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April 22, 2013

Phil Isenberg, Chairman
Council Members
Chris Knopp, Executive Officer
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

VIA E-MAIL

Re: Modified Proposed Rulemaking Documents

Dear Chairman Isenberg, Council Members, and Mr. Knopp:

As a response to the Delta Stewardship Council's Modified Proposed Rulemaking Documents, San Joaquin County reiterates the comments, observations, suggestions and objections set forth in its January 14, 2013, letter, and attachments thereto, to the Delta Stewardship Counsel regarding the Proposed Rulemaking and related documents. This reiteration is made notwithstanding some of the changes in the Modified Proposed Rulemaking documents because, while some deletions addressed our concerns, many more concerns and objections were not addressed or eliminated as most of the changes from the original Proposed Rulemaking and related documents merely consolidated objectionable and legally faulty language elsewhere in the relevant documents, or substituted equally objectionable and legally faulty language in the relevant documents.

Accordingly, San Joaquin County's January 14, 2013, letter (with attachments) is again submitted as though fully set forth herein, including those submittals of Yolo and Solano Counties which were incorporated into San Joaquin County's letter by reference, regardless of any further changes in those Counties' submittals that may be made in response to the Modified Proposed Rulemaking Documents. As well, San Joaquin County concurs in the submitted objections and comments of Yolo County, set forth in its April 22, 2013, letter regarding the Modified Proposed Rulemaking Documents, and adopts those objections and comments by reference as though full set forth herein.

Sincerely,

Frank L. Ruhstaller
Member of the Board of Supervisors
San Joaquin County

Attachments (nine)

- c: San Joaquin County State Delegation
 - Paul Yoder, State Advocate
 - Karen Lange, State Advocate
 - Mark Limbaugh, Federal Advocate
 - Roger Gwinn, Federal Advocate
 - Delta Counties Coalition
 - Rosa Lee, SJC Interim County Administrator
 - Elena Reyes, SJC County Administrator's Office
 - David Wooten, SJC County Counsel
 - Tom Gau, SJC Public Works Department
 - Kerry Sullivan, SJC Community Development Department
 - Scott Hudson, SJC Agricultural Commissioner
 - Michael Cockrell, SJC Office of Emergency Services

BOS10-04



LOIS M. SAHYOUN
Clerk of the Board

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January 14, 2013

Phil Isenberg, Chairman
Council Members
Chris Knopp, Executive Officer
Delta Stewardship Council
650 Capitol Mall, Fifth Floor
Sacramento, CA 95814

VIA E-MAIL

Comments to Delta Stewardship Council – Final Draft Delta Plan, DPEIR and Proposed Regulations

Dear Chairman Isenberg, Council Members, and Mr. Knopp:

On behalf of the residents of San Joaquin County and the San Joaquin County Board of Supervisors, we would like to thank you for the opportunity to submit comments on the Delta Stewardship Council's (DSC) Final Draft Delta Plan, the Recirculated DPEIR, and the Proposed Regulations and Rulemaking Process. With nearly two-thirds of the Delta located within San Joaquin County, we remain very concerned about the protection of water quantity and quality available within the Delta. We are equally concerned about the potential negative effects that additional planning and regulatory processes may have on the County's communities, land use, flood protection, infrastructure, agriculture, economy, recreation, wildlife, and our way of life.

San Joaquin County strongly urges the DSC to take seriously the comments provided herewith including those previously submitted by the County concerning earlier versions of the Draft Delta Plan and the DPEIR. It is imperative that the DSC's future actions with regard to the Delta Plan and related documents and actions meaningfully address these comments.

The County's specific comments to the Final Draft Delta Plan, the Recirculated DPEIR, and the Proposed Regulations and Rulemaking Process are attached hereto and submitted herewith.

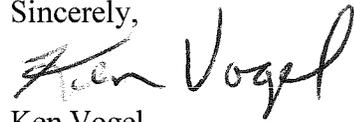
Thank you for your attention and consideration on this critical matter. If you have any questions

Phil Isenberg, Chairman, Council Members, and Chris Knopp
Delta Stewardship Council
Re: San Joaquin County's Comments on the Final Draft Delta Plan,
DPEIR and Proposed Regulations

January 14, 2013
Page 2

regarding this topic, please contact Tom Gau, Public Works Director at (209) 468-3101.

Sincerely,



Ken Vogel
Chairman, Board of Supervisors
San Joaquin County

Attachment

- c: San Joaquin County State Delegation
 - Paul Yoder, State Advocate
 - Karen Lange, State Advocate
 - Mark Limbaugh, Federal Advocate
 - Roger Gwinn, Federal Advocate
 - Delta Counties Coalition
 - Manuel Lopez, SJC County Administrator
 - David Wooten, SJC County Counsel
 - Tom Gau, SJC Public Works Department
 - Kerry Sullivan, SJC Community Development Department
 - Scott Hudson, SJC Agricultural Commissioner
 - Gabe Karam, SJC Office of Emergency Services

BOS10-04

General Comments re Proposed Regulations

The proposed Regulations contain a fundamental flaw in that they do not recognize that certain existing water right holders have preferential or priority rights over other water users. The basis of California water law is premised on an established priority system where shortages among competing water right holders are resolved based on water right priorities. The Delta Reform Act expressly states that the Act does not diminish, impair, reduce, or otherwise affect the State's water right priority system. Wat. Code § 85031. As written, the proposed Regulations conflict with the current law by ignoring the water right priority system and the relevant protective statutes.

California Water Rights and Priority System

California's water rights operate under a dual system that recognizes both riparian water rights and appropriative water rights. The riparian doctrine confers on the owner of land the right to divert and use the water flowing by that land for use on the land adjacent to the watercourse without regard to the priority in time of such use. Riparians are vested in common ownership of the water within a watercourse and in times of water shortages all riparians must reduce their usage proportionally. *United States of America v. State Water Resources Control Board* (1986) 182 Cal.App.3d 82, 101 (*Racanelli*). Riparians have no right to specific amount of water. Rather, they enjoy a correlative share of the natural flow. In times of shortages all riparians must share the available water. *Racanelli* at 104.

During the Gold Rush era, the appropriative system of water rights emerged so that water could be used on land that was not riparian. The appropriation doctrine confers upon one who actually diverts and uses water the right to do so provided that the water is used for reasonable and beneficial uses and is surplus to that used by riparians or earlier appropriators. *Racanelli* at 101. Originally, appropriative water rights were perfected by actual diversion and use of the water. It was possible, but not necessary, to file a recording of such water right with the County Recorder. In 1914, the appropriative permit system was established as the exclusive method of acquiring appropriative water rights. As such, appropriative water rights consist of both pre-1914 water rights by appropriation which occurred prior to 1914 and post-1914 appropriative water rights by permit. The State Water

Resources Control Board and its predecessors have had exclusive jurisdiction to grant an appropriative water right permit. Once the appropriative water right is granted, the appropriator has the right to take and use the water subject to the conditions of the permit. Water Code §§1381, 1455; *Racanelli* at 102.

Appropriation rights are subordinate to riparian rights so that in times of shortage, riparians are entitled to fulfill their needs before appropriators are entitled to *any* use of the water. *El Dorado Irr. Dist. v. SWRCB* (2006) 142 Cal.App.4th 937, 961 (citing *Racanelli* at 102) (emphasis added). And, as between appropriators, the rule of priority is "first in time, first in right". *Racanelli* at 102; see *Irwin v. Phillips* (1855) 5 Cal. 140, 147. The senior appropriator is entitled to fulfill its needs before the junior appropriator is entitled to use any water. *Racanelli* at 102; see *Phelps v. SWRCB* (2007) 157 Cal.App.4th 89, 118.

All users are limited by the Constitutional principle of reasonable use, even riparians. Riparians and appropriators alike are subject to the universal limitation that water use must be reasonable and for a beneficial purpose. Cal. Const., art. X, § 2; *Racanelli* at 105. However, even in the application of the Reasonable Use Doctrine the priority system of California water law must be considered. *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1250.

Thus, riparians take first and in the entire amount to fulfill the riparians' reasonable and beneficial uses, subject only to the correlative rights of other riparians. Then, senior appropriators may take from any surplus, followed by more junior appropriators. Competing demands for water by water right holders are properly resolved by applying the priority system, not by balancing.

With respect to the Delta, any reductions in use of Delta waters required by the Delta Plan and accompanying proposed Regulations must adhere to this priority hierarchy. That is, reductions must first be borne by the most junior appropriator up to the entire amount of the water right permit before the water right holder of the next highest priority is affected.

Protection Statutes

In conjunction with the system of water right priorities, California has enacted several statutes to protect the water rights of residents in areas of origin. These area of origin statutes include the Watershed Protection Act (Water Code §§ 11460 et seq.), the Delta Protection Act (Water Code §§ 12200 et seq.), the County of Origin protection (Water Code §§ 10500 et seq.), and protected area provisions (Water Code §§ 1215 et seq.).

The Watershed Protection Act was passed in 1933 as part of the Central Valley Project Act and ensures that water users within a watershed of origin will not be deprived of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein. Wat. Code § 11460. The provision was initially intended to apply to the Department of Water Resources, but was made applicable to the Federal Bureau of Reclamation under Water Code § 11128. Thus, the Bureau's CVP operation must not deprive water right holders in the Delta watershed the use of water originating therein necessary to supply all of the watershed's beneficial needs.

The Delta Protection Act of 1959 was enacted to ensure that water right holders within the legal Delta have an adequate supply of good quality water. The Act requires that the CVP and the SWP coordinate to provide salinity control and an adequate water supply for the users of water in the Sacramento-San Joaquin Delta. Wat. Code § 12202. The Bureau and DWR are required to release stored water to meet salinity requirements set by the SWRCB to ensure that Delta water users have access to water sufficient to maintain and expand agriculture, industry, urban and recreational development in the Delta. Wat. Code § 12201; see *Racanelli* at 139. Further, no person, corporation, or public or private agency should divert water from the Delta to which the users within the Delta are entitled. Wat. Code § 12203. No water shall be exported if needed to meet the above requirements. Wat. Code § 12204. Thus, the Act prohibits exports if Delta water right holders are not first able to receive all the water to which they are entitled under those rights.

The County of Origin protection was enacted in 1931 as an amendment to the Feigenbaum Act which authorized the State to obtain rights to unappropriated water. The enacted statutes ensure that water appropriated

by the State will not be transferred for use outside the County of Origin when such water is necessary for the development of the County. Wat. Code § 10505.5. Several Counties of Origin exist within the Delta watershed and such Counties may not be deprived water necessary for County development by DWR's SWP operations.

The protected area statutes were enacted in 1984 and mandate that water exporters shall not deprive the statutorily protected areas of the prior right to all the water reasonably required to adequately supply the beneficial needs of the protected area, or any of the inhabitants or property owners therein. Wat. Code § 1216. Water users in the protected area may obtain a water right that is senior in priority over the rights of an exporter. Wat. Code § 1217. The Delta is specifically named as a protected area. Wat. Code § 1215.5. Thus, any Delta water right holder's beneficial and reasonable use has priority senior to that of any exporter. Therefore, under the State's priority system, any required reductions of Delta water use must first be borne by exporters before any Delta water right holders are affected.

Impact of Proposed Regulations on Agriculture

Although recent drafts of the Delta Plan have discussed the subject of "covered actions" in more detail than previous drafts, there remains much ambiguity. Due to the lack of specificity in the Plan's description of covered actions, the types of activities that may be covered actions could be open to different interpretations. Because of this ambiguity, potential impacts the "covered actions" provisions of the Plan may have on Delta agriculture is difficult to assess. However, using the Plan's definition of "covered actions", there are two examples of already highly regulated farming practices that may be considered covered actions. They are applications of restricted pesticides and irrigation water discharge.

Because growers are required to obtain permits from County Agricultural Commissioners before using restricted pesticides, some may argue that the use of restricted pesticides in the Delta is considered a "covered action." Presently, the California Department of Pesticide Regulation and the

County Agricultural Commissioners have sole authority and responsibility over the use of pesticides in California. Pesticide use in California is subject to Division 6 and 7 of the California Food and Agricultural Code. However, as a covered action, restricted pesticide use in the Delta may now be deemed to require certification of consistency with the Delta Plan and approval by the Delta Stewardship Council if the certification is challenged. Consequently, the Delta Plan and these proposed Regulations become a new body of law governing pesticide use and the Delta Stewardship Council could be deemed to be new authority for authorizing pesticide usage.

Presently, staff in the County Agricultural Commissioners' offices has neither the expertise nor the training to certify restricted pesticide consistency with the Delta Plan. Additionally, there are no established criteria or guide to help them with this certification task. It is also unclear whether every permit that is issued requires a separate evaluation as to its consistency with the Delta Plan or whether the general use of restricted pesticides in the Delta is granted a blanket certification of consistency (or non-consistency).

In addition to the possible covered actions impacts on the use of restricted pesticides in the Delta, the ability for growers to discharge their irrigation waters into the Delta may also be impacted. Presently, the California Regional Water Quality Control Board allows growers to discharge irrigation water into the "waters of the state" under the conditions of an "agricultural waiver." Since irrigation discharge is permitted by a State agency, the CRWQCB Region 5 agricultural waiver may require certification of consistency with the Delta Plan before Delta growers discharge irrigation water under the terms of the waiver.

Adding another regulatory requirement to these and other permitted activities potentially puts an unnecessary regulatory burden on already highly regulated and protective activities. Furthermore, the Delta Stewardship Council has no authority in regulating pesticides or irrigation water discharge. There are other agencies dealing with these issues and they already have in

place the authority, laws and permitting processes to protect the environment and water quality.

Specific Comments re Proposed Regulations:

A. Proposed Regulation Article 1, Section 5001 Definitions

1. As to Section 5001(e)(3), San Joaquin County concurs in the submitted objections and comments of Solano County and Yolo County regarding this definitional language and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.

2. As to Section 5001(i), San Joaquin County concurs in the submitted objections and comments of Solano County and Yolo County regarding this definitional language and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.

3. As to Section 5001(l), San Joaquin County concurs in the submitted objections and comments of Solano County regarding this definitional language and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.

4. As to Section 5001(s), San Joaquin County concurs in the submitted objections and comments of Solano County regarding this definitional language and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.

5. As to Section 5001(n), San Joaquin County concurs in the submitted objections and comments of Yolo County regarding this definitional language and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.

6. As to Section 5003, San Joaquin County concurs in the submitted objections and comments of Solano County and Yolo County regarding this definitional language and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.

B. Policy G P1 "Detailed Findings to Establish Consistency with the Delta Plan"; Proposed Regulation Article 2, Section 5004.

1. This proposed Regulation is inconsistent with and intrudes upon the authority of CEQA. Additionally, the proposed Regulation usurps the authority of the Legislature to enact or amend laws dealing with the subject matter of the Regulation.

2. This proposed Regulation is, in many respects, unclear and internally inconsistent. For one example, among many, Section 5004 (b) (3) reads as follows: "As relevant to the purpose and nature of the project, all covered actions must document use of best available science (as described in Appendix 1A);" Precisely what does "must document" mean? Does it mean that those who are certifying consistency simply state that best available science was or was not used? Does it mean that those who are certifying consistency must show what was used as the best available science? Does it mean that those who are certifying consistency simply refer to peer-reviewed publications which may justify the certification conclusions? The language of this proposed Regulation, while certainly wordy, is so vague as to leave those who are subject to the regulation guessing as to their obligations under this proposed Regulation.

3. This proposed Regulation is not reasonably necessary because the Delta Plan and this proposed Policy do not sufficiently ascertain what the Delta's baseline conditions are, in terms of water quality and quantity, environmental conditions, and economic conditions, such that the proposed Regulation would protect and enhance, even though such information was developed in the peer-reviewed Economic Sustainability Plan adopted by the Delta Protection Commission. California case law requires that proposed regulations are to be based on developed substantial evidence showing the necessity for the regulation rather than a requirement that parties covered by

the regulation gather the evidence necessary to support the proposed regulation in the first place.

4. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.

5. All non-ministerial projects within both the Primary and Secondary Zones of the Delta will be subject to the determination of whether or not they meet the definition of covered action. If they are determined to be a covered action, the Community Development Department of San Joaquin County (Department) will be required to file a certification of consistency. The certification of consistency will require the Department to make specific findings of consistency with both the coequal goals of the Delta Plan, and each of the proposed Regulations articulated in Article 3 implicated by the covered action. As San Joaquin County has stated in comments on previous versions of the Delta Plan, the preparation of the certification of consistency and underlying findings will be costly and time-consuming to both the project applicant and Department.

The Department likely will have to require the project applicant to prepare and submit draft consistency findings based upon best available science for Department consideration, and then base the consistency certification upon those draft consistency findings. In turn, this likely will require applicants to retain a consultant to prepare the draft consistency findings. This will be expensive and time-consuming and subject to appeal to the Delta Stewardship Council. The planning and permitting process in California is often criticized for being cumbersome, complicated, expensive and lengthy. These new requirements will serve to make the situation worse.

Section 5005(b)(5), contains vague and confusing language that requires the local agency to include in the certification of consistency a certification that the covered action complies with all applicable laws regarding water resources, biological resources, flood risk, and land use and planning. Based upon this language, it appears that the Department will be responsible for enforcement of measures required to make findings of consistency upon which to base the certification of consistency. It would then

follow that such measures would need to be incorporated into project approval, prior to certification, so that they can be enforced. In order to do this, the best available science will need to be done prior to project approval, so that measures ensuring consistency can be identified during the CEQA process, and incorporated into project approval. Accordingly, the expense of "best available science" will be incurred by the applicant before the applicant even has an approved project.

6. As to Section 5004(b)(2), San Joaquin County concurs in the submitted objections and comments of Yolo County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.

7. As to Sections 5004(a) and (b)(5), San Joaquin County concurs in the submitted objections and comments of Solano County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.

C. Policy WR P1 "Reduce Reliance on the Delta and Improve Regional Self-Reliance"; Proposed Regulation Article 3, Section 5005.

1. This proposed Regulation is inconsistent with and violates established California water rights and priorities laws, California area of origin laws, and California County of origin laws. It divests holders of established water rights of their property and is inconsistent with and contravenes the common pool standard for the Delta. It also is inconsistent with and intrudes on the authority of entities and agencies vested with regulatory and adjudicatory authority with respect to water rights and entitlements.

The State Water Resources Control Board and the courts have exclusive jurisdiction over California water rights. Amending or restricting a valid water right is not within the scope of the Stewardship Council's authority. Thus, the required reductions and prohibitions contained in the regulations are not enforceable by the Council. The regulations should only include measures authorized by the State Legislature under the Delta Reform Act.

2. This proposed Regulation is, in many respects, vague, unclear and internally inconsistent. For instance, the proposed Regulation relies on definitions which are circular (Section 5001(s): "significant impact" is defined as "substantial impact"). Moreover, the "significant impact" definition refers to a change in baseline conditions but the Delta Plan prescribes no baseline conditions, leaving the proposed Regulation meaningless and unenforceable.

3. This proposed Regulation is unreasonable and creates a significant statewide adverse impact directly affecting business and no reasonable alternative has been proposed. Pursuant to the language of the proposed Regulation, if one water supplier, as defined, fails to meet the prescriptions of the proposed Regulation and does not fall within any exemption specified in the proposed Regulation, then no water shall be exported from, transferred through, or used in the Delta, even by other water suppliers or water users, including those who have legally-protected rights to such water or who are meeting the requirements of the proposed Regulation.

4. This proposed Regulation, and the Delta Plan document upon which it relies, fails to demonstrate that it is the least burdensome effective alternative necessary to carry out the purpose of the proposed Regulation or to meet the co-equal goals of the Delta Reform Act. Additionally, this proposed Regulation could, but does not, provide measurable standards (rather than regulatory prescriptions) by which those covered under the Regulation would be deemed to be consistent with the provisions of the Delta Plan and the Delta Reform Act.

5. The proposed Regulations are fundamentally flawed because they do not comply with the State's water right priority system and enacted protective statutes. Proposed Regulation Section 5001 states that the required reduced reliance on the Delta, for the purpose of achieving the co-equal goals, will be consistent with the existing water rights and the State's area of origin statutes. However, the proposed Regulations set forth requirements that ignore the current law and make no reference to the priority rights system.

Proposed Regulation Section 5005 requires reduced reliance on the Delta through improved regional self-reliance and significant reductions in the amount of water used from the Delta watershed. That Section purports to prohibit the export, transfer, or use of water in the Delta unless a receiving

water supplier adequately contributes to the reduced reliance on the Delta. Such prohibition may result in additional reductions by a water right holder. Under the water right priority system, any reductions must first be borne by the most junior water right holder. A senior water right holder is not required to reduce the amount of water used unless all junior holders have eliminated their use completely. To be consistent with existing water rights, as the proposed Regulations attest to be, reductions must first be required of junior appropriators, then more senior appropriators, and then riparians. Balancing the burden and requiring all water rights holders to share in the reductions rather than basing reductions on the hierarchy of water right priority is inconsistent with California water law. Thus, the proposed Regulations should clarify that any reduction of water use by water right holders will follow the priority system.

Further, the proposed Regulations fail to comply with the relevant protection statutes. The Watershed Protection Act prohibits the Bureau from depriving Delta watershed water right holders the use of water originating in the watershed needed for beneficial use. Any required reduction by a water right holder within the Delta watershed of water needed for beneficial use while the Bureau maintains any water exports of Delta watershed water through CVP operation is inconsistent with the Watershed Protection Act. The proposed Regulations do not recognize this protection for water rights holders within the Delta watershed. The Delta Protection Act prohibits any diversions from the Delta of water to which in-Delta water users are entitled. Permitting any diversions of Delta water from the Delta while any in-Delta water right holder is required to reduce the use of Delta water to which they are entitled is inconsistent with the Delta Protection Act. The proposed Regulations do not recognize this protection for in-Delta water right holders. The "protected area" statutes similarly prohibit exports from the Delta to the detriment of in-Delta water users. In-Delta water users are ensured senior priority over the rights of an exporter. Again, the proposed Regulations do not recognize this protection for in-Delta water users because the water right priority system is absent.

Beyond the failure of the proposed Regulations regarding California water rights, the proposed Regulations create an impossible standard for regions within the Delta watershed. The proposed Regulations state that achieving the co-equal goal of providing a more reliable water supply for

California means regions that use water from the Delta watershed will reduce their reliance on this water for reasonable and beneficial uses and improve regional self-reliance. The proposed Regulations simultaneously require reduced use of water from the Delta watershed and improved regional self-reliance. For regions within the Delta watershed, the two prongs of the requirement contradict each other. Required self-reliance by those within the Delta watershed necessarily requires continued use of that region's Delta water. The Commission should redraft the proposed Regulations in a manner that allows water users in the Delta watershed to effectively participate in the Delta Reform effort.

6. The proposed Regulations also fail to provide all water users with a means for demonstrating reduced reliance on the Delta. A water supplier is presumptively contributing to reduced reliance on the Delta if it completes an Urban or Agricultural Water Management Plan and identifies and implements locally cost-effective and technically feasible programs set forth in the plan. However, not all water users that are required to reduce reliance must adopt such plans. The proposed Regulations should identify how non-water suppliers—particularly in-Delta users, many of which are individual farmers—may evidence their reduced reliance on the Delta and improved regional self-reliance.

The proposed Regulations state that the policy of the State of California is to reduce reliance on the Delta. However, the proposed Regulations also state that success in achieving that policy is demonstrated through a reduction in use of water from the Delta watershed. The Delta and the Delta watershed are two vastly different demarcations with the latter encompassing the former, but also extending through the Sacramento River and San Joaquin River hydrological regions. Requiring reduced reliance on the Delta is not the same as requiring a reduction in use of water from the Delta watershed. The proposed Regulations should clarify that the geographic scope they purport to regulate is only the legal Delta and not the entire Delta watershed. Regulating outside the legal Delta is beyond the authority of the Commission. The Delta Reform Act limits the geographic scope of the Delta Plan to the Delta except that the Plan may make *recommendations* for projects outside the Delta or identify actions to be taken outside the Delta only if such actions significantly reduce flood risks in the Delta. Wat. Code §§ 85302, 85307. Nevertheless, if

the proposed Regulations are intended to cover the Delta watershed, that should be stated clearly and unconditionally.

7. This proposed Regulation is confusing and, if strictly interpreted, impracticable and unenforceable. As a reasonable person would understand this proposed Regulation, all three conditions stated in the proposed Regulation must occur before water export, transfer or use by a water supplier can be prohibited. Pages 2-4, lines 7-23 of the Delta Plan's recirculated PEIR appears to support this assessment. If this is the case, then a water supplier may export water during a dry year even though a significant adverse environmental impact in the Delta may occur as long as the supplier has a water management plan in place with scheduled water-saving projects. On the flip side, the policy seems to read that if water export does not result in a significant adverse environmental impact in the Delta, then no management plan is required for the water export. This seems counter to what WR P1 is trying to accomplish. Policy WR P1 may actually make water exports from the Delta easier because water suppliers do not have to worry about environmental concerns if they have implemented a water management plan. This is not consistent with the Delta Plan's co-equal goal of a reliable water supply (for the Delta).

D. Policy ER P1 "Update Delta Flow Objectives"; Proposed Regulation Article 3, Section 5007.

1. This proposed Regulation, based on the language used therein, is not necessary. The operative words of the proposed regulation are "should" (Section 5007(a)) and "could" (Section 5007(b)). The proposed Regulation recites that development, implementation and enforcement of new and updated flow objectives are key to the achievement of the co-equal goals of the Delta Reform Act. Yet the language of the proposed Regulation is simply a recommendation to the State Water Resources Control Board.

2. This proposed Regulation is vague and unclear and internally inconsistent. While the proposed Regulation recites that new and updated flow objectives are the key to achievement of the co-equal goals of the Delta Reform Act, and while the purpose of the Delta Plan, with which this proposed

Regulation requires consistency, is to meet those co-equal goals, proposed Regulation sub-Section (c) requires reference to flow standards which are themselves inconsistent with the Delta Reform Act and the Delta Plan itself.

3. This proposed Regulation, specifically sub-Section (d), is not "clearly understandable", as required by rulemaking review standards. When the references to the Delta Reform Act, cited in the proposed Regulation, sub-Section (d), are literally parsed out and included in the language of the proposed Regulation, the result is a confusing, circular, and vague directive. It leaves those covered by the proposed Regulation, and those assessing consistency with the proposed Regulation, to guess at its meaning, application, and effect.

4. Proposed Section 5007 states that flow objectives could be implemented through several mechanisms including negotiation and settlement. Pursuant to the Porter-Cologne Water Quality Control Act, setting flow objectives for the Delta is solely within the jurisdiction of the State Water Resources Control Board. Subsequently, the Board has exclusive jurisdiction to implement the flow objectives by amending existing water rights. Given the Board's solitary authority regarding flow objectives, negotiation and settlement is not an appropriate mechanism.

5. The Delta Plan continues to move towards implementation without revised flow objectives. This proposed Regulation states that revised flow objectives are key to the achievement of the co-equal goals. The Delta flow update must be completed before the Delta Plan's full environmental impacts can be determined. Therefore, until the SWRCB's flow objectives and criteria update are completed, the proposed Regulations dealing with or impacting Delta flows, as well as the related Delta Plan and recirculated PEIR must remain in "draft" form and be the subject of additional public review when the Delta flow update is completed.

E. Policy ER P2 "Restore Habitats at Appropriate Elevations"; Proposed Regulation Article 3, Section 5008.

1. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.

2. This proposed Regulation, specifically sub-Section (b)(1), is not "clearly understandable", as required by rulemaking review standards.

3. As to Section 5008, San Joaquin County concurs in the submitted objections and comments of Solano County and Yolo County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.

F. Policy ER P3 "Protect Opportunities to Restore Habitat"; Proposed Regulation Article 3, Section 5009.

1. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.

2. In San Joaquin County's portion of the Delta, the priority habitat restoration areas are the Lower San Joaquin River Floodplain and a portion of the Cosumnes and Mokelumne Rivers confluence. Presently, the land use in these areas is predominately agriculture encompassing thousands of acres of agricultural land. This proposed Regulation could substantially affect the ability of growers to change their farming operations to sufficiently meet changing market, environmental, or regulatory demands in perpetuity. Additionally, designating these lands as priority habitat restoration areas has a potential to devalue the land and could result in less flexibility regarding land use. Farmers may not be able to plant higher value crops or build needed structures to support their farming operations. The designation may also adversely impact values and flexibility on adjacent lands. Neither the recirculated PEIR nor the Delta Plan adequately addresses the potential impacts to agriculture on lands designated as priority habitat restoration areas.

3. As to Section 5009, San Joaquin County concurs in the submitted objections and comments of Solano and Yolo County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.

G. Policy ER P4 "Expand Floodplains and Riparian Habitats in Levee Projects"; Proposed Regulation Article 3, Section 5010.

1. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.

2. Levee projects must evaluate and, where feasible, incorporate alternatives, including use of setback levees, to increase floodplains and riparian habitats. When available, the criteria developed under the Delta Plan's RR R7 must be used to determine appropriate locations for setback levees. This proposed Regulation covers a proposed action to construct new levees or substantially rehabilitate or reconstruct existing levees.

It is unclear from the Delta Plan how the new wetlands and floodplains created by the setback levees will be managed. Who is responsible for managing the wetlands and floodplains and who will pay the cost of management? Requiring already financially challenged Reclamation Districts to build and maintain setback levees and the wetlands they create could make levee maintenance cost prohibitive for many Districts. Additionally, poorly managed wetlands caused by insufficient funds and/or expertise could adversely affect neighboring agricultural lands by serving as a reservoir for harmful insects, noxious weeds, disease, and rodents. If the Delta Plan requires setback levees to increase wetlands and floodplains, then it should also identify responsible parties and funding sources for managing them into perpetuity.

H. Policy ER P5 "Avoid Introductions and Habitat Improvements that Enhance Survival and Abundance of Nonnative Invasive Species"; Proposed Regulation Article 3, Section 5011.

1. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.

I. Policy DP P1 "Locate New Development Wisely"; Proposed Regulation Article 3, Section 5012.

1. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.

2. Sub-Section 5012(a) states that new urban development including residential, commercial and industrial uses, must be limited to certain areas. These include areas within the City of Stockton's or County's General Plans as of the date of the Delta Plan adoption which areas are designated for development in Cities or are shown in their adopted spheres of influence. This requirement is confusing and may lead to implementation problems because the proposed Regulation appears to use the term "uses" synonymously with the term "General Plan designation." How land is actually used may be somewhat different than the specific General Plan designation language. For instance, land may be designated in the General Plan as General Agriculture, but the use of the land may be for a residence with the rest of the parcel used for agricultural production. There are also a number of uses that can be considered as commercial or industrial types of agricultural uses, such as wineries or large agriculture processing facilities, but they may be permitted on land designated as General Agriculture in the General Plan.

As of the adoption of the Delta Plan, this proposed Regulation subsection would also prohibit the County from changing the General Plan designation to permit urban development on any land within the Primary and Secondary zones of the Delta outside of a City's sphere of influence. As the County is in the process of updating its General Plan, this will place limits on the County's ability to plan where growth and development may occur in the future. The fundamental issue at hand is the loss of local land use authority, which is inconsistent with State law. Section 65100 of California Planning and Zoning Law states that there is in each City and County a planning agency with the powers necessary to carry out the purposes of this title. Section 65103 states that each planning agency is responsible for, among other things, the preparation and implementation of the General Plan. Section 5012 of Article 3 will tie the hands of the County when preparing and implementing its General Plan.

3. As to Section 5012, San Joaquin County concurs in the submitted objections and comments of Solano County and Yolo County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and

the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.

J. Policy DP P2 “Respect Local Land Use when Siting Water or Flood Facilities or Restoring Habitats”; Proposed Regulation Article 3, Section 5013.

1. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.

2. This proposed Regulation, specifically sub-Section (a), is not “clearly understandable”, as required by rulemaking review standards. The use of the words “considering” and “consider” leaves those covered by, or implementing, the proposed Regulation to guess whether the proposed regulation requires action or simply requires review of possible action.

K. Policy RR P1 “Prioritization of State Investments in the Delta Levees and Risk Reduction”; Proposed Regulation Article 3, Section 5014.

1. There is no authority for this proposed Regulation. The Delta Stewardship Council is authorized only to make recommendations with respect to priorities for State levee investments. (Water Code Section 85306)

2. This proposed Regulation would result in conducting an island-by-island economics-based risk analysis. Additionally, the analysis would be required to consider the impact related to protecting the value of Delta islands’ economic output, including agriculture. However, the Delta Plan does not state how to determine the value of the agriculture that is protected by a levee. If the required economic analysis is done properly, the value of agriculture protected by a levee should be determined over the life of the Plan and not on an annual basis.

3. As to Section 5014, San Joaquin County concurs in the submitted objections and comments of Yolo County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.

L. Policy RR P2 "Require Flood Protection for Residential Development in Rural Areas"; Proposed Regulation Article 3, 5015.

1. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.

2. Sub-Section 5015(a) requires residential development in the Delta, outside of several specifically identified areas, to provide 200-year flood protection. Current state statutes (SB 5, SB 1278) require 200-year flood protection only in "urban or urbanizing" areas, and most of the Delta does not fall within such areas. The Delta Reform Act does not mandate this increased flood protection requirement. Neither the Delta Plan nor the proposed Regulations provide any rationale for this increased flood protection requirement.

3. As to Section 5015, San Joaquin County concurs in the submitted objections and comments of Solano County and Yolo County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.

M. Policy RR P3 "Protect Floodways"; Proposed Regulation Article 3, Section 5016.

1. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.

2. As to Section 5016, San Joaquin County concurs in the submitted objections and comments of Solano County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.

N. Policy RR P4 "Protect Floodplains"; Proposed Regulation Article 3, Section 5017.

1. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.

2. As to Section 5017, San Joaquin County concurs in the submitted objections and comments of Solano County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.