



El Dorado County Water Agency

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January 14, 2013

Cindy Messer
Delta Plan Program Manager III
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Re: Comments on Text of Proposed Regulations and Initial Statement of Reasons

Dear Ms. Messer:

Thank you for the opportunity to review and comment on the Delta Stewardship Council's (DSC or Council) proposed regulations as described in the "Notice of Proposed Rulemaking, Text of Proposed Regulation (11/16/12) and Initial Statement of Reasons" released November 30, 2012. El Dorado County Water Agency exists to ensure that those who live, work and recreate in El Dorado County have access to safe, reliable water resources now and for the future. We have previously participated in the DSC process through the review of earlier draft documents and draft plans as well as DSC meetings and workshops. In addition, we have provided written comments on the Final Draft Delta Plan and, through the Offices of John S. Mills, oral testimony before the Council.

Paragraphs containing our proposed changes are highlighted in **bold** and *italic* font with proposed revisions in ~~strikeout~~ (remove) and underline (new) format.

Text of Proposed Regulation

General Definitions, Section 5001(e)(1)(B)

This section leaves out two important elements: one, directly taken from CWC §85021 and the other from the Delta Plan's Appendix P (Demonstrating Consistency with the Delta Plan Regarding Reduced Reliance on the Delta and Improved Regional Self-Reliance).

To correct these deficiencies and errors of omission, Section 5001(e)(1)(B) should be rewritten as follows:

“Regions that use water from the Delta watershed will reduce their reliance on this water ~~for reasonable and beneficial uses~~¹ and improve regional self-reliance, consistent with existing water rights and the State’s area of origin statutes ~~and reasonable use and Public Trust Doctrines~~². This will be done by improving, investing in, and implementing local and regional water supply projects³, local projects and programs that increase water conservation and efficiency, increase water recycling and use of advanced water technologies, expand storage, improve groundwater management, and enhance regional coordination of local and regional water supply development efforts. For the purposes of improving regional self-reliance water conservation is considered a new source of water supply, consistent with CWC §1011(a). Water so saved through these counts as a new source of supply as this water would have been needed to meet future demand. Thus, even if water use is increasing as a result of economic or population growth, a water supplier can demonstrate that its water use is more efficient and is contributing to reduced reliance on the Delta and improved regional self-reliance.”⁴

It is important that the definitions of Section 5001 be as clear as possible. Therefore, we urge the inclusion of the expanded language regarding “improving regional self-reliance” suggested from the Delta Plan’s Appendix P. This language provides a clear explanation of exactly how this standard (of improving regional self-reliance) is met and how those agencies within the Delta Watershed may be assured their investments and management actions and policies are consistent with the Delta Plan objectives.

¹ The term reasonable and beneficial use is included in Section 5001(e)(1)(A), which therein applies to all waters of the state. It is not necessary to specifically include the same terminology in Section 5001(e)(1)(B), which only applies to water used from the Delta watershed, and then, inexplicably, not apply it to water exported from the Delta as described in Section 5001(e)(1)(C). Using the term once, for the entire state, should be sufficient.

² This specific reference to the reasonable use of water and the Public Trust Doctrine is only made in reference to water used from the Delta watershed. It would be better to delete such reference here and, instead, include it in Section 5001(e)(1)(A), which would be universally applied to all the waters of the state.

³ Taken directly from CWC §85021.

⁴ Delta Stewardship Council Final Draft Plan, Appendix P, page P-2, lines 30-35.

General Definitions, Section 5001

The definition of a “Covered Action” is already provided in CWC §85057.5, and that complete definition, taken directly in its entirety from the statute, should be included immediately following subsection 5001(f). There is no reason to leave out a clear, statutory definition of this important term in this section.

Change General Definitions, Section 5001(h) to read:

“Delta Plan’ means the comprehensive, long-term management plan (including its appendices) for the Delta to further the achievement of the coequal goals, as adopted by the Delta Stewardship Council, in accordance with the Sacramento-San Joaquin Delta Reform Act of 2009.”

The Appendices are part of the circulated Delta Plan and are systemic to it as they provide clarity to the policies, recommendations and narrative of the Plan.

Section 5002 Proposed Action Defined.

The “proposed action” definition is an unnecessary complication to the clarity provided for covered actions found in CWC §85057.5:

“Covered action’ means a plan, program, or project as defined pursuant to Section 21605 of the Public Resources Code that meets all of the following conditions:

- 1. Will occur in whole or in part within the boundaries of the Delta or Suisun Marsh.*
- 2. Will be carried out or approved or funded by the state or a local public agency.*
- 3. Is covered by one or more provisions of the Delta Plan*
- 4. Will have a significant impact on 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.”*

Please note that all four of the listed conditions must be met for a plan, program or project to be a “covered action.”

However, on page 5 of the text of the proposed regulations, any “proposed action” is described as being classified as a “covered action” if it, *“Is covered by one or more provisions of the Delta Plan, which for these purposes, means one or more of the regulatory policies contained in Article 3 §5003(a)(5).”*

The inclusion of the term “proposed action” is unnecessary and confusing, but if the Council is wedded to the term “proposed action” then Section 5002(b) should

simply state, “A proposed action is a covered action if it meets all the criteria of a covered action as defined in CWC Section 85057.5.”

In short, not all proposed actions are covered actions, but all covered actions are proposed actions. Inasmuch as the CWC is completely clear on this point, there is no apparent reason to further complicate the matter by use of the term “proposed action” in these regulations.

Section 5004(a) Contents of Certification of Consistency. Please change as follows:

“This policy specifies what must be addressed in a certification of consistency filed by a state or local public agency with regard to a covered action. This policy only applies ~~after a proposed action has been determined~~ after a state or local public agency has determined that a proposed plan, program or project is a covered action because it meets the definition of a covered action in CWC§85057(a). ~~to be a covered action because it is covered by one or more of the regulatory policies contained in Article 3. Inconsistency of with this policy may be the basis for an appeal.~~”

Section 5005(a) Reduce Reliance on the Delta through Improved Regional Water Self-Reliance. Please change as follows:

“The policy of the State of California is to reduce reliance on the Delta in meeting future water supply needs and that each region that depends on water from the Delta watershed shall improve its region self-reliance. ~~Success in achieving the statewide policy of reduced reliance on the Delta and improving regional self-reliance will be demonstrated through a significant reduction in the amount of water used, or in the percentage of water used from the Delta watershed. This will be done by improving, investing in, and implementing local and regional water supply projects~~⁵, local projects and programs that increase water conservation and efficiency, increase water recycling and use of advanced water technologies, expand storage, improve groundwater management, and enhance regional coordination of local and regional water supply development efforts. For the purposes of improving regional self-reliance water conservation is considered a new source of water supply, consistent with CWC §1011(a). Water so saved through these projects and programs counts as a new source of supply as this water would

⁵ Taken directly from CWC §85021.

have been needed to meet future demand. Thus, even if water use is increasing as a result of economic or population growth, a water supplier can demonstrate that its water use is more efficient and is contributing to reduced reliance on the Delta and improved regional self-reliance.⁶

It is important that there is clarity within Section 5005 regarding the subject of reduced reliance on the Delta and improved regional self-reliance. Section 5005 should be consistent with CWC §85021 and the Final Draft Delta Plan.

Section 5007 Update Delta Flow Objectives. Please change as follows:

“Section 5007(a)(1) The SWRCB should update the Bay-Delta Water Quality Control Plan immediately following the completion of the Bay Delta Conservation Plan. Flow objectives to protect identified beneficial uses consistent with CWC §13000 et seq.”

“(2) Flow objectives should be established and implemented consistent with the coequal goals. Until the SWRCB has completed the Water Quality Control Plan update, existing water rights flow requirements shall constitute compliance with the Delta Plan.”

- ~~(1) “By June 2, 2014 adopt and implement updated flow objectives for the Delta that are necessary to achieve the coequal goals;~~
- ~~(2) By June 2, 2018, adopt and as soon as reasonably possible, implement flow objectives for high priority tributaries in the Delta watershed that are necessary to achieve the coequal goals; and,~~
- ~~(3) For the purposes of paragraph 2, the State Water Resources Control Board staff will work with the Delta Stewardship Council and the Department of Fish and Game to determine priority streams. As an example, priority streams could include the Merced River, Tuolumne River, Stanislaus River, Lower San Joaquin River, Deer Creek (tributary to Sacramento River), Lower Butte Creek, Mill Creek (tributary to Sacramento River), Consumnes River, and American River.~~

(b) Flow objectives could be implemented through several mechanisms including negotiation and settlement, Federal Energy Regulatory Commission (FERC) relicensing, or water rights hearing. Implementation through water rights hearings or FERC relicensing is expected to take longer than negotiation and settlement. Than the deadlines listed in paragraphs (1) and (2) of subsection (a).

⁶ Delta Stewardship Council Final Draft Plan, Appendix P, page P-2, lines 30-35.

~~(c) Prior to the establishment of revised flow objectives as described in subsection (a) and (b) the existing Bay Delta Water Quality Control Plan flow objectives shall be used to determine consistency with the Delta Plan. After flow objectives are revised, the revised flow objectives shall be used to determine consistency with the Delta Plan.~~

~~(d) For the purposes of Water Code Section 85057(a)(3) and Section 5003(a)(5) of this Chapter, the policy set forth in Section 5007(a)(2) subsection (c) covers applies to a covered action. that could affect flow in the Delta."~~

Initial Statement of Reasons

Page 1, paragraph 1, change as follows so as to be consistent with CWC §85020(d):

"include promoting statewide water conservation and water use efficiency, and sustainable water use, improving water quality..."

Page 2, Definitions:

Please change to be consistent with our earlier recommendations (regarding definitions) as provided on the Text of the Proposed Regulation. This would include elimination of the term "proposed action" and a definition of "covered action" consistent with CWC §85057.5(a).

Page 4, paragraph beginning with, "The intent of Section 5005..." change as follows:

"efficiency and conservation and diversify local water supply portfolios. This will be done by improving, investing in, and implementing local and regional water supply projects⁷, local projects and programs that increase water conservation and efficiency, increase water recycling and use of advanced water technologies, expand storage, improve groundwater management, and enhance regional coordination of local and regional water supply development efforts. For the purposes of improving regional self-reliance water conservation is considered a new source of water supply, consistent with CWC §1011(a). Water so saved through these counts as a new source of supply as this water would have been needed to meet future demand. Thus, even if water use is increasing as a result of economic or population growth, a water supplier can

⁷ Taken directly from CWC §85021.

demonstrate that its water use is more efficient and is contributing to reduced reliance on the Delta and improved regional self-reliance.”⁸

Page 5 paragraph beginning with, “Achieving the Delta ecosystem restoration goal...”, change to read:

“...and migratory species with diverse and biologically diverse appropriate habitats, functional corridors and ecosystem processes. The ultimate restoration of the Delta ecosystem will also be dependent upon achieving a more natural flow regime from upstream. That natural flow regime will be due in part to the return to more historic Sierra Nevada Forest canopy and composition conditions and improved watershed conditions. The long-term sustainability of the Delta ecosystem is dependent upon a resilient, functioning Sierra Nevada ecosystem.”

Revise page 5, paragraph beginning with: “Altered flows in the Sacramento and San Joaquin Rivers and their tributaries change flows within and out of the Delta and affect salinity and sediment in the Delta. Not all altered flows are due to water diversion projects or stream channel modifications. The condition of upstream Sierra Nevada forests in canopy and composition as well as the condition of meadows and watersheds influences what the current flows in Delta tributary rivers and streams are. Therefore, to achieve a more natural flow regime to benefit fish and other aquatic species, a return to more historic Sierra Nevada forest densities will be necessary.”

We again thank you for the opportunity to comment on the Text of Proposed Regulations and Initial Statement of Reasons. Our agency will continue to work with the DSC and their staff throughout the remainder of the DSC Delta Plan and rulemaking process, as well as the upcoming early implementation phase of the Council’s work. We will continue to participate in DSC meetings and workshops to assist the Council and their staff in support of the Plan.

Sincerely,



Dave Eggerton
General Manager

⁸ Delta Stewardship Council Final Draft Plan, Appendix P, page P-2, lines 30-35.