UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL OCEAN SERVICE
OFFICE OF OCEAN AND COASTAL RESOURCE MANAGEMENT
Silver Spring, Maryland 20910

MAY - 5 2011

Mrs. Terry Macaulay
Deputy Executive Officer
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Re: Comments on Second Staff Draft Delta Plan

Dear Ms. Macaulay,

I am writing for the Office of Ocean and Coastal Resource Management (OCRM) in response to the California Delta Stewardship Council's request for comments on the California Delta Stewardship Council's second draft of the Delta Plan (dated March 18, 2011).

Our interest in the Delta Plan stems from the requirement under the *Sacramento-San Joaquin Delta Reform Act of 2009* that once the Plan is adopted by the Delta Stewardship Council, the Plan is to be incorporated into the existing federally approved California Coastal Management Program (CCMP). Pursuant to OCRM's responsibilities under the *Coastal Zone Management Act of 1972* (16 U.S.C. 1451, *et seq.*, as amended), any changes to the California Coastal Management Program (CCMP), including the incorporation of the Delta Plan, must be submitted to our office for approval.

In addition to the preliminary comments attached, we ask that the Council carefully consider the approval requirements of the CZMA and its implementing regulations (15 CFR Part 923). Particular attention should be given to how the implementing authorities, boundaries, and policies of the Delta Plan align with the existing CCMP implemented by the California Coastal Commission (CCC) the San Francisco Bay Conservation and Development Commission (BCDC) and California State Coastal Conservancy.

Before providing more detailed comments on a draft Delta Plan, OCRM will need to have further discussions with the Council, BCDC, and the CCC on the nature of the Delta Plan, its relationship to the existing programs and other CZMA requirements.

We appreciate the Council extending the opportunity to OCRM to provide comments on the Draft Delta Plan. If you have any questions please call me at (301) 563-1160.

Sincerely,

Bill O'Beirne
Acting Team Leader
Pacific-Islands Region
Coastal Programs Division

cc: Peter Douglas, Executive Director
California Coastal Commission

Will Travis, Executive Director,
San Francisco Bay Conservation and Development Commission

Office of Ocean and Coastal Resource Management Coastal Programs Division
Comments on 2nd Draft Delta Plan

COMMENT #1: DESCRIBING THE SCOPE OF THE PROGRAM: State Coastal Zone Management Programs (CZMP) are required to describe the boundaries, uses subject to the management program, and any special management areas as follows:

A) Inland CZM Boundary: The Coastal Zone Management Act (CZMA) (16 USC §1455 et. al.) and its implementing regulations (15 CFR Section 923) require that state CZMPs identify the seaward, interstate and inland boundaries of the programs (16 USC §1455 (d) (2) (A)). In addition, the inland boundary "must be presented in a manner that is clear and exact enough to permit determination of whether property or an activity is located within the management area. States must be able to advise interested parties whether they are subject to the terms of the management program within, at a maximum, 30 days of receipt of an inquiry (15 CFR §923.31(a)(8)). Any revisions to the California Coastal Program that adjust the inland boundary need to clearly describe what the new inland boundary will be.

For example, the State is be the boundary of planning area 1, planning area 1 and 2 or the entire state.

B) Areas of Particular Concern: State CZMPs must include an inventory and designation of areas of particular concern within the coastal zone, on a generic and/or site-specific basis, and broad guidelines on priorities of uses in particular areas, including specifically those uses of lowest priority. (16 USC §1455 (d)(2)(C) and 15 CFR 923.21(a)). Revisions to state programs may include new areas of particular concern (APC). If the delta plan will contain new APCs it must identify those areas and describe how they will be managed.

C) Uses Subject To the Program: State CZMPs must identify those land and water uses that will be subject to the terms of the management program (16 USC §1455 (d)(1)(B), 16 USC §1455 (d)(2)(H), and 16 USC §1455 (d)(12)(B)). At a minimum, these land and water uses shall be those with direct and significant impacts on coastal waters, or on geographic areas likely to be affected by or vulnerable to sea level rise (CZMA 306(d)(2)(A)) and 15 CFR §923.11). Any revisions to a state CZMP should identify the land and water uses within the new management area that will subject to the program –especially any new land and water uses. The program should identify the land and water uses in the most unambiguous way possible so that parties proposing to undertake various uses or activities will have a reasonable understating whether they are subject to the management program.

For example, specifying the land and water uses that meet the definition of "covered action" would be far more transparent for affected parties.

D) Uses Of Regional Benefit: State CZMPs must identify land and water uses of regional benefit, and contain a method of assuring that local land use and water use regulations within the coastal zone do not unreasonably restrict or exclude these uses of regional benefit (16 USC §1455(d)(12). To do this state CZMP must identify what constitutes uses of regional

benefit; and identify and utilize any one or a combination of methods, consistent with the control techniques employed by the State, to assure local land and water use regulations do not unreasonably restrict or exclude uses of regional benefit (15 CFR §923.12). Revisions to state programs must identify any new "uses of regional benefit" and describe how the existing or any new methods employed by the State, will assure local land and water use regulations do not unreasonably restrict or exclude existing or new uses of regional benefit.

COMMENT #2 - MANAGEMENT OF USES SUBJECT TO THE PROGRAM: State CZMPs, or revisions to those programs, must provide for the management of those identified land and water uses. This includes the policies, and authorities or mechanisms to enforce the policies to assure the appropriate protection of those significant coastal resources and areas that make the State's coastal zone a unique, vulnerable, or valuable area. (16 USC §1455(d)(2)(D) and 15 CFR §923.3).

A) Program Policies: State CZMPs must identify the policies that will guide the land and water uses subject to the management program within the CZM boundary. State CZMPs must distinguish between enforceable and encouragement policies and clearly identify the enforceable policies for the purposes of federal consistency (15 CFR §§923.81(b)(1) and 923.84(b)(2)(i)(A)). The policies in the program must be appropriate to the nature and degree of management needed for uses, areas, and resources identified as subject to the program. (15 CFR §923.3(d)). The policies, standards, objectives, criteria, and procedures by which program decisions will be made must provide: a clear understanding of the content of the program, especially in identifying who will be affected by the program and how, and a clear sense of direction and predictability for decision makers who must take actions pursuant to or consistent with the management program (15 CFR §923.3(e)). This would apply to any new policies. NOAA encourages CZMPs to remove or define vague or ambiguous words or phrases in its coastal policies (or standards) to enhance predictability and compliance with the policy.

B) Incorporation of Policies by Reference: A CZMP policy that is "incorporated by reference" is not an "enforceable policy" of a state's CZMP for the purposes of federal consistency. That is, policy language in other plans, regulations, or statutes etc. that is merely referenced in a coastal policy is not considered enforceable for the purposes of federal consistency because that policy language has not undergone the formal program review and approval process. The same applies for States revising their programs to add additional policies. Any enforceable policies or standards that the state intends to use for federal consistency must be clearly spelled out in the program document, and go through formal program change approval process. (See CZMA Federal Consistency Overview p. 6 for a discussion: http://coastalmanagement.noaa.gov/consistency/media/FC_overview_022009.pdf). The program change process allows federal agencies to have a clear understanding of all the policies they may be subsequently be subject to while providing them with an opportunity to provide meaningful comment.

COMMENT #3 - MANAGEMENT TECHNIQUES AND PROGRAM AUTHORITIES:

A) Program Authorities: State CZMPs must identify and describe the means of exerting control over land and water uses noted above including a relevant State constitutional provisions, laws, regulations, and judicial decisions and management techniques consistent with those allowed in the CZMA (16 USC 1455(d)(2)(d), 16 USC 1455(d)(10)(A), and 15 CFR §923.40-45). Revisions to State CZM programs should clearly describe the nexus between any new "enforceable" policies and the statutory or regulatory enforceable mechanism that imposes the policy on the public and private uses within the state's jurisdiction. This could be a state permit program or a provision in state law that requires all state agencies to apply the policy in their permit and enforcement actions. (See CZMA Federal consistency Overview p.6 at http://coastalmanagement.noaa.gov/consistency/media/FC_overview_022009.pdf.)

B) Management Techniques: States must demonstrate that the enforceable mechanism identified above provides a means of ensuring compliance. This demonstration will be in the context of one or a combination of the three control techniques specified in section 306(d)(11) of the Act" 15 CFR 923.40(b). The three eligible control techniques are: 1) state establishment of criteria and standards for local implementation; 2) direct state land and water use planning and regulation; or 3) state review on a case-by-case basis of actions affecting land and water uses subject to the management program. (See 15 CFR 923.42, 43, and 44 respectively).

Additions of new authority to CZMP programs must demonstrate how they meet one of the eligible management techniques. In particular, the description should articulate how the enforcement component of that mechanism would work, including how the state can ensure compliance for individuals or state agencies that ignore prohibitions, conditions or other decisions.

COMMENT #4 - ORGANIZATIONAL STRUCTURE THAT WILL IMPLEMENT PROGRAM: State CZMPs must be organized to implement the management program and the management program must describe the organizational structure. (16 USC 1455(d)(2)(F), 16 USC 1455(d)(7) and 15 CFR §923.46). Revisions to state programs must identify any changes to the existing organization of the States CZMP and how the structures can effectively implement any new or revised policies and authorities. This description needs to include a discussion of those state and other agencies, including local governments, that will have responsibility for administering, enforcing and/or monitoring those authorities or techniques required to pursuant to the following subsections of the Act: 306(d)(3)(B); 306(d)(10); 306(d)(10) (A) and (B); 306(d) (11) and (12); and 307(f). Finally, the description must also describe the relationship of any new program administering agencies, such as the Delta Stewardship Council, to the lead state CZM agency, designated pursuant to subsection 306(d)(6) of the Act, which in this case is the California Coastal Commission. (15 CFR §923.46)

COMMENT #5 - FEDERAL CONSISTENCY PROVISIONS

A) Federal Consistency Provisions and Delta Act – State Consistency Provisions: Revisions to CZM programs should clearly distinguish between any state-level consistency process and the "federal consistency" process provided for in the CZMA. The Council has developed a state-level "Delta consistency process" that is very similar in terminology and content to the Federal Consistency Process established in the CZMA. Moreover, it appears that these two processes will overlap in some case, thus creating a real possibility for significant confusion between these two processes on the part of project proponents and state and Federal agencies.

B) Federal Consistency Process: State CZMPs must describe the procedures it will use to implement the federal consistency requirements of subsections 307 (c) and (d) of the Act. Revisions to CZMPs, therefore must describe any changes to existing consistency procedures including changes to:

a) the state agency designated pursuant to subsection 306(d)(6) of the Act or a single other agency will handle consistency review (see 15 CFR 930.18);
b) the list of Federal license and permit activities that will be subject to review (see 15 CFR 930.53); and
c) the public notice procedures to be used for certifications submitted for Federal License and permit activities and, where appropriate, for OCS plans (see 15 CFR 930.61 through 930.62 and 930.78).
d) The procedures used to allow public comment on federal consistency decisions.

Any changes to the federal consistency procedures produced by the Delta plan must be clearly described. Will there be any change to the approved entities issuing federal consistency concurrences or objections? Will there be new listed federal license or permits for review, and will there be any new geographic location descriptions established to review activities outside of inland CZM boundary or in another state? How will the Delta Council decision timelines fit into mandated federal consistency timelines for federal agency actions and licenses and permits?

C) Necessary Data And Information: For federal consistency purposes, state CZMPS must identify and describe in the program any specific data and information they wants to require to assess the consistency of federally licensed, permitted or funded activities. (15 CFR §930.58). Necessary data and information may include completed State or local government permit applications which are required for the proposed activity, but shall not include the issued State or local permits. NEPA documents shall not be considered necessary data and information when a Federal statute requires a Federal agency to initiate the CZMA federal consistency review prior to its completion of NEPA compliance (15 CFR §930.58).

COMMENT #6 - CONSIDERATION OF THE NATIONAL INTEREST: State CZMPs must provide for "adequate consideration of the national interest involved in planning for, and managing the coastal zone, including the siting of facilities such as energy facilities which are of greater than local significance. In the case of energy facilities, the Secretary shall find that the State has given consideration to any applicable national or interstate energy plan or program. (CZMA Section 306(d)(8). Revisions to state programs should also evaluate and identify any

changes to the approved process for continued consideration of the national interest in the planning for and siting of facilities during program implementation.

COMMENT #7 - PARTICIPATION BY PUBLIC AND FEDERAL AGENCIES: State CZMPs must provide opportunity for full participation by relevant Federal agencies, State agencies, local governments, regional organizations, port authorities, and other interested parties and individuals, public and private, consistent with the policy declared in 16 USC§1452, in the development and adoption of the management program (16 USC §1455 (d)(1)CZMA Section 306(d)(1)). To meet this requirement, states need to (a) develop and make available general information regarding the program design, its content and its status throughout program development; (b) provide a listing, as comprehensive as possible, of all governmental agencies, regional organizations, port authorities and public and private organizations likely to be affected by or to have a direct interest in the development and implementation of the management program; (c) indicate the nature of major comments received from interested or affected parties, identified in paragraph (b)(2) of this section, and the nature of the State's response to these comments; and (d) hold public meetings, workshops, etc., during the course of program development at accessible locations and convenient times, with reasonable notice and availability of materials. Revisions to state programs shall also need to provide these same opportunities to relevant Federal agencies, State agencies, local governments, regional organizations, port authorities, and other interested parties and individuals, public and private.

Please be advised that these comments are preliminary and are provided solely for the purpose of noting questions that have been raised by OCRM staff for further discussion. These comments have not been vetted within the agency and should not be relied upon. Much of the detail of the Delta Plan still needs to be fleshed out, and that detail is necessary for NOAA's review of the Delta Plan to determine whether the Plan meets the minimum approval criteria in the CZMA.

Resources: To assist you here are links to some CZMA legislative and regulatory requirements the Council should consider in developing the Delta Plan:

(1) Link to CZMA (*see* §1455(d) for requirements):
http://coastalmanagement.noaa.gov/about/media/CZMA_10_11_06.pdf

(2) Link to Coastal Zone Management Program Development and Implementation Regulations:
http://www.access.gpo.gov/nara/cfr/waisidx_03/15cfr923_03.html.

(3) Link to Coastal Zone Management Act Federal Consistency Regulations (15 CFR Part 930):
http://coastalmanagement.noaa.gov/consistency/media/15CFRPart930_2007.pdf.

(4) CZMA Federal Consistency Overview
http://coastalmanagement.noaa.gov/consistency/media/FC_overview_022009.pdf.