



May 10, 2021

Via email

Eraina Ortega, Director
Manpreet Singh, Exempt Program Manager
California Department of Human Resources
1515 S Street, North Building, Suite 500
Sacramento, California 95811-7258

Request re: Unapproved Exempt Position Classification Created by the Delta Stewardship Council

Dear Ms. Ortega and Mr. Singh:

In 2020, the Delta Stewardship Council decided that members of the Delta Independent Science Board (“Delta ISB”) were to be exempt employees, with a salary of \$100.00 per diem. Our review establishes that when it took this action, the Delta Stewardship Council acted beyond the scope of its authority and contrary to applicable law and procedure. For a decade, the Delta Stewardship Council has contracted with the Delta ISB members to obtain and reimburse their services. Nothing has changed. There is no legal basis for precipitously classifying them as exempt employees of the Delta Stewardship Council, entitled only to \$100 per diem.

Furthermore, these actions crippled the Delta ISB’s legislatively mandated work in FY 2020-21 as they resulted in funding cuts of over 90% to the Delta ISB. This is evident from current meeting notices for the Delta ISB which state:

As discussed at recent Delta ISB meetings, the current appointment structure of Delta ISB members necessitates greatly curtailing the agenda and activities of the Delta ISB to a much lower level. Substantial delays in many of the Delta ISB’s anticipated and legislatively mandated reviews, products, and activities are expected. The Delta ISB is committed to supporting science for the Delta's

problems and problem-solving, and looks forward to returning to its high level of productivity as soon as the State fully resolves this issue.¹

We respectfully request that the California Department of Human Resources (“CalHR”) resolve this situation by eliminating this incorrectly created exempt position classification thereby terminating classification of members of the Delta ISB as per diem employees of the Council. We offer the following analysis in support of our request:

1. The law does not authorize these exempt employee positions.

Government Code section 19818.12 provides that “[p]ositions in the state service shall be established by the appointing power as authorized by law subject to budgetary authorization and the availability of funds.” (Emphasis added.) Water Code section 85280 provides that Delta ISB members are to be appointed by the Delta Stewardship Council, however; the foregoing section does not authorize classifying members of the Delta ISB as exempt employees of the Delta Stewardship Council. Additionally, replacing the use of contracts with exempt employee positions was not reviewed or authorized by the Legislature because the Delta Stewardship Council did not notify the Legislature of its intent to create new exempt employee positions for the Delta ISB for FY 2020-21.^{2,3}

2. The per diem salary for the Delta ISB was not authorized by the Legislature.

As the basis for paying Delta ISB members a \$100 per diem salary for FY 2020-21, the Delta Stewardship Council has used Government Code section 11564.5, which states:

Notwithstanding any other provision of law, whenever a member of a board, commission, committee, or similarly constituted body created by executive order or statute, is authorized to receive a per diem salary or allowance in excess of expenses incurred by the member, that rate shall be established at one hundred dollars (\$100) per day unless a higher rate is provided by statute. (Emphasis added.)

¹ See, for example, the May 3, 2021 Delta ISB meeting notice. Available at <https://deltacouncil.ca.gov/pdf/isb/meeting-notice/2021-04-23-isb-meeting-notice.pdf>.

² 2020-21 State Budget, Detail 3885 Delta Stewardship Council, 3 Year Expenditures and Positions. Available at <http://www.ebudget.ca.gov/2020-21/pdf/Enacted/GovernorsBudget/3000/3885.pdf>.

³ The two approved positions for Delta Plan Implementation were requested in a January 8, 2020 Budget Change Proposal. Available at https://esd.dof.ca.gov/Documents/bcp/2021/FY2021_ORG3885_BCP3775.pdf.

Water code section 85280 does not authorize a per diem salary for the Delta ISB members. Its members were never intended to be employees, as explained below.

We respectfully request CalHR revisit and rescind the action of setting a \$100 per diem salary for Delta ISB members under Government Code section 19818.6. The duties and responsibilities of Delta ISB are not similar other state boards. Delta ISB members are required to be “nationally or internationally prominent scientists with appropriate expertise to evaluate the broad range of scientific programs that support adaptive management of the Delta.” (Wat. Code § 85280(a)(2).) The legislature also intended that Delta ISB members themselves provide oversight the “scientific research, monitoring, and assessment programs that support adaptive management of the Delta through periodic reviews of each of those programs...” (Wat. Code § 85280(a)(3).)

Paying Delta ISB members \$100 per diem is also not comparable to the previous compensation for the Delta ISB. From 2017-2020, the Delta Stewardship Council requested authorization to pay members for up to two meetings a month, 7 days of work per meeting, eight hours per day, at the Delta Stewardship Council’s contract rate for independent scientific experts.⁴

3. The Legislature intended that the Delta ISB members be paid by contract.

By enacting Water Code sections 85210 and 85213, the Legislature authorized payment of Delta ISB members through the use of contracts. Interpreting Water Code sections 85210 and 85213, contracts were considered to be the necessary means of providing compensation, because Water Code section 85280(a)(2) mandates that “members shall not be directly affiliated with a program or agency subject to the review activities of the Delta Independent Science Board.” On this basis, the Delta ISB Chair and Past Chair sent a letter to the Governor in December 2020 objecting to the classification of Delta ISB members as employees of the Delta Stewardship Council.⁵ Since that time, the Legislative Counsel has also determined that the Delta ISB members should not be employees of the Council.⁶

From 2010-2020, Delta Independent Science Board members were paid through contracts authorized by the Legislature under Water Code sections 85210 and 85213. Exercising

⁴ Delta Stewardship Council, 2017 Special Category Non-competitive Bid Request to the Department of General Services for the Delta Science Program, p. 5. [Available at https://cah2oresearch.com/wp-content/uploads/2021/05/Special-Category-NCB-Request.pdf](https://cah2oresearch.com/wp-content/uploads/2021/05/Special-Category-NCB-Request.pdf).

⁵ Delta Independent Science Board, Letter to Governor Newsom, December 2020. Available at <https://cah2oresearch.com/wp-content/uploads/2021/05/DISB-Letter-to-Governor-Newsom-b.pdf>.

⁶ Senate Natural Resources and Water Committee Analysis of SB 821, April 12, 2021. Available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=20210220SB821#.

authority beyond the scope of their positions and contrary to applicable law, between April and August 2020 Delta Stewardship Council staff decided not to extend contracts with current board members, or to issue new contracts for the six incoming board members.

4. When Creating the Exempt Employee Positions the Delta Stewardship Council assumed authority never given by the Legislature.

The Exempt Position Request package sent to the California Department of Human Resources (CalHR) included an organization chart showing the Delta ISB as reporting to the Delta Stewardship Council (Exhibit A.) The organization chart provided to CalHR incorrectly interprets Water Code section 85280(a)(4). Section 85280(a)(4) states that the Delta ISB “shall submit to the council a report on the results of each review, including recommendations for any changes in the programs reviewed by the board”, a far cry from reporting as employees to the Delta Stewardship Council. Additionally, Water Code section 85280(a)(2) directs that “members [of the Delta ISB] shall not be directly affiliated with a program or agency subject to the review activities of the Delta Independent Science Board.” The Delta Stewardship Council is subject to the review activities of the Board.

5. Duties under the CALFED Record of Decision extend only to establishing the Independent Science Board, not to supervising the work of the Board.

The CALFED Record of Decision (“ROD”), signed by Federal and State agencies, running through 2030 states:

In order to better integrate scientific review into the CALFED Program, the Governor and the Secretary of the Interior will appoint an independent science board to provide oversight and peer review for the overall program. (p. 79.)

Water Code section 85034 specifies that the Delta Stewardship Council manages the science program element of the CALFED Record of Decision:

(d) The council shall assume from the California Bay-Delta Authority all responsibility to manage, in accordance with Chapter 5 (commencing with Section 85280) of Part 3, the science program element that was required to be undertaken by Division 26.4 (commencing with Section 79400), as that division read on December 31, 2009.(Emphasis added.)

Former section 79470 of the California Bay-Delta Act stated:

79470. (a) The lead scientist shall nominate, and the authority shall establish, a board of independent scientists, to be known as the Independent Science Board, that shall advise and make

recommendations to the authority and the Bay-Delta Public Advisory Committee, as appropriate, on the science relative to implementation of all program elements.

(b) The authority may recognize an existing board of independent scientists as members of the board required by this section.

(c) The authority shall respond in writing to the advice and reviews prepared by the Independent Science Board.

The Delta Stewardship Council did not create the Delta ISB. Quite the contrary, the Council was created by statutes enacted at the same time as the statute which established the Delta ISB. By virtue of the Legislature's use of a specific statute, its intent was to establish the Board as a standing board of the state of California, not a part of the Delta Stewardship Council. Therefore the Delta Stewardship Council must recognize the Board as an entity in its own right, not a creation of the Council subject to the Council's administration, but rather as the Independent Science Board required by the science program element of the CALFED Record of Decision.

6. The Council has both the right and the duty to execute contracts to pay proper compensation to members of the Delta Independent Science Board.

Water Code section 85034(b) states:

(b) The council [Delta Stewardship Council] shall be the successor to and shall assume from the California Bay-Delta Authority all of the administrative rights, abilities, obligations, and duties of that authority.

Contracts were the means used to fund the CALFED Independent Science Board, which had been created pursuant to the CALFED ROD and the California Bay-Delta Act. The right and in fact the responsibility to execute contracts to pay the Board is among the many rights, abilities, obligations, and duties assumed by the Council in its role as the successor of the California Bay-Delta Authority.

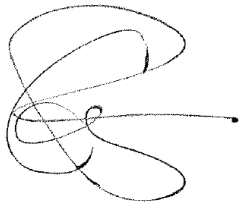
Conclusion

Maintaining the health and independence of the Delta ISB is the most significant of the responsibilities assumed by the Delta Stewardship Council pursuant to Water Code section 85034(d). The Legislature could not have been more eloquent as it described the importance of the Delta, declaring "... the Sacramento-San Joaquin Delta...is a critically important natural resource for California and the nation. It serves Californians concurrently as both the hub of the California water system and the most valuable estuary and wetland ecosystem on the west coast of North and South America." (Wat. Code § 85002, in part.) The Delta ISB is equally critically important, because it exists to

“provide oversight of the scientific research, monitoring, and assessment programs that support adaptive management of the Delta ...” (Wat. Code § 85820(a)(3).) This protects and supports what the Legislature so vividly described.

The Delta Stewardship Council’s staff misinterpreted the law when they created exempt employee positions for Delta ISB members, asserted they should be paid a per diem salary and misrepresented to CalHR that the members reported to the Delta Stewardship Council. It is plain, based on the purpose, function and structure of the Delta ISB, that the statutorily authorized way to pay the Delta ISB members is through the use of contracts.

Sincerely,



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Attachment:

Organization chart from 2020 Exempt Position Request package

cc:

Vera Bezdicek, Senior Counsel, Delta Stewardship Council

Jessica Pearson, Executive Director, Delta Stewardship Council

Jessica O’Connor, Deputy Executive Officer of Administration, Delta Stewardship Council

Louise Conrad, Deputy Executive Officer of Science, Delta Stewardship Council

Susan Tatayon, Chair, Delta Stewardship Council

Delta Stewardship Council members

Stephen Brandt, Chair, Delta Independent Science Board

Delta Independent Science Board members

Laurel Larsen, Lead Scientist, Delta Science Program

Michael Chotkowski, Delta Science Coordinator, US Geological Survey

Kristin Staffaucher, Appointments Advisor, Governor's Appointments Office

Anna Woodrow, Assistant Chief Counsel, Department of General Services

Bryan Kimura, Staff Counsel III, Department of General Services

The Honorable Wade Crowfoot, Secretary of Natural Resources

EXHIBIT A

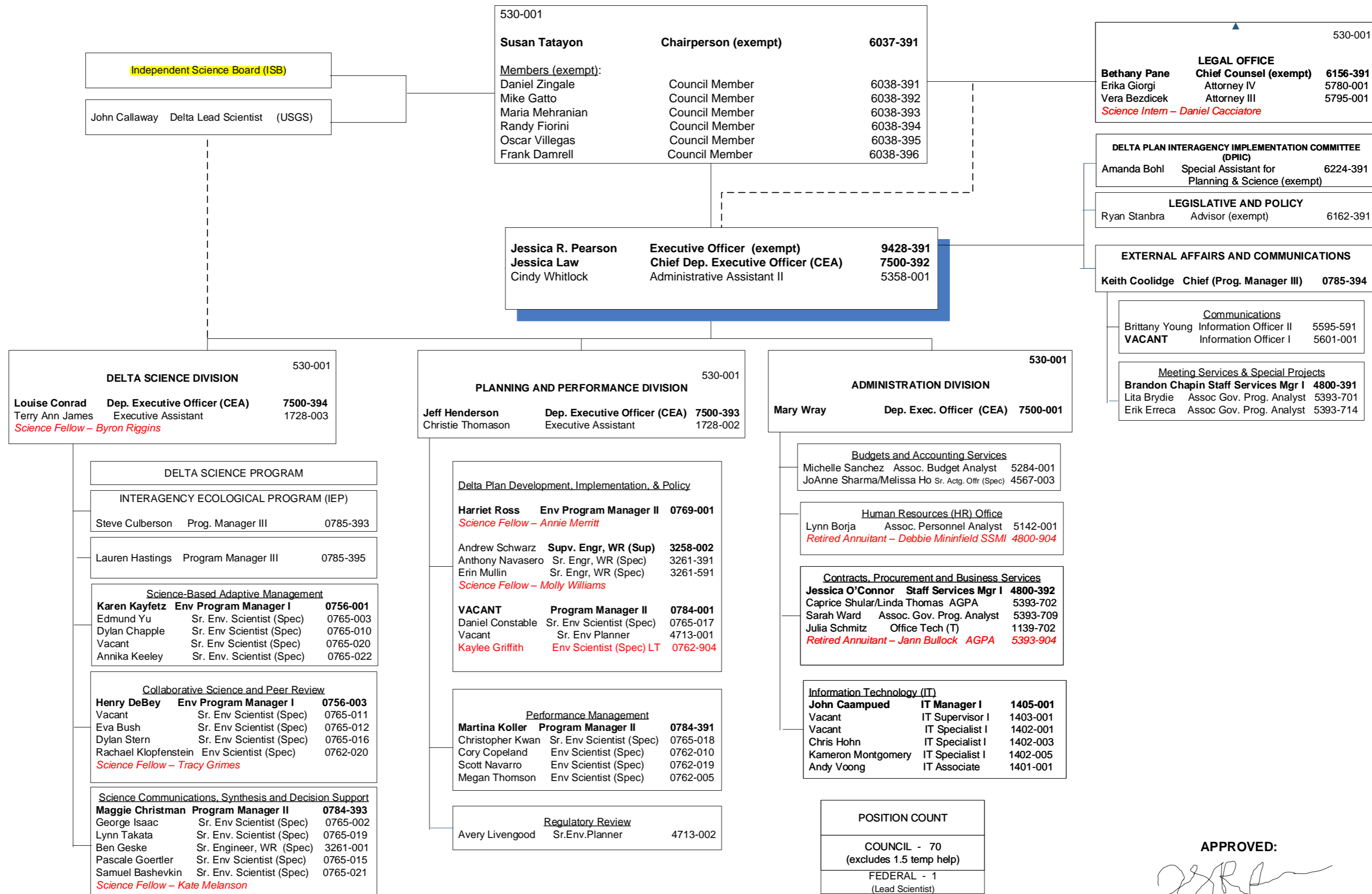


DELTA STEWARDSHIP COUNCIL

A California State Agency

INTERNAL USE ONLY:

INCLUDES TEMP HIRES, FELLOWS, & VOLUNTEERS



APPROVED:

JESSICA R. PEARSON, EXECUTIVE OFFICER
APRIL 2020