

ACTION ITEM

Single-Year Water Transfers Amendments

Summary: At its Nov. 2015 meeting, the Council, based on analysis by the staff that single-year water transfers, as currently regulated, do not significantly affect the coequal goals, directed staff to pursue an amendment to the Delta Plan to continue to exempt single-year water transfers from the Delta Plan's regulation of covered actions.

At today's meeting, the staff will be asking the Council to take action on several items to amend the Delta Plan to both: (1) exempt single-year water transfers from the definition of "covered action" (23 C.C.R. section 5001, subdivision (dd)(3)), and (2) amend WR R15 to encourage the Department of Water Resources (DWR), State Water Resources Control Board (SWRCB), and California Department of Fish and Wildlife (DFW) to memorialize certain interagency procedures adopted on a temporary basis in response to recent drought conditions ((1) and (2), collectively, the Single-Year Water Transfer Amendments).

Staff will recommend that the Council adopt (via the Resolution attached hereto as Attachment 6): (1) the Addendum to the Delta Plan Programmatic Environmental Impact Report (Addendum) that evaluates impacts of the proposed single-year water transfers amendments, (2) the Statement of Exemption from the California Environmental Quality Act (CEQA), and (3) the Single-Year Water Transfers Amendments. The Resolution also (4) directs the Executive Officer to correct any errata or non-substantive changes identified at this meeting, and to (5) finalize all elements of the rulemaking package and submit it to the Office of Administrative Law (OAL) once that is complete. Last, it (6) grants the Executive Officer discretion to make changes required by the OAL in order to comply with requirements of the California Administrative Procedure Act (APA), and inform the Council of any such changes.

Staff will also discuss examples of public comments received and proposed responses, and summarize the proposed final OAL rulemaking package.

Requested Action

Staff recommends the Council adopt the proposed Resolution attached hereto as Attachment 6, through which the Council would:

- (1) Adopt the (Final) September Addendum for the Single-Year Water Transfers.
- (2) Determine that the Project is exempt from CEQA pursuant to CEQA Guidelines Section 15061(b)(3).

- (3) Approve the amendment to WR R15 in order to encourage DWR, SWRCB, and DFW to memorialize certain interagency procedures adopted on a temporary basis in response to recent drought conditions.
- (4) Approve the amendments to 23 C.C.R. section 5001, subdivision (dd)(3) to permanently exempt single-year water transfers from the Delta Plan's regulation of covered actions.
- (5) Direct the Executive Officer to correct any errata or non-substantive changes identified at this meeting, and to finalize all elements of the rulemaking package and submit it to the OAL once that is complete.
- (6) Grant the Executive Officer discretion to make changes required by the OAL in order to comply with requirements of the APA, and inform the Council of any such changes.

Background

A. Delta Reform Act Requirements

The Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act), Water Code section 85000 *et seq.*, directs the Council to develop an enforceable, comprehensive, long-term management plan for the Sacramento-San Joaquin Delta and the Suisun Marsh (collectively, the Delta) and directs that the Delta Plan must further the "coequal goals" (Water Code section 85300). The Delta Reform Act defines the coequal goals to mean providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem, both 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 mandates that a state or local agency that proposes to undertake a "covered action" must prepare a written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan and must submit that certification to the Council (Water Code section 85225). The Delta Reform Act defines a covered action as a plan, program, or project as defined pursuant to section 21065 of the Public Resources Code that will, among other things, 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)).

B. Current Delta Plan Provisions and Regulations

The Delta Reform Act does not define what it means for a covered action to have a "significant impact" on the coequal goals; however, on May 17, 2013, the Council adopted regulations implementing the Delta Reform Act and, through those regulations, adopted a definition for the term "significant impact" (Cal. Code Regs., tit. 23, section 5001, subd. (dd)). This definition recognizes that "significant impact" 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". This definition also lists four categories of projects that have been determined not to have a significant impact on the coequal goals and are therefore outside the definition of "covered action". One of these categories is "[t]emporary water transfers of up to one year in duration" (*id.* section 5001, subd. (dd)(3)). Currently, the definition is structured so that it will remain in effect only through Dec. 31, 2016, and will be repealed as of Jan. 1, 2017, unless the Council acts before that date to extend it.

The Council contemplated that any such extension would be based upon DWR's and the SWRCB'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 Dec. 31, 2016. The Council stated such recommendations should include measures to address potential issues with recurring transfers of up to one year in duration and improved public notification for proposed transfers (Cal. Code Regs., tit. 23, section 5001, subd. (dd)).

At the same time that it adopted this definition of "significant impact," the Council adopted a related recommendation, Delta Plan Water Reliability Recommendation 15 (WR R15), which recommends that DWR and the SWRCB 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 Dec. 31, 2016. WR R15 further provides that these recommendations should include measures to address potential issues with recurring transfers of up to one year in duration and improve public notification for proposed water transfers.

The Council took this approach toward single-year water transfers because, at the time it was developing the Delta Plan, it had substantial evidence that single-year water transfers could have a significant impact on the coequal goals, as well as substantial evidence that single-year water transfers would not have a significant impact on the coequal goals. This evidence was comprehensive, informative, and authoritative, but it was not conclusive. The Council thus attempted to strike a balance by exempting single-year water transfers from review for the limited period after adoption of the Delta Plan and before the sunset date while, in the meantime, collaborating with sister agencies and stakeholders to gather further information about single-year water transfers and refine this subsection of the regulations.

The Council determined that incorporating the Jan. 1, 2017, sunset date into its finding regarding the significance of impacts of single-year transfers on the coequal goals would limit the scope of potential aggregate impacts and would encourage compliance with WR R15.

C. Supporting Information for this Amendment

The Council held duly noticed meetings to discuss single-year transfers and to receive public comment and research conducted by Council staff on July 23, 2015, Sept. 24, 2015, Nov. 19, 2015, and Dec. 17, 2015. DWR and the SWRCB provided written recommendations to the Council in the form of memoranda submitted in July 2015 and Sept. 2015, and oral recommendations at the Council meetings held on Sept. 2015 and Nov. 2015.

Both agencies summarized recent improvements and transparency in review and processing of single-year water transfers. Specific actions included:

- prioritizing review and processing of single-year water transfers,
- regular state and federal coordination meetings including DWR, SWRCB, DFW, National Marine Fisheries Service, and U.S. Fish and Wildlife Service,
- meetings with stakeholders to address outstanding water transfer issues, and improvements in accessibility and transparency of information on public websites.

The agencies concluded the above actions promoted increased efficiency and flexibility in single-year water transfers while ensuring the protection of water rights and environmental resources.

At the Sept. 24, 2015 Council meeting The Nature Conservancy representative commented that single-year water transfers could result in habitat changes due to crop idling or reduction in shallow wetlands and stream flow due to groundwater substitution, and that historic groundwater pumping for local uses as well as groundwater substitution in the Sacramento Valley appeared to reduce stream flow by approximately 700,000 acre-feet/year.

Further analysis presented during those hearings, including a summary of the best available science relevant to the transfers, concluded that:

- Single-year water transfers provide water supply benefits to those water suppliers who receive the transferred water, but that the volume of single-year water transfers does not significantly impact California's overall water supply reliability.
- While there is some information suggesting that the impacts of single-year water transfers may have local effects on fish, birds, and terrestrial species by affecting habitat, those impacts are currently modest, do not occur in the Delta, and are instead limited to upstream areas where the water transfers originate. No clear scientific information demonstrated that single-year water transfers increase the risk of entrainment or have any significant impact on

smelt or salmon fisheries in the Delta. A thorough regulatory process is applied to single-year water transfers to avoid significant adverse effects to the Delta ecosystem and other water users.

- If in the coming decades, the demand for single-year water transfers increases or the regulations governing single-year transfers change, the Council should reevaluate the impacts of single-year water transfers on the coequal goals. The Council should receive regular reports from staff and from DWR and SWRCB to maintain its awareness of potential impacts.

Based on these conclusions, the Council voted at its Dec. 17, 2015, meeting to (1) propose for adoption an amendment to 23 C.C.R. section 5001, subdivision (dd)(3) (i.e., the Delta Plan's regulatory definition of "significant impact") to remove the sunset date and therefore make permanent the exemption of single-year water transfers from Delta Plan regulation; and (2) propose WR R15 for revision, recommending that DWR, the SWRCB, and DFW memorialize certain interagency procedures adopted on a temporary basis in response to recent drought conditions, all as more fully described in Section 2 (*Project Description*) of the Addendum attached hereto as Attachment 2. At the Dec. 17, 2015, meeting, the Council also directed its staff to conduct CEQA review for the proposed Single-Year Water Transfers Amendments. The proposed revisions to the Delta Plan are attached hereto as Attachment 1.

CEQA Compliance

A. CEQA Addendum

In accordance with the Council's request to conduct CEQA review for the proposed Single-Year Water Transfers Amendments, staff and consultants began a preliminary CEQA analysis of potential environmental impacts resulting from the proposed project. The proposed project consists of minor modifications to a Delta Plan regulation and recommendation. None of the conditions requiring a subsequent or supplemental EIR as described in Public Resources Code section 21166 and CEQA Guidelines sections 15162 and 15163 have occurred. For purposes of transparency and encouragement of public discourse, Council staff prepared a draft Addendum pursuant to CEQA Guidelines section 15164.

The Addendum cites substantial evidence that supports the conclusion that the Single-Year Water Transfer Amendments would not have a significant effect on the environment because: (1) the proposed project would continue to exempt single-year cross-Delta or in-Delta water transfers from the covered action process; therefore, no change from existing conditions would occur. (2) Single-year water transfers were not classified as covered actions before the Delta Plan was adopted, have not been classified as covered actions since the Delta Plan was adopted, and would continue to be excluded from the definition of a covered action. Therefore, the proposed project will not result in a change in physical conditions, and it will have no significant environmental effects.

Although not required by CEQA, the Council circulated the Addendum for a 30-day public-comment period from May 13, 2016 through June 13, 2016. The Council received 11 comment letters and emails from public agencies, environmental non-governmental organizations, and individuals. In response to the comments received, staff made minor amendments to the draft Addendum, and circulated it for an additional 15-day comment period on Sept. 14, 2016. A summary of the comments received to date and staff responses is included in the (Final) Addendum, dated Sept. 2016, attached hereto as Attachment 2. In general, the public comments were related to the following themes:

- Comments pertaining to lack of analysis of effects of multiple cross-Delta water transfers using the State Water Project and Central Valley Project water facilities.
- Comments pertaining to the status of pending litigation on the Delta Plan.
- Comments pertaining to the use of the description of existing conditions presented in the Delta Plan Programmatic Environmental Impact Report as the existing conditions in the Addendum.

Council staff recommends the Council adopt the attached Final Addendum (Attachment 2).

B. CEQA Statement of Exemption

Council staff independently studied the proposed project and has determined that the Single-Year Water Transfers Amendments are exempt from environmental review pursuant to CEQA Guidelines section 15061(b)(3), because “it can be seen with a certainty that there is no possibility that the activity in question may have a significant effect on the environment.” Staff therefore recommends that the Council adopt the CEQA Statement of Exemption (attached hereto as Attachment 3).

OAL Rulemaking

Staff initiated formal rulemaking under the APA by filing a Notice of Proposed Adoption, published in the California Regulatory Notice Register on July 22, 2016; and received and considered comments from the public during a 45-day public review period that began on July 22, 2016, and ended on Sept. 6, 2016. After the July 22, 2016 publication, the Council added documents and material to the rulemaking file for public inspection and comment, pursuant to Government Code section 11347.1, and received and considered comments from the public during a 15-day public review period that began on Sept. 14, 2016 and ends today, on Sept. 29, 2016, at 5 p.m.

The proposed rulemaking documents, including draft responses to public comments are summarized below (and attached) for your consideration.

- Final Proposed Regulation (Attachment 1) – Staff is not recommending any changes based on comments received during the public comment period.

- Draft Final Statement of Reasons (Attachment 4) – An Initial Statement of Reasons was provided for public review during the public comment period beginning on July 22, 2016. Staff has summarized comments that were directed at the proposed regulation during the public review periods (see Item D below).
- Draft STD Form 399 Economic and Fiscal Impact Statement (Attachment 5) – The Draft STD 399 Economic and Fiscal Impact Statement will be included in its final form in the final rulemaking record submitted to OAL. The STD 399 is based on information in the Economic Impact Analysis/Assessment which was attached to the *Initial Statement of Reasons* submitted to OAL and made available for public review on July 22, 2016. No changes are recommended based on public comment.
- Draft Responses to the Public Review Comments – The OAL rulemaking documents were made available to the public for review during two public review periods. The first 45-day review period began on July 22, 2016 and ended on Sept. 6, 2016. During that period two comments were received. One was determined not to be relevant to the project; the second comment was in support of the amendment. The comments and responses are summarized and included in the draft Final Statement of Reasons (Attachment 4). The second 15-day public review period, initiated as a result of additional documents added to the record, began on Sept. 14, 2016 and ends today on Sept. 29, 2016.

Staff Recommendation for Council Action

Today staff is recommending the Council adopt (via the Resolution attached hereto as Attachment 6) which would:

- (1) Adopt the (Final) September Addendum for the Single-Year Water Transfers.
- (2) Determine that the Project is exempt from CEQA pursuant to CEQA Guidelines section 15061(b)(3).
- (3) Approve the amendment to WR R15 in order to encourage DWR, SWRCB, and DFW to memorialize certain interagency procedures adopted on a temporary basis in response to recent drought conditions.
- (4) Approve the amendments to 23 C.C.R. section 5001, subdivision (dd)(3) to permanently exempt single-year water transfers from the Delta Plan's regulation of covered actions.
- (5) Direct the Executive Officer to correct any errata or non-substantive changes identified at this meeting, and to finalize all elements of the rulemaking package and submit it to OAL once that is complete.
- (6) Grant the Executive Officer discretion to make changes required by OAL in order to comply with requirements of the CAPA, and inform the Council of any such changes.

Staff recommends that, after receiving the report on this matter, the Council take public comment then, after deliberation, take the following action:

Adopt Resolution – “Resolution 2016-01 *Adoption of Addendum to Delta Plan EIR; Determination of CEQA Exemption; Approval of Amendments to California Code of Regulations, Title 23 Section 5001(dd)(3) and Delta Plan Water Reliability Recommendation 15 Regarding Single-Year Water Transfers*” (Attachment 6).

Next Steps

- Upon clerk’s certification of the adopted resolution, amendment to WR R15 takes effect.
- Oct. 2016: Final rulemaking package compiled and submitted to OAL for review and approval of amendment to 23 C.C.R. section 5001(dd)(3)
- Nov. through Dec. 2016: OAL review and approval of amendment to 23 C.C.R. section 5001(dd)(3) and supporting rulemaking file.
- Jan. 1, 2017: Anticipating OAL approval, amendment to Delta Plan regulation 23 C.C.R. section 5001(dd)(3) takes effect.

Fiscal Information

Not applicable.

List of Attachments

Attachment 1: Proposed Language of the Amendment of Existing Regulation 23 C.C.R. §5001(dd)(3) to Exclude Single-Year Water Transfers as Covered Actions and Amendment of WR R15 of the Delta Plan, *Enhanced Interagency Cooperation, Review and Reporting of Cross-Delta Water Transfers Improve Water Transfer Procedures*

Attachment 2: Addendum to the Delta Plan Programmatic Environmental Report dated Sept. 2016

Attachment 3: Statement of Exemption

Attachment 4: Draft Final Statement of Reason

Attachment 5: STD Form 399 Economic and Fiscal Impact Statement

Attachment 6: Resolution 2016-01 Adoption of Addendum to Delta Plan EIR; Determination of CEQA Exemption; Approval of Amendments to California Code of Regulations, Title 23 Section 5001(dd)(3) and Delta Plan Water Reliability Recommendation 15 Regarding Single-Year Water Transfers

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