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Ms. Terry Macaulay
Interim Chief Deputy Executive Officer
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Re: Fifth Staff Draft of the Delta Plan

Dear Ms. Macaulay:

The following are the South Delta Water Agency's comments to the Delta Stewardship Councils' fifth draft of the Delta Plan. SDWA joins in all previous comments which have been and are being submitted by the Central Delta Water Agency and its counsel Dante J. Nomellini, Sr., Esq., and Thomas Zuckerman, Esq.

Initially, we note that the Delta Plan does not address the current problems facing the Delta, and thus does not propose solutions or actions which will preserve and enhance the disappearing environment or meet the co-equal goals of the 2009 legislation. Instead, the Delta Plan repeats at length the same general, broad approach undertaken by CALFED and which tries to address everything instead of the important things. The concept of "adaptive management" should be finally cast aside as it has come to mean "keep trying anything and everything in order to protect exports."

Instead, the regulatory agencies, including DFG, CalEPA, SWRCB, FWS, NMFS, and EPA should simply apply the existing statutes and regulation and permits. Under such an approach, the projects would be forced to meet water quality obligations (flows and salinity control) on a multi-year basis, and only be allowed to export that water which is surplus to the

current and future needs of the areas of origin. Under those limitations, the main cause of injury to the Delta (export operations) would be reliable but significantly less and the preservation and enhancement of the region could be assured.

The draft Plan fails at even the basic level by ignoring such things as the priority of water rights, the available supply and statutory allocation of that supply, not defining what a "reliable supply" is, not identifying the causes of the Delta's decline, and not even describing the southern Delta salinity problems, to name just a few.

PREFACE:

The description of the co-equal goals must include what "reliable" means. Does it mean an average export of 5-6.5 MAF per year as stated by the exporters? Does it mean certainty about what amount is available for in-Delta users per the statutes which mandate this? Does it mean water right priorities should not be followed? Without taking a position on the definition, the DSC simply prolongs the current problems. State and Federal statutes tell us what "reliable" means. A simple reading of Water Code sections 11460 et. seq., 12200 et. seq., HR 2828, CVPIA, and others tell us the priorities of the available supply. Once these priorities are allocated water, then the remainder of the supply can be "reliably" allocated.

This section notes that an improved water supply and a decreased reliance on the Delta is necessary. However, no mention is made of in-Delta agricultural needs. The language of the draft Plan could be read to require a decrease use of Delta water by in-Delta needs; something contrary to statute.

The draft Plan gives lip service to what the "safe yield of the system" is, but then takes no action to determine what yield or how it should be allocated.

The draft Plan notes that the existing system of water rights in California "complicates California's ability to manage our water supplies as a fully integrated system." It is difficult to imagine how such a statement could be made. Since the water right priorities allocate how shortages are addressed, they can only "complicate" the distribution of water if one desires to alter or violate those priorities. Since the 2009 legislation specifies that it does not alter nor effect the current laws on priorities, desiring to alter the water right priorities indicates an inherent bias by the DSC (and or its staff). Those protected by the water right priority system would hope that the DSC represses its dissatisfaction with the law.

At innumerable places in the draft Plan it states "conveyance improvements" as one of the problems preventing the State from addressing water supply and ecosystem issues. This tired term does not mean that we somehow are lacking a ditch here or a pipeline there to get people

water, rather it means someone has concluded (before the studies are completed and in contravention of the laws) that we should take more water out of the Delta before it reaches the Delta. Since that is of course incorrect, we suggest a more fair and balanced description of the issue and the potential solutions. Such a description should include complete quotes of Water Code section 12200-12205.

CHAPTER 1.

The draft Plan correctly notes the need for areas of water shortage to develop regional supply plans and projects. However, until the DSC (or DWR/USBR) provides the numbers associated with the safe yield of the projects, no one knows how much each area must find. The precondition to having a reliable water supply is to first identify how much water is available to each area under current laws.

In describing the CVP and SWP it must be noted that the system is currently 5 MAF short per year in light of the failure of the SWP to develop north coast supplies. For some reason, DSC staff seems to want to avoid this little known but controlling fact.

The description of past generations' intent to narrow river channels in order that mining debris would be flushed out appears to be overstated, at least on the San Joaquin system. Many factors lead to the current size of channel widths, and it has always been known that maintenance dredging would be necessary to maintain flood flow capacity. In the Delta, flows, including flood (high) flows slow down and deposit significant amounts of silt. The Corps' work in our area did not assume narrow channels would keep the system clean.

On page 17 it notes the large amount of habitat which has been lost, but makes no mention of the health of the ecosystem after full reclamation of the Primary Zone. One of the key unanswered questions is why new habitat is needed in an area which had not lost any habitat for at least 40 (50? 60?) years. If the fish populations were healthy 40 years, why is more habitat needed in the southern Delta?

On page 19, in the discussion of the BO's, it should be noted that the smelt and salmon BO's identified export operations as the reason why other factors affecting fisheries were important. The changes in hydro-dynamics caused by the projects is what made most "other stressors" a factor.

The description on page 20 of how the State planned to add north coast supply to the Sacramento system a peripheral canal is inadequate. First, the failure to add 5 MAF of water to the Sacramento system does not simply result in less water for contractors, it means that area of origin needs in dry years are not just unavailable, but that in some years there is zero water for

the SWP. Second, the peripheral canal was a possible add-on to the SWP, it was not something that was required or necessary.

Table 1-1 on page 22 should note under the DWR description that agency is responsible for estimating future supply needs for the entire state and methods by which those needs might be satisfied.

The draft Plan's description on page 24 of the reliance on exports from the Delta again fails to address the main problem. Exports from the Delta are by law limited to water which is in excess of that needed for in-Delta uses and for area of origin uses. An analysis of the amount of water available under varying hydrologic year types indicates that there is insufficient water in some years to meet in-basin needs which means that there is no water for exports in some years. This gap in supply was to be partially addressed by the planned development of the 5MAF from the north coast rivers. The 5MAF was planned to cover the shortages in the areas of origin in the worst drought years, yet even that amount did not fully cover the in-basin shortages. This means that in drought years there is no water for exports, and even in many other year types, there is either little or no water surplus to the areas of origins and certainly not for exports. When California factors in the needs of the fisheries (now believed to be greater than at the time the projects were first planned) we see that the problem facing exports is not export restrictions due to fishery concerns, the problem is a near complete lack of supply. The question therefore is whether the State through such agencies as the DSC and SWRCB will abide by and apply the area of origin and related statutes which guarantee areas of origin and the Delta get water on a priority basis, or whether the DSC and others will frustrate and ignore such legal protections in order that exporters (who have little or no supply) will get water at the expense of others.

Page 24 makes the statement that "[O]wners and operators of nearly one-third of irrigated lands in the Delta watershed do not participate in programs to meet water quality standards, and their compliance with state law is unclear." A similar statement in the prior draft Plan accused (wrongfully) in-Delta landowners of failing to participate in water quality programs. This most recent statement is equally misleading. The text apparently refers to the percentages of agricultural lands currently in the Central Valley Regional Water Quality Control Board's Irrigated Lands program. That program deals with agricultural drainage (or storm water drainage) from irrigated lands. Since there are significant amounts of dry pasture/grazing land and many areas of the state where drainage never reaches a stream or lake, not all of agriculture is under this Regional Board program. It is misleading and unfair to represent this situation to suggest that one-third of the agricultural lands are somehow avoiding any obligation to maintain water quality. More correctly, the text should note that the USBR and DWR fail to meet their obligations to meet the interior southern Delta water quality standards on a regular basis and have no plan by which they will meet those permit conditions. Similarly, the text should mention the USBR and DWR's inability to meet outflow and cold water requirements in the past. In 2009,

the projects sought relief from the outflow requirement. Instead of proving 11,400 cfs outflow, the projects exported 4,000 cfs while the outflow was 7,000 cfs while complaining they would not have enough cold water flow later in the year if they were forced to meet the outflow requirement. How this justified taking one-third of the outflow was never explained.

The key point here is that in the beginning of (what was then believed to be) the third year of drought, the projects had insufficient water to meet permit requirements for outflow and cold water. This evidences the insufficient supply issue touched upon above. If the projects are being operated to run out of fishery water in the beginning of a third year of drought, something is horribly wrong with the system.

Page 25 notes the expected changes by the years 2050 and 2100. Notwithstanding any statutory requirement of providing for 55 inches of sea level rise, the footnote should also reference that there are many predictions of much less rise, and that the most recent data from NASA suggests current models understate the loss of heat from the atmosphere. This means that the models likely overstate sea level rise.

Page 25 notes that it seeks to achieve the co-equal goals by 2100 and recommends no water rights decisions or contracts should be approved/adopted without consideration of those goals. However, the draft Plan fails to address the area of origin and Delta protection statutes, neither of which were altered by the 2009 legislation. If an in-Delta diverter seeks a priority (over exports) contract or water right, the law provides it be approved at the expense of exports (see for example Water Code section 12204). This can be consistent with the co-equal goals unless those goals are interpreted as requiring exports to get a certain amount of water no matter other rights or laws.

The fifth bullet point on page 26 should be re-worked. As is, it appears to be trying to describe some nebulous, hoped-for in-Delta activities which will substitute for continued Delta agriculture. Delta ag will remain viable unless it is forced out by the unrestrained appetite for exports. "New markets and technologies" will not magically appear to compensate for lost farm land.

CHAPTER 2.

On page 35 the draft Plan attempts to describe its approach as something new or something resulting from a new understanding of the Delta. This is not correct. The last forty plus years show us that the same problems and approaches are raised and tried over and over. The draft Plan is not much different. In 1978 the SWRCB's D-1485 identified the massive impact exports had on fish noting that to fully mitigate exports impacts would require a virtual shutting down of the projects. It also noted that an additional 2 MAF was required to protect the

Suisun Bay which fish needed to survive and develop. Instead, exports continued to increase while one "new" approach after another sought to do other things, and balance needs, and find the best science. The result? Fisheries fell to record lows, prompting repeated "new" approaches. This latest example again tries to "spread the wealth" by making everyone equally liable for the Delta's problems, finding "new" dangers that require some users (not exporters) adjust and/or go away. It's always the same; find someway to provide exports with a certain "minimum" amount (calculated based on maximum exports) while forcing the rest of the state to mitigate the impacts of the exports. Co-equal means "the rest of the state must give in order to protect exports," the exports that have no firm supply of water and the exports that have destroyed the fisheries. Although the science underlying the understanding of fish has increased, nothing new is contained in the DSC approach except it is now much clearer that in-Delta ag is in the way of exports.

Where are the action and goals to protect in-Delta water supply for agriculture? Area of origin rights? The draft Plan does not seek either of these because their absence is the necessary consequence of a "reliable water supply" for exports.

The adaptive approach set forth in this chapter requires comment. The adaptive approach presupposes the problems facing fish are due to previous approaches were inflexible and narrow. That is clearly not the problem. The actual problem was that the failure of the regulatory agencies to apply and enforce the existing laws. For example, DFG has never issued a take permit to the SWP under CESA. One would imagine that if the state agency charged with protecting fish had outlined rules by which endangered and threatened species would be protected while allowing some take, there would have been more protection to those species. Further, in the CALFED process the fishery agencies were instructed to temper decisions based on the CALFED minimum export limits. Thus the regulated and regulators were in the same room and the pressure placed on fishery biologists to protect exports resulted in ineffective fishery decisions being made. Predictably, the inappropriate trade-offs directly lead to the crash of the fisheries. Further still, the CVPIA mandate to double the production of certain anadromous fish has resulted in zero impacts to fisheries excepting the (poorly interpreted) dedication of 800 TAF of CVP yield to fisheries. As a last example, the exporters were able to violate the minimum outflow requirement in 2009 in order take 4000 cfs (when no amount was surplus to fishery needs) and the SWRCB not only failed to take action, but began the process to actually bless the violations.

This all makes clear that we do not need some adaptive approach, rather we needed (and still need) to apply and enforce the laws and regulations such that fish are protected instead of exports.

CHAPTER 3.

The draft Plans proposal to limit or prevent land use changes in areas which may later be potential habitat or flood plain creates a sever legal and practical problem. Since the BDCP process has already designated the entire Primary Zone of the Delta as potential habitat of flood plain, the draft Plan would freeze land use in the entire Primary Zone. I will not expound on the "unlawful taking" lawsuits which will certainly follow. However, the freeze would immediately adversely affect land prices, making any farmer's desire to sell unlikely. His/her land will only be valued as habitat, not agricultural and there will be no buyers (except groups like The Nature Conservancy which could then get the land at a discount price). Further, any plans for any new buildings (shops, packing houses, homes) will be precluded until a final decision is made on what new habitat or flood plain is sought.

Just as important, the new habitat may be needed to mitigate the adverse effects of exports (reliable supply) on fisheries. Thus, government will be forcing in-Delta landowners to sacrifice their lands and livelihoods in order to mitigate exports and protect non-area of origin uses. This approach turns existing law upside down. How much new riverine habitat is needed in the southern Delta to maintain average annual exports of 5 MAF? How much is needed if exports were only of that amount surplus to the area of origin needs, including fishery needs? How many new San Joaquin River salmon will result from an additional 5,000 acres new habitat in light of the fact that there has been no habitat loss during the recent decades when fisheries crashed? One wonders how "the best science available" will address these issues in a manner that "protects and enhances the unique . . . agricultural values . . ." of the Delta.

The definition of "Covered Actions" also does not take into consideration the other relevant laws and regulations applying to the area. As referenced above, area of origin laws allow certain areas to take and use water in priority to the export of water. Among other things, this allows those areas to seek supply contracts or appropriative water rights at the expense of export supplies. Put another way, the areas of origin are authorized by law to "recapture" water that was previously used for export.

How can a new permit or a contract to receive water in the area of origin be a covered action? Either could certainly cause a "significant impact" and affect the co-equal goals. Are area of origin parties now limited in their ability to get water as long as it does not adversely affect the "reliability" of exports? If so, the DSC is seeking to overturn the area of origin laws. This of course cannot be done. It is also extremely bad policy, especially in light of the above referenced lack of export supply. Thus, the co-equal goals cannot result in any expected or protected amount for exports or those goals will be interpreted in a manner contrary to law.

Exemptions to the covered actions include the operation and maintenance of the projects but not local actions to maintain and operate local diversions. Should not the draft Plan make clear that continuance of local maintenance and operation of diversions do not affect the co-equal goals?

SDWA does not support the DSC being an additional oversight agency which will review local, city, county and other agency decisions.

The "covered actions" definition should attempt at least to explain how it will handle the conundrum of wetlands/methyl mercury. The draft Plan makes clear that all the planned habitat and flood plain is consistent if not necessary to meet the co-equal goals. However, the Regional Board has found that intermittent wetlands are the major sources of methyl mercury. Thus, one of the main goals of the DSC is to increase that which produces methyl mercury. It is likely that the very first projects the DSC is asked to approve will be for new wetlands. How will this be evaluated? Will additional methyl mercury be allowed? How will this effect other parties obligations under the TMDL? How does this affect the mandated requirement to improve water quality for fish and humans?

The Delta Plan cannot incorporate the BDCP, regardless of its final version. If it did, then export goals would become the standard against which consistency is measured. As stated above, the lack of supply and area of origin priorities preclude such actions.

CHAPTER 4.

As stated above, the first task of the DSC is to define "reliable water supply." Initially, the inclusion of the mandate that reliance on Delta supply must be decreased is a necessary start. However, more explanation is required. "Reliable" does not mean sufficient. There is no doubt that during many years, there is an insufficient amount of water produced to meet area of origin, fishery and export needs. Thus, we must first calculate the amount produced (and available) and then allocate it according to existing water law priorities. This calculation determines the reliability of any beneficial user's supply. That calculation will also note the extreme shortage of supply for export uses. From that, the identification of other possible supplies for exports can be made.

Second, since the area of origin and Delta laws preserve the right to use water both now and in the future, those users, especially in-Delta diverters cannot be under the mandate to "decrease" their use of Delta water. Otherwise, we would also have to be discussing how much less water fisheries need. It should be made clear that in-Delta users are not required to decrease their dependency on the Delta.

Figure 4-1 discusses the range of precipitation in the state but the figure itself is a chart showing inches of rainfall. I suggest using a chart which shows statewide natural runoff and one showing the runoff of the watersheds which supply Delta inflows. As per prior submittal, the Weber Foundation Studies indicated that the relevant watersheds do not supply enough to support current exports.

On page 77 the draft Plan mentions certain limitations on the ability to export water. The available supply should be noted and emphasized as the most limiting factor. In addition, the original SWP contracts had a "permanent shortage" provision which allowed DWR to decreased the amount of each contract. After it became clear that none of the north coast supplies would be developed, the contractors and DWR removed the provision; thus deciding the seek exports independent of the supply.

It should be made clear that the Policy on page 82 would not apply to any transfer wherein the purchaser is an in-Delta user (non-export). Similarly, Recommendation WR R5 should be removed. Current law anticipates that in-Delta users are guaranteed a future supply of water even if it impacts exports.

ER P1 notes that prior to any new flows being established by the SWRCB, D-1641 shall be used to determine consistency with the Delta Plan. The DSC must address the issue of regular violations of D-1641 water quality objectives before it uses them as something against which to judge consistency. Southern Delta salinity objectives are violated in most years due to the operation of the projects. Thus if those violations are exempted from being covered actions, the burden of meeting the salinity standards will likely be shifted onto other parties.

Page 86 also suggests that no new permits be issued by the SWRCB; clearly this would be a violation of the rights under area of origin and Delta laws.

Given the problem statement set forth on page 87, we must note that the idea that one could develop actions which would guarantee export permits for 50 years is unworkable. Notwithstanding everything else related above, the SWRCB always includes a "re-opener" in every water right decision which would make a 50 "permit" impossible.

The reference on page 89 that the SSJID project will result in an increase in farm production of 30% needs to be checked. Water savings may occur, but that doesn't result in crops having larger yields.

Page 94 sets forth certain unsupportable claims regarding the lack of and need for measuring water use. In-Delta water use can only be accurately measured by using evapo-transpiration calculations, since excess applied water is returned to the common Delta pool

(either via surface or subsurface means). The state is not somehow unaware of in-Delta net depletions because measuring devices are not on diversions. The Delta has been "operated" by the projects for many decades now using DICU estimates. Clearly, the Delta's problems are not a function of how much water is used on in-Delta lands. Similarly, in-Delta use does not somehow preclude project operations to maintain outflow and other fishery needs; while demand for exports does. Thus, the notion that "unknown" diversion amounts in the Delta is a problem is misdirection. Instead, it would likely be instructive to conduct an investigation to check the accuracy of project export rates and reported fishery flows.

CHAPTER 5.

As stated above, this Chapter makes no mention of southern Delta salinity objectives, the regular violation thereof, proposed methods by which those violations will be addressed, or the impact on Delta agriculture resulting from the violations. How could a Delta Plan completely ignore this important issue?

As stated above, there is currently no basis for concluding that any amount of new habitat is needed in the Delta. Fishery declines have occurred during the decades when there was no loss of habitat in the southern Delta, indicating that something else is the problem. Even if new habitat might be beneficial, it would appear to be the mitigation for other actions or operations. DSC cannot adopt policies whereby mitigation obligations are shifted to parties who are not responsible. Again, what data indicates that X amount of new habitat will result in Y additional San Joaquin River fish? How can an ecosystem goal of new habitat be based on no finding that a lack of habitat is a limiting factor in the species recovery?

The description of the historical Delta appears to be constructed to justify future changes to the system. Rather than describe the historic fresh water estuary, where many species reared in the Suisun Bay and Marsh, the draft Plan separates out three areas of the Delta for different treatment. The mixing zone was almost always downstream of its current project controlled location. Periodic salinity intrusion was the exception and not the rule; with the worst instances being of short duration. Now, the mixing zone is almost always shifted upstream and a near constant new salt source (San Joaquin River) added.

Page 112 fails to note that in most years, none of the San Joaquin River reaches the Bay.

On page 114 it should be noted that the historic fishery decline coincides with the time of maximum exports. The fisheries seemed healthy until the time the exports became regular and excessive.

Page 115 notes that a Stage 1 Finding of CALFED was that insufficient progress had been achieved via a through-Delta conveyance. It should also be noted that CALFED resulted in virtually nothing being done to maximize through-Delta conveyance, especially its complete abandonment of a new fish screen project.

CHAPTER 6.

As stated before, any mention of D-1641 should note that the southern Delta salinity standards are regularly violated (see page 134).

On pages 136-137 the draft Plan should include Contra Costa Water Agency's comprehensive analysis of how the mixing zone has been dramatically shifted upstream. The loss of the historic habitat in Suisun Bay and Marsh is a direct cause of the fishery decline.

Page 138 again fails to mention that incoming San Joaquin River salts result in regular violation of water quality objectives. The direct cause of this is the CVP delivery of upwards of 800,000 tons of salt to its service area in the valley.

Recommendation 2 on page 139 is backwards. One should not prevent new permits in order to avoid water quality effects, one should require the CVP to mitigate its effects on River quality and grant new permits as appropriate. The failure of the USBR to mitigate its effects should not prevent area of origin rights being exercised.

CHAPTERS 7 & 8.

SDWA incorporates and adopts all comments made by Thomas Zuckerman, Esq, and the Central Delta Water Agency relating to the issues covered in these Chapter. Please call me if you have any questions or comments.

Very truly yours,

John Herrick (dd)

JOHN HERRICK

Dictated but not read
in his absence to avoid delay.