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January 10, 2011

Ms. Terry Macaulay  
Deputy Executive Officer  
Delta Stewardship Council  
980 Ninth Street, Suite 1500  
Sacramento, CA 95814  
Via E-Mail: [deltaplanscoping@deltacouncil.ca.gov](mailto:deltaplanscoping@deltacouncil.ca.gov)

**Re: NOP for Draft Environmental Impact Report for the Delta Plan (dated December 9, 2010)**

Dear Ms. Macaulay:

On behalf of the thirty member counties of the Regional Council of Rural Counties (RCRC), I welcome the opportunity to submit the following preliminary comments in response to the Delta Stewardship Council (DSC) Notice of Preparation (NOP) of the Draft Environmental Impact Report (EIR) for the Delta Plan mandated by the Sacramento-San Joaquin Delta Reform Act of 2009 (Act) (SB 7x 1 Simitian/Steinberg).

RCRC's primary interest in the development of the Delta Plan relates to potential impacts to the Delta Stewardship Council's identified secondary planning area i.e. *"watersheds that contribute flows to the Delta (including areas within the Delta watershed upstream of the Delta and the Trinity River watershed) and areas of California with water users that use water from the Delta watershed."* This secondary planning area, as you know, encompasses the majority of the state (see attachment).

**Secondary Planning Area**

The NOP (Page 13 lines 14-15) states that *"The Act includes several provisions that require (emphasis added) the Delta Plan to address issues outside of the Delta, including Sections 85020, 85302(b), 85303, 85304, and 85307(a)."*

The NOP (Page 13, lines 16-17) points to **Section 85020(d)** that states that it is the policy of the State of California to *"Promote statewide water conservation, water use efficiency, and sustainable water use."*

The NOP (Page 13, lines 18-21) points to **Section 85302(b)** that states *“The geographic scope of the ecosystem restoration projects and programs identified in the Delta Plan shall be the Delta, except that the Delta Plan may (emphasis added) include recommended ecosystem projects outside the Delta that will contribute to achievement of the coequal goals.”*

The NOP (Page 13, lines 22-29) points to several other code sections as justification that the DSC is “required” to take actions outside of the Delta. **Section 85303** states that the Delta Plan shall promote statewide water conservation, water use efficiency, and sustainable use of water; **Section 85304** states that the Delta Plan shall promote options for new and improved infrastructure relating to the water conveyance in the Delta, storage systems, and the operation of both; and, **Section 85307 (a)** contains the term may (emphasis added) relating to the identification of actions to be taken outside of the Delta, if those actions are determined to significantly reduce flood risks in the Delta.

**RCRC Comment:** As it relates to **Section 85302(b)** and **Section 85307(a)** RCRC notes that the Act contains the term “may” which is permissive. Clearly the DSC is not “required” by these provisions of the Act to include recommended ecosystem projects outside of the Delta that will contribute to achievement of the coequal goals nor to identify actions to be taken outside of the Delta relating to the reduction of flood risks in the Delta.

The Assembly Senate Third Reading analysis of SB 7x1 (RN0925376) states *“The bill narrows the focus of the ecosystem restoration to the Delta, allowing ecosystem projects outside the Delta only (emphasis added) if the Council finds the project contributes to the achievement of the coequal goals”.*

**Sections 85303** and **Section 85304** state, respectively, that *“The Delta Plan shall promote statewide water conservation, water use efficiency, and sustainable use of water.”* and *“The Delta Plan shall promote options for new and improved infrastructure relating to water conveyance in the Delta, storage systems, and for the operation of both to achieve the coequal goals”.*

**RCRC Comment:** The common definition of “promote” is “advance”. RCRC questions whether members of the Legislature who voted in support of SB7x 1 intended to have “promote” in these two sections of the Act interpreted as requiring the DSC is to include in the Delta Plan recommendations to impose a variety of new costly mandates/requirements relating to water conservation, water use efficiency, and sustainable use of water on water users in the DSC identified secondary planning area (or statewide).

In fact, the Assembly Senate Third Reading analysis of SB 7x1 states *“Some criticized the CALFED Bay-Delta Program for the breadth of both its “problem area” (the Central Valley) and its even broader “solution area” (including Southern California and San Francisco Bay Area that rely on exports from the Delta Watershed). That criticism*

*suggested that the breadth of the CALFED program led to CALFED losing its focus on fixing the Delta. This bill will restore the spotlight to the legal Delta and Suisun Marsh, as an estuary system.”*

### **Legally Enforceable**

As noted in the NOP (Page 7, lines 28-29) Section 85001(c) states, in part, that it is the intent of the Legislature “...to establish a governance structure that will direct efforts across state agencies to develop a legally enforceable Delta Plan.”

**RCRC Comment:** RCRC submits for DSC consideration that a Delta Plan that contains recommendations for a wide variety of new costly mandates and requirements that are not enforceable absent legislative authorization falls short of this specific requirement in the Act that the DSC adopted Delta Plan be legally enforceable.

The NOP (Page 24, lines 13-18) states that the Delta Plan EIR will be a programmatic EIR, and that “...the programmatic nature of the EIR does not limit the applicability of provisions of the Act that designate the Delta Plan as a legally enforceable document.”

**RCRC Comment:** The term “legally enforceable” is used once in the Act, in Chapter 1, Short Title and Legislative Findings (Page 19). Section 85001 makes a variety of findings and declarations including Section 85001(c) which reads as follows:

*“Section 85001 (c) By enacting this division, it is the intent of the Legislature to provide for the sustainable management of the Sacramento-San Joaquin Delta ecosystem, to provide for a more reliable water supply for the state, to protect and enhance the quality of water supply from the Delta, and to establish a governance structure that will direct efforts across state agencies to develop a legally enforceable Delta Plan.”*

**RCRC Comment:** The legislative intent of Section 85001 (c) when read in combination with other provisions contained in the Act is clear. A “legally enforceable” Delta Plan is to be developed utilizing the legal authority vested in the various state agencies responsible for implementation of the Delta Plan (also see governance structure comments below). RCRC believes that the statement contained in the NOP that the Act designates the Delta Plan as a legally enforceable document is factually inaccurate.

In fact, the Assembly Senate Third Reading analysis of SB 7x1 (RN0925376) in the discussion relating to the protection for existing law states in part “...These sections also maintain SWRCB jurisdiction and preserve regulatory authority generally, in order to clarify that the new Delta Stewardship Council is NOT a super-regulatory agency that trumps other regulatory agencies, such as SWRCB and DFG.”

RCRC believes that this point made in the Assembly Senate Third Reading analysis of the Act is important as state agencies such as the State Water Resources Control Board (SWRCB) and the Department of Fish and Game (DFG) must take a broader statewide view. For example, the DFG must consider the impact of activities, programs and facilities on all public trust resources including those upstream and downstream of

the legal Delta. As DFG stated in their September 25, 2008 letter to the Delta Vision Task Force *“Nothing in the Plan can or should impact the Department’s independent regulatory function and duty to protect the state’s listed species.”*

### **Governance and Financing Plans**

The NOP (Page 23, lines 19-21) notes Section 85020(h) that states that it is the policy of the state to *“Establish a new governance structure with the authority, responsibility, accountability, scientific support, and adequate and secure funding to achieve these objectives.”*

**RCRC Comment:** The Act contains policy direction for governance not cited in the NOP, some examples of which follow:

- Section 85001 (c) *“...to establish a governance structure that will direct efforts across state agencies to develop a legally enforceable Delta Plan.”*
- Section 85022(a) *“...intent of the Legislature that state and local land use actions identified as “covered actions” ...be consistent with the Delta Plan.”*
- Section 85204 *“The council shall establish and oversee a committee of agencies responsible for implementing the Delta Plan. Each agency shall coordinate its actions pursuant to the Delta Plan with the council and the other relevant agencies.”*
- Section 85212 *“The council shall review and provide timely advice to local and regional planning agencies regarding the consistency of local and regional planning documents....with the Delta Plan.”*
- Section 85225 *“A state or local public agency that proposes to undertake a covered action, prior to implementation of that covered action, shall prepare a written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan and shall submit that certification to the council.”*

**RCRC Comment:** It appears to RCRC that the Legislature has laid out in the Act the new governance structure. RCRC notes that the Office of Senate Floor Analyses states in the analysis of SB 7x 1 that *“This bill replaces the existing Bay Delta Authority and CalFed Program with a new governance structure, designed to balance the needs of the environment, water users, and Delta Communities.”* The analysis goes on the list the various components of *“the proposed agreement for Delta governance”* which includes the redefining of the role of the Delta Protection Commission, the creation of a new Sacramento-San Joaquin Delta Conservancy, the creation of the new Delta Stewardship Council, etc. RCRC therefore finds it curious that the NOP includes (Page 23, lines 35-37) as an implementation strategy that the DSC *“Consider organization changes for management of state water resources, including suggestions by the Little Hoover Commission August 2010 report, “Managing for Change: Modernizing California’s Water Governance.”* The consideration by the DSC of fundamental structural changes to various state agencies appears to RCRC to go beyond the mission, duties, and responsibilities of the DSC specified in the Act.

The NOP (Page 16, lines 18-21) states that an EIR generally does not consider costs of implementation strategies, but that because the Delta Plan also will include Finance and Governance Plans, the affordability and/or cost-benefit comparisons could be considered in the initial evaluation of implementation strategies.

**RCRC Comment:** RCRC urges the DSC to consider the cost of implementation i.e. affordability and cost-benefit before including recommendations in the Delta Plan. To this end, affordability and/or cost benefit comparisons in the initial evaluation of implementation strategies would be extremely important to the development of a credible and implementable Delta Plan.

The NOP (Page 24, lines 1-4) states that the DSC will consider a financing plan that could be based upon fees and charges to fund implementation of the Delta Plan recommendations and the DSC activities.

**RCRC Comment:** RCRC will look forward to providing comments on this aspect of the Delta Plan when the details of the DSC proposed financing plan for the Delta Plan are made available.

One cannot consider the development of the Delta Plan by the DSC in isolation. As the DSC is well aware the development of a BDCP is underway by water exporters and various state and federal agencies. While it now appears that the BDCP will not be finalized in time to meet the DSC's deadline for completion of a Delta Plan, the Act specifically states that if the DFG approves the BDCP as an NCCP and it meets certain other conditions that the DSC shall incorporate the BDCP into the Delta Plan. Also of note in the area of financing is that the Act provides that if the BDCP does not receive DFG approval as a NCCP that the public benefits associated with the BDCP shall not be eligible for state funding.

In the recently released "*Highlights of the BDCP*" (December 2010), the Natural Resources Agency states that the preliminary mid-point estimate for the BDCP pipeline/tunnel conveyance option (based upon conceptual-level engineering) is approximately \$12.7 billion, and the annual cost to operate the proposed conveyance is approximately \$83 million per year. Additionally, the mid-point average cost to implement ecosystem restoration and to address other stressors is approximately \$3.6 billion, and the annual cost to manage the implementation of restoration and other stressor reductions is estimated at \$46 million per year over the BDCP's 50-year implementation period.

As the DSC is well aware, the BDCP provides a regulatory vehicle for project proponents (water exporters) to agree to implement a suite of habitat restoration measures, other stressor reduction activities, and water operations criteria in return for regulatory agency approval of the necessary long-term permits for the various projects and water operations to proceed. The apportionment of BDCP costs between urban and agricultural water exporters is still under discussion. The Highlights report states that export water users would pay for and finance the construction and maintenance of

new and/or improved conveyance facilities and associated habitat restoration, and that some portion of the habitat restoration and other actions may be paid for and financed by other sources such as state and federal agencies subject to funding availability.

At a recent meeting the DSC discussed incorporating portions of the draft BDCP (which is not a consensus document) into the Delta Plan on the basis that the BDCP represents “the best available science”. This raises a number of interesting questions which RCRC will comment on in the future should the DSC decide to take this path.

For the record, RCRC has adopted policy in the area of costs associated with the BDCP and the Delta Plan i.e. costs should be apportioned on the basis of benefits received, and public benefits should be paid for by GO bond proceeds and/or state and federal general tax revenues.

**Potential Environmental Effects of the Proposed Project and Potential Alternatives**

RCRC supports the DSC’s determination that an EIR is required for the Delta Plan. It is important that due consideration be given that programs or facilities implemented or constructed in the Delta will not result in the redirection of unmitigated significant impacts to beneficial uses in areas of origin upstream of the Delta and areas south of the Delta.

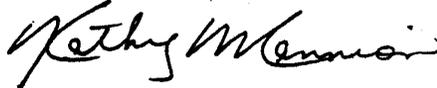
**Conclusion**

In conclusion, RCRC urges the DSC to focus on the core responsibilities specified in the Act i.e. the development of a Delta Plan for the Delta (as defined).

Additionally, RCRC urges the DSC to consider the other concerns raised in these comments relating to governance, “legally enforceable”, and financing.

Please feel free to contact me at (916) 447-4806 or [kmannion@rcrcnet.org](mailto:kmannion@rcrcnet.org) if you have any questions. Again, RCRC appreciates the opportunity to provide comments on the NOP.

Sincerely,



Kathy Mannion  
Legislative Advocate

cc: Mr. Joe Grindstaff, Executive Officer  
Members, Delta Stewardship Council  
Senator Darrell Steinberg, Senate Pro Tem  
Senator Joseph Simitian