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Mr. Phil Isenberg, Chair
Delta Stewardship Council
980 Ninth Street, Suite 1500
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September 29, 2011

Subject: Delta Plan – 5th Draft

Dear Chairman Isenberg and Council Members:

Thank you for the opportunity to review and comment on the Delta Stewardship Council's (DSC) Staff Draft version 5. The Tuolumne Utility District supplies water to over 13,500 customers within the County of Tuolumne. We have participated in the DSC process through the review of previous documents, draft plans and DSC meetings and workshops. Additionally, our agency is a participant in the Ag-Urban Coalition and worked in the development of that group's Alternate Draft Plan as submitted to the DSC previously.

We have noted that the 5th Staff Draft Plan is an improvement over the earlier drafts. However, we still have significant concerns regarding the ability of the Plan to be implemented and achieving the co-equal goals for the program. Additionally, we continue to be concerned regarding the level detail and the lack of specificity within the plan. Rather than improve confidence in water supply reliability within the Delta watershed, we believe that the current version of the Plan will instead add to uncertainty for local water agencies and increase the general level of tension between the DSC and those agencies it will have to work with to make progress. We believe that there will quite probably be negative impacts to water suppliers and their customers upstream of the Delta if version 5 of the Staff Draft were to be adopted by the Council.

Our concerns can generally be categorized as falling within the following broad categories:

Financing

Flows and Water Rights

Covered Actions/Governance

Financing

We have concerns regarding the notion of a “stressor fee” as discussed in the Draft Plan. We are unclear exactly what degree of “stress” the fee would be based upon and what the metric(s) would be to identify and quantify, what would probably be multiple stressors.

One could argue that essentially nearly any activity within most parts of California by people constitutes a stressor to some degree to on an ecosystem. Not all ecosystems in California are however, the Delta Ecosystem. Our agency is located within the Sierra Nevada Ecosystem. A distinction by the Council and it’s Independent Science Board (ISB) for other ecosystems must be incorporated into the Delta Plan. We refer the Council and the ISB to the Sierra Nevada Ecosystem Project Report as prepared for the U.S. Congress in 1993. The findings of that report are still valid and the extensive work that went into that effort should be recognized by the DSC and the ISB in your planning process.

Nonetheless, once having made that assertion for the justification for a fee however, the process of actually assigning a stress “fee” based on as yet undefined factors would certainly be opening an exhaustive examination of actions, probably unanticipated in the Plan. It should be pointed out that some actions taken to mitigate for one set or resource values may conflict with preconceived values such as “a more natural hydrograph”.

The following is a typical example. Operating a dam within the watershed to make releases to enhance white-water rafting during late summer months when “natural” (pre-dam) river flows were significantly lower is not an action that would mimic a more natural hydrograph. Would those summer, recreational flows be identified as a stressor to the Delta Ecosystem? Who would that then collect the fees assigned to this stressor? The federal agency that issued the use permit? The local agency operating the dam that was ordered to make those releases by another federal agency? Perhaps such stress fees should be collected directly from white water rafting outfitters?

This notion also raises the specter of certain actions that are taken that were defined previously as mitigation measures through multiple venues such as Federal Energy Regulatory Commission licenses, Clean Water Act 401 certifications, U.S. Forest Service Special Use Permits, NPDES permits, State Water Resources Control Board water rights conditions, etc. Could those also be stressors? Could they as mitigation measures focused

on the Sierra Nevada Ecosystem provide benefits downstream and perhaps even the Delta. If so, what if any credit is being assigned for these actions by the ISB and DSC? The level of complexity of this topic grows dramatically upon more reflection and is probably beyond the scope of need, time and capacity of the Council given the deadline for a completed Plan. We therefore recommend that any consideration for a “stressor based fee” be shelved until more information and input from local agencies, federal agencies, utilities and other key stakeholders can be gathered and analyzed by the DSC. This may best be carried out by an advisory group appointed by the DSC to assist in these efforts in coming years.

We also do not believe that the proposal to collect a fee (public goods charge) based on water as the measuring index, and then take those funds and use them outside the locality they are collected in is a particularly good idea. There is a scarcity of local revenues already and the DSC proposal to use electrical bills as the model is invalid. Specifically, funds collected on electrical bills are in fact used locally and invested in benefits to that local area. However, as we understand the DSC’s current proposal, funds collected from water users within the Sierra Nevada Ecosystem would then be reallocated for use any in the Delta Ecosystem or potentially even export areas. Such an approach would actually perpetuate the model whereby re-investments in the source watersheds from downstream beneficiaries, including the State, are far less than they should be. So, the current proposal would actually make the conditions within the Sierra Nevada Ecosystem worse - not better. We oppose such a public goods charge.

Finally, we believe that the DSC should in the short-term use existing funding sources such as the Proposition 84 Bond revenues and potential funds from the 2012 water Bond. The DSC must adopt a coherent and functional plan, followed by a logical and supported spending plan in advance of beginning to collect fees. In short, show us what you want to do, what it does in meeting the co-equal goals and then begin the discussion of who would pay how much to whom and why.

Flows & Water Rights -

Our agency continues to be concerned with the 5th draft plan’s focus on flow criteria as an apparent singular metric for a healthy Delta ecosystem. While there is a nexus between stream flow and some aspects of aquatic and terrestrial habitat and species health, it is also clear that there are many other factors influencing the Delta’s health beyond flows. Therefore, any flow objective metric would seem to have two applications. First, it could be used to quantify specific and clearly identified environmental benefits within specific river reaches. Second, the commitment of those flows (beyond what are likely already being provided as part of other regulatory venues) would have a probable negative impact on local water supplies while potentially benefiting export water supplies and in-Delta water supplies. Such a reallocation of water, made under the guise of ecosystem benefits would by necessity have to quantify where water supplies were significantly impacted and such impacts would be subject to some sort of “reverse stressor” payment.

It is implausible that the DSC in partnership with the SWRCB would attempt to levee stressor fees and beneficiary fees on upstream water agencies while demanding more water for downstream uses that have more options for new supplies. Clearly such actions would be in conflict the findings of the well-documented evidence in the Sierra Nevada Ecosystem Project Report as prepared for the U.S. Congress in 1993. That report found under investment in the Sierra's watersheds by downstream beneficiaries to be a major obstacle to improving the condition of those watersheds.

It also seems difficult if not impossible for the SWRCB to accomplish the completion of defensible flow objectives by 2014. Such flow objectives would have to be defined to meet in-stream flow requirements based on In-stream Flow Incremental Methodology (IFIM) models developed for each tributary and updated where necessary. Then once upstream flow requirements were identified it would be prudent to determine if these flows were to be "pass through" flows at the lower, generally larger, foothill reservoirs. If not, any such upstream flow contributions would simply be "lost" in down stream storage. Based on our experience, it is also quite possible that the "target" species within the Sierra Ecosystem and the Delta Ecosystem are different. For example, flows for a wild trout stream may be based on a desired hydrograph and fishery life stages completely different than a non-wild trout stream (the latter being planted with fish as opposed to a naturally grown population). Input from the California Department of Fish and Game, the U.S. Fish and Wildlife Service, the United States Forest Service and the Federal Energy Commission, should all be actively sought out by the ISB and the DSC in their own support of any SWRCB flow related process.

All of this will take time and resources. For the DSC's Plan to actually meet the coequal goals, Plan policies should not impinge upon upstream water rights. We recommend that ER P1, which calls for the SWRCB to cease issuing water rights permits if the Board has not defined Delta regulatory flow objectives by 6/2/2014 and upstream tributary non-regulatory flow criteria by 6/2/2018, should be deleted from the Plan. If this Policy were left in, we believe it further illustrates a serious breach of the authority of the DSC. The DSC was not given regulatory authority over the waters of the state by the Delta Reform Act.

This policy while left in place would allow for a functional moratorium on upstream area of origin counties and water agencies. This would result in the potential for the more junior and downstream state and federal projects to actually increase exports while freezing the ability of areas of origin to file for and obtain their, legislatively protected, water rights through due process. Such an action would reverse California's historic water rights priority system.

We are also concerned about the Plan's WR R5 recommendation.

"The State Water Resources Control Board and/or the Department of Water Resources should require that proponents requesting a new point of diversion, place of use, or purpose of use that

results in new or increased use of water from the Delta watershed should demonstrate that the project proponents have evaluated and implemented all other feasible water supply alternatives."

This language is problematic because it would require upstream agencies such as ours to have evaluated and implemented all other feasible water supply alternatives prior to being able to obtain essentially any change in our existing use of water or new diversion of water. It is also unclear who makes the determination that an alternative is feasible. To who and at what costs? Does feasible mean locally feasible (locally cost effective) or is there another standard of feasible? The proposal is not clear.

Such a recommendation could cause significant costs and delays to upstream agencies and not demonstrably benefit either the ecosystem or the water supply reliability aspect of the coequal goals. Indeed, imposing water supply alternatives with a marginal cost of water many times greater than another supply source, could impose a regressive tax on many upstream areas that are defined by the State of California as Disadvantaged Communities (DAC). That is, areas in which the annual average income is less than 80% of the state average. Why is it considered to be good policy to impose unjustified higher water supply costs on communities that are defined by the state as DACs?

The proposed language in WR R5 also raises additional questions unrelated to feasibility but rather centered on actual authority. The DSC must remember that the SWRCB does have limits to its authority. For example, a new condition on a Federal Energy Regulatory Commission (FERC) hydroelectric project license by making a change in amount of diversion or timing of diversions could trigger recommendation WR R5 as it could modify one or more of the conditions of water use.

Irrespective of the desire of the DSC for the SWRCB and the DWR to do certain things we must point out that the U.S. Supreme Court has already held that the SWRCB has no authority to pre-empt the authority of the FERC (CALIFORNIA v. FERC, 495 U.S. 490 (1990)). We urge that WR R5 be removed entirely from the Plan.

This points up an over reliance of the DSC's plan to focus on regulatory or semi-regulatory venues to achieve its ends rather than to fulfill its role of facilitator, coordinator and guiding agency as anticipated in the Delta Reform Act.

Covered Actions/Governance -

The Delta Reform act clearly gave the DSC the ability to exercise a certain degree of authority over actions within the Delta. However, there has been an ongoing concern by those upstream of the Delta, such as our agency, that it is not clear what the status of actions outside the Delta have to the DSC's authority over covered actions. We were encouraged when at the September 15 DSC workshop on Covered Actions and Governance, DSC staff pointed (orally) that any diversions of water that occur within the Delta's watershed but are outside the Delta, are not to be considered covered actions. This

was explained to mean even when there were changes of water rights permits for diversions (new) or differing amounts these were not to be considered covered actions. It is assuring to hear this from DSC staff in a workshop setting; however, if the assurance is to have a long-term validity it must be incorporated into the Plan in writing. We therefore suggest that WR P1 should incorporate the following clarifying new language in the text of the Plan.

A “covered action” does not include any action granting, administering or changing a water right permit or license to divert water within the Delta watershed, but wholly outside of the statutorily defined Delta, or any action to exercise a water right or to use water within the Delta watershed, but wholly outside the statutorily defined Delta unless the water is to be conveyed through the Delta through the volition of the party(ies) holding, or applying for the water right.

Notwithstanding this proposed change we still have concerns regarding the language on page 57 of the 5th Draft Plan, lines 36 to 38 and page 58 lines 1-5. While the draft plan admits that regulatory actions taken by another State agency are not covered actions, the phrase “...the underlying action regulated by that agency can be a covered action, (provided it otherwise meets the definition) continues to create confusion. This would be significantly clearer if it made a distinction that where the subject area of the regulation is being applied is outside the statutorily defined Delta such an regulatory action is not a covered action. In short, the subject regulatory action must be taken within the geographic area of the Delta.

We also have a more general observation that the Plan should be clearer as to its intended geographic area of application regarding some aspects of Plan. For example some proposals seem to have a practical application to those areas receiving water from the Delta (export areas) but being non-applicable to upstream areas. This is particularly true with regards to the language on pages 82 and 83 and the notion of regional self-reliance.

For example, the source area water agencies have limited options in terms of water sources. These agencies cannot tap into the vast Pacific Ocean as a source of desalination. Additionally, for most of the agencies on the west slope of the Sierra Nevada Mountain Range there is no groundwater table or defined basin (See DWR Bulletin 118). Groundwater is found at generally great depths in fractured rock and is not as reliable as groundwater tables in the Sacramento or San Joaquin valley. Additionally, due to the dominant landforms and deeply incised river canyons, water transfers are of limited application. Therefore, the only sources of water for these areas are the streams and rivers within the Sierra Nevada Ecosystem or as you refer to it, the Delta watershed. A local water agency’s ability to become “regionally self-sufficient” has little if any practical meaning in these areas. Most of the water in these upstream “regions” or watersheds exits the counties of origin for use elsewhere in the state. Therefore, any additional water supplies needed can be met only in one of two general ways: improving water use efficiency (which is being done already through targets and objectives as established by SB

X 7-7 and as set out in the Urban Water Management Plans prepared in 2010/11), or increasing diversions. If the latter is somehow re-defined to mean a region is not self-sufficient, then the protections accorded the areas of origin will be significantly harmed by the actions of the DSC. We urge you to carefully consider the implications of entertaining such an approach to meeting the coequal goals against the precedent of California's water rights priority system. We urge you rather to entertain a metric for water use that not only is indexed to efficiency (in compliance with targets and objectives in gallons per capita per day as defined in SBX 7-7) but also in achieving new water supply proposals identified in Urban Water Management Plans.

We again thank you for the opportunity to comment on Staff Draft Version 5. Our agency will continue to work with the DSC and their staff. We have already and will continue to participate in DSC meetings and workshops to improve the quality of the Plan. We will also review the Draft E.I.R. when it is released and participate through meaningful comments on that document.

Our agency will also continue to actively support the efforts of the Ag Urban Coalition and provide input through that process as well.

Sincerely,

A handwritten signature in black ink, appearing to read 'Peter Kampa', with a long horizontal stroke extending to the right.

Peter Kampa
General Manager

Cc: TUD Board of Directors
John Mills
MCWRA