



To promote the economic, social and environmental viability of Northern California by enhancing and preserving the water rights, supplies and water quality of our members.

August 4, 2008

The Honorable Phil Isenberg
Chair, Delta Vision Task Force
650 Capitol Mall
Sacramento, California 95814

VIA U.S. MAIL AND E-MAIL

Re: Comments on Second Draft Delta Vision Strategic Plan

Dear Mr. Isenberg:

The Northern California Water Association (“NCWA”) appreciates the opportunity to comment on the Task Force’s July 11, 2008 draft Delta Vision strategic plan. Our members supply water from many surface-water sources to meet the water demands of the Sacramento Valley, one of the richest agricultural areas in the world. We recognize that the Delta faces a serious crisis and are willing to work toward solutions. Accordingly, NCWA supports some aspects of the July 11 draft strategic plan, but opposes others. Specifically:

- The Task Force has correctly emphasized regional water self-sufficiency, and the Sacramento Valley is perhaps the State’s most water self-sufficient region. NCWA therefore: (1) supports proposals that will help regions manage their water resources in an integrated and environmentally-protective manner; (2) opposes uncompensated reallocations of water from our region to address the Delta’s problems (which have not been proven to result from our members’ uses of water); and (3) urges the Task Force to convene a panel of experts to discuss the legal and practical aspects of any reallocation proposals.
- NCWA supports improving regulatory coordination in the Delta through a new Division of Delta Resources within the State Water Resources Control Board (“SWRCB”). This new Division would be funded by in-Delta and Delta-export diverters under the “beneficiary pays” principle;
- While we could potentially support a new California Water Utility, we have many questions about governance of the proposed Utility, and especially the relationship between that Utility and the State Water Project (“SWP”) and Central Valley Project (“CVP”) contractors that are situated in the Sacramento Valley;

- NCWA supports water conservation efforts like our members' multiple reuse of water supplies, but opposes uniform statewide conservation standards; and
- NCWA takes no position about any particular Delta conveyance proposal because any specific proposal would trigger unique issues. NCWA does, however, support the concept of cost-effective Delta conveyance solutions that would balance the Delta's ecosystem needs and the need to meet future water demands.

Who We Are

NCWA consists of 54 members who supply the vast majority of surface water to the Sacramento Valley. Within the Sacramento Valley, there are, among other things, over 2,000,000 acres of farms, numerous communities with prominent places in California history, multiple wildlife refuges and crucial habitat for birds on the Pacific Flyway. To supply water to this region, NCWA's members have developed some of the largest and oldest surface-water systems in California, some based on water rights that date to the late 1800's. Many of our members divert water supplies pursuant to settlement contracts with the United States. Many of these members hold water rights that predate the construction of Shasta Dam, and the settlement contracts were necessary for the Bureau of Reclamation to proceed with the development and operation of the CVP.

In recent years, NCWA and its members have participated in the development of innovative water management strategies. Through NCWA, its members developed the Sacramento Valley Integrated Regional Water Management Plan, which, among other strategies, contemplates increased conjunctive use of the region's groundwater and surface-water supplies. Many of NCWA's members also signed the Phase 8 settlement agreement, under which Sacramento Valley and Delta-export interests avoided a very contentious and expensive water-right proceeding before the State Water Resources Control Board ("SWRCB"). In that agreement, the CVP and the SWP agreed to continue being responsible for satisfying Delta water quality standards, and Sacramento Valley water users agreed to make certain contributions of water to the Delta, partly through conjunctive-use programs.

The Sacramento Valley Is Self-Sufficient And NCWA Supports The Draft Strategic Plan's Emphasis On Improving Regional Self-Sufficiency Statewide

Because the Sacramento Valley is blessed with significant surface-water and groundwater supplies, our region has been self-sufficient for decades. Many NCWA members had constructed their own locally-financed reservoirs, diversions and distribution systems before the CVP, and especially the SWP, began diverting water from the Delta. NCWA's members now are working to further improve the region's self-sufficiency by testing and implementing programs to conjunctively use our region's groundwater aquifers. It should be noted, however, that such conjunctive-use programs require consideration of concerns among interests in the recharge areas on the eastern side of the Sacramento Valley, and therefore cannot be viewed as a replacement for the Valley's longstanding surface-water systems.

We strongly support the draft strategic plan's emphasis on improving other regions' self-sufficiency as a key component of any Delta solution. (July 11 draft strategic plan, p. 43 ("Regional self-sufficiency should be the linchpin of a water system that can meet our overall goals [*sic*] of achieving sustainability across generations").)¹ To the extent that it has not been possible for other regions to become entirely self-sufficient, the Sacramento Valley's water users have cooperated with numerous Delta-export communities to make water available to those communities through voluntary water transfers. NCWA and its members have worked with Delta exporters to develop, and urge the enactment of, legislation that has expedited transfers. (See Water Code §§ 1725-1732.) NCWA therefore supports the draft strategic plan's proposal to streamline water transfers (p. 49) and encourages the Task Force to propose legislation to achieve this goal, such as an exemption from CEQA for one-year transfers under pre-1914 water rights similar to the existing exemption for one-year transfers under permitted rights. (See Water Code § 1729.) Such legislation would increase the resiliency of California's water system by making it easier for water users to address one another's dry-year demands cooperatively. While NCWA would actively support such legislation, NCWA would not support the adoption of mandatory standards for transfers based on fallowing, as the draft strategic plan proposes (p. 50). The appropriateness of land fallowing is an issue for the affected communities, and should not be subject to mandatory statewide standards.

Opposition To Reallocations of Water

NCWA believes that some concepts stated in the July 11 draft strategic plan, if implemented, would seriously damage our region's self-sufficiency. In particular, NCWA believes that the following statement in that draft, as well as related statements in the Attorney General Office's July 9, 2008 letter to the Task Force, could lead to highly adverse impacts on the Sacramento Valley:

This Strategic Plan expects that water required to support and revitalize the Delta will not be purchased but will be provided within the California's [*sic*] systems of water rights and the constitutional principles of reasonable use and public trust.

(Pp. 25-26.)

NCWA disputes any assertion that upstream water users can be required to contribute water, without compensation, to Delta-enhancement measures, in the absence of evidentiary proof that these water users' actions contribute to the Delta's problems. (See *State of California v. Superior Court (Fogerty)* (1981) 29 Cal.3d 240, 249.) We believe that many of the theories stated in the Attorney General's July 9 letter are not supported by law, particularly the theory that the State can compel upstream water users to contribute, without compensation, to solutions for problems related to Delta exports, based upon the size of the water users' diversions. Moreover, the evidentiary hearings (and subsequent litigation) that would be constitutionally required to consider whether to implement any such reallocations would be so contentious that they would consume the time, resources and effort that are required to develop feasible and

¹Unless otherwise indicated, further page references are to the July 11 draft strategic plan.

lasting solutions to in-Delta problems. In short, any proposed involuntary reallocations of water would be based on flawed legal reasoning and would be bad policy as well. For similar reasons, NCWA opposes any restrictions on currently authorized diversions to storage that are now authorized (p. 39).

In order for the Task Force to grasp the full scope of the disputes within the California water community regarding the theories stated in the Attorney General's July 9 letter, and the proceedings that would be required to implement those theories, NCWA urges the Task Force to convene a panel of experts to: (1) explain each interest's position on the matter; and (2) discuss the real-world examples in which water interests have negotiated voluntary solutions to problems without prescriptive reallocations of water and the inevitable resulting litigation. Such a panel would aptly demonstrate why it would be much more productive for the Task Force to focus on encouraging cooperative, inter-regional arrangements, as opposed to encouraging the initiation of proceedings to compel involuntary reallocations of water. We suggest that such a panel consist of representatives of the following interests: (1) Sacramento Valley water users; (2) San Joaquin Valley water users; (3) the Attorney General; (4) Delta-export interests; and (5) the environmental community.

Support for Delta Coordination Within The State Water Resources Control Board

The Task Force has correctly identified a lack of coordination among agencies as a key concern in the Delta. Accordingly, NCWA supports the concept that existing agencies may require some reorganization in order to promote Delta solutions.

We believe, however, that the most effective reorganization would work within the SWRCB's existing structure, and a new California Delta Ecosystem and Water Council, as the July 11 draft strategic plan proposes, should not be created. The SWRCB was created specifically to bring water-right and water-quality regulation under one roof and already has the authority, under section 401 of the federal Clean Water Act, to require that federal permits comply with Delta water quality standards. (See Water Code § 174; 33 U.S.C. § 1341(a).) Accordingly, rather than recommending that a new state council be created, the Task Force should recommend a new SWRCB division – a Division of Delta Resources – be created. The SWRCB has organized *ad hoc* Delta “offices” or “teams” during prior Delta proceedings and NCWA's proposal essentially would institutionalize this concept. The new division obviously would require new staff and resources, but NCWA believes that this approach would be more efficient and cost-effective than creating a new agency, which would have new budget demands, would generate new points of controversy through a gubernatorial appointment process, and potentially would cause jurisdictional conflicts with existing agencies.

The “beneficiary pays” principle has gained acceptance in the water community, and it should be applied in relation to a new Division of Delta Resources' funding. Delta exporters and in-Delta water users would be the primary beneficiaries of improved Delta conditions and therefore should support a Division of Delta Resources through user fees or other mechanisms. Because it is based on the “beneficiary pays” principle, this approach would be more likely to be accepted, and rapidly implemented, than the watershed-wide diversion fee structure proposed by the July

11 draft strategic plan (p. 27). Such diversion fees would have the same problems as involuntary reallocations of water, unless it were proven that the fee-paying water users contribute to the Delta's problems. (See *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, 877-878, 881 (Cal. Supreme Court: regulatory-fee measure must "require a causal connection or nexus between the product and its adverse effects").)

In relation to Delta land use issues and ecosystem restoration programs, NCWA believes that: (1) the existing Delta Protection Commission could address Delta land use issues; and (2) it would be appropriate to create a new Delta Conservancy to manage Delta restoration programs.

The Proposed California Water Utility Is Not Sufficiently Explained

It may ultimately be a good idea to create a new California Water Utility to operate the SWP and eventually the CVP. We believe, however, that it is not possible to make any determinations about the Utility proposed in the July 11 draft strategic plan because key uncertainties exist about the proposed Utility's governance and authority.

As the Task Force is aware, the SWP and CVP do not only export water from the Delta. They operate, respectively, Oroville Dam and Reservoir and Shasta Dam and Reservoir and, through those operations, effectively control streamflows in the Feather and Sacramento Rivers in many instances. Accordingly, that control of the SWP and CVP upstream reservoirs includes some control over diversions from those rivers – both under SWP or CVP contracts and under independent water rights. Many of NCWA's members depend on such diversions, and NCWA therefore is very concerned about who would control the proposed Utility and how it would be governed. For example, it would not be appropriate for Delta-export interests to control the Utility in light of the importance of streamflows on the Feather and Sacramento Rivers for Sacramento Valley water users. Until additional information is provided concerning the governance and operations of a proposed California Water Utility, NCWA cannot state a final position on the concept.

While flood control is not a field in which NCWA generally participates, NCWA and its members also would be concerned about the governance of a California Water Utility. in relation to flood control in the Sacramento Valley. In this regard, if that Utility operated Shasta and Oroville, then that Utility would control flood-control operations that could affect essentially every community in the Sacramento Valley.

Agricultural Water Conservation Issues Are Unique to Regions

In the Sacramento Valley, diverted surface water generally is used several times before any portion of it flows back into a stream. These arrangements eliminate the need for many more diversions from surface streams. Because other regions' water use probably does not involve the same level of multiple reuse as the Sacramento Valley (e.g., in regions that depend on groundwater, excess water tends to percolate underground before it reaches a surface stream) it is not appropriate to adopt a uniform statewide water conservation standard for agricultural water use. NCWA commends the authors of the July 11 draft strategic plan for not proposing such a

standard. In addition, NCWA supports incentives for farmers to implement water-conservation techniques that are locally appropriate. NCWA, however, believes that the Task Force's ultimate strategic plan should not identify specific irrigation techniques for statewide regulatory favor. Accordingly, NCWA recommends that the Task Force not adopt the July 11 draft strategic plan's proposal to favor drip or micro irrigation systems specifically (p. 47).

More Information Will Be Needed To Evaluate Specific Conveyance Proposals

It is uncertain what facilities or improvements will be proposed, and the specifics of these proposals in terms of their configuration and capacity, to address existing conditions in the Delta. The Task Force has favored a dual conveyance option involving both extra-Delta facilities and through-Delta improvements. The Public Policy Institute of California has recommended focusing solely on an extra-Delta facility. DWR is conducting environmental review of multiple options. It is impossible to know what capacity or alignment any particular facility would have, and NCWA therefore cannot determine what legal protection its members would need against the possibility that a new facility would allow Delta exports to consume resources that the Sacramento Valley may need. In light of this situation, NCWA cannot state a final position concerning any particular option.

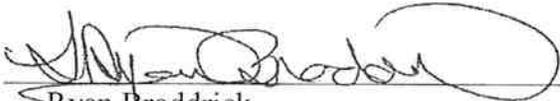
In general, NCWA believes that Sacramento Valley water users could support Delta conveyance improvements that would demonstrably improve the Delta's condition, that would not involve financial contributions by Sacramento Valley water users, and that were linked with additional legal protections ensuring the availability of the Valley's water resources for the Valley's benefit and when our communities require these resources.

Conclusion

NCWA appreciates the Task Force's consideration of these comments, and the opportunity to remain engaged in the Task Force's efforts to develop practical and sustainable solutions to the Delta's problems.

Sincerely yours,

NORTHERN CALIFORNIA WATER ASSOCIATION

By: 
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