



## Association of California Water Agencies

Leadership Advocacy Information *Since 1910*

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Delta Stewardship Council  
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Transmitted electronically:  
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Re: Sixth Draft – Delta Plan

Dear Chairman Isenberg and Members of the Council:

The Association of California Water Agencies (ACWA) submits the following comments regarding the sixth and final staff draft Delta Plan (draft plan) on the behalf of the Ag-Urban Coalition (Coalition). The Coalition is a diverse group of public water agencies, cities, associations and other interested groups located above, within, and below the Bay-Delta. See attached list of participants. We are committed to the achievement of the coequal 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.

In June, 2011, the Coalition submitted to the Council an Alternate Delta Plan. The Alternate Plan that was intended to provide constructive input to the Council staff as they continued to refine the draft Delta Plan. The Coalition appreciates the opportunities by the Council, your Executive Officer and staff for the Coalition to provide input – especially the fifth draft as it evolved into the sixth and final staff draft.

Follows are the Coalition's comments on the staff's sixth draft plan. We have included recommended additions, deletions and edits to the sixth draft that we believe will address our specific concerns.

### 1. Reliance on Delta Water (Water Code § 85021 and WR P1)

The Coalition recognizes that it is incumbent for water agencies and water users throughout the state to continually explore opportunities to improve water use efficiency and to expand water supply portfolios. This includes efforts to increase water conservation, advanced water technology, improved use of recycled water and stormwater, conjunctive use and strategies to improve regional water self-reliance. At the same time, it is incumbent for the Council, as well as state and federal policymakers, to recognize that such efforts have been ongoing for decades.

A fundamental problem with the draft Plan's interpretation of §85021, which is reflected throughout the document, is the failure to be consistent with the actual language of the statute and its differentiation between the policy to "reduce reliance on the Delta in meeting California's

future water supply needs through a *statewide strategy*” of investment and the policy that “*each region* that depends on water from the Delta watershed shall improve its regional self-reliance.” [Emphasis added.] The Legislature memorialized the important distinction between the two by using different and specific language to promote its desired outcomes. The Delta Plan must not muddle the Legislature’s clear policy direction into a single unauthorized mandate.

Although we recognize 85021’s intention that areas that depend upon water from the Delta watershed will improve in the efficient use of water through a number of actions, it is telling that several State Resource Management Strategies (California Water Plan Update 2009, Vol. 2) identified in 85021 – especially, “local and regional water supply projects” and “improved regional coordination of local and regional water supply efforts” – could result in *increased* water use within the Delta watershed. This is anticipated in the Delta Reform Act sections 85031(a) – which protects area-of-origin rights in the watershed – and 85302(i) – which states that nothing in the Act affects “[a]ny water right.” Such increased use of water may also be necessary not only to meet growing demands from the only available source, but also to allow for increased diversions in wet periods to enable reduced diversions in dry periods. For example, conjunctive-use programs in the watershed might involve such measures. Section 85021 therefore must be interpreted to allow for an ultimate increase of use in the watershed and from the Delta.

The sixth draft Delta Plan also misinterprets California Water Code section 85021 by applying the statewide “reduced reliance on Delta water” standard to individual water agencies. Specifically the sixth draft would adopt a metric under which “a significant reduction in net water use, or in the percentage of water used, from the Delta watershed” would be how consistency with section 85021 would be measured. See Sixth Draft, pages 100, 109. The misinterpretation would be applicable to water agencies in the Delta as well as agencies that divert water from the Delta.

The sixth draft Delta Plan fails to correctly recognize that many agencies in the Delta and Delta watershed, as well as some agencies outside the Delta watershed, do not have other water supplies and therefore cannot reduce their reliance on existing water supplies, whatever those supplies’ relationship with the Delta. In addition, the sixth draft metric fails to acknowledge that the specific language in section 85021 establishes a statewide policy to “reduce reliance on the Delta in meeting California’s future water supply needs through a **statewide** strategy of investing in improved regional supplies, conservation and water use efficiency” through improved “regional self-reliance”, as opposed to individual water agencies. This latter point is particularly crucial, given that the Legislature enacted section 85021 in conjunction with a water bond that would fund water management activities statewide. The Council simply cannot rewrite a statewide policy into an unfunded, agency-specific mandate that could be used to prevent agencies from expanding their water-supply portfolios.

Suggested Changes to the Sixth Draft: The sixth draft should be revised so that references to section 85021 reflect the intent of the Legislature that efforts should continue to be pursued to increase investment in measures that “improve regional water self-reliance” and “reduce reliance on the Delta in meeting California’s future water supply needs”. In addition, WR P1 should be made a recommendation and revised so that it does not focus on individual agencies’ actions and makes clear that following state law is sufficient to meet the intent of section 85021.

## 2. Role of the Delta Stewardship Council – Governance

As the Coalition has shared with the Council over the past eighteen months, we believe the most crucial role for the Council is not one of regulation but rather of facilitation. The 2009 Delta Reform Act provided that “[t]he council shall establish and oversee a committee of agencies responsible for implementing the Delta Plan. Each agency shall coordinate its actions pursuant to the Delta Plan with the council and the other relevant agencies.” California Water Code section 85204. Previous staff draft plans did not adequately identify this crucial role. We were pleased to see the sixth draft recognizes that “[t]he Council’s **most important and challenging role** is the facilitation of the coordination and integration of a range of actions and policies in support of the coequal goals. Sixth staff draft Delta Plan, page 36, lines 27-28. Also see page 41, “[g]iven the numerous government agencies that frequently have conflicting or overlapping jurisdictional and programmatic interest over Delta matters, there is a compelling need for the Council to fulfill the role of integrator of Delta policy and coordinator of actions.”

We are encouraged that the draft plan recognizes that, “perhaps the **most significant tool** the Council will have for implementing the Delta Plan and ensuring accountability is a formal method for agency coordination”, Id. at page 46, lines 36-38 (emphasis added), and that the Council will “coordinate implementation of the Delta Plan through the establishment and leadership of an interagency implementation committee...”, id. at page 47, lines 1-2. We note that there is no recommendation or element in the timeline for chapter 2 (Figure 2-4, page 58), that clearly identifies the steps for establishing the interagency implementation committee (IIC). In particular, the Council should ensure that relevant local agencies and funding partners are consulted before the IIC makes any recommendations that could affect those agencies and partners.

Suggested Changes to the Sixth Draft: The Council should include a more detailed strategy and a timeline for the establishment of the IIC in the final Delta Plan that ensures meaningful involvement by affected local agencies and funding partners.

## 3. Water Transfer Exemptions

The sixth draft Delta Plan’s administrative exemption for temporary water transfers of up to one year in duration has been changed from the fifth draft’s broad exemption that covers all temporary water transfers to a limited exemption that covers only temporary transfers under post-1914 rights that are subject to State Water Board approval and exempt from CEQA review under Water Code section 1729. Contrary to the sixth draft’s intent to simplify transfers as stated in proposed recommendation WR R15, the narrowed exemption will create significant impediments to other types of one-year transfers.

The fifth draft stated an exemption from consistency reviews for “Temporary water transfers of up to one year in duration.” (Fifth draft, p. 58, line 28.) The sixth draft now states the following exemption: “Temporary water transfers of up to 1 year in duration exempted from CEQA pursuant to Water Code section 1729.” (P. 53:34-35.) The problem with the change is that the sixth draft would exempt only those temporary transfers that are exempt from CEQA under Water Code section 1729. Under Water Code section 1729, only one-year transfers under post-1914 water right permits or licenses that are subject to review by the State Water Board would be exempt. The result of the language change from the fifth draft to the sixth draft is that it

excludes through-Delta temporary transfers under pre-1914 water rights and subjects them to appeals to the Council.

This change could result in significant impediments to such transfers, even if the Council were to ultimately reject consistency appeals concerning such transfers. Under the 2009 Delta Reform Act and Council regulations governing appeals: (1) there would be 30 days from the approval of a transfer for someone to file an appeal; (2) the Council would have 60 days from the filing of the appeal to hold a hearing; and (3) the Council would have another 60 days to make a decision on the appeal. (Water Code sections 85225.15, 85225.20; Delta Plan, sixth draft, Appendix B.) Because all through-Delta transfers must comply with many regulatory requirements, including the terms of USFWS's and NMFS's biological opinions, substantial planning and flexibility is necessary to implement such transfers. (Transfers under pre-1914 rights also are subject to CEQA review.) Even if the Council ultimately denies a consistency appeal, the possible 150-day delay resulting from the appeal is quite likely to prevent a non-exempt transfer from occurring, given the regulatory constraints in the Delta. This sort of impediment to transfers would conflict with the sixth draft's recommendation WR R15, which states:

The Department of Water Resources and the State Water Resources Control Board should work with stakeholders to identify and implement measures to reduce procedural and administrative impediments to water transfers while protecting water rights and environmental resources by 2014.

Suggested Change to the Sixth Draft: Replace the sixth draft's consistency review exemption (page 53 at lines 34-35) with the fifth draft's language that provides for a broader exemption for one-year transfers. See fifth draft, p. 58, line 28.

#### 4. Scope of the Delta Watermaster

The sixth draft, page 108 at lines 32-35, calls for an expansion of the Delta Watermaster's duties, in contravention to Water Code section 85230 which states in part, "[t]he Delta Watermaster's authority shall be limited to diversions in the Delta, and for the monitoring and enforcement of the board's orders and license and permit terms and conditions that apply to conditions in the Delta."

The Legislature was explicit that the Delta Watermaster's duties "*shall be limited*" to the boundaries of the Delta and Delta conditions pursuant to delegated power from the State Water Resources Control Board. (Water Code, § 85230(b).) Contrary to the sixth draft's suggestion, the Delta Watermaster has no authority to investigate and enforce against diversions that are neither in the Delta nor have any terms that concerning Delta conditions. Any expansion of geographic scope must come from the Legislature. While we recognize that this an "issue for future evaluation and coordination", the Coalition believes that the priority for Delta Watermaster should remain the legislative direction to fully complete an assessment of water diversions and use within the Delta and provide the State Water Resources Control Board a written report detailing findings of specific water rights (place, amount, use, etc.) as well as specific illegal diversions and actions to cease the illegal diversions.

Suggested Change to the Sixth Draft: The Coalition recommends that the Council eliminate any reference to the Delta Watermaster's duties on page 108. In the alternative, the Council could consider language that reiterates it is critical to the achievement of both the coequal goals for the

Delta Watermaster to provide a workplan to maintain ongoing efforts to investigate the existence of illegal diversions in the Delta.

#### 5. Inconsistent Language – “Proposed Action” vs. “Covered Action”

While the sixth draft clarifies many ambiguities found in the fifth draft Delta Plan with regards to determining what constitutes a “covered action”, it includes, for the first time, the term “proposed action” without any explanation or definition of the term. The language referring to a “proposed action”, in combination with the lack of any definition, creates unnecessary confusion and new uncertainties beginning on page 52.<sup>1</sup> It is unclear what action may be a proposed action, but not a covered action.

Suggested Change to the Sixth Draft: The Coalition recommends that the use of “proposed action” in the Delta Plan’s discussion of “covered actions” be eliminated. The present language that partially deconstructs the components of the Legislative definition of a “covered action” in an effort to differentiate between a so-called “proposed action” and a “covered action” is confusing and increases uncertainty. Alternatively, the Council should revise the draft Delta Plan to clarify that a “proposed action” is an action that in whole or in part will occur in the Delta or the Suisun Marsh that is subject to the action proponent’s review as to whether it is a “covered action” for purposes of making a Delta Plan consistency determination.

#### 6. Water Conservation: 20% x 2020 Reduced Water Consumption

In discussing the Water Conservation Act of 2009 (SB7 X7), the sixth draft implies that SB7 X7 mandates that an urban water supplier’s inability to reduce its per capita water consumption consistent with SB7 X7 could constitute unreasonable use:

The SWRCB should be encouraged to use its authority to prevent waste and unreasonable use by seeking enforcement of the State’s requirements. The potential for this type of action was anticipated in the Water Conservation Act of 2009 (SBX7 7), which explicitly recognized that the failure of urban water suppliers to reduce urban per capita water demand consistent with the State’s 20 percent by 2020 conservation requirements could result in unreasonable use proceedings before the SWRCB, starting in 2021 (Water Code section 10608 et seq.). (Sixth draft at 95, lines 12 – 17.)

Nothing in the relevant section of SB7 X7, however, even refers to unreasonable use. The relevant section is Water Code section 10608.8(a)(2), which states:

Because an urban agency is not required to meet its urban water use target until 2020 pursuant to subdivision (b) of [Water Code] Section 10608.24, an urban retail water supplier’s failure to meet those targets shall not establish a violation of law for purposes of any state administrative or judicial proceeding prior to January 1, 2021. Nothing in this paragraph limits the use of data reported to the department or the board in litigation or an administrative proceeding. This paragraph shall become inoperative on January 1, 2021.

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<sup>1</sup> For instance, the final paragraph states: “If the above four screening criteria are met, then ...the project is referred to as a ‘proposed action.’ If any of the four screening criteria are *not met* ... the project is not considered a covered action...” This language is confusing, whereas the statute is clear as to what constitutes a covered action. Adding a new concept unnecessarily complicates matters.

Where the Water Code creates authority for an agency to pursue unreasonable use proceedings, it does so explicitly, as in Water Code section 275. The absence of any language in Water Code section 10608.8(a)(2) that would create such authority or discuss unreasonable use in any way – is a strong indication that the Legislature did not “explicitly recognize” that a water supplier’s failure to meet its 2020 water use target “could result in unreasonable use proceedings before the SWRCB . . . .” In addition, an analysis of whether a water use is reasonable must consider numerous factors such as climate, economics and environmental benefits of a water use that SB7 X7 simply does not consider. Finally, the Delta Reform Act that governs the Delta Plan expressly states that the Delta Plan will not affect any water right (Water Code § 85302(i)). We believe that any language in the Delta Plan that urges the State Water Resources Control Board to take water-right actions based on an alleged failure to achieve the 20% by 2020 water conservation goal is an incorrect interpretation of SB7 X7.

Suggested Change to the Sixth Draft: Delete the above language (page 95, lines 12-17).

In conclusion, the Ag-Urban Coalition appreciates the opportunity to comment on the sixth draft staff Delta Plan. We recognize that the drafting of the Delta Plan has been a monumental undertaking by your staff. The Coalition looks forward to working with the Council as you review, modify and finalize the Delta Plan, in the hopes that the Council’s final Delta Plan is a plan that we can all work with together to advance the coequal goals.

Sincerely,



Timothy H. Quinn  
Executive Director

Cc: John Laird, Secretary, Natural Resources Agency  
Jerry Meral, Deputy Secretary, Natural Resources Agency  
Charlie Hoppin, Chair, State Water Resources Control Board