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Sent: Monday, January 14, 2013 4:44 PM

To: Messer, Cindy@DeltaCouncil

Cc: Grober, Les@Waterboards; Niiya, Karen@Waterboards; Evoy, Barbara@Waterboards; Trgovcich, Caren@Waterboards; Mahaney, Erin@Waterboards; Satkowski, Rich@Waterboards

Subject: Comments on Delta Plan Rulemaking Package

Dear Ms. Messer,

State Water Resources Control Board Staff has reviewed the Delta Plan Rulemaking package and has the following minor comments:

1. The Delta Stewardship Council could consider adding clarifying language to the rulemaking package that indicates the Delta Stewardship Council is proposing to include the fourteen policies of the Delta Plan as part of the proposed regulation, and that the Delta Plan's recommendations will not be part of the regulation.
2. The proposed regulation includes scientific appendices that contain material that could evolve over time as new information becomes available. For example, Section 5008(a) of the proposed regulation states "Habitat restoration must be carried out consistent with Section II of the Draft Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions (Department of Fish and Game 2011), with minor alterations. It is hereby attached as Appendix 3. The elevation map attached as Appendix 4 should be used as a guide for determining appropriate habitat restoration actions based on an area's elevation."

This language does not appear to allow for the possibility that the information in this appendix could become superceded by new research during the life of the regulation. The Delta Stewardship Council may want to consider including flexibility in the proposed regulation language regarding the scientific appendices to acknowledge the potential for improvements in science over time.

3. Section 5003(b)(2), which identifies exemptions to the definition of "Covered action" is potentially confusing because it references a water right action (a temporary water transfer) subject to the State Water Board's regulatory authority. Water Code section 85057.5(b) excludes regulatory actions of a state agency, such as the State Water Board, from the definition of a "Covered action." Section 5003(b)(1) appropriately references the exemptions under Water Code section 85057.5(b) in defining a "Covered action." Section 5003(b)(2)(C), however, specifically and temporarily excludes "temporary water transfers of up to one-year in duration" from this definition. This proposed temporary exemption from the definition of a "Covered action" would be repealed as of January 1, 2015, unless the Council takes further action to extend the exemption. Thus, it is possible that after January 1, 2015, temporary water transfers would no longer be excluded from the definition of "Covered action." Because the State Water Board's action on a petition for temporary water transfer under Water Code section 1725 et seq. is a regulatory action that is exempt under Water Code section 85057.5(b), we assume that this provision is not intended to apply to the State Water Board's exercise of its regulatory authority over water transfers, but instead to any transfers already approved by the Board. We recommend revising the proposed regulation to clarify its applicability.

4. Section 5007 of the proposed regulation and various sections of the Final Draft Delta Plan state that flow objectives for high-priority tributaries in the Delta watershed will be developed as part of the Bay-Delta Water Quality Control Plan. Although the State Water Board plans to develop flow objectives for high-priority tributaries in the Delta watershed, these objectives will not be part of the Bay-Delta Water Quality Control Plan.
5. Section 5007(b) also provides examples of how flow objectives could be implemented, including through a “water rights hearing.” We recommend replacing the word “hearing” (or “hearings”) with “adjudicative proceeding” (or “adjudicative proceedings” as appropriate) because the latter term more fully describes the process under Chapter 4.5 of the Administrative Procedure Act (Gov. Code, § 11400 et seq.) and the State Water Board’s regulations in which the Board holds an evidentiary hearing to determine facts by which the Board then reaches a decision.
6. On June 13, 2012, the State Water Board submitted a comment letter on the Final Staff Draft (Sixth Draft) Delta Plan. The comment letter suggested modifications to the proposed deadlines for several State Water Board activities. We note that some of these suggestions were accepted by the Delta Stewardship Council in the Final Draft Delta Plan, and others appeared not to be. State Water Board staff requests that the Delta Stewardship Council consider incorporating the remaining deadline modifications into the Final Delta Plan.
7. Appendix O of the Final Draft Delta Plan (Funding and Financing Options) appears to characterize the State Water Board’s filing fees for water transfers as “water marketing fees.” The State Water Board assesses regulatory fees to cover the costs of the board’s regulatory water right program. (Wat. Code, § 1525 et seq.) The Board’s fees for water transfers are not water marketing fees. They are regulatory fees—specifically, one-time filing fees for certain water right actions, including processing applications and change petitions involving transfers. (See, Cal. Code Regs., §§ 1062, 1064.)

Thank you for the opportunity to comment on the Delta Plan Rulemaking Package. Please let me know if you have any questions concerning these comments or would like to discuss them in more detail. You may also contact Karen Niiya at kniiya@waterboards.ca.gov or (916) 341-5365 with any questions.

Thanks,

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