

Consideration of Adoption of Delta Plan Regulation

This memorandum summarizes the proposed final Delta Plan rulemaking package, including public comments received to date. The attachments to this staff report include the final proposed regulation with a separate sheet listing errata (non-substantive technical) changes, which the Council will consider for adoption. Also attached to this report are staff produced documents provided to inform the Council as it considers adoption of the final proposed regulation, and will be included as part of the final Delta Plan rulemaking package submitted to the Office of Administrative Law. The proposed final regulation has not changed in a substantive manner since modified text was posted for public review on April 8, 2013 following direction from the Council at its March 28-29, 2013 meeting, and remains consistent with previous Council direction on Delta Plan policies.

This is an action item. The Council's action is to adopt the proposed regulation, direct the Executive Officer to complete the rulemaking package, and authorize a request for an early effective date of the regulation. The Council may adopt any and all of the documents attached to this staff report.

Introduction and Review of the Rulemaking Process for the Delta Plan to Date

The Delta Reform Act requires the Council, to adopt a legally enforceable Delta Plan to further the coequal goals in order to address the crisis in the Delta (Water Code sections. 85001 and 85300(a)). The proposed regulation is based on and carries out the policies contained in the Final Delta Plan. This proposed regulation must be adopted by the Council after considering public input and then approved by the Office of Administrative Law (OAL) before it becomes effective. The original proposed Rulemaking Package was submitted to OAL and posted for public review at the end of November, 2012.

The Council received a briefing on the proposed Rulemaking Package at its December 13, 2012 meeting. A 45-day public review and written comment period from November 30, 2012 to January 14, 2013 was followed by an official APA rulemaking hearing on January 24, 2013. An additional public hearing had previously been provided at a Council meeting on January 11, 2013. All comments received during the 45-day public review were posted on the Council's website by February 6, 2013. Modifications to the rulemaking package that resulted from responses to comments from the 45-day public review and written comment period were summarized and presented to the Council during the March 28-29, 2013 meeting.

Two subsequent 15-day public review and written comment periods were held. The first 15-day public review and written comment period, from April 8, 2013 through April 22, 2013 provided notice of public availability of the modified regulatory text and availability of a modified Cost Analysis for Proposed Delta Plan Regulations. The second 15-day

public review and written comment period, from April 24, 2013 through May 9, 2013, provided notice of availability of the modified form STD 399 (including its Attachment), in response to a request from stakeholders and in keeping with the Council's commitment to full transparency and open decision making.

Summary of Delta Plan Rulemaking Documents

The proposed final rulemaking documents listed below will be elements in the overall rulemaking file compiled and submitted to OAL for review and approval. The final proposed regulation is the one document the Council will consider for adoption at this May meeting. The remaining documents are staff products that are provided to the Council to inform its consideration of adoption of the regulation, but staff is not asking for Council action on these supporting documents.

1. Final Proposed Regulation (Attachment 1a)

The final proposed regulation is included as Attachment 1 to this report. The text of the final proposed regulation is the same as the modified proposed regulation. Staff is not recommending any substantive changes based on comments received during the 15-day comment period.

2. Staff Suggested Technical, Non-substantive Changes to the Final Proposed Regulation (Attachment 1b)

Staff is recommending certain technical, non-substantive changes to the Final Proposed regulation as shown in the errata sheet. None of these changes will require an additional public comment period under the Administrative Procedures Act.

3. Draft Final Statement of Reasons (Attachment 2a)

The Council staff has responded to and summarized comments that were directed at the proposed regulation during the 45-day and 15-day public review and written comment periods and at public hearings. Modifications to the rulemaking package that resulted from responses to comments from the 45-day public review and written comment period were summarized and presented to the Council during the March 28-29, 2013 meeting. Staff recommends only technical non-substantive changes to the proposed regulation, listed in Attachment 1b, following the additional 15-day comment period ending April 22, 2013.

The Final Statement of Reasons will include three separate comment and response matrices. Two of those are included as attachments to this staff report. The third will be prepared from comments received during the 15-day review period that concluded on May 9, 2013 and will be presented to the Council at its May 16-17 meeting. Comments from the 45-day public review period that concluded on January 14, 2013 were

summarized and presented to the Council at its March 28-29 meeting. Comments received during the additional 15-day public review and written comment period ending on April 22, 2013 are summarized below.

4. Draft Master Responses to Comments (Attachment 2b)

The Council staff has responded to and summarized master responses to comments that were directed at the proposed regulation during review and written comment periods and at public hearings. The draft responses will be finalized and submitted as part of the Final Statement of Reasons.

5. Draft Responses to the 45-day Review Comments (Attachment 2c)

During the initial 45-day review period ending January 14, 2013, staff received approximately 90 letters and e-mails plus oral testimony from agencies, organizations, and individuals. Within these, staff identified over 700 total comments on the rulemaking package. The majority of comments dealt with the proposed regulation. All comments are posted on the Council's website.

Examples of comment themes include the following:

- The Council does not have authority to take a regulatory approach.
- The Council does not have authority for key regulations such as WR P1 or DP P1.
- Some regulations constitute a "taking" of property without compensation.
- Regulations affect water rights and area of origin rights.
- Some regulations duplicate or conflict with the authority of other state or local agencies.
- The regulations improperly mix unnecessary, non-regulatory language with regulatory language.
- Some regulations lack clarity about what regulated entities are required to do.

6. Draft Responses to the 15-day Review Comments (Attachment 2d)

During the additional 15-day review period ending April 22, 2013, staff received 21 letters and e-mails from agencies, organizations, and individuals. Within these, staff identified 163 total comments on the modified regulation and Cost Analysis. The majority of comments dealt with the modified regulation. All comments are posted on the Council's website.

Examples of comment themes along with summarized staff responses include the following:

- **The Council lacks authority to take a regulatory approach and to adopt these specific regulations.** In most cases these comments reiterate comments made on the original proposed regulations. Comments asserted that the Legislature did not intend the Council to adopt or enforce regulations. Staff continues to disagree. The Delta Reform Act requires the Council to adopt a legally enforceable Delta Plan that seeks to achieve the coequal goals. Similarly, comments reassert that the Council lacks authority to adopt specific proposed regulations, for example section 5003 or section 5010. However, as described at length in the memorandum entitled “Basis for the Delta Stewardship Council’s Regulatory Authority,” (Attachment 2e) the proposed regulations implement the Act’s express grant of authority to the Council to adopt and enforce a Delta Plan that addresses specific issues, including achieving a more reliable water supply for the State, restoring a healthy Delta ecosystem, and achieving these goals in a manner that protects the Delta as an evolving place. The Council has authority to adopt enforceable regulations implementing the Delta Plan in general, and each of the proposed regulations is authorized by the Delta Reform Act.
- **Comments regarding one-year water transfers (Section 5001(dd)(3)).** Several commenters raised concerns about the Council’s determination that single-year water transfers will not have a significant impact on the coequal goals through December 31, 2016. One commenter asserted that the conclusion had been drawn without consideration of the harm that single year transfers could cause, especially those that are repeated over consecutive years. Other commenters asserted, by contrast, that single-year transfers would not have a significant impact on the Delta and that the sunset provision should be deleted. The Council recognizes the value of water transfers for improving water supply reliability to the State and that California law does not require environmental review of single year transfers within the jurisdiction of the State Water Resources Control Board. Therefore the Council has determined that temporary transfers would not have a significant impact on the coequal goals within the time frame of the sunset period. However, further evaluation is needed on the potential impact of repeated single-year transfers and therefore the sunset provision is appropriate.
- **Comments regarding Bass and Striped Bass (Definitions -- Section 5001(h)((2) and (v), and Section 5009).** Several commenters recommended revisions in regulations that they believe reflect upon the protection and enhancement of habitat for bass, striped bass, or other valuable but non-native species. The Central Delta Water Agency criticized the definition of ‘achieving the co-equal goal of protecting, restoring, and enhancing Delta ecosystem’ for its reference to native resident and migratory species because it did not expressly include valuable introduced species, such as stripers or pheasants, and the

definition of non-native invasive species - because they believed it potentially covered striped bass and black bass. The water agency also criticized the inclusion of striped bass and bass as species to be covered by Section 5009's provisions regarding avoiding introductions of invasive species or habitat improvements for them. The Department of Fish and Wildlife's (DFW) comments accepted the expansion of Section 5009 to cover stripers and bass. The Department provided several examples of practical measures that could lessen the improvement of habitat conditions for these species in ecosystem restoration projects. Because reports presented to the Council confirm these species' predation on endangered or threatened Delta fish, including Delta smelt and salmon, and consistent with the Department of Fish and Wildlife's advice, the Council has decided to retain the definition and the regulation's inclusion of striped bass and bass. DFW also recommended replacing the regulation's current standard of "mitigated in a way that appropriately protects the ecosystem", which offers flexibility to project sponsors attempting to balance the many complex issues in ecosystem restoration and other projects, with a more prescriptive standard of "minimize". The staff recommends against this revision because it does not significantly improve the clarity of the policy.

- **Costs and economic impacts are underestimated.** A number of comments have reiterated concern that costs or related impacts of complying with the regulation are underestimated or unacceptably large. Staff's response depends on the specific comment. In some cases, staff believes it has provided a reasonable range of potential costs and has laid out the calculations and assumptions in its cost analysis. In other cases, staff agrees that costs will occur and has acknowledged that, but without details of specific future covered actions the costs are not quantifiable at this time for purposes of the cost analysis or the STD. 399. In yet other cases Council staff disagrees with the commenter's interpretation of a regulatory provision and therefore disagrees that it will impose large costs or lead to statewide impacts.

These categories of comments are not comprehensive, but illustrate the primary concerns that have been raised in comments on the revised regulation.

7. Basis for the Delta Stewardship Council's Regulatory Authority (Attachment 1e)

This memorandum provides the basis for the Council's regulatory authority given to it by the Delta Reform Act.

8. STD Form 399 Economic and Fiscal Impact Statement (Attachment 3)

The modified STD 399 (Attachment 3), which was provided to Department of Finance (DOF) for review and approval will be included in its final form in the final rulemaking record submitted to the Office of Administrative Law. The modified STD 399 is based on

and includes all relevant information from the modified Cost Analysis (Attachment 4). No changes are recommended following the initial 15-day public review and written comment period ending April 22, 2013-. This form was made available during an additional 15-day period that concluded after this staff report was published. A summary of comments received will be provided separately at the May 16-17 Council meeting.

9. Cost Analysis for Proposed Delta Plan Regulations (Attachment 4)

The Cost Analysis provides the basis for information provided in the STD 399. This report was modified following the 45-day public review period and provided to DOF for review and approval. The revisions included: 1) changes in estimated costs resulting from revisions to the proposed regulation, notably to sections 5008 and 5012; and 2) clarifications and revisions in response to comments received on the initial draft of the Cost Analysis. No changes are recommended following the 15-day public review and written comment period ending on April 22, 2013.

Staff Recommendation for Council Action

Today the Council is considering adoption of the proposed regulation based on the substantial body of information it has before it: the Final PEIR, the Final Delta Plan, the comments received on the proposed regulation and draft responses to those comments, and the Cost Analysis for Proposed Delta Plan Regulations. If the Council chooses to adopt the proposed regulation, it will also need to direct staff to complete all elements of the final rulemaking package for submission to the Office of Administrative Law.

Staff recommends that, after the Council receives the staff's report on this matter, the Council take public comment, then, after Council deliberation, adopt Resolution 2013-3 (Attachment 5).

Next Steps in the Rulemaking Process

- May-June: Department of Finance to review and approve the STD. 399
- May - June: Final rulemaking package compiled and submitted to Office of Administrative Law for review and approval
- Summer/fall: Delta Plan regulation takes effect upon completion of State rulemaking process

List of Attachments

Attachment 1a: Final Proposed Regulation

Attachment 1b: Errata: Technical, Non-substantive Changes to the Modified Regulation

Attachment 2a: Draft Final Statement of Reasons

Attachment 2b: Draft Master Responses to Comments

Attachment 2c: Draft Responses to the 45-day Review Comments

Agenda Item: 6c
Meeting Date: May 16-17, 2013
Page 7

Attachment 2d: Draft Responses to the 15-day Review Comments
Attachment 2e: Basis for the Delta Stewardship Council's Regulatory Authority
Attachment 3: STD. 399 and Attachment 1
Attachment 4: Cost Analysis for Proposed Delta Plan Regulations
Attachment 5: Resolution 2013-3, Adoption of the Regulation Implementing the Delta Plan

Contact

Cindy Messer
Delta Plan Program Manager

Phone: (916) 445-0258