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**Subject:** Comments on Modified Rulemaking Package  
**Date:** Monday, April 22, 2013 6:00:48 PM  
**Attachments:** [LAND Comments on Mod. Rulemaking 4.22.13.pdf](#)

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Dear Cindy,

Here are LAND's comments on the modified package. I did not see any notice regarding an extension of the deadline on comments due to the unavailability of Form 399 on the Council's website. It also does not appear that the revised Form 399 is posted yet. Please advise if I am mistaken.

Thanks,

Osha

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April 22, 2013

VIA EMAIL: [modifiedrulemakingprocess.comment@deltacouncil.ca.gov](mailto:modifiedrulemakingprocess.comment@deltacouncil.ca.gov)

Ms. Cindy Messer, Delta Plan Program Manager  
Delta Stewardship Council  
980 Ninth Street, Suite 1500  
Sacramento, CA 95814

Re: Comments on Modified Rulemaking Package

Dear Ms. Messer:

Local Agencies of the North Delta (“LAND”)<sup>1</sup> previously submitted comments on the Rulemaking Package and Economic Analysis. While there have been some improvements, the Rulemaking Package is still not the least burdensome, effective alternative. Furthermore, changes to several of the proposed regulations appear to be substantive in nature, necessitating further public review prior to adoption. (See Gov. Code, § 11346.8, subd. (c).) For these reasons, LAND requests that the Delta Stewardship Council (“Council”) revise the Rulemaking Package to conform with applicable requirements prior to adoption and provide the public with an adequate opportunity to review and comment on those changes.

### **Comments on Cost Analysis and Economic Impacts of Rulemaking Package**

LAND remains concerned that the Cost Analysis still does not accurately reflect the likely costs of implementing the Rulemaking Package, which will place severe burdens on local districts in the Delta. (Gov. Code, §§ 11346.3, 11346.5.) We were also disappointed that the revised Economic Impact Statement (“Form 399”) was not made available on the Council’s website, and ultimately had to be physically retrieved from the Council’s office. As a regulatory process with stakeholders throughout the state, the entire rulemaking file should have been available online, or at least provided via email upon request.

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<sup>1</sup> LAND is a coalition comprised of reclamation, water and levee maintenance districts covering about 100,000 acres in the northern geographic area of the Delta. LAND participants include: Reclamation Districts 3, 150, 307, 317, 349, 407, 551, 554, 556, 563, 744, 755, 813, 999, 1002, 2011, 2067 and the Brannon-Andrus Levee Maintenance District. 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.

The Cost Analysis now claims that the annual costs of implementing the Delta Plan will be less than \$10 million. (Form 399, p. 1.) A clear explanation of how those costs were derived in the first place or how they were reduced from an estimated high of \$12.1 million in the November 2012 draft Rulemaking Package is not provided. This contravenes basic requirements for a valid rulemaking.

The Cost Analysis and Form 399 also continue to ignore the restrictions on public agencies imposed by Proposition 218. (See, e.g., Cost Analysis, pp. 7-8 and Appendix B.) Specifically, Proposition 218 establishes limitations on the levy of assessments as follows: (a) assessments may only be imposed upon parcels which receive a special benefit beyond the general benefits conferred on property within a special district as a result of the public improvement or service; (b) the charge to each parcel may not exceed the reasonable cost of the proportional special benefit conferred on that parcel; and (c) the special district must allocate costs between special and general benefits, and cannot use assessments to recover the proportionate cost attributable to the general benefit. (Art. XIII D, § 4, subd. (a).)

The inability of special districts to recover costs associated with the proposed Rulemaking Package should be recognized. Most critically, the inability to pass costs onto landowners within special districts for analysis and construction of setback levees should be disclosed for *Policy § 5008: Expand Floodplains and Riparian Habitats in Levee Projects*. This is because no benefits would be conferred to assessed parcels from setback levees. Instead, setback levees would likely remove from production the very farmland subject to assessment and diminish the number of acres within the district that can be assessed for fees. While it may be true that a special district could potentially show that a setback levee is ultimately infeasible because of the increased cost, providing that analysis is itself costly. Thus, if there is no mechanism to fund the setback levee, such a project is *per se* infeasible and no further analysis should be required.

Attachment 1 to Form 399 is also misleading in that it states that the “Delta Plan policies are expected to provide long-term benefits in protecting agriculture . . . .” (See p. 2.) As a coalition of special districts serving primarily family-operated farms in the Delta, it is clear that Delta Plan regulations *do not* protect agriculture in the Delta. To the contrary, the Delta Plan regulations make continuing agricultural activities *more difficult* in the Delta. This increased difficulty stems from Plan components that: (1) place additional restrictions and regulatory processes on continuing agricultural activities in the Delta; (2) promote conversion of agricultural lands to habitat, thereby reducing the economic viability of specialty crops grown in the Delta; and (3) promote completion of the Bay Delta “Conservation” Plan, which includes massive new diversion facilities in the north Delta that will convert nearly 5,000 acres of farmland and hinder availability of fresh water for agricultural use within the Delta. While we appreciate changes to the Plan over time making it *somewhat less destructive* and *interfere less* with existing agriculture

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in the Delta, the Delta Plan and the Rulemaking Package cannot fairly be interpreted to “protect agriculture” in the Delta. Attachment 1 should be revised to state that the Plan attempts to protect water supplies for agriculture that is reliant on water exported from the Delta (or something similar).

Generally, the Cost Analysis and Form 399 still do not provide a foundation for its conclusions regarding the costs of implementing the Rulemaking Package. This analysis should be corrected and made available on the Council’s website prior to adoption of the Rulemaking Package. A thorough analysis and public disclosure of these costs is necessary to informed decisionmaking as well as a valid set of regulations.

\* \* \*

Thank you for considering these comments; we are available to consult further regarding any questions staff may have about them.

Very truly yours,

**SOLURI MESERVE**  
A Law Corporation

By:   
Osha R. Meserve