

June 12, 2012

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

Dear Mr. Isenberg:

The East Bay Municipal Utility District (EBMUD) appreciates the opportunity to comment on the “Final Staff Draft Delta Plan” of May 2012 (Plan). With this letter we are providing some broad thematic comments and the attachment provides more specific recommendations for text edits.

We commend the Delta Stewardship Council (Council) and its staff for continuing improvements to the Plan and incorporating public input with each successive draft. In particular, we appreciate that the Plan has moved many of the items that were previously identified within WR P1 into a more appropriate series of recommendations set forth in WR R1 through WR R8. The Plan appropriately identifies and directs the various agencies that will be responsible for implementing the recommendations.

We concur with the levee prioritization concepts that are introduced into RR P1, including the recognition of levees that “protect water quality and water supply conveyance in the Delta, especially levees that protect freshwater aqueducts and the primary channels that carry fresh water through the Delta.” The importance of this policy is appropriately established by inclusion in the Output Performance Measures on page 278. We also support RR R3, which recommends that the California Public Utilities Commission immediately commence formal hearings to impose reasonable fees for flooding and disaster prevention on regulated privately owned utilities with facilities located in the Delta. This is a critical step in advancing the beneficiaries pay concept.

EBMUD also applauds the Council for addressing the statutory requirement to “establish and oversee a committee of agencies responsible for implementing the Delta Plan,” referred to as the Interagency Implementation Committee (Committee). Establishing an effective Committee will pose several challenges including:

- balancing between adequate representation of responsible agencies and limiting the group to a manageable size;
- ensuring transparency while still making (sometimes tough) decisions; and
- creating a functional, parallel stakeholder process.

Although we see the Plan generally improving through its development, we continue to be concerned about several issues.

Reducing reliance on the Delta (WR P1) is a key element of the Delta Plan. While there may be varying potential interpretations of the established policy to “reduce reliance on the Delta in meeting California’s future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency,” the basic intent of policy WR P1 is to improve the aquatic environment in the Delta. To facilitate efficiency and recognize a range of valid approaches to improving regional self-reliance for water, WR P1 should be revised to make it clear that suppliers can meet this policy by contributing to regional efforts. Further, we suggest that the Council continue to engage with stakeholders to address outstanding concerns on this cornerstone policy.

The Plan has made progress on clarifying the actions that will be deemed to be covered actions. Nonetheless, we believe that there are still some problems with the text which seeks to expand upon the statutory language in Water Code Section 85057.5(a). Many of these were described in our prior comments. Among other issues, requiring agencies to prepare detailed findings for actions that have a substantial beneficial impact on achievement of the coequal goals or implementation of flood control as part of the consistency review process will result in an unnecessary expense and waste of increasingly limited public resources. The language should be changed to be consistent with the statutory criteria set forth in Water Code Section 85057.5(a)(4).

Finally, while Chapter 8 accurately describes the challenges to stable funding for the Delta Plan, it still offers little in the way of concrete proposals that can be evaluated. Many water agencies have embraced the beneficiary pays principle because future investments can be justified with expected benefits. We believe that developing a beneficiary pays alternative is the most promising avenue to building support among Delta stakeholders.

Although a “stressor pays” fee system also holds some promise, Appendix O acknowledges that “[t]he revenue potential from stressors fees is unknown, but is probably minor.” As the Council develops a viable finance plan, it will be important to put the focus on funding mechanisms that could make a significant dent in the funding shortfall that imperils progress on many important fronts in the Delta. Building from a foundation of broadly accepted principles and definitions is one suggested starting point before identifying specific revenue mechanisms that could be contentious if not tied to a starting principle, such as a beneficiary pays framework.¹

In the sidebar on Bay Delta Conservation Plan (BDCP) funding (pg. 289), the draft Plan states that “it is highly likely that user fees, revenue bonds, and sources other than the State General Fund will be the primary source of funding.” The administrative draft BDCP made no mention of user fees as a potential funding source, and we believe it is inappropriate for the Delta Plan to speculate in this manner. Additionally, the emphasis of linking “user fees” to “water used” (pg. 291, lines 16-18) implies that water users are the only beneficiaries of water resources. This is not accurate and the Council should specifically identify the many other

¹ One example of this is the California Urban Water Agencies’ Public Investment White Paper at http://www.cuwa.org/pubs/PI_White_Paper_10_%20final.pdf.

Phil Isenberg
June 12, 2012
Page 3

beneficiaries/stressors in the Delta and consider their appropriate role in any related fee system.

Most importantly, the Council has an opportunity to develop a financing strategy for the Delta Plan in a deliberative and transparent fashion. With the expected delay of the water bond, pressures to find other funding sources for Delta needs will only intensify. We urge the Council to make this a priority in the coming months, prior to adoption of the Delta Plan. The ability to fully implement the Delta Plan hinges on yet to be defined funding mechanisms. The Council should strive to better develop some key concepts and engage stakeholder involvement to arrive at a specific proposal by late 2012.

We continue to support the Council's effort to develop a broadly supported and effective Delta Plan. If you have any questions, please contact Doug Wallace at (510) 287-1370.

Sincerely,



Alexander R. Coate
General Manager

ARC:DW

Attachment

East Bay Municipal Utility District Comments
May 2012 Final Staff Draft Delta Plan

Pg #, line #	Recommended Edits	Discussion
Pg. 36, line 22	Amend the following sentence: “The mission of the Council is to <u>further the achievement of the</u> coequal goals.”	The discussions in the Plan of the role of the Council should focus on the Council’s statutory mission of coordinating and overseeing the actions of other agencies responsible for implementing the Delta Plan, and ensuring consistency with the Delta Plan by exercising its appellate authority over consistency determinations. These actions will further the achievement of the coequal goals.
Pg. 37, Table 2-1	Under U.S. Fish and Wildlife Service, modify the text as follows: “Develops plans for the conservation <u>and recovery of public trust natural fish and wildlife</u> resources and addresses the variable needs of fish and wildlife in the Delta pursuant to ESA.”	The text should accurately present the legal responsibilities of the various agencies based on existing statutory language and should be consistent with the description offered for the National Marine Fisheries Service.
Pg 37, Table 2-1	Under State Water Resources Control Board, modify the text in the Table as follows: Required to develop and adopt criteria describing the flows deemed necessary to maintain water quality standards and protect public trust resources in the Delta. Enforce water rights and ensure proper allocation/diversion of water in and out of Delta. <u>Exercises water rights and water quality functions of the State consistent with State law.</u>	The text should accurately present the legal responsibilities of the various agencies based on existing statutory language.
Pg. 37, Table 2-1	Under National Marine Fisheries Service (NMFS), modify the text as follows: “Operates salmon and steelhead hatcheries, restore access over impassible dams, and <u>Develops plans for the conservation, survival, and recovery of salmonids in the Delta pursuant to the point at which ESA measures are no longer necessary.</u> ”	The text should accurately present the legal responsibilities of the various agencies based on existing statutory language and should be consistent with the description offered for the U.S. Fish and Wildlife Service.

Pg #, line #	Recommended Edits	Discussion
Pg. 52, lines 25-44	<p>Edit the paragraph as follows:</p> <p>In addition, a proposed project must have a “significant impact” as defined under Water Code section 85057.5(a)(4) to qualify as a covered action. For this purpose, “significant impact” means a change in existing conditions that is directly, indirectly, and/or cumulatively caused by a project and that will have a substantial impact on the achievement of one or both of the coequal goals or the implementation of government sponsored flood control programs to reduce risks to people, property, and State interests in the Delta. The substantial impact can be positive (for example, an ecosystem restoration action... but in so doing, would also reduce riparian habitat critical to recovery of native fish species).</p>	<p>As noted in our prior comments, the description of actions that will be deemed to be “covered actions” is not consistent with the statutory language. In order to be a “covered action,” a project must be deemed to have a significant effect on achievement of the coequal goals or flood control. A plan, program or project is not a covered action solely based on the fact that the action may “cumulatively cause” a change. To the extent that a number of small, individually insignificant projects in combination are part of a plan or program that will have a significant impact on achievement of the coequal goals or flood control, the program or plan is a “covered action.”</p> <p>The substitution of the term “substantial” appears to have led to the statement that an action will be a covered action even if it has a positive impact, so long as the impact, whether positive or negative is “substantial.” Requiring agencies to prepare detailed findings for actions that have a substantial beneficial impact on achievement of the coequal goals or implementation of flood control as part of the consistency review process will result in an unnecessary expense and waste of valuable resources. In this instance, it would likely be impossible for any entity to establish a credible claim that the action would be inconsistent with the Delta Plan. Thus there is no likelihood of an appeal of the determination, and the findings and the consistency determination would serve little purpose. The Council should be encouraging agencies to implement projects that have “positive” substantial impacts, not adding additional regulatory requirements to actions where the positive impacts are substantial will only add costs and scheduling delays with no corresponding benefit for the Delta and the achievement of the coequal goals.</p>

Pg #, line #	Recommended Edits	Discussion
Pg. 53, lines 18-26	<p>Edit the text as follows: “Although a regulatory action by another State agency is not a covered action, the underlying action regulated by that agency can be a covered action (provided it otherwise meets the definition). The Council has concurrent jurisdiction over covered actions when that action is also regulated by another State agency, <u>although the Council will defer to the determination by the agency over matters within its jurisdiction regarding significant impacts and potential impacts on achievement of the coequal goals . . .</u> Therefore, even when a covered action is regulated by another agency (or agencies), the covered action still must be consistent with the Delta Plan. In the situation where a covered action is governed by multiple agencies and laws, the action must comply with all relevant legal requirements.”</p>	<p>Although an underlying action may be determined to be a project pursuant to Section 21065, it should not be a covered action unless a permitting agency has determined that the action has a significant impact on the achievement of the coequal goals. A determination by the permitting agency that there is no potential for significant impacts or that sufficient protections have been put in place to avoid significant impacts should not be subject to a duplicative round of review by the Council. Instead, the Council should defer to the determinations made by agencies with regulatory authority over the action.</p>
Pg. 53, lines 34-35	<p>Edit the text as follows: Temporary water transfers of up to 1 year in duration exempted from CEQA pursuant to Water Code section 1729.</p>	<p>The covered action exemption should apply to all temporary water transfers of up to 1 year in duration.</p>
Pg. 54, lines 40-41	<p>The Covered Action Checklist, Certification of Consistency Form, and Appeals Form should be provided as an appendix to the final Delta Plan. The public should be given the opportunity to comment on the final versions of these forms before adoption by the Council.</p>	<p>At the December 9, 2011 “Covered Action Workshop”, the Council staff invited participants to comment on drafts of these forms. These forms have not been subsequently updated to reflect the latest revisions to the final draft of the Delta Plan or specific comments submitted by parties, including EBMUD, on those 2011 draft forms.</p>
Pg. 55, lines 13-7 and Appendix B, paragraph 5	<p>Revise the language in both of these sections to eliminate the ability of a member of the DSC or its executive officer to appeal a certification of consistency. As an alternative, add a requirement that any member who files an appeal on a proposed covered action must step down from acting as a member of the Council when matters related to the appealed covered action are heard by the Council.</p>	<p>The statutory language does not support the inclusion of provisions allowing members of the DSC or the DSC executive officer to appeal a determination of consistency. The DSC is empowered to act in as an appellate review body. There is an inherent conflict of interest for a member of the Council or its executive officer to both appeal a certification of consistency and objectively participate in the proceeding and make findings on the proposed covered action being appealed.</p>

Pg #, line #	Recommended Edits	Discussion
Pg. 56, lines 30-32	<p>Delete the following:</p> <p>“Covered actions not exempt from CEQA must include applicable mitigation measures identified in the Delta Plan’s Program EIR, or substitute mitigation measures that the proposing agency finds are equally or more effective.”</p> <p>As an alternative, revise the requirement as follows:</p> <p>“Covered actions not exempt from CEQA must <u>include evidence that the action will include applicable mitigation measures identified in the Delta Plan’s Program EIR that are within the jurisdiction of the entity undertaking the action and necessary to mitigate impacts of the action</u>, or substitute mitigation measures that the proposing agency finds are equally or more effective <u>in ensuring that the action will not result in significant physical impacts to the environment.</u>”</p>	<p>The language requiring a project proponent to include “applicable mitigation measures identified in the Delta Plan’s Program EIR, or substitute mitigation measures that the proposing agency finds are equally or more effective” broadens the obligation of a project proponent in a manner that cannot be fully understood until the Delta Plan PEIR and the anticipated addition are completed. Each agency undertaking a project that is subject to CEQA has its own independent duty to evaluate impacts and develop measures to mitigate those impacts to a level that is less than significant. These measures would also presumably mitigate any identified impacts set forth in the PEIR that result from the agency’s action and are within the jurisdiction of the agency. The requirement has the potential to conflict with the individual obligations of agencies under CEQA. It is difficult to determine what would be required or what findings the agency may be required to make without a better understanding of the impacts and mitigation measures that will be set forth in the Draft Additional PEIR. More importantly, because the Delta Reform Act requires that covered actions be consistent with the Delta Plan, but does not address CEQA, any requirement to make detailed CEQA findings a part of the consistency review process should be removed.</p>
Pg. 81, lines 3-11	<p>Revise the last sentence to include the percentage of the annual water deliveries from the Delta’s upper watershed:</p> <p>“...approximately 0.5 MAF, or about 1.5 percent of the <u>flow from the Delta watershed</u>, of annual water deliveries...”</p>	<p>For the sake of consistency and context, this percentage should be included. Page 80, line 2, states that approximately 31 percent of the flow from the Delta watershed is diverted upstream of the Delta, and page 81, line 13, indicates that about 4 percent of the watershed flows are diverted by Delta residents and farms. Additionally, line 20 of page 81 indicates that the SWP and CVP diversions account for 17 percent of the inflows into the Delta. Since every other diversion is given in terms of percent of flow from the watershed, the Mokelumne and Hetch Hetchy diversions should be provided in a similar format.</p>

Pg #, line #	Recommended Edits	Discussion
Pg. 100, lines 16-20	WR P1... “A proposed action is inconsistent with the Delta Plan if (1) one or more water suppliers that would receive water as a result of the proposed action have failed to reduce their reliance on the Delta and <u>or</u> adequately contribute to improved regional self-reliance...”	The Delta Reform Act requires “each region that depends on water from the Delta watershed” to “improve its regional self-reliance.” Consistent with this statutory language, a supplier should be able to show reduced reliance solely through contributions to regional efforts.
Pg. 100, lines 23-30	Clarify the language as follows: For purposes of this policy “reducing reliance on the Delta <u>or</u> and adequately contributing to improved regional self-reliance” means a significant reduction in <u>reliance on the Delta to meet increasing need</u> net water use, or in the percentage of water used, from the Delta watershed, which may be achieved through <u>improving, investing in, and implementing projects to further investment in</u> water use efficiency, water recycling, <u>and use of</u> advanced water technologies, <u>as well as</u> local and regional water supply projects, and improved regional coordination of local and regional water supply efforts.; and a <u>A</u> t a minimum, this must be achieved through compliance with existing state laws...	The language should be clarified to be more consistent with the discussion on page 68 regarding what it means to achieve the goal of providing a more reliable water supply for California.
Pg. 101, lines 14-17	Edit WR R5 as follows: The State Water Resources Control Board should evaluate all applications and petitions for a new water right or a new or changed point of diversion, place of use, or purpose of use that would result in new or increased long-term average use of water from the Delta watershed for consistency with the constitutional principle of reasonable and beneficial use.	Many urban water suppliers have projected that even though per capita water use may be reduced or remain unchanged in the future, overall demand may grow as a result of LAFCO-approved annexations or additions to service area boundaries, as well as in-fill development. Because of this, the reference to changes in place of use should be eliminated.
Pg. 105, lines 14-15	Edit as follows: “This policy covers a proposed action to export <u>CVP/SWP</u> water from, transfer <u>CVP/SWP</u> water through, or use <u>CVP/SWP</u> water in the Delta.	The text should be edited to be consistent with lines 11-13 and to clarify the intent of the policy is to apply only to water contracted from the CVP and SWP.

Pg #, line #	Recommended Edits	Discussion
Pg. 101, lines 32-36	<p>Edit the last sentence as follows:</p> <p>“At a minimum, these plans should include a plan for possible interruption of Delta water supplies <u>for a maximum interruption period based on expert analysis and documented in a written report or up to 36 months due to catastrophic events, evaluation of the regional water balance, a climate change vulnerability assessment, and an evaluation of the extent to which the supplier’s rate structure promotes and sustains efficient water use.</u>”</p>	<p>The interruption of water supply and contingency planning is an integral part of an Urban Water Management Plan where alternative water supply and water management strategies during a water shortage are addressed. The length of time before a reliable water supply can be regained varies by agency and in many cases will be far less than 36 months. EBMUD has studied this issue extensively, and has made improvements to its local supply system and to the aqueducts to reduce the maximum outage for the aqueducts.</p>
Pg. 105, lines 17-21	<p>WR R16 – Edit as follows:</p> <p>“The State Water Resources Control Board should require water rights holders submitting supplemental statements of water diversion and use or progress reports under their permits or licenses to report on <u>water conservation and consumptive use during the reporting period.</u> the development and implementation of all water efficiency and water supply projects and on their net (consumptive) use.”</p>	<p>Most water right holders presently report on water conservation as part of the submittal of progress reports pursuant to their permits and licenses, or through statements of water diversion and use. EBMUD supports this practice. The broadly worded requirement to report on “development and implementation of all water efficiency and water supply projects and on their net (consumptive) use” could significantly add to the burden of submitting progress reports and statements of water diversion and use, and it is not clear that the SWRCB would have the ability review this voluminous information or gather any useful data from it. The recommendation should be revised. It is proper to have an agency report on the quantities of water conserved, and possibly to also report on calculated per capita water use as part of its annual filings. The information on “all water efficiency and water supply projects” has little relation to the information typically included in the annual reports, and it conflicts with WR R17, because this information would reduce the effectiveness of a public online reporting system.</p>
Pg. 291, lines 16-18	<p>Delete as follows:</p> <p>“To the extent possible, user fees should be based on the amount of water used or, for stressors, the volume of the contaminants discharged.”</p>	<p>This statement implies that water users are the only beneficiaries, or stressors, of water resources. The Council should specifically identify the many other beneficiaries/stressors in the Delta and include them in any related fee system.</p>

Pg #, line #	Recommended Edits	Discussion
Appendix B, paragraph 4(c)	Eliminate 4.(c) e) The failure by a state or local agency to submit the record to the council on a timely basis as required by subparagraph (b), shall be grounds for the council to affirm the appeal on the basis that there was not substantial evidence presented to support the certification of consistency.	Depending on the content of the record and the nature of the claims in the appeal, ten days may not be sufficient to complete and certify a record and it may only lead to a need to supplement the record later in the process. Because of this, the appendix should not include provisions establishing that the failure to submit the record to the council within this time period is grounds for the council to affirm the appeal.
Appendix B, paragraph 6	Add part g to paragraph 6: 6. The appeal shall clearly and specifically set forth... g) <u>Documentation of any comments submitted on the proposed covered action during the CEQA process and the agency responses to those comments.</u>	Most actions meeting the definition of a covered action will require environmental review under CEQA. In addition, many covered actions may require approval by regulatory agencies that involve public notices. If the appellant did not participate in the CEQA process conducted by the state or local agency or otherwise provide comments on any aspect of the covered action when presented with the opportunity to do so, the appellant should explain the reason for failing to do so as part of any appeal of a consistency determination. The executive officer should consider the appellant's previous comments (or lack of comments) on the proposed covered action and any agency responses to the appellant's comments when performing the initial review of the appeal for merit.
Appendix B, paragraph 6(e)	Edit as follows: "e) <u>The specific grounds for appeal, including a specific explanation of the inconsistencies between the covered action and the Delta Plan policies; and</u> "	A proposed covered action will have undergone thorough review before submission of a consistency determination. The appeals procedures should make clear that the appellant has the burden of demonstrating inconsistency with the Delta Plan.
Appendix B, paragraph 9	Revise the second sentence as follows: "The council or by delegation its executive officer may dismiss the appeal for failure of the appellant to provide information requested within the period provided, if the information requested is in the possession of or under the control of the appellant, <u>or can be obtained by the appellant within a reasonable period of time, and/or for failure to set forth an allegation of inconsistency with the Delta Plan.</u> "	A proposed covered action will have undergone thorough review before submission of a consistency determination. The appeals procedures should make clear that the appellant has the burden of demonstrating inconsistency with the Delta Plan and that failure to demonstrate an inconsistency is grounds for dismissal.