

**1. Environmental Organizations (EDF, with pending endorsements from NRDC, TBI, Defenders of Wildlife)**  
**Strawman Governance Proposal For State Legislation 9.0**  
May 3, 2009

**1. Establish Independent Delta Water Ecosystem Council Responsible for Achievement of Co-Equal Goals.**

- Replace the Calfed Bay-Delta Authority with a new independent entity, the California Delta Ecosystem and Water Council (“CDEW”).
- The Council will be responsible for developing the over-arching plan (“The CDEW Plan”) essential for achieving the co-equal statewide goals of environmental reliability and water supply reliability.
- The Council will be responsible for ensuring that the co-equal goals articulated in Delta Vision Strategic Plan are implemented and that the CDEW Plan’s targets and objectives in the plan are achieved.
- The Council will also emphasize programs related to the Delta as place. Although not included by Delta Vision as co-equal goal, a significant effort in this area is essential the success of the Council and The Plan.
- The Council will not have the authority to review or modify regulatory decisions by state and federal regulatory agencies (e.g. SWRCB, DFG, FWS, Corps of Engineers, EPA and NMFS).
- The Council will have the authority to set fees targeted to meet specific purposes, to expend funds for specified purposes and to distribute those fees to specified agencies.
- The Council should review agency budgets regarding implementation of the Plan, and recommend to those agencies and the Legislature how to modify budgets to address specific concerns.
- The Council will provide oversight and accountability, including the ability to determine consistency/compliance of state and other agency actions with the Plan.
- The Council will ensure that environmental justice issues are fully integrated into the plan and its implementation.

NOTE: We are not making a recommendation as to the make up of the Council itself at this time.

**a. Federal Issues.**

Ultimately, the Council would operate as a joint federal/state unit. Because this paper is focused on aiding the development of state legislation, it does not address federal issues, although it is recognized that these are critically important. It is assumed that federal legislation will be required on a phased basis, and that federal interests will be adequately represented in the development and adoption of the CDEW Plan.

**b. Development of The CDEW Plan.**

We agree with the Delta Vision Strategic Plan that it is vitally important for all agencies to be working off of a comprehensive blueprint that establishes targets for

long-term ecosystem health, environmental flows needed to achieve ecosystem health, sustainable levels of diversions, habitat restoration, solutions for dealing with related issues such as invasive species and toxics, facilities, funding, assurances, environmental justice and other issues. We specifically concur with the list of performance measures listed on page 129 of the Strategic Plan. The CDEW Plan should build on existing plans and those in process including but not limited to:

1. Delta Vision Strategic Plan
2. The Calfed Ecosystem Restoration Plan
3. The Anadromous Fish Restoration Plan
4. A final BDCP/or relevant Biological Opinions
5. Delta Protection Commission Plan
6. Relevant floodplain management plans

See also Delta Vision Strategic Plan list of relevant plans at page 130. The Council's staff will be responsible for reconciling these plans in developing the CDEW Plan, and would work in consultation with key agency leads. Adoption of the CDEW Plan by the Council should occur no later than 18 months after creation of that body.

The Plan should include a "beneficiary pays" based financing plan. That plan should include fees and a public goods charge, per the discussion below. It should also ensure that water users pay for the benefits they receive, such as full water user financing for planning, construction, maintenance, mitigation and operations related to any new Delta conveyance facilities. (This is consistent with the position taken by the Metropolitan Water District in a March 20 Sacramento Bee opinion piece.)

### **c. Geographic and Jurisdictional Scope of The CDEW Plan.**

The CDEW Plan should cover the same geographic region as was covered in the CALFED process. CALFED designated a "problem area", (the Delta) and the "solution area" (all areas hydraulically connected to the Delta or relying on its water supplies). Consistency with the CALFED project area designation is appropriate especially given the alignment of the CALFED mission to the co-equal goals. (The mission of the CALFED Bay-Delta Program is to develop a long-term comprehensive plan that will restore ecological health and improve water management for beneficial uses of the Bay-Delta system.) A precise definition of the Problem and Solutions area can be found in Chapter 1 of the CALFED EIR/EIS.

The CDEW Council's jurisdiction within this geographic area would be limited to ensuring that The CDEW Plan was being implemented and its goals achieved in a timely manner.

### **d. Implementation of The CDEW Plan.**

The Council is responsible for the successful achievement of the CDEW Plan goals, through efforts to coordinate the actions of the relevant state and federal agencies required to implement the Plan. (See Delta Vision Strategic Plan at 122.) In this regard, the Council would be empowered to set specific targets and schedules for meeting them, levy fees to pay for CDEW Plan implementation, require regular reporting, etc. as described in more detail below.

Primary responsibility for implementing specific pieces of The CDEW Plan should lie with the relevant federal, state and local agencies. (See Strategic Plan at 122-123.) However, we concur with the Delta Vision Strategic Plan that an independent Council must be authorized to ensure that implementation is effective.

e. **Accountability: Budget Recommendation, Fees, Reporting, Findings, and Consistency Authority.**

As discussed in the Delta Vision Strategic Plan and other papers, the Calfed effort fell short of expectations in large part because:

“[T]hose in charge had no authority to ensure its implementation, those that were implementing it had no accountability, and, in the end, there was no money.” (DVSP at 129)

This paper proposes 6 inter-related accountability tools:

- i. **Budget Recommendation Authority.** The Council would be authorized to review those aspects of state and federal agency budgets that relate to implementation of the CDEW Plan to ensure that funding of projects and actions needed for implementation are appropriate and sufficient. The Council would make recommendations first to the agencies to modify budgets to address specific concerns. It could also make recommendations to the State Legislature and Congress if appropriate. Public Council budget documents would flag major issues for the state and federal administrations, for the State legislature, Congress and the stakeholder community.
- ii. **Fee Authority.** Based on the Beneficiary Pays principle, the Council shall be authorized to collect fees on diversions from the watershed, and other appropriate sources, in order to provide a sustainable funding source to implement the Plan. Individual fees should be narrowly tailored for specific purposes (e.g., levee maintenance, ecosystem restoration, science and agency support). For example, water users north of the Delta should not be required to help fund Delta levee maintenance, and contributions to the CVPIA Restoration Fund should be considered in creating a new system-wide ecosystem restoration fee. The Council would have the authority to pass a portion of this income to agencies such as the SWRCB, a Delta Conservancy and DFG, to support specified implementation activities. (Per the recommendations in the Strategic Plan, investments in efficiency and alternative water supplies must be dramatically increased to reduce reliance on the Delta. The best mechanism to ensure this investment is the legislative creation of a Public Goods Charge, as recommended in the AB 32 Scoping Plan. This would be, essentially, a minimum investment requirement for efficiency and similar alternative supplies. This charge would not be within the authority of the Council. Fee revenues would remain with water agencies and would not be run through the state.)

- iii. **Regular Progress Reporting.** The implementing agencies will report regularly to the Council as to their progress, success and evolving issues.
- iv. **Findings Authority.** The Council would be empowered to make periodic findings regarding the extent to which the co-equal goals are being met in a timely manner. Such findings would trigger non-discretionary review by the regulatory agencies with jurisdiction related to needed changes in operations in response, or to the BDCP adaptive management process. While regulatory agencies could override the Council's findings, the provisions related to consistency with the Plan (discussed below) would apply. It is recognized that this process would need to be incorporated into MOUs (or included in Federal legislation) related to any take permits issued pursuant to the BDCP process. [See below for further discussion integration of the Council and the BDCP implementation process.]
- v. **Consistency Authority.** The Council will be also responsible for ensuring that projects and actions of federal, state and local agencies (as well as others) within the relevant geographic area are consistent with and in fact promote implementation of The CDEW Plan and the co-equal goals.  
The Delta statute should contain a requirement that state and local agencies' project approvals and activities be consistent with the Delta Plan. The Council will:
  - 1. Determine presumptive consistency with Plan for major water, flood management and transportation infrastructure projects, land use and habitat plans.
  - 2. A finding of non-consistency of a project, plan or action, including on-going activities such as BDCP targets, triggers a mandatory review by agency with jurisdiction.
  - 3. The responsible agency with statutory or legal authority for implementation of the action or approval of the project or plan will make the final decision and can override the council finding.
- vi. **Independent Water System Operator.** See the proposal below regarding the creation of an independent water system operator.

#### **f. Integration with BDCP Implementation.**

It is expected that the BDCP participants would themselves undertake an initial review of the extent to which the proposed BDCP is in keeping with, and supports, other pre-existing plans and legal requirements in the relevant geographic area. At an appropriate time prior to the issuance of any take permits, the Council would conduct its own review of the draft BDCP to identify potential conflicts or other problems, to ensure these problems are resolved prior to the submittal of the BDCP to the responsible ESA and CESA regulatory agencies.

Our organizations do not anticipate that legislation establishing the Council would in any way change existing powers and authorities to make the decision about whether, when or how to construct a Delta conveyance facility.

If take permits are issued in connection with a successful NCCP/HCP, the final BDCP would be incorporated into the CDEW Plan. The Council would serve as the overseer of the implementation process, not supplanting the fisheries agencies with primary enforcement authority, but ensuring that targets are met on time as with all elements of The CDEW Plan as indicated above.

The Council's primary role would be to provide accountability and transparency to the proposed BDCP adaptive management process and ensure that problems in reaching ecosystem targets are adequately addressed. This role is intended to assist the BDCP process to proactively identify emerging threats and gaps in implementation and facilitate timely management responses.

The Council would be empowered to make periodic findings regarding the extent to which the BDCP targets are being met. Such findings will trigger non-discretionary changes in operations in response and, will also trigger the BDCP adaptive management process. It is recognized that this process would need to be incorporated into any take permits issued pursuant to the BDCP process. The Council would also address conflicts between BDCP implementation and implementation of other CDEW Plan activities that were not foreseen during the Plan's development.

## **2. Independent Water System Operator responsible for state/federal water project operations and ecosystem water.**

The creation of an Independent Water System Operator (IWSO) is a rational approach for operations decision-making involving the State Water Project, the Central Valley Project and the Delta Water and Ecosystem Plan. Integral to this approach is assuring that the Independent Water System Operator itself be obligated to use best efforts to provide both ecosystem water reliability and water supply reliability.

The purpose of the IWSO is to better institutionalize operational flexibility and transparency in both in-Delta and upstream SWP and CVP operations. The IWSO would not set environmental standards or negotiate water supply contracts – these responsibilities would remain with the relevant resources agencies. Nor would the IWSO “turn the knobs” of the projects. The IWSO would occupy the middle ground of interpreting and operationalizing the various environmental and water supply requirements and obligations of the projects day to day

The Director of the IWSO would be chosen by and report directly to the Council. The IWSO would be jointly responsible for compliance with all environmental regulatory parameters and water contract obligations relevant to the SWP (and CVP). It would not have authority with regard to other water delivery systems in the Bay Delta watershed. Environmental regulatory parameters would continue to be established by the SWRCB, CDFG, FWS, NOAA and other agencies with such authority.

The IWSO Director would chair an **Operations Group** consisting of equal numbers of representatives from fishery agencies/SWRCB and DWR/Bureau. An

Environmental Water Coordinator, or a Fish Master, would be responsible for coordinating the perspectives of the relevant environmental and fisheries agencies. A Project Coordinator would be responsible for coordinating the perspectives of the water supply agencies. The Operations Group would also include a representative or 2 from the Science Board (see below). It may be useful to have 1 or 2 members of stakeholders groups serve officially on this Operations Group as well. While it is anticipated that the Operations Group will generally reach consensus, final decisions are the prerogative of the IWSO. Water right permits would remain with the owners of the water projects themselves.

The relevant fisheries agencies would of course retain their statutory obligation and authority to determine whether and when operational changes are required in order to meet ESA requirements, either under the BDCP or other ESA plan.

The IWSO would be empowered to establish sub-groups to conduct modeling studies and data collection and other tasks as appropriate. It would prepare an annual operations plan with the aid of the Operations Group, which would be updated regularly in response to biological monitoring and real time hydrology. The plan would be publicly available.

### **3. Delta Conservancy.**

Establish a Delta Conservancy as an implementing entity, with responsibility for ensuring that ecosystem restoration projects identified in The CDEW Plan are implemented in a timely fashion. Other fishery agencies may also have implementation responsibility for these actions. As a secondary responsibility, the Conservancy would also work to ensure preservation of agricultural lands, recreation, and the sustainability of communities in the region, consistent with the Conservancy's primary ecosystem restoration responsibilities.

### **4. Independent Science Board.**

Retain the now well-established independent science board that has been working with CalFed Bay-Delta Program. Members of this Board should serve on the Operations Group working with the IWSO. The Science Board should provide input to each of the implementing entities listed, and to the Policy Group.

### **5. State (and Federal) Policy Group.**

Re-establish the state/federal Policy Group consisting of key agency heads, as well as the Lead Scientist and IWSO. This Group would support the Council by meeting regularly to coordinate agency actions necessary to implement The CDEW Plan. This forum would provide a regular reporting venue and accountability with regard to meeting the co-equal goals in a timely and successful manner. The Policy Group will provide regular reports to the Council on CDEW Plan implementation progress and problems and will provide recommendations to the Council in the event that goals and objectives are not being met, or when there are agency conflicts that cannot be resolved.

A reconstituted policy group could be a valuable, relatively informal body. It would have no formal authority and would likely be created through an inter-agency MOU, rather than through legislation. Improved coordination among state and federal

agencies is important, however, in terms of implementing the broad governance recommendations of the DVTF. A revived policy group would complement, but not replace, the creation of a Council.

## **6. Public Interest Advocates Group.**

In order to ensure the public interest is met through implementation of the Plan, establish a funded group, appended to the Council, advocating for the co-equal objectives. This would be similar to the California PUC's Division of Ratepayer Advocates. The staff would not be decision makers, but would monitor achievement of the co-equal objectives and advocate within the decision-making process.

## **7. Other Critical Governance Issue.**

Although not part of development of the CDEW Council or Plan, significant enhancements to the SWRCB funding and structure are required to achieve success.

**SWRCB Enhancements.** It is widely acknowledged that the SWRCB has been limited by financial, staff and other capacity constraints from monitoring compliance with water right permits, enforcing constitutional reasonable use requirements, and fulfilling its all of its public trust obligations. Governance reform can address these problems by mandating specific priorities for State Board action, increasing the Board's functional capacity, and providing the necessary financial resources for these tasks. Legislation addressing SWRCB enhancement should include at a minimum:

- Direction to the State Board to require monitoring and reporting of all surface and groundwater diversions(Delta Vision Action 4.2.4).
- Direction that the State Board to immediately begin a proceeding to set flow standards ensuring the establishment and maintenance of healthy migratory corridors for fish (Delta Vision Strategy 3.2, 3.3 and 3.4).
- Establishment of a new corps of administrative law judges within the SWRCB assigned to adjudicate water rights matters, including but not limited to water transfers and water rights disputes.
- Sufficient dedicated financial resources to accomplish the three tasks above.