Draft Master Responses to Comments Received on the Proposed Regulation during the Public Review Periods

MR1. Regulatory Authority (General)

Several commenters question the Council's authority to include a regulatory component in the Delta Plan. This Master Response addresses those comments.

The Sacramento-San Joaquin Delta Reform Act of 2009 ("Delta Reform Act") calls for an approach that includes a significant regulatory component. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. (Water Code, § 85001(c); see also § 85020(h) [declaring the intent of the Legislature to create "a new governance structure with the authority . . . to achieve (listed) objectives].) The Legislature therefore established a regulatory approach under which "covered actions" must be consistent with the Delta Plan. (See, for example, Water Code, §§ 85022(a) [legislative intent that land use actions be consistent]; 85057.5 [definition of covered action]; 85225-85225.30 [requiring consistency for all covered actions].)

This regulatory structure enables the Council to meet the Act's requirement that the Delta Plan be consistent with "[t]he federal Coastal Zone Management Act of 1972 [CZMA]. . . or an equivalent compliance mechanism." (Water Code, § 85300 (d) (A).) The CZMA's implementing regulations concerning compliance require "that the State demonstrates that there is a means of ensuring" compliance with the Coastal Management Plan's (i.e., Delta Plan's) enforceable policies. (15 C.F.R. § 923.40(b); 16 U.S.C. § 1455(d)(2)(D).) The Delta Plan must "identify the means by which the state proposes to exert control over the permissible land uses and water uses within the coastal zone." (15 C.F.R. § 923.41(a)(1).) In order to do so, the Plan must utilize one or more of the following three methods of oversight and enforcement: (1) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement; (2) direct State land and water use planning and regulation; or (3) state review for consistency with the Plan of all development plans, projects, or land and water use regulations proposed by any State or local authority or private party. (15 C.F.R. § 923.40(b); 16 U.S.C. § 1455(d)(11).) Whichever approach is utilized, it must be "sufficiently comprehensive and specific to regulate land and water uses, control development, and resolve conflicts among competing uses." (15 C.F.R. § 923.40(a).)

The Delta Plan must therefore include a significant regulatory component.

MR2. Appeals of Consistency Determination

This Master Response addresses comments pertaining to an appeal of certification of consistency. Commenters assert that the Council's appeals procedures preventing the agency from proceeding with a covered action unless no one appeals the revised certification or an appeal is filed and denied are 1) underground regulations and 2) unsupported by the terms of the Delta Reform Act.

The questioned appeals procedures, which are not part of this proposed regulation package, are not underground regulations because they are exempt from the Administrative Procedures Act (APA). Moreover, although not relevant to this APA response to comments, the appeals procedures are supported by the Delta Reform Act.

The Delta Reform Act provides that "[t]he council shall adopt administrative procedures governing appeals, which shall be exempt from" the APA. (Water Code, § 85225.30, citing Gov. Code, § 11340 et seq.) Given that exemption, the Council's procedures cannot be underground regulations. Pursuant to the Act, the Council adopted procedures governing appeals on September 23, 2010. Part I, section 15 of

those procedures provides as follows:

> No covered action which is the subject of an appeal shall be implemented unless one of the following conditions has been met:
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> a) The council has denied the appeal;
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> b) The public agency has pursuant to Water Code section 85225.5 decided to proceed with the action as proposed or modified and has filed with the council a revised certification of consistency addressing each of the findings made by the council, 30 days has elapsed and no person has appealed the revised certification; or
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> c) The council or its executive officer has dismissed the appeal for one or both of the following reasons:
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> 1. The appellant has failed to provide information in her possession or under her control within the time requested or
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> 2. The issue raised is not within the council's jurisdiction or fails to raise an appealable issue.

Because the Council's procedures are exempt from the APA, the commenters are in essence arguing that the concept of a stay embodied in the above provision cannot be deemed a procedural matter under section 85225.30. Stays, however, are quintessentially procedural. For a few examples of judicial references to "stays" as being "procedural," see *In re Morgan* (2010) 50 Cal.4th 932, 948 ("The stay and abeyance procedure approved by the Supreme Court"); *People v. Benson* (1998) 18 Cal.4th 24, 41 ("the *Niles* stay procedure" *Selma Auto Mall II v. Appellate Department* (1996) 44 Cal.App.4th 1672, 1681 ("Code of Civil Procedure sections governing stays of enforcement in civil appeals"); *Robbins v. Foothill Nissan* (1994) 22 Cal.App.4th 1769, 1778 ("a stay procedure"); *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 387 fn. 8 ("stay procedure under the primary jurisdiction doctrine."). Because the stay procedure was not subject to the APA, it cannot be an underground regulation.

The challenge to this procedure is not only irrelevant in this regulatory adoption process, given the APA exemption, it is also incorrect on the merits because the challenged procedure tracks the Delta Reform Act.

The Act provides that:

1) Agencies proposing to undertake a covered action must "prior to initiating the implementation" file a "certification of consistency" with the Council. (Water Code, § 85225.)
2) Any person "may file an appeal with regard to a certification of consistency submitted to the council." (Water Code, § 85225.10 (a).)
3) After hearing the appeal, the Council shall either deny the appeal or remand the matter back to the agency for reconsideration. (Water Code, § 85225.25.)
4) On remand, if the agency decides to proceed, it shall "prior to proceeding with the action, file a revised certification of consistency" with the Council. (Water Code, § 85225.25.)

The commenters would have the process stop there, and prohibit an appeal of that revised certification. The Act, however, expressly provides that any person "may file an appeal with regard to *a certification of consistency* submitted to the council." (Water Code, § 85225.10 (a); emphasis added.) The revised "certification of consistency" is "a certification of consistency." The commenters would like to change the statutory language to state that any person "may file an appeal with regard to *an initial* certification of

consistency submitted to the council." The Legislature, however, did not limit appeals to "initial" certifications. The comments ignore express statutory language.

Given this express language, the comments' legislative history argument is not relevant. Where legislative language is clear and unambiguous, courts do not resort to legislative history. (See *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal. 4th 983, 992.)

Moreover, the legislative history that the comments cite does not support their argument. They cite a prior version of section 85225.25 under which, after remand, an agency would not have been allowed to proceed with a project unless the Council had made specified written findings. The comments assert that the lack of that requirement in the adopted statute indicates a legislative intent that there cannot be further Council review. However, while the Legislature did change the review requirements where an agency decided to proceed with a covered action, the Legislature did not eliminate review. In the prior version, Council review was mandatory; it always occurred. In the enacted version, review is contingent; review does not occur unless a person files an appeal challenging the revised certification.

Finally, the commenters' approach would ignore the Legislative mandates, described in more detail elsewhere (see Master Response 3 [Land Use Authority]), 1) that the Council adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals (Water Code, § 85001(c)), and 2) that the Delta Plan must be consistent with "[t]he federal Coastal Zone Management Act of 1972 [CZMA]. . . or an equivalent compliance mechanism." (Water Code, § 85300 (d) (A).) Allowing an agency to proceed with a project that fails to comply with the Delta Plan as these comments suggest would undermine those enforcement mandates.

MR3. Land Use Authority

This Master Response addresses those comments questioning the Council's authority to regulate land uses or development and comments asserting that the proposed regulations are inconsistent with, and contrary to, local agency land use authority as set forth in California law.

The Delta Reform Act expressly provides that the Delta Plan is to regulate land uses and development. Water Code section 85022 (a) thus states as follows: "It is the intent of the Legislature that state and local land use actions identified as 'covered actions' pursuant to section 85057.5 be consistent with the Delta Plan." Section 85057.5, in turn, states that covered actions include a "project" as defined by the California Environmental Quality Act (CEQA) that will occur at least in part within the Delta. CEQA's definition of "project" encompasses among other things "development" ("an activity which may cause . . . a direct physical change in the environment . . ."). (Public Resources Code, § 21065.)

In sharp contrast, the same legislation that established the Council (SBX 7 1) established the Sacramento-San Joaquin Delta Conservancy and expressly prohibited the Conservancy from regulating land use. (See Public Resources Code, § 32381: "This division does not grant to the conservancy any of the following: (a) The power of a city or county to regulate land use. (b) The power to regulate any activities on land [except where it owns the land or the owner agrees].") The lack of a similar prohibition concerning the Council reinforces the express language giving it authority to regulate land uses and development.

Moreover, as noted in Master Response 1 (Regulatory Authority), the Delta Reform Act directs the Council to develop a Delta Plan consistent with the CZMA "or an equivalent compliance mechanism." (Water Code, § 85300 (d) (A).) That mechanism mandates that a covered plan (in our case, the Delta Plan) exert control over development and land uses.

The CZMA's implementing regulations concerning compliance thus require "that the State demonstrates that there is a means of ensuring" compliance with the Coastal Management Plan's (i.e., Delta Plan's) enforceable policies. (15 C.F.R. § 923.40(b); 16 U.S.C. § 1455(d)(2)(D).) In other words, the program must "identify the means by which the state proposes to exert control over the permissible land uses and

water uses within the coastal zone." (15 C.F.R. § 923.41(a)(1).) In order to do so, the Plan must utilize one or more of the following three methods of oversight and enforcement: (1) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement; (2) direct State land and water use planning and regulation; or (3) State review for consistency with the Plan of all development plans, projects, or land and water use regulations proposed by any State or local authority or private party. (15 C.F.R. § 923.40(b); 16 U.S.C. § 1455(d)(11).) Whichever approach is utilized, it must be "sufficiently comprehensive and specific to regulate land and water uses, control development, and resolve conflicts among competing uses." (15 C.F.R. § 923.40(a).)

One comment states that "This proposed Regulation is inconsistent with, and contrary to, local agency land use authority as set forth in California law." (San Joaquin County Board of Supervisors.) The comment does not provide any further information beyond that quoted sentence. It appears that the comment asserts that an otherwise valid State regulation is invalid if it is contrary to a local land use law. To the extent that an otherwise valid State regulation conflicts with a local law, however, the State measure prevails. See, for example, *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 747 (local legislation that contradicts State law is void).

MR4. Authority to Consider Out-of-Delta Actions When Regulating In-Delta Actions

This Master Response responds to comments asserting that section 5005 (section 5003 in the revised regulation) impermissibly considers out-of-Delta actions in determining the validity of an in-Delta action.

The Delta Reform Act gives the Council the authority and discretion to regulate by providing that the validity of a covered action occurring at least in part within the Delta that would significantly harm the Delta's ecosystem turns on whether the project is needed only because one or more out-of-Delta water suppliers receiving water are failing to implement conservation and local water supply development measures.

The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. (Water Code, § 85001(c).) Moreover, the Delta Plan must be consistent with "[t]he federal Coastal Zone Management Act of 1972 [CZMA]. . . or an equivalent compliance mechanism." (Water Code, § 85300 (d) (A).) The CZMA's implementing regulations concerning compliance in turn require "that the State demonstrates that there is a means of ensuring" compliance with the Coastal Management Plan's (i.e., Delta Plan's) enforceable policies. (15 C.F.R. § 923.40(b); 16 U.S.C. § 1455(d)(2)(D).) In other words, the Delta Plan must "identify the means by which the state proposes to exert control over the permissible land uses and water uses within the coastal zone." (15 C.F.R. § 923.41(a)(1).)

The central enforcement tool available to the Council to meet that mandate is the Delta Reform Act's requirement that "covered actions" be consistent with the Delta Plan. (Water Code,, §§ 85225, 85022(a).) The Act provides that a plan, program, or project must at least "in part" occur within the Delta in order for these consistency requirements to apply. (Water Code, § 85057.5(a)(l).) The Act incorporates CEQA's definition of "project," i.e., "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Water Code, § 85057.5(a); Public Resources Code, § 21065.)

As an example, a proposed project involving the export of water from the Delta, such as an increase in the size of existing Delta intakes, will generally be a covered action. The Council can, therefore, regulate that action by requiring it to be consistent with the Plan. Some comments question, however, whether the Council can require that the validity of the covered action turn on, in part, whether it is needed because, say, a Southern California recipient water supplier is failing to conserve water in accordance with the

regulation. The Council's authority can be seen by using a proposed expanded Delta intake as an example:

1) Pumping water out of the Delta may have significant negative impacts on the Delta's ecosystem and an expanded intake therefore may be contrary to the statutory goal of "protecting, restoring and enhancing the Delta ecosystem." (Water Code, § 85054.)

2) The expanded intake should nevertheless be allowed if it is needed to achieve the coequal goal of "providing a more reliable water supply for California." (Water Code, § 85054.)

3) But because in this example the water supply goal could be met through out-of-Delta measures without undermining the ecosystem goal, the expanded in-Delta intake is not justified and is inconsistent with the Delta Plan.

Various provisions in the Delta Reform Act reinforce this reasoning. First, the Delta Reform Act's directions concerning the content of the Delta Plan indicate that the Council has the discretion to reach some water supply reliability actions taken outside of the Delta. Water Code section 85303 mandates that the Delta Plan "shall promote statewide water conservation, water use efficiency, and sustainable use of water." (Water Code §85021.) The Delta Plan must also include measures that "promote a more reliable water supply" generally, including addressing the broad issues of meeting needs for reasonable and beneficial uses of water and sustaining the state's economic vitality. (Water Code, § 85302(d).)

Some comments assert that by using the term "promote," the Legislature intended to limit the Council's out-of-Delta authority to recommendations and similar non-regulatory provisions. They are correct that the term "promote" includes the notion of prodding. However, it also includes promoting by regulating. Thus, the term is defined as "support or actively encourage (a cause, venture, etc.); further the progress of: [for example] *some regulation is still required to promote competition*." (See Oxford Dictionaries' definition at http://oxforddictionaries.com/definition/english/promote [emphasis in original].) Consistent with this definition, both the Legislature and the California Supreme Court have expressly used the term "promote" to mean "require." (See for example, Health & Safety Code, § 1276.3(b)(1) [agency can "promote" by "requiring" certain actions]; Pen. Code, § 1016.5 [declares Legislature's intent to "promote fairness . . . by requiring" a specified warning]; *Bank of Italy v. Johnson* (1926) 200 Cal. 1, 22 [rule that used the word "require" was "in harmony" with statute that used the word "promoted."].) In the Delta Reform Act, the Legislature neither limited the term to non-regulatory actions nor required regulatory actions. Rather, it left that determination to the Council's discretion.

Second, the Legislature's use of the phrase "shall promote" in the water supply context contrasts with its discussion of the Plan's out-of Delta reach with regard to ecosystem restoration and flood risk reduction. Ecosystem restoration and flood risk provisions may (not shall) reach outside the Delta if they meet specified conditions. (Water Code, §§ 85302(b), 85307(a).) This contrast indicates that the Legislature sought to require the Council to adopt more robust measures concerning out-of-Delta water conservation and local water supplier development than out-of-Delta ecosystem or flood risk measures.

Third, the requirement that the Delta Plan address statewide water conservation and water use and development of local water supplies efficiency in a meaningful way is necessary for the Council to achieve the various policies laid out in the Delta Reform Act. For example, Water Code section 85001(c) declares the intent of the Act is "to provide for a more reliable water supply for the state ..." (See also § 85004(b) [explaining that "providing a more reliable water supply for the state" involves a broad set of water efficiency, conservation, and infrastructure projects].) Section 85020 declares the State's policy regarding the Delta to include: "(a) manag[ing] . . . the water resources of the state over the long term," "(d) promot[ing] statewide water conservation, water use efficiency, and sustainable water use," and "(f)

improv[ing] the water conveyance system and expand[ing] statewide water storage." The Legislature goes on to state that these objectives are not directed to an advisory body. Rather, it expressly "(h) establish[ed] a new governance structure with the authority, responsibility, accountability, scientific support, and adequate and secure funding to achieve these objectives."

In addition, section 85021 declares the State's policy is "to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." That section also mandates that "[e]ach region that depends on water from the Delta watershed shall improve its regional self-reliance." Thus, the Act itself includes a mandate that regions outside of the Delta take actions outside of the Delta in order to achieve the coequal goals. Finally, section 85023 provides that the public trust doctrine and the constitutional principle of reasonable use are the foundation of State water management policy. The requirement that the Council craft a Delta Plan capable of meeting the Delta Reform Act's ambitious statewide water policies is incompatible with an interpretation of the Act that prohibits a regulation that can take out-of Delta actions into account in determining the validity of an in-Delta covered action.

The Delta Reform Act therefore gives the Council the authority and discretion to adopt a regulation that takes out-of-Delta water conservation and local water supply development actions into account when those actions have a direct causal relationship to the action within the Delta, i.e., where the out-of-Delta action significantly causes the need for the in-Delta action. If the regulation had to ignore those out-of-Delta actions, the Council's ability to meet the Delta Reform Act's mandates and goals relating to water conservation, efficiency, and sustainable use, and ultimately its ability to achieve the coequal goal of statewide water supply reliability, would be seriously limited.

MR5. Authority to Protect, Restore and Enhance the Delta Ecosystem

This Master Response addresses comments that question the Council's authority to protect and restore habitat.

Regulatory measures regarding habitat protection and restoration further the coequal goal of "protecting, restoring and enhancing the Delta ecosystem." (Water Code, § 85054.) They also advance the "fundamental" statutory goals to "Protect, maintain, enhance, and, where feasible, restore the overall quality of the Delta environment and its natural and artificial resources" (Wat, Code, § 85022(d)(1)) and to "protect existing habitats." (Water Code, § 85022(d)(5).) The provisions also address the statutory mandate that the Delta Plan promote "Diverse and biologically appropriate habitats and ecosystem processes" (Water Code, § 85302(c)(3)), that the plan advance the restoration of "large areas of interconnected habitats within the Delta (Water Code, § 85302(e)(1)) and that it "Restore habitat necessary to avoid a net loss of migratory bird habitat and, where feasible, increase migratory bird habitat to promote viable populations of migratory birds." (Water Code, § 85302(e)(6).) The regulations intended to protect habitat are therefore authorized by the Delta Reform Act.

MR6. Avoidance of Regulatory Takings

This Master Response responds to comments asserting that section 5009 (section 5007 in the revised regulation) is an unlawful taking of private property rights.

One comment states that section 5009 "is a 'regulatory taking' as it limits the future use of private property on" certain areas. (Central Valley Flood Control Association.) Another states that the section "raises the specter of inverse condemnation/taking . . . due to depressed property values." (Solano County Department of Water Management.) A third states that "[t]his regulation coupled with the regulation pertaining to covered actions constitutes a regulatory taking . . . [because] [i]dentification of such areas . . . will diminish land values without compensation. (Central Delta Water Agency.) That comment also states that limiting use to facilitate future acquisition "constitutes an unlawful taking."

Regulations, however, can only amount to a "taking" if they are "so onerous" that they are "tantamount to a direct appropriation or ouster." (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 537.) To determine whether regulations are that onerous, courts engage in "ad hoc, factual inquiries . . . designed to allow careful examination and weighing of all the relevant circumstances." (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 322 [internal citations and quotation marks omitted].) Moreover, the "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *(Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 645 (1993).) Given the fact-specific nature of takings claims and the requirement of more than a diminution in value, the "mere enactment" of a regulation is rarely a taking. (*Tahoe-Sierra* at 321.) To show that the enactment is a taking, a person must "establish that no set of circumstances exists under which the regulation would be valid." (*Akhtar v. Burzynski* (9th Cir. 2004) 384 F.3d 1193, 1198. See also *Yee v. City of Escondido* (1992) 503 U.S. 519, 534 [owner must show that the regulation is a taking "no matter how it is applied."].) Because the takings inquiry depends upon the particular facts of a case, it is difficult to see how section 5009 could be deemed a taking no matter how it is applied. That difficulty is reinforced by the section's provision that uses are permitted if their impacts are appropriately mitigated. Moreover, designating an area as potentially eligible for mitigation can actually enhance its value. (See *Hearts Bluff Bame Ranch, Inc. v U.S.* (Fed. Cir. 2012) 669 F.3d 1326, 1332, where a landowner asserted that it suffered a serious economic loss when the federal government refused to designate its land as eligible for participation in a federal mitigation bank program.) Finally, even if one could somehow show that no matter how section 5009 is applied it would impose a taking, section 5018 would preclude a taking because it calls for the Council and other entities to avoid applying any policy if its application would constitute a taking.

One comment adds that preventing an irretrievable conversion of lands suitable for restoration is an unlawful taking of private property rights if the land is not causing harm to the ecosystem. (Central Delta Water Agency). This comment suggests that the regulation takes property because protecting restoration opportunities in a priority restoration habitat area does not make sense. That suggestion, however, is unsupported. As explained in more detail in Master Response 5, the Legislature directed the Council to, among other things, include provisions seeking to restore large areas of interconnected habitats within the Delta. Preventing development that would preclude the restoration of habitat in a priority restoration habitat area furthers that goal. Moreover, even if the provision had not so clearly promoted a legitimate public use, the U.S. Supreme Court explains that the notion that a regulation "'takes' private property for public use merely by virtue of its ineffectiveness or foolishness is untenable." (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 543.) That applies to the California takings clause as well because in reviewing regulatory takings claims, California courts construe the State's takings clause "congruently" with the federal clause. (*San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, 664.)

MR7. Avoidance of Conflict with the Authority of the Delta Protection Commission

This Master Response addresses comments stating that section 5012 (section 5010 in the revised regulation) conflicts with the responsibilities of the Delta Protection Commission. (comment from, for example, California Central Valley Flood Control Association)

Agency responsibilities often overlap. (See, for example, *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 866 ["One who would construct and operate a California power plant must first obtain an interconnected set of federal, state and regional agency approvals."]; *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 935 [timber harvest permit approvals are subject to a "regulatory scheme that encourages interagency teamwork" but does not strip "state agencies of their respective authority to protect resources"].)

The Delta Reform Act recognizes the overlap between the missions of the Council and of the Delta Protection Commission. It goes so far as to direct the Commission to propose measures that the Council might include in its Delta Plan "to protect, enhance, and sustain the unique cultural, historical, recreational, agricultural, and economic values of the Delta as an evolving place." (Water Code, § 85301.) More generally, legislative findings concerning the Commission's mission overlap those of the Council. Like the legislative findings concerning the Council, those concerning the Commission thus emphasize the need to "protect, maintain, and, where possible, enhance and restore the overall quality of the delta environment, including, but not limited to, agriculture, wildlife habitat, and recreational activities" (Public Resources Code, § 29701) and to protect "historical" and "cultural" values. (Public Resources Code, § 29708.)

This legislatively directed overlap reflects, at least in part, the very different jurisdictional reach of the two entities. Due to that difference, even if the Council adopts a Commission rule verbatim, the rule's impact will be far different. The Commission only has jurisdiction over lands in the primary zone of the Sacramento-San Joaquin Delta, but not lands in its secondary zone. (Public Resources Code, §§ 29728, 29731, 29764.) The Council's jurisdiction, in contrast, extends to projects in any part of the Sacramento-San Joaquin Delta, including its secondary zone, as well as to lands in the Suisun March. (Water Code, §§ 85301, 85057.5(a)(1).)

Moreover, the Commission's Resource Management Plan has no regulatory control over federal agencies. In contrast, the Council's Delta Plan is to have such control. It needs to be consistent with "[t]he federal Coastal Zone Management Act of 1972 . . . or an equivalent compliance mechanism." (Water Code, § 85300 (d) (A).) That provision and others (see, for example, Water Code, § 85300 (d) (B) and (C)) are intended to facilitate Delta Plan control over federal agency actions. As explained in a key legislative report on the Delta Reform Act:

> *In order to encourage federal government participation under the State's leadership, AB 39 requires the Delta Plan to be developed consistent with certain statutes that allow for certain state discretion over federal activities. These statutes include the Coastal Zone Management Act (CZMA), the Reclamation Act of 1902 (which governs the Bureau of Reclamation's Central Valley Project), and the Clean Water Act. If the Council decides to adopt the Delta Plan pursuant to the CZMA, then the bill requires submission to the Secretary of Commerce for approval, so the State may exercise certain authority over federal agency actions. It is widely anticipated that California may need Congress to enact laws to protect the Delta consistent with the State's plan – perhaps a "Delta Zone Management Act." This bill allows for that eventuality, by providing for submission of the Delta Plan to whatever federal official a subsequent federal statute identifies. (See pages 15-16 of the legislative staff report, presented to the Assembly Committee on Water, Parks and Wildlife on September 11, 2009.)*

MR8. Avoidance of Infringement on Water Rights

This Master Response addresses comments asserting that the regulations infringe on water rights or impair water contracts.

A number of comments state that section 5005 (section 5003 in the revised regulation) improperly infringes on the water rights and statutory priorities of diverters within the Delta and other areas of origin. For three independent reasons, section 5005 does not infringe on the water rights or statutory priorities of diverters within the Delta or other areas of origin.

- First, section 5005 applies only to proposed projects that among other things "would have a significant adverse environmental impact in the Delta." The section bars the harmful project, unless at least one of two conditions exists: a) The harmful project is allowed if all water

suppliers that will receive the water are complying with listed water conservation and related measures; and b) even if one or more water suppliers are not complying with those measures, the project is allowed if that failure is not a significant cause of the need for the project.[1] A regulation aimed at preventing environmental harm does not violate water rights or area of origin rights. For example, if an in-Delta water supplier wanted to destroy wetlands to build a water storage facility, an agency denying the permit due to that environmental impact would not be taking any water rights, even if the water supplier ended up with less usable water as a result of its inability to build the facility.

Moreover, the regulation follows an approach that is similar to the one used by CEQA. Even where a project harms the environment, it is not prohibited under CEQA if among other things specified benefits outweigh that harm. (Public Resources Code, § 21081.) By similar reasoning, section 5005 allows harm to the Delta environment in order to meet the coequal goal of "providing a more reliable water supply for California." (Water Code,, § 85054.) That override, however, is only available where Delta water recipients are already doing their part to try to avoid that harm by taking the conservation and local water supply development measures listed in section 5005.

- Second, the concern about water and area of origin rights is also misplaced because it is based upon the incorrect assumption that section 5005 "is simply a taking of the property of those with seniority and a gift to the contractors of the SWP and CWP receiving waters exported at the SWP and CVP pumps near Tracy." (Central Delta Water Agency.) Section 5005, however, does not require any involuntary water transfer. Rather, it calls for meeting water needs through conservation and local water supply development measures before undertaking a water project that would harm the Delta environment. If an in-Delta diverter is able to use its water more efficiently, and thereby needs less for existing demands, the freed up water would still be available for other in-Delta needs cited by the Central Delta Water Agency ("to provide salinity control for the Delta and provide an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban and recreational development."). (Internal quotation marks omitted.)

- Third, while section 85031 disavows any intent in the Act to diminish, impair or affect any water rights protections, the Legislature simultaneously reaffirmed the limitations on those rights under the reasonable use and public trust doctrines and declared that those limitations "are particularly important and applicable to the Delta." (Water Code, § 85023.) Those legislatively reaffirmed restrictions are background principles that limit an owner's property interest in using water**.** (See, for example, *Allegretti v. County of Imperial* (2006), 138 Cal.App. 4th 1261, 1279 [no property right to unreasonable use of water]; *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 140 [paramount consideration in determining reasonable use is "the ever increasing need for the conservation of water in this state."]; *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 567 ["What is a (reasonable) beneficial use at one time may, because of changed conditions, become a waste of water at a later time."]; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 437 ["no vested right to use (water) rights in a manner harmful to the (public) trust.") Thus, diverters do not have a property right to use water in a manner that is inconsistent with the reasonable use or public trust doctrines.

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[1] Moreover, even if the project will harm the Delta environment, it is not covered by this regulation if it consists of a local public agency's "routine maintenance and operation of any facility."

> Moreover, consistent with the reasonable use and public trust doctrines, the Legislature reinforced the importance of water conservation and local water supply development measures by directing the Council to adopt a Delta Plan "that furthers the coequal goals," and declaring that "inherent" in those goals is the promotion of "statewide water conservation, water use efficiency, and sustainable water use." (Water Code, § 85020(d).) Similarly, the Legislature declared that "[e]ach region that depends on water from the Delta watershed" is directed to improve its regional self-reliance for water by a variety of measures aimed at increased efficiency, conservation and local water supply development. (Water Code, § 85021.)

MR9. Avoidance of Encroachment on the Jurisdiction of the State Water Resources Control Board

Two comments state generally that the proposed regulations would improperly make the Council "a super-regulatory agency that trumps" other State regulatory agencies such as the State Water Resources Control Board (SWRCB). (San Louis & Delta-Mendota Water Authority; State Water Contractors, Inc.) These commenters, however, misread section 5005 as well as the structure of these regulations.

By statute, the proposed regulations do not apply to "[a] regulatory action of a state agency." (Water Code, § 85057.5(b)(1). They do not, therefore, regulate SWRCB actions.

Agency responsibilities, however, often overlap. (See, for example, *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 866 ["One who would construct and operate a California power plant must first obtain an interconnected set of federal, state and regional agency approvals."]; *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 935 [timber harvest permit approvals are subject to a "regulatory scheme that encourages interagency teamwork" but does not strip "state agencies of their respective authority to protect resources"].) The Delta Reform Act encourages cooperation among State agencies. (See, for example, Water Code, §§ 85086 (c) (1), 85204, 85300 (b) and (c).) The Act also grants the Council independent authority to protect Delta resources. As outlined in detail in Master Response 4 (Authority to Consider Out-of-Delta Actions When Regulating In-Delta Actions), section 5005 is among other things based on the Council's authority to protect Delta resources. (See also Master Response 5 [Authority to Protect, Restore and Enhance the Delta Ecosystem].) It is therefore proper.

MR10. Avoidance of Conflict with the Central Valley Flood Protection Board's Authority

This Master Response addresses comments suggesting that section 5016 and section 5017 (sections 5014 and 5015 in the revised regulation) may conflict with aspects of the Central Valley Flood Protection Board's authority. Agency responsibilities often overlap. (See, for example, *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 866 ["One who would construct and operate a California power plant must first obtain an interconnected set of federal, state and regional agency approvals."]; *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 935 [timber harvest permit approvals are subject to a "regulatory scheme that encourages interagency teamwork" but does not strip "state agencies of their respective authority to protect resources"].) The Act grants the Council independent authority to include measures in the Delta Plan that reduce in-Delta risks. (Water Code, § 85305(a).) The Legislature also expressed its intent that the Council would have an independent regulatory role concerning flood control issues 1) by authorizing the Council to include local plans of flood protection in the Delta Plan (Water Code, § 85307(b)) and 2) by defining covered actions as including actions that will have a significant impact on flood control programs. (Water Code, § 85305(a).)

MR11. Recommendations for the Removal of the Covered Action Exemption Sunset Date for Single-year Water Transfers

Single-year water transfers through December 31, 2016, are among the list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under

Water Code section 85057.5. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from original section 5003(b), the definition of a covered action, to revised section 5001(dd), the definition of significant impact.

CEQA and the Act are distinct statutory schemes, operating for different purposes and imposing differing requirements on regulated entities. The Act is narrower to the extent it focuses on the Delta rather than CEQA's statewide approach, but broader to the extent it focuses on policy objectives beyond CEQA's objective to eliminate adverse environmental impacts. Nevertheless, the Legislature acknowledges and directs some overlap between the two statutes by cross-referencing CEQA concepts as part of the definition of "covered actions" over which the Council has jurisdiction. Thus, under section 85057.5(a)(1), a plan, program, or project must be a "project" under CEQA, Public Resources Code section 21065, to be a "covered action" under the Act.

While the intent and effect of the Act governing "covered actions" are distinct from CEQA's, the Council draws from existing CEQA statute and Guidelines where the statutory schemes overlap. Thus, where the Council finds that a project exempt from CEQA would similarly not have a significant impact on the coequal goals, it makes that finding in this regulation. Accordingly, for example, the Council has found that projects exempted from CEQA because they are ministerial, as a category, will not have an impact on the coequal goals.

Furthermore, the Council determined as a general matter that projects that are exempt from CEQA are not likely to have a significant impact on the coequal goals. Thus, this regulation presumes those CEQA-exempt projects will not have a significant impact on the coequal goals for purposes of Water Code section 85057.5(a)(4) and section 5003(a)(4) (section 5001(j)(1)(D) in the revised regulation), unless there are unusual circumstances indicating otherwise.

With respect to the Council's determination that single-year transfers will not have a significant impact on the coequal goals through December 31, 2016, the Council believes that water transfers contribute to California's water supply reliability. However, the Council also understands that water transfers may have a significant impact on the Delta's ecosystem, especially if these single-year transfers are repeated over consecutive years as a means to circumvent the CEQA review process for multi-year (repeat) transfers. At this time, the Council is not aware that single-year transfers are conducted in this manner. Accordingly, the Council has determined that, for the time being, one-year water transfers do not have a significant impact on the coequal goals. In order to provide time to evaluate the potential significant impacts caused by repeated single-year transfers, the Council sunsets this determination on December 31, 2016, unless the Council acts prior to the date. Until that time, there is no proposal to change or disrupt the current water transfer process. This review is consistent with WR R15, which recommends a stakeholder process to identify and recommend measures to reduce procedural and administrative impediments to water transfers and to address potential issues with recurring single-year transfers.

MR12. Requirement that Projects Not Exempt from CEQA Must Include Feasible Mitigation Measures Identified in the Delta Plan's Environmental Impact Report or Substitute Measures

Section 5003(b)(2) in the originally proposed regulation (now section 5001(dd) in the revised regulation) exists because it is mandated by CEQA. CEQA requires that an environmental impact report's (EIR's) mitigation measures "shall" be made "fully enforceable…, in the case of the adoption of a plan, policy, regulation, or other public project, by incorporating the mitigation measures into the plan, policy [or] regulation…." (Public Resources Code, §21081.6(b).) Section 5003(b)(2) is the vehicle to comply with this requirement.

section 5003(b)(2) includes flexibility. It requires non-CEQA-exempt covered actions to include "applicable feasible" mitigation measures from the program EIR (PEIR). If a PEIR mitigation measure is

not factually "applicable" to the specific covered action in question (e.g., because the facts of the specific covered action do not reveal a significant CEQA environmental impact requiring the specific mitigation in question) or not "feasible," then it would not be required, provided that the proposing agency explains why the measure is not applicable and/or feasible. Section 5003(b)(2) also provides flexibility that allows a proposing agency to tailor mitigation measures to the particular facts of a given proposed covered action by allowing "substitute mitigation measures that the agency that files the certification of consistency finds are equally or more effective." In sum, section5003 (b)(2) ensures CEQA's requirement that mitigation measures be made enforceable "by incorporating the mitigation measures into the plan, policy [or] regulation" is satisfied (Public Resources Code, §21081.6(b)), while providing flexibility to tailor those measures to each factual situation without undermining the PEIR or harming the environment.

- This flexibility is consistent with the PEIR's recognition that "[t]he severity and extent of project-specific impacts on the physical environment would depend on the type of action or project being evaluated, its specific location, its size, and a variety of project- and site-specific factors that are undefined at the time of preparation of this program-level study." (PEIR Volume 3, page 2-26)
- This flexibility also inherently is consistent with a proposing agency's ability to adopt a Statement of Overriding Consideration under CEQA, which can only be done if the agency finds and justifies that mitigation measures are "infeasible." (Public Resources Code, §21081(a)(3), (b).)

The final list of PEIR mitigation measures relevant to section 5003(b)(2) will be adopted by the Council in its CEQA Findings (Public Resources Code, §21081) that will accompany the Council's adoption of a Final Delta Plan and will be listed in the mitigation monitoring and reporting program (Public Resources Code, §20180.6(a)(1)). Whether any of the measures, as identified in the PEIR, are "infeasible" (Public Resources Code, §21081(a)(3)) will be determined at that time.

The reasons for potential mitigation are explained in the PEIR. One commenter (Contra Costa Water District) asked why mitigation would be necessary at all for a project consistent with (or having a beneficial impact on) the coequal goals. As the PEIR concludes (see, e.g., PEIR Volume 3 at page ES-3), even projects that could have long-term beneficial impacts on the coequal goals could create significant adverse environmental impacts (e.g., construction impacts) in the short term if not mitigated.

Section 5003(b)(2) should not be confused with the standards that determine whether a proposed action is a "covered action." (East Bay Municipal Utility District) Once a proposed action becomes a "covered action," section 5003(b)(2) applies. Compliance with section5003 (b)(2) does not then render the proposed action no longer a "covered action."

All lead agencies for projects that are subject to CEQA must comply with CEQA regardless of the requirements of the Delta Reform Act or the policies of the Delta Plan. As stated above, because the Council is the CEQA lead agency for the Delta Plan, the Council is required to identify and adopt measures to mitigate or avoid the significant effects on the environment of the Delta Plan, and to ensure that such measures are fully enforceable. (Public Resources Code, §§ 21002, 21002.1 and 20181.6(b).) In the case of adoption of a plan, such as the Delta Plan, CEQA provides that the mitigation measures should be adopted and incorporated into the project (Public Resources Code, § 21081.6(b)), which is accomplished by Policy G P1 and section 5004(b)(2) (section 5002(b)(2) in the revised regulation). Pursuant to section 5004(b)(2), therefore, each lead agency making a consistency determination will determine whether the mitigation measures adopted by the Council and made part of the Delta Plan are applicable to the project and feasible.