



Department of Utilities
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January 14, 2013

Sent via US Mail and Email: RulemakingProcessComment@deltacouncil.ca.gov

Ms. Cindy Messer
Delta Plan Program Manager
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

**Re: Regulatory Rulemaking Text of Proposed Regulation Cal. Code of Regulations, Title 23.
Waters. Division 6. Delta Stewardship Council. Chapter 2.**

Dear Ms. Messer:

The City of Sacramento (Sacramento) submits the following comments regarding the Text of the Proposed Regulations (11/16/2012). Sacramento provides a domestic water supply, wastewater collection and treatment services, as well as stormwater collection, management, and discharge for the residents of Sacramento. Sacramento designed, operates, and maintains its wastewater and stormwater systems in accordance with its National Pollutant Discharge Elimination System (NPDES) permits issued by the State of California. These permits ensure protection of the beneficial uses of the Sacramento River and downstream waters, including the Sacramento-San Joaquin Delta.

Sacramento supports the co-equal goals of restoring the ecological health of the Delta and creating a reliable water supply for the State. Sacramento is very concerned with the health of the Delta and the tributary watersheds. Sacramento values our environmental resources and supports sustainability and maintenance of their quality for current and future generations. We are a leader in stewardship of water quality in the region, applying practical cost effective solutions to water pollution and encouraging environmentally balanced and sustainable regional and watershed-wide solutions developed through collaborative stakeholder processes.

Our comments are intended to assist the DSC in its task of developing a Draft EIR that complies with the California Environmental Quality Act (CEQA) and provides a sound foundation for subsequent environmental review of the Delta Plan itself as it is ultimately fashioned, as well as the numerous individual projects that ensue.

It is our understanding that these regulations must be developed in accordance with the procedural and substantive requirements of the Administrative Procedure Act (APA) and the regulations and



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guidance adopted by the Office of Administrative Law (OAL). Our comments are intended to help ensure that the proposal submitted to OAL can be easily reviewed and expeditiously adopted and that the Council's Plan is in compliance with the authorities of the Sacramento – San Joaquin Delta Reform Act.

Our overarching comment is that many sections of the regulatory language are inconsistent with the standards in the APA, including the "necessity," "nonduplication," and "consistency" standards set forth in Government Code sections 11349(a) and 11349(f). We believe that the proposed regulations include a significant amount of unnecessary narrative language and statements of policy that diminish the binding impact of the appropriate provisions and make it difficult for the potentially regulated entities to discern precisely what is required of them. It is imprudent to begin a new regulatory process in a manner that clouds rather than clarifies the objectives of the regulations. We believe that the more appropriate place for narrative language is within the Delta Plan and not within the regulation. We therefore urge the Council to make that distinction through changes to the proposed regulatory text. Further, where there are areas of the Final Draft Delta Plan that are unclear, those sections should be remedied within the Plan and that clarity then mirrored in any proposed regulations.

For example, the proposed regulations should be clarified by limiting the language of those regulations to straightforward regulatory requirements that the DSC is empowered to adopt absent any narrative statements about the "policy of the State," items that the Council "contemplates," and discussions of what "could" or "should" happen. Those are more appropriate to a narrative discussion in the Plan. One example of this is subsections (a) and (b) of Section 5007, which provide a narrative discussion of what the SWRCB "should" do to update flow objectives, and how objectives "could" be implemented. These provisions are not regulatory in nature, and as such are unnecessary and should be deleted.

We also urge the Council to use terminology in the regulations as is already specifically defined in the California Water Code (CWC). The structure and depth of the definition section is both inappropriate and confusing and neither is particularly desirable in new regulations. Where new definitions are created they are excessively long and complex and include "actionable language" that makes it very difficult to discern the extent of the prescriptive or regulatory intent of the substantive provisions. The definitions should be clear and concise, defining only terms where a definition is necessary, and regulatory requirements should not be embedded within a definition.

For the Council to be successful in achieving the coequal goals within a sustainable and coherent governance structure, we urge the development and adoption of clear, targeted regulations consistent with the OAL regulations and other state laws and regulations. We do not believe the proposed text will achieve those objectives and instead may itself create an obstacle to such progress. We also caution the Council to only promulgate regulations within that specific authority granted to them by the Sacramento – San Joaquin Delta Reform Act.

Administrative regulations should be enacted to implement, interpret or carry out the provisions of a statute and should not alter or amend a statute or enlarge, confuse or otherwise impair its scope or purpose. The Notice of Proposed Rulemaking sets forth twenty-four provisions of the Water Code that the proposed regulations are intended to implement, interpret or make specific. It further notes that the regulations make reference to more than twenty-four other provisions of the Water Code, as well as one provision of the Public Resources Code, several provisions of the federal Clean Water Act, Endangered Species Act, and National Flood Insurance statutes, and the CEQA regulations.

Many of the provisions that the proposed regulations are implementing, interpreting, or making specific, including the water efficiency provisions in SB 7X 7 are not statutes that the DSC is specifically charged with implementing, interpreting, or carrying out. Similarly, many of the Delta Reform Act provisions that the proposed regulations purport to implement, interpret, or carry out do not identify the specific authorities or powers of the Council. Instead, they are articulations of state policy or elements or objectives that should be included in the Delta Plan, but do not provide a basis for prescriptive regulations adopted by the Council.

The APA requires OAL to review regulations using standards of: (1) necessity; (2) authority, (3) clarity; (4) consistency; (5) reference; and (6) nonduplication. Sacramento is concerned that many of the proposed provisions may not meet these standards. Many of the provisions are not necessary to effectuate the Sacramento – San Joaquin Delta Reform Act and some exceed the authority provided by the Act. Some of the language is also not written in a manner that can be easily understood by the targeted entities, and in some cases it is difficult to even discern which entities are targeted by the provisions. Several provisions also overlap or duplicate the requirements of other state and federal laws. The proposed regulatory text should be reviewed with specific reference to the APA standards, and provisions that fail to meet each of the six standards should be removed.

This letter is not intended to provide a line-by-line, or section-by-section commentary on the proposed regulatory text. However, we have provided three specific examples of critical elements of the Delta Plan and the proposed regulations to illustrate the points we have raised thus far.

Section 5001(e) – The new definition of “coequal goals,” which is already succinctly defined in Water Code §85054 is unnecessary and confusing. The new definition is over a page and a half in length, while the definition in statute is just two sentences. The new definition itself contains three “further defined” phrases, which have their own separate definitions in Section 5001(e), as well as other terms defined separately in Section 5001. The second sentence of the definition uses prescriptive regulatory language to express how the goal “shall be achieved” and then the definition goes on to define “achievement,” including language establishing prescriptive requirements applicable to “regions that use water from the Delta watershed” and to undefined entities. This structure of mixing definitions and regulatory language is confusing to the potentially regulated community to which it is presumably intended to apply.

As we pointed out “coequal goals” is already defined by statute (CWC §85054) and it is not clear why it is also necessary to then define “achieving the coequal goals.” Subparagraphs (e)(1)-(3) appear to be expressing either the Delta Stewardship Council’s aspirations or statements of intent regarding what it hopes to promote through implementation of the Delta Plan, rather than adding any clarity. These sections, as a component of regulatory text are unnecessary.

In subparagraphs (e)(1)(A)-(C) the use of vague and relative terminology such as “better matching” “more closely match” and “reduce their reliance” make it difficult for a potentially regulated entity to understand how these “definitions” will be applied in a coherent and reasonable regulatory setting.

In addition, the language in subparagraphs (e)(1)(A) and (e)(1)(B) is duplicative in many respects, differing only in the general applicability of subparagraph (e)(1)(A) to undefined entities, while (e)(1)(B) is directed at “regions that use water from the Delta watershed.” To the extent that these definitions are establishing prescriptive mandates, they are duplicative of the general requirement in

Water Code §85021, which is a provision that the Council is not specifically charged with enforcing. In short, they are regulations that the Council has no authority to promulgate.

The language of subparagraphs (e)(3)(A)-(F), moreover, sets forth numerous "strategies" for protecting the unique values of the Delta, without explaining specifically how these strategies relate to "achievement" of the coequal goals or assist in interpreting or further clarifying the statutory definition. This language should, at a minimum, be moved from the definition section, or should be eliminated entirely from the regulatory language.

Section 5003 – Covered action defined. Similar to the enhanced definition of "coequal goals," this enhancement of the definition of "covered action," which is already defined in Section 85057.5, sets forth substantive regulatory requirements that are unclear.

Section 5003(b)(2)(C) exempts one-year transfers from being considered a covered action, which is consistent with Section 1729 of the Water Code. However, Section 5003(b)(2)(C) sunsets the exemption on 1/1/2015, a limitation that is not consistent with Section 1729 of the Water Code. This creates a potentially confusing regulatory requirement that could result in an agency undertaking an environmental review of a one-year transfer to satisfy the requirements for certifying consistency with the Delta Plan, even though the legislature has exempted these from the requirements for CEQA review.

The last sentence of section 5003(b)(2)(C), starting with "The Council contemplates..." is simply a narrative expression of the Council's intent and is unnecessary. It does not provide clarity for the regulated community and does not meet the standards of necessity for regulatory language.

In Section 5003(b)(2)(D), there appears to be an error in the first sentence reference to Section 5001(n) of this Chapter, which is the definition of "floodway."

Section 5003(b)(2)(D)(i)-(ii) provides two narrative "examples" of unusual circumstances that could arise. It may not be appropriate to include examples in the regulatory language. Such language is more appropriate to the Plan.

Section 5003(c) includes prescriptive requirements applicable to state and local agencies that should not be included within a "definition" and section 5003(d) inexplicably includes a clause that limits "the application of the definition." This is language that should be removed from the definitions portion of the proposal. As this portion of the proposal is currently structured the regulatory requirements are not clear to the regulated community. We question the need to include the statement that a determination is subject to judicial review, or any of the prescriptive requirements that the proposed regulations appear to be applying to state or local public agencies, when they are simply reiterations of the requirements of Water Code §85225 or processes set forth in statute.

Section 5005 - Reduce Reliance on the Delta through Improved Regional Water Self-Reliance. Sections 5005(a) and (b) set forth narrative expressions of "policies of the State" and do not serve a regulatory purpose. Their inclusion in the regulatory language makes it difficult for potentially regulated entities to determine their responsibilities. The sections are not necessary and should be deleted.

Section 5005(e)(1) and subparagraphs (A) – (C) are awkward and unclear. Whereas subparagraph (A) refers to an “Urban or Agricultural Water Management Plan,” subparagraph (B) refers to “the management plan” and (C) refers to “the plan.” The terminology should be consistent so that it is clear that each of these paragraphs, (A) through (C), is referring to the same plan.

It is not clear whether or not 5005(e)(1)(B) is referring only to “programs and projects” that are included in the “management plan.” It should be made clear that this subparagraph is referring only to the identification, evaluation, and implementation of projects that are included in the urban or agricultural management plan.

Section 5005(e)(1) distorts the purpose of the urban/agricultural water management plan. These plans are long-range planning documents that change over time as conditions and technologies change. The implementation schedules set forth in the plans are goals established by the water suppliers and are intended to remain flexible for purposes of adaptability. In order to protect the integrity of the water management plans as a useful planning document, Section 5005(e)(1)(B) should delete the phrase “consistent with the implementation schedule set forth in the management plan.”

Section 5005(e)(2) appears to be entirely narrative and not regulatory in nature. For the sake of clarity it should be deleted.

Legal Enforceability of Delta Plan Recommendations

The Rulemaking Package fails to clearly distinguish the regulatory difference between policies and recommendations in the Delta Plan and PEIR. The Notice of Propose Rulemaking states “The Delta Plan contains a foundational set of policies and recommendations to guide Plan Implementation. Consistent with the Delta Reform Act, the regulatory policies set a comprehensive, legally enforceable direction ...” The discussion does not clarify the enforceability of the recommendations. We are concerned that the State Water Board and Central Valley Water Board will interpret the recommendations as State Policy. The Delta Plan recommends that the State and Regional Water Boards apply special status considerations to the Delta; however, environmental impacts of this recommendation are not fully evaluated.

Cost Analysis for Proposed Regulations

The Council has prepared a Cost Analysis as required by Government Code sections 11346.3 and 11346.5. The Cost Analysis, however, appears to suffer from substantial deficiencies.

First, the discussion regarding the ability of local agencies to “recover costs” associated with the implementation of the Delta Plan is wrong and out of date. In this regard, the Cost Analysis relies on the case of California Farm Bureau Federation v. State Water Resources Control Board (2011) 51 Cal.4th 421, to suggest that “regulatory fees” can simply be imposed to recover costs. This case, however, is based on the law prior to the passage of Proposition 26 – a proposition that further restricted the ability of state and local agencies to raise revenue and recover certain costs. The Cost Analysis, to be accurate and informative, should consider the ability to local agencies to recover costs in light of Proposition 26.

Moreover, the Cost Analysis assumes that most of the regulatory components of the Delta Plan will have no costs associated with implementation. This is somewhat surprising, given the Cost Analysis

recognizes that "the Delta Plan policies will become regulations that all State and local agencies, as they are identified within each policy, must observe." (Cost Analysis, p.12.) Yet, the Cost Analysis argues that Section 5005 "does not mandate substantial new costs on water suppliers" because those water suppliers are already subject to the water management planning and implementation of existing laws set forth in Section 5005. For Section 5006, the Cost Analysis states that this provision simply provides that contracting "will follow [already] established procedures" and therefore "imposes no new costs to state or local agencies or on private entities." (Cost Analysis, p.14.) For Section 5007, the Cost Analysis states that "no mandates are made" through the proposed regulation and, therefore, there are no additional costs on any state or local agencies or on private entities. (Cost Analysis, p.14.) The discussion of Section 5008 is similar, explaining that Section 5008 "does not mandate any additional habitat restoration actions nor is it likely to significantly alter future restoration plans" and therefore "imposes no new costs." (Cost Analysis, Page 14.)

The same is true for Section 5010 (policy only requires consideration of alternatives and therefore is not anticipated to impose additional costs); Section 5011 (policy would already be covered by required CEQA mitigation and therefore imposes no new costs); Section 5012 (policy imposes no direct costs); Section 5013 ("[t]his policy does not differ significantly from existing conditions"); and Section 5014 (recognizes existing efforts underway and claims no additional costs).

The analysis used in the Cost Analysis appears to contradict the Delta Plan, the Proposed Regulations, and the Initial Statement of Reasons supporting the regulations. The Initial Statement of Reasons argues that "[t]he adoption of these regulatory policies is necessary to carry out the legislative requirement that the Council adopt a legally enforceable long-term management plan for the Delta" and "are necessary to carry out the legislative intent of achieving the coequal goals and objections specified" in the Water Code. (Initial Statement of Reasons, p.1) The Cost Analysis, however, argues that the Regulations impose no additional costs on anyone, in part, because existing law already imposes the same mandates contained in the Regulations. Either the proposed regulations are indeed necessary to effectuate the legislation – and the associated costs are attributable to the regulations – or, as argued in the Cost Analysis, they are not necessary.

Sacramento encourages the Council to review the text of the proposed draft regulations and to revise them as necessary by applying the requisite standards of: (1) necessity; (2) authority, (3) clarity; (4) consistency; (5) reference; and (6) nonduplication. The City continues to support the Council in its efforts to develop, adopt and implement a sustainable Delta Plan and appropriate regulations consistent with the duties and authorities provided in the Sacramento – San Joaquin Delta Reform Act.

If you have any questions, please contact Jim Peifer at (916) 808-1416.

Sincerely,

A handwritten signature in black ink, appearing to read "Dave Brent" with a stylized flourish at the end.

Dave Brent
Director of Utilities

cc: John Woodling, Regional Water Authority