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Phil Isenberg, Chair
Delta Stewardship Council
980 Ninth Street, Ste 1500
Sacramento, CA 95814

**RE: Are Efforts to Improve Delta Levees to PL 84-99 Standards
Consistent With the Delta Plan?**

Dear Phil:

My effort to address this issue with the DSC at its meeting on Thursday, June 23, 2011, albeit somewhat clumsy, provoked a seemingly negative reaction, bordering upon hostility, from you and other commissioners and staff. This letter is an effort to state the problem more clearly and to reach a more reasoned conclusion than what emerged at Thursday's session.

The problem deals with the potential necessity of the Council's consistency review of efforts by Reclamation Districts to improve existing levees in the Delta to the U.S. Corps of Engineers' PL84-99 agricultural standard, a long-standing goal of virtually every Reclamation District in the Delta¹, including those that have chosen to participate in the Delta Levees Subvention Program and the Special Projects Program. It is readily demonstrable that levee work accomplished to date under these programs has reduced incidents of catastrophic levee failure in the Delta dramatically. In fact, the only major failure of a Delta levee (other than those designed to "fail" under purchased flood easements) in the last dozen years (Jones Tract), occurred not because of high water.

¹ Indeed, the Reclamation Districts, as well as the State, are under a continuing obligation to maintain levees as a condition of the original swamp and overflow grants under the Arkansas Act of 1850 (9 U.S. Stats. At Large, p.519) from which titles were originally granted by the United States to California "to promote the speedy reclamation of the lands and thus invite to them population and settlement, thereby opening new fields for industry and increasing the general prosperity." See *Kimball v. Reclamation Fund Commissioners* (1873) 45 CAL. 394, 360.

Although it is abundantly clear that PL84-99 levees are appropriate and consistent with the Delta Plan, confusion arises with prospective designation of existing agricultural areas for wetlands habitat or other types of ecological or recreational use, for which either “no specific goal” or “HMP” levees are deemed “acceptable” in Table 7-1 at page 141 of the Fourth Staff Draft . An implication arises that continuing efforts by Reclamation Districts to achieve the PL 84-99 levee standards might be deemed “inconsistent” if lands protected by the District levee were designated or reserved for future wetlands habitat or other types of ecological or recreational use elsewhere in the Delta Plan, or a related plan (such as the BDCP) eventually incorporated in the Delta Plan. Current versions of the Delta Plan, the BDCP and other planning processes include broad and extensive indications of intent to so designate many thousands of acres of currently farmed Delta lands, without evidence of financial ability to acquire and/or convert such lands to such purposes. In addition, it is likely that most, if not all, such converted lands will require PL 84-99 (or better) levees to protect the substantial public investment in such projects, as well as to continue to protect adjacent lands from prospective inundation from wave wash, burrowing animals and other causes. And even further, it is foreseeable that restoring historic flow patterns in the Delta will restore ecological functions in Suisun Bay and Marsh that these conversions are meant to replace, increasing the likelihood that the conversions will never occur.

Although it is likely that consistency determinations will eventually be positive in such cases, delay is the enemy of progress in flood protection in the Delta. In a post-flood scenario, any significant delay in repair of a failed levee (such as might occur in a consistency determination) multiplies the damage and repair cost. In pre-flood conditions, Reclamation Districts are working with limited funds and available specialized equipment in very narrow work windows. Progress lost by missing an annual work window is never regained.

The solution to this dilemma is to make clear in the Delta Plan that work to achieve PL 84-99 Agricultural Standards levees in the Delta is consistent with the Plan, not requiring further review for that purpose. The avoided delay will be invaluable. This should have the additional salient effect of deferring inverse condemnation claims resulting

from findings in a consistency proceeding that levee construction to PL 84-99 standards is inconsistent with possible future wetlands or recreational uses.

Contrary to statement made by others during my presentation on the 23rd, this suggestion is not made to prevent orderly conversion of agricultural lands to wetlands or recreation usage once competent projects are determined, designed and funded, nor should it provide a rationale for no longer funding the Delta Levee Subventions and Special Projects Programs whose continued existence is essential to achieving the stated goals of environmental recovery, or more reliable water supply and preservation of the Delta.

Yours very truly,



THOMAS M. ZUCKERMAN

TMZ:csf

cc: Joe Grindstaff