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June 29, 2012

Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814
Attn: Terry Macaulay

Re: Comments on the Final Staff Draft of the Delta Plan

Dear Mr. Macaulay:

The California Farm Bureau Federation is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing more than 74,000 agricultural, associate and collegiate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

These comments on the Delta Stewardship Council's Final Staff Draft Delta Plan are offered in no particular order:

1. Comment #1: In many areas, we believe that the Delta Plan overreaches and misinterprets the legislative intent and public spirit that motivated passage of the 2009 Water Package of legislation. To the potential detriment of future collaborative efforts, major aspects of the plan risk the trust that that unusual moment of consensus required. In the course of the Council's lengthy deliberations, differences of opinion have assumed the character of an ideological debate. The interests have stated and restated their positions, the Council has made some adjustments in some areas—but, for the most part, there remains a large area in which, it appears, the Council and its staff have simply resolved to disagree with significant segments of the larger stakeholder community. Regrettably, but perhaps inevitably at this point, we foresee that these gaps will be left for painful resolution in implementation.

2. Comment #2: The Council and the Plan place great emphasis on the concept of a "legally enforceable" Delta Plan. Unfortunately, while "legal enforcement" by the Council cannot exceed the bounds of the Council's statutory authorities, we believe many provisions of proposed Delta Plan *do* exceed the bounds of those statutory authorities. In our view, many provisions of the Delta Plan misinterpret, misapply, and conflict with the enacted laws that authorize preparation of the Delta Plan. Furthermore, it seems likely that these same conflicts will propagate into the Council's administrative regulations. An administrative regulation, however, cannot seek to accomplish things for which there is no underlying statutory authority. On multiple levels, we believe the Delta Plan's ambition outstrips the underlying legal and statutory authorities for its content. Quite predictably, this again prepares the way for significant conflict in implementation.

3. Comment #3: The Plan's choice of policies and recommendations (and, for that matter, the absence of any sort of prioritization among them) is in many cases puzzling—and, yet, it is also quite revealing as to where the Council has placed its emphasis:

    a. The Sixth Draft's "Ecosystem Restoration" chapters includes 5 very strong policies, and 8 moderately strong recommendations;
    b. The "Water Reliability" chapter contains 2 policies, including a strong policy on "reduced reliance," and 19 recommendations, focusing notably on water use efficiency, reasonable use requirement, "reduced reliance" on the Delta, and planning, reporting, and enforcement or other regulatory facilitation of various proposed requirements and new restrictions on existing water use;
    c. The "Water Quality" chapter contains 0 policies, 1 extremely weak "recommendation" that the state comply with the law by meeting existing water quality standards, and a hodge-podge of some 11 other proposed "recommendations," generally urging intensification or acceleration of various existing regulatory programs;
    d. The "Delta Protection" chapter contains 2 extremely weak policies, and 19 generally weak or faintly optional recommendations;
    e. The "Reduce Risk" (state flood liability and levees) chapter outlines 4 strong policies, focused on ecosystem restoration and reduced state liability, and 9 moderately strong recommendations, frequently focusing on a significant shifting of liability, risk, and responsibility to local agencies, local land use planning, agriculture and private individuals.

    Overall, the picture that emerges from the Council's choices of policies and recommendations is one of disengagement of state government from the state's businesses and economic interests and from the concerns and affairs the majority

of state's people. The Plan's emphasis is on reducing state liabilities, withdrawing state support, shifting responsibility to local and regional entities, downsizing and out-sourcing agriculture, co-opting local planning authorities, seizing greater control of resources, limiting and eroding private property rights, and requiring greater contribution toward adverse state policies, even as these policies further exacerbate existing scarcity.

4. Comment #4: Given that the current Plan fairly inevitably sets the stage for further conflict, this then raises the question of how this plan will advance the co-equal goals.

5. Comment #5: The Delta Plan's concept of water use efficiency and "reduce reliance" is overly simplistic. For the Council, it seems, efficiency means using less and less water in every circumstance, indefinitely into the future; and "reduced reliance" means finding more and more ways, not to achieve reliability of water supplies from the Delta and its watershed, but rather to *do without* these sources. The plan draws no apparent distinction between the legal threshold of reasonable use and the distinct concept of absolute efficiency, nor does it appear to encompass realities of basin-level efficiency and reuse. It ignores groundwater, artificial and in lieu recharge, and surface water reliability as important conjunctive use methods in many areas of the state. It ignores unique aspects of agricultural water use, irrigation, soil conservation, and other agronomic factors. Pursued to its logical extreme, the Plan's approach to water use efficiency and "reduced reliance" crosses the line from efficient water use and regional diversification of supplies into reallocation and potential elimination of whole categories of existing water use. If the goal is not only to reduce use or net reliance on the Delta, but also non-use of water and regional independence from Delta sources, there arises a mindset for which zero use of water is even better than 99.9 percent efficiency. This mindset assigns a subjective value to a particular use or water need and prioritizes that use or need over other supposed lesser uses. The focus is not on the efficiency with which a particular drop of water is employed for a particular use, but rather on the propriety of the use itself and the subjective desirability of actually reassigning that drop of water to some other preferred use. The focus is not on how better to meet future and existing demands for water from the Delta, but rather on shrinking, limiting, or outright eliminating the uses that create those demands to begin with. The approach turns ancient notions of water rights priorities and reasonable and beneficial use on their head. It fosters a climate of investment-stifling uncertainty, conflict, and mistrust. Moreover, except for the interests that might gain by the windfall of such an approach, these policies seem hostile to property, the constitution, and the public interest. All of these would appear to be negative and undesirable characteristics in a state plan to achieve greater water supply reliability—nonetheless, over the strong objections of countless stakeholders, this is the unfortunate direction the plan has taken.

6. Comment #6: Subject to reasonable protections including environmental, third-party, agricultural, groundwater, area of origin, and in-basin impacts, past droughts and water shortages show voluntary water transfers that protect underlying water rights *can be* a key component to achieve greater water supply reliability. Unfortunately, instead of seeking ways to facilitate functional water markets, the Delta Plan has devised an elaborate new layer of bureaucratic reviews, appeals, consistency findings, and related planning and reporting that will now stand in the way of future water transfers and the ultimate goal of greater water supply reliability.

7. Comment #7: The proposed Delta Plan, in Water Reliability Recommendations 4 and 5, attempts to add to urban and agricultural water management plans a new Water Supply Reliability element that is not a part of existing law. This includes a recommendation that the Department of Water Resources promulgate Water Supply Reliability Element Guidelines. Since none of the proposed components, other than tiered pricing of water, is required content in an agricultural water management plan under existing law, we view the Water Reliability Elements proposed in WR R4 and WR R5 as generally inappropriate for agricultural water suppliers.

8. Comment #8: Similar to WR R4 and R5, the provisions of WR R9 and R11 appear to exceed the scope of any existing law relating to required contents for DWR's Bulletin No. 118 updates or local groundwater management. In particular, the suggestion that the State Water Resources Control Board should pursue actions to restrict groundwater use as an "unreasonable use," where local groundwater users cannot "develop and implement a ***sustainable*** groundwater management plan, consistent with both the required and recommended components of local groundwater management plans […] by December 31, 2014" is extremely overreaching, needlessly aggressive, and unprecedented. There is no definition of the term "sustainable," either in the Plan or in existing law pertaining to groundwater management in California—and no legal precedent that to prepare and implement a local groundwater management plan, or a failure to achieve some subjective measure of "sustainability" would somehow constitute an actionable "unreasonable use" of water.

9. Comment #9: Water Supply Reliability Recommendation 13 on surface water storage (to "complete surface water storage investigations of proposed off-stream surface storage projects by December 31, 2012, including an evaluation of potential additional benefits of integrating operations of new storage with proposed Delta conveyance improvements," and "recommend the critical projects that need to be implemented to expand the State's surface storage") does little or nothing to move the

state toward completion of new facilities to help achieve the Delta Plan's "water supply reliability" goal. In essence, this policy does little more than to prolong the *status quo*—whereas the *status quo* on new surface water storage has been characterized an almost complete lack of forward movement over the last 20 years. The plan's failure to offer more robust measures or policies in the area of new surface water storage, and the decision to instead default to an unacceptable *status quo*, essentially takes this indispensable tool in the toolkit of California's water future off the table. Here as elsewhere, the Plan's lack of vision and leadership in this critical area again ensures a prolongation of the current era of water shortage and conflict.

10. Comment #10: Aside from the proposed timeframe, which we view as unachievable, Ecosystem Restoration Policy 1's requirement that the State Water Resources Control "[d]evelop[], implement[] and enforce[] new and updated flow objectives for the Delta and high priority tributaries […] ***necessary to achieve the coequal goals***" is an extremely vague formulation. First, it assumes that the coequal goals ***can be*** achieved through the setting of such new flow standards. Second, even supposing that this first assumption is correct, it further assumes that the amount of flow to be established in such new flow standards can be determined and established in isolation from other fundamental limitations, including the need to balance public trust and fish and wildlife needs against other beneficial uses such as agriculture, associated economic impacts, and the broader public interest. To avoid such awkward and possibly false suppositions, we suggest the policy refer not to the amount of flow "necessary to achieve the coequal goals," but rather to the amount of flow *required by law*, consistent with the Water Code, the State Water Resources Control Board's statutory authorities, and a public process including appropriate water rights proceedings to review and potentially amend existing water quality standards under California's Porter-Cologne Act and other applicable laws, precedents, and regulations. Again, this is apart from the suggested 2014 and 2018 timeframes referenced in ER P1, which we have commented upon previously and consider to be unreasonable.

11. Comment #11: Delta Protection Recommendation 4 refers to acquisition of lands from willing sellers "when feasible." We believe this recommendation should be strengthened by making it a policy, and also by replacing the phrase "when feasible" with a requirement that lands be acquired, in every instance, from willing sellers "unless shown to be infeasible." Alternately, short of this stronger approach as our first preference, the Council might also consider: (1) simply making the current "recommendation" a "policy" as is; or (2) retaining the recommendation as a "recommendation," but otherwise substituting the stronger "unless shown to infeasible" formulation for the weaker "when feasible." Another related and no less

important distinction here is the ER R4's reference to land acquisition for "water management facilities, ecosystem restoration, and flood management infrastructure." If the intent here is that an exercise of the power of eminent domain would be considered *only* for where there is no willing seller or feasible alternative, and *only for infrastructure*, then this is at least generally consistent with past representations we have heard in BDCP and from DWR. If, on the other hand, there is any thought that the state's powers of eminent domain would be invoked, not for "infrastructure" (e.g., a fish ladder or weir, etc.), but rather to acquire lands for restoration to habitat, then this would be a significant departure from past commitments. Consistent with past representations, our most strenuous recommendation here would be that ER R4 clarify that lands would not be acquired by eminent domain for "ecosystem restoration" purposes alone, as opposed to some specific form infrastructure for whose siting there is no willing seller and no possible, feasible alternative. On the other hand, if the Council's intent is that land might be acquired by eminent domain for restoration purposes alone, then this is a major shift in past policy, and one that should be very prominently spelled out. Either way, this issue is a significant one that warrants express clarification—not only as part of the Council's final Plan, but also in the Council's and the State of California's deliberations and discussions with affected stakeholders.

12. Comment #12: The language in Delta Protection Policy 1 referring to city and county general plans and "[n]ew urban development, including residential, commercial, and industrial uses (***other than commercial recreational visitor-serving uses or facilities for processing of local crops or that provide essential services to local farms***)" is an appreciated and necessary provision, consistent with the Council's charge that the Delta Plan protect and preserve the unique agricultural and recreational values of the Delta, as an evolving place. However, it is also possible that some agricultural processing facilities, including shipping and packing facilities could process some non-local agricultural commodities or products, or provide service to both within and outside of the immediate Delta area and yet also contribute to vitality and wellbeing of the Delta region's agricultural economy. Therefore, while we commend the Council for the apparent good will gesture that motivates this language, we would also ask the Council to consider the possibility that the noted restriction to exclusive "local crops" and "local farms" may ignore possible interregional connections to the Central Valley's broader agricultural economy.

13. Comment #13: Water Quality Recommendation 1 ("Protect Beneficial Uses") currently reads as follows: "Water quality in the Delta should be maintained at a level that supports, enhances and protects beneficial uses identified in the applicable State Water Resources Control Board or regional water quality control board water

quality control plans." This "recommendation" should not be a "recommendation," but rather a "policy." In essence, the recommendation restates existing law. Therefore, it should be non-controversial to make it a "policy" and not a "recommendation."

14. Comment #14: Chapter 6 (the "Water Quality" chapter) is characterized by the directive "Improve Water Quality to Improve Human Health and the Environment." What this misses is the equally important legal requirement to protect, not only "human health" (i.e., drinking water) and "the environment" (i.e., fish and wildlife and other public trust uses), but also other designated "beneficial uses," including "irrigation." (See related comment, under Comment #13 above.)

15. Comment #15: The Council should add two important new policies to the "Risk Reduction" (levees) chapter: First, a policy or at least a "recommendation" to continue to fund the state's critically important Levee Subventions and Special Delta Projects programs, unless and until these programs are replaced by some other program or mechanism to meet the needs that are currently addressed through these existing programs. Secondly, the Delta Plan should broaden its universe of geometric standards and preferred levels of protection for Delta Levees by following the recommendations in the Delta Protection Commission Economic Sustainability Plan to consider a new "fat levee" standard, as a potentially promising option for protection of homes, lands, assets, revenues, property, roads, and other critical infrastructure in the Delta, including potential seismic threats to Delta levees.

Thank you for this opportunity comment on the Council's Final Staff Draft Delta Plan.

Very truly yours,

Justin E. Fredrickson
Environmental Policy Analyst

JEF/pkh
Attachment