



January 14, 2013

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

Re: Delta Stewardship Council Notice of Proposed Rulemaking  
Title 23. Water - Division 6

Dear Ms. Messer:

On behalf of Westlands Water District ("Westlands" or "District"), we submit this comment letter on the Delta Stewardship Council's Notice of Proposed Rulemaking, submitted to the Office of Administrative Law ("OAL") on November 16, 2012.

The California Administrative Procedure Act ("APA") requires OAL to review proposed regulations for necessity, authority, clarity, consistency, reference, and non-duplication. (Gov. Code, § 11349.1; Cal. Code Regs., tit. 1, §§ 10-16.) The Delta Stewardship Council's proposed regulations fail to meet each of these standards.

**I. LACK OF AUTHORITY AND CONSISTENCY**

**A. The Proposed Regulations Directly and Substantially Conflict with Controlling Law**

Under the APA, proposed regulations purporting to implement or interpret a statute must be consistent and not in conflict with statutory authority, and must

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be reasonably necessary to effectuate the statutory purpose. (Gov. Code, § 11342.2.) Regulations are 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.) No deference is accorded to the agency proposing the regulations as to whether it has exceeded its statutory authority. (*Rank, supra*, 51 Cal.3d at pp. 11-12; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 108-109.)

For the reasons set forth below, among others,<sup>1</sup> the proposed regulations exceed and transgress the Delta Stewardship Council's statutory authority. As such they are invalid under the Delta Reform Act of 2009 (Wat. Code, § 85001 et seq.), the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.), and the APA (Gov. Code, § 11342.2).

## **B. Examples**

### *Section 5001(e)(1)*

The proposed regulatory definition of "achieving the coequal goal of providing a more reliable water supply for California" conflicts with the authorizing statute. (Wat. Code, § 85302, subd. (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.*) The Council's proposed regulation conflicts with this key criterion identified in the Delta Reform Act to achieve the goal of water supply reliability.

### *Section 5001(s)*

The proposed regulatory definition of "significant impact" impermissibly attempts to alter and amend established CEQA principles regarding baseline

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<sup>1</sup> / As a member agency of the San Luis & Delta-Mendota Water Authority ("Authority"), Westlands joins in the Authority's comments on the Delta Stewardship Council's proposed regulations.

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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 Proceedings* (2008) 43 Cal.4th 1143, 1167-1168 (“*In re Bay-Delta*”); *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 an *adverse physical change* in the existing environment. (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, §§ 15060, subd. (c)(2), 15061, 15064, 15125, 15358, 15360, 15378, subd. (a); 15382.)

*Section 5003(b)(2)(C)*

One-year transfers approved by State Water Resources Control Board are statutorily exempt from CEQA pursuant to Water Code section 1729. Statutory exemptions are absolute; they reflect legislative policy determinations and are not subject to any exceptions. (*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 956, 966, fn. 8; *Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 128-129.) The Delta Stewardship Council has no authority to amend, alter, or limit application of this statutory CEQA exemption.

*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, subd. (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, subd. (b)(2); *Sunset Sky Ranch Pilots Association, supra*, 47 Cal.4th at p. 907; *Great Oaks Water Co., supra*, 170 Cal.App.4th 956, 966, fn. 8;

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*Communities for a Better Environment, supra*, 103 Cal.App.4th at pp. 128-129.) The Council's proposed regulation directly conflicts 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, subd. (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.

#### *Section 5004(b)(3)*

The proposed regulation states 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)." While the use of best available science certainly should be encouraged, this regulation appears to exceed the Council's authority to the extent that it imposes higher standards of proof for local agency actions than can be found in the controlling law. (See, e.g., Code Civ. Proc., §§ 1085, 1094.5 [substantial evidence]; Pub. Resources Code, §§ 21168, 21168.5 [same].) The Council lacks authority to limit or alter the scope of local agency discretion.

#### *Section 5009*

The Council's 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* change to existing conditions under controlling law). (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, §§ 15358, 15382; see *In re Bay-Delta, supra*, 43 Cal.4th at pp. 1167-1168.) Further, it is unclear how the proposed mandatory language

requiring that “opportunity” impacts “must be avoided or mitigated” is to be satisfied.

## II. LACK OF NECESSITY

### A. The Initial Statement of Reasons Fails to Establish Necessity for Most of the Proposed Regulations

Government Code section 11349.1, subdivision (a)(1), requires OAL to review all proposed regulations for compliance with the “necessity” standard. Government Code section 11349, subdivision (a), defines necessity to mean that “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.” (See also Cal.Code Regs., tit. 1, § 10, subd. (b).) For the reasons set forth below, the proposed regulations fail to comply with this standard.

### B. Examples

#### *Section 5001*

The Delta Stewardship Council’s Initial Statement of Reasons states that “[s]ection 5001 defines words and phrases to provide clarity to their specific use in the regulation.” In reality, section 5001 consists not only of “definitions,” but of significant, substantive provisions that, as discussed above, not only attempt to impose duties and obligations not found in the authorizing statute but also attempt to alter and amend controlling law. The Council’s conclusory single-sentence justification for proposing sweeping substantive mandates and changes to existing law violates OAL’s “necessity” standard.

#### *Section 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.

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#### *Section 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, supra*, 43 Cal.4th at pp. 1167-1168; *Communities for a Better Environment, supra*, 48 Cal.4th at pp. 315, 320-322; *Citizens for East Shore Parks, supra*, 202 Cal.App.4th at pp. 557-566.)

#### *Section 5003(b)(2)(C)*

One-year transfers approved by State Water Resources Control Board are statutorily exempt from CEQA pursuant to Water Code section 1729. Statutory exemptions are absolute; they reflect legislative policy determinations and are not subject to any exceptions. (*Sunset Sky Ranch Pilots Association, supra*, 47 Cal.4th at p. 907; *Great Oaks Water Co. v. Santa Clara Water Dist.* (2009) 170 Cal.App.4th 956, 966, fn. 8; *Communities for a Better Environment, supra*, 103 Cal.App.4th at pp. 128-129.) The Council's proposed regulation is confusing and unnecessary as well as inconsistent with controlling law.

### **III. LACK OF CLARITY**

OAL must review each proposed regulation to determine whether it complies with the clarity standard set forth in Government Code section 11349.1, subdivision (a)(3). "Clarity" means "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." (See also Cal.Code Regs., tit. 1, § 16, subd. (a).)

The Council's proposed regulations will be implemented through a series of vaguely described processes, with many of the critical details unknown. The proposed regulations do not comport with the applicable standard of clarity, requiring that the regulations be "written or displayed so that the meaning . . . will be easily understood by the persons directly affected by them." (Gov. Code, § 11349, subd. (c).) Because the regulations contain so many vagaries, the

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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, but instead the proposed regulations are ambiguous and confusing.

In section 5009, for example, the Council's 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. REGULATORY DUPLICATION**

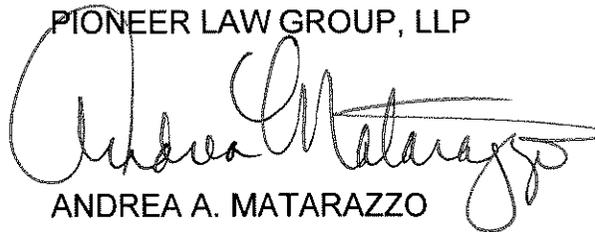
Nothing in the Council's authorizing statute permits it to supersede the regulatory authority of any other California department or agency, or to duplicate or adopt conflicting regulations in areas already regulated. A number of significant conflicts with existing statutes, regulations, and established case law are created by the Council's proposed regulations. For example, the California Resources Agency is responsible for adopting guidelines implementing CEQA, and the courts have extensively interpreted that statute's definitions and requirements pertaining to environmental impact assessment, mitigation requirements, and environmental disclosure standards in relation to project approval, among others. The Council has no authority to adopt regulations that attempt to supersede, and create substantial conflicts with, those established requirements.

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Thank you for the opportunity to submit these comments.

Very truly yours,

PIONEER LAW GROUP, LLP

A handwritten signature in black ink, appearing to read "Andrea Matarazzo". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

ANDREA A. MATARAZZO

AAM:jis

cc: Thomas W. Birmingham  
H. Craig Manson