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February 2, 2012

SENT VIA US POST and E-MAIL eircomments@deltacouncil.ca.gov

Delta Stewardship Council
980 Ninth Street, Suite 1500
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Attn: Terry Macaulay

RE: Comments on Draft Environmental Impact Report for Fifth Staff Draft Delta Plan

Dear Chair Isenberg and Members of the Council,

Placer County Water Agency (Agency) appreciates the opportunity to provide comments on the Draft Environmental Impact Report (DEIR) for the Fifth Staff Draft Delta Plan (Plan). As the Delta Stewardship Council (DSC) intends to issue a sixth and seventh draft of the Plan, the Agency reserves the right to comment on those further drafts as well as the right to comment on whether the DEIR, as it may be revised after responding to comments, provides an adequate basis for the DSC's adoption of the final Plan in the absence of supplementation and recirculation. The Agency's review of the Plan and DEIR has been conducted in collaboration with the Association of California Water Agencies, the State and Federal Contractors Water Agency, the Mountain Counties Water Resources Association and the Regional Water Authority, and the comments of those entities are adopted and incorporated herein, along with the specific comments presented below.

The Project Description is Inadequate

As long recognized by the courts, "An accurate, stable, and finite project description is the *sine qua non* of an informative and legally sufficient EIR." (*County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 193 (1977).) Without an accurate description, decision-makers and the public cannot weigh a project's environmental costs and benefits, meaningfully consider mitigation measures, or evaluate alternatives. (See also CEQA Guidelines § 15124 (requiring detail sufficient for "evaluation and review of the [project's] environmental impact").) CEQA requires a project description provide sufficient facts "from which to evaluate the pros and cons" of the project; an EIR in which "important ramifications" of the project remain "hidden from view" throughout the approval process "frustrates one of the core goals of CEQA." (*Santiago County Water Dist. v. County of Orange*, 118 Cal. App. 3d 818, 829 (1981).)

The DEIR describes the Plan's purpose and characteristics in terms that are insufficient to support a reasoned analysis of its potential impacts. While this inadequacy is undoubtedly due to the fact that the Plan itself is still in flux, that circumstance does not relieve the DSC of its obligation to prepare and circulate an environmental document that clearly informs the public, as well as the DSC and other affected state agencies, of the environmental impacts of the Plan that is ultimately adopted, and of its implementation. One of these critical potential impacts is the Plan's effect on water supply and water supply reliability, a co-equal goal of the Delta Reform Act, which may be affected by policies in Plan Chapters 4 and 5, among others.

In addition to the instability of the project definition caused by the evolving components of the Plan, the DEIR is less than clear on the scope of the project it is analyzing: whether it is the full Fifth Staff Draft Delta Plan, or whether it is the bare policies and recommendations set forth in the Fifth Staff Draft Delta Plan. The important distinction is that the *policies* themselves, at least ERP 1, simply call for the State Water Resources Control Board to "adopt and implement flow objectives for the Delta [and high-priority tributaries in the Delta watershed] that are necessary to achieve the co-equal goals" without specifying or recommending any particular parameters for such flow objectives, as is appropriate for a Commission that does not have jurisdiction over the issue. By contrast, the *textual discussion* in the 225-page Fifth Staff Draft Delta Plan clearly advocates for a "more natural flow regime" as the goal of the flow-setting proceedings. (Plan at 108:7-9; 110:41-42; 112:3-9, 31-32, 36-87; 113.) This ambiguity should be rectified in the Final EIR.

Another problem with the Project description is that there remains confusion concerning the extent and scope of the DSC's authority under the Plan. The Agency and others have repeatedly requested that the Plan clarify the extent to which actions taken outside of the Delta, but which could affect Delta attributes such as inflow or water quality, may be considered to be "covered actions" subject to the DSC's jurisdiction to make consistency findings. To date, the clarification has not been included.

The lack of clarity concerning the Plan's reach may affect the DEIR's conclusions concerning its impact on water supply. As one example, WR R5 recommends that even routine changes to water rights within the Delta watershed, not just the Delta, be conditioned on demonstration that "all other feasible water supply alternatives" have been implemented. The DEIR states that its conclusions are based on an assumption that all recommendations are accepted. However, the potentially far reaching effects of the implementation of this recommendation on existing water right holders and the communities and businesses they serve is not even addressed in the Plan or the DEIR.

Additionally, the DEIR relies on water transfers as a means of avoiding significant water supply impacts the Plan may cause, but does not address WR P1 and WR R5, which inject substantial uncertainty concerning the standards that must be met by transferring and receiving entities to meet with the “consistency” standard and thereby consummate such transfers.

The DEIR’s Conclusions Concerning the Water Supply Impacts of the Plan are Unsupported and Misleading

Of critical importance to the Agency is the potential effect of the Plan on reliable water supply availability. The two keys to the reliability and sufficiency of the Agency’s water supply are (1) the ultimate decision by the State Water Resource Control Board in establishing flow objectives in the Sacramento River and its tributaries, and (2) the feasibility of projects to offset water supply losses resulting from those objectives. As mentioned above, the Proposed Project is not well described in the DEIR. The Fifth Staff Draft Delta Plan is 225 pages long, and includes far more than the 12 policies and 61 recommendations set forth in the DEIR. For example, ERP 1 merely recommends that the State Water Resource Control Board establish flow objectives by a date certain, without specifying the nature of those objectives. This is entirely proper, inasmuch as the DSC has no jurisdiction over flow objectives. However, the DEIR recognizes the nuance and refinement contained in the full text of the Plan, noting that the flow objectives that would be adopted by the State Water Resources Control Board

would likely result in a more natural flow regime in the Delta and Delta tributaries.

(DEIR at 4-68:5-10; 3-83.) This assumption is repeated in the analysis of water resources in Chapter 3.

Under the Proposed Project, the SWRCB would be encouraged to modify Delta flow objectives *in order to place more emphasis on creating a natural flow regime in the Delta.*

(DEIR at 3-84:40-41, *emph. added.*)

This is consistent with the Plan’s textual discussion, which states outright that, “Creating a more natural flow regime in the Delta is an important step toward meeting the co-equal goal of a healthier Delta ecosystem.” (Plan, at 112.) Given the Plan’s emphasis on creating a more natural flow regime, however, the DEIR must provide more and better analysis of such a regime on water supplies, given the co-equal goal of water supply reliability. According to the DEIR,

environmental analysis of the impact of ERP 1 assumes that the Plan's goal of "more natural flow regime" will be implemented by the State Water Resources Control Board.¹

The DEIR's blithe impact assessment fails to meet the requirements of CEQA. While acknowledging that "water would continue to be available for municipal, agricultural and industrial water uses, but at a reduced amount," the DEIR's stunning conclusion, after a single page of discussion (of the DEIR's more than 2000 pages of text), is that "there is no substantial evidence that this impact [of a more natural flow regime] would be significant," and that "the total water supply available would remain the same or increase." This conclusion is completely unsupported by fact. It appears in section 3.4.3.2.3 (DEIR at 3-84 to 3-85) and is apparently based solely on the presumed availability of alternate sources such as surface and groundwater, stormwater runoff, desalination, recycled wastewater, water transfers and water efficiency projects, which would substitute for the reduction in Delta water. (*Id.*) Absolutely no analysis of the availability or feasibility of such replacement supplies is undertaken in the DEIR.

As the DEIR should note, many of these replacement sources are infeasible or unavailable in much of the study area. Groundwater is absent in roughly half of the study area (See DEIR, Fig. 3-3), including most of Placer County and other foothill and mountain communities. Additionally, due to constraints of terrain and legal authority, recycled water is infeasible to many steep foothill and mountain areas within the Delta watershed; these same factors limit potential for water transfers to provide replacement water.

In analyzing the availability of replacement water supplies, the DEIR should also recognize the chilling effect on development of alternate water supplies that is the outfall of two other policies: WR R5 and WR P2. WR R5's requirement that "all other feasible water supply alternatives" be demonstrated before water right change petitions could be approved may discourage water agencies' management of existing water supplies in a flexible and creative manner. The requirement creates a vague standard that is expensive and could well be productive of litigation and delay. WR P2's requirement that water transfer terms be negotiated in public would undermine consummation of water transfers. Furthermore, all water potentially transferable would also originate in the Delta watershed and either be affected by the same supply reduction or affect Delta inflow.

¹ "The policies and recommendations . . . are statements of policy direction to other agencies which, if the direction is followed, could lead to types of specific physical actions³ . . . fn³: This EIR assumes that the Delta Plan will be successful and will lead to other agencies taking physical action." (DEIR at ES-2) "In other words, the analysis in this EIR assumes that the Delta Plan has the desired outcome." (DEIR at 2-2B: 21-22.)

Capture of stormwater runoff for subsequent use would have the same effect on the natural flow regime as diverting water to storage. Desalination is unavailable to many jurisdictions due to their distance from the ocean. Water suppliers are already increasing conservation efforts to meet the requirements of SB7x 7, even where not locally cost-effective.

In short, because of terrain and absence of non-tributary water supplies, the reduction in water supply due to flow objectives implementing a “more natural flow regime” would almost certainly constitute an *unavoidable significant impact* to areas upstream of the Delta. For a valid and adequate analysis of the water supply impact, the FEIR must, at a minimum, distinguish in its analysis between areas that receive water *from* the Delta, and those areas located upstream in the Delta watershed. Furthermore, since water supply reliability is one of the co-equal goals of the Delta Plan, the benefits of a “more natural flow regime” cannot simply be considered in isolation from the impacts of such a regime on water supply as the DEIR attempts to do.² The trade-off of water supply reliability and ecosystem benefit must be made explicit.

Description of the Alternatives Erroneously Characterizes their Effect with the Description of the Alternatives, Prejudicing their Impact Analysis

Section 2A of the DEIR is set forth as “descri[bing] the characteristics of the Proposed Project and alternatives.” (DEIR at 2A-1.). Alternative 1B is denominated an alternative “to export more water out of the Delta.” However, nowhere in Alternative 1B, as fully set forth in the Appendix, is any provision to “export more water out of the Delta.” Yet this is how it (and also Alternative 1A) are “described.” Ultimately, neither the Proposed Project nor any of the alternatives has a legitimate goal related to the amount of water exported from the Delta. The Alternative descriptors are irrelevant, misleading and prejudicial and should be deleted, and a more accurate and unbiased description of the alternatives should be prepared for the final EIR.

The Basis of DEIR Conclusions Concerning Alternatives is Unsupported

Compounding the bias suggested in the names given the alternatives in the DEIR is the fact that the description of each alternative contains conclusory statements disparaging its efficacy in advancing the co-equal goals of the Delta Reform Act. The basis for these conclusions is never explained. For example, the DEIR sets forth no logical connection between the provisions of Alternative 1B and its “description” in the DEIR that “. . . the types of facilities that would

² The authors of the DEIR should consult the analysis of such a flow regime by the State and Federal Contractors Water Agency, attached hereto and incorporated herein by reference, for more information concerning the impact of a “more natural flow regime.”

increase water use efficiency and reduce reliance on the Delta (such as described in subsection 2.2.1)³ *would be less likely under Alternative 1B* compared to the Proposed Project.” (DEIR at 2A-95, *emph. added.*) This conclusion, which is inappropriate in a *description* of the Alternative in any event, is mystifying in light of the limited scope of the Plan:

The Proposed Project does not direct the construction of specific projects, nor would projects be implemented under the direct authority of the Council.

(DEIR at 2A-5.)

According to the DEIR, the Plan would simply “*encourag[e]* various actions which, if taken, *could* lead to . . . projects that could provide a more reliable water supply.” (*Id.*, *emphasis added.*) The only hint as to why the DEIR authors might have considered the Proposed Project to be more efficacious than Alternatives 1A or 1B might be its description of WR P1’s “three component” provisions. However two of the three components of WR P1 are already law: the first, “compliance with State law” would be required whether included in WR P1 or not; the second, “addition of a water supply reliability element in urban and agricultural water management plans” is also already required by state law (Water Code sec. 10635). Only WR P1’s directive that water suppliers develop a “conservation-oriented rate structure” is not already expressly required under state law. However, it is a Best Management Practice subscribed to by the members of the California Council for Urban Water Conservation, which represent about 75% of California’s urban water deliveries.⁴ CCUWC’s BMP 11 requires volumetric pricing, also known as conservation pricing, of water.⁵ Urban water suppliers are also required by law to adopt conservation strategies that will result in statewide reduction in urban per capita water use of 20% by 2020. In light of these overriding state mandates, it is unclear how much “more likely” water use efficiency projects would be under the Plan than under Alternative 1A or 1B.

One of the signal purposes of an EIR is to inform decision-makers of the advantages and disadvantages of the alternatives available to them. Opinions expressed by the authors of an EIR are only as good as the facts and logic supporting them. As one Court of Appeal put it,

³ DEIR subsection 2.2.1 lists potential water replacement projects as surface and groundwater projects, ocean desalination, recycled wastewater and stormwater, water transfers and water efficiency projects (see DEIR at 2A-5.)

⁴ CUWCC Strategic Plan 2009-2010 at 9: <http://www.cuwcc.org/WorkArea/showcontent.aspx?id=8522>

⁵ BMP 11 is set forth at <http://www.cuwcc.org/BMP-11-Rates.aspx>

The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence.

(*Pacific Gas & Electric Co. v. Zuckerman* (1987) 189 Cal.App. 3d 1113, 1135.) When the DSC makes its decision adopting the Delta Plan, "the public and decision-makers, for whom the EIR is prepared, should also have before them the basis for that opinion so as to enable them to make an independent, reasoned judgment." (*Santiago County Water Dist v. County of Orange* (1981) 118 Cal.App. 3d 818, 831.) The DEIR should, therefore, be revised to include a reasoned analysis, with citation to supporting facts, of its conclusions comparing the Proposed Plan to the Alternatives.

Conclusion

In sum, to be adequate, the EIR will need to provide better linkage between its conclusions and the facts on which the conclusions are based. It must also distinguish between impacts and potential mitigation available upstream of the Delta and impacts within and "below" the Delta. In a 2000+ page environmental document, water supply reliability effects merit more than a summary page of discussion. The goal of water supply reliability is co-equal with that of ecosystem health, and is of vital concern to water suppliers throughout the State, and the impact of the Plan on water supply deserves a complete and comprehensive analysis.

Sincerely,
PLACER COUNTY WATER AGENCY



Michael R. Lee
Chairman, Board of Directors

Enclosure

c: PCWA Board of Directors
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