Department of Conservation & Development

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Contra Costa County

Catherine O. Kutsuris
Director

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AUG 02 2010
3885-Delta Council

July 30, 2010

Delta Stewardship Council
650 Capitol Mall, Fifth Floor
Sacramento, CA 95814

Re: Comments on the Delta Stewardship Council Administrative Procedures

Dear Chairman Isenberg and Council Members:

On July 23, the Delta Stewardship Council (DSC) requested counties with jurisdiction in the Delta provide written comments on their concerns with the proposed administrative procedures discussed under Item 13 on the DSC agenda. This letter provides Contra Costa County's comments. These comments cover *Part I – Administrative Procedures Government Appeals*, and *Part III – Other Forms of Review or Evaluation by the Council.*

As a general comment, Contra Costa County believes it is premature to adopt procedures for review of certification of consistency with the Delta Plan. Why is the DSC proposing to adopt an appeal process now when the plan that we must be consistent with will not be adopted until January 1, 2012? The concerns we have now could change significantly depending on the content of the Delta Plan. At this point, the County has no idea of the Delta Plan's affect on potential covered actions that could occur in Contra Costa.

If the DSC is committed to adopting procedures now for review of certification of consistency with the Delta Plan, it should include direction to staff to bring the matter back to the DSC for reconsideration once a Delta Plan has been prepared or adopted. At that time, the DSC should undertake direct outreach to affected agencies to obtain comments on these procedures. Direct outreach in the form of workshops would help affected agencies understand how the procedures would work and would allow affected agencies to provide more constructive comments to the DSC.

The following are more detailed comments on the discussion draft of the administrative procedures that were released on July 12, 2010.

- **The DSC should consider an appeal fee in Procedure 6 to help recover costs.**

- **Augmentation of the administrative record in Procedure 10 should be allowed only if the DSC can demonstrate that the additional information was widely known and available *to the agency making the decision.*** As currently drafted, it is not clear if the additional information needs to be widely known and available to the agency making the decision. The standard for accepting additional information should include this requirement. This requirement could be met by showing the affecting agency was involved in the review or preparation of the additional information, the agency included the

additional information in the review of other actions, or the agency was advised to look for the information during consideration of the covered action and such information could be easily obtained.

- **Procedure 15b should be corrected to reference Water Code Section 85225.25.**

- **The procedure should limit the number of times a covered action can be appealed to the DSC.** Procedure 15b leaves open the possibility that the same action can be appealed without limit. It would be preferable that a revised certification of consistency not be subject to appeal. Rather, such a certification should not become effective until the DSC makes a finding that the covered action is consistent with the Delta Plan. To that end, Procedure 15b should be revised to read as follows:

  The public agency has pursuant to Water Code section 85225.25 decided to proceed with the action as proposed or modified and has filed with the council a revised certification of consistency addressing each of the findings made by the council and the council makes findings that the recertified action is consistent with the Delta Plan.

- **The process for determining that the BDCP meets the requirements of 85320 needs to be more transparent to the public.** Such transparency is needed to minimize consideration of unnecessary appeals. Procedures to add prior to receipt of the Department of Fish & Game's determination include:

  - Require an agreement with the Department to formalize a commitment between the parties to work collaboratively in preparation of the BDCP and related environmental documents. This agreement should clarify and define the roles and responsibilities of the DSC and the Department. Responsibilities include coordination with the lead agencies on meeting the requirements of 85320, providing preliminary deliverables and technical analyses for review and comment by the Independent Science Board and DSC consultants, and funding the DSC responsibilities under 85320.

  - Require the Department to include an indexed administrative record with its determination of the BDCPs consistency with 85320. The intent would be similar to Procedure 4 that is proposed for the review of certifications of consistency with the Delta Plan.

  - Require a draft determination of consistency be made available to the DSC to give members of the public an opportunity to review and comment on it prior to its submission to the DSC and to include such comments in the administrative record accompanying the determination of consistency. The intent is similar to Procedure 3 that is proposed for the review of certifications of consistency with the Delta Plan.

- **The DSC should have the ability to request additional information on the determination of consistency in the event there is no appeal.** The new procedure would be of value after the DSC has received the determination, and prior to including the BDCP in the Delta Plan. Such additional information may be necessary to clarify, amplify, correct or supplement the information submitted in the Department's determination of consistency. Alternatively, Procedure 19 should indicate the need for additional information concerning a specific requirement of 85320 is sufficient grounds for an appeal by the DSC, its executive officer, or any member of the DSC.

- **The DSC should consider procedures for reviewing and commenting on potential covered actions that may be initiated before the Delta Plan is adopted.** This comment is suggested as an alternative to preparing procedures for review of certificates of consistency with the Delta Plan. The premature nature of the Certificates of Consistency procedures has already been described. Maybe the most appropriate action for the DSC to consider now would be to prepare a process for reviewing and commenting on potential covered actions that may be initiated before the Delta Plan is adopted.

Procedure 2 under *Part III – Other Forms of Review or Evaluation by the Council* (on page 9), provides a general advisory note on what the DSC may do with potential covered actions before the Delta Plan is adopted. It may be worthwhile to develop a more explicit procedure. The DSC may want to notify a public agency with jurisdiction or activities in the DSC's planning area of that agency's statutory responsibility per 85225, the schedule for completing the Delta Plan, and advise the agency that it should monitor development of the Delta Plan so if the agency approves a covered action after the Delta Plan is adopted, a certification of consistency can be anticipated.The County does not believe the DSC could or should do more than this for the certificates of Consistency procedure until the Delta Plan is adopted.

Sincerely,

Steven L. Goetz, Deputy Director
Conservation and Transportation Planning Programs

cc: Contra Costa County Legislative Delegation
Contra Costa County Board of Supervisors
Delta Counties Coalition
Contra Costa Council