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Dear Ms. Messer:

The East Bay Municipal Utility District (EBMUD) appreciates this opportunity to provide comments on the Delta Stewardship Council's (DSC) Proposed Delta Plan Regulatory Package dated November 16, 2012. We understand the intent of this proposal, as stated in the Notice of Proposed Rulemaking, is to adopt regulations in accordance with Water Code Section 85210(i) to carry out the powers and duties of the DSC identified in the Delta Reform Act. As with any other California state agency regulations, these regulations must be developed in accordance with the procedural and substantive requirements of the Administrative Procedure Act (APA) and the regulations and guidance adopted by the Office of Administrative Law (OAL). We appreciate the intent of the DSC to promote the achievement of the coequal goals and the objectives inherent in the coequal goals, and provide these comments to help ensure that the proposal submitted to OAL can be easily reviewed and expeditiously adopted.

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). The 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. The proposed regulations could be clarified by limiting the proposal to straightforward regulatory requirements that the DSC is empowered to adopt and removing narrative statements about the "policy of the State," items that the DSC "contemplates," and discussions of what "could" or "should" happen. These narrative discussions are more appropriate for the Delta Plan or the accompanying statement of reasons.

Additionally, many of the substantive requirements of the regulations have been set forth in the definitions portion of the regulations, and the structure and depth of the definition section is both inappropriate and confusing. The definitions 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. Furthermore, some definitions, including the definition of "significant impact," differ substantially from common usage and will not only cause confusion among regulated entities, but

create conflicts within the regulatory language itself. "Significant impact" has been defined to include beneficial impacts as well as negative impacts, which is inconsistent with CEQA and other regulatory policies and regulations currently in place. One needs to look no further than Section 5009(a) to see the problem created by using the overly broad definition, as this section now prohibits any actions that might improve the opportunity to restore ecosystem habitat. We doubt this was the intended outcome. The definitions should be clear and concise, defining only terms where a definition is necessary; further, regulatory requirements should not be embedded within a definition.

Overall, in order to achieve the important and ambitious goal of the Delta Reform Act to establish a new governance approach for the Sacramento-San Joaquin Delta focused on promoting the achievement of the coequal goals, we urge the development and adoption of clear, targeted regulations consistent with the OAL regulations and other state laws and regulations.

Our general assessment of the proposal and comments on specific sections are set forth below:

#### **I. General comments**

Administrative regulations generally should be enacted to implement, interpret, or carry out the provisions of a statute and should not alter or amend a statute or enlarge or impair its scope. 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 x7-7 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 set forth specific authorities or powers of the DSC. 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 DSC.

The APA requires OAL to review regulations using standards of: (1) necessity; (2) authority; (3) clarity; (4) consistency; (5) reference; and (6) nonduplication. We are concerned that many of the proposed provisions may not meet these standards. Many of the provisions are not necessary to effectuate the 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

discern which entities are targeted by the provisions. Several provisions also overlap or duplicate the requirements of other state and federal laws.

In general, the language should be reviewed with specific reference to the APA standards, and provisions that fail to meet each of the six standards should be removed.

## II. Section by section comments

**Section 5001(d) – Definition of “best available science.”** The definition is overly restrictive and inconsistent with Appendix 1A in that it requires best available science to have “all” of the attributes listed in subparagraphs (d)(1)-(3). Very little available science will have all of those attributes. Appendix 1A acknowledges that “There are several sources of scientific information and tradeoffs associated with each” and that although “peer-reviewed publications” are the “most desirable,” there are other sources of scientific information that may qualify as best available, including “science expert opinion” and “traditional knowledge.” The inclusion of subparagraphs (d)(1)-(3), which summarize some of the information found in the appendix, but are not consistent with the appendix, make it difficult for the reader and the regulated community directly affected by the proposed regulations to understand the scope and nature of the requirements. As an example, subparagraph (d)(3)(F) would require the science to be peer reviewed in order to be considered “best available science.” That concept is not consistent with the language or intent of Appendix 1A. Overall, the definition is overly restrictive and will have a substantive impact that exceeds the intent of the Delta Reform Act, which is simply to ensure that in developing the Delta Plan, the DSC will make use of best available science.

The definition of “best available science” should be modified as follows:

5001(d) “Best available science” means the best scientific information and data for informing management and policy decisions. Best available science shall be consistent with the guidelines and criteria found in Appendix 1A.

Subsections 5001(d)(1)-(3) should be deleted for the sake of clarity, consistency, and necessity.

**Section 5001(e) – The enhanced definition of “coequal goals,”** which is defined in Water Code Section 85054, continues for a page and a half and 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.

Because “coequal goals” is already defined by statute, it is not clear why it is also necessary to define “achieving the coequal goals.” Subparagraphs (e)(1)-(3) appear to be expressing the DSC’s aspirations or statements of intent regarding what it hopes to promote through implementation of the Delta Plan, rather than adding any necessary clarity to the definition of “coequal goals” already set forth in the statute.

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 the “definitions” will be applied in a 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 Section 85021, which is a provision that the DSC is not specifically charged with enforcing.

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 from the regulatory language.

**Section 5001(i) – The definition of “encroachment”** is not consistent with the commonly understood definition, which typically includes illegal intrusions or invasions, with or without obstruction, on greater range of areas than floodways or floodplains and would not in most circumstances include “removal of vegetation.” It would be helpful to explain the need and reason for setting forth a different and narrower definition of the term; if the commonly understood definition of the term would be acceptable, the definition should be eliminated and any appropriate prescriptions on removing vegetation should be moved to the substantive provisions.

**Section 5001(q) – The definition of “restoration” or “restoring”** merely references the statutory definition set forth in Water Code Section 85066 in order to define a term set forth in the lengthy and confusing enhanced definition of “coequal goals.” This separate definition does little to interpret or carry out the statutory provisions and should be removed.

**Section 5001(s) – The definition of “significant impact”** improperly includes changes that when considered cumulatively in connection with the effects of past projects, other current projects, and probable future projects, will have a substantial impact on the achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs. It further improperly includes impacts that may be

positive, even though, inexplicably, Section 5009 requires the avoidance or mitigation of “significant impacts” to the opportunity to restore habitat, a mandate that would require entities to refrain from undertaking any actions that could benefit opportunities to restore habitat at the delineated elevations.

If the DSC determines that it is necessary to define “significant impact” in these regulations, we urge the adoption of a definition consistent with Section 15382 of the CEQA Guidelines. “Significant impact” should be defined as “a substantial adverse change in baseline conditions.” This is consistent with the intent of Water Code Sections 85031 and 85032, which state that the Delta Reform Act does not alter CEQA or supercede or modify certain other provisions. It will also eliminate internal inconsistencies in the regulatory package.

**Section 5002 – Proposed Action Defined.** It is not clear that there is any need for a separate definition of “proposed action” in Section 5002, particularly if this term is defined as meaning all plans, program, or projects meeting the covered action screening criteria. It would be better to follow the Water Code language and simply define “covered action” and then include the language in Section 5003(b) noting the plans, programs, and projects excluded from the definition.

**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 January 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 DSC’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.” We have provided a separate comment regarding Section 5001(s), the definition of “significant impact.”

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.

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 Section 85225 or processes set forth in statute.

**Section 5004 – Contents of Certifications of Consistency.** Subsection 5004(a) specifies a “policy” that “applies” after a “proposed action” (a term that is defined as the equivalent of a “covered action”) has been determined to be a “covered action” because it is controlled by one or more of the “regulatory policies” set forth in the article that follows this section. This language is narrative and unnecessary.

In addition, the intent of the last sentence stating, “Inconsistency with this policy may be the basis for an appeal,” is unclear. If inconsistency is the only basis for an appeal, it would be better phrased as: “Inconsistency with this policy is the only basis for an appeal.”

The statutory basis for the requirements in Section 5004(b)(2) should also be more clearly explained. It is not clear whether this provision is intended to require a certificate of consistency to include mitigation measures beyond those required by CEQA. If this is the case, then the basis for the requirement should be further explained. Otherwise, it should be made clear that applicable mitigation measures are only those feasible mitigation measures or substitute measures necessary to reduce the impacts to a level that no longer results in a significant impact to the coequal goals or the implementation of flood control measures.

**Section 5005. Reduce Reliance on the Delta** - Sections 5005(a) and (b) set forth narrative expressions of “policies of the State,” do not serve a regulatory purpose, and duplicate requirements enforced by other state agencies. Their inclusion in the proposed regulations makes it difficult for potentially regulated entities to determine their responsibilities.

Section 5005(c) sets forth a general prescription applicable to exports from the Delta, transfers through it, or use from it. The language does not explicitly specify the entities to which it applies or how it will be enforced, and Section 5005(d) does little to add these necessary details or clarify the intent of the section.

Section 5005(e)(1) and subparagraphs (A) – (C) are unclear. Subparagraph (A) refers to the completion of an “Urban or Agricultural Water Management Plan,” while subparagraph (B) refers to “the management plan” and subparagraph (C) refers to “the

plan” and a requirement that will not commence until 2015. 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.” To be consistent with the DSC’s statutory authority, this provision should make it clear that the requirement in this subparagraph refers only to an obligation to identify, evaluate, and implement projects that are included in the urban or agricultural management plan.

Section 5005(e)(1) also misrepresents urban and agricultural water management plans. These plans are long-range planning documents that change over time as conditions and technologies change, and, as noted in the language, the Department of Water Resources (DWR) is charged with reviewing them and determining compliance with the statutory requirements. 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, all references to implementation should be deleted. Subsection 5005(e)(1)(B) should be revised as follows: “Identified and evaluated all programs and projects in the Urban or Agricultural Water Management Plan that are locally cost effective, technically feasible, and which would reduce reliance on the Delta.”

Section 5005(e)(2) appears to be entirely a narrative list setting forth programs that could reduce reliance on the Delta. For the sake of clarity it should be deleted.

**Section 5006. Improved Transparency in Water Contracting** – The provisions in Section 5006(a)-(b) are duplicative, unnecessary, and unclear. The statement of reasons indicates that the “lack of accurate, timely, consistent, and transparent information on the management of California’s water supplies and beneficial uses is a significant impediment to the achievement of the coequal goals.” However, the solution proposed by the regulatory language is to reiterate existing state and federal policies and regulations that are enforced by other agencies. Furthermore, the regulatory package provides no documentation or evidence suggesting that the existing state and federal policies and regulations are not currently being enforced. As such, this entire section appears inconsistent with both the standards of necessity and nonduplication. This section is not necessary, as there is no evidence that the existing policies and regulations are not currently being implemented and enforced, and it is also not clear that these policies and regulations, or the statutes pursuant to which they were adopted, can be enforced by the DSC.

**Section 5007. Update Delta Flow Objectives** - Section 5007(a), suggesting what the State Water Resources Control Board (SWRCB) “should” do with regard to the Bay-Delta Water Quality Plan and when it should do this is narrative and does not set forth a regulatory requirement. Section 5007(a) is unnecessary and should be deleted.

Similarly, Section 5007(b) is a narrative discussion of how the SWRCB-established flow objectives “could” be implemented by other agencies, and is not regulatory in nature. This section is unnecessary and should be deleted.

**Section 5009. Protect Opportunities to Restore Habitat** – As noted earlier, Section 5009(a) uses the term “significant impacts” which is defined in 5001(s) as either a positive or negative impact. If this definition is used, Section 5009(a) requires that a project having either a positive or negative impact on the opportunity to restore habitat in select areas must be avoided or mitigated. As discussed in our comments for Section 5001(s), the definition of “significant impact” should be changed to make it consistent with all other state and federal regulations that use the term “significant impact” in an environmental context. To our knowledge, the term is always used to identify “adverse” significant impacts, and there is nothing in the Delta Reform Act provisions that supports the use of a different definition. By adding the concept of “positive” impacts to the definition, the definition becomes confusing to the regulated community and inconsistent with other regulations and policies.

**Section 5010. Expand Floodplains and Riparian Habitats in Levee Projects** - Section 5010(a) is unclear in that it directs the regulated community to do something that hasn’t yet been identified. The second sentence states “When available and incorporated into this policy” various criteria must be used to make a determination, however the criteria are not available at this time so they should not be incorporated into the regulation. The regulatory criteria should be adopted into regulatory language after they have been developed – not before. The regulated community must have an opportunity to provide comment on the criteria, and this approach does not allow for that opportunity.

**Section 5014. Prioritization of State Investments in Delta Levees** - Section 5014(a) is applicable by its terms to the DSC, and is essentially a proposal by the DSC to adopt regulations requiring itself to develop funding priorities for State investments in Delta levees by January 1, 2015. This is an unnecessary regulation, and is more appropriate for internal DSC guidance and/or Delta Plan language.

To the extent the DSC determines that additional Delta Plan language is warranted, in developing the language, it would be helpful to specify which “local agencies” the DSC intends to consult. Several state agencies are named, but at the local level no specificity is provided other than “local agencies.” Local agencies involved in funding levee maintenance and local agencies with infrastructure dependent on levee maintenance should be among the agencies consulted.

Subsections 5014(b) and (c) are also not necessary and are directed at actions to be conducted by DWR, although the regulations are not worded to require DWR to take action. Subsection 5014(d)(2) is also directed at DWR but is worded only as guidance or an expectation. This unnecessary language should be deleted.

**Section 5017. Floodplain Protection** - Subsection 5017(a) also highlights the problems with the definition of “significant impact.” Using the definition in 5001(s), the reader must conclude that no encroachment can take place even if the encroachment will actually result in a benefit to the floodplain values and functions. To resolve this issue the definition of “significant impact,” as presented in 5001(s), should be revised to include only adverse impacts, not beneficial impacts.

**Appendix 1A – Best Available Science.** It appears as if the Appendix, as provided to the public via the DSC’s website, is incomplete. The last paragraph on page 1A-2 ends abruptly with an incomplete sentence, as illustrated below.

It is recognized that differences exist among the accepted standards of peer review for various fields of study and professional communities. When applying the criteria for best available science in Table 1A-1, the Council recognizes that the level of peer review for supporting materials and technical information

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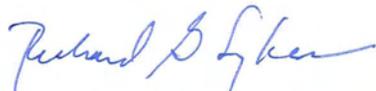
1A-2

There is no continuation of Appendix 1A. This typographical error should be corrected.

**General comment regarding forms** – during the development of the Delta Plan, DSC staff created a draft covered action checklist form and a certification form. These forms are still on the DSC’s website and have not been updated since 2011. The forms in their current draft are not consistent with the proposed regulatory language. It should be noted that the contents of the forms must consist only of existing, specific, legal requirements, and that the forms cannot add any regulatory language or requirements that are not included in the adopted regulation.

We appreciate this opportunity to provide comments on the regulatory package. As noted above, we also acknowledge and support the efforts being undertaken to promote the achievement of the coequal goals and establish a governance structure to coordinate state agency efforts and authorities. We hope these comments will assist the DSC in developing a package that can be approved by OAL and expeditiously adopted. If you have any questions regarding our comments, please contact Doug Wallace at 510-287-1370.

Sincerely,



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RGS:DW:PGS