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SENT VIA EMAIL (deltaplancomment@deltacouncil.ca.gov)

Ms. Terry Macaulay
Deputy Executive Officer, Strategic Planning
Delta Stewardship Council
650 Capitol Mall
Sacramento, CA 95814

Re: LAND Comments on Fourth Staff Draft Delta Plan

Dear Ms. Macaulay:

These comments are submitted on behalf of Local Agencies of the North Delta (“LAND”), which is a coalition comprised of reclamation and water districts in the northern geographic area of the Delta.¹ LAND participant Agencies have concerns about how the Delta Stewardship Plan (“Plan”) may eventually impact provision of water, and/or, drainage and flood control services to landowners within their respective districts, and wish to consult with the Delta Stewardship Council (“Council”) on these and related issues. (Water Code, § 85300, subd. (b).) These comments are offered in an attempt to promote development of a Plan that meets statutorily mandated legacy community, sustainable agricultural, economic, environmental and other values as the Council pursues its broader co-equal goals.

Chapter 1: The Delta Plan

General Comments

The Fourth Draft of the Delta Plan continues to overstate the risk of catastrophic failures in the Delta with respect to many islands in the north Delta, which are not comprised of peat, have levees in better condition than many other areas, and are not significantly

¹ / Current LAND participants include: Reclamation Districts 3, 150, 551, 554 and 999. Some of these agencies provide both water delivery and drainage services, while others only provide drainage services. These districts also assist in the maintenance of the levees that provide flood protection to homes and farms.

below sea level. Moreover, continued farming anywhere in the Delta is not at risk even in the event of levee failures, *if the levees are ultimately repaired.*

With respect to the continued overstatement of existing risks in the Delta related to levees, we recommend that Council staff review the information provided on pages 33-64 of the Delta Protection Commission's recently released Draft Delta Economic Sustainability Plan. (Available at: <http://www.delta.ca.gov/res/docs/Draft%20ESP%20June%202023.pdf>.)

We appreciate the changes to Chapter 1 that better recognize that the existing Delta already has significant habitat values (pp. 14-21) and continuing to consider the entire Delta watershed for purposes of improving conditions for at risk species (pp. 14-21).

While Chapter 8 now recognizes that agriculture must be protected, consistent with SB 7x1 (p. 156), that essential point should also be included in Chapter 1.

We also continue to be concerned that the Plan continues to blindly promote completion of the Bay Delta Conservation Plan ("BDCP") as a panacea for the problems of the Delta. (See e.g., pp. 48, 170.) In particular, and notwithstanding the explanation provided in Appendix A of the Fourth Draft, we still believe that the Council should make general recommendations on conveyance options that would meet the coequal goals. As written, Plan policies and recommendations address parts of the BDCP (e.g., Chapter 5 addresses habitat creation), but do not provide any guidance on the most potentially deleterious aspects of the BDCP (e.g., new isolated conveyance). The BDCP does not have statutory responsibility for meeting the coequal goals; only the Council can provide guidance on how conveyance could be improved in the context of achieving the coequal goals "in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place (Wat. Code, § 85054).

Chapter 3: Governance

General Comments

We continue to be concerned with the Plan's approach to Governance in restricting the ability of local agencies to continue to provide essential services and for Delta communities to prosper.

Specific Comments

Draft 4, pp. 43-47: Submission of Certification for Proposed Covered Actions.

This section is clearer than in the Third Draft, but we are still concerned that too many normal, local projects could be considered covered actions, thereby interfering with the sustainability of Delta communities and the functionality of local governments.

As a particular example, it does not appear reasonable for Delta local governments to submit all of their ordinances for certification. (p. 45, lines 4-5.) Nothing in the authorizing statute requires or even permits the Council to supersede the land use authority of local governments. Rather, the Council should focus its efforts on consistency of covered actions going forward. Neither the Council nor local governments have the staff or resources to deal with such a consistency process for the myriad of local ordinances in any case.

Draft 4, pp. 44-45: Confusion of Delta Reform Act definitions with CEQA terms of art should be avoided.

While the discussion of the relationship of covered actions to the applicability of the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq. (“CEQA”)) to projects within the Plan area has improved, this issue is still far from resolved.

CEQA is a complex body of law, including the statute itself, state regulations (the “CEQA Guidelines”), as well as locally adopted CEQA guidelines and thresholds. Local lead agencies are in the best position to apply CEQA, including making determinations regarding exemptions from CEQA. To the extent it is necessary to provide a further definition of “significant impact” for purposes of determining whether an action is a project for which a consistency determination is required, the Plan should do so without confusing the use of the same term of art (“significant impact”) as defined by CEQA law. The current definition also uses several other terms of art used in CEQA: “substantial change in existing conditions that is directly, indirectly or cumulatively caused by a project that will affect...” (Fourth Draft, p. 44, lines 19-21.) Such overlapping language should be avoided unless the Council intends for those terms to have the same definitions as they do in CEQA.

It is also worth noting that under CEQA, a project’s consistency with applicable plans must analyzed (see, e.g., CEQA Guidelines, Appendix G, § X(b); thus CEQA review for projects would already include analysis of consistency with the Delta Plan even if the project is not a covered action.

Due to the complexity of issues surrounding the proper relationship of the Plan to CEQA, it is recommended that these issues be addressed further in a focus or work group.

Draft 4, pp. 44-45: Appropriate projects should not be considered covered actions.

LAND continues to support the Council's consideration excluding projects that local lead agencies have determined to be exempt from CEQA from the definition of a covered action. (See Pub. Resources Code, §§ 21080, subd. (b), 21080.01-21080.08, 21080.7-21080.33, 21084, subd. (a), CEQA Guidelines, § 15061, 15260-15285, 15300-15332.) Exempt projects have been selected by the Legislature and the Resources Agency pursuant to CEQA, and are unlikely have "a significant impact on achievement of one or both of the coequal goals." This approach would provide local planning staff with better clarity regarding when consistency determinations are necessary. The types of projects subject to CEQA exemptions are described in the CEQA statute itself, in the CEQA Guidelines, in other statutes, and in the associated body of case law. It is not necessary, and would actually create further confusion, for the Council to try to provide a list or description of projects exempt from CEQA (p. 25, lines 11-13); the Plan should simply rely on the local lead agency's determination regarding a project's exemption from CEQA.

List of potential local projects that should not be covered actions:

At the Council's June 23, 2011 meeting, the Council Chair requested that local governments provide a list of the types of local projects for which a consistency certification should not be necessary. Examples of such projects include:

- Co-location of existing water intakes;
- Screening of existing water intakes;
- Second dwelling units for agriculturally zoned parcels, as permitted by the local land use jurisdiction;
- Major repairs to levees (beyond routine maintenance);
- Road and other existing infrastructure maintenance; and
- Construction of farm related buildings and agricultural product processing facilities.

While it is likely these types of actions would not rise to the level of having a significant impact on achievement of the coequal goals in the first place, it would be helpful for the Council to clarify that these types of actions would not require a certification of consistency.

Chapter 4: Manage Water Resources

General Comments

The Fourth Draft Plan includes appropriate emphasis on improving regional self-sufficiency, which is the keystone of a sustainable water future for the state.

It is still unclear, however, whether the policies in this chapter are appropriately applied to existing diversions in the Delta for in-Delta use. Because these uses are within the region where the water is located they are already regionally self-reliant; it is not clear that the same policies as are applied to areas receiving water exported from the Delta (not regionally self-reliant) should apply to new in-Delta diversions (regionally self-reliant). While all water users must use water reasonably, those using water within their own watershed should not be subject to the same requirements and those relying on exported water. This is especially important when considering new requirements for small entities in rural areas.

Specific Comments

Draft 4, p. 65, WR R3 as amended on 9/22/11: In-Delta diversions are already regionally self-reliant.

WR R3 was amended in the Fourth Draft to include a requirement for new water diversions for use in the Delta to demonstrate the evaluation and implementation of all of other water supply alternatives. The policy objective this recommendation implements is “improved regional water self-reliance.” It is unclear why such a demonstration would be required for new water diversions that would be used within the Delta watershed, and are therefore consistent with regional water self-reliance.

Draft 4, p. 48: Conveyance Policies and Recommendations are Needed

As discussed above, the Council should give at least general direction to the BDCP and any future process on conveyance, as it does for ecosystem restoration (Chapter 5). The Plan should provide some policy direction for the development of improved conveyance that: (1) recognizes that conveyance may come in many forms (i.e., may not include an actual tunnel or canal); and (2) should not substitute one co-equal goal (restoring the Delta) for another (reliable water supply). On this second point, specific policies could include:

- Conveyance should not simply relocate environmental, species and water quality problems to new places but instead should provide improvements in

- conditions throughout the Delta;
- Any change in diversion point for new conveyance must not injure any legal user of water;
 - Conveyance should not interfere with the ability to restore Delta ecosystems;
 - A broad spectrum of conveyance options should be evaluated prior to selection of any option. Examples include continuing through Delta (and screening the current intakes) as well as a west Delta island based intake. (Note that the Council does not have to prefer any of these options but should provide leadership on the issue of at least considering these options as possible projects.)

Chapter 5: Ecosystem Restoration

General Comments

LAND continues to be concerned that ecosystem restoration be conducted in a manner that does not interfere with existing agriculture and communities in the Delta. Moreover, any burdens from creation of habitat should be borne by the habitat projects, not neighboring landowners. (See, e.g., Land Use Policy P-3 of the LURMP, available at: <http://www.delta.ca.gov/res/docs/MP-Land%20Use.pdf>.) A similar policy should also be adopted by the Council.

Specific Comments

Draft 4, p. 91, ER P3 as amended on 9/22/11: Delta legacy communities should be treated the same as incorporated cities.

The Fourth Draft excludes existing cities/spheres of influence from the requirement to demonstrate that a covered action avoids impacts on habitat restoration opportunities. This exclusion should also apply to legacy communities in unincorporated areas. Adequate land exists for habitat restoration without infringing on existing legacy communities.

Draft 4, pp. 91, 93 ER P4 and ER R4: Recognition that setback levees are not feasible in many areas.

The caveat of setback levees “*where feasible*” has returned in the Fourth Draft, which accounts for the real possibility that site constraints often make setback levees infeasible. LAND appreciates this clarification in the Plan. Setback levees may have advantages in

the upper watershed, but the conditions of the Delta often obviate any ecological benefits from these engineered features.

Draft 4, p. 94, ER P5: Approach to Corps' vegetation policy is beneficial.

We appreciate the addition of the policy regarding the need to exempt the Delta from the Corps' misguided vegetation policy.

Draft 4, pp. 92-93, ER R3: Policies regarding use of eminent domain are still needed.

The Council still needs to direct that the Delta Conservancy Strategic Plan preclude use of eminent domain to obtain habitat and include strong policies to coordinate with local agencies and landowners in planning and implementing habitat projects. It should be noted that while the Delta Conservancy itself may not exercise eminent domain (Wat. Code, § 32370), it appears that other entities could exercise eminent domain and then convey the land to the Delta Conservancy. Thus, there is not existing statutory protection against use of eminent domain for acquisition of land for habitat creation/restoration.

The fifth bullet under ER R3 refers to development of a plan and a protocol for acquiring necessary land for ecosystem restoration. This is inadequate to address the concerns regarding use of eminent domain for habitat projects. As explained previously, a sub-recommendation should be added to preclude use of eminent domain for habitat projects. Local Habitat Conservation Plans ("HCPs") do not allow condemnation of land for the simple reason that these lands are already managed effectively by local residents and their support is needed to maintain the conservation benefits.

Chapter 6: Improve Water Quality

General Comments

The role of sustainable agricultural practices as a means to improve water quality still is not recognized in this Chapter. Policies applicable to all users of water that originated in the Delta should be included in the Plan.

As explained in previous comments, the co-equal goals cannot be met without a concerted and implementable sustainability strategy. The Plan should include policies to promote these and other sustainable practices in the Delta, upstream of the Delta, *as well as in areas that rely on water exported from the Delta.*

Chapter 7: Reduce Delta Flood Risk to People, Property, and State Interests

General Comments

The Fourth Draft Plan continues to include numerous policies to restrict development within the Delta with the ostensible goal of reducing risks. However, as has been explained by LAND as well as other local governments previously, development within the Delta is already severely limited by existing state and local requirements. Moreover, there are many more effective means to reduce risk than preventing quite minimal agriculturally-related development.

Specific Comments

Draft 4, p. 139, Figure 7-2

LAND objects to inclusion of this figure in the Plan. It presents an unrealistic and worst case picture of the risks associated with levee failures. Moreover, even if the figure is reliable, further study directed by the same authors indicates that the Delta would flush and restore its freshwater character in a relatively short time period, which is an important factor to consider in the context of assessing risks to water supply posed by earthquakes.

Draft 4, pp. 140-141, RR P3, as amended in Redline Comparison Table dated 7/22/11: Policies regarding levee classifications should take into account existing land uses and the feasibility of major levee upgrades.

While the revised table is somewhat improved, there are still many questions about how it would work in practice. In particular, the table appears to include activities that are not covered actions. While LAND initially appreciated the clarification that agriculture may occur within Class 1 levees (which may have been a typo according to today's discussion), ongoing agriculture or even a new agricultural should not be a covered action in the first place.

The revised version of Table 7-1 also includes a new column for "Legacy Towns". As explained previously, agricultural zoning in the Primary Zone of the Delta generally allows for a second home to be built on the same parcel. Such second homes are helpful in maintaining multi-generational family farms as well as providing security against increasingly brazen thievery of copper wire and other valuable commodities from farm related equipment, such as pumps. Table 7-1 should clarify what type of development that would also be a covered action that it is attempting to regulate and second homes that would not otherwise be covered actions should clearly not be subject to the restrictions in

Table 7-1. If a separate column for Legacy Towns is to be used, the type of development being limited should be clarified.

With respect to the timing of implementation of RR P3, a reasonable amount of time should be provided for all covered actions to come into conformance with the final version of Table 7-1. It is unclear why actions within Class 5 levees would have until 2025 to comply while actions within other types of levees would have no time to comply.

The Council should also be aware that its ability to impose new development restrictions on land within the Delta is not unfettered. Even where a regulation is a valid exercise of police power, a regulation that deprives an owner of all economically beneficial uses of land constitutes a taking unless the proscribed use interests were not part of the title to begin with. (See, e.g., *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003.)

Due to the complexity of these issues and the need for close consultation with local governments with land use jurisdiction over the Delta, it is recommended that development of restrictions on development projects constituting covered actions as a means to reduce risk be addressed in a focus or work group.

Draft 4, RR R4 (previously RR P5), as amended in Redline Comparison Table dated 7/22/11: It is not feasible for all actions on the on the land side of the levee to demonstrate adequate area for a setback levee pending further guidance in the future.

This recommendation is an onerous and unreasonable from an economic, as well as implementation perspective. While only a recommendation now, RR R4 appears to recommend that all such actions wait an unspecified length of time for future locations for setback levees to be defined. Implementation of this recommendation would interfere with ongoing activities in the Delta that are essential to protecting and enhancing the regional agricultural values. This requirement as written remains unnecessary and unimplementable.

Draft 4, RR R5 (formerly RR P4), p. 143, as amended in Redline Comparison Table dated 7/22/11: Investment priorities should not be designed to foreclose investment in locally important levee systems.

While the amended version of RR R5 now delegates prioritization of levee investments to the Department of Water Resources, there is still no recognition of the need for maintenance of levees to protect and enhance agricultural values and protect legacy

communities. This recommendation should acknowledge the need to also prioritize flood protection for such ongoing uses.

Draft 4, RR R9 (formerly RR R7), p. 146, as amended in Redline Comparison Table dated 7/22/11: Any new Flood Control District should not detract from funding of existing districts with flood control and related responsibilities.

It is still not clear that a new entity with taxation powers is necessary or would not be duplicative of functions already being carried out by local reclamation districts. From the local agency perspective, the primary improvement in the process would come from better coordination between the existing participants and streamlining of documentation requirements, not creation of a new layer of bureaucracy.

A key question that would arise in the implementation of fee assessment is the scope of the geographic area subject to the assessment. LAND appreciates the reference to water exporters as beneficiaries of maintaining the levees.

While LAND appreciates the addition of the reference to cooperation with existing reclamation districts, this should be a requirement, not merely a suggestion.

Chapter 8: Protect and Enhance the Unique Cultural, Recreational, Natural Resources, and Agricultural Values of the California Delta as an Evolving Place

General Comments

LAND continues to suggest the Council's promotion of special agricultural districts to protect and enhance Delta agriculture. Conferring with the Delta County Agricultural commissioners for recommendations regarding policies that would promote the Delta's agricultural values would also be helpful.

Specific Comments

Draft 4, p. 163, Outcome Performance Measures

The first bullet point refers to "maintaining" gross revenues from the Delta's agricultural sector. The legislative mandate is actually to protect and enhance Delta agriculture. Therefore this performance measure should be for Delta agricultural revenues to increase in the future, not just be maintained.

Chapter 9: Finance Plan to Support Coequal Goals

Draft 4, FP R12 (formerly DP R3), p. 158, as amended in Redline Comparison Table dated 7/22/11: The Council should require payment of in-lieu taxes and assessments for Delta Plan consistency.

This policy recommends that the Legislature consider a requirement for payment of in-lieu taxes to replace revenues lost through ecosystem restoration and new water supply projects. Instead of punting to the Legislature, the Council should consider inclusion of a policy requiring payment of in-lieu taxes and assessments for an action to be determined consistent with the Delta Plan. Such payments are essential to protecting and enhancing the unique cultural, recreational, natural resources, and agricultural resources of the Delta as an evolving place.

Draft 4, p. 168, Guiding Principles

The third bullet in this list refers to a “stressor pays” principle. While the reference to pesticides (and other contaminants) is appropriate, this bullet should also refer to stressors on fish caused by reduced flows as well as entrainment and entrapment in major water diversion facilities. This major stressor has been recognized by the state and federal courts with respect to CVP’s and SWP’s south Delta facilities, and would also occur as a result of construction of new diversion facilities in the north Delta.

The sixth bullet refers to targeted finance plans for “major” Delta Plan activities. Targeted plans should also be prepared to finance protecting and enhancing the unique cultural, recreational, natural resources, and agricultural resources of the Delta as an evolving place.

* * *

Thank you for considering these comments on the Fourth Draft of the Plan. We look forward to continued collaboration with the Council and staff, including participation in focus or work groups, as the Plan progresses.

Very truly yours,

SOLURI MESERVE
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By: /s/
Osha R. Meserve

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cc: Steering Committee, Local Agencies of the North Delta