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Via email to [eircomments@deltacouncil.ca.gov](mailto:eircomments@deltacouncil.ca.gov)

Delta Stewardship Council  
Attn: Terry Macaulay  
980 Ninth Street, Suite 1500  
Sacramento, CA 95814

RE: Comments on Delta Plan Draft Environmental Impact Report

Dear Mr. Macaulay:

Thank you for the opportunity to provide comments on the Draft Environmental Impact Report ("EIR") for the Delta Stewardship Council's Delta Plan ("Plan" or "project").<sup>1</sup> Rossmann and Moore, LLP submits these comments in behalf of our firm to provide our perspective based on more than 35 years of practice and 25 years of teaching in California water resources.

We highlight what we perceive as some of the EIR's key deficiencies. We generally do not in these comments provide a detailed assessment of the EIR's specific text. Embedded in our discussion is a set of concerns that relate to the contents of the Plan itself, which in key respects does not fulfill statutory requirements. As explained below, these concerns have become even more problematic in the context of this EIR, which will guide the environmental impact analysis for many future projects whose scope and components are virtually unknown at this time.

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<sup>1</sup> All citations to the Delta Plan refer to the "Fifth Staff Draft Delta Plan."

Our comments highlight several critical flaws in the EIR. First, the EIR fails to disclose and analyze deficiencies in the Plan that will hinder the achievement of the project's objectives and the mandates of the California Water Code, as well as other laws protecting the environment. Second, the EIR avoids essential information and contains ambiguities that prevent the reader from discerning whether the project and its alternatives can accomplish the purported objectives. These problems bear on the EIR's failure to fulfill the purposes of a program EIR and the EIR's evasion of accurate comparison between the project and the alternatives. Third, the EIR does not adequately address and prioritize the protection of public trust uses.

We urge the Delta Stewardship Council to decline to accept this draft EIR and to reissue a revised draft in light of our and others' comments on its flaws. We also urge the Delta Stewardship Council to reformulate the Delta Plan so that it fulfills the Legislature's directives in the Sacramento-San Joaquin Delta Reform Act of 2009 ("Delta Reform Act"). Without a fundamental reworking of both the EIR and the Plan itself, there will be scant, if any, improvement in the underlying issues of grave concern to California: water supply reliability and the health of the Delta ecosystem. Worse, the EIR and Plan without revision might be misused to foreclose the very steps needed to protect that ecosystem, as well as water quality and beneficial uses.

**I. The EIR Fails to Disclose Deficiencies in the Delta Plan that Thwart its Ability to Achieve the Project's Objectives and to Meet the Statutory Mandates Set Forth in the Delta Reform Act.**

The Water Code and specifically the Delta Reform Act establish a suite of requirements for the Plan. These requirements are framed by the Water Code's "basic goals" for the Delta: to "[a]chieve the two coequal<sup>2</sup> goals of providing a more reliable water supply for California; and protecting, restoring, and enhancing the Delta ecosystem" (closely tracking the mandate to "[p]rotect, maintain, and, where possible, enhance and restore the overall quality of the Delta environment, including, but not limited to, agriculture, wildlife habitat, and recreational activities"). (Wat. Code § 29702; *see also* Wat. Code § 85054.) The pursuit of these goals must conform to the Legislature's overarching determination that "[t]he permanent protection of the Delta's natural and scenic resources is *the paramount concern* to present and future residents of the state and nation." (Wat. Code § 85022, subd. (c)(2) (emphasis added).)

In the pursuit of these goals, the Plan falls fundamentally short. The Plan contains little more than a description of background conditions and a plethora of hortatory statements without real regulatory muscle to support them. Ultimately, the people of California cannot rely on the Plan's weak "policies" and unenforceable

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<sup>2</sup> Like *The Economist*, we continue to question the diction of the 2009 legislation whose "main feature is a phrase, 'coequal goals'—though how coequal goals differ from equal ones is not clear." *California's Water Wars: Of Farms, Folks and Fish*, *The Economist* (Oct. 22, 2009).

“recommendations” to confront in any meaningful fashion the challenges facing the Delta. As explained below, however, the EIR assumes that the project (*i.e.*, the Delta Plan) will succeed in its grand ambitions, and neglects to consider the potential, even likely, result that the Plan will fail to deliver the full range of benefits presupposed but not necessarily realizable.

First, the Plan and its eventual EIR must complete the unfinished work that the Legislature declined to accomplish: define “reliability.” Specifically, the Plan must make clear that a “reliable” water supply is not necessarily (or likely to become) a water supply *increased* above recent, demonstrably harmful Delta exports. Instead, reliability seeks to determine the amount of water that consumers can expect to receive on a long-term basis through multiple drought years since that is the amount of water on which both water agencies and land use agencies must predicate California’s present and future development. (*See* Wat. Code, § 10910 *et seq.*; Gov. Code § 66473.7.) As explained by our former colleague, University of Maine Law Professor David Owen, Delta management is doomed to failure if it is predicated on maximum but unsustainable levels of export. (D. Owen, *Law, Dynamism, Reliability: The Rise and Fall of CALFED* (2007) 37 ENVTL. L. 1145.)

The Plan’s central shortcoming manifests itself throughout the portions of the document that describe the Plan’s “policies” and “recommendations.” Of these two categories, only “policies” create binding obligations; “recommendations” merely suggest ideas to other actors for their contemplation. (Delta Plan at pp. 53-54.) Hence, the likelihood of the Plan’s success as a “legally enforceable” document for the “comprehensive, long-term management [of] the Delta” (Wat. Code §§ 85000, subd. (c), 85059) must be judged by analyzing its policies alone since there is no certainty whatsoever that any of the “recommendations” will be heeded.

Within the Plan’s twelve policies, scant substance advances the Legislature’s goals beyond existing laws and strategies. Most of the policies repeat existing requirements, demand the drafting of studies or plans that will inform further actions, or allow for unfettered wiggle room by setting standards based not on numeric targets, but solely on “feasibility” or “appropriateness.” This lack of substance is far from sufficient to ensure the provision of a more reliable water supply for California and the protection, restoration, and enhancement of the Delta. In adopting such policies, the Plan also ignores the Legislature’s direction that the Plan should “[i]nclude quantified or otherwise measurable targets associated with achieving the [Plan’s] objectives” and “[b]e based on the best available scientific information.” (Wat. Code § 85308.) Use of the best available scientific information would enable the Plan to do exactly what it fails to do: set meaningful, quantified targets that would place California on a path to a more reliable water supply and a

healthy Delta ecosystem. Following is a short discussion of the relevant policies and their particular failings.<sup>3</sup>

Policy WR P1 covers actions to export water, transfer water through, or use water in the Delta. It specifies in part that an action is inconsistent with the Plan if that action does not comply with the requirements of Water Code sections 10608 *et seq.*, 10610 *et seq.*, and 10800 *et seq.* (Delta Plan at p. 82.) Given their codification in statutory law, these requirements of policy WR P1 are inconsequential; by restating them, the Plan does no more than call attention to existing legal obligations. The other portions of policy WR P1 mandate that water suppliers “develop and implement a conservation-oriented rate structure” and “expand an existing or add a new Water Reliability Element in their Urban Water Management Plan and/or Agricultural Water Management Plan.” (Delta Plan at pp. 82-83.) These might be apt means to effectuate the Legislature’s intent for the Plan if they “[i]nclude[d] quantified or otherwise measurable targets.” (Wat. Code § 85308, subd. (b).) The Plan fails, however, to establish any quantified or otherwise measurable targets for these requirements, rendering them effectively toothless.

Policy ER P1, relied upon by the Plan to address three areas of concern (water supply reliability, ecosystem restoration, and water quality improvement), suffers from a similar problem. This policy exhorts the State Water Resources Control Board (“State Board”) to develop “new and updated” flow objectives for the Delta, as well as flow criteria for high-priority tributaries, by certain dates. (Delta Plan at p. 86.) Although this is slightly more than a restatement of existing legal obligations, it is still merely a requirement that another state agency do as the law already bids, just on a different schedule. Moreover, the State Board has already established the flow criteria meant to inform planning decisions for the Delta Plan and the Bay Delta Conservation Plan (BDCP) under Water Code section 85086(c).<sup>4</sup>

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<sup>3</sup> Four of the Plan’s twelve “policies” address flood management alone, and one addresses the contents of Delta Plan consistency certifications. *See* Delta Plan at pp. 60, 165, 173, and 178. These thus do not assist in the achievement of the Delta Reform Act’s “coequal goals” of increased water supply reliability and ecosystem restoration. The seven policies discussed here are the totality of enforceable measures that the Plan establishes to help ensure a reliable water supply in California and to restore the Delta’s ecosystem.

<sup>4</sup> Through Resolution No. 2010-0039, the State Board on August 3, 2010 approved its report “determining new flow criteria for the Delta ecosystem that are necessary to protect public trust resources.” State Water Resources Control Board, Resolution No. 2010-0039: Determining Delta Flow Criteria Pursuant to the Delta Reform Act, Aug. 3, 2010, *available at* [www.waterboards.ca.gov/board\\_decisions/adopted\\_orders/resolutions/res10.shtml](http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/res10.shtml). We address below some of the recommendations of this report. Although the implementation of these criteria remains a pending

Policy WR P2 directs that contracts “to export water from, transfer water through, or use water in the Delta ... [must be] developed in a transparent manner consistent with Department of Water Resources’ revised policies ... or comparable policies issued by the Bureau of Reclamation.” (Delta Plan at p. 95.) This policy is nothing more than a repetition of existing DWR and Bureau of Reclamation policies regarding procedural transparency.

Policy ER P2 mandates that habitat restoration actions be consistent with habitat type locations based on the California Department of Fish and Game’s *Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions*. (Delta Plan at p. 117.) This policy is simply a formalization of another agency’s existing strategy.

The Plan’s other policies aimed at the goals of ecosystem restoration and increased water supply reliability lack the robustness or specificity to lead to more than insignificant results. Policy ER P3 obligates covered actions to avoid or mitigate “adverse impacts to the opportunity for habitat restoration” at certain elevations. (Delta Plan at p. 117.) It bears emphasis that this is not a requirement for actual habitat restoration—it is only a requirement that the *opportunity* for habitat restoration remain available. The Plan contains no requirement that would directly result in habitat restoration.

Policy ER P4 states that local and state agencies constructing new levees or substantially reconstructing existing levees “shall evaluate and, where feasible, incorporate alternatives ... that would increase the extent of floodplain and riparian habitats.” (Delta Plan at p. 119.) The Plan fails to describe when such alternatives would be considered “feasible,” nor does it identify the extent of “increase” expected. Moreover, this policy could result in positive impacts for the Delta only when local and states agencies construct new levees or “substantially” (another undefined term) reconstruct existing levees.

Policy ER P5 requires agencies to “demonstrate that the potential for new introductions of or improved habitat conditions for nonnative invasive species have been fully considered and avoided or mitigated in a way that appropriately protects the ecosystem.” (Delta Plan at p. 124.) Notably absent from the Plan is a standard for judging “appropriate” protection of the ecosystem, hardly a self-evident benchmark.

The policies referenced here form the entirety of the Delta Plan’s enforceable measures to “further the restoration of the Delta ecosystem and a reliable water supply.” (Wat. Code § 85302, subd. (a).) This short list of feeble requirements pales in comparison to the Legislature’s expectations for the Plan:

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issue (Delta Plan at p. 86, n. 29), the Plan and its environmental review should not be misused to foreclose future implementation.

(c) The Delta Plan shall include measures that promote all of the following characteristics of a healthy Delta ecosystem:

- (1) Viable populations of native resident and migratory species.
- (2) Functional corridors for migratory species.
- (3) Diverse and biologically appropriate habitats and ecosystem processes.
- (4) Reduced threats and stresses on the Delta ecosystem.
- (5) Conditions conducive to meeting or exceeding the goals in existing species recovery plans and state and federal goals with respect to doubling salmon populations.

(d) The Delta Plan shall include measures to promote a more reliable water supply that address all of the following:

- (1) Meeting the needs for reasonable and beneficial uses of water.
- (2) Sustaining the economic vitality of the state.
- (3) Improving water quality to protect human health and the environment.

(e) The following subgoals and strategies for restoring a healthy ecosystem shall be included in the Delta Plan:

- (1) Restore large areas of interconnected habitats within the Delta and its watershed by 2100.
- (2) Establish migratory corridors for fish, birds, and other animals along selected Delta river channels.
- (3) Promote self-sustaining, diverse populations of native and valued species by reducing the risk of take and harm from invasive species.
- (4) Restore Delta flows and channels to support a healthy estuary and other ecosystems.
- (5) Improve water quality to meet drinking water, agriculture, and ecosystem long-term goals.
- (6) Restore habitat necessary to avoid a net loss of migratory bird habitat and, where feasible, increase migratory bird habitat to promote viable populations of migratory birds.

(Wat. Code § 85302.) Unless all of the Plan's unenforceable recommendations miraculously become reality, the Plan will fail to uphold its statutory purpose. This nearly certain outcome nowhere figures in the EIR's analysis.

The EIR instead acknowledges the problem and then blithely ignores it in analyzing the Plan. On water supply reliability, the EIR states: "The Proposed Project does not require specific water reliability projects; rather it contains broad requirements and recommendations.... Given both the general nature of the Proposed Project policies and recommendations and the uncertainty concerning the extent to which the Proposed Project will result in any particular action, it is unclear what types of projects will actually be implemented as a result of the Proposed Project policies and recommendations. Nevertheless, *this EIR assumes that the Proposed Project will lead to an increase in local and regional water reliability projects.* Also, the degree to which the Proposed Project will increase the chances

that a storage facility will be built is unknown, because these projects are within the authority and jurisdiction of other agencies. However, *this EIR assumes that the Proposed Project recommendations regarding storage will lead to an increase in water storage projects.*” (EIR at p. 2A-6 (emphasis added).)

On ecosystem restoration, the EIR engages in the same assumptive exercise: “The Proposed Project does not require specific projects for Delta ecosystem restoration; rather it contains broad requirements and recommendations to encourage ecosystem restoration. Given both the general nature of the Proposed Project policies and recommendations and the uncertainty concerning the extent to which the Proposed Project will result in any particular action, it is unclear what types of projects will actually be implemented as a result of the Proposed Project policies and recommendations. Nevertheless, *this EIR assumes that the Proposed Project will lead to an increase in Delta ecosystem restoration projects.*” (EIR at p. 2A-26 (emphasis added).)

Unfortunately, the lackluster contents of the Plan do not justify the EIR’s speculative assumption that the Plan will somehow lead to an increase in local and regional water reliability projects, water storage projects, and Delta ecosystem restoration projects. The Plan’s enforceable elements are far from adequate to ensure an increase in *any* such projects. The EIR’s ill-conceived assumption infects the EIR with an unrealistic and groundless optimism about the environmental and human benefits that the project will be able to provide. It paints an unwisely rosy picture of the project in comparison to the baseline and other alternatives, including the no-project alternative, and it causes the EIR to ignore impacts that may occur if the Plan is adopted. Worse still, the EIR glosses over the Plan’s deficiencies and assumes its compliance with the Legislature’s directives in the Delta Reform Act. Assuming such benefits without foundation deprives the public and decision-makers of critical information about the project, its impacts, feasible mitigation, and the impacts of other alternatives to which the EIR compares it.

## **II. The EIR’s Ambiguities and Lack of Crucial Information Prevent the Reader from Testing Whether the Project and its Alternatives Can Accomplish the Asserted Objectives.**

### **A. The EIR Fails to Meet the Purposes of a Program EIR.**

Using a program 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 programwide mitigation measures” at a time when the lead

agency has the best opportunity to address them properly. (Cal. Code Regs., tit. 14, § 15168, subd. (b).)

The Draft EIR does not even come close to meeting these standards. The environmental analysis, like the text of the Delta Plan discussed above, excludes so much that there is scarcely a project left to analyze. The paucity of genuine environmental review is evident in virtually every section of project assessment, which finds the lead agency repeatedly asserting that the Council “does not propose or contemplate directly authorizing construction or operation of any physical activities” and at most has an “influence” or “nudging” effect on still-undefined projects. (EIR at p. 2B-2.)

Likewise, in contravention of CEQA, the EIR repeatedly defers any genuine analysis of feasible mitigation measures until long after the Plan becomes final. The discussion of mitigating impacts to water resources, water quality, and fish and wildlife habitat, for example, fails to analyze whether or how the Plan could meet legal and ecosystem requirements in the context of increased diversions from the Delta. (*See, e.g.*, EIR at pp. 3-93, 4-65 to 4-66, 4-82 to 4-83.) That omission would foreclose the use of this EIR as a program document in future decisions. (Cal. Code Regs., tit. 14, § 15142, subd. (b).)

These evasions are disingenuous for a Delta Plan that concededly will be used as the basis for “consistency” determinations that might preclude future application of some available strategies, even if they have major environmental benefits. (EIR at p. 2B-1.) Remarkably, the EIR portrays as “very conservative” its assumption, in lieu of analysis, that “the Delta Plan has the *desired outcome*.” (EIR at p. 2B-2 (emphasis added).) That is far from conservative for a document that avoids public trust considerations, as detailed below, and merely assumes that sufficient water will be available in the future to support the statutory “coequal goals.”

B. The EIR Evades a Genuine Comparison Between the Project and Alternatives.

“[An] EIR may not define a purpose for a project and then remove from consideration those matters necessary to the assessment whether the purpose can be achieved.” (*County of Inyo v. City of Los Angeles* (1981) 124 Cal.App.3d 1, 9.) But that is precisely what occurs in the Draft EIR.

The Draft EIR identifies the Delta Plan as a “legally enforceable, comprehensive management plan for the Sacramento–San Joaquin Delta and the Suisun Marsh (Delta) that *achieves the coequal goals and all of the inherent subgoals and objectives, as described in Section 1.*” (EIR at p. 2A-1 (emphasis added).) The Plan and EIR are the source of information for “cities, counties, and State, federal, and local agencies to restore the Delta ecosystem and provide a more reliable water supply for California.” (*Id.*) However, the EIR fails entirely to serve as the basis for a genuine comparison between the project and its alternatives, making the reader



unable to determine even whether the plan, much less its alternatives, can feasibly accomplish these objectives.

First, the EIR's definition of the "project" itself is fraught with ambiguities. For example, it leaves uncertain whether, and under what circumstances, the "applicant-driven" BDCP will become part of the Plan and therefore be incorporated into consistency determinations. Additionally, key words that are essential to understanding the contours of the project remain undefined, most notably the "reliability" of water supplies, as well as the "protection," "restoration," and "enhancement" of the Delta ecosystem.

Second, through a combination of euphemisms and evasive statements, the EIR avoids confronting critical water supply difficulties that are likely to undermine the EIR's assumption that the "coequal goals" can be simultaneously achieved. 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 adopted 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.<sup>5</sup>

Moreover, letters from environmentalists and water suppliers in the flow proceedings reveal a depth of conflict barely addressed in the EIR, and the EIR also fails to analyze the consequences of Plan implementation for areas of origin. The still-unresolved history of controversy over the Monterey Amendments and the Kern Water Bank is not even discussed in the EIR's water analysis, despite the promise that restoration of the urban preference, and of state control of the Kern Water Bank, offer to increased urban water reliability.

Third, as persuasively detailed in the comment letters of the California Environmental Water Caucus and California Sportfishing Protection Alliance, the

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<sup>5</sup> Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem, State Water Resources Control Board, Aug. 3, 2010, p. 5, *available at* [www.swrcb.ca.gov/waterrights/water\\_issues/programs/bay\\_delta/deltaflow](http://www.swrcb.ca.gov/waterrights/water_issues/programs/bay_delta/deltaflow).

EIR undermines any fair comparison between the project and Alternative 2. It does so by (1) misattributing key project elements to Alternative 2; (2) assigning to the proposed project an illusory advantage based upon retirement of drainage-impaired land; and (3) failing to ascribe to Alternative 2 significant environmental advantages likely to stem from the retirement of that land.

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 inadequately recognizes the depth and specificity of the State's existing analyses of climate change and water, such as DWR's 2006 *Progress Report* and 2008 report, *Managing an Uncertain Future*. The Delta Plan and EIR must be consistent with the California Climate Adaptation Strategy and continuing efforts of the California Climate Action Team's water task force. The Delta Plan and EIR must also incorporate other climate studies, such as those consulted and referenced in connection with DWR's 2005 and 2009 California Water Plan Updates. The EIR must apply this information to Plan components and clearly disclose, as these sources have consistently found, that reliance on the twentieth-century hydrologic range is not an accurate guide to conditions during the project's future term.

The EIR also inconsistently applies the climate insight disclosed in its EIR. Incredibly, the EIR cites climate change in its discussion of the disadvantages of Alternative 2, due to its additional "facilities" and the mistaken assumption that desalination and reverse osmosis are in this EWC-inspired alternative. (EIR at pp. 21-38 to 21-39.) At the same time, the EIR fails to apply climate change concerns to the 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, subd. (c)(2).)

### **III. The EIR Does Not Appropriately Address and Prioritize the Protection of the Public Trust.**

We understand that members of the Council have expressed a preference not to address the public trust in the Plan under review, but instead to defer to subsequent determinations of the State Board. We question that premature deference and ask the Council in its final plan and EIR to seize the precedential opportunity that the Legislature has created to restore the public trust in the Delta to the stature of its venerable roots.

The action-forcing sentence in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 446, reads, with emphasis added, "*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 uses wherever feasible." This Council, as an agent of *the state* (see Wat. Code, § 85200, subd. (a)), must embrace the public trust doctrine in its *planning* for the future of the Delta.

In preparing its plan, the Council must adhere to the appropriate protection of public trust uses “wherever feasible” – an obligation, as the Court’s accompanying footnote 27 explains, that is “similar” *but not identical* to those of CEQA. (33 Cal.3d at p. 446.) As the Court explained, the trust does not universally favor preservation or appropriation. But the trust does require that “the state ... protect the people’s common heritage of streams, lakes, marshlands and tidelands, *surrendering that right of protection only in rare cases...*” (*Id.* at p. 441 (emphasis added).) As we have commented previously to the Council in the formative days of its operation, the test of feasibility is emphatically not that of naked preference, as many observers view CEQA. Instead, the “infeasibility” required to authorize loss of trust resources resembles that defined in section 4(f) of the federal Department of Transportation Act, which the U.S. Supreme Court has interpreted, in light of the “paramount importance” of parkland protection, to require loss only forced by “truly unusual factors” of “extraordinary magnitudes.” (*Citizens to Preserve Overton Park v. Volpe* (1971) 401 U.S. 402, 411-413.)

As the Hawaii Supreme Court explained, in a case remarkably parallel to *Audubon* for recognizing the need “for both instream and offstream uses where feasible,” “the necessity of a balancing process” does not mean that “the state’s public trust duties amount to nothing more than a restatement of its prerogatives.” (*In re Water Use Permit Applications for the Waihole Ditch* (2000) 94 Haw. 97, 142; 9 P.3d 409, 454.) “[A]ny balancing between public and private purposes [must] begin with a presumption in favor of public use, access, and enjoyment.” (*Id.*) The burden of proof to justify intrusion on the public trust must be borne by those seeking that intrusion.

Fortunately, while some may question that this Council should conduct its public trust assessment on these principles and presumptions,<sup>6</sup> the Legislature has expressly declared that “*permanent protection* of the Delta’s natural and scenic resources is the *paramount* concern to present and future residents of the state and nation.” (Wat. Code, § 85022(c)(3) (emphasis added).) Thus the Legislature, like

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<sup>6</sup> A handful of Court of Appeal cases suggest that the public trust amounts to nothing more than the naked preference of decision-makers supported by substantial evidence (*SWRCB Cases* (2006) 136 Cal.App.4th 674, 778-779), and that satisfying CEQA equates to satisfying the public trust (*Citizens for East Shore Parks v. California State Lands Comm.* (2011) 202 Cal. App. 4th 549, 576-577). The California Supreme Court, however, recognizes that “water exports from the Bay-Delta ultimately must be subordinated to environmental considerations.” *In re Bay-Delta Programmatic EIR Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1168. At the January 21, 2012 California Water Law Symposium at UC Berkeley School of Law, in evaluating the *SWRCB Cases*’ application of the “substantial evidence” standard to the State Board’s decisions incorporating the trust, Professor Emeritus Joseph Sax opined: “clear error.” In short, neutral “balancing” does not honor the paramount role of trust values.

the Supreme Court in the *Bay-Delta Programmatic EIR* case, has expressed a *preference* for public trust values, using the same adjective (“paramount”) as section 4(f) interpreted by *Overton Park*. Because that legislative determination cannot be characterized as unreasonable, the Legislature’s implementation of the public trust by the preference expressed in Water Code section 85022, subdivision (c)(3) must be honored by the Council. (*California Trout v. State Water Res. Control Bd.* (1989) 207 Cal. App. 3d 585, 624-625, 629-631.)

## **Conclusion**

For the reasons described above, we request that the Delta Stewardship Council not accept this draft EIR and instead direct its staff to reformulate the Delta Plan so that it fulfills the Legislature’s mandates. Following this process, the EIR should be redrafted to address its existing deficiencies and to analyze the import of the revamped Delta Plan. Without these actions, the Delta Plan will fail to help provide the reliable water supply and healthy Delta ecosystem that California so desperately needs.

Respectfully,

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