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June 27, 2012

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Dear Chairman Isenberg and Council Members,

This letter is provided in response to the request of the Council at the June 15, 2012 meeting for a legal analysis of the authority of the Delta Stewardship Council (Council) to include a policy in the Delta Plan regulating Delta water quality. As always, CCWD appreciates the opportunity to provide further input on the Final (Sixth) Staff Draft Delta Plan dated May 14, 2012, and notes the incorporation of many of its previous comments. The remaining issue of a Delta water quality policy is particularly important, and bears further consideration by the Council. CCWD believes that if a water quality policy is not included in the Delta Plan, the Delta Plan will fail to comply with the direction provided by the California Legislature, and the Council will have in part foreclosed its own ability to provide meaningful review of future actions in the Delta.

CCWD understands that the Council hesitated to include such a policy because of its reservations in two areas: Concern over legal authority to include a policy regarding Delta water quality, and concern over whether such a policy would add value, given the existing regulations. With this letter, CCWD hopes to provide some clarity on both of these concerns.

Legal Authority

CCWD's legal counsel has reviewed the law that created the Council and mandated the Delta Plan, as well as other legal authorities. The Delta Reform Act of 2009 (Act) provides substantial express authority to the Council to protect Delta water quality as part of achieving the "*coequal goals.*"

The Legislature intended to, as stated in Section 85001(c), "*...protect and enhance the quality of water supply from the Delta...*" The Council was specifically granted the authority in Section 85210(i) to "*adopt regulations...to carry out [its] powers and duties*" and required the development and inclusion in the Delta Plan of measures to promote "*...improving water quality to protect human health and the environment.*" [Water Code section 85302(d)(3)] Similarly, Section 85302(e)(5) provides that the Delta Plan shall include additional subgoals and strategies to "*Improve water quality to meet drinking water, agriculture, and ecosystem long-term goals.*"

Section 85020 (h) specifically establishes "*a new governance structure with the authority, responsibility, accountability, scientific support, and adequate and secure funding to achieve these objectives*." (emphasis added). Nothing in the Act precludes the Council from adopting policies affecting Delta water quality. In fact, as noted above, the Council is specifically authorized and directed to do so. Adoption by the Council of a Delta Plan lacking even a single water quality policy would be a failure to fulfill the Council's responsibilities and legislative direction to improve water quality for the protection of "*...human health and the environment consistent with achieving water quality objectives in the Delta.*" [Water Code section 85020(e)]

Further, it is well established that neither Congress, through enactment of the Federal Clean Water Act (CWA) [33 U.S.C. §1251 et seq. (1972)] or the State Legislature, by enacting the Porter Cologne Water Quality Control Act (Porter Cologne) [Water Code, Division 7, §13000 et seq.], intended to preempt more rigorous State regulation in the area of water quality protection. In fact, the Legislature's approval of the Delta Reform Act reveals its clear intent to provide additional and complementary regulatory authority over Delta water quality to the Council.

Had the Legislature intended for the Council to simply provide non-regulatory guidance to the many State agencies exercising some control over Delta water quality, it could have simply provided for that in the Act as it did with regard to water rights authority [Water Code section 85031(d)]. It is clear that the Legislature intended for the Council and the Delta Plan to provide for regulatory, as well as non-regulatory, measures to "*protect and enhance the quality of water supply from the Delta.*" The legislative imperative is clear that the Council is empowered, and more importantly, required to adopt policies to ensure and improve Delta water quality.

In light of the above, if the Council believes that the Legislature, in enacting Delta Reform Act, failed to provide the Council with the necessary legal authority to allow for the inclusion of water quality policies in the Delta Plan; the Council should provide to the public a legal opinion to support that understanding.

Adding Value

The Council discussed the need for a Delta water quality policy at the April 26, 2012 meeting, and apparently determined that it can defer to State Water Resources Control Board (State Board) and Regional Water Quality Control Boards (Regional Boards) on the specifics of this subject. CCWD agrees that the specifics of how and what Delta water quality measures should be adopted rightly belongs with those Boards; however, a general policy providing guidance is within the domain of the Council to ensure that any such regulations are consistent with the Delta Plan. The

approach of avoiding a Delta water quality policy altogether will certainly not add value to a plan for the Delta, nor does it achieve neutrality on the subject, given that the Delta Plan is specifically intended to establish a review process for future projects that might have substantial water quality effects. By avoiding the adoption of a clear policy on water quality protections, the Council risks allowing proposed regulations or projects that could degrade Delta water quality to slip through the process without Council oversight. Allowing covered actions to avoid addressing or mitigating water quality impacts could thwart or run counter to the objectives of the Delta Plan.

To add value to the existing regulatory framework, the Council can and should adopt a policy that makes clear that water quality effects of proposed projects should be evaluated on their effects to existing water quality, and that projects that have significant impacts should address their effects.

Therefore CCWD is reiterating its request that, at a minimum, the Delta Plan should include the following Delta water quality policy to ensure that covered actions are consistent with the Delta Reform Act, existing water quality regulations, and the goals and objectives of the Delta Plan:

WQ P1 *Covered actions shall avoid degrading water quality to the extent feasible consistent with existing regulations and anti-degradation policies (State Water Resources Control Board (SWRCB) Resolution No. 68-16, SWRCB Resolution No. 88-63, 40 Code of Federal Regulations section 131.12). Significant water quality degradation associated with a covered action shall be mitigated to a less than significant level.*

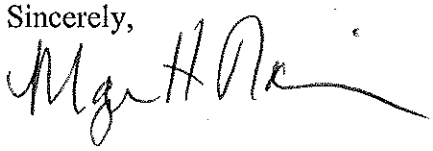
It is clear that the Legislature intended for the Council, through the Delta Plan, to challenge proposed actions that would degrade rather than improve Delta water quality in a significant way. Without specific policies in the Delta Plan prohibiting the further significant degradation of Delta water quality, the Council will not have an established basis to make such a challenge. Therefore, CCWD also proposes that a second policy on water quality be included as follows:

WQ P2 *Covered actions must identify any significant impacts to Delta water quality. This information will be used by the Council to determine whether a covered action is consistent with the Delta Reform Act goal of improving water quality to protect human health and the environment.*

Inclusion of these policies will certainly add value to the existing regulatory framework and will help the Council meet the requirements of the Delta Reform Act.

As always, thank you for your consideration of these comments. CCWD looks forward to providing further input to the Delta Plan as the process continues. Please call me at (925) 688-8018 if you have any questions or concerns.

Sincerely,



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