

# Alert – SB 12 and AB 39 as amended September 10

Issued September 10, 2009

Major changes have been made to SB 12 and AB 39. As the two bills together create new governance structures for the Delta and provide for a Delta Plan as the primary way to integrate actions affecting the Delta, they must work effectively jointly. Both bills are simplified and AB 39 is greatly shortened.

- ✓ Further amendments are needed to ensure effective governance
- ✓ Effective linkage to SB 458 is needed, as well to any bond bill proposed
- ✓ Robust financing provisions must be added to SB 12, an absolute requirement for success
- ✓ Clarified and stronger provisions for adaptive management are required, effectively incorporating BDCP and other plans relevant to the Delta into a common five cycle of review and revision of the Delta Plan under the council

## Comments on SB 12, identifying specific areas for improvement:

1. Section 85054 adopts the definition of co-equal goals previously used in AB 39, a substantial improvement over that used earlier in SB 12 and in SB 458.
2. Section 85057.5 defines “covered action,” important as covered actions are included in the Delta Plan developed by the council. The proposed exclusion under (b) is overly broad and invites conflict over “regulatory” actions. Improved language would read: “(b) “Covered action” does not include a regulatory action a state agency of the board, the Fish and Game Commission or the Department of Fish and Game.”
3. Section 85067 should return to the prior language of the section, which incorporates by reference consideration of the action items included in the *Delta Vision Strategic Plan*. This change would also strengthen integration with AB 39 which references the action items at section 85300(a).
4. Section 85082 should be modified to be consistent with AB 39 section 85300(d)(1)(A) requiring the Delta Plan conform to the federal Coastal Zone Management Act “or an equivalent compliance mechanism.”
5. No financing provisions are included in this version of SB 12, nor were they included in the version dated September 1, 2009. This is a critical omission. A coherent, effective and reliable financing structure must be provided. Preprint SB 1 (incorporating SB 12) did include financing and the Delta Vision Foundation provided a comment recommending improvements to that language.<sup>1</sup> The *Delta Vision Strategic Plan* includes a more extensive discussion of financing in Strategy 7.3.
6. Adaptive management is defined in section 85052, but no processes or procedures are specified in SB 12 for this purpose. AB 39 requires a review of the Delta Plan at least once every five years with revision “..as the council deems appropriate” (section 85300(c)) but is essentially silent on how adaptive management will work. A solution could be a new section 85213 charging the council with developing adaptive management processes including at minimum (a) incorporation of key plans affecting the Delta, especially those of BDCP and regarding levees, (b) provisions for organizing the work of the Delta Science Program and reviews by the Delta Independent Science Board, and (c) processes for public participation.

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1 . The comment is dated September 3, 2009: <http://www.deltavisionfoundation.org/reports.php>

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7. Section 85225.10(a) should allow the council to initiate review of an action, accomplished by adding a sentence to the end of this section: The council may also take an appeal on its own motion.
8. Provision should be made to ensure that BDCP is integrated into the Delta Plan and work of the Delta Stewardship Council over time to achieve the greatest contribution to the coequal goals and integrate policy making regarding the Delta into common, transparent structures. This can be most easily accomplished by incorporating adaptive management of BCCP into adaptive management of the Delta Plan. Some integration is implied in section 85329(a) regarding inclusion of the BDCP into the Delta Plan, the role of the Delta Independent Science Board in section 85320(c) and the on-going reporting and recommendations anticipated in sections 85320(f) and 85320(g). Clear direction to integrate these processes without affecting the authority of permitting agencies could be accomplished by amending the language in section 85320(g) as follows: ~~“The council may make recommendations to BDCP implementing agencies regarding the implementation of the BDCP. BDCP implementing agencies shall consult with the council on these recommendations.”~~ Adaptive management of BDCP will be integrated to the greatest extent possible with processes established for adaptive management of the Delta Plan. These recommendations from the adaptive management process shall not change the terms and conditions of the permits issued by state and federal regulatory agencies.”

### Comments on AB 39, identifying specific areas for improvement:

As noted above, AB 39 is simplified and dramatically shortened. In many areas, “shall” language is replaced with “may” language. Interested parties should review the changes closely for likely effects. These comments focus only on selected areas of high importance.

1. Section 85300(c) should be amended to read: “The council shall review the Delta Plan, incorporating the Bay Delta Conservation Plan and other Delta related plans as the council determines appropriate, at least once...”
2. Section 85301(a) should specify that the plan developed and submitted to the council incorporates both the resource management plan and the economic sustainability plan required of the commission in SB 458.
3. Section 85302(b) reduces the geographic scope of the Delta Plan to the Delta (changed from “to the first dam of tributaries”). The Delta Plan should also include Suisun Marsh and the full extent of the Yolo Bypass.
4. Section 85320(e)(1) does not include a target and would be improved with addition of “..in the range of 100,000 acres...”