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DELTA COUNCIL
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Mr. Phil Isenberg, Chair
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA. 95814

April 29, 2011

Subject: Delta Plan – 3rd Draft

Dear Chairman Isenberg and Council Members:

On behalf of the Tuolumne Utilities District we thank you for the opportunity to comment on the 3rd Draft of the Delta Plan. We have previously commented on the 2nd Draft Plan and refer you to those earlier comments. We have also provided comments to the Delta Stewardship Council (DSC) through the Notice of Preparation process for CEQA compliance.

The Tuolumne Utilities District has an interest on the proposed Delta Plan due to the location of our District's service area within a San Francisco Bay Delta Tributary watershed.

Our agency continues to have significant concerns with the tenor and implications of the DSC's draft Plan. This document proposes a redundant, unauthorized and non-sustainable regulatory methodology that will not solve the problems in the Delta. Instead it will make them worse by impeding progress on many local and regional partnerships and innovative resource management programs.

To solve the Delta's problems will require a broad and diverse set of partnerships spanning the watersheds on a local and regional scale. To solve the Delta's problems we expect the DSC to provide local agencies and regional programs with a Plan that identifies goals and objectives that focus on crafting solutions for the Delta. Instead, the draft Plan is a prescriptive, clearly a regulatory program and one that will drive away participants rather than attract them to working with the DSC.

Our comments generally follow the order in which the subject matter appears in the Draft Plan. Comments refer to page, line and paragraph number except where the comment is a general one referring to the document as a whole.

General Comments -

The document must be very clear in it's meaning, as in its present form it is intended to create new regulations. There must be a consistent meaning to key terms throughout the document and those terms must then be used consistently within the context of that definition (just a few examples include; Delta, Delta Watershed, State, fully integrated, basin, groundwater basin, groundwater, project, in whole or in part, control water demand, every action, etc.).

Page 13, line 29 & 30 state that "For the purposes of the Delta Plan, the Delta and the Suisun Marsh are collectively referred to as the 'Delta' unless otherwise specified." A covered action is defined as meeting all those four criteria defined in CWC Sec. 85057.5(b). Therefore, unless an action occurs in some fashion within the Delta or Suisun Marsh as defined in CWC Sec. 12220 and PRC Section 29101 respectively it is not a covered action subject to review in the Delta Plan.

It is essential that these terms and definitions be carried throughout the Delta Plan consistently, so that the reader can be assured of the intended meaning. If an action is not a covered action then the Delta Plan and the DSC have no authority.

However, on page 45 of the Plan, lines 23 through 28, in the context of the entire State, refer to controlling water demand, dealing with infrastructure limitations, development of local and regional water supplies. Given the limitations of covered actions cited above it is not clear that the narrative background on page 45 is consistent.

On page 47 in lines 14 through 42 the Plan proposes to also apply policies and recommendations for additional Urban Water Management Plan elements, to areas that do not meet the definition of a covered action. By page 48 this has evolved to requiring - apparently statewide - evaluations of regional water balances (lines 3-11) and by lines 12 and 13 the plan has "drilled down" to the evaluation of the water rate structure of all water suppliers in the State. Local water agencies setting local water rates for their customers is not a covered action, and the Plan has no legal authority to regulate those rates. This is actually proposed by line 35 of the same page lines 35 - 38. Public Agency water providers are limited in their authority to set and increase water rates by the strict provisions of Proposition 218 (1996), which have amended California Constitution Article XIIId. Any recommended action of the DSC, including implementation of a form of mandatory water rate structure or assessment of a Public Good Charge, must consider the fee approval limitations of the California Constitution.

This same expansive theme of regulation is carried forward on page 50 through the blurring of the definition of the Delta and Suisun Marsh, a covered action and the relationship to other areas of the state. By this page the Plan provides a recommendation to the SWRCB of ceasing to issue all water rights permits anywhere both in the Delta and the Delta watershed. To be clear, this could prohibit the issuance any and all new permits for water rights anywhere within the Delta watershed (which by definition are not covered actions).

It is clear that the terms covered actions; Delta, Delta watershed, and State become blurred in their meaning and application, so that an expansive area of anticipated control by the DSC is crafted.

In general we believe the DSC Draft Plan #3 far exceeds the actual authority provided by legislation. The expansive and aggressive regulatory zeal evident in the Plan is not supported by the enabling legislation. The Plan, instead of being a strategic or programmatic plan that is phased in over a period of years as additional information is made available (such as the SWRCB's flow decisions and the completed BDHCP), has moved directly to a very specific, regulatory focus. Draft Plan #3 is not a plan, but rather a regulatory roadmap for the DSC. Unfortunately, the Plan as drafted would create significant uncertainty through a plethora of new regulations. Parties whose interests are compromised would in all likelihood challenge such regulations, as they are unsupported by statute. As written the plan will have a chilling effect on the state's economic recovery, delay new jobs, new homes and deny a sustainable economic future for millions of Californians.

There currently exists a delicate water flow balance in many of the Sierra Nevada Foothill reservoir operations. Federal Energy Regulatory Commission (FERC) hydroelectric licenses, SWRCB 401 Water Quality Certification and a variety of local operating agreements all establish in-stream flow and reservoir operating requirements which, in many cases, have been established through years of negotiation among water resource interests, extensive scientific studies and investment of millions of local ratepayer dollars. Such agreements must be consulted and incorporated into any process which may propose to alter flow requirements. In many cases due to these delicate flow balances, if flow requirements are increased by mandate of the SWRCB through DSC actions, water agencies will be left completely without water supply due to FERC and State mandatory minimum elevations and flows existing within these permits and authorizations.

Specific Comments -

1. Page 10, lines 26-39. It is not factually correct based upon the present information and science available, that all surface water and deep granitic

fracture groundwater within the Sierra Nevada Mountain Range and its foothills are "part of an interconnected system".

2. Page 12, line 3. It is not clear what the term "fully integrated, real time" means.

3. Page 12, third paragraph. Reference is made to reducing urban per capita water used by 50% or more statewide, but no baseline condition is referenced. This then raises the question of 50% of what? Does this mean the baseline amounts developed consistent with SBX 7-7, the 2015 targets established through Urban Water Management Plans, or perhaps the year 2020 targets?

4. Page 12, line 26. It is not clear what the term "depend on the Delta and its watershed" means. To what degree?

5. Page 16 & Page 27, Adaptive Management. To be able to deploy and utilize the "best available science" so as to achieve adaptive management, then experts and scientists must have a high degree of knowledge of the resources in question. Given the expansive nature and ambitious proposals by the Plan for much of the land area of California, it is quite probable that the existing Delta scientists are not the right experts to deal with the subject matter of that vast land area. Thus, the Plan will not be using the best available science, but only the most convenient and available Delta science.

6. Page 35, second paragraph. The plan should make clear why the issuance of a building permit issued to expand a house within an incorporated city differs from a building permit issued in an unincorporated city, or portion of a county. These areas are all required to meet the same requirements for planning, zoning and building code enforcement. The example is more confusing than helpful and raised more issues than it settles. It does however; raise the point of how a ministerial act (the issuing of a building permit by a local jurisdiction) must now be subject to a new discretionary level of review to determine <u>if</u> the issuing of a building permit to remodel a home is a "covered action". This will add time and expense to simple home modeling projects further impacting economic recovery. It is not at all clear what impact a front porch or an extra bedroom, taken on face value, could have on the Delta. The term "likely not a covered action" is less than helpful in illuminating this precept and lends to the specter of appeals of home remodeling projects being to the DSC by parties who believe these are "covered actions".

7. Page 36, last paragraph. The notion that the issuance for a single building permit, a ministerial act by a local agency, now falls under the jurisdiction of the Delta Stewardship Council, potentially anywhere in the export areas or the Delta and/or its watersheds is troubling. Such a new regulatory process

will add significant local land use permitting costs and time to entitlement actions that by any stretch of the imagination are unconscionable. The Plan would place a burden on local governments of determining, literally on a house plan-by-house plan basis, if they were approving a "covered action". This will undoubtedly drive up local permitting costs and the time required to issue what now is a simple, ministerial, permit and unnecessarily add to the cost of construction.

8. Page 38. The graphic incorrectly indicates that actions that occur "within the boundaries of the Delta" are one of the criteria, while the narrative within the plan refers to actions that "occur, in whole <u>or in part</u> within the boundaries of the Delta or the Suisun Marsh".

9. Page 39. Policy GP1. By including single-family home additions as a potential covered action and then requiring that "All covered actions must be fully transparent by disclosing all potentially significant adverse environmental impacts and mitigation measures" the Plan imposes a new level of analysis and scrutiny to all local governments in most of the State. These governments and local agencies must now impose an analysis, equivalent to a full CEQA process, to the issuance of what was a ministerial act. This will add significant time and cost to the process of building or adding onto a home in most of the State. Further, it will expose those permits to potential appeals to the Delta Stewardship Council thereby creating a permitting new hurdle never anticipated in the authorizing legislation. Under this measure of diligence by the DSC it is likely local decisions regarding even the most moderate water supply and quality projects throughout much of the state could be appealed to the DSC. This would hinder, rather than improve local water supply reliability and water quality projects.

10. Page 45, third paragraph. The language in this paragraph is inconsistent with the language within SBX 7-1. Terms such as "deal with infrastructure" and "control water demand" are, within the statute, "improve...infrastructure" and "promote statewide conservation". The Plan should not attempt to blur and expand what authority it was provided by overreaching terminology.

11. Page 47 first paragraph. This paragraph is factually incorrect. Local water agencies are required by law to submit Capital Improvement Plans to local governments for an affirmative finding of consistency with mandated local general plans. Thus, actions anticipated by local agencies and their planned investments are identified. Further, each five years all urban water suppliers are required to develop Urban Water Management Plans that identify water sources, supply and proposed water use efficiency measures, among other things. These plans are now required (SBX 7-7) to meet new, more stringent,

unique. Similarly, rivers, streams and small creeks are also each unique regarding their specific terrestrial and aquatic habitat and species. Thus, the presumption that "every action that potentially" could increase the diversions from the Delta (it is not clear if the author meant the statutory Delta or the Delta watersheds) should not take place until 100% certainty of the needs of the system are determined by the SWRCB would mean no action would take place for quite some time. Under those conditions of restriction it would seem the DSC would see no immediate need for any further regulation as it would have imposed a moratorium on new water supplies that would have significant and far reaching socioeconomic impacts to much of the state and a chilling effect on the state's economic recovery. This excessive regulatory approach is echoed on page 50 items B and C.

19. Page 53. Please note that not all the lands of the state are located within a groundwater basin. Please see Bulletin 188 (DWR) to clarify. This same fact applies to page 54 WR R7.

20. Page 61 paragraph 2. Native species are those species that were not introduced into an ecosystem directly or indirectly through the actions of man. The remainder of your definition is correct.

On behalf of the District and our customers, we again wish to thank the Council for allowing for review and comment on the third draft of the Plan. We urge the Delta Stewardship Council to join local agencies such as ours as partners and move the Delta Plan onto a solution-oriented path of progress.

Sincerely,

Peter Kampa
General Manager

Cc: TUD Board of Directors
John Mills
MCWRA