



CALIFORNIA FARM BUREAU FEDERATION

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Sent via E-Mail

RulemakingProcessComment@deltacouncil.ca.gov

January 14, 2013

Cindy Messer
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Re: Proposed Rulemaking, Title 23. Water Division 6. Delta Stewardship Council

Dear Ms. Messer:

The California Farm Bureau Federation (“Farm Bureau”) is a non-governmental, non-profit, voluntary membership California corporation whose purpose is to protect and promote agricultural interests throughout the state of California and to find solutions to the problems of the farm, the farm home and the rural community. Farm Bureau is California's largest farm organization, comprised of 53 county Farm Bureaus currently representing more than 74,000 agricultural, associate and collegiate members in 56 counties. Farm Bureau strives to protect and improve the ability of farmers and ranchers engaged in production agriculture to provide a reliable supply of food and fiber through responsible stewardship of California's resources.

Farm Bureau thanks the Delta Stewardship Council (“Council”) for the opportunity to comment on the Council's proposed rulemaking. The following comments are arranged by reference to the section numbers of the proposed rules in question.

Section 5003(b)(2)(C)

Section 5003(b)(2)(C) provides an exemption for “[t]emporary water transfers of up to one-year in duration,” stating that “[t]his exemption shall remain in effect only through December 31, 2014, and as of January 1, 2015, is repealed, unless the Council acts to extend the exemption prior to that date,” and stating further that “[t]he Council contemplates that any extension would be based upon the Department of Water Resources and the State Water Resources Control Board's participation with stakeholders to identify and implement transfer measures, as recommended in the Delta Plan's Water Resources Recommendation Number 15.”

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Water Resources Recommendation Number 15 reads as follows:

The Department of Water Resources and the State Water Resources Control Board should work with stakeholders to identify and recommend measures to reduce procedural and administrative impediments to water transfers and protect water rights and environmental resources by July 1, 2014. These recommendations should include measures to address potential issues with recurring transfers of up to 1 year in duration and improved public notification for proposed water transfers.

Comment: Farm Bureau cautions the Council against potentially penalizing short-term voluntary water transfers. Such transfer provide a practical and effective way to alleviate water supply reliability concerns and achieve overall efficiency by allowing water markets to optimize geographic distribution and economic uses of the state's limited water resources, while at the same time respecting the underlying vested water rights. While the Water Reliability Recommendation 15 sounds well-meaning enough, and while revised administrative rules could potentially streamline future water transfers, the Council should be careful not to exacerbate the problem of already lengthy and cumbersome water transfer procedures.

Any procedure or Council regulation that has potential to make water markets less and not more efficient could in fact be deemed inconsistent with the Delta Reform Act's legislative goal to improve statewide "water reliability."

Section 5001(e)(1)(C)

Describing one of the hallmarks of "achievement" of the "more reliable water supply" goal of the co-equal goals, proposed section 5001(e)(1)(C) states that "[a]chieving the coequal goal of providing a more reliable water supply for California means," among other things, that "[w]ater exported from the Delta will more closely match water supplies available to be exported, based on water year type and consistent with the coequal goal of protecting, restoring, and enhancing the Delta ecosystem." The text explains further that:

This will be done by improving conveyance in the Delta and expanding groundwater and surface storage both north and south of the Delta to optimize diversions in wet years when more water is available and conflicts with the ecosystem less likely, and limit diversions in dry years when conflicts with the ecosystem are more likely. Delta water that is stored in wet years will be available for water users during dry years, when the limited amount of available water must remain in the Delta, making water deliveries more predictable and reliable.

Not only is concept this correct, but there is in fact broad agreement among stakeholders that a system that could physically maximize wet period diversions and storage of surplus

flows, so as to minimize impacts at other more biologically and ecologically sensitive times, is a critically important objective for the Delta.

So-called ‘sip-gulp’ operations and accompanying infrastructure are also enormously important to the Delta Plan’s goal to “protect[], restor[e], and enhance[e] the Delta ecosystem” by “establishing a resilient, functioning estuary and surrounding terrestrial landscape capable of supporting viable populations of native resident and migratory species with diverse and biologically appropriate habitats, functional corridors, and ecosystem processes” (See proposed section 5001(e)(2)), and the goal to restore “more natural Delta flows,” and “improving ecosystem water quality” (See proposed section 5001(q)).

Unfortunately, without additional storage, and without the ability to significantly increase diversions at times of surplus and significantly decrease them in times of scarcity, modest or marginal conveyance improvements in the Delta will not address this need.

While the mentioned water supply reliability objective is a critically important, the current trajectory of statewide planning is *not* on track to meet this objective. To correct this problem and ensure consistency of proposed actions affecting the Delta, the Council, the Delta Plan, and state government in general will need to take a more aggressive stance on development of adequate storage and wet period conveyance.

Without this element, balanced implementation of the co-equal goals is not likely possible. Furthermore, if the current impasse and lack of meaningful progress on either Delta conveyance and storage continues, it may be incumbent upon the Council to revisit and expand the suite options and potential solutions that can more quickly and effectively accomplish the co-equal goals.

Section 5001(i)

Proposed section 5001(i) defines an “encroachment” as “*any obstruction or physical intrusion by construction of works or devices, planting or removal of vegetation, or by any means for any purpose, into or otherwise affecting a floodway or floodplain.*”

Comment: Farm Bureau is concerned that section 5001(i)’s definition of “encroachment” is overly broad and that the proposed definition could potentially interfere with routine agricultural practices, activities, improvements, and economic and real property interests in the mentioned floodplains.

Farm Bureau has similar concerns with the language in proposed sections 5016(a) and 5017(a). To avoid confusion and potential conflicts, the regulations should specifically exempt agricultural uses in the mentioned floodplains from the Council’s consistency

finding and appeals processes, and also from the mitigation the requirements referenced in section 5009 (“Protect Opportunities to Restore Habitat”).

Such clarification is also necessary to avoid internal conflicts with other provisions in the Council’s proposed regulations (and with the related provisions of Delta Reform Act itself), including sections 5001(e)(3)(B) (“Plan to protect the Delta’s lands and communities”), 5001(e)(3)(C) (“Maintain Delta agriculture as a primary land use, a food source, a key economic sector, and a way of life”), and 5001(e)(3)(E) (“Sustain a vital Delta economy that includes a mix of agriculture, tourism, recreation, commercial and other industries, and vital components of state and regional infrastructure”).

Section 5001(s)

Section 5001(s) defines the term “significant impact,” in relation to required “consistency findings” and proposed sections 5003(a)(4), 5009, and 5017, as “[any] change in baseline conditions that is *directly or indirectly caused* by a project and *that, on its own, or when considered “cumulatively” in connection with the effects of past projects, other current projects, and probable future projects,* will have a substantial impact on the achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and State interests in the Delta.”

Comment: The proposed definition is unclear and ambiguous, and potentially exceeds the scope of legislative authority delegated to the Council. Considered in terms of “direct or indirect” impacts, whether “‘cumulatively’ in connection with the effects of past projects, other current projects, and probable future projects,” the argument could be made that virtually any non-exempt activity proposed anywhere in the Delta might have a potential “significant impact.” Such an interpretation would in turn open virtually any activity proposed anywhere in the Delta to costly and time-consuming covered action and consistency finding consultations, possible conditions, mitigation requirements, and appeals.

The definition is made even more problematic and broad by the expansive of definition of “project” and by the operation of various policies, whereby local water management and water planning activities throughout the state would ostensibly now fall within the purview of the Council.

The definition of “significant impact” must be narrowed or will be rendered defective and unworkable by its over-expansive and unnecessary scope and reach.

Section 5005(c)

Section 5005(c), pertaining to “reduce[d] [regional] reliance on the Delta *in meeting future water supply needs*,” provides that:

Water shall not be *exported from, transferred through, or used in the Delta* if all of the following apply:

- (1) One or more water suppliers that would receive water *as a result of the export, transfer or use* have failed to adequately contribute to reduced reliance on the Delta and improved regional self-reliance consistent with all of the requirements listed in paragraph (1) of subsection (e);
- (2) That failure has significantly caused the need for the export, transfer or use; and
- (3) The export, transfer, or use would have a significant adverse environmental impact in the Delta.

Comments: The regulations should clarify what is meant by “future water supply needs.” For example, does this mean water use above a certain baseline, a change in existing water uses, or does it mean *all* uses of water at some future time? The regulations should also clarify that, for areas *in the Delta*, “reliance on the Delta” is and will almost necessarily always be near 100 percent reliance. Thus, it is fairly nonsensical to say that the Delta must rely on some source other than the Delta—and rather, for the Delta itself, there must be some different and more appropriate metric.

Also, in areas of the Delta where significant leaching fractions are required, where more water must sometimes be pumped out than piped in, where lands are literally surrounded by an abundance of naturally occurring water, and where significant amounts applied water percolate back into Delta channels, ordinary notions of water efficiency may have little application.

Without necessary clarifications on these points, the proposed regulation will potentially violate the “clarity,” and also the “consistency” and “necessity” elements of a valid regulation.

Section 5007

Proposed section 5007 declares that the State Water Resources Control Board “should” update Delta Water Quality Control Plan objectives for the Bay-Delta by June 2, 2014, and for “high-priority tributaries” in the Delta watershed by June 2, 2018. The proposed regulation likewise observes that, if the State Water Resources Control Board indeed undertakes to set the mentioned flow objectives, this “could be implemented through several mechanisms including negotiation and settlement, Federal Energy Regulatory Commission (“FERC”) relicensing, or water rights hearing[s],” whereas “[i]mplementation through water rights hearings or [a] FERC relicensing is expected to take longer than the [mentioned] deadlines.”

The Council's selection of the word permissive "should," rather than mandatory "shall" is a prudent choice, as to use the word "shall" would result in fundamental inconsistency with sections 85031, 85032, 85057.5(b)(1), and 85057.5(c).

Sections 5008 and 5009

Proposed sections 5008 and 5009 reference the specific elevations depicted in certain CALFED Draft Conservation Strategy "elevation maps," as criteria having potential relevance to the Council's determination on "consistency," "significant impacts," and related "mitigation" requirements for proposed habitat restoration projects in the Delta.

With respect to these elevation maps, some future restoration activities and locations could conceivably involve alteration or modification of existing elevations, thus the elevation maps referenced in the propose rule should not be a rigid requirement for a potential consistency determination, under appropriate circumstances, where the objective might be precisely to restore desired habitat at some different elevation than the current elevation.

Section 5010

As currently proposed, section 5010 would require that "[l]evee projects [...] evaluate and *where feasible* incorporate alternatives, including the use of setback levees, to increase floodplains and riparian habitats." As clarified in section 5010(b), the section would apply to "a proposed action to construct new levees or substantially rehabilitate or reconstruct existing levees." By extension, consistent with Water Code section 85057.5(b)(5), the section would not apply to "[r]outine maintenance and operation of any facility located, in whole or in part, in the Delta, that is owned or operated by a local public agency."

Section 5001(r) clarifies the meaning of "setback levee," defining a "setback levee" as "a new levee constructed behind an existing levee which allows for removal of a portion of the existing levee and creation of additional floodplain connected to the stream," and further clarifies that "in the Delta, a 'setback levee' may not necessarily result in removal of the existing levee."

Section 5010 further provides that "criteria" used to "determine appropriate locations for setback levees for purposes of [the state policy]" would be developed by the Department of Water Resources, in conjunction with the Central Valley Flood Protection Board, the Department of Fish and Game, and the Sacramento-San Joaquin Delta Conservancy.

Comment: For small rural and agricultural reclamation districts in the Delta that would now be required to comply with the policy proposed in section 5010 (local public

agencies within the meaning of 85057.5(b)(5)), it will be important to further define and clarify the distinction between “routine maintenance and operation” and a “proposed action to [...] substantially rehabilitate or reconstruct [an existing levee].”

Secondly, it would be very important to clearly establish what level of “evaluation,” and what showing of “feasibility” or “infeasibility” will be required to comply with the new policy, and avoid a potential appeal.

First and foremost, it would seem that financial feasibility should be the primary constraint on “incorporation” of “alternatives, including the use of setback levees, to increase floodplains and riparian habitats” in a local levee project. Moreover, it would seem appropriate that the financial feasibility of the proposed local project control over any future “criteria” developed by the Department of Water Resources, the Central Valley Flood Protection Board, the Department of Fish and Game, and the Sacramento-San Joaquin Delta Conservancy.

With respect to proposed section 5010, it is also important that the regulation avoid unintended consequences, such as a situation in which local levee districts are prevented from undertaking necessary work to “rehabilitate or reconstruct” levees beyond “routine maintenance operation,” due to potential prohibitive costs of such action, as result of the policy proposed in section 5010.

A regulation that fails to address such concerns could be found inconsistent with the Delta Reform Act—and with other portions of the Council’s regulations—as such a regulation could potentially increase flood risks to life and property in the Delta, and might furthermore conflict with statutory objectives to protect Delta agriculture, the Delta economy, etc. (See, e.g., proposed sections 5001(e)(3)(B), (C), and (E).)

Section 5016(a)

Proposed section 5016(a) specifies that “[n]o encroachment shall be permitted in a floodway, unless it can be demonstrated by appropriate analysis that the encroachment will not *unduly impede the free flow of water* in the floodway or jeopardize public safety.”

Comment: See related comment on proposed section 5001(i) above.

Section 5017(a)

Proposed section 5017(a) specifies that “[n]o encroachment shall be permitted in any of the following floodplains unless it can be demonstrated by appropriate analysis that the

encroachment *will not have a significant impact on floodplain values and functions* [in certain areas of the Delta designated as floodplains].”

Comment: See related comment on proposed section 5001(i) above.

Section 5017(c)

Section 5017(c) clarifies that the policy in section 5017(a) (“Floodplain Protection”) that no “encroachment” be permitted in certain designated floodplain areas is “not intended to exempt any activities in [certain designated floodplain areas] from applicable regulations and requirements of the Central Valley Flood Protection Board.”

In addition to avoiding any exemption from applicable regulations of the Central Valley Flood Protection Board, to avoid duplication and inconsistency, the Council’s proposed regulations must ensure that the Council’s definitions of “encroachment,” “floodway,” and “floodplain,” and its consistency, review, and potential appeal processes, do not advance substantially different or unworkable standards, or otherwise work at cross-purposes to the Central Valley Flood Protection Board’s existing regulations on “encroachments” in floodways and floodplains.

Moreover, since the Flood Board is the agency with the greatest technical competence and expertise in this area, the Council’s regulations should perhaps incorporate that agency’s regulations, otherwise defer to the Flood Board in this area, or potentially incorporate any existing Flood Board permitting requirements as a functional equivalent of any separate Council process, with an initial presumption of validity and overall adequacy as to compatibility of routine agricultural activities as permissible uses in designated floodways and floodplains.

Sections 5003(d), 5018, and 5019

Section 5003(d) provides that “[n]othing in the application of the definition of a “covered action” shall be interpreted to authorize the abrogation of any vested right whether created by statute or by common law.”

Section 5018 provides that “[t]he provisions in this Chapter are not intended and shall not be construed as authorizing the Delta Stewardship Council or any entity to exercise its power in a manner that will take or damage private property for public use without the payment of just compensation.”

Section 5019 provides that “[t]he provisions in this Chapter are not intended to affect the rights of any owner of property under the Constitution of the State of California or the United States.”

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Comment: All three of these provisions are appropriate and absolutely necessary to avoid potential improper application or interpretation of the proposed regulations.

General Comment

Not having gone through a formal rulemaking, the materials appended to the current Delta Plan as Appendix B (“Administrative Procedures Governing Appeals, Statutory Provisions Requiring Other Consistency Reviews, and Other Forms of Review or Evaluation by the Council”) appear to be underground regulations.

The same is true of any forms adopted by the Council without compliance with the APA which may contain any language meeting the definition of a “regulation” within the meaning of the exception to the exemption set forth in Government Code section 11340.9(c).

Closing

Thank you once again for the opportunity to comment. This concludes Farm Bureau’s comments on the Council’s proposed rulemaking.

Very truly yours,



Justin E. Fredrickson
Environmental Policy Analyst

JEF:pkh