



ACTION ITEM

Consideration and Possible Adoption of Regulations Relating to the Delta Ecosystem Restoration Management (Cal. Code Regs., tit. 23, § 5001 et seq.)

Summary

During today's meeting, staff will recommend that the Delta Stewardship (Council) approve Resolution 2024-06 to adopt proposed regulatory amendments to California Code of Regulations, title 23, sections 5001 to 5015, inclusive, and the addition of section 5005.1, Appendix 3A, Appendix 4A, and Appendix 8A (Office of Administrative Law File No. Z-2024-0318-02) to implement Chapter 4 of the Delta Plan, as approved by the Council in June 2022.¹

Background

Pursuant to Water Code section 85320, subdivision (e), Chapter 4, "Protect, Restore, and Enhance the Delta Ecosystem" of the Delta Plan was originally developed between 2011-2013 with the expectation that the Bay Delta Conservation Plan (BDCP) would be incorporated into the Delta Plan if the BDCP met specified statutory requirements. However, in May 2015, state and federal agencies shifted from the BDCP to a portfolio of mitigation projects known as the EcoRestore initiative. Following this shift, the Council identified a need to amend Chapter 4 of the Delta Plan (Ecosystem Amendment) to ensure that the Delta Plan included a complete vision for achieving ecosystem goals for the Delta.

The Ecosystem Amendment, adopted by the Council in June 2022, presented five core strategies to achieve the coequal goal of protecting, restoring, and enhancing the Delta ecosystem that form the basis for policies, recommendations, and performance measures. The proposed regulations presented to the Council today were approved as Delta Plan policies as part of the Ecosystem Amendment in June 2022. They are now going through the Administrative Procedure Act (Gov. Code, §

¹ All further references to regulations are to California Code of Regulations, title 23.

11340 et seq.; APA) rulemaking process to become law as part of the California Code of Regulations.

Delta Reform Act Requirements and Authority

The Sacramento-San Joaquin Delta Reform Act of 2009 (Wat. Code, § 85000 et seq.; Delta Reform Act) charges the Council with furthering the state's coequal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Sacramento-San Joaquin River Delta and Suisun Marsh (Delta) ecosystem to be achieved in a manner that protects and enhances the unique characteristics of the Delta as an evolving place. (Wat. Code, § 85054.) The Delta Reform Act authorizes the Council to adopt regulations or guidelines as needed to carry out the Council's statutory powers and duties. (Wat. Code, § 85210, subd. (i).) and develop a legally enforceable comprehensive resource management plan for the Delta, known as the Delta Plan. (Wat. Code, § 85300.) The Council adopted the Delta Plan in 2013. (Wat. Code, §§ 85059, 85300.) The regulatory portions of the Delta Plan are set forth in California Code of Regulations, title 23, section 5001 et seq.

Prior Actions by the Council Concerning the Proposed Regulations

The Council began initial consideration of the need for the Ecosystem Amendment in 2015 and 2016. Throughout 2017 and 2018, Council staff conducted listening sessions with a range of stakeholders, local agencies, Delta residents, Council members in public meetings, and Delta Independent Science Board (Delta ISB) members in public meetings. Based on these listening sessions and Council staff research, staff developed the Ecosystem Amendment to include a portfolio of actions that protect existing ecosystems, restore ecosystems, and enhance working or urban landscapes that provide habitat resources to species. The Ecosystem Amendment leveraged decades of research, lessons learned in recovery planning, and increased coordination among state and local agencies and partners working toward a common vision for a restored Delta ecosystem.

Council staff presented preliminary proposed revisions to Chapter 4 to the Council for feedback at the April 2019 and June 2019 Council meetings. Staff released a subsequent Preliminary Public Review Draft in November 2019 and solicited agency, public, and Delta ISB comments. These comments were incorporated into

the May 2020 Draft of the Ecosystem Amendment. The Council authorized the May 2020 Draft as the proposed project for environmental review under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.; CEQA) at its May 1, 2020, meeting. The Council issued a Notice of Completion and Notice of Availability of a Draft Program Environmental Impact Report (PEIR) and appendices on September 27, 2021, and on November 18, 2021, and hosted a public workshop to solicit oral comments on the Draft PEIR before the public comment period closed on November 30, 2021. A Final PEIR was prepared to respond to comments on the Draft PEIR and describe text changes made in response to comments.

At the June 2022 Council meeting, the Council approved Resolution 2022-05, certifying the Ecosystem Amendment PEIR; Adopting Findings and a Statement of Overriding Considerations, Mitigation Measures, and a Mitigation Monitoring and Reporting Program; and Adopting the Ecosystem Amendment. The resolution also directed Council staff to initiate a rulemaking process for the new and revised Delta Plan polyciary and mitigation measures resulting from the Ecosystem Amendment.

In 2024, the Council initiated the rulemaking following the completion of an Economic and Fiscal Impact Analysis (EFIA). The APA rulemaking steps taken are described below.

Proposed Regulatory Amendments

The proposed amendments to sections 5001, 5002, 5003, 5004, 5005, 5006, 5007, 5008, 5009, 5010, 5011, 5012, 5013, 5014, and 5015 and the additions of section 5005.1, Appendix 3A, Appendix 4A, and Appendix 8A are provided on the Council's website and as Attachment A to Resolution 2024-06. In the final proposed text, the proposed amendments are shown in underline to indicate additions and shown in ~~striketrough~~ to indicate deletions relative to the existing regulations, including technical, conforming changes. Technical, conforming additions made after the public comment period are shown in double underline, and technical, conforming deletions are shown in ~~double striketrough~~.

All proposed changes to the existing regulations are summarized below. No substantive modifications from the initial proposed text of the regulations are proposed after the comment period ending May 17, 2024. Proposed amendments to **section 5001** would include defining and clarifying terms included in Council

current and proposed regulations, in addition to harmonizing with existing codes and regulations.

- Proposed amendments to **sections 5002 through 5005, inclusive, and sections 5006 through 5015, inclusive**, would consist of updates to a cross-reference to the definition of “Covered Action” in section 5001.
- Proposed amendment to **section 5001(ee)**, would consist of a correction to a cross-reference in the existing language of 5001(ee) to have it correctly refer to 5001(o)(1)(E).
- The proposed addition of **section 5005.1** would enable data collection necessary to support the improvement necessary to fulfill the requirements of restoration projects in the Delta, as set forth in the Delta Reform Act.
- Proposed amendments to **section 5006** would remove an elevation map from the existing regulation and instead provide tabular guidance on appropriate elevation bands for various types of restoration actions. A new criterion requires consideration for the selection of the geographical location of restoration sites at appropriate elevations.
- Proposed amendments to **section 5007** would clarify standards for mitigating significant adverse impacts that are required for a state or local agency proposing a covered action in a designated Priority Habitat Restoration Area to be consistent with the Delta Plan. Additionally, this proposed amendment clarifies the interaction between this section and section 5002.
- Proposed amendments to **section 5008** would adjust the geographical boundary within which levee projects would be required to evaluate the feasibility of constructing a setback levee. As levee modifications have been completed in some areas and new, more accurate data has been collected on land elevation and sea level rise, adjustments of the geographical boundary are needed. The new geographical boundary would reflect the changes that have occurred since the original section 5008 became effective in 2013 and identify where alternatives to traditional levees are currently possible.
- A CEQA “legacy clause” is proposed for **sections 5006, 5007, and 5008** to delay the operative date for the changes made to the sections specific to covered actions that had initiated the CEQA process prior to the adoption of the proposed amendments.

- Proposed **Appendix 3A** would require state and local agencies proposing restoration actions to disclose contributions to restoring ecosystem function and providing social benefits as required by section 5005.1.
- Proposed **Appendix 4A** would provide an updated regulatory map for covered actions subject to section 5006. A cross-reference included in error under Table 1-1 was removed after the 45-day public comment period.
- Proposed **Appendix 8A** would provide an updated regulatory map for levee project covered actions subject to section 5008. The update reflects completed construction, stakeholder input on feasibility of setback levees in areas of the Central Delta, and areas that have immediate adjacent development.

In addition to the proposed amendments, two non-substantial, technical changes are being made to the regulatory text. A “non-substantial change” is one that clarifies without materially altering the requirements, rights, responsibilities, conditions or prescriptions contained in the original text. (Cal. Code Regs., tit. 1, § 40.)

- A proposed non-substantial modification to section 5001, subsection (ee), would change an incorrect cross reference to correctly refer to 5001(o)(1)(E).
- A proposed non-substantial modification to **Appendix 4A** would remove a cross-reference included in error under Table 1-1.

[Objectives and Benefits of the Proposed Amendments](#)

As discussed in the Initial Statement of Reasons (ISOR) and EFIA, the broad objectives of the proposed amendments are to achieve the requirements of the Delta Reform Act by implementing five core strategies to achieve the coequal goals of protecting, restoring, and enhancing the Delta ecosystem. (Wat. Code, § 85054.) The five core strategies are: (1) create more natural, functional flows; (2) restore ecosystem function; (3) protect land for restoration and safeguard against land loss; (4) protect native species and reduce the impact of nonnative invasive species; and (5) improve institutional coordination to support the implementation of ecosystem protection, restoration, and enhancement.

The proposed amendments would benefit the health and welfare of California residents and protect the environment because the amendments include a

portfolio of actions that protect existing ecosystems, restore ecosystems, and enhance working or urban landscapes that provide habitat resources to species. These approaches can reestablish ecological processes in natural communities to make them more resilient to land conversion and climate change.

Fiscal Information

As discussed in the ISOR, Final Statement of Reasons (FSOR), and EFIA, the information needed to complete Appendix 3A and Appendix 4A is information that already would be disclosed as part of a project's design, CEQA, and permitting processes. The requirement to use the best available science in establishing consistency with the Delta Plan is part of existing law, both in statute and regulations, and, thus, the proposed regulations would not change that. Therefore, the review process associated with these requirements are unlikely to change to the extent that they would delay permitting and construction of a covered action. Conservative, or high, estimates were applied to avoid underestimating potential economic and fiscal impacts. The proposed amendments would not create costs to, or mandates on, any local agency or school district or other nondiscretionary costs or savings to state or local agencies. The proposed amendments would also not create costs or savings in federal funding to the state.

Rulemaking Process under the APA

Pursuant to Council authorization (Resolution 2022-05), Council staff initiated a regular rulemaking under the APA by filing a Notice of Proposed Action, published in the California Regulatory Notice Register on March 29, 2024 (Office of Administrative Law File No. Z-2024-0318-02). A required written public comment period began on March 29, 2024. The initial deadline was 6:00 p.m. on May 14, 2024. Interested parties were notified via the Council listserv, website, and U.S. mail. A duly noticed public hearing was held on May 14, 2024, where public comments were received. An extension of the comment period to May 17, 2024, was requested by an interested party. The Council granted the request and extended the public comment period to 5:00 p.m. on May 17, 2024. No changes were made to the proposed regulations in response to public comments received.

Public Comments and Responses

The Council received a total of three written public comments by the close of the written public comment period. Additionally, eight individuals provided oral comments at the May 14, 2024, public hearing. Copies of the letters and a transcript of the public hearing comments are provided as part of today's Council meeting documents as Attachment 2 to the Final Statement of Reasons (FSOR). As described further in the FSOR, responses to the comments address the following topics:

- Coordination with Interested Parties
- Requests for Exemption and Variance
- Requests for Additional Guidance from the Council
- Ambiguous Policy Language
- Economic and Fiscal Impact of the Amended Regulations
- Feasibility of Setback Levees

After careful consideration of comments received, staff is not proposing any additional changes to the proposed regulation in response to the comments received.

No rebuttal or supplementation period is required by the APA, although opportunity for public comment is provided pursuant to the Bagley-Keene Open Meeting Act (Gov. Code, § 11120 et seq.) at Council meetings. However, the Council will not be responding to public comments that are received after the close of the public comment period on May 17, 2024, consistent with the APA.

Requested Action

Following Council discussion, staff recommends the Council adopt Resolution 2024-06, which would adopt the proposed amendments to sections 5001, 5002, 5003, 5004, 5005, 5006, 5007, 5008, 5009, 5010, 5011, 5012, 5013, 5014, 5015, and the addition of section 5005.1, Appendix 3A, Appendix 4A, and Appendix 8A.

If the Council adopts the resolution, staff anticipates the proposed regulations would take effect on either January 1, 2025, or April 1, 2025, depending on the review and approval timelines of the Department of Finance and Office of Administrative Law.

List of Attachments

Attachment 1: Final Statement of Reasons (FSOR)

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