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Merced Modoc Mono Napa Nevada Placer
Plumas San Benito Shasta Sierra Siskiyou
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May 5, 2011

Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814
Sent via E-mail: deltaplancomment@deltacouncil.ca.gov

Re: Third Staff Draft of the Delta Plan (dated April 22, 2011)

Dear Chairman Isenberg and Members of the Council:

On behalf of the thirty member counties of the Regional Council of Rural Counties (RCRC), I appreciate the opportunity to submit the following comments on the staff Third Draft of the Delta Plan dated April 22, 2011. These comments build upon comments previously submitted on the Second Draft Interim Delta Plan, the Notice of Preparation (NOP) for the Delta Plan, the First Staff Draft of the Delta Plan and the Second Staff Draft of the Delta Plan.

The Third Staff Draft of the Delta Plan (Delta Plan) is an improvement over the previous documents, and RCRC commends the Council and staff for the positive changes made. The document is also easier to read with the new revised format. However, RCRC continues to have very serious fundamental problems with the Delta Plan - as described in our comment letters on the First and Second Staff Drafts of the Delta Plan. In short - the Delta Plan continues to propose a regulatory scheme that significantly exceeds the authority provided to the Council in the Delta Reform Act.

Given the short turnaround time between the release of the Delta Plan and the comment deadline, RCRC will once again focus on selected sections of the document and endeavor not to repeat comments previously submitted, the majority of which have yet to be addressed.

Chapter 1, The Delta Plan

Overall, RCRC agrees with previous commenter's remarks as to the Delta Plan not containing a "plan" to meet the co-equal goals as required by statute.

Page 13, lines 22-35.

Please see RCRCs previously submitted comments on the geographic scope and use of the Delta Plan. To repeat, the proposed geographic scope and proposed

use of the Delta Plan is a serious fundamental flaw. RCRC urges the Council not to follow in the footsteps of the failed CALFED Bay-Delta Program.

Chapter 3, Governance: Implementation of the Delta Plan

RCRC urges the Council to re-consider the approach put forward in Chapter 3.

Page 27, Lines 11-16

The Delta Plan's proposed definition of "significant impact" is extremely broad i.e. ..."a substantial or potentially change in existing conditions that is directly, indirectly, and/or cumulatively caused by a project and that will or may....". This definition is so inclusive that it provides no guidance whatsoever to entities that may propose a plan, program, or project.

Page 35, lines 28-32

The document states, relating to regulatory policies, that the Delta Plan will "seek to prevent actions that may preclude the future implementation of projects that meet the requirement of the Act" and "protect floodplains and floodways until studies are completed by the Department of Water Resources." Please see RCRCs previous comments on the extent of Council authority and local agency land use control. RCRC supports the comments of the Delta Counties on this topic.

Page 36, lines 1-7

RCRC appreciates the addition of language in the Delta Plan recognizing the Council's role, per the statute, as a coordinator of the agencies who have the regulatory authority to implement the Delta Plan. RCRC believes that it would be appropriate for the Delta Plan to identify the agencies to be included on the committee.

Lacking in the document is recognition that other state agencies have responsibilities that extend beyond the more narrow interests of the Council which they are obliged to fulfill, and which may conflict with the guidance and recommendations of the Council. This may be an appropriate location in the Delta Plan to include recognition of this fact.

Page 36, lines 32-38

The Delta Plan states that various CEQA statutory and categorical exemptions are not cross-referenced in the definition of a "covered action" and that these types of projects therefore fall under the Delta Reform Acts definition of covered action.

The Legislature had provided these statutory and categorical exemptions for a reason – and RCRC fails to grasp how the Council can assert jurisdiction (i.e. consistency review) over projects over which other state and local agencies have no discretion (i.e. ministerial projects).

If the Council believes that it must assert jurisdiction over these types of projects due to the lack of a cross-reference in the law - RCRC recommends that the Council

include in the Delta Plan a recommendation that the Legislature remedy this oversight via legislation.

Page 39, lines 13-18

The statement is made that a covered action must be implemented as described in its finding of consistency. How and when does adaptive management come into play?

Page 40, lines 1-19

RCRC appreciates that the Delta Plan now makes a distinction as it relates to more comprehensive requirements for "large-scale ecosystem restoration and water management covered actions".

Chapter 4, A More Reliable Water Supply for California

Please see RCRCs previous comments on the Council's authority or lack thereof extending beyond the Delta, and the meaning of the term "promote". RCRC encourages the Council to substantially re-write Chapter 4.

Page 47, lines 13-21

As the Council knows, the export/transfer of water is within the jurisdiction of the State Water Resources Control Board (State Water Board). It is therefore unclear to RCRC staff how the Council envisions this proposed regulatory policy would work. Is the Council proposing that they make a finding of consistency, for example, prior to the State Water Board considering/approving a water transfer and that the State Water Board cannot take action until the Council has determined consistency? Or, that once the State Water Board approves a water transfer that the Council has the authority to stop the transfer if they make a finding of inconsistency? Further clarity as to process and a discussion of the Council's authority to impose new requirements is requested.

Page 48, lines 14-38

Please refer to RCRC's previous comments relating to excessive proposed requirements.

Page 49, lines 14-45

RCRC agrees with other commenter's regarding the use of the correct terminology in order to avoid confusion when discussing flows i.e. "water quality objectives" v. "flow standards".

Page 50, lines 11-19

Placing in the Delta Plan dates by which a sister agency should accomplish certain actions comes across as rather high-handed, and the statement "If the State Water Resources Control Board fails to act by the dates indicated, the Council will XXX" is even more so. The State Water Board has their own multiple responsibilities and priorities, and is not subservient to the Council.

The State Water Board staff has informed the Council that in order to meet the proposed dates in the Delta Plan that they would have to significantly redirect their efforts from other State Water Board priorities. It would be of great interest to RCRC to know the specifics as to what other programs would have to be reprioritized if the State Water Board were to redirect their efforts.

Another very important detail is funding or the lack thereof. Water right fee payers would rightly object to the redirection of their fees for purposes other than what was intended. As it is, water right fee payers have considerable angst at the high level of fees currently being paid as the result of the elimination of general fund support for the Water Rights Program. As noted earlier, the State Water Board's fees are the subject of litigation.

Additionally, RCRC notes that the Council expects the State Water Board to set flows that "are necessary to achieve the coequal goals". The State Water Board has responsibilities that extend beyond the narrow focus of the Council (i.e. balancing of competing needs), and flows are not the sole solution to achieving the coequal goals. The Council should not presume to instruct the State Water Board on how they should fulfill their responsibilities.

Page 50, lines 20-29

RCRC objects to the three options presented for consideration by the Council "for consequences if flows not adopted". The Council is aware of the flawed nature of the 2010 *Development of Flow Criteria for the Sacramento-san Joaquin Delta Ecosystem* report. To propose that the Council use this report to determine consistency of covered actions is not reasonable. The Council is well aware that the State Water Board made it clear that the flow criteria do not consider the balancing of public trust resource protection with public interest needs for water. Additionally, the flow criteria did not consider other public trust resource needs such as the need to manage cold-water resources in reservoirs tributary to the Delta.

Also objectionable are the proposals to determine inconsistency of covered actions that would increase the capacity to store water, etc., and to recommend that the State Water Board cease issuing water right permits in the Delta and the Delta watershed. The adversarial and punitive nature of these (and other) proposals in the Delta Plan are, in the opinion of RCRC staff, counter-productive and should be deleted.

Pages 53-54

As it relates to groundwater, groundwater overdraft is not a statewide problem but a localized one. RCRC supports local management of groundwater resources as groundwater resources are best managed by local jurisdictions, and opposes state interference in local groundwater management.

A productive recommendation would be that groundwater management in the state would benefit from increased state and federal funding for groundwater research, monitoring, and other management programs.

Additional Suggested Language

The Delta Plan contains select language from the Delta Reform Act, which is appropriate. RCRC urges the Council to additionally include in the Delta Plan, at a minimum, a reference to the following code sections, if not the specific language, taken from the Delta Reform Act:

85031. (a) This division does not diminish, impair, or otherwise affect in any manner whatsoever any area of origin, watershed of origin, county of origin, or any other water rights protections, including, but not limited to, rights to water appropriated prior to December 19, 1914, provided under the law. This division does not limit or otherwise affect the application of Article 1.7 (commencing with Section 1215) of Chapter 1 of Part 2 of Division 2, Sections 10505, 10505.5, 11128, 11460, 11461, 11462, and 11463, and Sections 12200 to 12220, inclusive.

(b) For the purposes of this division, an area that utilizes water that has been diverted and conveyed from the Sacramento River hydrologic region, for use outside the Sacramento River hydrologic region or the Delta, shall not be deemed to be immediately adjacent thereto or capable of being conveniently supplied with water therefrom by virtue or on account of the diversion and conveyance of that water through facilities that may be constructed for that purpose after January 1, 2010.

(c) Nothing in this division supersedes, limits, or otherwise modifies the applicability of Chapter 10 (commencing with Section 1700) of Part 2 of Division 2, including petitions related to any new conveyance constructed or operated in accordance with Chapter 2 (commencing with Section 85320) of Part 4 of Division 35.

(d) Unless otherwise expressly provided, nothing in this division supersedes, reduces, or otherwise affects existing legal protections, both procedural and substantive, relating to the state board's regulation of diversion and use of water, including, but not limited to, water right priorities, the protection provided to municipal interests by Sections 106 and 106.5, and changes in water rights. Nothing in this division expands or otherwise alters the board's existing authority to regulate the diversion and use of water or the courts' existing concurrent jurisdiction over California water rights.

85032. This division does not affect any of the following:

(a) The Natural Community Conservation Planning Act (Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code).

(b) The California Endangered Species Act (Chapter 1.5 (commencing with Section 2050) of Division 3 of the Fish and Game Code).

(c) The Fish and Game Code.

(d) The Porter-Cologne Water Quality Control Act (Division 7 (commencing with Section 13000)).

(e) Chapter 8 (commencing with Section 12930) of Part 6 of Division 6.

(f) The California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code).

(g) Section 1702.

(h) The application of the public trust doctrine.

(i) Any water right.

(j) The liability of the state for flood protection in the Delta or its watershed.

Chapter 5, Restore the Delta Ecosystem

Pages 64-65

The Delta Plan states that altered Delta flow regimes are detrimental to native aquatic species, and under "Policies" refers the reader to WR P4 (page 50) which states that the State Water Board should develop flow criteria and establish flows by certain specified dates. See RCRC's earlier comments under Chapter 4.

The Delta Plan, it appears, is not only stating that the State Water Board should develop flow criteria and establish flows, but that when doing so that the State Water Board should create a more natural flow regime. (Page 64, line 42)

As RCRC has previously stated, the State Water Board must by law balance a number of considerations when establishing new objectives. The Council has no authority to tell the State Water Board what it should do and how it should do it.

Page 67

Please see RCRC's previous comments relating to local land use control. RCRC supports the comments of the Delta Counties on this topic.

Page 69

The Delta Plan proposes that if the Bay Delta Conservation Plan (BDCP) is not completed by a date certain that the Council will proceed with ecosystem and conveyance planning recommendations independent of the BDCP process. RCRC finds this proposal objectionable given the narrow focus of the Council.

Decisions of this nature must be made by agencies that are required to balance competing needs like the Department of Fish and Game (DFG). For example, the DFG must consider in its decision-making process within the BDCP process the potential for negative impacts on upstream ecosystems from proposed actions to benefit the Delta.

Chapter 6, Improve Water Quality to Protect Human Health and the Environment

Page 80, lines 37-38

Throughout the Delta Plan the Council proposes regulatory action or recommendations that various state agencies undertake actions, often by a date certain. For example, WQ R3 states that "The California Department of Public Health should prioritize funding for disadvantaged communities that lack safe drinking water supplies."

The DPH has a priority system in place currently that ranks communities based on public health and safety criteria. RCRC suggests as an alternative that the Council recommend that the State Legislature provide funding in the State Budget to supplement State Revolving Fund (SRF) funding for water and wastewater projects that benefit small and disadvantaged communities. The Small Communities Wastewater Grant Program is an example of an extremely valuable program that is only funded from time to time if specific funding is included in a G.O. bond.

Recommending throughout the Delta Plan that the State Legislature provide additional funding to state agencies in order that they may undertake actions of importance to the Council's mission would seem more appropriate than trying to dictate (or recommend) what another state agency should do and when they should do it.

Chapter 7, Reduce Risk to People, Property, and State Interests in the Delta
Page 88-89

RCRC supports the comments of the Delta Counties relating to local land use and floodplain and floodway protection.

Chapter 8, Protect and Enhance the Unique Cultural, Recreational, Natural Resources, and Agricultural Values of the California Delta as an Evolving Place
Pages 101-104

RCRC supports the comments of the Delta Counties relating to the protection and enhancement of the unique cultural, recreational, natural resources, and agricultural values of the California Delta as an evolving place.

Chapter 9, Finance Framework to Support Coequal Goals
RCRC questions the legality of the fees proposed.

Pages 107- 118

As it relates to the Finance Plan Framework Guiding Principles, RCRC submits the following comments for Council consideration:

- RCRC believes that public benefits should be funded by state and federal funds not otherwise required for project mitigation or by law for other purposes.
- As RCRC has stated previously relating to the “beneficiary pays” principle, the so-called beneficiaries must directly benefit. Once having established that there is a direct measurable benefit RCRC could support the concept of a sliding scale cost allocation based on the degree of benefit received.
- RCRC understands that the Council proposes the use of the “stressors pays” principle as opposed to the “polluter pays” principle as it is perceived that doing so will result in the inclusion of a wider pool of potential payees. Please note that RCRC would oppose the identification of upstream water diversions as a “stressor” simply due to the diversion of water from the watershed.
- If there are to be user fees to fund the Delta Plan, RCRC agrees that the fees must be protected from redirection to other purposes. The only method to ensure that the current or future Legislature is unable to tap into such funds is to include specific protection within the California Constitution.
- RCRC opposes volumetrically based user fees for water diversions.

On page 110, lines 6-21, the Delta Plan identifies three immediate financing needs. The first is the protection of the existing Delta water export system from flood risks and needed ecosystem improvements to reduce damage by operations of the existing export pumps in the Delta. The water exporters are the beneficiaries of these actions, but there is also a public benefit that should be funded by the state and federal funds.

The second is the funding of a strong Delta Science Program. This would seem to be appropriately funded with state and federal funds. As to the operations of the Delta Stewardship Council and the Delta Conservancy, it would seem appropriate that state and federal funding be augmented by beneficiaries for the "services" provided by the Council.

RCRC cannot support (page 112, lines 27-30) the Council's recommendation that the Legislature grant to the Council blanket authority to develop fees for beneficiaries and stressors of the Delta ecosystem to fund the operational costs of the Council, the Delta Conservancy and the Delta Protection Commission.

RCRC also opposes (page 113, lines 2-6) the Council's recommendation that the Legislature additionally create a public goods on urban and agricultural water users to fund ecosystem costs or State water management costs such as developing the California Water Plan Update. These are public benefit costs that should be paid by the state and federal government utilizing the proceeds of taxes and/or bonds.

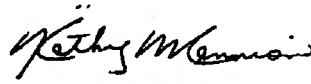
RCRC understands only too well the current fiscal constraints faced by the state and federal government. California State legislators and members of Congress should, like local government must, determine their priorities and allocate funds accordingly.

On page 114, lines 16-17, the Delta Plan states "Allowing reallocation of resources among users may be required for the long-term economic vitality of the State." RCRC would appreciate clarification as to the meaning of this statement.

The Delta Plan puts forward a variety of potential funding sources (redirecting fees, fines, and forfeitures from the State Water Resources Control Board to Delta activities; reallocating funds among agencies involved with Delta operations; additional fees on hydropower generators; fishing fees; other stressor fees; and, water marketing fees, among others) while also recognizing that significant funding from these sources is not anticipated. RCRC reminds the Council that when proposing to establish a new/additional fee that a nexus must be established.

In conclusion, RCRC appreciates the opportunity to provide the Council with comments on the third draft of the Delta Plan. Please contact me at (916) 447-4806 or kmannion@rcrcnet.org with any questions.

Sincerely,



Kathy Mannion
Legislative Advocate

cc: Joseph Grindstaff, Executive Officer