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February 1, 2012

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

Attention: Terry Macaulay

Re: Comments on Draft Environmental Impact Report for 5<sup>th</sup> Draft Delta Plan

Dear Chair Isenberg and Council Members,

On behalf of the Mountain Counties Water Resources Association (MCWRA), I write to express serious concerns with the Draft Environmental Impact Report (DEIR). MCWRA provides advocacy for the water interests of 62 members from within the Sierra Nevada watershed. For your information, I have attached a membership list.

As way of background, you are aware the Association is also part of a coalition with the Association of California Water Association's Ag-Urban Coalition (ACWA). The Coalition is a diverse group of public water agencies, cities, associations and other interested groups located above, within, and below the Bay-Delta. We are and have been committed to helping the Delta Stewardship Council (DSC) develop a plan to achieve the co-equal goals of statewide water supply reliability and the restoration of a sustainable Delta ecosystem while protecting and enhancing the unique cultural, recreational, natural resources and agricultural values of the Delta as an evolving place.

Several months have passed since the Ag/Urban Coalition submitted its proposed plan. We have attended several individual meetings with council members and DSC staff, all taking steps to build a workable plan for every region in the State. We believe that there are several guiding foundational policy elements that must be incorporated into the Delta Plan if the DSC is to be successful in its efforts to advance the co-equal goals.

- The co-equal goals must be advanced concurrently to encourage and maintain active participation by all the responsible governmental agencies and stakeholders that have a vested interest in the successful implementation of the Delta Plan.

- Executive Members
- Amador Water Agency
  - Calaveras County Water District
  - City of Folsom
  - County of Calaveras
  - County of Placer
  - El Dorado County Water Agency
  - El Dorado Irrigation District
  - Foresthill Public Utility District
  - Georgetown Divide Public Utility District
  - Nevada Irrigation District
  - Placer County Water Agency
  - South Tahoe Public Utility District
  - Tuolumne Utilities District
  - Utica Power Authority

- The Council must embrace its governance role not as a regulatory body but as a facilitator to improve communication, coordination and integration amongst the various local, state and federal agencies that have statutory and/or regulatory responsibilities in the Delta.
- The Delta Plan must ensure that all the significant factors (“stressors”) affecting the co-equal goals are analyzed in a comprehensive, integrated manner so the Council and partnering agencies can objectively assess trade-offs between proposed actions, and leverage limited resources to most efficiently and effectively advance the co-equal goals.
- Science and adaptive management are critical to the successful implementation of projects designed to advance the co-equal goals. The Council should develop a “science plan” which amongst other elements identifies the critical role of the Independent Science Panel in assisting the Council and other agencies to prioritize and modify, when needed, actions designed to advance the co-equal goals.

The 5<sup>th</sup> Draft Delta Plan fails to reconcile the above foundational policies and has serious negative implications for our members. The DEIR identifies the DSC’s plan as the environmentally superior alternative, yet the plan itself has little quantitative assessment of the Plan or any of the alternatives. You have heard before from ACWA’s executive director Tim Quinn and many others, that the DEIR completely mischaracterizes the alternate plan submitted by our Ag-Urban Coalition. It fails to acknowledge the comprehensive approach we proposed to address both the ecosystem and water supply reliability.

Further, the DEIR lacks the substantive analysis that the California Environmental Quality Act (CEQA) requires of a program-level environmental document. We find it unfortunate that we must respond to a 2,200 page DEIR, which is based on the unsupported 5<sup>th</sup> Draft Delta Plan. The DEIR, like the 5<sup>th</sup> Draft Delta Plan itself, does not provide the path for meeting the co-equal goals of improving water supply and ecosystem health, missing this critical opportunity to make real progress.

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There continues to remain confusion concerning the extent and scope of the DSC’s authority under the Delta Plan. The Association and others have repeatedly requested that the Plan clarify the extent to which actions taken outside of the statutory 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 or examples of a covered action has not been included in the Plan. This lack of clarity in the plan may affect the DEIR’s conclusions concerning its impact on water supply. As one example, WR R1 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. Absent in DEIR are the potential far-reaching effects of the implementation of this recommendation on existing water right holders and their communities.

The source of the problem is the DEIR's analytical approach. On one topic after another, the DEIR's analysis unfolds as follows: (1) The Delta Plan will have no direct environmental impacts (because the Council itself will take no actions to implement the Plan); (2) It will have various indirect impacts (because the Plan's policies and recommendations will spur actions by others that will affect the environment); (3) The magnitude of those indirect impacts generally cannot be assessed (because few specific implementing projects have yet been proposed); (4) Based on past EIRs for similar-type projects, implementing projects could be expected to have various specified types of impacts; (5) Certain industry-standard mitigation measures are typically used to ameliorate the identified impact types; those mitigations shall be included in covered actions and should be adopted in all other actions; and (6) Notwithstanding these generic mitigation measures, the generic expected impacts should be treated as significant because there is no way to prove that they will not be. (See, for example, DEIR pages 2B-1 to 2B-3, 3-76 to 3-93, 4-58 to 4-86, 18-30 to 18-48.)

While the statutory Delta is a defined area, the Delta watershed is a vital part of the system and its health and sustainability is critical to meeting the co-equal goals. Unfortunately, the DEIR does not consider the physical, chemical, biological, and socio-economic roles and interconnections that the Delta watershed plays in the Delta's current and future environmental attributes. For example: A mandatory subject of the Delta Plan is "Measures to promote a more reliable water supply that address," among other things, "Meeting the needs for reasonable and beneficial uses of water." (See page 1-2.) Since this subject lacks substance in the 5<sup>th</sup> Draft Delta Plan, it is not surprising that the DEIR lacks substance on this subject.

### **The DEIR's Conclusions on Water Supply Impacts are Unsupported and Misleading**

The DEIR draws unsupported conclusions that under the Delta Plan, "the total water supply available would remain the same or increase as compared to existing conditions," and "there is no substantial evidence that this [water supply] impact would be significant" because it is impossible "to identify a reasonably plausible scenario in which a potential significant impact would occur." (Page 3-85.) Having drawn these conclusions, the DEIR accordingly does not adequately assess the potential impacts of reduced or less reliable water supplies in such topical areas as water resources, agriculture and forestry resources, land use and planning, population and housing, public services, hydro-power generation, recreation, and cumulative impacts. Nor does the DEIR analyze, other than generically, the potential environmental impacts of attempts to develop substitute water supplies.

Of critical importance to the Association members is the potential effect of the Proposed Plan on reliable water supply availability. Two significant factors to water supply reliability are (1) the ultimate decision by the State Water Resource Control Board (SWRCB) in establishing flow objectives in the major tributaries to the Delta as described in their August, 2010, 191 page, report, "Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem", Prepared Pursuant to the Sacramento-San Joaquin Delta Reform Act of 2009; RESOLUTION NO. 2010-0039, and (2) the feasibility of projects to offset water supply losses resulting from those objectives.

Relevant to the SWWCB 2010 Report, it acknowledges that its Delta flow criteria does not reflect any balancing of ecological values with the public water supply values. Rather, the criteria address only the ecological side of the equation, based on information that could be obtained and considered during

the eight-to-nine-month period since SB1's enactment. As the members of the State Board noted in adopting the Report, it presents only a partial perspective of California's water needs.

As we have heard from the DSC Chair and the Council Members, water supply reliability is co-equal with that of ecosystem health. Water supply reliability is of vital concern to water suppliers and communities in our region and throughout the State. In this 2,200 page Draft EIR, water supply reliability should be based on scientific analysis of inputs and outputs in each region of the State because one of the purposes of an environmental impact report is to inform decision-makers of the advantages and disadvantages of the alternatives available to them. Water supply reliability deserves a complete and comprehensive analysis along with a CEQA-compliant analysis of potential adverse water supply impacts (Chapter 3 and Chapter 22).

The 5<sup>th</sup> Draft Delta Plan is a programmatic plan and supported as such in the DEIR rather than a science based EIR. For example, ERP 1 merely recommends that the SWRCB 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 Plan, noting that:

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, emphasis added.)

This is consistent with the Plan, 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. Given the Plan's emphasis on creating a more natural flow regime potentially affecting the major tributaries to the Delta, the DEIR should provide a thorough analysis of such a regime on water supplies, given the other co-equal goal of water supply reliability.

The DEIR's single one-page (of the 2,200 page document) statement that "there is no substantial evidence that this impact would be significant," and that "the total water supply available would remain the same or increase" is wholly inadequate and unsupported by any analysis. The conclusion acknowledges that "water would continue to be available for municipal, agricultural and industrial water uses, but at a reduced amount." Further, where it is addressed, the DEIR assumes – without rationale, and contrary to the last four decades of California's water resource development history – that alternate water supplies will automatically be developed such as surface and groundwater, stormwater runoff, desalination, recycled wastewater, water transfers and water efficiency projects to offset supply decreases that result from higher in-stream flow standards and other environmental restoration policies and recommendations included in the Delta Plan. (See, for example, pages 3-82 to 3-85).

The DEIR fails to analyze impacts that will result from redirecting water supplies from our region to the Delta. It dismisses water-supply impacts by assuming communities will simply develop other water supplies. (pages 3-84, 3-85.) In mountainous and largely rural area-of-origin service areas, surface water storage, reservoir reoperation, and water use efficiency are potentially feasible means of augmenting water supply. Generally, recycling water is not feasible and ground water, desalination and importing water from other regions is not an option. Additional consideration should be given on how

these limited options will play out during a long-term drought or climate change. The DEIR does not even address these factors, much less analyze them.

As the DEIR should note, many of these replacement sources are unfeasible 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 the foothill and mountain communities.

Additionally, due to constraints of terrain and legal authority the same factors limit potential water transfers. In analyzing the availability of replacement water supplies, the DEIR should recognize the effect of WR P2's requirement that public negotiation would have on the ability to consummate 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. Capture of stormwater runoff for subsequent use would have the same effect on the natural flow regime as diverting water to storage.

There is no basis to assume that sufficient new water developments will simply materialize to offset the Plan's adverse impacts to water supply adequacy and reliability, much less to enhance water supplies beyond current conditions. The same is true of the assumed actions that are intended to directly enhance the Delta ecosystem, improve water quality, reduce flood risk, and enhance the Delta as a place. CEQA requires the DEIR to make realistic assumptions, even if they are adverse to the Plan's objectives, rather than simply hoping for the best.

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. 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's analysis does.

Both Chapter 3 and Chapter 22 (Cumulative Impacts) of the DEIR need to be modified to provide a CEQA-compliant analysis of adverse water supply impacts.

### **The Analysis of Flow Modification Impacts is Incomplete**

Given the assumption that new water supply developments will offset the Delta Plan's impacts on water supply adequacy and reliability, the DEIR suggests that increased in-stream flow requirements will have negligible or beneficial biological resource impacts (page 4-69:10-15), as will increased stream flows resulting from reservoir reoperation, transfers, or water use efficiency. (Page 4-62:24-28, 31-34.) This represents incomplete analysis. First, it reflects the uncritical assumption that when it comes to flow, more is always better. Second, inconsistent with the rest of the DEIR, it appears that the study area to which these conclusions apply is limited to the Sacramento River watershed downstream of the large dams, rather than the entire Delta watershed. (Page 4-39:27-28 *et seq.*) Therefore, the analysis does not consider the potential impacts of altered stream flow regimes upstream of the major dams.

There is no analysis of the impacts implementing the undefined "more natural flow regime" would have on reservoir cold-water pools on which the Central Valley's salmon and steelhead, and California's salmon industry, depend. How does the Project operation coordinate water supply reliability if the cold

water pools have been drained and all the upstream water supplies have all been released in the spring because of the adherence to a natural flow regime in wet and dry water years?

There is no analysis of the potentially adverse impacts to the aquatic environment from retimed, reduced, and lower-quality return flows to streams that result from water use efficiency measures. Rather, the DEIR chooses to focus exclusively on expected improvements to the Delta environment. (Page 4-68.)

There is no analysis of the indirect impacts of altered stream flow regimes on farmland and forestland. The DEIR repeatedly identifies the conversion of farmland and forestland to non-agricultural or non-forest uses as potential impacts of the Delta Plan (pages 7-19 to 7-21, 7-26, 7-27, 7-30, 7-31, 7-33, 7-34, 7-36, 7-37, 7-39, 7-40, 7-42, 7-43, 7-45, 7-46, 7-48 to 7-51), but in none of those analyses does it identify altered stream flow regimes as a potential source of those impacts. It should; although it is an indirect impact, the fallowing or conversion of farmland and forestland is a predictable consequence of the decrease in water supply adequacy and reliability that higher in-stream flow requirements will likely cause.

There is no analysis of the foreseeable impacts that altered stream flow regimes will have on hydro-power generation. This clean, renewable electric power from north state rivers and streams is critical to California and the western U.S. The need to secure alternative power sources would be costly, both economically and environmentally.

There is no analysis of the foreseeable impacts on recreation such as white water rafting and boating on the major tributaries. Re-operation of the existing reservoirs under the plan, will see their in-stream flow burdens increased, which will cause less water to be stored, and more to be released at different times of the year.

These operational changes will adversely affect hydro-power generation and recreation, which will have a coupling affect by long-term droughts and climate change. Unless these impacts are analyzed, the DEIR's flow modification impact is incomplete and inadequate.

**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 "describing 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) is "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 by 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 increase water use efficiency and reduce reliance on the Delta (such as described in subsection 2.2.1)<sup>1</sup> would be less likely under Alternative 1B compared to the Proposed Project." (DEIR at 2A-95, emphasis added.) This conclusion, which is inappropriate in a *description* of the Alternative, is mystifying in light of the description of the limited scope of the Proposed Project:

"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 Proposed Project would simply encourage various actions which, if taken, could lead to . . . projects that could provide a more reliable water supply. The only hint as to why the DEIR authors might have considered the Proposed Project to be more effective 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 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.<sup>2</sup> BMP 11 requires volumetric pricing, also known as conservation pricing, of water.<sup>3</sup> 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 Proposed Project than under Alternative 1A or 1B.

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.

<sup>1</sup> 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.)

<sup>2</sup> CUWCC Strategic Plan 2009-2010: <http://www.cuwcc.org/WorkArea/showcontent.aspx?id=8522>

<sup>3</sup> BMP 11 is set forth at: <http://www.cuwcc.org/BMP-11-Rates.aspx>.

Thank you for the opportunity to comment on the DEIR. We look forward to our continued work with the DSC to develop a fair and balanced solution to solve the water supply and environmental challenges that face the Delta and the State.

Sincerely,

A handwritten signature in blue ink, appearing to read 'JKingsbury', written over the typed name.

John Kingsbury  
Executive Director  
Mountain Counties Water Resources Association

c: MCWRA Board of Directors  
Dr. Jerry Meral, CA Natural Resources Agency  
Tim Quinn, Executive Director, ACWA