

April 1, 2011

Phil Isenberg, Chairman  
Delta Stewardship Council  
980 Ninth Street, Suite 1500  
Sacramento, CA 95814

Dear Mr. Isenberg:

The East Bay Municipal Utility District (EBMUD) commends the Delta Stewardship Council (Council) for its continued progress in the development of the Delta Plan. We acknowledge that the Council's task is Herculean. We appreciate this opportunity to offer specific comments on the March 18, 2011 "Second Staff Draft Delta Plan." Our comments fall into several broad categories, including scope of the plan, governance, water flow standards, finances, levees, and water transfers. Within each category, we offer specific comments and language that we believe should be considered in the development of the Delta Plan.

### **1. Scope of the Delta Plan**

The Delta Plan should clarify the distinction between proposed Council actions within the geographical limits of the legal Delta where the Council has jurisdiction, and other areas where the Council is making recommendations, but not asserting enforcement or regulatory authority. The Delta Reform Act provides that the jurisdictional scope and actions of the Delta Plan are limited to the legal Delta, with a few specific exemptions.

For specific language, we suggest that the language provided in the February 14 draft (page 2-3, lines 13-28, as reiterated below) be reincorporated into the Delta Plan and that all policies and recommendations throughout the Plan be consistent with this description.

The Secondary Planning Area includes areas within the Delta watershed, other areas that contribute water to the Delta watershed through imports (Trinity watershed), and areas outside of the Delta watershed that use water from the watershed. The Council extended the Delta Plan planning area outside of the Delta and Suisun Marsh because the Act includes several provisions that address issues outside of the Delta, including Water Code Sections 85020(d), 85302(b), 85303, 85304, and 85307(a).

*85020(d) Promote statewide water conservation, water use efficiency, and sustainable water use.*

*85302(b) The geographic scope of the ecosystem restoration projects and programs identified in the Delta Plan shall be the Delta, except that the Delta Plan may include recommended ecosystem projects outside the Delta that will contribute to achievement of the coequal goals.*

*85303. The Delta Plan shall promote statewide water conservation, water use efficiency, and sustainable use of water.*

*85304. The Delta Plan shall promote options for new and improved infrastructure relating to the water conveyance in the Delta, storage systems, and for the operation of both to achieve the coequal goals.*

*85307(a) The Delta Plan may identify actions to be undertaken outside of the Delta, if those actions are determined to significantly reduce flood risks in the Delta.*

Throughout, the Plan should indicate whether a policy or recommendation is addressing an item in the primary or secondary planning area. For those items in the secondary planning areas the Plan should specifically identify the statutory authority upon which the action is based.

The text “box” that currently precedes each chapter attempts to clarify this issue to some degree, but does not address individual policies and recommendations. The last sentence in the text box currently reads: “Where, however, a regulatory policy is directed to an out-of-Delta action that is not connected to a covered action as provided above, the regulatory policy is a discretionary recommendation as to that out-of-Delta action.” The end of this sentence could be modified as follows; “... the regulatory policy is a recommendation that another entity could consider using its authority to pursue or implement the recommended policy or action.”

## **2. Governance – Covered Actions**

EBMUD suggests that the Council consider providing a more limited review or exemption for projects that are exempt under the California Environmental Quality Act (CEQA) unless there is a specific reason for further review. This might be required, for example, with the particular location of a proposed action if it is within a key ecosystem restoration area, or if the potential cumulative effect of serial actions that individually are not significant, but cumulatively may cause concern.

The Council will need to provide its interpretation of what a “significant impact” means under Water Code Section 85057.5(a)(4) with respect to one or both of the coequal goals, or the implementation of government sponsored flood control programs as those terms are used in Sec. 85057.5(a)(4). Just as CEQA has published guidelines to help a project proponent determine what steps to take to comply with CEQA, the Council may need to provide interpretive guidance on how to comply with this important provision of the Delta Reform Act. That guidance could perhaps be provided outside of the Delta Plan itself or as an appendix to the Delta Plan, if the Council takes up this suggestion.

### **3. Water Flow Standards**

We agree that the State Water Resource Control Board (SWRCB) should pursue an update of its Delta Water Quality Control Plan (D-1641) as a priority action, and we commend the Council for looking for ways to better integrate the role of the SWRCB and the Delta Watermaster with the role of the Council in implementing the Delta Plan.

We offer the following suggestion for WR P1 (c) and (d):

c) Prior to the date indicated in (a), the Council will utilize existing Delta flow standards. If the State Water Resources Control Board fails to act by that date, the Council will consider new projects or covered actions ~~to be inconsistent with~~ through the adaptive management provisions of the Delta Plan.

d) Prior to the date indicated in (b), the Council will utilize existing Delta watershed flow standards. If the State Water Resources Control Board fails to act by that date, the Council will consider new projects or covered actions ~~to be inconsistent with~~ through the adaptive management provisions of the Delta Plan. ”

Rather than attempting to name consequences now for a missed deadline years into the future, especially for the date specified in (b) which is after the first five year review of the Delta Plan, the suggested language would allow the Council to benefit from the adaptive management provisions of the Delta Plan. EBMUD supports the robust approach to adaptive management exhibited in early drafts of the Delta Plan and we look forward to more detailed provisions in future drafts of the Delta Plan.

### **4. Finances**

It is essential that the Delta Stewardship Council thoroughly review and document the costs of the projects, programs, plans, actions, and activities contemplated in the Draft Plan. The total costs, both with and without a Bay Delta Conservation Plan (BDCP), should be presented in the Plan as BDCP will not be complete by the time the Delta Plan is adopted later this year. Also, as recommended at the outset of this letter, more attention should be devoted to describing actions and costs within the Delta, where the Council's jurisdiction is clear, as distinct from other areas where the Delta Plan is making recommendations for other entities to implement plans, programs, projects or activities.

To help in the review of costs, apportionment or allocation of those costs, and consideration of various revenue generation mechanisms, we suggest that the Council consider the use of a well balanced advisory committee of stakeholders to provide input and recommendations on each of these topics. Varied and substantial input should be expected on these finance topics and the Council should facilitate broad and constructive input before reaching its ultimate decisions in this area. EBMUD would be interested in participating in such a committee, if established, as we have spent considerable effort on

analyzing Delta finance and found common ground with many other water agencies on specific finance issues.

Building on a recommendation in the Delta Vision Strategic Plan (Action 7.3.1, pg 134 of the Strategic Plan), EBMUD recommends that the Council adopt “a series of principles regarding design of financing” that could inform future legislation for Delta finance. Such principles should include:

- Establishing that beneficiary pays means allocating costs to individual entities, classes of entities, or the public in approximate proportion to benefits received by each from implementation of measures in the Delta Plan;
- Asserting that the mitigation of any adverse impacts to the Delta should be accomplished separately, as part of compliance with CEQA and any other permit conditions;
- Defining “public benefits” as distinct from those that accrue to specific entities or classes of entities;
- Imposing a cap on the total revenues that can be derived from the user fee(s) or other means of generating revenue, based on the legislatively approved annual budget for the Delta Plan;
- Including protections against the redirection of user fee revenues or other revenue sources to unrelated purposes;
- Creating guidelines for apportioning costs for projects with both private and public benefits; and
- Providing for an open, transparent public process that permits the presentation of evidence, on the record, to inform the design of a finance system for the Delta Plan.

When the beneficiary pays principle is put into practice, it should not result in a uniform fee imposed on all Delta users. By the same token, it is neither desirable nor feasible that every beneficiary should have a specifically tailored fee that reflects its particular situation. In the case of water users, a limited number of distinct categories for fees may be both fair and practical to implement.

EBMUD supports the recommendation to create a Delta Flood Control Assessment District with fee assessment authority (RR R6). Recognizing its own obligation to contribute to Delta levees, EBMUD supported SB 34 (Torlakson) in 2007, which proposed a benefit assessment district for this purpose. Instream flow studies conducted under the purview of the SWRCB will require significant funding, which might be collected via SWRCB fees on water rights or other user fees. By contrast, other elements of the Delta Plan including ecosystem restoration, the Council’s administrative costs, and the science program may be viewed as a public benefit, which may require a broader funding base than programs with more defined beneficiaries.

Specifically regarding ecosystem restoration, EBMUD believes that it will be vital to conduct a transparent analysis for each major project to determine the proportions of each that constitute mitigation for past and future Delta water export operations, those that

mitigate for other activities, and actual enhancement that can be recognized as a public benefit. While not a simple exercise, making these distinctions is critical for those entities that might be subject to a broad-based user fee to finance public benefits, and that rightfully hope for a reasonable effort to avoid cross-subsidies.

The prospects for any fee system(s) will be subject to the final disposition of Proposition 26; therefore, the Council's efforts are best directed at this time to a preliminary examination and scoping of viable alternatives for sustainable funding of the Delta Plan. Any proposal that involves new fees on Delta interests will be controversial; however, the existing vacuum in Delta financing also carries a penalty on long-term planning. EBMUD is eager to assist the Council in developing a finance plan that reflects the principles outlined above.

### **5. Delta Levees**

EBMUD appreciates the extensive effort that has been put into Chapter 7 of the Delta Plan. We fully agree that it is necessary to create a prioritized investment strategy to determine how best to utilize limited public funds to provide the most protection. However, we caution against placing too many restrictions on the use of state funds for bolstering critical levees. Risk Reduction Policy 4 (RR P4) could inadvertently stall critical levee improvement investments by requiring that investments "be based upon a Delta-wide comparative benefit/cost analysis." If the completion of such a Delta-wide comparative benefit/cost analysis were on the horizon, this would be an acceptable strategy. However, no decisions have been made about who will be responsible for conducting such an analysis or when it will be completed and approved. The Department of Water Resources (DWR) expressed reluctance to implement such a Delta strategy due to potential liability concerns that may accrue to the state, as described during presentations to the Council at the May 2010 and June 2010 Council meetings.

Policy RR P4 should be revised to indicate that such an analysis should be completed, and provide the basis for future state investments. However, an interim policy is needed to facilitate levee improvements that are time-critical and avoid delays that only increase risk. The January 2011 scoping comments from EBMUD recommended that the Council gather Delta-wide information on Delta interests and assets protected by levees and expenditure information on an annual basis. This information could help to inform communications and coordination between the Council, DWR, and the U.S. Army Corps of Engineers. The timing of annual discussions about future investments might align well with development of the Council's budget or the Delta cross-cut budget that is required for 2012. This policy should perhaps be developed in incremental steps to continue investment of public funds in necessary and legitimate levee improvements while a "Delta-wide comparative benefit/cost analysis" is further developed during implementation of the Delta Plan.

As mentioned previously, EBMUD supports the recommendation to create a Delta Flood Control Assessment District with fee assessment authority (RR R6) and we would

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welcome the opportunity to work with Council staff to further develop details of this recommendation. EBMUD has voluntarily contributed over \$15 million to maintain and improve the levees that protect its aqueducts, and the Delta levee system would benefit greatly if more beneficiaries participated financially.

## 6. Water Transfers

Within Chapter 4 on Water Resources the Council should consider adding a policy on facilitating water transfers that help improve water supply reliability as well as water transfers for ecosystem purposes if proponents bring forward proposals to do that. During public comments at the March 24, 2011 Council meeting, several parties expressed concern that potentially beneficial actions, such as cross-Delta transfers, would be discouraged if they were considered a covered action and put through all the requirements of a covered action. EBMUD shares this initial reaction and would defer to specific language suggestions from those entities on this draft of the Plan. We look forward to reviewing subsequent drafts and may provide more detailed language suggestions at that time.

We thank you for the opportunity to provide these comments and we look forward to continuing to work with you and your staff to help develop a functional and effective Delta Plan. If you have any questions, please call Doug Wallace at (510) 287-1370.

Sincerely,



Alexander R. Coate  
General Manager

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