novo review standard to ensure its independent judgment and discretion for this policy decision as envisioned by the statute.

Accordingly, the Delta Counties respectfully ask the Council to maintain independent review through inclusion of the de novo provision in the administrative procedures and ensure language consistency in the Interim Plan.

The Delta Counties Coalition appreciates the opportunity to provide these comments to the Council as we are the home to the residents, businesses, recreation facilities and agriculture of the Delta.

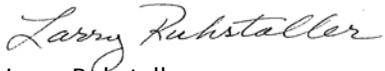
Sincerely,



Mary Nejedly Piepho  
Supervisor, Contra Costa County



Don Nottoli  
Supervisor, Sacramento County



Larry Ruhstaller  
Supervisor, San Joaquin County



Michael J. Reagan  
Supervisor, Solano County



Mike McGowan  
Supervisor, Yolo County