



Municipal Services Agency
Robert B. Leonard, Administrator

Interim County Executive
Steven C. Szalay

County of Sacramento

April 15, 2011

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

Re: Comments on the Second Draft of the Delta Stewardship Council's (DSC) Delta Plan

Dear Ms. Macaulay:

Sacramento County appreciates the opportunity to comment on the second of seven scheduled drafts of the Delta Plan (DP). As authorized in the 2009 Delta Reform Act (Act) and summarized in Chapter 1 of the draft DP, adoption of a comprehensive plan is critical to the long-term health, viability and sustainability of the Delta in terms of addressing and furthering the Act's "coequal goals" (Water Code section 85054) and reducing reliance on the Delta in meeting California's future water supply needs (Water Code section 85201). Our comments will focus on the basic framework and message contained in the DP, as well as on specific policies and recommendations. We look forward to providing more substantive and detailed comments on key chapters as they are completed, including chapters addressing Science and Adaptive Management, Water Resources, Ecosystem Restoration, Water Quality, Risk Reduction, Delta as a Place, and Financing.

Framework and Intent of the Delta Plan (Chapter 1): As stated in our January 27, 2011 comments on the Notice of Preparation (NOP) for the DP's EIR, Sacramento County is supportive of a comprehensive land use and water management plan that provides a "reasonable and implementable" policy/regulatory framework for the management of the Delta. However, we remain very concerned the DP's proposed policies and regulatory requirements far exceed the authority provided by the Act.

While the County recognizes the Act confers some authority to implement actions outside of the "statutory" Delta, the geographic scope of the draft DP extends far beyond that limited authority.

Specifically, Water Code sections 85302(b)¹, 85303², and 85307(a)³ authorize a limited application outside of the Delta. The authority to extend beyond the Delta is a project-specific authorization, not a global authorization resulting in a significant portion of the State being included within the DP (as shown in Figure 1-1 (pg 5)). To further emphasize this point, Water Code section 85302(a) simply states the implementation of the DP shall further the restoration of the Delta ecosystem and a reliable water supply. Moreover, subsection (b) says the geographic scope of the ecosystem restoration projects and programs identified in the DP shall be the Delta, except that the DP may include recommended ecosystem projects outside the Delta that will contribute to achievement of the coequal goals. Nothing in this subsection mandates the DSC to impose its authority over vast areas of the State in the name of restoring and protecting the Delta, but rather provides the DSC flexibility and discretion in adopting “reasonable” and “implementable” and science-based solutions to protect and enhance a regional and statewide resource.

Covered Actions and the Project Consistency Certification Process: Maintaining local land use authority is critical to the County; this key governance protection was a point of concern during the crafting of the Delta Reform Act and remains so today. Therefore, the DSC must take extreme care in clarifying how “covered actions” and “consistency” will be defined and implemented. For example, the DP is currently silent on how a project will be treated if it meets just one of the co-equal goals, e.g., ecosystem restoration, but may not address the reliable water supply goal. Also, pursuant to Water Code section 85225.10, an appeal from a determination of consistency is authorized if, as a result of that inconsistency, the covered action will have a significant, adverse impact on the achievement of one of the coequal goals or the implementation of government-sponsored flood control programs. This suggests that inconsistency alone is not prohibited, but that there must be some significant, adverse impact on the achievement of the coequal goals. However, under the draft DP, the significance of, or existence of, an adverse impact does not seem pivotal. As indicated on page 22, the certification submittal requires a showing of how each covered action addresses the policies and recommendations as well as a provision for addressing “failure to achieve results consistent with the policy objectives.” There appears to be a no deviation standard imposed. Rather than requiring simple consistency, the draft DP appears to require that a “covered action” further the goals of the Plan. There is no statutory authority for this requirement.

Because of the reasons listed above, it is imperative the DP's policies and regulatory requirements provide a high level of certainty and predictability when defining “covered actions” and applying those local land decisions and local/regional water management and flood control projects which are ultimately defined as “covered actions.” An example of the importance of refining the covered action definition is found on page 6. As indicated, when a covered action

¹ 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 include recommended ecosystem projects outside the Delta that will contribute to achievement of the coequal goals.

² The Delta Plan shall promote statewide water conservation, water use efficiency, and sustainable water use.

³ The Delta Plan may identify actions to be taken outside of the Delta, if those actions are determined to significantly reduce flood risks in the Delta.

“has a connection to an out-of-Delta action(s),” the proponent must evaluate: (1) whether the out-of-Delta action significantly contributes to the need for the covered action and, if so, (2) whether the out-of-Delta action is consistent with the DP’s regulatory policies. No citation or authority is given for this requirement. This requirement is overly broad and encompassing, subjecting non-Delta actions to the DP’s regulatory requirements if the non-Delta action “significantly contributes” to the need for the covered action. Note, the statutory citation for “covered action” found on page 6 should read Water Code section 85057.5(b).

Incorporation of Other Plans into The Delta Plan: According to page 7 of the DP, the inclusion of other plans in the DP should expressly recognize that the DSC may incorporate only “completed” plans related to the Delta (Water Code section 83530). In addition, the purpose for such inclusion is “promotion” of the coequal goals, not “achievement” of those goals. Further, the DP acknowledges that several planning efforts may not be completed prior to the deadline for adoption and implementation of the DP. The draft DP indicates that the DSC has reviewed the available information to determine whether these plans may be included in the DP and states that the DSC can elect to include a final plan or to incorporate new information into the DP. However, Water Code section 85300(c) does not confer such authority to include/incorporate new information into the DP at any time. While that provision allows the DSC to revise the DP as it deems appropriate, it does not circumvent the requirement that a plan must be complete prior to its incorporation. That provision also contemplates incorporation of information after the adoption for the DP, not incorporation of incomplete information based on draft and preliminary plans, such as the Bay Delta Conservation Plan (BDCP). The draft DP glosses over this issue by merely asserting that consideration or use of BDCP-related studies or concepts will not have a pre-decisional effect on future appeals of a Department of Fish and Game determination related to the BDCP. This ignores the fact that the BDCP is not complete.

Lastly, according to the discussion on page 8, lines 6-14, vital sources of data such as BDCP, flow criteria, and improved water use data will not be available prior to the adoption of the DP. This discussion further indicates that the first step to achieving coequal goals is to halt, to the extent possible, new or additional practices and activities within the Delta or that have an impact on the Delta, including further erosion of water supply reliability, degradation of the ecosystem, and/or increasing risk. There is no statutory authority in the Reform Act that allows the DSC to take this broad action in the absence of complete information.

Proposed Policies and Recommendations

Governance (Chapter 3)

GP P1(d) (page 23, lines 37-41): This policy requires that a covered action with a useful life of more than 10 years or a total capital and operating cost of more than \$10 million over a ten-year period shall include an economic analysis and a financing plan. While the draft DP indicates that the DSC “may” adopt a standard format that will facilitate the its understanding of the action’s impacts on the State’s economic vitality, it is important to note that in addition to sustaining the economic vitality of the State, Water Code Section 85302(d)(2) also requires that

the DP include measures to promote a more reliable water supply that also addresses the needs for reasonable and beneficial use of water and improving water quality. However, the draft DP does not yet identify any standard format or measure to address a covered action's impacts to economic viability of the State, reasonable and beneficial use of water or improving water quality.

The Coequal Goals policies listed on page 24 must be expanded to identify specifically how ecosystem restoration and water system reliability will actually be achieved, while at the same time enhancing the socio-economic values (i.e., agriculture, recreation, tourism, cultural, natural resources) of the Delta as an evolving place.

GP P7 (page 24, lines 27-34): This policy references performance measures and measurable targets that are a basis for action under the adaptive management required by the Delta Reform Act. However, Water Code section 85211 requires performance measurements that will enable the DSC to "track progress in meeting the objectives of the Delta Plan." The performance measurements must include, but are not limited to, quantitative or otherwise measurable assessments of the status and trends of the health of the Delta's estuary and wetland ecosystem and the reliability of California's water supply imported from the Sacramento River or the San Joaquin River watershed. Specific "measurements" should be included in the Plan.

GP P9 (page 24, lines 39-40): This policy requires that the allocation of costs and risks be identified for a covered action. However, the authority cited (Water Code section 85302(d)(2)) refers to measures to be included in the DP, not covered actions. In addition, the allocation of costs and risks is not a measure that promotes a reliable water supply.

Manage Water Resources Policies (Chapter 4)

WR P1 (page 29, lines 17-19): It is unclear whether implementation of this policy would subject all new projects (including emergency flood control projects) or covered actions to the State Water Resources Control Board (SWRCB) adopting a new flow standard. The lack of specificity makes the implementation of this policy problematic. Sacramento County recommends it be deleted.

WR P2 (page 30, lines 4-8): This proposed policy does not clearly describe what is meant by the requirement for water agencies to develop and implement a plan "similar to an Integrated Regional Water Management Plan (IRWMP)". As defined in Water Code Section 10534, an IRWMP is a document that describes the major water-related objectives and conflicts within a region. It considers a broad variety of water management strategies, identifies the appropriate mix of water demand and supply management alternatives, water quality protections, and environmental stewardship actions to provide long-term, reliable, and high-quality water supply. It also identifies disadvantaged communities in the region and takes the water-related needs of those communities into consideration. These issues are typically best addressed as part of a regional effort involving many different agencies and interests (Water Code section 10539). To focus this effort solely on water agencies is inappropriate and inconsistent with the

requirements for developing integrated regional water management plans. Additionally, water agencies are currently required under Water Code sections 10610-10656 to develop Urban Water Management Plans which contain much of the same information requested under this policy. Rather than create a duplicative requirement for submittal of an additional planning document, it would make sense to use the existing process, which is administered through the Department of Water Resources. Therefore, the County recommends the deletion of this policy.

WR P6 (page 31, lines 28-31): This policy is far too prohibitive. Sacramento County recommends it be deleted from the Plan.

WR R2 (page 32, lines 9-14): The term "sustainably" found in this policy is too vague and requires more specificity. For example, groundwater management occurs at a regional level and requires collaboration between all users. One local agency should not be impacted by the failure of another agency to "sustainably" manage its groundwater resources.

Ecosystem Restoration (Chapter 5)

ER P2 (page 34, lines 3-11): This policy references specific existing biological opinions but provides that new biological opinions will supersede and replace existing opinions. To assist with future implementation, this policy must be expanded/clarified to include a biological standard.

ER R1 (page 35, lines 8-12): According to this recommendation, the BDCP is to be completed by December 31, 2014, and if it is not, the DSC will proceed with ecosystem and conveyance planning recommendations independent of the BDCP process for inclusion in the first five-year update of the DP. This appears to be beyond the purview of the Delta Reform Act which expressly contemplates that the BDCP is an independent process which may be included within the DP under certain circumstances.

Water Quality (Chapter 6)

WQ R6 and R7 (page 38, lines 13-17): These recommendations are duplicative and should be deleted from the plan as the State Water Resources Control Board, the Central Valley Regional Water Quality Control Board, and the California Department of Public Health have existing regulations that protect the quality of groundwater used for drinking water.

Risk Reduction in the Delta (Chapter 7)

RR P1 (page 40, lines 4-6): As proposed, this policy would prohibit any covered action from reducing the level of flood flow capacity through and/or around the Delta. This geographic scope is unclear. In addition, it establishes an absolute standard, unrelated to the circumstances of an individual project.

RR P2 (page 40, lines 7-11) should be expanded to read: “[T]he statutory Delta is inherently a flood-prone area wherein the most appropriate land uses are agriculture, wildlife habitat, and where specifically provided, recreational activities, **respecting and protecting the existing rural Delta communities.**”

RR P2, bullet #5 (page 40, lines 26-27): As described, a “proposal shall not increase risk to public services maintained by the federal, state, or local governments.” This policy is unclear and overly broad as it would seem to prohibit even the reconstruction of a damaged home or business (or the improvement of an existing home or business) for maintenance purposes, expansion of existing use, or necessity to meet current code for the purpose of sale (all within the limits allowed by FEMA). Will the DSC consider these uses/improvements as “covered actions”? Even with flood-proofing or building at elevations above the floodplain, would these uses/site improvements still be considered an increase in risk to public service simply because they would depend on public services?

RR R1 (page 43, lines 4-6): This recommendation is overarching and duplicative. The National Flood Insurance Program is the appropriate avenue for the establishment of flood insurance requirements. The creation of a state mandate, particularly one that requires insurance for structures whether or not they currently have a loan, is restrictive. The creation of a mandate and possibly the creation of a separate insurance program, separate from FEMA, is duplicative. As a result, Sacramento County suggests this recommendation be deleted from the Plan.

RR R6 (page 44, lines 14-17): This recommendation needs to explain which agency would implement the creation of a Delta Flood Assessment District. At a minimum, a regional flood assessment district should be administered by the State, as part of the Central Valley Flood Protection Plan and the DP, not by local agencies. It is doubtful that such an assessment could be supported economically solely by properties within the Delta. Further, as the Delta Protection Act of 1992, Chapter 1, recognizes that the Delta contains invaluable agricultural, natural, ecological, water supply resources of value statewide, nationally and internationally, and that there is an urgency to protect those resources and population centers in the Delta, it is essential the entire State bear the cost for this protection.

Delta as an Evolving Place (Chapter 8)

DP P1 (page 45, lines 13-19): As provided for in this policy, no covered action involving development activities will be consistent with the DP until the Economic Sustainability Plan is completed and determined to be consistent with the coequal goals. This brings to a halt any kind of development activity, of any size, for an indefinite period. It is a predetermination of consistency related to a document as yet unprepared and not part of the DP.

DP P2 (page 46, lines 8-12): This policy must be revised to include a specific timeframe for the DPC to develop the strategy for the protection of legacy communities. Additionally, there should be some allowance for legacy communities to undergo reconstruction of a damaged home or business, or the improvement of an existing home or business for maintenance purposes,

expansion of existing use (within limits), or necessity to meet current code for the purpose of sale, within the limits of what is allowed by FEMA.

Finance Plan to Support Coequal Goals (Chapter 9)

The "Guiding Principles" (page 48, lines 20-35) include a brief description of the "beneficiary pays" principle for financing water projects. Given the DP identifies statewide protection of water conservation as a goal/purpose, does that mean the costs will be spread statewide?

In closing, as evidenced by our written comments on the Interim DP and the NOP for the DP's EIR, Sacramento County has consistently stated and advocated that sound, reasonable, and collaborative-based policies and regulatory requirements are critical in order for the DSC to effectively manage and administer the Delta and its related resources over the long term. Again, the County appreciates the opportunity to share its comments on the second draft of the DP and remains committed to staying engaged as subsequent draft plans are released for comment and input. Should you have any questions regarding our initial comments, please contact Don Thomas, Senior Planner, at (916) 874-5140.

Sincerely,



Robert B. Leonard, Administrator
Municipal Services Agency

RBL:DT/smh