

May 06, 2011

Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, California 95814

**Sent via e-mail to Individual Council members
and Council Executive Director**

Re: Water Community Comments on Third Draft of Delta Plan

Dear Chair Isenberg and Council members:

In the 14 days since the April 22, 2011 release of the third draft of the Delta Plan, we have reviewed that draft in detail and participated in the Council's April 28-29 workshop concerning that draft. The third draft made noteworthy improvements from the first and second drafts. Unfortunately, the third draft still contains significant problems. The most significant problems are the third draft's lack of a cohesive plan and reliance on the failed approach of focusing on flow to resolve all of the Delta's problems, an approach that has contributed significantly to the Delta's decline and an unsustainable reduction on statewide water supply reliability. There continues to be an obvious absence of an integrated, comprehensive strategy that looks at all the factors ("stressors") influencing the Delta ecosystem in a coordinated manner. Clearly, such absence will result in a "plan" that has little, if any, likelihood of achieving the coequal goals, as mandated by the Legislature in SB X7 1. Furthermore, if the final Delta Plan continues to promote a regulatory-centric approach, it is hard to imagine parties rallying around the plan and stepping forward in the voluntary manner that is essential to a successful implementation of the Delta Plan.

We have provided detailed comments on the third draft's specific deficiencies below, followed by necessary changes to remedy these deficiencies. We urge the Council and Council staff to make the suggested changes to the next draft Delta Plan. Per the request of the Chair and various Council members, we are also preparing a detailed alternative Plan that we will be submitting for Council consideration as a reasonable alternative to the proposal developed by staff. Given that the Council identified many of our members as responsible agencies in its notice of an environmental impact report (EIR) preparation, we respectfully request that the Council include and analyze our submitted alternative in its draft EIR.

Chapter 1: The Delta Plan Should Be a Plan for the Delta, Not a New Set of Statewide Water Regulations

The third draft Delta Plan is not a cohesive plan that will achieve the coequal goals. Instead, the third draft is a series of statewide regulatory proposals that are unrelated to each other or a larger plan to achieve ecosystem restoration and water supply reliability. In order to be successful, the Delta Plan must start by identifying the goal and work backwards to implement the goal with policies and recommendations. Like a complicated puzzle, the full picture must be in place before the pieces are cut up. The Council has yet to identify the full picture; it has yet to identify what steps would contribute to water reliability and what actions would restore the ecosystem. Furthermore, there is no discussion with regards to an integrated approach to address the coequal goals. Instead, the third draft has begun to manufacture pieces, such as groundwater reporting and Delta levee evaluations, in hopes they fit together and somehow resolve the Delta's problems.

The regulatory proposals put forth by the third draft have little, if any, geographic limitation. The third draft declared that the “geographic scope of the Delta Plan must include areas that divert water upstream of the Delta and those areas that export water from the Delta. This is virtually the same planning area used for the CALFED Bay-Delta Program.” (Third draft, p. 13:22-25 (emphasis added).) In other words, the third draft explicitly adopts the model of the program that the Legislature abolished and replaced with the Council because CALFED had failed.

This is inconsistent with the Delta Reform Act, which was clear that the focus of the Delta Plan be on the legal Delta. With the understanding the Delta cannot be viewed in total isolation, the next draft of the Delta Plan must recognize that the Council’s authority to act outside the Delta is limited and focus the Delta Plan on actions in the primary Delta in a manner that protects the unique values of the Delta as an evolving place, as stated in the Delta Reform Act. (Delta Reform Act § 85054 and Public Resources Code § 29702).

. Rather than seeking to create yet more regulations, we encourage the Council to identify and adopt, in the Delta Plan, strategic, non-regulatory approaches to advance actions outside the Delta that can contribute to the advancement of the coequal goals. The Council should identify incentives, and improvements to existing state activities, that will catalyze progress involving existing resources. We believe that such efforts represent the true strength of the Council and conform with the intent of the Legislature when it created Delta Stewardship Council.

Chapter 1: Necessary Changes

The Delta Plan should describe clearly its long-term vision for the Delta based, in large part, on a comprehensive strategy for infrastructure and ecosystem investments in the Delta. The Plan should identify the programs, policies and actions currently being undertaken by federal, state and local agencies, as well as non-governmental organizations, and describe how they are consistent or inconsistent with the Council’s vision of the Delta. Finally, the Plan should integrate existing policies into a robust plan and, based on the synthesized result, only then identify new policies or modifications to existing policies that would best achieve the coequal goals.

Chapter 2: The Delta Plan’s Adaptive Management Discussion Fails to Describe How the Delta Will Be Adaptively Managed

Chapter two of the third draft provides a very good summary of adaptive management as a tool in the abstract. That chapter does little, however, to describe how the concept might actually apply in the Delta. As the Delta Independent Science Board stated in its report (April 7, 2011) and reiterated by the Council’s chief scientist, “the [adaptive management] chapter reads like an academic description of adaptive environmental management rather than an integration of the principles of adaptive environmental management into a plan for governing the Delta....”

This problem is driven by the third draft’s fatal error, which is common to Delta planning and regulatory efforts over the past two or more decades: It focuses on flow as the primary tool

to achieve ecosystem benefits. That focus may be convenient, but it is not supported by the best available science. Over four years ago, the Public Policy Institute of California explained:

For the past 70 years, the state's policy has been to maintain the Delta as a freshwater system through a program of water flow regulation, supported by maintenance of agricultural levees. This strategy improved water quality for Delta agriculture and water exports and was assumed to protect both native and desirable alien species (particularly striped bass). But most such species have not done well under this policy.

Envisioning Futures for the Sacramento–San Joaquin Delta, p. viii (2007). That statement and similar statements made by others are supported by ongoing scientific research. For example, in 2002, Dr. W.J. Kimmerer wrote:

The current state of knowledge about flow effects does not provide adequate support to decision making... All of [the] problems are shortfalls of knowledge that can be addressed through a program of research coupled with experimental manipulation of some aspects of freshwater flow.

Physical, Biological, and Management Responses to Variable Freshwater Flow into the San Francisco Estuary, p. 1286, *Estuaries* (December 2002). As one might expect the work by Dr. W. J. Kimmerer preceding and following that statement did not concern flow but the “mechanisms of response and the biology of the species being managed.” *Id.* at 1284.

California must shift from the flow-based paradigm to one that is based on discovering the mechanisms behind species responses. It can no longer afford to manage its water system by simply regulating hydrodynamics. We need to be confident that critically-important water supply and ecosystem management decisions are supported by an understanding of what is directly and adversely affecting the ecosystem, and what is needed to restore the Delta ecosystem. The Delta Plan can play a critical role, assisting with that shift, by establishing a strong science plan. Unfortunately, the scientific research discussed in the draft Delta Plan does not go nearly far enough. Instead of perpetuating the agency science status-quo with some possible modifications around the margins, the Council should heed the advice of Dr. Jeff Mount who told the Council on April 29 that what was needed was a "science plan," not just a "science program."

The development of life cycle models for each species of concern would begin to uncover the mechanisms for species responses to environmental conditions. The strength of each model would be dependent upon the state of the science. The pursuit of life cycle models can be achieved in the context of a “science plan”, which would (1) identify and synthesize statistical analyses to be undertaken of existing data, and make recommendations on the need for additional data; (2) identify hypotheses that require testing, and (3) ensure adequate and reliable funding. Results from those efforts would be used to inform management decisions and would guide any adaptive management plan. In the end, such a science plan will provide agencies, like the State Water Resources Control Board (SWRCB), with the scientific tools they will need to make decisions about the Delta that will be more effective in restoring and maintaining the Delta's resources than past, flow-centric decisions have been. As Dr. W.J. Kimmerer recognized, it

would allow for substantial improvement in decision making and ultimately better use of California's limited water resources.

The high cost of the water...raises the question: Can these actions be made more effective with the same quantity of water, or equally effective with less water? The answer to these questions depends on the mechanisms of response and the biology of the species being managed...

Physical, Biological, and Management Responses to Variable Freshwater Flow into the San Francisco Estuary, p. 1284.

While we do not agree with the third draft's approach to scientific issues, we appreciate the insertion, on the third draft's page 28, of the paragraph lines 19 through 26. That paragraph effectively recognizes the concern that experts in some technical fields that will be key to the Council's work do not regularly subject their work to peer review. Given the variety of technical experts that will contribute to Delta solutions, that paragraph is quite important.

Chapter 2: Necessary Changes

The Delta Plan must do two things to provide an appropriate scientific base for future actions. First, for reasons also discussed below, the Council must identify specific in-Delta projects and actions that, based on the best available science, can be conducted in the immediate future, short-term and long-term. After such projects are identified, the Delta Plan should describe those projects' monitoring programs and reporting requirements and establish a framework for reviewing and revising the projects based on analysis of results. We need to recognize the value of early successes, as well as the fact that this plan is envisioned to evolve over decades. The role of the Council, through its periodic review process, is to modify the plan after evaluating actions implemented, and assessing changing circumstances. Second, for the reasons discussed above, the Council must state how life-cycle models for the key species will be developed.

Accordingly, we recommend that, in chapter two, the Council:

- Identify, for each in-Delta project prioritized for implementation, how its progress and effects will be monitored, how the effects of that analysis will be reported and how decisions will be made about the project's further implementation.
- Direct the Delta ISB to develop, in consultation with the relevant federal, state and local agencies, a scientific plan for identifying the linkages among conditions in the Delta, possible Delta management actions and responses by key species, including delta smelt, longfin smelt, splittail, Chinook salmon, steelhead and green sturgeon. The Council should direct the Delta ISB to present its first draft plan by July 1, 2012 and will assess the schedule for completing the plan at that time. The Council should recommend that, in the draft plan, the Delta ISB identify and prioritize the top ten research tasks for identifying paths to restoring populations of the key species to at least self-sustaining levels.

Chapter 3: The Third Draft's Discussion Of "Covered Actions" Overreaches and Would Create Significant Confusion Statewide

The third draft expands the Council's authority over covered actions beyond the Delta Reform Act. The third draft determines that, although covered actions are defined by the CEQA definition of a "project", the exemptions limiting what qualifies as a "project" under CEQA are not similarly applied to a covered action. Such an expansionist reading would result in the Council reviewing the consistency of, for example, local building permits that are consistent with general and specific plans, use permits, and subdivision maps. Such a reading would grant the Council authority over one-year water transfers that the Legislature has exempted from CEQA under Water Code section 1729. In addition, the third draft states that a project could be significant because it "cumulatively" causes an impact. Under environmental law, this means that the project would contribute – when combined with the impacts of all other reasonably foreseeable projects – to some impact. (See Cal. Code of Regulations, title 14, § 15355 (defining "cumulative impacts" under CEQA.) The third draft's discussion therefore casts an extremely broad net for consistency review. In short, it is very difficult to perceive the geographic and substantive limits of the consistency reviews proposed in chapter three.

The third draft also expands the geographic scope of covered actions. The Delta Reform Act is clear – covered actions are limited to those actions that take place, in whole or in part, in the Delta. (Delta Reform Act § 85057.5(a)(1).) The third draft includes provisions that suggest that any project that takes water from the Delta or has water pass through the Delta would amount to a covered action. Furthermore, the third draft would obligate a proponent of a covered action to ensure that actions outside the Delta that are related to the covered action comply with specific policies set forth in the draft plan. See pages 47-48 of the third draft. This expansive interpretation frustrates the geographic limitation of covered actions and cannot be interpreted as consistent with the legislation.

Chapter 3: Necessary Changes

The third draft should limit its discussion of covered actions to the section in which the Delta Plan explains how consistency reviews will be conducted after the Delta Plan is in effect. The Delta Plan must stop using its consistency review as a way to effectuate back-door regulation. The standards for determining consistency reviews under a Delta Plan that is a plan for the Delta, rather than a new regulatory program, would be relatively simple. To be a "covered action," a project occurring at least in part in the Delta or the Suisun Marsh would have to at least potentially impact one of the actions, policies or projects identified in the Delta Plan and the project would be inconsistent with the Delta Plan if it were to interfere with, or hinder, the implementation of the relevant Delta Plan item or items. Such a determination could be based largely on the relevant project's CEQA document, which would need to analyze how the project would impact the relevant resource in the Delta or the Suisun Marsh. Such an analysis would involve few, if any, of the value judgments that are inherent in the third draft's discussion of "covered actions."

Accordingly, we recommend that, in chapter three, the Council:

- Delete proposed policy G P1 and all of its subparts; and
- State that upon appeal, the Council will consider an action to be inconsistent with the Delta Plan if it would interfere with, or hinder, the implementation of a policy, action or program identified in the Delta Plan. If a state or local agency has found that its action will be consistent with the Delta Plan, the Council will uphold that finding if it is supported by substantial evidence.

Chapter 4: The Third Draft's Water Resources Discussion Fails To Reflect the Coequal Goals

A. Chapter Four Contains No Plan for Improving Statewide Water-Supply Reliability

The Delta Reform Act defines the “coequal goals” as meaning “the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.” (Delta Reform Act § 85054.) The Act therefore requires the Delta Plan to “promote statewide water conservation, water use efficiency, and sustainable use of water.” (Delta Reform Act § 85303 (emphasis added).) Chapter four’s policies and recommendations, however, almost uniformly seek to impose more obligations on local water suppliers. (Third draft, WR P1, WR P2, WR P3, WR R2, WR R3.) These policies go so far as to seek to control local water suppliers’ water rates, which, under Article XIID of the California Constitution (Proposition 218), are subject to limits tied to those suppliers’ individual costs of water and related facilities. (Third draft, WR P1, WR P3.) Even where chapter four proposes that state agencies undertake tasks, those tasks involve state agencies’ exertion of more control over, or imposition of more constraints on, local water suppliers, as with the chapter’s proposals for California Water Commission hearings, more elaborate processes for negotiating State Water Project contracts, local agencies’ participation in DWR’s Water PIE program and for State Water Resources Control Board proceedings concerning groundwater basins. (Third draft, WR R4, WR P5, WR R5, WR R7, WR R8.)

The state, however, already requires that local water suppliers implement large numbers of planning, reporting and transparency requirements, including preparation of urban and agricultural water management plans (which themselves must comply with very detailed requirements), water conservation plans, water-supply assessments for significant new developments, specific requirements to seek state funding under integrated regional water management plans, groundwater monitoring and water-right reporting, among other things. In addition, if a local water supplier obtains supplies from the federal government, there are additional federal requirements. Finally, there is already a statewide system for monitoring streamflows.

Instead of adding another layer of regulation, the Delta Plan should focus on resolving a crucial statewide water management problem, namely the state’s failure to integrate, assess and disseminate all of the information that flows from existing local agencies and state programs. This failure prevents the state from assessing the sustainability of California’s water supplies as a whole and identifying ways that state agencies can assist local water suppliers in taking steps to improve their supplies.

B. The Third Draft Would Discourage Investments in Regional Self-Reliance

Chapter four emphasizes “improving regional water self-reliance” as the primary tool for achieving the water-supply coequal goal. That chapter, however, does not acknowledge that such a policy involves the necessary corollary that, in order to make the necessary investments, local communities require assurances that they will be able to reap those investments’ benefits. Rather than giving any such assurances, the third draft only exacerbates concerns that the Council’s activities will reduce, not enhance, water suppliers’ ability to improve their self-reliance. Specifically, that draft: (1) questions whether water suppliers should make new investments until the SWRCB completes new streamflow objectives; (2) fails to recognize that state-of-the-art streamflow measures are already being implemented in many parts of the Delta watershed; and (3) suggests that the California Water Commission should take the lead in identifying projects to enhance regional self-reliance. Instead of making these statements, the Council should simply make a statement in the Delta Plan that reflects the Delta Reform Act’s express statements about: (A) its effect on the rights and laws that provide water suppliers the assurances they need to make investments; and (B) the potential incorporation of the Bay-Delta Conservation Plan (BDCP) into the Delta Plan.

C. Chapter Four’s Proposals Concerning Streamflows, If Implemented, Would Violate the Delta Reform Act

The third draft’s focus on flow is unbalanced. The third draft includes policies that would seek to require the SWRCB to set flow objectives as its main policy objective in three of its five substantive Chapters. This flow-centric focus is not balanced, does not reflect an integrated approach to the coequal goals, and will not be effective. The best available science (as recited by the Council’s lead scientist Cliff Dahm on many occasions) concludes that addressing flow in isolation of the other stressors on the Delta system will not restore the Delta ecosystem.

In addition, the third draft’s focus on flow is not legally supportable. The third draft seeks to create unjustifiable regulatory constraints if the SWRCB does not set flow objectives according to the Council’s proposed schedule. These statements ignore the fact that the SWRCB’s task is to consider impartially whether to change current flow objectives and prejudices the outcome of that process. Not only would the third draft’s proposed flow policies marginalize the SWRCB’s process underway, but it would overstep the Council’s legal authority under the Delta Reform Act, which left the SWRCB’s authority unchanged. (Delta Reform Act §§ 85031(d), 85032(d).)

The specific options for Council action if the SWRCB does not meet the requirement to set flows are similarly flawed. Option A – the Council would apply the SWRCB’s 2010 Delta flow criteria report in consistency reviews – would violate the Act because both the Act and the report itself indicates that the report is not appropriate for project-specific decisions. (Delta Reform Act § 85086(c)(1)(SWRCB criteria not “predecisional” concerning any water-right permit); SWRCB, *Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem*, pp. 2-4 (2010).) Option B – any project that would increase diversion capacity in the Delta or Delta watershed would be inconsistent with the Delta Plan until the SWRCB adopts new

flow objectives – would violate the portions of the Delta Reform Act that state that the Act does not impact the SWRCB’s authority over water-right permitting. (Delta Reform Act § 85031(c)-(d).) For the same reason, Option C – the SWRCB should stop issuing water-right permits in the Delta and Delta watershed until it adopts new flow objectives – would be illegal.

The requirement to set flows also should not be included in the Delta Plan’s section on water reliability. Flow objectives will not result in achieving the water-supply coequal goal; flow objectives are set in the context of water quality in attempts to address ecosystem habitat issues, not water supply issues. In fact, given California’s variable Mediterranean climate, it is difficult to guess how reliable water supplies could be provided to the 96% of Californians who rely, at least in part, on water from the Delta watershed if dam owners were required to release water to mimic the natural hydrograph. The third draft’s discussion of flows therefore would fail to reflect the coequal goals.

Finally, the third draft says nothing about eliminating illegal diversions of water, which should be assessed and terminated before any determination is made as to whether any legal users of water must contribute to any new Delta streamflow objectives. The state’s commitment to ensuring that all uses of water are legal demands nothing less.

Chapter 4: Necessary Changes

As with the other chapters of the draft plan, chapter four would be improved significantly if the Council were to identify how federal, state and local actions related to the Delta could be integrated to promote the coequal goals. This sort of discussion would “promote statewide water conservation, water use efficiency, and sustainable use of water,” as required by Delta Reform Act section 85303. We recommend that, in chapter four, the Council:

- Delete: (1) paragraphs A and B concerning “covered actions” on page 47; (2) policies WR P1 (and all of its subparts); (3) paragraphs A and B on page 48; (4) policies WR P2 and WR P3; (5) recommendations WR R1, WR R2 and WR R3; (6) policy WR P4; (7) paragraphs A, B and C on page 50; (8) recommendation WR R4; (9) policy WR P5; (10) recommendations WR R5, WR R7 and WR R8.
- Retain recommendation WR R6.
- Recommend that at least the Bureau of Reclamation (Reclamation), DWR, the SWRCB, the Regional Water Quality Control Boards, the Department of Public Health, the U.S. Geological Survey and the California Urban Water Conservation Council coordinate the information reported to them by local water and wastewater agencies to create a statewide system of integrated water information.
- State that the Council will consult with DWR concerning its grant-funding processes with the goal of reducing the costs associated with grant applications and increase the per-dollar water yield of grant-funded projects.

- Recommend that the SWRCB identify groundwater recharge as a beneficial use for water-right permitting or, if the SWRCB determines it cannot do so under current law, propose legislation to correct the problem.
- State that the Council will consult with DWR, Reclamation, university engineers and scientists and private experts to improve the state's understanding of the benefits and detriments of increased storage and, in particular, new storage.
- Recommend that DWR complete its pending storage investigations by December 31, 2012.
- State that the Council will consult with DWR, Reclamation, the U.S Corps of Engineers, the Federal Energy Regulatory Commission and other dam operators concerning whether new flood-control rules can be developed that would allow reservoirs to be operated more flexibly in light of current weather-forecasting technology to increase water storage without compromising flood control.
- State that the Council will consult with DWR, the SWRCB and other state agencies to identify funding and regulatory incentives to catalyze individual local agencies to implement projects that will help the state achieve the coequal goals, including water conservation, water use efficiency, conjunctive use and other projects that improve regions' self-sufficiency.
- Recommend that the SWRCB seek to terminate all illegal diversions of water as rapidly as possible and that it direct the Delta Watermaster to identify all illegal diversions in the Delta by January 1, 2013 and seek to terminate those diversions as rapidly as possible thereafter.
- Make the following statement to provide local water suppliers the assurances they need to make investments to improve their self-reliance: *Pursuant to the Delta Reform Act, nothing in this Plan will be applied or interpreted to impair any water right, any water right priority, any area of origin protection or any protection provided to municipal water suppliers under Water Code sections 106 and 106.5. (Delta Reform Act §§ 85031(a), 85031(d), 85032(i).) In addition, also under that Act, if BDCP is certified by the Department of Fish and Game as satisfying the pertinent statutory criteria, then BDCP will be incorporated into the Delta Plan. (Delta Reform Act § 85320(3).)*

Chapter 5: The Third Draft's Ecosystem Discussion Is Internally Inconsistent and Illogical

Chapter five recognizes the Delta has changed extensively over time and continues to change. (Third draft, pp. 61:24-64:22, 65:26-66:40.) Despite this recognition, the third draft promotes returning to a more natural hydrograph as a key ecosystem measure. (Third draft, pp. 49:15-50:7, 64:43-65:19.) All components of the Delta system have changed, so restoring only one of those components and expecting it to remedy all system ailments is not rational or supported by science.

Moreover, the promotion of returning to a natural hydrograph results in the Delta Plan missing a crucial opportunity to manage and optimize the system that currently exists. Science tells us there are several non-flow programs that are affordable and readily implementable that would improve habitat for native fish and wildlife. These programs include predation removal programs and addressing water quality issues. Furthermore, most of the draft's ecosystem recommendations and policies are quite vague, providing little indication of what the Council might actually be doing by adopting them. (See ER P4, ER R1, ER R2.)

Chapter 5: Necessary Changes

We believe that the Council could make significant progress by identifying, and seeking to expedite measures in the following three areas: (1) in-Delta habitat restoration; (2) salmonid predator control; and (3) fishery harvest regulations. At the Council's April 14-15 workshop, the Delta ISB's Lead Scientist Cliff Dahm stated he believes it is time to begin implementing pilot habitat restoration projects so that we can learn what actually works and what does not. In essence, Mr. Dahm indicated that it is time to start adaptively managing habitat restoration. In relation to the control of salmonid predators, there can be little doubt that there is a very serious problem when the Delta has become so well-known for supporting such predators that ESPN covers bass-fishing tournaments there. In relation to ocean harvest regulations, the Council should identify measures that either have been successful in managing salmonids elsewhere or that have been demonstrated by the best available science.

We recommend that, in chapter five, the Council:

- Delete: (1) policies ER P1, ER P2, ER P3, ER P4 and ER P5; and (2) recommendations ER R1, ER R3 and ER R4.
- Identify a limited number of in-Delta habitat restoration projects that should be implemented as soon as possible or direct the Delta ISB to work with state and federal resource agencies to identify, and begin implementation of, such projects rapidly;
- State measures to control in-Delta predation on salmonids or a statement that the Council will consult with the relevant resource agencies to identify such measures for rapid implementation; and
- Recommend that NMFS, the Pacific Fisheries Management Council and DFG to develop regulations or rules for Central Valley salmon to selectively protect naturally-spawning fish, and older fish, from ocean harvest.
- Acknowledge other processes that have defined, or will define, instream flows in the Delta watershed – including, but not limited to, FERC relicensing, the San Joaquin River Restoration program, the Yuba River Accord and the American River's Water Forum Agreement – and describe how information from those processes already reflects or, in the case of on-going projects, will reflect the coequal goals.

Chapters 6-8: More Clarity Is Crucial

In some ways, chapters six through eight are significantly better than the third draft's other chapters because many of the policies and recommendations in chapters six through eight attempt to integrate other state agencies' programs and activities into a coherent approach to improving the Delta. We encourage the Council to look at these recommendations as an opportunity for the Council to implement its role as a facilitator, coordinator and integrator, as envisioned by the Delta Reform Act. There is a great need for a governing body such as the Council to bring together the other responsible state and federal agencies to craft cohesive, integrated strategies to address the array of challenges we are facing in the Delta and to coordinate on-the-ground actions to leverage limited resources to advance the coequal goals in a timely and productive manner. As discussed below, we believe that some of those recommendations and policies should be emphasized further.

Chapters six through eight, however, display two serious problems that are common to the third draft's other chapters. First, some of the recommendations are so vague that it is nearly impossible to understand what their impacts would be. The following recommendations are particularly problematic in this way: WQ R2, WQ R3, WQ R8, WQ R9, RR P2, RR P3, RR P5 and RR R5. Unless those recommendations can be clarified appropriately, they should be deleted. Second, chapter six's policy WQ P1 incorporates the discussion of streamflow objectives in chapter four and therefore should be deleted for the reasons discussed above.

Chapters 6-8: Necessary Changes

We request that, in editing the third draft, the Council do the following:

- Delete the following policies and recommendations unless they are substantially clarified: WQ R2, WQ R3, WQ R8, WQ R9, RR P2, RR P3, RR P5 and RR R5;
- Delete policy WQ P1;
- Convert recommendation RR R7 into a policy;
- Highlight RR R8, which is similar to one of our key recommendations for chapter four and could be an important water-supply tool;
- Revise recommendation DP R4 to state that the Council will take an active role in seeking to coordinate the development of voluntary safe harbor agreements in the Delta; and

Chapter 9: The Draft Finance Plan Seeks To Support a Statewide Regulatory Program, Not a Plan for the Delta

Chapter nine's financing strategy reflects the draft plan's flawed business model. That strategy's primary proposals are that the Legislature immediately authorize the Council to begin

charging water-diversion and wastewater-discharge fees to fund the Council's operation and its regulatory program and that there ultimately be a public goods charge on water deliveries. In the current financial climate, these proposals are unlikely to succeed, but also are likely to exacerbate existing conflicts over the Delta.

Those financing proposals have many problems. First, the third draft does not discuss the importance of the voters' 2010 passage of Proposition 26, which demonstrates, if nothing else, that the public has little appetite for additional fees and charges to fund new state regulatory programs. Second, the draft Plan does not acknowledge that, even under pre-Proposition 26 law, the fees that the draft Plan proposes are of questionable legality. In its 2010 decision in *Cal. Farm Bureau Federation v. State Water Resources Control Bd.* (2011) 51 Cal.4th 421, the California Supreme Court did not validate, but rather remanded for further judicial consideration, the volumetric water-right fees that the SWRCB charges. While uncertain themselves, those water-right fees have a much closer relationship to the "regulated" activity than the diversion and discharge fees that the draft Plan proposes. Third, the draft Plan fails to acknowledge that local water and wastewater agencies already bear a large part of the burden of funding existing state regulatory programs, including the SWRCB's Division of Water Rights, the Regional Water Quality Control Boards' NPDES programs, the Bureau of Reclamation's ecosystem restoration efforts, the Division of Safety of Dams' inspection program (which largely duplicates the Federal Energy Regulatory Commission's similar program) and DFG's programs (through fees under CEQA). While it is simple to propose that water users and wastewater agencies pay more fees to fund yet another state regulatory program, such an approach would only add to the financial burdens that local agencies already bear and would amplify the institutional cacophony that the Council was created to quiet.

Chapter 9: Necessary Changes

If the Council were to take a leaner "shepherding" approach in the Delta Plan, then its baseline funding needs would be lower and probably would be more likely to attract more public funding. The Council could identify specific beneficiaries of specific projects and apply "beneficiary pays" rules to them. In addition, the state currently funds, at least in part, many programs through state-organized voluntary mechanisms like license plate funds and state tax-return check-offs. The Council should explore such methods for satisfying its baseline funding needs. Similar mechanisms have supported the nation's presidential campaigns for much of the last 40 years, so they can be reliable sources of revenue. Moreover, in contrast to the distaste for more fees reflected in Proposition 26's passage, the public has demonstrated its willingness to fund new water benefits through its consistent passage of water bonds. If, as the Delta Reform Act states, the coordination of federal, state and local Delta programs is a crucial statewide need, then new mechanisms that ask the public to voluntarily contribute to funding the Council's activities should attract sufficient support to satisfy the Council's baseline financial demands.

Accordingly, we recommend that, in chapter nine, the Council:

- Highlight the importance of measures like policy FP R6;
- Delete policy FP R7 and all of its subparts;

- Delete recommendation FR R10;
- State that the Council will seek to implement financing mechanisms that do not add additional complexity to the Delta's governance; and
- In light of the condition of the state's General Fund, during 2012, study mechanisms under which important federal and state objectives have been funded by voluntary taxpayer contributions, with the current objective of proposing, to the Legislature during its 2013 session, a Clean Water Fund that would receive license plate funds, state taxpayer check-off funds and other voluntary taxpayer contributions.

Conclusion

It is important that a Delta Plan be a plan for the Delta that describes how the state can manage the Delta to meet the coequal goals. Unfortunately, the third draft is not such a plan and actually would make the identification and implementation of solutions to the Delta's problems more difficult by creating a new statewide regulatory program that undoubtedly would generate new conflict. We respectfully request that the Council make our proposed changes to the draft in order to get the Delta Plan back on track.

Very truly yours,

Signatures on attached pages

Cc: Members of the Delta Stewardship Council
Joe Grindstaff, Executive Director, Delta Stewardship Council



Timothy Quinn
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