



May 6, 2011

Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, California 95814

Re: San Joaquin River Group Authority Comments on the Third Draft Delta Plan

Dear Delta Stewardship Council:

We have reviewed the third draft Delta Plan released for public comment by the Delta Stewardship Council on April 22, 2011 ("third draft"). The third draft continues the "flow centric" myopia that has crippled efforts to comprehensively and effectively address ecosystem and water management problems in the Delta watershed for decades. This approach is neither effective nor legally defensible. For these reasons, the San Joaquin River Group Authority requests the Delta Stewardship Council ("Council") make substantial revisions to its policies related to flow.

The third draft includes two flow-based provisions that are problematic: A policy to set flow objectives and a discussion promoting the return to a natural hydrograph. The policy oversteps the Council's authority; it mischaracterizes and marginalizes the process required to set flow objectives, it attempts to regulate in place of the State Water Resources Control Board ("State Board"), and it uses "flow" as the answer to all Delta problems. The promotion of returning to a natural hydrograph is unrealistic, unbalanced, and unsupported by science, given the highly altered, degraded, and unnatural state of the South Delta.

Policy on Flow Objectives

The third draft includes a proposed policy (WR P4) that requires the State Board to adopt and implement flow objectives by 2014. The third draft asserts that "if the coequal goals are to be achieved" it is "essential" that the Board "set flow objectives and criteria for the Delta and the major tributary streams." Based on this premise, the third draft requires the State Board "adopt and implement flow objectives for the Delta that are necessary to achieve the coequal goals" by June 2, 2014.

The Flow Policy Mischaracterizes the Process to Review Flow Objectives

The policy states the State Board must set flow objectives. The State Board has already set flow objectives - they are in place and being met. The process underway at the State Board is the review of existing flow objectives. This review requires the State Board to determine whether the current objectives provide sufficient protection for fish and wildlife in the South Delta. Setting new flow objectives can only be done after the State Board has balanced the various competing beneficial uses of water, including recreation, municipal water use, and agricultural water use. If the Board determines that the current flow objectives at Vernalis do not reasonably protect fish and wildlife, then the Board may amend the flow objectives. If other reasonable and beneficial uses are

determined to be of a “higher priority” or “greater significance,” the State Board may set flow standards that do not fully/optimally protect fish and wildlife.

The Flow Policy Marginalizes the Process to Review Flow Objectives

The flow policy marginalizes the State Board process to review the existing flow objectives. More specifically, the flow policy incorrectly assumes the Board will determine (1) water quality objectives need to be amended, and (2) this amendment will require a regime of increased flows. Although historically the Board has used flow as a means of protection, the State Board is not limited or otherwise required to use flow and could conclude reasonable protection of fish and wildlife is best achieved through non-flow related measures, such as reducing predation or establishing discharge control programs. The third draft’s assumptions are pre-decisional and disregard an on-going process in which water rights holders have invested significant time and resources. More importantly, it totally disregards the State Board’s required mandate and jurisdiction to weight and balance competing water needs when setting water quality objectives.

The Flow Policy Goes Beyond the Authority of the Council

The flow policy in the third draft amounts to the Council regulating in place of the State Board. By mandating the State Board review of existing water quality objectives result in the setting of new flow objectives, the Council is attempting to perform the regulatory duties assigned to the State Board. This amounts to a super regulatory act, which is outside the authority of the Council.

The Flow Policy is Overused

The third draft includes the proposed flow policy in three of the five substantive chapters, relying on it to ensure water reliability, restore the ecosystem, and improve water quality. The third draft’s reliance on such a flow policy is misplaced. For example, the flow policy first appears in the chapter on water supply reliability. The third draft fails to address how water supply reliability will be promoted by increasing flow demands, nor does the draft explain how increased flows will ensure regional self-sufficiency.

The Council’s reliance on the flow policy also compromises other non-flow solutions. For example, the chapter on ecosystem restoration relies on the flow policy, while failing to address issues that more directly impact habitat, such as predation, food web, channelization, temperature, contaminant issues, levees, and dredging.

Return to a Natural Hydrograph

The third draft promotes returning to a more “natural” flow regime. This approach is over simplistic, based on nostalgia, not science. As the third draft correctly recognizes, nothing in the Delta is similar to what it once was – the geography has changed with reclamation, levees, and dredging, the geomorphology has changed with channelization and flood control measures, turbidity has changed with altered sedimentation and dams, the foodweb has changed due to nutrient ratios, the fish communities have changed due to invasive species and predation, the quality of water has changed due to toxins and contaminants, the influence of the tides has changed due to levee infrastructure and climate change, and the floodplain and marsh habitat has changed due to development. The proposition that a “natural” flow regime will provide benefit in such an unnatural system is not defensible. Science simply does not support the idea that returning one

component to its “natural” condition, while ignoring the other multitudes of change, will benefit the existing unnatural environment or otherwise restore the ecosystem.

Suggested Revisions

The third draft should be revised to balance its isolated focus on flow. Concentrating on flow, while refraining from seriously addressing other stressors, has and will continue to result in throwing water at the problem in a wasteful, inefficient, and ineffective manner. A comprehensive plan that furthers the coequal goals must include evaluation and suggested action on other stressors and non-flow mechanisms to address water supply reliability and ecosystem restoration.

The flow policy must be revised to be compliant with the authority of the Council. To do so, the Council may recommend and encourage the State Board to review its water quality objectives; it may not step in the place of the State Board and mandate the results of this review. Further, it would be helpful for the Council to undertake a science plan that would provide the State Board with the supporting science, such as biological or life-cycle modeling, it needs to support any amendment of the water quality objectives to protect fish and wildlife.

Similarly, the third draft section on a “natural” flow regime must be revised. Rather than maintaining and echoing the misguided focus on returning to the natural hydrograph, the Council should determine how to optimize the existing Delta system. There are several projects that are scientifically supportable, affordable and likely to be effective in the current system, such as predator removal programs. The Council should identify and recommend such projects be undertaken.

Thank you for consideration of our comments, we look forward to the next draft Delta Plan and hope to see a comprehensive plan develop.

Very truly yours,

O’LAUGHLIN & PARIS LLP



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SAN JOAQUIN RIVER GROUP AUTHORITY

VK/tb