

**Environmental Defense Fund
The Bay Institute**

September 2, 2008

Phil Isenberg, Chair
Delta Vision Blue Ribbon Task Force
c/o California Bay-Delta Authority
650 Capitol Mall, 5th floor
Sacramento, CA 95814

RE: Supplemental Comments on 3rd Draft Strategic Plan, Strategy 15

Dear Chairman Isenberg:

This letter is submitted as joint supplemental comments of Environmental Defense Fund and the Bay Institute regarding Strategy 15 in the August 14, 2008, third staff draft of the Delta Vision Strategic Plan. Our organizations are also each submitting separate comments on the staff draft as a whole.

The Delta Vision prudently calls for the elevation of ecosystem health to co-equal status with water supply. As discussed in our prior submissions, it is clear that reliable water supplies depends upon environmental reliability, meaning that water and other resources needed for long-term, self-sustaining native fisheries and ecosystems must be reliable. The inability of the current set of tools to consistently and reliably provide freshwater flows needed for ecosystem health must be addressed for the Vision to succeed.

The draft Strategic Plan goes a long way in the right direction by identifying the urgent need to strengthen the regulatory requirements to protect and restore the Delta ecosystem, and by proposing specific new targets for protection and restoration. It also identifies the need for new tools to supplement these protections and provide for additional flexibility in managing environmental water supplies

Our organizations recommend that the next Delta Vision report include as part of Strategy 15 the establishment of an environmental water right for California. Environmental water rights currently exist in 13 other western states. An environmental water right would be supplemental and complementary to the other tools currently available to provide a reliable supply of water for environmental purposes. It would create a legal home for environmental water on equal footing with consumptive appropriative rights under the State's water code. In keeping with some of the other governance recommendations in the current report, this proposal could be outlined as follows:

By May 2009, the Legislature should create an environmental water right within the California Water Code. This mechanism would allow a designated state agency, such as the proposed California Delta Conservancy, as well as private Non-Governmental Organizations, to apply for a new water right or to acquire and manage appropriative water rights from willing sellers on long- or short-term basis and to dedicate such rights to instream purposes to supplement the regulatory baseline. This would address a current limitation in California law providing that appropriative rights must involve physical control over a diversion of water out of a stream.

An environmental water right would have the following characteristics and functions:

- * It would provide instream flows with a similar level of legal protection as appropriative water rights.
- * New environmental water rights would be issued by the State Water Resources Control Board through a modified version of the process new appropriative rights applicants currently use. Such rights would not be considered by the Board in establishing and revising water quality objectives and other requirements, or water right permit conditions and other actions to comply with such requirements.
- * Transfers of existing rights from willing sellers would also be subject to State Board approval through a more streamlined process.
- * Private, non-profit water trusts modeled on existing land trust organizations would be able to marshal philanthropic as well as public funds to help acquire the flows that Delta Vision has indicated will be needed to ensure healthy fisheries and the Delta ecosystem in the future.

Current state law allows water rights holders to transfer their rights to instream use. The proposal above would supplement this process and potentially enhance it substantially.

Thank you for your consideration. We are available to discuss this proposal further at your convenience.

Sincerely,

Cynthia Koehler
Senior Consulting Attorney
Environmental Defense Fund

Gary Bobker
Program Director
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