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By Regular and Electronic Mail
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RE: Delta Stewardship Council Proposed Rulemaking

Dear Chairman Isenberg and Council Members:

The State Water Contractors, Inc. and San Luis & Delta-Mendota Water Authority, collectively referred to herein as the "Public Water Agencies",[1] submit this letter pursuant to the Notice of Proposed Rulemaking the Delta Stewardship Council ("Council") submitted to the Office of Administrative Law ("OAL") on November 16, 2012. The Public Water Agencies value the role the Legislature established for the Council. However, the regulations the Council submitted to OAL on November 16, 2012 and propose for adoption ("Proposed Regulations") go well beyond statutory authorities granted to the Council through the Sacramento-San Joaquin Delta Reform Act of 2009 (Wat. Code, § 85000 et seq., "Delta Reform Act" or "Act"). For that reason, as well as the Proposed Regulations failing to meet other important OAL requirements, the Proposed Regulations, if adopted, would be unlawful. The Public Water Agencies respectfully request that the Council revise the Proposed Regulations, consistent with these comments, before the Council considers their adoption.

I. INTRODUCTION

As detailed below, the Proposed Regulations include a number of provisions that fail to meet the standards of necessity, authority, clarity, consistency, reference, and non-duplication set forth in the Government Code. The Public Water Agencies and their member agencies object to the Proposed Regulations particularly because in numerous respects they exceed and conflict with the limited authority the Legislature conferred upon the Council through the Delta Reform Act.

In the Initial Statement of Reasons, the Council asserts that "implementation of the proposed regulatory policies is necessary in order to *achieve* the coequal goals as enumerated in the 2009 Delta

[1] Descriptions of the Public Water Agencies are included in Attachment 1 hereto.

Reform Act."[2] The Council further states that "[t]he authority vested in the Council to make consistency determinations ensures that Delta-related activities will be coordinated and legally enforceable under the oversight of the Council." (Initial Statement of Reasons at p. 14.) Thus, the Council conceives of its role as that of a "super-regulatory" agency with approval authority over all "Delta-related actions."[3] In a similar vein, the Council states that "Section 5005 is aimed at achieving [the] policy of reduced reliance on the Delta and improving regional self-reliance *by requiring a significant reduction in the amount of water used, or in the percentage of the water used, from the Delta watershed*." (Initial Statement of Reasons at p. 4, emphasis added.) It is striking that the Council asserts this outcome as an apparent central responsibility of the Council to achieve, through its appellate review of Delta Plan consistency certifications, notwithstanding the clear absence of such authority in the Delta Reform Act.

Nowhere does the Delta Reform Act authorize or require the Council to act as a "super-agency" with the authority or mandate to "achieve" the coequal goals through its appellate review of covered actions for consistency with the Delta Plan, or to impose reductions in water use from the Delta or the Delta watershed. Such action by the Council would exceed the authority conferred upon it in the Delta Reform Act. The Act simply requires the Council to "develop, adopt, and commence implementation of the Delta Plan pursuant to this part that *furthers* the coequal goals." (Wat. Code, § 85300(a), emphasis added.) Specifically, the Act states that "the Delta Plan shall include subgoals and strategies to *assist in guiding* state and local agency actions related to the Delta"; the Delta Plan "may also identify specific actions that state or local agencies *may* take to implement the subgoals" (*ibid*., emphasis added); and "[t]he Delta Plan shall *promote* statewide water conservation, water use efficiency, and sustainable use of water" (*id*., § 85303, emphasis added).

As evidenced by the Legislature's specific word choices, there was no intent to provide or even imply a regulatory role for the Council with regard to broad water management activities. Indeed, to the contrary, the Council and the Delta Plan are directed to provide guidance and advisory recommendations to further the achievement of various pertinent state policies, with the *limited* exception of establishing an administrative scheme for reviewing appeals of consistency certifications only applicable to statutorily defined "covered actions" undertaken *in* the Delta and Suisun Marsh.

Notably, the state policy in the Delta Reform Act pertaining to reduced reliance on the Delta to meet *future* water supply needs through a statewide strategy is not included in the statutory objectives the Legislature determined are inherent in the coequal goals (*id*., § 85020), and it is conspicuously absent from the specifically described elements of the Delta Plan (*id*., § 85300 et. seq.). Thus, nothing in the Delta Reform Act empowers the Council to force "significant reductions" in water use from the Delta watershed, or a significant reduction in water exports to meet current or historic water supply needs.

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[2] State of California, Delta Stewardship Council, California Code of Regulations, Title 23. Water, Division 6. Delta Stewardship Council, Chapter 2. Consistency with Regulatory Policies Contained in the Delta Plan, Initial Statement of Reasons 14 ("Initial Statement of Reasons"), http://deltacouncil.ca.gov/sites/default/files/documents /files/3%20-%20InitialStatementReasonDraftNov2012.pdf.

[3] "Delta-related actions" is not a term defined in the Act or in the Proposed Regulations. By statute, the Council has no authority to adjudicate appeals over consistency certifications for all "Delta-related actions," but only for statutorily defined "covered actions."

Moreover, the Delta Reform Act expressly recognizes the continuing authority of other state and federal regulatory regimes over the management and regulation of water and other resources in the Delta. (See, e.g., Wat. Code, §§ 85031(d), 85032.) This was made clear in the final analysis of SBX7-1 considered by the Senate before voting on the Act. The analysis concludes that the various savings clauses in the bill "maintain SWRCB jurisdiction and preserve regulatory authority generally, in order to clarify that the new Delta Stewardship Council is NOT a super-regulatory agency that trumps other regulatory agencies such as SWRCB and DFG."[4] Thus, the substantive mandates that the Council seeks to promulgate and enforce are inconsistent with the Delta Reform Act and other statutes.

In addition, the coequal goals are set forth in the statute as state *policy*. As demonstrated below, these policies are not legislative mandates, and they are clearly not mandates that the Legislature authorized the Council to enforce. Instead, the Delta Plan is expressly defined in a way that acknowledges it is but one tool that will provide policy makers with an important source of guidance for, and a means of tracking progress toward, achieving the coequal goals established by the Legislature. Rather than creating an agency charged with regulating the State's water resources, the Legislature established a framework for a collaborative and synergistic approach to improving overall Delta management and contributing to the achievement of the coequal goals by the pertinent local, state and federal agencies already responsible for carrying out or regulating various components of the Delta Plan.

Because the Council is not authorized to impose substantive mandates regarding water use through the Delta Plan, the Public Water Agencies respectfully request that the Council revise its proposed regulations to remove any such mandates.

II. LEGAL STANDARD FOR REGULATIONS

At the most fundamental level, the Proposed Regulations must be within the scope of the Council's statutory authority and consistent with controlling law. (Gov't Code, § 11342.1 ["Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law"].) An administrative agency such as the Council has no inherent power; it possesses only those powers granted to it by the Constitution or by statute. (*Security National Guaranty, Inc. v. California Coastal Commission* (2008) 159 Cal.App.4th 402, 419.) "That an agency has been granted some authority to act within a given area does not mean that it enjoys plenary authority to act in that area." (*Ibid*.) Thus, any act taken in excess of the power conferred upon an agency is void. (*Ibid*.)

Similarly, no regulation adopted by a state agency is "valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov't Code § 11342.2; see *Sabatasso v. Superior Court* (2008) 167 Cal.App.4th 791, 796 ["agencies do not have discretion to promulgate regulations that are inconsistent with the governing statute or amend the statute or enlarge its scope," citation omitted]; *Rich Vision Centers, Inc. v. Board of Medical Examiners* (1983) 144 Cal. App. 3d 110, 114 [an agency "may exercise such additional powers as are necessary for

[4] Bill Analysis for SBX7-1 as amended November 3, 2009, p. 15, available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx7_1_cfa_20091104_035148_asm_floor.html.

the due and efficient administration of powers expressly granted by statute, or as may be fairly be implied from the statute granting the powers"].)

Government Code section 11349 *et seq*. governs the OAL review of regulations. OAL must make determinations of the necessity, authority, clarity, and consistency of proposed regulations in addition to ensuring compliance with the other procedural and substantive mandates of the Administrative Procedure Act ("APA"). As explained below, a number of provisions in the Proposed Regulations fail to meet the OAL's standards and must be removed or revised accordingly.

III. DEFICIENCIES WITH PROPOSED REGULATIONS

A. The Proposed Regulations Exceed The Council's Authority Granted To It Through The Water Code

To be valid and effective, the Council must demonstrate that the Proposed Regulations are authorized by the Delta Reform Act, and do not conflict with controlling law. "Authority," as defined by Government Code section 11349(b), means "the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation." Proposed regulations are also invalid if they impair or conflict with the statute they purport to implement. (*California Association of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11; *Esberg v. Union Oil Co.* (2002) 28 Cal.4th 262, 269.) The Proposed Regulations fail these standards as they exceed and transgress the Council's statutory authority and conflict with controlling law.

1. The Substantive Mandates in Proposed Sections 5004 and 5005 Exceed the Council's Statutory Authority and Conflict with Controlling Law; Therefore, They Must Be Removed from the Proposed Regulations

Section 5004: The requirements imposed through this section of the Proposed Regulations are intended to govern certifications of consistency filed by state or local public agencies with regard to covered actions. The proposed requirements, however, are not fully set forth in the Proposed Regulations. On page 59 of the current draft of the Delta Plan, it states: "If the covered action is found to be inconsistent, *the project may not proceed until it is revised so that it is consistent with the Delta Plan*." (Emphasis added.) In other words, the Council claims the authority to preempt already established statutory processes and to itself *prohibit* the action from moving forward until it has determined the project is consistent with the Delta Plan. That claim of what is essentially permitting authority is inconsistent with the language of the Delta Reform Act, as well as its legislative history. It also is unenforceable because it is an unlawful "underground regulation" that has not been submitted to OAL.

The Plain Language of the Delta Reform Act Does Not Authorize the Council to Prohibit a Covered Action Until It Determines It Is Consistent with the Delta Plan: Under the Delta Reform Act the proponent of a proposed action potentially affecting the Delta must determine if it is a "covered action." If the agency determines it is a covered action, it must certify to the Council that it is consistent with the Delta Plan. (Wat. Code, § 85225.) Absent an appeal, the agency may continue to pursue regulatory

approvals and implement the action. If the certification is appealed, the Council must determine whether the certification is supported by substantial evidence. If the Council determines the certification is not so supported, it remands it to the agency. (Wat. Code, §§ 85225.10-85225.25.)

On remand the "agency may determine whether to proceed with the covered action." (Wat. Code, § 85225.25.) Its options are to (i) "proceed with the action" as proposed or (ii) proceed with "the action as modified to respond to the findings of the council." (*Ibid*.) In either case it must, "prior to proceeding with the action file a revised certification of consistency that addresses each of the findings by the council." (*Ibid*.) That is the end of the certification process. Nothing in this language prohibits the agency from proceeding with the covered action even if the Council has deemed it inconsistent, so long as the agency files a revised certification addressing the Council's findings. The Council's assertion that a covered action is prohibited unless the Council deems it consistent simply is not supported by the plain language in the Delta Reform Act.

<u>The Delta Reform Act's Legislative History also Undermines the Council's Assertion of Authority to Prohibit Implementation of a Covered Action Until an Appeal Is Resolved to the Council's Satisfaction</u>. The October 2008 Delta Vision Strategic Plan, an early step in developing the governance structure that resulted in the Delta Reform Act, would have created a Council as a "regulatory and oversight body" with numerous and broad regulatory authorities. (Delta Vision Strategic Plan, pp. 121-24.) These would have included the power to determine the consistency of covered actions and to "ensure federal and state consistency with the [Plan]." (Delta Vision Strategic Plan, pp. 123-24.) The Delta Reform Act significantly pared these proposals down. In particular, the authority to determine consistency in the first instance and the authority to "ensure" consistency overall before a project may be implemented are both absent from the Delta Reform Act.

The legislative history of the Delta Reform Act demonstrates that the Legislature purposefully removed provisions that would have authorized the Council to prevent an inconsistent "covered action" from being implemented. Proposed Conference Report No. 1, dated September 9, 2009, contains an appeals process similar to that in the enacted Delta Reform Act. Like the enacted version, it provided that a covered action may be implemented if no appeal is filed to the consistency certification. However, the *pre-print* version of section 85225.25 provided:

> Upon remand, the state or local agency may determine not to proceed with the covered action or may modify the appealed action and resubmit the certification of consistency to the council. A proposed covered action appealed pursuant to these provisions shall not be implemented until the council has adopted written findings, based on substantial evidence in the record, that the covered action, as modified, is consistent with the Delta Plan.

Delta Reform Act section 85225.25 *as enacted* is significantly changed from this earlier version. While the prior version gives the agency the option of either not proceeding with the action or modifying the action to satisfy the Council, the enacted version gives the agency the option to "proceed with the action" *without* modification, or as modified, provided it files a revised certification. Finally, the

Legislature pointedly removed the prohibition that the proposed action "shall not be implemented" without a Council consistency determination. Despite the Legislature's purposeful refusal to adopt a statute mandating that a covered action shall not be implemented absent a Council blessing, the Council is attempting to reinsert that rejected mandate. This attempt clearly is an illegal alteration, amendment and enlargement of the statute that is beyond the Council's authority. (Gov't Code, §§ 11342.2 & 11349.1; see also OAL Handbook, p. 19.)

These changes to subsequent versions of the Act and the language of the Delta Reform Act expressly permit implementation of a covered action when the Council disagrees with an implementing agency's consistency certification. Upon remand from an appeal, an agency is not required to modify a proposed covered action, but only to file a revised certification addressing the Council's findings. The plain language of the Act and its legislative history manifest the Legislature's intent to preserve the authority of state and local agencies to proceed with "covered actions" even if the Council ultimately disagrees with a proffered consistency certification.

Attempts to Implement Underground Regulation Are Unlawful: The APA specifically prohibits an agency from making use of a rule which meets the definition of a "regulation" but has not been submitted to the OAL for approval, referred to as an "underground regulation." (Gov't Code, § 11340.5(a); OAL Handbook, pp. 12-16.) "Underground regulations" are a means to avoid the requirements of the APA and can take the form of "'policies,' 'interpretations,' 'instructions,' 'guides,' 'standards,' or the like, and are contained in internal organs of the agency." (OAL Handbook, pp. 13-14, citing *Armistead v. State Personnel Board* (1978) 22 Cal.3d 198.)

Here, the Council claims the authority to prohibit an agency from proceeding with a project unless the Council has deemed it consistent with the Delta Plan: "If the covered action is found to be inconsistent, the project may not proceed until it is revised so that it is consistent with the Delta Plan." (Draft Delta Plan at p. 59.) As explained above, this proposed rule is not within the Council's authority. Nevertheless, the Council has included it in the Delta Plan.[5]

Although the Council has not designated it as a Regulatory Policy, it clearly would meet the definition of "regulation" under Government Code Section 11342.600, that is, a "rule, regulation, order or standard" contained in a Delta Plan adopted by the Council purportedly "to implement, interpret, or make specific the law . . . administered by it." The proposed mandate meets the three part test specified in the OAL Handbook at p. 14: (1) it is a rule of standard or general application with respect to the consistency process; (2) it is a policy adopted by the Council to implement or make specific the law administered by it; and (3) it is not exempt under the APA.

The Council's assertion of the authority to prohibit implementation of an action it deems inconsistent with the Delta Plan is not supported by the language or legislative history of the Delta

[5] The Council is authorized to adopt "administrative procedures governing appeals" that are not required to be submitted to OAL. (Wat. Code, § 85225.30.) However, the provision at issue is not procedural. It is instead a substantive rule of law affecting the State's or a public agency's ability to carry out its statutory responsibilities, and it impairs the property rights of an entity applying for the permit or other approval at issue.

Reform Act and is an unlawful "underground regulation." The Council's assertion of authority is unenforceable and should be deleted from the Delta Plan.

Section 5004(b)(3): The Proposed Regulations state that "[a]s relevant to the purpose and nature of the project, *all covered actions must document use of best available science* (as described in Appendix 1A)." (Emphasis added.) The Council asserts that this regulatory requirement is necessary for consistency with the Delta Plan "to ensure that all significant actions [affecting the Delta] utilize best available science or adaptive management in particular." (Initial Statement of Reasons at p. 2.)

The use of best available science in evaluating the merits of a covered action should be encouraged. However, this proposed regulation exceeds the Council's authority to the extent that it imposes higher standards for state and local agency actions than can be found in the Delta Plan or elsewhere in controlling law. (*See, e.g.*, Code Civ. Proc., § 1094.5(c) [substantial evidence in light of the whole administrative record]; Pub. Resources Code, § 21168.5 [abuse of discretion established for purposes of CEQA if a determination or decision is not supported by substantial evidence]; Cal. Code Regs., tit. 14, § 15384 [defining substantial evidence].) The Council lacks authority to limit or alter the scope of local agency discretion by requiring that all covered actions that have a significant impact on the achievement of the coequal goals must use (and document the use of) best available science and adaptive management, *even where no other applicable law imposes such a requirement*.

The Council's stated basis for this requirement is that "despite the Delta's special status, there are no overarching guidelines or best management practices to ensure that all significant actions utilize best available science or adaptive management in particular." (Initial Statement of Reasons at p. 2.) However, the Delta Reform Act does not require proponents of covered actions to support their decisions with the best available science or utilize adaptive management in all situations . The *Council's* adoption of the Delta Plan must be supported by the best available science. (Wat. Code, §§ 85302(g), 85308(a).) But nothing in the Act authorizes the Council to impose that evidentiary standard on covered actions. In addition, the Delta Plan itself can be based upon the best available science without requiring every covered action to also be based on the best available science. Thus, the proposed requirement is not reasonably necessary for the Council to fulfill its obligation to use the best available science.

In addition, such a requirement would result in a new standard for implementing agency decision making. This new standard could, in turn, expose implementing agencies and the Council to potential litigation over the intensively fact-specific determination whether an implementing agency has used the best available science, whether it has adequately documented such use, and whether the Council's determination to that effect in a certification appeal is supported by substantial evidence in the administrative record.

To the extent that such a requirement is already imposed by other statutes or regulations, the regulation is duplicative, and would add nothing but another layer of paperwork to an implementing agency's regulatory burden. Thus, the proposed requirement is not only unauthorized, unnecessary, and administratively burdensome, it could lead to unintended consequences for implementing agencies as well as the Council.

The requirement that all covered actions that significantly impact the achievement of the coequal goals must use and document the use of the best available science should be removed from the Proposed Regulations.

Section 5004(b)(5): This subsection requires a certifying agency that will carry out a covered action to also certify that "the covered action complies with all applicable laws pertaining to water resources, biological resources, flood risk, and land use and planning[,]" and if the certifying agency will approve or fund, but not carry out, the covered action, then it must "include a certification . . . that the covered action complies with all applicable laws of the type listed above over which that agency has enforcement authority or with which that agency can require compliance." These additional certifications are not authorized in the Delta Reform Act, and they are unnecessary and duplicative of existing laws. If these additional certifications are required by regulation, then, in addition to any potential liability for an alleged failure to comply with the *substantive* mandates of those other applicable laws, project opponents could also bring an appeal before the Council, and potentially file litigation in state court challenging the *certification* of compliance with other substantive laws, *and* the Council's determination of consistency on any appeal, in addition to litigation in state or federal court challenging the alleged failure to comply with the *substantive* mandates of the law.

Consequently, this requirement should be removed because it would increase regulatory burdens on agencies, including the Council, and it would increase the potential for litigation and the attendant costs and delays without providing any benefits in terms of compliance with the law, consistency with the Delta Plan, or furthering achievement of the coequal goals.

Section 5005: The proposed "regulatory policy" WR P1 unlawfully asserts regulatory power to undertake the enforcement of a new policy of the State 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." (Wat. Code, § 85021.) In the Notice of Proposed Rulemaking, the Council claims that requiring reduced reliance on the Delta is "consistent with the Delta Reform Act contained in Water Code §85021 (Notice of Proposed Rulemaking at 3), but this assertion of authority reaches far beyond the substantive and geographic scope of its authorities as explicitly delineated by the Legislature. Furthermore, because the Delta Reform Act does not expressly give the Council a duty or the power to enforce or regulate the general state policy of seeking to "reduce reliance on the Delta in meeting future water supply needs," there is no implied authority to promulgate regulations pertaining to that policy. The only specific language articulated in the Act arguably related to such potential authority merely directs the Council to "promote" conservation and other water management activities that would contribute to furthering the state policy expressed in Section 85021 and elsewhere in the Act and other bills that were part of the comprehensive water package of which the Act was only a part.

The Language of the Statute Does Not Support the Council's Asserted Authority to Require a Significant Reduction in Water Use. Nowhere in the Act's sections providing explicit direction to the Council regarding content of the Delta Plan (see Wat. Code, §§ 85300-85308) is the reduced reliance policy mentioned or cited as a focus of the Delta Plan. The reduced reliance policy in Section 85021 of

the Act is simply a statement of policy, not a delegation to the Council of power to expand or enforce the policy. The Council is not even mentioned in section 85021, let alone authorized to enforce the policy through forced reductions in current or historic supplies pumped from the southern Delta. It is telling that while the Act did not include any standards or criteria in the Section 85021 policy statement, other bills included as part of the comprehensive water package did specifically target establishing statewide standards and criteria related to increasing water conservation throughout California.[6]

In fact, Section 85021 does not require a "reduction" in current supplies from the Delta at all, let alone a "significant reduction." Instead, it states a policy to take positive actions to increase local supplies and water efficiency through investment as a means to reduce reliance on the Delta "in meeting California's future water supply needs." The Council's proposed Section 5005 attempts to turn that positive, statewide investment policy into a prescriptive rule prohibiting entities that need to export, transfer through, or use water in the Delta or in the entire Delta watershed from doing so unless they have demonstrated "a significant reduction in the amount of water used, or in the percentage of water used, from the Delta watershed." The Council's attempt to add this requirement where the Legislature did not would "alter or amend [the] statute or enlarge or impair its scope" and therefore "is void and must be struck down by a court." (OAL Handbook at p. 19.)

Moreover, the Council ignores the Legislature's focus on reducing reliance in meeting California's *future* water supply needs and instead attempts to require a reduction from current use. But on its face, section 85021, through the express use of the term "future," applies solely to water supply needs that do not currently exist as opposed to current water supply needs. In *Tenet/Centinela Hospital Medical Center v. Workers' Compensation Appeals Board* (2000), the court, in interpreting a statute, was required to distinguish between "continuing" or "further" medical treatment and "future" treatment. (80 Cal.App.4th 1041, 1046.) Looking to the Webster Dictionary, a common reference for statutory interpretation, the Court concluded that whereas "continuing" means "constant" and "further" means "going or extending beyond what exists", the term "future" means "existing or occurring at a later time." (*Id*.) The court went on to find that "future" medical care suggested medical attention that would be required at a later date but is not ongoing. (*Id*.) Using this definition of the term "future," Section 85021 applies to water supply needs that do not currently exist but would arise in the future due to population an economic growth absent the statewide investment strategy called for in Water Code section 85021.

The principles of statutory interpretation require that each word in a statute be given significance. (*Dyna-Med, Inc*. *v. Fair Employment and Housing Comm'n* (1987) 43 Cal.3d 1379, 1386-87.) The Council's interpretation that Section 85021 calls for a reduction in the use of Delta water from current water supply levels renders the term "future" as surplusage. Under that interpretation, Section

[6] See generally 2009 Water Bills SBx7-7 and SBx7-8, which specifically discuss and seek to reduce per capita use of water in the context of statewide strategies related to conservation, diversification of water supply portfolios, and funding to further achieve those policy goals.

85021 would have stated a policy to reduce reliance on the Delta in meeting California's water supply needs, generally, which the Legislature explicitly chose not to do[7].

Moreover, two other significant sections of the Delta Reform Act are inconsistent with the Council's position. In Section 85020, the section immediately preceding Section 85021, the Legislature spelled out in specific detail the objectives "inherent in the coequal goals for management of the Delta." Rather than requiring, as the Council would, the "significant reduction" in use of water from the Delta watershed, the Legislature stated the objective is to "promote" statewide water conservation, water use efficiency and sustainable water use. This Legislative objective demonstrates that the Legislature did not choose to confer regulatory authority on the Council but instead provided discretion to "promote" activities related to "sustainable water use." The Legislature's use of "promote" cannot legitimately be interpreted to mean "mandate."

Part 4, Chapter 1 of the Delta Reform Act (Wat. Code, §§ 85300-85309) also demonstrates that Section 85021, while a general policy statement that is certainly relevant when considering actions affecting the Delta, does not delegate any enforcement authority to the Council or even to any of the agencies that do have regulatory authority in the Delta. In particular, while the Legislature devoted these several sections to specifying in detail the elements to be required in the Delta Plan, it did not include or refer to the general Section 85021 policy. What it did do was require that the Delta Plan "shall promote statewide water conservation, water use efficiency, and sustainable use of water." (Wat. Code, § 85303.) This is yet another demonstration that the Legislature did not empower the Council to regulate water use but instead directed it to "promote" good water management in line with section 85021. (See also Wat. Code, § 85302(d)(1), (2) [directing the inclusion of measures to "promote" a more reliable water supply that "[m]eet[s] the needs for reasonable and beneficial uses of water" and "[s]ustain[s] the economic vitality of the state"].)

In addition, the Delta Reform Act limits the Council's consistency review authority to "covered actions," which are limited to projects that "[w]ill occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh." (Wat. Code, § 85057.5.) Thus, the Council's assertion of authority to mandate reductions in the use of water anywhere in the State is clearly beyond the geographic scope of the Council's authority.

Moreover, the Council's assertion of authority over water use is inconsistent with several savings clauses in the Delta Reform Act. The statute provides that:

> Unless otherwise expressly provided, nothing in this division supersedes, reduces, or otherwise affects existing legal protections, both procedural and substantive, relating to the [State Water Resources Control Board's] regulation of diversion and use of water, including, but not limited to, water rights priorities, the protection provided to

[7] This is clearly revealed by the legislative history described below, which also illuminates the significance of the Legislature's use of the phrase "reduce reliance" on the Delta, in contrast to "reduce dependence." The legislative history confirms that the Legislature did not intend the Delta Plan to be an *enforcement* mechanism for the newly established policy of reducing reliance on the Delta to meet future water supply needs, or for the Council to be its enforcer.

> municipal interests by Sections 106 and 106.5, and changes in water rights. Nothing in this division expands or otherwise alters the board's existing authority to regulate the diversion and use of water or the court's existing concurrent jurisdiction over California water rights.

(Wat. Code, § 85031(d).)

The Council's assertion of authority to mandate reductions in water diversions and water use throughout the State is inconsistent with these important savings provisions in the statute, and would intrude upon the exclusive concurrent jurisdiction of the State Water Resources Control Board and the courts to adjudicate and regulate water diversions and water rights.

The courts have held that general statements of legislative intent do not create an affirmative duty or authority on the part of the agency to impose a mandate in furtherance of the policy. (E.g., *City of Arcadia v. State Water Resources Control Bd.* (2011) 191 Cal.App.4th 156, 175-176; *Shamsian v. Dept. of Conservation* (2006) 136 Cal.App.4th 621, 633.) Therefore, the Council's assertion of authority to regulate water use is inconsistent with the express statutory language and an enlargement of the Council's authorities beyond those provided in the Delta Reform Act.

Ultimately, while it is consistent with the statutory scheme for the Council to "promote" activities that could contribute to reducing reliance on the Delta in meeting future water supply needs, the proposed section 5005 mandate is not "reasonably necessary to effectuate the purpose" of the Delta Reform Act, and it is therefore beyond the Council's authority and should be removed from the Proposed Regulations. (Gov't Code §§ 11342.2, 11349(a)(1) & (2).)

Thus, this provision should be removed from the Proposed Regulations.

Section 5005(c): The prohibition of exports from the Delta proposed in subsection (c) is also not authorized by the Delta Reform Act for the reasons explained above; and it is also inconsistent with the Delta Reform Act's exclusion of routine project operations from the definition of covered actions and with its several savings clauses.

The Delta Reform Act specifically excludes from the definition of "covered action" "[r]outine maintenance and operation of the State Water Project or the federal Central Valley Project." (Wat. Code, § 85057.5(b)(2).) In addition, as demonstrated, the Delta Reform Act provides that "[n]othing in the application of this section shall be interpreted to authorize the abrogation of any vested right whether created by statute or common law" (*id*., § 85057.5(c)), and "[n]othing in this division expands or otherwise alters the [State Water Resources Control Board's] existing authority to regulate the diversion and use of water or the courts' existing concurrent jurisdiction over California water rights" (*id*., § 85031(d)).

Thus, the Council lacks the authority to require a reduction in exports of water via the routine operation of the State Water Project ("SWP") or the federal Central Valley Project ("CVP"), and this provision should be removed from the Proposed Regulations.

The Legislative History Directly Contradicts the Council's Assertion of Regulatory Authority to Prohibit or Mandate the Actions Required in Section 5005: While it is clear from the face of the statute that the Council does not have the authority to promulgate the mandates in Section 5005, the legislative history provides additional evidence of the Legislature's intent that the reduced reliance policy promote general water management activities and programs to meet future water supply needs, rather than delegating authority to the Council to mandate a requirement that water use be "significantly reduced."

Statements by legislators who were key in the sponsorship, drafting and adoption of the Act explicitly sought to clarify the reach of Section 85021 as it was being considered. They agreed it was a "broad statement of a policy goal . . . certainly not a mandate." And they agreed that *reducing dependence* on the Delta to meet California's water supply needs *was not* an appropriate policy objective. These conclusions were articulated at a September 3, 2009, joint Senate and Assembly conference committee hearing discussing the various bills that would result in the Delta Reform Act, including SBx7-1, which established the Council and outlined in detail the contents and purposes of the Delta Plan:

Senator Aanestad: "To say that we are going to be able to decrease dependency on the Delta is an impossible goal . . . . The solution is the second part of this paragraph [revised 85021 referring to statewide strategy of investment] and that is to improve efficiency, conservation, etc. . . . , it's foolishness to say we are going to become less dependent on the Delta. I think it's imperative to say we're going to be more responsible with the water that goes through the Delta . . . ."

Colloquy between Senator Steinberg (Senate Majority Leader and coauthor of SBx7-1) and Assemblyman Huffman (Chairman of the Assembly Water, Parks and Wildlife Committee and author of Preprint Assembly Bill No. 1, the Assembly's version of SBx7-1):

> ***Senator Steinberg***: "[O]ne question for consideration is whether or not the proponents of this language [section 85021] intended it to have legal import or is it a statement of intent."
>
> ***Assemblyman Huffman***: "I think, Mr. Chair, ***we know how to write mandates when we want to, that's not how this reads, it reads as a broad statement of policy of a goal that will guide things going forward*** . . . . You reduce dependence by following some of the ***conservation measures that we are asking folks to do in separate legislation*** . . . . So, I think it reflects a prudent policy guidance for the state going forward but ***certainly not a mandate***." [Emphasis added.]
>
> ***Senator Cogdill*** (Lead sponsor of the companion Water Bond): "[I]t ought to be more about how we make the Delta a more reliable source of water rather than to say we are going to do everything we can to limit exports from that very important source."

The Legislators' agreement reflected in these exchanges is supported by the Legislative drafting history of section 85021 and related sections. As originally drafted Water Code Section 85021 read:

> The policy of the State of California is to ***reduce dependence on water from the Delta watershed, over the long-term*****,** for statewide water supply reliability. Each region that depends on water from the Delta shall improve its regional self-reliance for water through investment in water-use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts. (Preprint SB 1 (Aug. 4, 2009).) [Emphasis added.]

That language was amended on September 9, 2009,[8] after the September 3 discussions quoted above, to the language adopted ultimately and now codified in section 85021:

> The policy of the State of California 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. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water-use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts. [Emphasis added.]

The significant changes to the first sentence of the section are italicized and bolded to emphasize the differences between the earlier draft version, and the ultimately adopted version of section 85021. The first revision changes "reduce dependence" on water from the Delta watershed "over the long-term" to "reduce reliance" on the Delta "in meeting California's future water needs." Similar to the discussion above of *Tenet/Centinela Hospital Medical Center v. Workers' Compensation Appeals Board*, the adopted term "future" (as opposed to "continuing" or "existing") means "existing or occurring at a later time." In other words, the Section 85021 policy envisions reduced reliance on use of Delta water over use that would exist or occur *in the future* if the policy were not implemented. It does not mean reduce "continuing" or "existing" reliance on Delta water "beyond what exists" currently or historically.

The second significant change is the addition of the language regarding a "statewide strategy of investment." This is an important reflection of legislative intent that meeting the policy directive set forth in Section 85021 is to be achieved on a "statewide" basis that would include local initiatives and investments, statewide bond initiatives, or other funding mechanisms. Notably, nowhere does this language expressly or impliedly authorize the Council to impose an obligation to "significantly reduce" the current use of water from the Delta watershed, or an authorization to the Council to "enforce" its particular interpretation of Section 85021 through the Delta Plan.

<u>The Proposed "Significant Reduction" Requirement Is Inconsistent with the Legislature's Deletion from the Bill of a Similar Requirement</u>: Another indication the Legislature did not intend to require (or authorize the Council to regulate) a reduction of current use of water is its consideration and rejection of a proposed section 85219. That section would have prohibited construction of a

[8] Conference Rept. No. 1, SB 12 (Sept. 9, 2009).

conveyance facility within or around the Delta until the Council made a determination that agencies relying on the facility for water deliveries had submitted "long-term plan[s] for reducing reliance on those exports." (Preprint SB 1 (Aug. 4, 2009).) That language, which could have been interpreted to support the "significant reduction" requirement the Council is attempting to impose, was deleted at the same time Section 85021 was amended to add "future water supply needs" and the "statewide strategy of investment" language.

The substantive mandate in proposed Section 5005 is inconsistent with both the plain language of the Delta Reform Act and its legislative history, and should be removed from the Proposed Regulations.

Section 5005(e)(1): The language of the statute does not support the Council's asserted authority to require (e)(1)(A), (B), and (C), as a prerequisite for using, exporting, or transferring water through the Delta. For example, subdivision (A) mandates that every water supplier that might receive water from the "covered action" has an urban and agricultural management plan. This is a current requirement under law for certain water suppliers, and is therefore duplicative and unnecessary. (Wat. Code, § 10620 [urban water suppliers]; *id*., §10820 [agricultural water suppliers].)

Of more concern, as currently proposed Subsections 5005(c) – (e) appear to create a new consequence for water supplies that fail to meet novel requirements that the Council has proposed for inclusion in urban and agricultural water management plans in subsections (e)(1)(B) and (C); namely, a potential denial of the ability to use or export water from, or transfer water through, the Delta. Current law, however, has very limited specific repercussions for a failure to adopt these plans in compliance with the specific requirements set forth in the Water Code. (Wat. Code, §§10608.56(a), (c), (e), (f); 10631.5 [terms of and eligibility for certain water management grants or loans for urban water suppliers]; *id.*, §§ 10608.56(b), (e), (f); 10852 [agricultural water suppliers].) Nothing in the Delta Reform Act provides authority for the novel requirements for urban and agricultural water management plans proposed in subsections (e)(1)(B) and (C) of Section 5005. In addition, insofar as these subsections duplicate existing law, they are unnecessary and create confusion in the regulated community.

Furthermore, Section 5005(e)(1)(B) distorts the purpose of urban and agricultural water management plans. These plans are internal long-range documents that are to be revised over time as conditions and technologies change. Therefore, the implementation schedules set forth in the plans must remain flexible and adaptable. These plans are meant to inform local water management planning, not to create a new forum for regulation by the Council. Similarly, in subsection 5005(e)(1)(C) the Council grants itself the authority to require a new provision in all water management plans starting in 2015. The Delta Reform Act does not give the Council this authority, and there is no such requirement in existing law. (See Wat. Code, § 10631 [elements of an urban water management plan]; *id.*, § 10826 [agricultural water management plan]; *id*., § 10608 et seq. [requirements for urban and agricultural water management plans related to sustainable water use and demand reduction].)

Thus, Subsections 5005(c) – (e) should be removed from the Proposed Regulations.

2. The Definition of "Achieving the Coequal Goal of Providing a More Reliable Water Supply for California" Includes Unlawful Substantive Mandates to Reduce Water Use

Section 5001(e)(1)*:* The Council proposes to include a definition of "achieving the coequal goal of providing a more reliable water supply for California" to include "[b]etter matching the state's demands for reasonable and beneficial uses of water to the available water supply" (§ 5001(e)(1)(A)), and states that "[r]egions that use water from the Delta watershed *will* reduce their reliance on this water for reasonable and beneficial uses, and improve regional self-reliance" (§ 5001(e)(1)(B), emphasis added), and "[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" (§ 5001(e)(1)(C), emphasis added). In addition, the proposed definition states: "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." (§ 5001(a)(1)(C), emphasis added.)

The proposed regulatory definition of "achieving the coequal goal of providing a more reliable water supply for California" conflicts with the language and structure of the Delta Reform Act. (Wat. Code, § 85302(d)(1).) Specifically, the statute mandates that "[t]he Delta Plan shall include measures to promote a more reliable water supply that address all of the following," including "[m]eeting the needs for reasonable and beneficial uses of water." (*Ibid*.) Furthermore, the Delta Reform Act's coequal goal for water supply is to provide "a more reliable water supply for California . . . ." (Wat. Code, §§ 85054, 85020(a).) The Legislature has declared that seven specific objectives "are inherent in the coequal goals for management of the Delta[,]" including the objectives to "[i]mprove the water conveyance system and expand statewide water storage." (Wat. Code, § 85020(f).)

First, the proposed definition of achievement of the coequal goal of a more reliable supply of water does not promote or identify actions that will *meet* water needs. Instead, it defines achieving the coequal goal of a more reliable water supply in a manner that *limits* use of water from anywhere in the Delta watershed, and limits water exports from the Delta.

Specifically, the proposed definition purports to impose a substantive requirement on all those who use water that originates anywhere in the Delta watershed to "reduce reliance on this water for reasonable and beneficial uses." This mandate is an unauthorized expansion beyond the *policy* of the State of California articulated in the Delta Reform Act "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." (Wat. Code, § 85021, emphasis added.)

As demonstrated above, the Legislature did not include the statewide policy of reduced reliance on the Delta to meet *future* water supply needs in the policies "inherent" in the coequal goals, or in its specified elements required to be part of the Delta Plan. (Wat. Code, §§ 85020, 85300 et. seq.) Thus, the Legislature has not authorized the Council to adopt a new mandate applicable to all users of water from the Delta watershed regarding *current or historic* water supply needs based on this general

expression of state policy that depends on a *statewide* strategy to reduce reliance on the Delta to meet *future* water supply needs. (See Wat. Code, §§ 85210 [enumerated powers of the Council notably lacks any authority to convert state policy into new substantive mandates]; 85212 [authorizing Council to "provide timely *advice* to local and regional planning agencies regarding consistency of local and regional planning documents . . . with the Delta Plan," emphasis added]; 85300(a) [requiring the Council to develop a Delta Plan pursuant to the Delta Reform Act "that *furthers* the coequal goals" and includes "subgoals and strategies *to assist in guiding* state and local agency actions related to the Delta," emphasis added].) The precatory and permissive language in the Delta Reform Act cannot be reasonably interpreted as authorizing the Council to mandate reductions in water use or water exports.

Second, the proposed definition purports to require that those who export water from the Delta, i.e., the Department of Water Resources and U.S. Bureau of Reclamation, reduce exports in "dry years, when the limited amount of available water must remain in the Delta . . . ." This provision in the proposed definition implies that consumptive uses will only get what is available after other "in-stream" uses are met. In addition, the statement is ambiguous, suggesting that in undefined "dry years," exports may be reduced to zero because "the limited amount of available water must remain in the Delta . . . ."

The failure to recognize or even reference the "public interest" integral to the reasonable and beneficial use of water and the Public Trust doctrine is a fatal deficiency in the Council's unsubstantiated interpretation of the objective to further the achievement of the coequal goal of a more reliable water supply. Nowhere in the Delta Reform Act did the Legislature authorize the Council to adopt a mandate that state and federal agencies must reduce exports from the Delta. Instead, any limits on exports are governed by other statutory and regulatory requirements administered by other state and federal agencies, including the State Water Resources Control Board, Department of Fish and Wildlife, [9] the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service.

The proposed definition conflicts with the savings clauses in the Delta Reform Act that expressly acknowledge the authority of other state and federal laws and regulations that affect the management of water resources in the Delta and Delta watershed. (See Wat. Code, §§ 85031 [limitations on division], 85032 [subjects not affected by division]; see also Wat. Code, § 85320(e)-(g) [recognizing that the Department of Water Resources, Department of Fish and Wildlife, and other agencies besides the Council are "charged with BDCP implementation," and that the Council's authority is limited to making recommendations to the BDCP implementing agencies regarding implementation of the BDCP, which is to be incorporated into the Delta Plan].)

3. The Proposed Definition of "Significant Impact" Is Inconsistent with CEQA and Should Be Removed or Substantially Revised

<u>Section 5001(s)</u>: The proposed regulatory definition of "significant impact" impermissibly attempts to alter and amend established CEQA principles regarding baseline conditions and assessment of impacts (direct, indirect, and cumulative), and is in direct conflict with controlling law. (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, § 15125; *In re Bay-Delta Coordinated*

[9] Formerly named the Department of Fish and Game.

Proceedings (2008) 43 Cal.4th 1143, 1167-1168; *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 315, 320-322; *Citizens for East Shore Parks v. State Lands Commission* (2011) 202 Cal.App.4th 549, 557-566.) The Council has no authority to alter the fundamental framework of environmental review, which is concerned with whether approval of a proposed action may result in a significant *adverse* physical change in the existing environment. (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, §§ 15060 (c)(2), 15061, 15064, 15125, 15358, 15360, 15378(a); 15382.)

Of special concern is the Council's inclusion of an overbroad definition of any proposed project that appears to include any contribution, no matter how insignificant, to any existing cumulatively significant impact on achievement of the coequal goals. It is conceivable that a proposed project may have an insignificant contribution to a cumulatively significant impact that has resulted from over a century of development in the Delta and Delta watershed. At a minimum, the definition of "significant impact" should be revised to expressly exclude such projects from the definition.

Section 5003(b)(2)(C): One-year temporary CVP- and SWP-related water transfers occur regularly and are subject to all terms and conditions and other environmental protections imposed on the SWP and CVP. They therefore are "routine operations" of the SWP and CVP and expressly excluded from the definition of "covered action" by Water Code section 85057.5(b)(2). Moreover, one-year transfers approved by State Water Resources Control Board are exempt from the application of CEQA pursuant to Water Code section 1729, and therefore are not a "project" under Public Resources Code section 21065. Although the proposed regulation administratively exempts one-year temporary water transfers, it does so "only through December 31, 2014." This proposed sunsetting of the covered action exclusion is inconsistent with the express language in the Delta Reform Act and will hinder achievement of the coequal goal of improving water supply reliability. Accordingly, this Section should be removed from the Proposed Regulations.

Section 5003(b)(2)(D): The proposed definition of "covered actions" impermissibly attempts to alter and amend established CEQA principles regarding the definition of a "project," as well as the application of statutory and categorical exemptions, and is in direct conflict with controlling law. (Pub. Resources Code, § 21065; Cal. Code Regs., tit. 14, §§ 15300.2 (c), 15378; 15382.) Statutory exemptions under CEQA are absolute; they reflect legislative policy determinations and are not subject to any exceptions for "unusual circumstances." (Cal. Code Regs., tit. 14, § 15061(b)(2); *Sunset Sky Ranch Pilots Association v. County of Sacramento* (2009) 47 Cal.4th 902, 907; *Great Oaks Water Co. v. Santa Clara Water Dist.* (2009) 170 Cal.App.4th 9576, 966, fn. 8; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 128-129.) The Proposed Regulations directly conflict with these established principles. Furthermore, "unusual circumstances" as they pertain to categorical CEQA exemptions have been defined and interpreted under CEQA. (Cal. Code Regs., tit. 14, §§ 15300.2(c); *see, e.g., Banker's Hill v. City of San Diego* (2006) 139 Cal.App.4th 249, 261; *Turlock Irrigation District v. Zanker* (2006) 140 Cal.App.4th 1047; *Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 800; *Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1260-1261.) The Council has no authority to fundamentally alter controlling law.

4. Section 5006 Includes an Unauthorized Assertion of Regulatory Authority over State and Federal Water Contracting

Section 5006: The Proposed Regulations require "improved transparency in water contracting." The Council does not have the statutory authority to impose that requirement merely because it is based on a Council determination that water contracting is a "covered action." While the Delta Reform Act authorizes the Council to review on appeal whether a covered action is consistent with the Delta Plan, it has no role in the initial determination whether a proposed action is a "covered action." As described above, early language had proposed to give the Counsel a direct role, but the Legislature declined to do so as reflected in the Act. The Council recognizes this at page 54 of the Delta Plan—"The state or local agency . . . determines whether the proposed plan, program or project is a covered action . . ." Nevertheless, Section 5006(b) appears to be an attempt to administratively declare that the Department of Water Resources' and U.S. Bureau of Reclamation's administration of their contracts are covered actions. The Legislature, however, has explicitly provided otherwise by excluding routine operations of the SWP and CVP—which includes routine execution and amendment of a water supply contract—in Water Code Section 85057(b)(2). The Delta Reform Act does not authorize the Council to regulate the contract renewal process, and its attempt to do so is inconsistent with the Delta Reform Act.

In addition, any attempt by the Council to alter or amend those contracting policies would be inconsistent with supremacy principles under federal law, which governs the contracting process for water supplied by the Central Valley Project; the Burns-Porter Act (see, e.g., Wat. Code § 12937), which governs the State Water Project; and the Delta Reform Act savings clause (including the provision that nothing in the Act affects the Burns-Porter Act). (Wat. Code, § 85032(e).)

For the foregoing reasons, Section 5006 should be removed from the Proposed Regulations.

Section 5009: The Proposed Regulation states that "[s]ignificant impacts to the opportunity to restore habitat at the elevations shown in Appendix 4 must be avoided or mitigated." It is unclear what constitutes an "opportunity to restore habitat," and how such an "opportunity" might be the subject of a potentially significant impact (which much be an adverse physical impact under controlling law). (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, §§15358, 15382.) These ubiquitous uncertainties violate OAL requirements. Thus, Section 5009 must be removed or revised.

B. Sections of the Proposed Regulations Are Not Necessary or Are Unreasonable

The OAL will review the Proposed Regulations for compliance with the "necessity" standard. Government Code section 11349(a) defines the necessity standard:

> "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion.

To satisfy this standard, Council must provide:

> (1) a statement of the specific purpose of each adoption, amendment, or repeal; and
>
> (2) information explaining why each provision of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An "expert" within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question.

Numerous sections of the Proposed Regulations do not meet these legal standards. Examples are set forth below.

Section 5001: In the Initial Statement of Reasons, the Council states that the definitions in section 5001 "are necessary to clarify the meaning of terms used in the regulations." (Initial Statement of Reasons at p.2.) However, at least the following five provisions within the proposed definitions are unnecessary.

Subsection 5001(k): The proposed regulatory definition of "feasible" merely repeats the language of Public Resources Code section 21061.1. (See also Cal. Code Regs., tit. 14, § 15364.) As such, the regulation is unnecessary and duplicative.

Subsection 5001(s): The proposed regulatory definition of "significant impact" conflicts with existing statutory and regulatory definitions of the same term used in the same context. (Pub. Resources Code, § 21068; Cal. Code Regs., tit. 14, § 15382.) The Council's proposed regulation is confusing and unnecessary as well as inconsistent with controlling law. (Pub. Resources Code, § 21068; Cal. Code Regs., tit. 14, § 15382; *see also In re Bay-Delta Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1167-1168; *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 315, 320-322; *Citizens for East Shore Parks v. State Lands Commission* (2011) 202 Cal.App.4th 549, 557-566.)

Section 5005: The Initial Statement of Reasons describes section 5005 as necessary to "ensure[] that urban and agricultural water suppliers are taking appropriate actions to contribute to the achievement of reduced reliance on the Delta . . ." (Initial Statement of Reasons at p. 4.) In addition, the text of section 5005 of the Proposed Regulations requires use of water from the Delta watershed to be "significantly reduced." The Council's proposed implementation of that requirement violates the Savings Clauses of the Delta Reform Act. (Wat. Code, §§ 85031-85032.) Moreover, the legislative purpose of the Act was to further the coequal goals through the establishment of the Council to improve coordination of state agency actions in the Delta, develop a new Science Program to improve water and ecosystem management in the Delta, and ensure activities of the State and local governments in the

Delta did not preclude progress toward achievement of the coequal goals. These outcomes were to be achieved through the Delta Plan, under which the Council was given the authority to review appeals of consistency certifications for "covered actions." Regulations seeking to reduce water use statewide and SWP and CVP water deliveries are not necessary for the Council to effectuate these purposes of the Delta Reform Act, which the Legislature directed it to pursue with very limited, rather than expansive, authorities provided in the Act.

Subsection 5005(c): Water Code section 85021 calls for a statewide strategy of investment in regional water supply and management actions as a means to help reduce reliance on the Delta in meeting future water supply needs. However, proposed subsection 5005(c) turns this statutory, forward-looking investment policy into a highly punitive threat to current and future water supplies. In doing so, the Council has proposed a regulation that is unnecessary, unreasonable, and inconsistent with the statute itself and that "does not reasonably effectuate the statute." (Gov. Code, §§ 11342.2, 11346.3, 11349.1(a).)

The Council's proposed section 5005(c) could prevent water supply entities the use of their water rights, or their contract rights to water service, even if those entities meet all statutory requirements, simply because the Council has decided that another entity has not, in the Council's opinion, adequately reduced its reliance on water from the Delta watershed. For example, the Council apparently claims the authority (1) to determine that one entity sharing a supply with others (e.g., several retailers served by the same wholesale supplier) has not implemented "all programs and projects" identified in its water management plan as cost effective and technically feasible; and (2) to prohibit the delivery to other parties sharing that supply and for which water management plan compliance has not been questioned. Under this proposed regulation, if "one or more" water suppliers have not satisfied the Council, it claims the right to consider that factor in deciding whether to halt delivery of any of that water to all of the entities sharing that supply. Not only is this assertion of power untenable and not supported by the language of the statute or its legislative history, it also is invalid and ineffective under Government Code section 11342.2.

Section 5006: In the Initial Statement of Reasons, the Council asserts that section 5006 is intended to remedy the "lack of accurate, timely, consistent, and transparent information on the management of California's water supplies and beneficial uses" through "improved public involvement and transparency in decision making processes by enforcing . . . existing contracting policies within the [DWR] and the Bureau of Reclamation." (Initial Statement of Reasons at p. 5.) However, the requirement in the Proposed Regulation of "improved transparency in water contracting" is redundant of existing policies, as shown in the Council's own appendices. The specific language merely requires the Department of Water Resources and U.S. Bureau of Reclamation to follow contracting policies that each has developed and is currently utilizing. There is no need for the requirement.

C. Sections of the Proposed Regulations Lack Clarity

The OAL will review the Proposed Regulations to determine whether they comply with the "clarity" standard. (Gov. Code, § 11349.1(a)(3).) "Clarity" as defined by Government Code section

11349(c) means "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." "Clarity" is further defined in California Code of Regulations, title 1, section 16(a):

> In examining a regulation for compliance with the "clarity" requirement of Government Code section 11349.1, OAL shall apply the following standards and presumptions:
>
> > (a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exists:
> >
> > (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning . . . .

Because the Proposed Regulations contain so many vagaries, the regulated community cannot know how they may be required to comply. The Council has an obligation to provide clear and complete regulations for public review and comment such that their requirements are readily apparent. The following examples illustrate where the Proposed Regulations do not satisfy that obligation.

Subsection 5001(s): As noted above, the Initial Statement of Reasons states that the definitions in section 5001 "are necessary to clarify the meaning of terms used in the regulations." (Initial Statement of Reasons at p.2.) However, the proposed definition of "significant impact" is confusing. Subsection 5001(s) does not explain what would constitute a "*substantial* impact on the achievement of one or both of the coequal goals," which is a key component of the proposed definition of "significant impact." (Emphasis added.) Thus, in addition to being unnecessary and inconsistent with controlling law, subsection 5001(s) lacks clarity.

Section 5009: The Proposed Regulation states that "[s]ignificant impacts to the opportunity to restore habitat at the elevations shown in Appendix 4 must be avoided or mitigated." It is unclear what constitutes an "opportunity to restore habitat," and how such an "opportunity" might be the subject of a potentially significant impact (which much be a physical impact under controlling law). (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, §§15358, 15382.) Further, it is unclear how the proposed mandatory language requiring that "opportunity" impacts "must be avoided or mitigated" is to be satisfied.

IV. DEFICIENCIES WITH COST ANALYSIS

The Cost Analysis of the DSC proposed regulations contains analytical errors, errors of omission, and simply ignores significant costs.

A. The Cost Analysis Does Not Adequately Explain the Assumption of No Cost to Comply with Existing Regulations

The proposed regulations are based on an apparent assumption that the Proposed Regulations merely duplicate, and do not add to the substantive requirements of existing law, so the costs of the proposed regulations would occur in any case. That assumption is not explicitly stated or supported by

citations to law. Thus, the assumption that particular results of the regulations are already defined in law, and thus generate no costs, is unsupported. To the extent that the Proposed Regulations add substantive mandates, as demonstrated above, the assumption is inaccurate.

B. The Cost Analysis Greatly Underestimates the Cost of Complying with the Proposed Regulations

Most simply put, the cost analysis is limited to administrative costs of compliance with the Proposed Regulations; thus, it fails to address the larger direct and indirect economic and social costs associated with application of the regulations as written.

The Proposed Regulations fail to consider:

- Costs (both opportunity and direct costs) due to delays in private projects for consistency determinations;
- Costs due to delays that result in the abandonment of projects;
- Costs due to appeals regarding consistency certifications, and the lack of clear definition of many of the terms of the regulation lend themselves to interminable, hyper-technical legal challenges based on differing interpretations of vague and ambiguous provisions;

Also, the cost analysis ignores the costs associated with the mandatory reductions in the quantity of water conveyed through the Delta, and in reductions in water used from within the Delta watershed set forth in Section 5005 of the Proposed Regulations. The economic and social costs of those reductions are severe. The Public Water Agencies' prior letter regarding the Delta Plan Draft Program Environmental Impact Report, dated February 2, 2012, discusses the work of economists from U.C. Davis and the University of the Pacific, which concluded that in 2009, as a result of a relatively dry hydrology and water supply restrictions imposed on the State Water Project and Central Valley Project, the San Joaquin Valley population lost as many as 7,434 jobs, more than $278 million in income, and more than $368 million in overall economic output. (Michael J., et al. 2009. A Retrospective Estimate of the Economic Impacts of Reduced Water Supplies to the San Joaquin Valley in 2009 (Sep. 28, 2010).) Additional support can be found in several court decisions. (*Delta Smelt Consol. Cases* (E.D. Cal. 2010) 717 F.Supp.2d 1021, 1052; *Consol. Salmonid Cases* (E.D. Cal. 2010) 713 F.Supp.2d 1116, 1148; *San Luis & Delta-Mendota Water Authority v. Salazar (Delta Smelt Consol. Cases)* (E.D. Cal. 2009) 2009 WL 1575169 at *5-6.)

To the extent the proposed regulations assume the reductions in the quantity of water conveyed through the Delta would be "offset" by localized actions, the cost analysis does not identify costs associated with those other actions. For example, if the offset is to occur with increased production of groundwater, the cost analysis does not consider the cost of overdrafting groundwater basins.

C. The Cost Analysis Erroneously Interprets Habitat Restoration as No Cost

The cost analysis assumes that all habitat restoration will result from the operation of CEQA. There is no basis for this assumption, as nowhere in the Proposed Regulations are habitat restoration goals tied to those required to fulfill CEQA obligations to implement feasible alternatives or mitigation measures to address significant environmental impacts. As a result, the cost analysis improperly assumes no cost for habitat restoration that may be required as a result of the Proposed Regulations.

Further, the related requirement to protect opportunities to restore habitat imposes additional opportunity and direct costs, as use of private property may be affected by restoration effort mandates. The discussion in the cost analysis focuses on areas that are currently regulated to justify its finding of no additional costs, but fails to examine the costs associated with those areas which are not currently regulated.

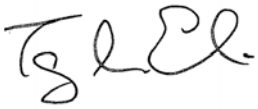
D. The Cost Analysis Ignores Potential Costs Associated with Implementing the Requirements to Reduce Reliance on Delta Watershed Water to Meet Future Water Supply Needs

While existing law may require regions to improve water conservation, groundwater management, and multiple other water use changes (see Wat. Code, § 10608 et seq.), Section 5005 of the Proposed Regulations threatens loss of water supply for failing to meet certain reductions in water used from the Delta watershed. The Proposed Regulations state, if a region fails to '"adequately contribute," to water use reductions,[10] those within that region may not receive water from within the Delta, or conveyed through the Delta. If restrictions on water supply are imposed pursuant to Section 5005, such draconian consequences will drive significant expenditures beyond what is currently underway. Conversely, those regions which have already significantly complied with the requirements may have limited ability to further reduce their demand. Those regions may lose opportunities to have sufficient water to meet demands or be forced to spend large sums of money on projects that are not otherwise cost-effective. Thus, the Council has yet to analyze the economic costs associated with the implementation of Section 5005.

[10] "Adequately contribute" is undefined. Thus, the cost of compliance may be unknowable. However, the Council cannot promulgate an unlawfully vague and ambiguous regulation, then use the vagueness and ambiguity as an excuse not to conduct the required economic analysis of the impact of implementing the Proposed Regulations.

For all the reasons stated above, the Proposed Regulations including the Cost Analysis are fundamentally flawed and should be revised and recirculated for public comment.

Sincerely,



Daniel G. Nelson
Executive Director
San Luis & Delta-Mendota Water Authority

Terry L. Erlewine
General Manager
State Water Contractors

ATTACHMENT 1

The State Water Contractors (SWC) represents 27 public agencies that contract with the State of California for water from the State Water Project (SWP). These agencies are each organized under California law and provide water supplies to nearly 25 million Californians and 750,000 acres of prime farmland from Napa County to San Diego and points between.

The San Luis & Delta-Mendota Water Authority (SLDMWA), which was formed in 1992 as a joint powers authority, consists of 29 member agencies, 27 of which contract with the United States Department of the Interior, Bureau of Reclamation (Reclamation), for supply of water from the federal Central Valley Project (CVP). SLDMWA's member agencies hold contracts with Reclamation for the delivery of approximately 3.3 million acre-feet of CVP water. CVP water provided to SLDMWA's member agencies supports approximately 1.2 million acres of agricultural land, as well as more than 100,000 acres of managed wetlands, private and public, in California's Central Valley. SLDMWA's member agencies also use CVP water to serve more than 1 million people in the Silicon Valley and the Central Valley.

SLDMWA Member Agencies:	SWC Member Agencies:
Banta-Carbona Irrigation District Broadview Water District Byron Bethany Irrigation District (CVPSA) Central California Irrigation District City of Tracy Del Puerto Water District Eagle Field Water District Firebaugh Canal Water District Fresno Slough Water District Grassland Water District Henry Miller Reclamation District #2131 James Irrigation District Laguna Water District Mercey Springs Water District Oro Loma Water District Pacheco Water District Pajaro Valley Water Management Agency Panoche Water District Patterson Irrigation District Pleasant Valley Water District Reclamation District 1606 San Benito County Water District San Luis Water District Santa Clara Valley Water District Tranquility Irrigation District Turner Island Water District West Side Irrigation District West Stanislaus Irrigation District Westlands Water District	Alameda County Flood Control and Water Conservation District Zone 7 Alameda County Water District Antelope Valley-East Kern Water Agency Casitas Municipal Water District Castaic Lake Water Agency Central Coast Water Authority City of Yuba City Coachella Valley Water District County of Kings Crestline-Lake Arrowhead Water Agency Desert Water Agency Dudley Ridge Water District Empire-West Side Irrigation District Kern County Water Agency Littlerock Creek Irrigation District Metropolitan Water District of Southern California Mojave Water Agency Napa County Flood Control and Water Conservation District Oak Flat Water District Palmdale Water District San Bernardino Valley Municipal Water District San Gabriel Valley Municipal Water District San Gorgonio Pass Water Agency San Luis Obispo County Flood Control and Water Conservation District Santa Clara Valley Water District Solano County Water Agency Tulare Lake Basin Water Storage District