

June 13, 2012

Delta Stewardship Council
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Transmitted via e-mail
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Re: Proposal to Revise Exemption for One-Year Water Transfers in Sixth Draft Delta Plan to Ensure Consistency with Delta Council's Policy to Promote Water Transfers

Dear Chair Isenberg and Council Members:

The undersigned agencies (hereinafter, the "Water Transfer Group")¹, thank you for the opportunity to comment on the sixth draft of the Delta Plan prepared by the staff of the Delta Stewardship Council ("Council"). This letter focuses on the sixth draft's proposed administrative exemption from covered actions for water transfers of up to one year in duration. The Group discussed its comments with the Department of Water Resources staff, who have agreed that these comments are consistent with the Department comments that will be sent separately. That exemption has been significantly narrowed from the fifth draft's broad exemption covering all temporary water transfers to a limited exemption covering only temporary transfers under post-1914 appropriative rights that are exempt from CEQA review. All other temporary transfers such as those based on pre-1914 and riparian rights could be subject to the Council's consistency determination procedures. The [Water Transfer Group] encourages the Council to instead revert to the broad administrative exemption in the fifth draft Delta Plan because it is most consistent with the co-equal goals and the Council's policy to facilitate water transfers.

Issue: The Exemption in the Sixth Draft Will Impede Water Transfers

The fifth draft stated an administrative exemption from consistency reviews for "Temporary water transfers of up to one year in duration." (Fifth draft, p. 58:28.) The sixth draft contains a revised exemption: "Temporary water transfers of up to 1 year in duration exempted from CEQA pursuant to Water Code section 1729." (Sixth draft, p. 53:34-35 (emphasis added).) The problem with the language added to the exemption in the sixth draft is that it would exempt only those temporary transfers subject to review by the State Water Resources Control Board under Water Code sections 1725 through 1732, including the exemption from CEQA review provided in Water Code section 1729. The changed exemption could subject all through-Delta temporary transfers made under water rights other than post-1914 rights to consistency appeals. This change has the potential to significantly limit the amount of water made available in water short years because appeals, no matter how unjustified, would effectively prevent sellers under water rights

¹ Browns Valley Irrigation District, Santa Clara Valley Water District, San Joaquin River Exchange Contractors Water Authority, Western Canal Water District, Richvale Irrigation District, M&T Ranch, Anderson-Cottonwood Irrigation District, South Yuba Water District, Nevada Irrigation District, Plumas Mutual Water Company, Biggs-West Gridley Water District, Cordua Irrigation District, and Butte Water District

other than post-1914 rights from moving water during the June through September period when capacity is generally available due to the minimum 150 days required to process an appeal.

The narrowed exemption for one-year transfers would be contrary to the co-equal goals set forth in Water Code section 85054 because it would impede water supply supplementation in water shortage years. The narrowed exemption also would be inconsistent with the sixth draft's recommended policy encouraging the streamlining of water transfers, 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.

(Sixth draft, p. 104:32-26.)

Recommended Revision of One-Year Water Transfer Exemption

To address the problems summarized above, the [Water Transfer Group] recommends that the Council replace the sixth draft's consistency review exemption on page 53:34-35 with the fifth draft's proposed exemption for one-year transfers, which stated: "Temporary water transfers of up to one year in duration." (Fifth draft, p. 58:28.) As discussed in the remainder of this letter, we believe that the broad exemption in the fifth draft is adequate because all one-year transfers are subject to full public review, rigorous regulatory processes, and are subject to challenge by parties who allege injury from the transfer.

If, however, the Council believes that reverting to the fifth draft Delta Plan's exemption for temporary transfers does not fully address its concerns, the [Water Transfer Group] suggests that the Council adopt one of the following exemptions:

1. Temporary water transfers of up to one year in duration that satisfy all applicable legal and regulatory requirements.
2. Temporary water transfers of up to one year in duration that are either exempt from CEQA or that are approved by the lead and responsible agencies after complying with CEQA or NEPA, as applicable.

All Water Transfers are Subject to Rigorous Review Under Existing Law and Regulations

The Water Transfer Group has discussed the temporary water transfer exemption with Council staff. We also understand that the ACWA AG/Urban Coalition also has raised this issue with staff. We believe that the narrowing of the water transfer exemption in the sixth draft resulted in part from a misunderstanding about how transfers work and the already significant obligations and oversight imposed on them. The Council and staff have already recognized this burden by proposing policy WR R15. To assist the Council and staff to better understand the mechanics of water transfers, the process is summarized below.

Temporary water transfers conducted by sellers holding post-1914 appropriative rights are reviewed by the State Water Resources Control Board under Water Code sections 1725 through 1732. To initiate the process, a seller must file a petition and environmental information form with the State Water Board identifying the water right license or permit covering the transferred supply; describing how water would be made available for transfer, anticipated impacts of the transfer, if any, and mitigation for any identified impacts; and demonstrating compliance with any local ordinance or permitting requirements. The seller also must serve a notice of the petition on all interested parties. The State Water Board then reviews the petition and environmental information and considers written comments filed by parties that may be affected by the transfer. If the State Water Board determines that the petition complies with all requirements, it issues an order approving the transfer. (Water Code section 1726.) The State Water Board may not approve a one-year transfer unless the petitioner demonstrates that no injury would occur to any legal user of water during the transfer period and that the transfer would not unreasonably affect fish, wildlife or other beneficial instream uses. If the petitioner establishes that the transfer complies with these requirements, the burden of proof shifts to any party opposed to the transfer to demonstrate that the transfer would cause an injury. (Water Code section 1727.)

Transfers under pre-1914 water rights also are subject to significant review, although that review is different than the statutory process conducted by the State Water Board. Transfers under pre-1914 rights must first be reviewed under CEQA by the lead agency for the project, which generally is a public agency holding its own water rights or entitlement. Consistent with CEQA's requirements, the lead agency must prepare an analysis that describes the transfer in full and that identifies potential environmental impacts of the transfer, including any cumulative impacts. Once the lead agency prepares its CEQA document, it must circulate the document to the public and relevant responsible agencies, including the State Water Board, the Department of Water Resources, and the Department of Fish and Game. If a responsible agency objects to a CEQA document, the seller would be required to respond to those comments to the responsible agency's satisfaction or risk being sued for violating CEQA. Likewise, interested members of the public may comment on the CEQA document and take legal action if they believe that the analysis does not comply with CEQA's requirements. If the water might be transferred through the Bureau of Reclamation's Central Valley Project in whole or in part, NEPA compliance also would be required in tandem with or instead of CEQA review. Many transfers are subject to County ordinances that require a permit or other authorization to transfer water outside the boundaries of the County and require a showing that the transfer will not result in environmental impact; no injury to third parties or other legal users of the water; and that no unreasonable economic impacts occur as a result of the transfer.

In addition, all transfers, regardless of how they are reviewed initially, must comply with many regulatory requirements, including the terms of USFWS's and NMFS's biological opinions and other regulatory constraints that are imposed on the operations of both the State Water Project and the federal Central Valley Project. In the case of water transferred through the State Water Project, the Department of Water Resources is required to make findings under Water Code section 1810(d) that there is sufficient excess capacity in the State Water Project's facilities to move the water and that the transfer will not injure any legal user of water, unreasonably harm

fish, wildlife or other instream beneficial uses, and will not unreasonably affect the overall economy or environment of the county from which the water is being transferred. Under existing law, all transfers implemented by CVP water service contractors and SWP contractors also are subject to NEPA and CEQA analysis by USBR, DWR and the participating contractors. Operations to accomplish transfers must be carried out in coordination with SWP and CVP operations, such that the capabilities of the projects to exercise their own water rights or to meet their legal and regulatory requirements are not diminished or limited in any way.

The Department of Water Resources and Bureau of Reclamation also issue an annual joint guidance document for water transfers. That document generally requires all water transfers that are not exempt under Water Code section 1729 to comply with CEQA/NEPA and to comply with all of the above requirements before any water will be moved through the projects. In addition, buyers and sellers must execute a conveyance agreement with the Department of Water Resources that binds the parties to comply with all applicable legal requirements. Those agreements also require monitoring and reporting before, during and after the transfer to demonstrate that it does not have any unreasonable impacts.

As this summary description of the water transfer process demonstrates, any seller and buyer wanting to engage in a temporary water transfer must invest a tremendous amount of time and financial resources to plan and execute a water transfer. Regardless of the mode of review, all transfers receive significant public scrutiny and are subject to oversight by the state and federal projects as appropriate during all phases of the transfer. Given the amount of planning, resources and oversight involved, more flexibility, rather than less, is necessary to ensure that temporary water transfers can timely and most efficiently occur.

The Sixth Draft Plan's Limited Exemption Would Impede Water Transfers and Therefore is Inconsistent with the Policy WR R15

The proposed limitation on one-year water transfers in the sixth draft Delta Plan could result in significant impediments to a transfer subject to a consistency appeal even if the Council ultimately denies it. The sixth draft's proposed exemption would add a minimum 150-day public-review requirement to the existing requirements, without achieving any additional public benefit. (See Water Code sections 85225.15, 85225.20; Delta Plan, sixth draft, Appendix B.) Agencies must invest significant time, money and resources to make a water transfer work. If faced with the risk of a consistency appeal for a proposed transfer that has already undergone significant public review -- including an opportunity for the public and trustee agencies to comment on and take legal action against a proposed transfer -- many agencies may simply decide against trying to transfer water regardless of how great the need may be for supplemental supplies downstream of the Delta in water shortage years.

Water transfers are a favored policy of the State of California to help meet California's water supply needs, and all State agencies are directed to encourage and facilitate water transfers. (See, e.g., Water Code sections 109 and 475.) Consistent with this policy, state agencies should be working with water users to find ways to make the process more efficient. For example, the Little Hoover Commission issued a report in August 2010, entitled "Managing for Change:

Modernizing California's Water Governance," which calls for increasing economic efficiency and system flexibility through a streamlined water transfer process. Even if the DSC ultimately denies an appeal, the minimum 150-day delay most likely will prevent a non-exempt transfer from occurring, given the regulatory constraints in the Delta. Adding impediments to water transfers in the Delta Plan would therefore conflict with policy recommendation WR R15.

The Argument that So-Called Recurring Transfers Violate the Law or the Delta Plan is Contrary to the Prevailing Law

We understand that the Council has received comments claiming that some agencies have participated in "recurring" water transfers, which allegedly are not subject to sufficient environmental review. Those objecting to such transfers argue that they should be subject to heightened review to ensure that the participating agencies do not evade their legal obligations to ensure that a transfer does not harm the environment or injure other legal users of water.

The concerns about so-called recurring transfers ignore the facts. With limited exemption such as transfers occurring under the Yuba Accord, all water transfers that have occurred in California have been temporary. The reality is that these transfers are truly annual in nature because it is impossible for buyers to know from year to year what their water allocations might be and if the state and federal projects will have any available capacity to move transfer water even if they need it for water supply supplementation. Likewise, sellers are generally unable to commit to annually providing a water supply for transfers because of variable customer demands and constraints on their supplies from variable hydrology and conditions on their licenses, permits, or water right settlement agreements.

The term "recurring" then, is only meaningful to the extent that certain agencies have been able to participate in water transfers over a period of years. The concept ignores, for example, that few transfers occurred between 2002 and 2008, or that water transfers occurred in 2009 and 2010 but did not occur in 2011. In recent years when transfers have occurred, not all of the same buyers and sellers participated, nor were the same water rights or quantities of water transferred in successive years. A few transfers have been negotiated this year, but it appears that there will not be any excess capacity in the state and federal projects to move any transfer water. The concept also ignores the fact that each transfer undergoes separate environmental review processes and requires separate approvals from applicable regulating agencies for each transfer.

The variables discussed above illustrate the fallacy in the argument that transfers "recur." Transfers have occurred in more than one year, but each year's transfers must be completely reevaluated because of the number of variables that affect transfers in a given year. Those variables would render any reasoned attempt to analyze a transfer that might recur between a particular buyer and seller in a future year speculative at best.

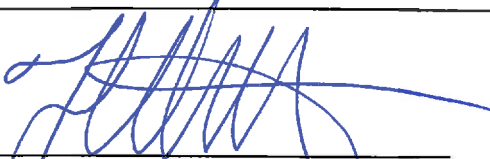
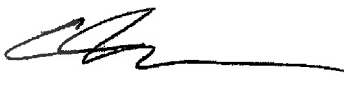
Conclusion

For the reasons stated above, the [Water Transfer Group] urges the Council to replace the sixth draft Delta Plan's proposed administrative exemption for one-year water transfers with the

language used in the fifth draft. As described in this letter, the broad exemption in the fifth draft would not alter the existing legal and regulatory requirements that apply to one-year transfers, which ensure that all such transfer are fully vetted and subject to legal challenge if any person or entity believes that the required review is inadequate. If the Council believes a more detailed exemption is required, we urge the Council to choose one of the proposed alternatives in this letter.

Based on the their extensive experience in this area, the [Water Transfer Group] believes that the proposed limited exemption for temporary water transfers could impede the use of one-year water transfers to increase the availability of supplemental water in water shortage years. This would be a very unfortunate result for a Delta Plan that is intended to help minimize unnecessary burdens on water transfers and to resolve conflicts concerning water supply reliability and the environment, not worsen them.

Sincerely,

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