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DELTA STEWARDSHIP COUNCIL

A California State Agency

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May 31, 2011

Dr. Jerry Meral, Deputy Secretary
California Natural Resources Agency
1416 Ninth Street, Suite 1311
Sacramento, California 95814

Dear Dr. Meral:

Several questions about the Delta Stewardship Council (Council) and its relationship to, and implications for, the Bay Delta Conservation Plan (BDCP) have been raised in recent weeks. It seemed the best way to clarify issues was in writing, hence this letter.

Council Relationship to BDCP

The governing statute of the Council assigns it three roles in relationship to BDCP. The first two roles – as a responsible agency under the California Environmental Quality Act (CEQA) and as a party to be consulted with in development of the BDCP– are relatively straightforward. A third role is that of a potential appellate body (see Water Code Sections 85320-85322). The operative section of law is as follows:

"(e) If the Department of Fish and Game approves the BDCP as a natural community conservation plan pursuant to Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code and determines that the BDCP meets the requirements of this section, and the BDCP has been approved as a habitat conservation plan pursuant to the federal Endangered Species Action (16 U.S.C. Section 1531 et seq.), the council shall incorporate the BDCP into the Delta Plan. ***The Department of Fish and Game's determination that the BDCP has met the requirements of this section may be appealed to the council."*** Water Code Sec. 85320 (emphasis added)

This section requires the Council to hear an appeal of the Fish and Game determination relative to BDCP. In anticipation of this possibility the Council adopted specific language in its Administrative Procedures Governing Appeals in September 2010. These provisions have the force of law.

During the months of deliberation on its Administrative Appeals process, the Council discussed an option that would allow it to conduct a *de novo* review, essentially to hear the issue anew, in its entirety, and without limits. The Council rejected that option. Some parties at that time suggested that the Council limit its review to "substantial evidence", the lowest possible level of review considered, suggesting that the Council automatically follow the decision of the Department of Fish and Game if any evidence in the Department's own record supported its

decision. The Council rejected that option as well, which one Council member suggested was a 'potted plant' standard, because it appeared to us to be inconsistent with the statute. Ultimately, the Council adopted a mid-course measure:

> *"23. The council shall determine,* ***based upon a preponderance of the evidence,*** *whether the department correctly determined that the BDCP meets all of the requirements of Water Code section 85320 for inclusion in the Delta Plan.* ***In reaching its decision, the council shall give weight to the reasoning and factual findings of the department.*** *The council may seek clarification from the department of its reasoning and factual findings prior to the council making its final determination."* DSC Administrative Procedures, Rule 23 (emphasis added)

Some now argue that the Legislature must have intended an idle act by granting appellate rights to the Council. This assertion suggests that a 53-page bill – part of a monumental five-bill package hailed by the Governor and legislators as a historic breakthrough on water and Delta policy – deliberately included an idle act, a *pro forma* appeal, is unconvincing. Many of those who complain about the potential appellate role of the Council supported the bill package, and were deeply involved in the drafting and reviewing of bill language. To suggest that the appeal process was a pretense and had no meaning does not pass the blush test. The Council adopted a reasonable middle course.

Reduced Reliance and Water Code Sec. 85021

Some argue that the language of state law regarding decreased reliance on water from the Delta watershed has a very narrow meaning and effect. Here is the entire section at question:

> ***"The policy of the State of California is 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. Each region that depends on water from the Delta watershed shall improve its regional self-reliance*** *for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts"* Water Code Sec. 85021 (emphasis added).

In many previous conversations, certain parties have essentially argued that "reduced reliance" applies only in the distant future. That argument is contrary to the clear language of the statue, and inconsistent with achievement of the coequal goals of the statute. I will attach a copy of a letter I wrote last fall addressing this issue (Attachment 1).

Covered Actions

Concern has been raised about the requirements of the law which imply a review of future actions that are part of BDCP. The BDCP is a major project considering large-scale improvements in water conveyance and large-scale ecosystem restorations in the Delta. When completed, it must be incorporated into the Delta Plan if it meets the requirements of Water Code section 85320. If and when the BDCP is incorporated into the Delta Plan, it becomes part of the Delta Plan and, therefore, part of the basis for future consistency determinations.

With respect to the Council's authority over the BDCP's incorporation into the Delta Plan, the Council is limited to the requirements of Water Code section 85320(e). Thus, pursuant to that statutory provision (and the Council's Procedures Governing Appeals), if the Fish and Game's determination regarding BDCP is appealed to us, the Council's review will be limited to whether Fish and Game correctly determined that the BDCP meets all the requirements of Water Code section 85320 for inclusion in the Delta Plan. If the BDCP is incorporated into the Delta Plan, any projects that are approved as a part of BDCP may be covered actions and therefore require a consistency determination; however, those projects need to certify only that they are the same projects approved as a part of BDCP to be consistent with the Delta Plan.

Another example is a concern expressed by many that the proposed regulatory policy included in the Third Staff Draft (that the Council require all agencies with proposed covered actions to include a regional self-reliance element in future Urban Water Management Plans and Agricultural Water Management Plans) should not apply to transfers of water through, or exports from, the Delta. Many disagree with my stated position that agreements to move water from the Delta are most likely covered actions. The law clearly outlines the definition of covered actions in Water Code 85057.5. It is lengthy so I will summarize:

Covered actions must meet all of the following criteria: 1) not be exempted by the Delta Reform Act, 2) be a "project" as defined by CEQA, 3) occur in whole or in part in the Delta, 4) be carried out, approved or funded by the State or a local public agency, 5) be covered by one or more provisions of the Delta Plan, and 6) have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs. As I have stated previously, I believe most actions to remove water from the Delta meet these tests. Based on the Council's direction, it is difficult to conceive that a water agency that needs to export more water is acting consistently with the Delta Plan if it has failed to implement water conservation programs and/or to generally evaluate local water supply alternatives.

In addition, the Delta Reform Act gives the Council the authority to regulate out-of-Delta water conservation and related actions when they have a direct causal relationship to a "covered action." While I understand the concerns that have been raised with this, in fact, in my view, if the Council chooses not to exercise its authority to regulate those types of out-of-Delta actions, it will severely limit its ability to achieve the co-equal goals, as required by the Delta Reform Act. I have taken the liberty of attaching for your information a more detailed analysis of this issue prepared by our legal staff (Attachment 2).

I hope this information is helpful to you and sheds light on some of the third-party assertions about the Council and the Draft Delta Plan. The Delta Stewardship Council is on record supporting completion of the BDCP as rapidly as possible. The Council believes that adoption of a BDCP that advances the coequal goals and meets the statutory requirements of the Delta Reform Act will be a major step forward.

Our previous "Responsible Agency" comments relative to the BDCP may be found at http://deltacouncil.ca.gov/dsc-comments-bdcp.

In light of the roles we have and because of the importance of BDCP to the Delta, if there are ways we can assist you in development of the BDCP, please let me know.

Sincerely,

Keith G Coolidge

for P. Joseph Grindstaff,
Executive Officer

Attachment 1 – Letter to State and Federal Water Contractors Agency dated Nov. 15, 2010

Attachment 2 – Attorney's Analysis re: The Delta Reform Act gives the Delta Stewardship Council the authority and discretion to regulate out-of-delta water conservation and related actions when those actions have a direct causal relationship to a "covered action."

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DELTA STEWARDSHIP COUNCIL

November 15, 2010

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Mr. Byron M. Buck, Executive Officer
State & Federal Contractors Water Agency
1121 L Street, Suite 802
Sacramento, CA 95814

Dear ~~Mr. Buck~~ Byron:

Thank you for the recent undated letter from the State and Federal Contractors Water Agency (SFCWA) to the Council regarding the September ARCADIS report to the Council. You followed up with a letter on November 2 which addresses some of the same points. I am writing to clarify a few key issues that you raise in those letters. Please note that I am focusing on the larger issues you raised, not each detail mentioned in the letters. In virtually every case, I refer you to the Delta Reform Act itself which is far clearer than you may wish with regard to the Council's role and the Delta Plan.

The Council's Role With Regard to the BDCP

The SFCWA states on the first page of its cover letter that "the emphasis on an assessment of and the resulting comments related to the BDCP steering committee process seems to imply a role for the Council that is much more intrusive than that authorized by the Delta Reform Act (Act)." That statement overlooks the robust role of the Council under the Act.

Under Water Code section 85320 (a), (d) and (e); the Council has a duty to consider, on appeal from a Department of Fish and Game determination, of the BDCP, whether the BDCP is appropriate for incorporation into the Delta Plan. This decision is based on whether the BDCP meets all criteria contained in Water Code section 85320(b). These criteria include whether the BDCP "complies with" all requirements of the Natural Communities Conservation Planning Act (NCCPA) and CEQA, and includes a "comprehensive review and analysis" of multiple components, such as "a reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy the criteria for approval of a natural community conservation plan" and "a reasonable range of Delta conveyance alternatives." (Water Code § 85320(b) (1) and (b) (2).

In addition to questions surrounding the Council's appellate role, the statute designates the Council as a responsible agency, Water Code section 85320 (c). It also expressly mandates that the Department of Water Resources consult with the Council "during the development of the BDCP." Moreover, Water Code § 85320 (d) requires the Council to hold a hearing before it can incorporate the BDCP into the Delta Plan.

All in all, the Council's role with regard to BDCP is robust. I gather you have a different view but the statutory language is clear.

BDCP Compliance with the Act's Co-Equal Goals

The SFCWA letter (on page 3) also takes issue with ARCADIS' conclusion that the BDCP currently does not "appear to consider alternatives that will reduce current levels of reliance on the Delta for water export."

Although you raise legal arguments about the precise meaning of the statute, your implication is clear: you do not believe the BDCP is subject to the coequal goals, and the eight policy objectives outlined in SB 7X 1, and signed into law by Governor Schwarzenegger. Thus, your insistence that the language in Water Code § 85021"The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a strategy of investing in improved regional supplies, conservation and water use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts." does not apply to current water supply needs.

SFCWA's argues that the legislative policy requiring reduced reliance on Delta diversions is inapplicable to the BDCP because it is directed only to *future*, not current, water supply needs. This argument is based on a misunderstanding of the intent and purpose of Water Code § 85021 and the Act as a whole.

The term "future water supply needs" does not just refer to "the increment of increased demands due to population or other growth," as the SFCWA claims (see SFCWA Letter to Council, Oct. 18, 2010).

It is our strong opinion that the phrase includes all current water supply needs *as these needs will continue into the future*. It is impossible to imagine that the broad policy goals of the legislation could be met in any way if Delta exports are not part of the discussion. The sentence under discussion talks about conservation and water use efficiency. Surely that refers to current practices, not "the increment of increased demands due to population or other growth."

Our interpretation is consistent with the overall goals and policies of the Act, which make plain the Legislature's intent to reform *current* unsustainable water uses in the Delta and to protect and restore the Delta ecosystem. For example, the Legislature declared that "[t]he Sacramento-San Joaquin Delta watershed and California's water infrastructure are in crisis and *existing* Delta policies are not sustainable. Resolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources." (Water Code § 85000(a), emphasis added.)

This also comports with the operational reality of having to adapt our current system to a changing climate, the effects of which we are already beginning to experience. For instance, we are already experiencing declining snowpack and the scientific community tells us that climate change models consistently predict a system yield that is likely to significantly decline in the future. Prudent and resilient management must seek to redesign the system in ways that allow for the probability of reduced exports and reduced water available for the ecosystem. It is clear however that the legislature expects our water supply system, and the economy that relies upon it, to be more resilient and <u>less reliant</u> on the Delta. None of those decisions will be easy, but to assert that your clients must automatically receive all the water they currently receive, plus whatever amounts they have reserved for possible future use, regardless of supply, regardless of statewide needs, and regardless of its impacts on the Delta ecosystem (the other coequal goal) is obviously not the intent of the law.

SFCWA Comments Regarding Funding Mechanisms for BDCP

The SFCWA questions ARCADIS' assertion that the BDCP does not currently provide funding assurances as required by the federal habitat conservation planning (HCP) process and the NCCPA. Actually, if the BDCP funding mechanisms are not developed until after the draft BDCP EIR is released; such an approach would be contrary to the federal Endangered Species Act (ESA), the NCCPA, and CEQA. Appropriate funding mechanisms for the BDCP are an essential foundational requirement for its approval as an HCP/NCCP under the federal ESA and the NCCPA, --- not an afterthought.

Miscellaneous SFCWA Comments

Finally, while I agree that it would have been more accurate for the ARCADIS report to qualify that some of its statements referring to unspecified "stakeholders" were referring to "some" rather than "all" BDCP stakeholders, this qualification was clear from the context. In order to avoid any subsequent misunderstandings, however, the Council will direct ARCADIS to make clear in its future reports to the Council whether it is referring to all or only to certain BDCP stakeholders.

Promoting Statewide Water Conservation and Water Use Efficiency and Sustainable Use of Water

In your letter of November 2, you assert that "it is appropriate for the Council's Plan to support this statewide policy by offering technical assistance and encouraging funding and incentives to increase regional water management, it is beyond the Council's mandate to insert itself into what must ultimately remain local water management agency decisions as they work to apply the policy articulated in Water Code § 85021..." The law clearly states in Water Code § 85303 "The Delta Plan shall promote statewide water conservation, water use efficiency, and sustainable use of water."

There is no statutory language that limits the Council to providing only technical advice. . In fact, Water Code § 85308 states "The Delta Plan shall...include quantified or otherwise measurable targets associated with achieving the objectives of the Delta Plan."

It is impossible to develop performance measures without standards to measure performance. The legislature, after long battles, adopted a major urban water conservation plan in 2009. It is useful to remember this provision from the Delta Reform Act of 2009:

"Water Code § 85023. The longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta"

I would expect that the Council would directly seek to prohibit waste or unreasonable use of water, particularly if it occurs in a way which hinders achieving the co-equal goals. It is my intent to recommend to the Council a finding be included in the Delta Plan that failure to implement appropriate water use efficiency and conservation measures should be defined as waste and unreasonable use.

It is always easier to delay hard decisions. The water bill package of 2009 made it clear that delay is no longer an option.

Once again, I thank SFCWA for its input and I hope that this letter clarifies my view of the issues you have raised.

Sincerely,

P. Joseph Grindstaff
Executive Officer

The Delta Reform Act gives the Delta Stewardship Council the authority and discretion to regulate out-of-delta water conservation and related actions when those actions have a direct causal relationship to a "covered action."

The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that will achieve the coequal goals. (Water Code, § 85001(c).) The central enforcement tool available to the Council to meet that mandate is the Delta Reform Act's requirement that "covered actions" be consistent with the Plan. (Water Code, §§ 85225, 85022(a).) The Delta Reform Act provides that a plan, program, or project must at least "in part" occur within the Delta in order for these consistency requirements to apply. (Water Code, § 85057.5(a)(1).) The Act incorporates the California Environmental Quality Act's definition of "project," i.e., "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Water Code, § 85057.5(a); Pub. Resources Code, § 21065.)

As an example, a proposed project involving the export of water from the Delta, such as an increase in the size of existing Delta intakes, will generally be a covered action. The Council can, therefore, regulate that action by requiring it to be consistent with the Plan.[1] Some parties have questioned, however, whether the Council can also require consistency of out-of-Delta actions downstream of the Delta that have a direct relationship to the in-Delta project, such as a Southern California recipient water supplier's failure to conserve water in accordance with the Plan.

The Delta Reform Act provides the Council the authority to adopt Delta Plan requirements that if water supplier recipients of the intake's waters have not been meeting, say, specified water conservation measures, and that failure is a significant cause of the need to increase the size of the intake, then the new intake would be inconsistent with the Delta Plan. The authority is based upon the following reasoning:

1) Pumping water out of the Delta has significant impacts on the Delta's ecosystem and a new intake may be contrary to the statutory goal of "protecting, restoring and enhancing the Delta ecosystem." (Water Code, § 85054.)
2) The intake should nevertheless be allowed if it is needed to achieve the coequal goal of "providing a more reliable water supply for California." (Water Code, § 85054.)
3) However, because in this example the water supply goal could be met through conservation measures provided in the Delta Plan without undermining the ecosystem goal, the expanded intake is not justified and is inconsistent with the Delta Plan.

Various provisions in the Delta Reform Act reinforce this reasoning. First, the Delta Reform Act's directions concerning the content of the Delta Plan indicate that the Council has

[1] Note that if the Bay Delta Conservation Plan (BDCP) expressly includes a project, that project might be a covered action. However, if the BDCP is incorporated into the Delta Plan, then an agency proposing a specific project that is included and adequately described in the BDCP must only file a consistency certification finding that the specific project is the same project that was incorporated into the Delta Plan.

the discretion to reach some water supply reliability actions taken outside of the Delta. Water Code section 85303 mandates that the Delta Plan "shall promote statewide water conservation, water use efficiency, and sustainable use of water." The Delta Plan must also include measures that "promote a more reliable water supply" generally, including addressing the broad issues of meeting needs for reasonable and beneficial uses of water and sustaining the state's economic vitality. (Water Code, § 85302(d).) Some parties have asserted that by using the term "promote," the Legislature intended to limit the Council's out-of-Delta authority to recommendations and similar non-regulatory provisions. They are correct that the term "promote" includes the notion of prodding.[2] However, it also includes promoting by regulating. Thus, the Legislature itself has expressly used the term "promote" to mean "require."[3] In the Delta Reform Act, the Legislature neither limited the term to non-regulatory actions nor required regulatory actions. Rather, it left that determination to the Council's discretion.

Second, the Legislature's use of the phrase "shall promote" in the water supply context contrasts with its discussion of the Plan's out-of Delta reach with regard to ecosystem restoration and flood risk reduction. Ecosystem restoration and flood risk provisions **may** (not shall) reach outside the Delta if they meet specified conditions. (Water Code, §§ 85302(b), 85307(a).) This contrast indicates that the Legislature sought to require the Council to adopt more robust measures concerning out-of-Delta water conservation than out-of-Delta ecosystem or flood risk measures.

Third, the requirement that the Delta Plan address statewide water conservation and water use efficiency in a meaningful way is necessary for the Council to achieve the various policies laid out in the Delta Reform Act. For example, Water Code section 85001(c) declares the intent of the Act is "to provide for a more reliable water supply **for the state** . . ." (See also § 85004(b) [stating that "providing a more reliable water supply for the state" involves a broad set of water efficiency, conservation, and infrastructure projects].) Section 85020 declares the state's policy regarding the Delta to include: "(a) manag[ing] . . . the water resources **of the state** over the long term," "(d) promot[ing] **statewide** water conservation, water use efficiency, and sustainable water use," and "(f) improv[ing] the water conveyance system and expand[ing] **statewide** water storage." The Legislature goes on to explain that these objectives are not directed to an advisory body. Rather, it expressly "(h) establish[ed] a new governance structure with the **authority**, responsibility, accountability, scientific support, and adequate and secure funding **to achieve these objectives**."

In addition, section 85021 declares that the state's policy is "to reduce reliance on the Delta in meeting **California's future water supply needs** through a **statewide strategy** of

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[2] The Merriam-Webster Online Dictionary defines "promote" as follows:

1. a: to advance in station, rank, or honor : raise; b : to change (a pawn) into a piece in chess by moving to the eighth rank; c : to advance (a student) from one grade to the next higher grade.
2. a: to contribute to the growth or prosperity of : further <promote international understanding>; b: to help bring (as an enterprise) into being : launch; c: to present (merchandise) for buyer acceptance through advertising, publicity, or discounting.

[3] "The state department, shall **promote** safety by **requiring** that licensed health facilities that have surgical suites and procedural rooms provide information and training in fire and panic safety in oxygen rich environments, including equipment, safety, and emergency plans, as part of an orientation for new employees, and ongoing inservice training." (Health & Saf. Code § 1276.3(b) (1); emphasis added.)

investing in improved regional supplies, conservation, and water use efficiency." That section also mandates that "[e]ach **region that depends on water from the Delta watershed shall** improve its regional self-reliance." Thus, the Act itself includes a mandate that regions outside of the Delta take actions outside of the Delta in order to achieve the coequal goals. Finally, section 85023 provides that the public trust doctrine and the constitutional principle of reasonable use are the foundation of state water management policy. The requirement that the Council construct a Delta Plan capable of meeting the Delta Reform Act's ambitious statewide water policies is incompatible with an interpretation of the Act that limits the Council's regulatory authority to actions occurring within the Delta.

The Delta Reform Act therefore gives the Council the authority and discretion to regulate out-of-Delta water conservation and related actions when those actions have a direct causal relationship to the action within the Delta, i.e., that the out-of-Delta action significantly causes the need for the in-Delta action. Should the Council not regulate those out-of-Delta actions, its ability to meet the Delta Reform Act's mandates and goals relating to water conservation, efficiency, and sustainable use, and ultimately its ability to achieve the coequal goal of statewide water supply reliability, would be seriously limited.