



June 13, 2012

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Re: Comment Letter Re Sixth Staff Draft Delta Plan

Dear Council Members:

The San Joaquin Tributaries Authority (“SJTA”) has reviewed the Sixth Staff Draft Delta Plan (“Sixth Draft”) and is encouraged with the progress that took place between the Fifth Staff Draft Delta Plan and the Sixth Draft. Particularly, the SJTA is pleased to see the evolution from a “natural flow regime” to a “functional flow” mentality. This shift shows an awareness that flow is just one of many factors to further the coequal goals.

The SJTA is also very pleased to see the Sixth Draft’s clarification of “covered actions,” which correctly excludes upstream water diversion and use. This reflects appropriate adherence to statutory mandates set forth in the 2009 Delta Reform Act. While the Sixth Draft has made these and other significant advances, there remain several key issues that the SJTA feels the Delta Stewardship Council (“DSC”) should improve upon and are set forth below.

Water Supply Reliability.

In Chapter Three, “*A More Reliable Water Supply for California,*” Water Reliability Policy 1 (WR P1) states in part, “reducing water reliance on the Delta and adequately contributing to improved regional self-reliance means a significant reduction in net water use, or in the percentage of water used, from the Delta watershed[.] ...” Similarly, an Output Performance Measure in Chapter Three states that:

“Water suppliers that receive water from the Delta watershed have documented achievements of net reductions in volume of water used from Delta or expansion of local supplies relative to Delta water use.”

This policy suggests that improved regional reliance would require a reduction in the net volume or percentage of water used from the Delta watershed. This is contrary to California policy defined in the Delta Reform Act.

Water Code section 85021 states:

“The policy of the State of California is to reduce reliance on the Delta in meeting California’s future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts.”

Therefore, each region within the Delta *watershed* shall improve its regional self-reliance. Suggesting that water suppliers within the Delta watershed should reduce net use or percentage of water is improper and threatens to infringe upon water rights. Regional self-sufficiency cannot mean to take water away, but rather to improve efficiencies as described in section 85021.

A key reason that the Sixth Draft misinterprets section 85021 and regional self-sufficiency of the Delta watershed is because throughout the Sixth Draft, particularly Chapter Three, it appears to improperly use “Delta” and “Delta watershed” synonymously. This creates confusion and unintended consequences, which go beyond the scope of the Delta Reform Act.

Water Code section 85058 defines the statutory “Delta” as the boundaries described in section 12220 and the Suisun Marsh as described in Public Resources Code section 29101. Water Code section 85060 defines the “Delta Watershed” as “the Sacramento River Hydrologic Region and the San Joaquin River Hydrologic Region as described in the department’s Bulletin No. 160-05.” These are not synonymous definitions and the difference is fundamental. Indeed, Figure 1-1 of the Sixth Draft (page 10) graphically illustrates the difference.

The misapplied interchanging of “Delta” and “Delta watershed” is found throughout the narrative of Chapter 3.¹ Perhaps most problematic are the statements that water reliance on the Delta watershed will be reduced. This is incorrect. Reduced water reliance on the “Delta”—not “Delta watershed”—is the objective. Regional self-sufficiency in the Delta watershed is achieved through more efficient water use and may ultimately help to achieve the objective of reduced reliance on the Delta.

Further, as WR P1 currently reads, it is contrary to the policy set forth in Water Code section 85021 and area of origin water rights. The same applies for each misuse of “Delta watershed” for “Delta” throughout the Delta Plan. These issues must be addressed and clarified.

¹ See, e.g., Chapter 3, pp. 68 (green box); 69:17 – 18; 100:23 – 30; 108:13 – 18; and 109:6 – 8.

The Geographic Scope of the Delta Watermaster is Statutorily Defined.

On page 108, the Sixth Draft suggests geographic expansion of the scope of the Delta Watermaster's duties. This is in contravention to Water Code section 85230(b), which clearly defines the geographic scope of the Delta Watermaster. It states in relevant part, "The Delta Watermaster's authority shall be limited to diversions in the Delta, and for the monitoring and enforcement of the board's orders and license and permit terms and conditions that apply to conditions in the Delta." The legislature was explicit that the Delta Watermaster's duties "*shall be limited*" to the boundaries of the Delta; any expansion of geographic scope must come from the legislature.

Further, it is important that the scope of the Delta Watermaster remains within the statutory Delta to establish certainty of water diversions and use within the Delta. Thus far, the Watermaster has not established any significant level of certainty of diversion and water use, and has only evaluated a small number of the 3,000 Delta diversions. The Watermaster has not provided any improvement in certainty because water rights are not being verified or invalidated.

It is contrary to the Delta Reform Act to recommend the Delta Watermaster's duties should expand beyond geographic scope of the Delta. Additionally, it is premature to advocate for it.

Update Delta Flow Objectives (ER P1).

Ecosystem Restoration Policy 1 (ER P1) states that the State Water Resources Control Board ("State Water Board") should adopt and implement updated flow objectives for the Delta by June 2, 2014, and adopt and implement flow objectives for high-priority tributaries in the Delta watershed by June 2, 2018. The Sixth Draft suggests that the State Water Board can achieve these deadlines through mechanisms including Federal Energy Regulatory Commission ("FERC") relicensing or water rights hearings. This policy remains unrealistic and is contrary to law.

The State Water Board is in the process of reviewing the Bay-Delta Water Quality Control Plan ("Water Quality Control Plan"). Currently, the review is fraught with procedural and substantive violations on several grounds. These violations may be a result of the admitted "ambitious" deadlines the Sixth Draft presents in regulatory policy ER P1. The DSC should encourage the State Water Board to review the Water Quality Control Plan in a comprehensive manner that is legally defensible.

Additionally, the recommended mechanisms to achieve the 2014 deadline are arguably unlawful methods by which the State Water Board may implement revised flow objectives. Utilizing FERC relicensing as a means of implementing water quality flow objectives is contrary to law, flies in the face of water right priorities, and will not likely succeed.

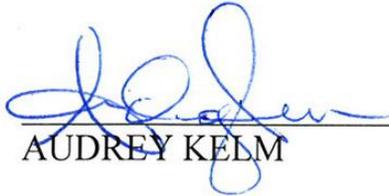
This policy remains a serious issue that could in fact have negative consequences on the promotion of the coequal goals in the Delta. Directing the State Water Board to meet the 2014 deadline is causing the State Water Board to rashly rely on faulty analyses and utilize unlawful

mechanisms to implement updated flow objectives. This consequently jeopardizes the coequal goals of greater water supply reliability and the protection and restoration of the Delta ecosystem.

The SJTA appreciates the opportunity to comment on the Sixth Draft and is cautiously optimistic of the direction of the Delta Plan, notwithstanding the remaining issues which must be resolved before the Final Delta Plan can be successful. The SJTA therefore requests the DSC to address these issues prior to the release of the Final Delta Plan.

Very truly yours,

O'LAUGHLIN & PARIS LLP



AUDREY KELM

AK/tb

Cc: San Joaquin Tributaries Authority