

Proposed Draft Regulatory Language and Proposed Draft Findings in Support of Option 1(a), Along with Proposed Draft Amendment to Delta Plan Recommendation WR R15

Option 1(a):

- Proposed draft language to amend California Code of Regulations, Title 23, section 5001(dd) as follows to exempt single-year water transfers from regulation as covered actions until Dec. 31, 2019:

(dd) "Significant impact" for the purpose of determining whether a project meets the definition of a "covered action" under section 5001(j)(1)(D) means a substantial positive or negative impact on the achievement of one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people, property, and State interests in the Delta, that is directly or indirectly caused by a project on its own or when the project's incremental effect is considered together with the impacts of other closely related past, present, or reasonably foreseeable future projects. The following categories of projects will not have a significant impact for this purpose:

(1) "Ministerial" projects exempted from CEQA, pursuant to Public Resources Code section 21080(b)(1);

(2) "Emergency" projects exempted from CEQA, pursuant to Public Resources Code section 21080(b)(2) through (4);

(3) Temporary water transfers of up to one year in duration. This provision shall remain in effect only through December 31, ~~2016~~ 2019, and as of January 1, ~~2017~~ 2020, is repealed, unless the Council acts to extend the provision prior to that date. The Council contemplates that any extension would be based upon a determination that single-year transfers will not have cumulatively significant impacts on the coequal goals. ~~the California Department of Water Resources' and the State Water Resources Control Board's participation with stakeholders to identify and recommend measures to reduce procedural and administrative impediments to water transfers and protect water rights and environmental resources by December 31, 2016. These recommendations should include measures to address potential issues with recurring transfers of up to 1 year in duration and improved public notification for proposed water transfers.;~~

(4) Other projects exempted from CEQA, unless there are unusual circumstances indicating a reasonable possibility that the project will have a significant impact under Water Code section 85057.5(a)(4), as further defined by this section. Examples of

unusual circumstances could arise in connection with, among other things:

(A) Local government general plan amendments for the purpose of achieving consistency with the Delta Protection Commission's Land Use and Resource Management Plan; and

(B) Small-scale habitat restoration projects, as referred to in CEQA Guidelines, section 15333 of Title 14 of the California Code of Regulations, proposed in important restoration areas, but which are inconsistent with the Delta Plan's policy related to appropriate habitat restoration for a given land elevation (section 5006 of this Chapter).

- Proposed draft language to amend Delta Plan Recommendation WR R15 as follows:

Enhanced Interagency Cooperation, Review and Reporting of Cross-Delta Water Transfers ~~Improve Water Transfer Procedures (WR R15)~~ – ~~The California Department of Water Resources and the State Water Resources Control Board should work with stakeholders to identify and recommend measures to reduce procedural and administrative impediments to water transfers and protect water rights and environmental resources by December 31, 2016. These recommendations should include measures to address potential issues with recurring transfers of up to 1 year in duration and improved public notification for proposed water transfers.~~ *DWR and the SWRCB, in coordination with the DFW, should memorialize in writing by December 31, 2016, procedures that build upon, and make routine, the drought-related, enhanced level of interagency cooperation and review of proposed cross-Delta water transfers. The procedures should promote increased efficiency and flexibility, while ensuring the following: (1) the protection of water rights and environmental resources; and (2) transparency and accountability, including sharing of relevant information and standardizing public reporting on cross-Delta water transfers.*

Proposed Draft Findings for Option 1(a)

Under the Sacramento-San Joaquin Delta Reform Act of 2009 (the Act), a “covered action” must be consistent with the Delta Plan. Section 85057.5(a)(4) of the Act defines a “covered action” as, in part, a plan, program or project that will have a “significant impact” on the achievement of one or both of the coequal goals.

In its Delta Plan implementing regulations, the Council defined “significant impact.” That definition, now codified at Cal. Code Regs., tit. 23, section 5001(dd), recognizes single-year water transfers occurring before Dec. 31, 2016 as not having significant impacts and thus as being exempt from covered action consistency requirements.

The Council intended for this exemption to serve as an interim regulation. At the time it was developing the Delta Plan, the Council did not have sufficient information about single-year transfers to support a permanent exemption. It had received information describing the importance of single-year transfers to water supplies, and it had received information raising theoretical concerns about the cumulative impacts of single-year transfers. But none of this information conclusively demonstrated the significance of the impacts of single-year transfers on the coequal goals.

The interim exemption preserved the status quo while giving the Council additional time to investigate single-year transfers. To that end, the Council adopted, as a companion to its interim exemption, WR R15 – Improve Transfer Procedures, which called for the DWR, SWRCB, and stakeholders to identify and recommend measures to reduce procedural and administrative impediments to water transfers while protecting water rights and environmental resources. Under the WR R15 collaborative process, DWR submitted two documents to the Council – a July 2015 report on the Background and Recent History of Water Transfers in California, and a September 2015 report, prepared in consultation with SWRCB, on Water Transfers and the Delta Plan.

The Council returned to single-year transfers as its July 23-24, 2015 meeting, where staff briefed it on the exemption and associated issues. At that time, staff recommended the Council examine single-year transfers over the coming months in the event it wished to modify or replace the existing interim regulation before the exemption expired. At this and all other meetings, the Council held public comment periods in which stakeholders could share additional testimony.

The Council discussed and heard testimony about single-year transfers at three subsequent meetings. On Sept. 24, 2015, the Council convened three panels on single-year transfers: the first featured executives from DWR and SWRCB; the second featured environmental stakeholders; and the third featured transfer practitioners. On Nov. 19, 2015, staff briefed the Council on its investigation of single-year transfers and presented the Council with two options: either (1) take no action and allow the exemption to expire, or (2) repeal the sunset date and extend the exemption indefinitely (staff’s recommendation). The Council voted against taking no action and allowing the exemption to expire; but directed staff to return to the Dec. 17, 2015 meeting with draft findings that would support: (1) Option 1, and (2) a refinement of Option 1 (i.e., Option 1(a)) that would extend the sunset date for two-four more years.

At the Dec. 17, 2015 meeting, staff presented Council with these two options. Based upon the information included in the record for the original Delta Plan, and on all information collected since, including all reports and testimony provided pursuant to WR R15, the Council finds that, under the current regulatory system, the single-year

transfers that would occur during the three-year period between the current and amended sunset dates would not, either individually or cumulatively, have significant impacts on the coequal goals. The Council further finds that this additional period will enable the Council to obtain better information which could lead it to determine, prior to the expiration of the new sunset period, that no single-year transfers would have significant impacts on the coequal goals. For this reason, the Council finds that the most appropriate course of action, subject to CEQA review, is to extend the current sunset period by an additional three years.

During this period, the Council will review any new materials it receives from stakeholders or its staff on the cumulative impacts of temporary transfers or on the ways that the through-Delta conveyance options currently being considered by DWR could affect the significance of the impacts of single-year transfers on the coequal goals.

The extension of the sunset period would cause the exemption for single-year transfers to expire on Dec. 31, 2019, and for single-year transfers to be under the jurisdiction of the Council as covered actions beginning Jan. 1, 2020, assuming the Council does not modify the policy before that time.

The Council recognizes now, as it did at the time it adopted the Delta Plan, that water policy, hydrologic conditions, and best available science are constantly evolving. To the extent that uncertainty remains about the present or future impacts of single-year transfers, the Council finds that such uncertainty should, for now, be interpreted in a manner that does not impede transfers. The Council bases this finding on: the legislative preference expressed in Water Code Section 475 for encouraging transfers; the legislative preference expressed in the Administrative Procedure Act, Government code section 11340 et seq., for avoiding unnecessary or duplicative regulation; and the executive preference for expediting transfers expressed in Governor Brown's Jan. 17, 2014 declaration of emergency and in subsequent related executive orders.

Because of this existing policy preference, the Council finds that it is more appropriate to exempt single-year transfers on a limited basis than to regulate them on a limited basis. In addition, while the Council is aware of concerns about the potential cumulative impacts of single-year transfers on the coequal goals, it finds that any such cumulative impacts that occur during the limited sunset period are likely to be insignificant.