

Notice of Intention to Amend

California Code of Regulations, Title 23. Water Division 6. Delta Stewardship Council Chapter 2. Consistency with Regulatory Policies Contained in the Delta Plan Article 1. Definitions §5001. (dd) “Significant impact” (3). Temporary water transfers of up to one year in duration

NOTICE IS HEREBY GIVEN that the Delta Stewardship Council (hereafter Council) proposes to amend the regulation described below after considering comments, objections, and recommendations regarding the proposed action.

Opportunity for Public Comment

- Written Comment Period. The opportunity to submit written comment **begins July 22, 2016, and closes September 6, 2016.** The Council will also accept written and oral comments submitted during the public hearing on September 29. Any interested person, or his or her authorized representative, may submit written comments relevant to the proposed regulatory action. Submit written comments to:

Anthony Navasero, P.E., Senior Engineer
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

- Electronic Submittal of Comments. Any interested person, or his or her authorized representative, may submit comments by electronic submittal on or before September 6, 2016. Electronic submittals of comments are preferred, and can be submitted to the following address:

oal_amendsingle@deltacouncil.ca.gov

- Public Hearings. The Council will hold one public hearing. This hearing will be held in accordance with the requirements set forth in Government Code section 11346.8.

Date: September 29, 2016

Time: The Council meeting is anticipated to convene and open to the public at 9:30 a.m. however, this item may be considered at any time during the regularly scheduled meeting of the Council. Public hearing item will remain open as long as attendees are presenting testimony. Please consult the agenda, which will be available at least ten (10) days before September 29, 2016, to confirm the time at which this item will be considered. The agenda will be posted at <http://deltacouncil.ca.gov>.

Location: 980 9th Street, Sacramento, CA 95814, 2nd Floor Conference Room

Authority and Reference

Water Code section 85210(i) authorizes the Council to adopt regulations or guidelines as needed to carry out its powers and duties.

This proposed rulemaking action implements, interprets, and makes specific the Sacramento-San Joaquin Delta Reform Act of 2009, Water Code section 85000 et seq. (Delta Reform Act) which requires the Council to further the “coequal goals” by adopting a legally enforceable Delta Plan. It defines the coequal

goals to mean “providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.” (Water Code section 85054.)

The Delta Reform Act gives the Council authority to enforce the Delta Plan by requiring any state or local agency that proposes to undertake a covered action to submit a certification of consistency with findings that set forth the reasons the covered action is or is not consistent with the Delta Plan. The Delta Reform Act defines the term “covered action” to refer, in part, to a project that “[w]ill have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta.” (Water Code section 85057.5(a)(4) [emphasis added]).

The Delta Reform Act does not define the term “significant impact,” but in 2013, the Council adopted a regulatory definition of that term, as 23 CCR section 5001(dd). The proposed amendment would revise that regulatory definition.

Informative Digest

Policy Statement Overview Explaining the Broad Objectives of the Regulatory Amendment

The Delta Reform Act requires any state or local agency that proposes to undertake a covered action to submit a certification of consistency with findings that set forth the reasons the covered action is consistent with the Delta Plan. The Council has appellate authority with regard to the certification. The Delta Reform Act defines the term “covered action” to refer, in part, to a project that “[w]ill have a *significant impact* on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta.” (Water Code section 85057.5(a)(4) [emphasis added]). The Delta Reform Act does not define the term “significant impact”; however adopted regulations define the term which includes certain categories for projects the Council determined would not have a significant impact, including single-year water transfers with a specified time frame (see 23 CCR 5001(dd)(3)).

In particular, the Delta Plan recognizes that water transfers that occur in whole or in part in the Delta can be an important tool for improving water supply reliability. However, at the time it developed the Delta Plan, the Council recognized the value of developing an interim approach to single-year water transfers while it researched the issue of potential impacts further and refined its regulation. With this goal in mind, and in light of the substantial evidence in the administrative record, the Council determined that single-year water transfers occurring between the date of the adoption of the Delta Plan and the end of 2016 would not have a significant impact on the coequal goals.

In reaching this determination, the Council was mindful that Water Code section 109(a) declares that it is “the established policy of this state to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import”. The Council was also aware that sister agencies already had frameworks for reviewing certain single-year water transfers.

To gather further evidence about single-year water transfers, the Council consulted with the Department of Water Resources (DWR), State Water Resources Control Board (SWRCB), and others to develop recommendations for potential updates to the Council’s regulation of single-year water transfers. The Council discussed amending the single-year water transfers determination at four Council meetings over the course of 2015. At these meetings, the Council received additional information on single-year water

transfers, including in the form of public comments and in the form of presentations from subject matter experts. Following this review, at the December 17, 2015 meeting, the Council adopted a description of the Proposed Project for purposes of conducting environmental review and proposing regulatory amendment.

The Proposed Project adopted by the Council would amend the existing definition of “significant impact” by eliminating the sunset date for the determination regarding single-year water transfers. That amendment would change the definition as follows:

(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...

(3) Temporary water transfers of up to one year in duration. ~~This provision shall remain in effect only through December 31, 2016, and as of January 1, 2017, is repealed, unless the Council acts to extend the provision prior to that date. The Council contemplates that any extension would be based upon 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.~~

Summary of the Effect of the Proposed Amendment

The Council’s proposed amendment of removing the “sunset” date would extend the existing condition that single-year water transfers are not included in the statutory definition of a covered action and therefore do not require certification of consistency with the Delta Plan.

Policy Statement Overview Explaining the Specific Benefits Anticipated from the Proposed Action

The proposed amendment would allow affected persons to avoid the potential cost of covered action compliance that would result from expiration of the exemption after 2016.

Summary of Existing Laws and Regulations Related Directly to the Proposed Rulemaking

The proposed amendment is to modify the existing law codified in CCR Title 23, Division 6, Chapter 2, Article 1, §5001. (dd)(3) regarding the exemption of temporary water transfers of up to one year in duration from being classified as covered actions.

Consistency with Existing State Laws and Regulations

Pursuant to Government Code section 11346.5(a)(3)(D), the Council evaluated the proposed regulations to determine whether or not they are inconsistent or incompatible with existing state regulations. Relevant laws and regulations were reviewed in the process of making the evaluation. The proposed amendment on temporary water transfers of up to one year in duration is consistent with existing laws and

regulations that relate to these types of single-year water transfers, including the California Environmental Quality Act (CEQA). The proposed amendment is also consistent with existing regulatory and administrative requirements within the jurisdiction of SWRCB, DWR, and the State Department of Fish and Wildlife (DFW). Therefore, the proposed regulations are neither inconsistent nor incompatible with existing state regulations.

Substantial Differences from Existing, Comparable Federal Regulations or Statutes

The proposed amendment on temporary water transfers of up to one year in duration is consistent and compatible with existing federal regulations and statutes including the National Environmental Policy Act (NEPA). The proposed amendment is also consistent with existing regulatory and administrative requirements within the jurisdiction of the U.S. Bureau of Reclamation, the U.S. Fish and Wildlife Service, and National Marine Fisheries Service.

Documents Incorporated by Reference

None. Definitions and policies of the Delta Plan are within the text of the proposed amendment.

Mandated by Federal Law or Regulations

The proposed amendment is not mandated by federal law or regulations.

Other Statutory Requirements

None.

Local Mandate

The proposed amendment will not impose a mandate on local agencies or school districts.

Fiscal Impact

- The proposed amendment will not result in costs to any local agencies or school districts that would require reimbursements.
- The proposed amendment will not result in costs or savings to any State agency, compared to the existing condition. The proposed amendment would result in a potential savings to the Council compared to no extension of the exemption.
- The proposed amendment will not impose any other non-discretionary costs or savings upon local agencies, compared to the existing condition. The proposed amendment would result in a potential savings to local agencies compared to no extension of the exemption.
- The proposed amendment will not result in costs or savings in federal funding to the State.

Housing Costs

The proposed amendment will not have any significant effect on housing costs.

Significant Statewide Adverse Economic Impact Directly Affecting Business, Including the Ability of California Businesses to Compete with Businesses in Other States

The proposed amendment will not have a significant statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

Statement of the Results of the Economic Impact Analysis/Assessment

Based on the *Economic Impact Analysis/Assessment*, the Council makes the following initial determinations:

The proposed amendment will not affect the creation or elimination of jobs within California.

The proposed amendment extends indefinitely the current regulatory policy. Relative to expiration of the current policy, the consistency determinations avoided for a relatively small number of potential, single-year transfers affected would not affect staff levels for the Council or affected parties.

The proposed amendment will not affect the creation of new businesses or elimination of existing businesses within California.

The proposed amendment extends indefinitely the current regulatory policy. Relative to expiration of the current policy, the consistency determinations avoided for a relatively small number of potential, single-year transfers affected would not affect creation or elimination of businesses.

The proposed amendment will not affect the expansion of businesses currently doing business within the State.

The proposed amendment extends indefinitely the current regulatory policy. Relative to expiration of the current policy, the consistency determinations avoided for a relatively small number of potential, single-year transfers affected would not affect expansion of existing businesses.

Benefits of the regulation to the health and welfare of California residents, worker safety, and the state's environment.

The proposed amendment may benefit the health and welfare of California residents through improvements in water supply reliability. As described in the Recirculated Draft Program Environmental Impact Report (PEIR) Addendum, the transfer action could reduce the amount of withdrawals from groundwater or surface storage reservoirs used by the purchasers during the year that the single-year water transfer occurred. This action would provide flexibility for the use of this water in subsequent periods of time, thereby increasing water supply reliability throughout the duration of the single-year water transfer and possibly in subsequent years when the stored water would be available for future uses. The proposed amendment would not affect worker safety.

The proposed amendment could potentially provide a benefit to the State's environment if a single-year transfer were used to support an environmental water use or avoid an environmental impact. As described in the PEIR, water transferred from north of the Delta through the Delta could improve ecosystem conditions of wetlands and riparian communities along the Delta channels due to a temporary increase in fresh water flows in the Delta, especially in the late summer months.

Cost Impacts on Representative Person or Business

The Council is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed amendment.

Business Report

The proposed amendment will not require business reports to be made.

Small Business

The proposed amendment does not adversely affect small businesses. Purchasers of single-year transfers have been and are anticipated to be, water suppliers that are public agencies or regulated public utilities. The proposed amendment extends a current regulatory policy that exempts certain single-year water transfers from determination of consistency with the Delta Plan. Therefore, if a future participant in a single-year transfer were a small business, the exemption would provide a cost savings.

Consideration of Alternatives

The Council must determine that no reasonable alternative it considered or that has otherwise been identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost-effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Contact Persons

Inquiries concerning the proposed administrative action may be directed to:

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Availability Statements

The following materials are available for public review throughout the public comment period:

- Text of Proposed Amendment
- Notice of Proposed Rulemaking
- Initial Statement of Reasons
- Attachment 1 to Initial Statement of Reasons – Economic Impact Analysis/Assessment
- Form 400
- Form 399
- Information upon which proposed amendment is based, including Draft Addendum to the Delta Plan Programmatic Environmental Impact Report
- Final Statement of Reasons (upon completion)
- Final Text of Regulation (upon completion)

These materials may be viewed in two ways:

- Visiting the Council's website (<http://deltacouncil.ca.gov>)
- Arranging an in-person review. Please contact Anthony Navasero (contact information provided above).

After holding the hearing and considering all timely and relevant comments received, the Council may adopt the proposed amendment substantially as described in this notice. If the Council makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Council adopts the amendment as revised. Please send requests for copies of any modified regulations to the attention of Anthony Navasero at the address indicated above. The Council will accept written comments on the modified regulations for 15 days after the date on which they are made available.

Final Statement of Reasons

When it has been prepared, the Final Statement of Reasons will be posted on the Council's website at <http://deltacouncil.ca.gov>. If the regulation is approved by the Office of Administrative Law, the date the regulation is filed with the Secretary of State and the effective date of the regulations will also be posted on the Council's website .

Internet Access

All materials published or distributed by the Council are available at its internet website at <http://deltacouncil.ca.gov>.