State of California
Delta Stewardship Council

Draft Final Statement of Reasons for Rulemaking, Including Summary of Public Comments and Agency Responses

Update of Initial Statement of Reasons

The initial statement of reasons is included in the rulemaking file. The information contained therein is updated as follows. Council staff modified the proposed regulation in response to comments received during the comment periods and public hearings on the proposed regulation. The modifications to the originally proposed regulations are summarized below and are set forth in detail in Attachment 1 to this notice, the modified text of proposed regulation, which contains the final regulation language. All references to sections 5001 to 5016 (originally 5001 to 5020) are to Title 23, Division 6 of the CCR. The following summary does not include modifications to correct typographical or grammatical errors, changes in numbering or formatting; nor does it include all of the non-substantive revisions made to improve clarity or correct references. For a complete account of all modifications in the proposed regulations, please refer to the underline and strikeout sections in Attachment 1.

Section 5001. Definitions (originally 5001. General Definitions; 5002. Proposed Action Defined; and 5003 Covered Action Defined)

Definitions in Section 5001 were edited for clarity, to clarify intent of the proposed regulation, and pursuant to revisions or additions to the proposed regulation in response to comments. Substantial changes include:

- "Base flood," "Base flood elevation," and "Floodproofing," Sections 5001(d), 5001(e), and 5001(s), respectively, were added as new definitions related to the revised Section 5013.
- The term "Best available science", Section 5001(f), was revised for conciseness. Deleted information is included in Appendix 1A to the regulations.
- "Central Valley Flood Protection Board", Section 5001(g), was added as a new definition related to the revised Sections 5014 and 5015.
- The term "Covered action", Section 5001(j), was revised to clarify intent. Language removed from the definition was more appropriately placed in Section 5001(dd), "Significant impact".
- "Designated floodway" and "Regulated stream", Sections 5001(m) and 5001(aa), respectively, were added as new definitions related to the revised Section 5014.
- The definition of "Nonnative invasive species", Section 5001(v), was added as a new definition related to the revised Section 5009 . The definition was taken from the California Department of Fish and Wildlife's 2008 *California Aquatic Invasive Species Management Plan*.
- Definitions of "Non-project levee" and "Project levee", 5001(w) and 5001(x), respectively, were added to distinguish between non-project and project levees.
- Categories of projects not having a "significant impact" on achievement of the coequal goals or a government-sponsored flood control program were moved from the definition of "covered action", and more appropriately placed in Section 5001(dd), the definition of "Significant

impact". Water transfers of one year or less are included among the categories of projects not having a "significant impact" in Section 5001(dd)(3) until December 31, 2016. Previously, the "sunset date" had been December 31, 2014.

Section 5002 (originally 5004). Contents of Certification of Consistency

Changes to this policy include the following:

- Clarifies that covered actions need to be consistent with the Delta Plan.
- Clarifies how conservation measures pursuant to existing local natural community conservation plans or habitat conservation plans can be found consistent with the Delta Plan.
- Removes the requirement that the certification of consistency include a certification that the covered action complies with specified categories of applicable laws.

The revisions to this policy were primarily made to better conform to the Delta Reform Act or other provisions of California law, and/or existing authorities and jurisdictions of various State agencies. These changes concern the standards and procedures that will be used to determine whether a covered action is consistent with the Delta Plan.

Section 5003 (originally 5005). Reduced Reliance on the Delta through Improved Regional Water Self-Reliance

Changes to this policy include the following:

- Removes introductory statements and moves them to the Delta Plan narrative.
- Clarifies that this section applies only when one or more water suppliers would receive water as a result of a proposed action to export water from, transfer water through, or use water in the Delta.
- Adds quantification of previously included performance measures for demonstrating reduction in reliance on the Delta and improvement in regional self-reliance, and specifies a mechanism for reporting this information to the State.
- Clarifies that regional water storage is included in the list of programs and projects that could reduce reliance on the Delta.

The removal of the descriptive, introductory language has no effect on the scope of the policy. Clarifying performance measures and the contents of water management plans changes the planning and reporting that agencies must undertake pursuant to this policy. The addition of regional water storage projects clarifies the Council's intent that those projects may be considered in evaluating compliance with the policy.

Section 5004 (originally 5006). Transparency in Water Contracting

Changes to this policy include the following:

- Provides the citations to the Central Valley Project Improvement Act and the rules and regulations implementing that Act.

The addition of the law title and reference to the associated rules and regulations clarifies the language that was previously proposed.

Section 5005 (originally 5007). Update Delta Flow Objectives

Changes to this policy included the following:

- Reclassifies the recommendation to the State Water Resources Control Board to update flow objectives as a recommendation in the Delta Plan rather than included in this regulation.
- Clarifies that this section only applies to proposed actions that could "significantly" affect flow in the Delta.

This change removed recommendation language from the regulation and placed it into a recommendation in the Delta Plan for the purpose of improved accuracy. "Significantly" was added to clarify the Council's intent that this policy only apply to projects which significantly affect flow in the Delta.

Section 5006 (originally 5008). Restore Habitats at Appropriate Elevations

Changes to this policy include the following:

- Provides for deviations from the elevation map attached as Appendix 4 if a rationale based on best available science is provided.

Revisions to this policy were made to account for the California Department of Fish and Wildlife comment that the potential to deviate from a portion of the regulation be allowed if supported by sufficient scientific rationale.

Section 5007 (originally 5009). Protect Opportunities to Restore Habitat

Changes to this policy include the following:

- Clarifies that within the specified priority habitat restoration areas, significant "adverse" impacts to the opportunity to restore habitat must be avoided or mitigated, to a point where the impacts have no significant effect on the opportunity to restore habitat.
- Clarifies that impacts will be deemed to be avoided or mitigated if the project is designed and implemented so as not to preclude or otherwise interfere with the ability to restore habitat.

Revisions to this policy were made to specify how a project can avoid or mitigate potential reduction in the ability to restore habitat areas and to tie the avoidance and mitigation to Section 5006 for clarity. "Adverse" was added to clarify the Council's intent that only significant adverse impacts must be avoided or mitigated.

Section 5008 (originally 5010). Expand Floodplains and Riparian Habitats in Levee Projects

Changes to this policy include the following:

- Reduces the requirement to evaluate and incorporate, where feasible, the use of setback levees to specified areas only.

Revisions to this policy would reduce the scope of its requirements from Delta-wide to only the specific areas listed in the policy.

This change reduced the estimated total cost to state and local agencies of evaluating the feasibility of setback levees. The Cost Analysis for Proposed Delta Plan Regulations and the STD 399 were revised accordingly and made available for public review.

Section 5009 (originally 5011). Avoid Introductions of and Habitat Improvements for Nonnative Invasive Species

Changes to this policy include the following:

- Added the word "invasive" in the title of the regulation for clarity.
- Expressly lists "striped bass and bass" to clarify that these species are covered by the policy.

As discussed previously, a related definition of "non-native invasive species" was added to the regulatory definitions (see Section 5001) to provide additional clarification. Bass and striped bass were already subject to the provision as originally proposed, but because questions were raised whether they were technically covered, the modified revision simply makes their inclusion explicit.

Section 5010 (originally 5012). Locate New Urban Development Wisely

Changes to this policy include the following:

- Clarifies that proposed development outside of the areas specified in the policy is permitted if it is consistent with the county general plan as of the date of Delta Plan adoption.
- Clarifies that the restrictions on the location of new urban development apply to residential, commercial and industrial uses.

The revisions clarify what constitutes new urban development subject to the restrictions (residential, commercial, and industrial uses), and that these uses nevertheless may be permitted if they are consistent with the applicable county's general plan. Appendix 7 to the proposed regulation depicting the unincorporated Delta towns in Sacramento County was revised. Revisions to the maps were made regarding Hood, but not suggestions for Walnut Grove or Courtland, which proposed designations of sites not contiguous with these towns as part of the unincorporated town, or for Locke, where the county sought to include a large undeveloped site planned for commercial recreation as part of the unincorporated town. In addition, Appendix 7 maps for the cities of Tracy and Lathrop was revised to reflect the most current General Plans for these cities.

Section 5011 (originally 5013). Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats

Changes to this policy include the following:

- Clarifies, for purposes of avoiding land use conflicts with water management, ecosystem restoration and flood management projects encouraged by the Delta Plan, that conflicts should be avoided with not only existing uses but also with planned land use described or depicted in city and county general plans.

Revisions to this policy were made to clarify that planned uses are defined as those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence.

Section 5012 (originally 5014). Prioritization of State Investments in Delta Levees and Risk Reduction

Changes to this policy include the following:

- Removes subsections addressing recommended Delta Stewardship Council and Department of Water Resources actions to update Delta levees funding priorities and places them in the Delta Plan as a recommendation, as they are not regulatory.
- Removed the statement that State Legislature funding allocations to the Delta Levees Subventions Program is not a covered action.

Revisions to this policy appropriately reclassify the actions or studies needed to support the development of revised funding priorities as a recommendation rather than a regulatory policy.

Shifting the Council's participation in prioritization to a statutory obligation rather than a new regulatory obligation reduces the regulatory cost to the State. The Cost Analysis for Proposed Delta Plan Regulations and the STD 399 were revised accordingly and made available for public review.

Section 5013 (originally 5015). Require Flood Protection for Residential Development in Rural Areas

Changes to this policy include the following:

- Clarifies the specific level of flood proofing required for new residential development of five or more parcels so that it is at least 12 inches above the 100-year (compared to the prior requirement of 200-year protection) base flood elevation plus sufficient additional specified elevations to protect against a 55-inch sea level rise at the Golden Gate.

Revisions to this policy improves the level of flood protection for new residential development of five or more parcels in rural areas by changing from a requirement for 200-year protection (levees or floodproofing) to 100-year floodproofing plus additional freeboard elevation requirements to account for anticipated sea level rise within approximately the next 100 years. These changes are consistent with current legal requirements for floodproofing structures in rural areas, with an additional measure of risk reduction to account for sea level rise, as recommended by the Ocean Protection Council.

Section 5014 (originally 5016). Floodway Protection

Changes to this policy include the following:

- Changes the word "permitted" to "allowed or constructed" for accuracy .
- Acknowledges the Central Valley Flood Protection Board's (CVFPB) authority over "designated floodways" and "regulated streams", and clarifies that this policy only applies to floodways not regulated by the CVFPB, as defined in the definitions section (Section 5001). Related definitions are added to the definitions (Section 5001) of the regulations.

Changing "permitted" to "allowed or constructed" more appropriately tracks the Council's consistency review process. The other revisions to this policy clarify that the policy does not apply to those designated floodways and regulated streams which are subject to the authority of the CVFPB.

Section 5015 (originally 5017). Floodplain Protection

Changes to this policy include the following:

- Changes the word "permitted" to "allowed or constructed", and adds the word "adverse" in the policy for clarity.
- Clarifies the geographical extent of the Yolo Bypass addressed by the policy to be limited to the portion only within the Delta.

Changing "permitted" to "allowed or constructed" more appropriately tracks the Council's consistency review process. Adding "adverse" clarifies the Council's intent that only significant adverse impacts be covered by this regulation. The other revision to this policy clarifies that only the portions of the Yolo Bypass that are within the Delta are covered by the policy.

Section 5016. Miscellaneous Provisions (originally 5018. Just Compensation; 5019. Property Owner Rights; and 5020. No Increase in State's Flood Liability)

This section was changed to combines three sections into a single section.

Additional Clarification to the Initial Statement of Reasons as Provided in the Delta Plan

Changes were made in explanatory text in the Delta Plan to better describe the Council's rationale for its policy on water contracting transparency, section 5004 (originally 5006). The original explanation was included in the Initial Statement of Reasons, and the revised explanation is provided below:

> Accurate, timely, consistent, and transparent information on the management of California water supplies and beneficial uses is an important tool used in the achievement of the coequal goals. The State needs sufficient information to assess the current reliability of its water supplies or to meaningfully measure progress toward achievement of more reliable water supplies for California.

Additional Document(s) Added to the Record

Cost Analysis

The Delta Reform Act requires State or local agencies that propose to undertake covered actions to certify with the Council, before acting, that their proposed plans, programs, or projects are consistent with the Delta Plan. The Cost Analysis for Proposed Delta Plan Regulation in Support of Economic and Fiscal Impact Statement, dated November 2012, identified the economic and fiscal impacts to business associated with the proposed regulatory policies contained in the Delta Plan. The analysis was used to support estimates used in STD 399, Economic and Fiscal Impact Statement, and its attachment.

The Council staff modified the "Cost Analysis for Proposed Delta Plan Regulations", in response to comments received and to reflect the revisions to the regulation. The important revisions affecting the cost estimate are the changes to sections 5008 and 5012. In Section 5008, the applicability of the evaluation of levee setbacks has been substantially narrowed. In Section 5012, the direction for the DSC to participate in levee prioritization has been removed as a regulatory provision, and the corresponding cost associated with that activity has been removed from the cost estimate. This change recognizes that the DSC's participation is a statutory requirement. In response to comments, additional description of Delta Plan benefits and potential indirect costs has also been included.

In accordance with Government Code section 11347.1, the modified "Cost Analysis for Proposed Delta Plan Regulations" was made available for public review in the "Notice of Public Availability of Modified Regulatory Text and Availability of Additional Documents".

STD 399, Economic and Fiscal Impact Statement

The revised analysis from the "Cost Analysis for Proposed Delta Plan Regulations" was used to update the estimates and conclusions contained in STD 399, Economic and Fiscal Impact Statement, and its attachment. While there is no legal requirement that a modified STD 399 be made available for public review and comment, the Council made the document available for public review with its "Notice of Additional Document for Public Review" in keeping with its commitment to full transparency and open decision.

Summary and Response to Comments

- Attachment 2: Draft Master Response to Comments Received During the Notice Periods
- Attachment 3: Draft Response to Comments Received During the 45-day Notice Period November 30, 2012 through January 14, 2013 and during the Public Hearing January 24, 2013

- Attachment 4: Draft Response to Comments Received
  During the 15-day Notice Period April 8, 2013 through April 22, 2013
- Attachment 5: Draft Response to Comments Received
  During the 15-day Notice Period April 24, 2013 through May 9, 2013 (to be completed)

Local Mandate

The Council has determined that the proposed regulatory action could impose a mandate on local agencies and school districts. However, the Council has also determined that many if not all local agencies and school districts have existing legal authority to recover costs of consistency certification and compliance with applicable policies through the use of fees, assessments, and charges. In this instance the local mandate is not reimbursable pursuant Government Code sections 17556(d). In the event, however, that any agency does not have or is unable to exercise such authority, Section 41 of the Delta Reform Act provides for the Commission on State Mandates to determine costs mandated by the state and for reimbursement to local agencies pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.

Consideration of Alternatives

Alternative approaches to individual policies were considered by the Council over the course of the Delta Plan development. Numerous drafts were prepared and hundreds of comments and suggestions from stakeholders and the public were provided and considered. Alternative approaches for fourteen proposed policies are summarized in the Initial Statement of Reasons (November, 2012). The specific alternative approaches and the reasons they were not preferred are specific to the different policies. In general, reasons for selecting the proposed policy include:

- The proposed policy is required by the Delta Reform Act.
- Other approach does not adequately meet coequal goals.
- Other approach is infeasible or impractical.
- Other approach is inconsistent with existing law, regulation, or policy.
- Other approach is too costly or burdensome for the regulated entities.
- Other approach could have unacceptable environmental or economic impacts.

In addition, a Draft Program Environmental Impact Report (Draft PEIR) was prepared by the Council as the Project proponent and State lead agency under the California Environmental Quality Act (CEQA). In response to comments, a revised Delta Plan was developed and evaluated as the Revised Project in the Recirculated Draft PEIR.

The Draft PEIR evaluated a range of alternatives to the Revised Project. The alternatives were developed based on information collected during the CEQA scoping process and during development of eight drafts of the Delta Plan. In accordance with CEQA Guidelines, the range of reasonable alternatives was developed and evaluated for the extent and feasibility of attaining most of the basic objectives of the Proposed Project and avoiding or substantially lessening any of the significant effects of the project. Alternatives were:

1. Less aggressive approach to increase local and regional water supplies and reduce reliance on Delta water supplies. Emphasis on consideration of benefits relative to costs.
2. Less aggressive approach to increase local and regional water supplies and reduce reliance on Delta water supplies. Emphasis on a phased approach.

3. More aggressive approach to increase local and regional water supplies, reduce reliance on Delta water supplies, and develop water quality and flow objectives to support public trust resources. Emphasis on a phased approach to ecosystem restoration and eliminating land uses that could increase the risk to human life due to levee failure.
4. Less aggressive approach to regional water balances for users within the Delta and Suisun Marsh. Emphasis on ecosystem restoration on publicly owned lands and minimizing major developments in flood risk areas.

For the reasons set forth in the Initial Statement of Reasons (ISOR), in Council staff's response to comments received during the 45 and 15 day comment periods, and in this document, the Council has determined that none of the alternatives considered or that have otherwise been identified and brought to the attention of the Council would be more effective in carrying out the purpose for which the regulatory action was proposed.

Small Business Impact

The direct cost of the proposed regulatory policies falls on State and local public agencies, not on businesses. Businesses in general are affected by (1) costs passed on by a local agency through assessments, rates, fees, or other charges; and (2) benefits foregone or additional costs if a covered action must be modified to comply with Delta Plan policies. There is no evidence that small businesses would be disproportionately affected or overly burdened by the proposed regulation.

Several policies incorporated alternative approaches to avoid or minimize impacts on small businesses in the Delta. For example, limitations on construction or development in the Delta (section 5010) specifically exempt "commercial recreational visitor-serving uses or facilities for processing of local crops or that provide essential services to local farms." Section 5011 directs covered actions to avoid conflicts with existing land uses including farming.

The Council expects and intends that substantial statewide benefits will result from achievement of the Delta Plan's goals of ecosystem restoration, water supply reliability, and flood protection. On a statewide basis, the resulting benefits to private businesses, including small businesses, and individuals are expected to outweigh any costs imposed on them.

For the reasons set forth in the ISOR, in Council staff's response to comments received during the 45 and 15 day comment periods, and in this document, the Council has determined that none of the alternatives considered or that have otherwise been identified and brought to the attention of the Council would be as effective and less burdensome to affected private persons, including small businesses, than the action taken by the Council.

List of Attachments

- Attachment 1: Modified Text of Proposed Regulation
- Attachment 2: Draft Master Response to Comments Received During the Notice Periods
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