

Basis for the Delta Stewardship Council's Regulatory Authority

A number of comments concerning the Council's proposed regulations question the Council's authority to adopt any regulations, as well as its authority to adopt regulations concerning specific actions. The following explains why the proposed regulations are authorized.

Regulatory Authority in General

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, §§ 85057.5 [definition of covered action]; 85225-85225.30 [requiring consistency for all covered actions].) The legislative history confirms that the approach taken in the Delta Reform Act "ensures consistency with the state's Delta Plan," and that "[t]he Council's role in developing and enforcing consistency with the Delta Plan will provide a critical component of crafting a coherent and sustainable long-term state policy for the Delta."¹

The Delta Reform Act's directive that the Delta Plan include a robust regulatory component is reinforced by 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).) That mechanism will subject federal agencies to Delta Plan requirements. Adopting a Delta Plan consistent with the CZMA requires that its terms comply with the CZMA's implementing regulations. Those regulations 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 Reform Act therefore requires that the Council include a significant regulatory component in the Delta Plan.

¹ See page 20 of the legislative staff report, presented to the Assembly Committee on Water, Parks and Wildlife on September 11, 2009.

Authority to Adopt a Process That Can Stop a Project

On September 23, 2010, the Council adopted “Administrative Procedures Governing Appeals.” Those procedures are not currently being reviewed by the Council, as they are not part of the Delta Plan or its implementing regulations. Nevertheless, a number of comments have noted that the appeals procedures could stop a project. That is correct. Under the procedures, once a person challenges an agency’s certification of consistency by filing an appeal with the Council, the regulations do not allow the project to proceed unless 1) the Council rejects the appeal, or 2) the Council agrees with the appeal, returns the matter to the agency, the agency files a revised certification of consistency, and either no one challenges that new certification or someone appeals it and the Council rejects the appeal.

Comments have gone on to question whether the Delta Reform Act authorizes a procedure that could stop a project. It does. 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.)

Comments assert that the process should 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 Legislature did not limit appeals to “initial” certifications. The comments ignore express statutory language.

Moreover, the legislative history affirms that the appeal procedure is intended to “ensure[] consistency with the state’s Delta Plan.”² The commentators’ approach would not. And “enforcing consistency”³ is needed to meet the Legislative mandates, described in more detail above under “Regulatory Authority in General,” 1) that the Council adopt a “legally enforceable Delta Plan” (Water Code, § 85001(c)), and 2) that the Delta Plan be enforceable so that it is consistent with the CZMA. (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.

² Ibid.

³ Ibid.

Authority to Regulate Land Uses

Some comments assert that the Council cannot regulate any land uses or development. The Delta Reform Act, however, expressly authorizes that regulation. 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.) Furthermore, the Act requires the Delta Plan to “promote⁴ . . . appropriate land uses” (Water Code §§ 85305(a), 85020(g)) and it declares fundamental goals for management of land uses in the Delta (Water Code § 85022(d)). The Act therefore gives the Council the authority to regulate land uses and development in the Delta.

Authority to Consider Out-of-Delta Actions When Regulating In-Delta Water Projects

Some comment question the authority of the Council to adopt section 5003 of the revised regulation. That section provides that an in-Delta proposed action designed to use Delta water is inconsistent with the Delta Plan if the action would have a significant adverse environmental impact in the Delta, and if it is needed because its beneficiaries have failed to take certain steps to reduce their reliance on the Delta. The Council has the authority to adopt section 5003. It applies only to proposed actions that would harm the Delta, and is therefore grounded on the Council’s authority to protect and restore the Delta ecosystem. The Council is required to adopt a “legally enforceable Delta Plan” that will, among other things, “provide for the sustainable management of the Sacramento-San Joaquin Delta ecosystem.” (See Water Code, § 85001(c).) Many other statutory provisions reinforce this authority. (See “Authority to Protect, Restore and Enhance the Delta Ecosystem,” below.) Section 5003 is authorized by those provisions because it applies only to a project that “would have a significant adverse environmental impact in the Delta.” (See § 5003(a)(3).)

In questioning the authority to adopt section 5003, some comments make the related assertion that the Council has no authority to constrain the operations of the State Water Project or Central Valley Project. But the Legislature granted broad authority to the Council over “covered actions” in Water Code section 85057.5, and it only carved out a limited exclusion concerning those projects. The Council lacks authority over their “[r]outine maintenance and operation.” But any actions concerning those projects that go beyond routine maintenance and operation can be regulated under section 5003 or other applicable regulatory sections if part of the action occurs in the Delta and it would have a significant impact on a coequal goal. (See Water Code, § 85057.5.)

⁴ The Legislature uses the term “promote” in a number of Delta Reform Act provisions. That term includes both the concepts of “prodding” and of “regulating.” Thus, the Oxford Dictionary explains that it means “further the progress of: [for example] *some regulation is still required to promote competition.*”

Authority to Protect, Restore and Enhance the Delta Ecosystem

The Council can adopt regulations aimed at protecting the Delta ecosystem. 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 “[p]rotect, maintain, enhance, and, where feasible, restore the overall quality of the Delta environment and its natural and artificial resources” (Water Code, § 85022(d)(1)) and to “protect existing habitats.” (Water Code, § 85022(d)(5).) The provisions further address the statutory mandate that the Delta Plan promote “[d]iverse 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 “[r]estore 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 various regulations intended to protect habitat are therefore authorized by the Delta Reform Act.

Authority over Projects Regulated by Other State Agencies

Some comments question whether the Council has the authority to adopt regulations covering subjects addressed by other state regulatory agencies such as the Delta Protection Commission or the State Water Resources Control Board. By statute, the proposed regulations do not apply to “[a] regulatory action of a state agency.” (Water Code, § 85057.5(b)(1).) The proposed regulations do not, therefore, apply to the regulatory actions of other state agencies such as State Water Resources Control Board actions.

But, while the Council cannot direct other state regulatory agencies to take particular actions, the Council can exercise its own concurrent jurisdiction over subjects also addressed by those agencies. Agency responsibilities often overlap. For example, in reviewing timber harvest permits, our Supreme Court explained that approvals may be subject to a “regulatory scheme that encourages interagency teamwork,” but that does not strip “state agencies of their respective authority to protect resources.”⁵ While the Delta Reform Act encourages cooperation among state agencies, (see Water Code, §§ 85086(c)(1), 85204, 85300(b) and (c)), it also grants the Council independent regulatory authority to protect Delta resources and water supply reliability, as discussed in previous sections.

The Legislature often gives agencies overlapping responsibilities when their jurisdiction differs or when they have a different focus. For example, while the Delta Protection Commission and the Council are both charged with protecting the Delta, their jurisdictional reach is very different. 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 Legislature

⁵ *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 935.

directed the Council to obtain that control by enacting a Delta Plan consistent with the Coastal Zone Management Act or an equivalent compliance mechanism. (Water Code, § 85300(d)(1)(A).)