



DELTA STEWARDSHIP COUNCIL

## Regulations

A. Delta Plan Implementing  
Regulations 23 CCR § 5001-5016

B. Administrative Procedures  
Governing Appeals

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**A. FINAL DELTA PLAN IMPLEMENTING REGULATIONS**

The Delta Stewardship Council adopted the Delta Plan on May 16, 2013, and on May 17, 2013, adopted implementing regulations to make the “policies” contained in the Delta Plan legally-enforceable.

The State Office of Administrative Law approved the implementing regulations on August 12, 2013, and they became effective on September 1, 2013. The implementing regulations are codified in 23 California Code of Regulations Sections 5001 to 5016.

## FINAL REGULATION TEXT

Title 23. Waters  
Division 6. Delta Stewardship Council  
Chapter 2. Consistency with Regulatory Policies Contained in the Delta Plan  
Article 1. Definitions  
**§ 5001. Definitions.**

As used in this division, the terms listed below shall have the meanings noted:

- (a) “Adaptive management” means a framework and flexible decision-making process for ongoing knowledge acquisition, monitoring, and evaluation leading to continuous improvement in management planning and implementation of a project to achieve specified objectives.
- (b) “Agricultural water management plan” means a plan prepared, adopted, and updated by an agricultural water supplier pursuant to the Agricultural Water Management Planning Act, Water Code section 10800 et seq.
- (c) “Agricultural water supplier” under the Water Code refers to both agricultural retail water suppliers and agricultural wholesale water suppliers, but not the California Department of Water Resources or the United States Bureau of Reclamation, and includes both of the following:
- (1) A water supplier, either publicly or privately owned, providing water to 10,000 or more irrigated acres, excluding recycled water; and
  - (2) A water supplier or contractor for water, regardless of the basis of the water right, that distributes or sells water for ultimate resale to customers.
- (d) “Base Flood” means the flood that has a 1-percent probability of being equaled or exceeded in any given year (also referred to as the 100-year flood).
- (e) “Base Flood Elevation” (BFE) means the water surface elevation associated with the base flood.
- (f) “Best available science” means the best scientific information and data for informing management and policy decisions. Best available science shall be consistent with the guidelines and criteria found in Appendix 1A.
- (g) “Central Valley Flood Protection Board” or “Board” means the Central Valley Flood Protection Board (formerly The Reclamation Board) of the Resources Agency of the State of California as provided in Water Code section 8521.
- (h) “Coequal goals” means the two goals of providing a more reliable water supply

for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place. In addition, “achievement” for the purpose of determining whether a plan, program, or project meets the definition of a “covered action” under section 5001(j) is further defined as follows:

(1) “Achieving the coequal goal of providing a more reliable water supply for California” means all of the following:

(A) Better matching the state's demands for reasonable and beneficial uses of water to the available water supply. This will be done by promoting, improving, investing in, and implementing projects and programs that improve the resiliency of the state's water systems, increase water efficiency and conservation, increase water recycling and use of advanced water technologies, improve groundwater management, expand storage, and improve Delta conveyance and operations. The evaluation of progress toward improving reliability will take into account the inherent variability in water demands and supplies across California;

(B) 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, consistent with existing water rights and the State's area-of-origin statutes and Reasonable Use and Public Trust Doctrines. This will be done by improving, investing in, and implementing local and regional projects and programs that increase water conservation and efficiency, increase water recycling and use of advanced water technologies, expand storage, improve groundwater management, and enhance regional coordination of local and regional water supply development efforts; and

(C) Water 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. This will be done by improving conveyance in the Delta and expanding groundwater and surface storage both north and south of the Delta to optimize diversions in wet years when more water is available and conflicts with the ecosystem are less likely, and limit diversions in dry years when conflicts with the ecosystem are more likely. 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. In addition, these improvements will decrease the vulnerability of Delta water supplies to disruption by natural disasters, such as, earthquakes, floods, and levee failures.

(2) “Achieving the coequal goal of protecting, restoring, and enhancing the Delta ecosystem” means successfully establishing a resilient, functioning estuary and surrounding terrestrial landscape capable of supporting viable populations of native resident and migratory species with diverse and biologically appropriate habitats, functional corridors, and ecosystem processes.

(3) “Achieving the coequal goals in a manner that protects and enhances the unique

cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place” means accepting that change, including change associated with achieving the coequal goals, will not cease, but that the fundamental characteristics and values that contribute to the Delta's special qualities and that distinguish it from other places can be preserved and enhanced while accommodating these changes. In this regard, the following are core strategies for protecting and enhancing the unique values that distinguish the Delta and make it a special region:

(A) Designate the Delta as a special place worthy of national and state attention;

(B) Plan to protect the Delta's lands and communities;

(C) Maintain Delta agriculture as a primary land use, a food source, a key economic sector, and a way of life;

(D) Encourage recreation and tourism that allow visitors to enjoy and appreciate the Delta and that contribute to its economy;

(E) Sustain a vital Delta economy that includes a mix of agriculture, tourism, recreation, related industries and business, and vital components of state and regional infrastructure; and

(F) Reduce flood and other risks to people, property, and other interests in the Delta.

(i) “Commercial recreational visitor-serving uses” means a land use designation that describes visitor-serving uses, accommodations, restaurants, and shops, that respect the rural character and natural environmental setting. These uses also include campgrounds and commercial recreational facilities.

(j)(1) “Covered action” means a plan, program, or project that meets all of the following criteria

(which are collectively referred to as covered action screening criteria):

(A) Is a “project,” as defined pursuant to section 21065 of the Public Resources Code;

(B) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh;

(C) Will be carried out, approved, or funded by the State or a local public agency;

(D) Will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and State interests in the Delta; and

(E) Is covered by one or more provisions of the Delta Plan, which for these purposes, means one or more of the regulatory policies contained in Article 3.

(2) “Covered action” does not include any plan, program, or project that is exempted pursuant to Water Code section 85057.5(b).

(3) A State or local public agency that proposes to carry out, approve, or fund a plan, program, or project that may be subject to this Chapter must determine whether that proposed plan, program, or project is a covered action. That determination, which is subject to judicial review, must be reasonable, made in good faith, and consistent with the Delta Reform Act and this Chapter.

(4) Nothing in the application of the definition of a “covered action” shall be interpreted to authorize the abrogation of any vested right whether created by statute or by common law.

(k) “Delta” means the Sacramento-San Joaquin Delta as defined in section 12220 of the Water Code and the Suisun Marsh, as defined in section 29101 of the Public Resources Code.

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

(m) “Designated Floodway” means those floodways, as defined in California Code of Regulations, Title 23, section 4 (i), under the jurisdiction of the Central Valley Flood Protection Board.

(n) “Encroachment” means any obstruction or physical intrusion by construction of works or devices, planting or removal of vegetation, or by any means for any purpose, into or otherwise affecting a floodway or floodplain.

(o) “Enhancement” or “enhancing,” for purposes of section 5001(h)(2), means improving existing desirable habitat and natural processes. Enhancement may include, by way of example, flooding the Yolo Bypass more often to support native species or to expand or better connect existing habitat areas. Enhancement includes many fish and wildlife management practices, such as managing wetlands for waterfowl production or shorebird habitat, installing fish screens to reduce entrainment of fish at water diversions, or removing barriers that block migration of fish to upstream spawning habitats.

(p) “Feasible” means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.

(q) “Floodplain” means any land area susceptible to being inundated by flood waters from any source.

(r) “Floodplain values and functions” has the same meaning as set forth in 33 Code of Federal Regulations section 320.4(1)(1).

(s) “Floodproofing” means any combination of structural and nonstructural additions, changes, or adjustments appropriate for residential structures, which reduce or

eliminate risk of flood damage to real estate, improved real property, or structures with their contents.

(t) “Floodway” means the portion of the floodplain that is effective in carrying flow (that is, the channel of a river or other watercourse and the adjacent land areas that convey flood waters).

(u) “Government-sponsored flood control program to reduce risks to people, property, and State interests in the Delta” means any State or federal strategy, project, approval, funding, or other effort that is intended to reduce the likelihood and/or consequences of flooding of real property and/or improvements, including risks to people, property, and State interests in the Delta, that is carried out pursuant to applicable law, including, but not limited to the following:

(1) State Water Resources Law of 1945, Water Code section 12570 et seq.;

(2) Sacramento-San Joaquin River Flood Control Projects (Flood Control Act of 1941, P.L. 77-228);

(3) Local Plans of Flood Protection prepared pursuant to the Local Flood Protection Planning Act (Water Code section 8200 et seq.), that are consistent with the Central Valley Flood Protection Plan pursuant to Water Code section 9612;

(4) Central Valley Flood Protection Plan (Water Code section 9600 et seq.);

(5) Subventions Program, Special Projects Program (Water Code section 12300 et seq.);

(6) Way Bill 1973-Subventions Program, Special Projects Program (Water Code section 12980 et seq.);

(7) Central Valley Flood Protection Board Authority (California Code of Regulations, Title 23, Division 1); and

(8) National Flood Insurance Program (National Flood Insurance Act of 1968, 42 U.S.C. 4001 et seq., P.L. 90-448).

(v) “Nonnative invasive species,” for purposes of section 5009, means species that establish and reproduce rapidly outside of their native range and may threaten the diversity or abundance of native species through competition for resources, predation, parasitism, hybridization with native populations, introduction of pathogens, or physical or chemical alteration of the invaded habitat.

(w) “Nonproject levee” means a local levee owned or maintained by a local agency or private owner that is not a project facility under the State Water Resources Law of 1945, Chapter 1 (commencing with Water Code section 12570) and Chapter 2 (commencing with section 12639 of Part 6 of the Water Code).

(x) “Project levee” means a federal flood control levee that is a project facility under the State Water

Resources Law of 1945, Chapter 1 (commencing with Water Code section 12570) and Chapter 2 (commencing with section 12639 of Part 6 of the Water Code).

(y) “Proposed action” means a plan, program, or project that meets the covered action screening criteria listed in section 5001(j)(1)(A) through (D). Proposed action is also a “covered action,” and therefore subject to compliance with the regulatory policies contained in Articles 2 and 3-if the proposed action meets the covered action screening criterion listed in section 5001(j)(1)(E).

(z) “Protection” or “protecting,” for purposes of section 5001(h)(2), means preventing harm to the ecosystem, which could include preventing the conversion of existing habitat, the degradation of water quality, irretrievable conversion of lands suitable for restoration, or the spread of invasive nonnative species.

(aa) “Regulated stream” means those streams identified in Table 8.1 of California Code of Regulations, Title 23, section 112, under the jurisdiction of the Board.

(bb) “Restoration” or “restoring,” for purposes of section 5001(h)(2), has the same meaning as in Water Code section 85066. Restoration actions may include restoring interconnected habitats within the Delta and its watershed, restoring more natural Delta flows, or improving ecosystem water quality.

(cc) “Setback levee” means a new levee constructed behind an existing levee which allows for removal of a portion of the existing levee and creation of additional floodplain connected to the stream. In the

Delta, a “setback levee” may not necessarily result in removal of the existing levee.(dd) “Significant impact” for the purpose of determining whether a project meets the definition of a “covered action” under section 5001(j)(1)(D) means a substantial positive or negative impact on the achievement of one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people, property, and State interests in the Delta, that is directly or indirectly caused by a project on its own or when the project's incremental effect is considered together with the impacts of other closely related past, present, or reasonably foreseeable future projects. The following categories of projects will not have a significant impact for this purpose:

(1) “Ministerial” projects exempted from CEQA, pursuant to Public Resources Code section 21080(b)(1);

(2) “Emergency” projects exempted from CEQA, pursuant to Public Resources Code section 21080(b)(2) through (4);

(3) Temporary water transfers of up to one year in duration. This provision shall remain in effect only through December 31, 2016, and as of January 1, 2017, is repealed, unless the Council acts to extend the provision prior to that date. The Council contemplates that any extension would be based upon the California Department of Water Resources'

and the State Water Resources Control Board's participation with stakeholders to identify and recommend measures to reduce procedural and administrative impediments to water transfers and protect water rights and environmental resources by December 31, 2016. These recommendations should include measures to address potential issues with recurring transfers of up to 1 year in duration and improved public notification for proposed water transfers.;

(4) Other projects exempted from CEQA, unless there are unusual circumstances indicating a reasonable possibility that the project will have a significant impact under Water Code section 85057.5(a)(4), as further defined by this section. Examples of unusual circumstances could arise in connection with, among other things:

(A) Local government general plan amendments for the purpose of achieving consistency with the Delta Protection Commission's Land Use and Resource Management Plan; and

(B) Small-scale habitat restoration projects, as referred to in CEQA Guidelines, section 15333 of Title 14 of the California Code of Regulations, proposed in important restoration areas, but which are inconsistent with the Delta Plan's policy related to appropriate habitat restoration for a given land elevation (section 5006 of this Chapter).

(ee) "Urban area" means a developed area in which there are 10,000 residents or more.

(ff) "Urbanizing area" means a developed area or an area outside of a developed area that is planned or anticipated to have 10,000 residents or more within the next 10 years.

(gg) "Urban water management plan" means a plan prepared, adopted, and updated by an urban water supplier pursuant to the Urban Water Management Planning Act, Water Code section 10610 et seq.

(hh) "Urban water supplier" refers to both "urban retail water suppliers" and "urban wholesale water suppliers":

(1) "Urban retail water supplier" means a water supplier, either publicly or privately owned, that directly provides potable municipal water to more than 3,000 end users or that supplies more than 3,000 acre-feet of potable water annually at retail for municipal purposes.

(2) "Urban wholesale water supplier" means a water supplier, either publicly or privately owned, that provides more than 3,000 acre-feet of potable water annually at wholesale for municipal purposes.

(ii) "Water supplier" refers to both "urban water suppliers" and "agricultural water suppliers," but for purposes of section 5003, does not include agricultural water suppliers during the time that they may be exempted by section 10853 of the Water Code from the requirements of Parts 2.55 and 2.8 of Division 6 of the Water Code.

Note: Authority cited: Section 85210(i), Water Code. Reference: Sections 85057.5, 85059, 85058, 85066, 85020, 85054, 85052, 85302(g), 85308, 85300, 10608.12 and 10853, Water Code.

Article 2. Certifications of Consistency

**§ 5002. Detailed Findings to Establish Consistency with the Delta Plan.**

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

(b) Certifications of consistency must include detailed findings that address each of the following requirements:

(1) Covered actions, in order to be consistent with the Delta Plan, must be consistent with this regulatory policy and with each of the regulatory policies contained in Article 3 implicated by the covered action. The Delta Stewardship Council acknowledges that in some cases, based upon the nature of the covered action, full consistency with all relevant regulatory policies may not be feasible. In those cases, the agency that files the certification of consistency may nevertheless determine that the covered action is consistent with the Delta Plan because, on whole, that action is consistent with the coequal goals. That determination must include a clear identification of areas where consistency with relevant regulatory policies is not feasible, an explanation of the reasons why it is not feasible, and an explanation of how the covered action nevertheless, on whole, is consistent with the coequal goals. That determination is subject to review by the Delta Stewardship Council on appeal;

(2) Covered actions not exempt from CEQA must include applicable feasible mitigation measures identified in the Delta Plan's Program Environmental Impact Report (unless the measure(s) are within the exclusive jurisdiction of an agency other than the agency that files the certification of consistency), or substitute mitigation measures that the agency that files the certification of consistency finds are equally or more effective;

(3) As relevant to the purpose and nature of the project, all covered actions must document use of best available science;

(4) Ecosystem restoration and water management covered actions must include adequate provisions, appropriate to the scope of the covered action, to assure continued implementation of adaptive management. This requirement shall be satisfied through both of the following:

(A) An adaptive management plan that describes the approach to be taken consistent with the adaptive management framework in Appendix 1B; and

(B) Documentation of access to adequate resources and delineated authority by the entity responsible for the implementation of the proposed adaptive management process.

(c) A conservation measure proposed to be implemented pursuant to a natural community conservation plan or a habitat conservation plan that was:

(1) Developed by a local government in the Delta; and

(2) Approved and permitted by the California Department of Fish and Wildlife prior to May 16, 2013 is deemed to be consistent with sections 5005 through 5009 of this Chapter if the certification of consistency filed with regard to the conservation measure includes a statement confirming the nature of the conservation measure from the California Department of Fish and Wildlife.

Note: Authority cited: Section 85210(i), Water Code. Reference: Sections 85225, 85225.10, 85020, 85054, 85302(g) and 85308, Water Code.

Article 3. Consistency with the Regulatory Policies Contained in the Delta Plan  
**§ 5003. Reduce Reliance on the Delta Through Improved Regional Water Self-Reliance.**

(a) Water shall not be exported from, transferred through, or used in the Delta if all of the following apply:

(1) One or more water suppliers that would receive water as a result of the export, transfer, or use have failed to adequately contribute to reduced reliance on the Delta and improved regional self-reliance consistent with all of the requirements listed in paragraph (1) of subsection (c);

(2) That failure has significantly caused the need for the export, transfer, or use; and

(3) The export, transfer, or use would have a significant adverse environmental impact in the Delta.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action to export water from, transfer water through, or use water in the Delta, but does not cover any such action unless one or more water suppliers would receive water as a result of the proposed action.

(c)(1) Water suppliers that have done all of the following are contributing to reduced reliance on the Delta and improved regional self-reliance and are therefore consistent

with this policy:

(A) Completed a current Urban or Agricultural Water Management Plan (Plan) which has been reviewed by the California Department of Water Resources for compliance with the applicable requirements of Water Code Division 6, Parts 2.55, 2.6, and 2.8;

(B) Identified, evaluated, and commenced implementation, consistent with the implementation schedule set forth in the Plan, of all programs and projects included in the Plan that are locally cost effective and technically feasible which reduce reliance on the Delta; and

(C) Included in the Plan, commencing in 2015, the expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance. The expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance shall be reported in the Plan as the reduction in the amount of water used, or in the percentage of water used, from the Delta watershed. For the purposes of reporting, water efficiency is considered a new source of water supply, consistent with Water Code section 1011(a).

(2) Programs and projects that reduce reliance could include, but are not limited to, improvements in water use efficiency, water recycling, stormwater capture and use, advanced water technologies, conjunctive use projects, local and regional water supply and storage projects, and improved regional coordination of local and regional water supply efforts.

Note: Authority cited: Section 85210(i), Water Code. Reference: Sections 10608, 10610.2, 10610.4, 10801, 10802, 85001(c), 85004(b), 85020(a), 85020(d), 85020(h), 85021, 85022(d)(1), 85022(d)(5), 85023, 85054, 85300, 85302(d), 85303 and 85304, Water Code.

Article 3. Consistency with the Regulatory Policies Contained in the Delta Plan  
**§ 5004. Transparency in Water Contracting.**

(a) The contracting process for water from the State Water Project and/or the Central Valley Project must be done in a publicly transparent manner consistent with applicable policies of the California Department of Water Resources and the Bureau of Reclamation referenced below.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, this policy covers the following:

(1) With regard to water from the State Water Project, a proposed action to enter into or amend a water supply or water transfer contract subject to California Department of Water Resources Guidelines 03-09 and/or 03-10 (each dated July 3, 2003), which are attached as Appendix 2A; and

(2) With regard to water from the Central Valley Project, a proposed action to enter into or amend a water supply or water transfer contract subject to section 226 of P.L. 97-293, as amended or section 3405(a)(2)(B) of the Central Valley Project Improvement Act, Title XXXIV of Public Law 102-575, as amended, which are attached as Appendix 2B, and Rules and Regulations promulgated by the Secretary of the Interior to implement these laws.

Note: Authority cited: Section 85210(i), Water Code. Reference: Sections 85020, 85021, 85300 and 85302, Water Code.

### **§ 5005. Delta Flow Objectives.**

(a) The State Water Resources Control Board's Bay Delta Water Quality Control Plan flow objectives shall be used to determine consistency with the Delta Plan. If and when the flow objectives are revised by the State Water Resources Control Board, the revised flow objectives shall be used to determine consistency with the Delta Plan.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, the policy set forth in subsection (a) covers a proposed action that could significantly affect flow in the Delta.

Note: Authority cited: Section 85210(i), Water Code. Reference: Sections 85020, 85054, 85086, 85087, 85300 and 85302, Water Code.

### **§ 5006. Restore Habitats at Appropriate Elevations.**

(a) Habitat restoration must be carried out consistent with Appendix 3, which is Section II of the Draft Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions (California Department of Fish and Wildlife 2011). The elevation map attached as Appendix 4 should be used as a guide for determining appropriate habitat restoration actions based on an area's elevation. If a proposed habitat restoration action is not consistent with Appendix 4, the proposal shall provide rationale for the deviation based on best available science.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action that includes habitat restoration.

Note: Authority cited: Section 85210(i), Water Code. Reference: Sections 85020, 85022, 85054, 85300 and 85302, Water Code.

### **§ 5007. Protect Opportunities to Restore Habitat.**

(a) Within the priority habitat restoration areas depicted in Appendix 5, significant adverse impacts to the opportunity to restore habitat as described in section 5006, must be avoided or mitigated.

(b) Impacts referenced in subsection (a) will be deemed to be avoided or mitigated if the project is designed and implemented so that it will not preclude or otherwise interfere with the ability to restore habitat as described in section 5006.

(c) Impacts referenced in subsection (a) shall be mitigated to a point where the impacts have no significant effect on the opportunity to restore habitat as described in section 5006. Mitigation shall be determined, in consultation with the California Department of Fish and Wildlife, considering the size of the area impacted by the covered action and the type and value of habitat that could be restored on that area, taking into account existing and proposed restoration plans, landscape attributes, the elevation map shown in Appendix 4, and other relevant information about habitat restoration opportunities of the area.

(d) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, this policy covers proposed actions in the priority habitat restoration areas depicted in Appendix 5. It does not cover proposed actions outside those areas.

Note: Authority cited: Section 85210(i), Water Code. Reference: Sections 85020, 85022, 85054, 85300, 85302 and 85305, Water Code.

### **§ 5008. Expand Floodplains and Riparian Habitats in Levee Projects.**

(a) Levee projects must evaluate and where feasible incorporate alternatives, including the use of setback levees, to increase floodplains and riparian habitats. Evaluation of setback levees in the Delta shall be required only in the following areas (shown in Appendix 8): (1) The Sacramento River between Freeport and Walnut Grove, the San Joaquin River from the Delta boundary to Mossdale, Paradise Cut, Steamboat Slough, Sutter Slough; and the North and South Forks of the Mokelumne River, and (2) Urban levee improvement projects in the cities of West Sacramento and Sacramento.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action to construct new levees or substantially rehabilitate or reconstruct existing levees.

Note: Authority cited: Section 85210(i), Water Code. Reference: Sections 85020, 85022, 85054, 85300, 85302 and 85305, Water Code.

**§ 5009. Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species.**

(a) The potential for new introductions of or improved habitat conditions for nonnative invasive species, striped bass, or bass must be fully considered and avoided or mitigated in a way that appropriately protects the ecosystem.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action that has the reasonable probability of introducing or improving habitat conditions for nonnative invasive species.

Note: Authority cited: Section 85210(i), Water Code. Reference: Sections 85020, 85054, 85300 and 85302, Water Code.

**§ 5010. Locate New Urban Development Wisely.**

(a) New residential, commercial, and industrial development must be limited to the following areas, as shown in Appendix 6 and Appendix 7:

(1) Areas that city or county general plans, as of May 16, 2013, designate for residential, commercial, and industrial development in cities or their spheres of influence;

(2) Areas within Contra Costa County's 2006 voter-approved urban limit line, except no new residential, commercial, and industrial development may occur on Bethel Island unless it is consistent with the Contra Costa County general plan effective as of May 16, 2013;

(3) Areas within the Mountain House General Plan Community Boundary in San Joaquin County; or

(4) The unincorporated Delta towns of Clarksburg, Courtland, Hood, Locke, Ryde, and Walnut Grove.

(b) Notwithstanding subsection (a), new residential, commercial, and industrial development is permitted outside the areas described in subsection (a) if it is consistent with the land uses designated in county general plans as of May 16, 2013, and is otherwise consistent with this Chapter.

(c) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, this policy covers proposed actions that involve new residential, commercial,

and industrial development that is not located within the areas described in subsection (a). In addition, this policy covers any such action on Bethel Island that is inconsistent with the Contra Costa County general plan effective as of May 16, 2013. This policy does not cover commercial recreational visitor-serving uses or facilities for processing of local crops or that provide essential services to local farms, which are otherwise consistent with this Chapter.

(d) This policy is not intended in any way to alter the concurrent authority of the Delta Protection Commission to separately regulate development in the Delta's Primary Zone.

Note: Authority cited: Section 85210(i), Water Code. Reference: Sections 85020, 85022, 85300, 85302 and 85305, Water Code.

### **§ 5011. Respect Local Land Use when Siting Water or Flood Facilities or Restoring Habitats.**

(a) Water management facilities, ecosystem restoration, and flood management infrastructure must be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence when feasible, considering comments from local agencies and the Delta Protection Commission. Plans for ecosystem restoration must consider sites on existing public lands, when feasible and consistent with a project's purpose, before privately owned sites are purchased. Measures to mitigate conflicts with adjacent uses may include, but are not limited to, buffers to prevent adverse effects on adjacent farmland.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, this policy covers proposed actions that involve the siting of water management facilities, ecosystem restoration, and flood management infrastructure.

Note: Authority cited: Section 85210(i), Water Code. Reference: Sections 85020, 85022, 85054, 85300 and 85305, Water Code.

### **§ 5012. Prioritization of State Investments in Delta Levees and Risk Reduction.**

(a) Prior to the completion and adoption of the updated priorities developed pursuant to Water Code section 85306, the interim priorities listed below shall, where applicable and to the extent permitted by law, guide discretionary State investments in Delta flood risk management. Key priorities for interim funding include emergency preparedness, response, and recovery as described in paragraph (1), as well as Delta levees funding as described in paragraph (2).

(1) Delta Emergency Preparedness, Response, and Recovery: Develop and implement appropriate emergency preparedness, response, and recovery strategies, including those developed by the Delta Multi-Hazard Task Force pursuant to Water Code section 12994.5.

(2) Delta Levees Funding: The priorities shown in the following table are meant to guide budget and funding allocation strategies for levee improvements. The goals for funding priorities are all important, and it is expected that, over time, the California Department of Water Resources must balance achievement of those goals. Except on islands planned for ecosystem restoration, improvement of nonproject Delta levees to the Hazard Mitigation Plan (HMP) standard may be funded without justification of the benefits. Improvements to a standard above HMP, such as that set by the U.S. Army Corps of Engineers under Public Law 84-99, may be funded as befits the benefits to be provided, consistent with the California Department of Water Resources' current practices and any future adopted investment strategy.

Priorities for State Investment in Delta Integrated Flood Management

Categories of Benefit Analysis

| <i>Goals</i> | <i>Localized Flood Protection</i>                                                                               | <i>Levee Network</i>                                                                                                                                                                   | <i>Ecosystem Conservation</i>                                              |
|--------------|-----------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------|
| 1            | Protect existing urban and adjacent urbanizing areas by providing 200-year flood protection.                    | Protect water quality and water supply conveyance in the Delta, especially levees that protect freshwater aqueducts and the primary channels that carry fresh water through the Delta. | Protect existing and provide for a net increase in channel-margin habitat. |
| 2            | Protect small communities and critical infrastructure of statewide importance (located outside of urban areas). | Protect flood water conveyance in and through the Delta to a level consistent with the State Plan of Flood Control for project levees.                                                 | Protect existing and provide for net enhancement of floodplain habitat.    |
| 3            | Protect agriculture and local Working landscapes.                                                               | Protect cultural, historic, aesthetic, and recreational resources (Delta as Place).                                                                                                    | Protect existing and provide for net enhancement of wetlands.              |

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action that involves discretionary State investments in Delta flood risk management, including levee operations, maintenance, and improvements. Nothing in this policy establishes or otherwise changes existing levee standards.

Note: Authority cited: Section 85210(i), Water Code. Reference: Sections 85020, 85300, 85305 and 85306, Water Code.

### **§ 5013. Require Flood Protection for Residential Development in Rural Areas.**

(a) New residential development of five or more parcels shall be protected through floodproofing to a level 12 inches above the 100-year base flood elevation, plus sufficient additional elevation to protect against a 55-inch rise in sea level at the Golden Gate, unless the development is located within:

(1) Areas that city or county general plans, as of May 16, 2013, designate for development in cities or their spheres of influence;

(2) Areas within Contra Costa County's 2006 voter-approved urban limit line, except Bethel Island;

(3) Areas within the Mountain House General Plan Community Boundary in San Joaquin County; or

(4) The unincorporated Delta towns of Clarksburg, Courtland, Hood, Locke, Ryde, and Walnut Grove, as shown in Appendix 7.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action that involves new residential development of five or more parcels that is not located within the areas described in subsection (a).

Note: Authority cited: Section 85210(i), Water Code. Reference: Sections 85020, 85300, 85305 and 85306, Water Code.

### **§ 5014. Protect Floodways.**

(a) No encroachment shall be allowed or constructed in a floodway, unless it can be demonstrated by appropriate analysis that the encroachment will not unduly impede the free flow of water in the floodway or jeopardize public safety.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action that would encroach in a floodway that is

not either a designated floodway or regulated stream.

Note: Authority cited: Section 85210(i), Water Code. Reference: Sections 85020, 85300, 85302 and 85305, Water Code.

### **§ 5015. Floodplain Protection.**

(a) No encroachment shall be allowed or constructed in any of the following floodplains unless it can be demonstrated by appropriate analysis that the encroachment will not have a significant adverse impact on floodplain values and functions:

(1) The Yolo Bypass within the Delta;

(2) The Cosumnes River-Mokelumne River Confluence, as defined by the North Delta Flood Control and Ecosystem Restoration Project (McCormack-Williamson), or as modified in the future by the California Department of Water Resources or the U.S. Army Corps of Engineers (California Department of Water Resources 2010); and

(3) The Lower San Joaquin River Floodplain Bypass area, located on the Lower San Joaquin River upstream of Stockton immediately southwest of Paradise Cut on lands both upstream and downstream of the Interstate 5 crossing. This area is described in the Lower San Joaquin River Floodplain Bypass Proposal, submitted to the California Department of Water Resources by the partnership of the South Delta Water Agency, the River Islands Development Company, Reclamation District 2062, San Joaquin Resource Conservation District, American Rivers, the American Lands Conservancy, and the Natural Resources Defense Council, March 2011. This area may be modified in the future through the completion of this project.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action that would encroach in any of the floodplain areas described in subsection (a).

(c) This policy is not intended to exempt any activities in any of the areas described in subsection (a) from applicable regulations and requirements of the Central Valley Flood Protection Board.

Note: Authority cited: Section 85210(i), Water Code. Reference: Sections 85020, 85300, 85302 and 85305, Water Code.

Article 4. General Provisions  
**§ 5016. Miscellaneous Provisions.**

(a) The provisions in this Chapter are not intended and shall not be construed as authorizing the Delta Stewardship Council or any entity to exercise its power in a manner that will take or damage private property for public use without the payment of just compensation.

(b) The provisions in this Chapter are not intended to affect the rights of any owner of property under the Constitutions of the State of California or the United States.

(c) The provisions in this Chapter shall not increase the State's flood liability.

Note: Authority cited: Section 85210(i), Water Code. Reference: Sections 85032(j) and 85057.5(d), Water Code.

## **B. ADMINISTRATIVE PROCEDURES GOVERNING APPEALS**

The Delta Reform Act of 2009 provides for an appeals process to ensure the consistency of certain state and local public agency actions (“covered actions”) with the regulatory portions of the Delta Plan (see Water Code §§ 85225-85225.30).

The Delta Reform Act also provides a separate process in which the Council may hear appeals with regard to determinations by the Department of Fish and Wildlife (DFW) that the Bay-Delta Conservation Plan (BDCP) has met the requirements of Water Code section 85320 (which focus on compliance with the Natural Community Conservation Planning Act and the California Environmental Quality Act) for incorporation into the Delta Plan.

Water Code section 85225.30 requires the Council to adopt administrative procedures governing appeals, which are exempt from the State Administrative Procedure Act (the normal state rulemaking process).

The Delta Stewardship Council adopted these appeal procedures at its September 23, 2010, Council meeting. The appeals procedures—including as “Part I” below—are not codified in the California Code of Regulations, but still have the force of law.

[ADOPTED 9/23/2010]

**DELTA STEWARDSHIP COUNCIL**

**ADMINISTRATIVE PROCEDURES GOVERNING APPEALS**

**II. STATUTORY PROVISIONS REQUIRING OTHER CONSISTENCY REVIEWS**

**III. OTHER FORMS OF REVIEW OR EVALUATION BY THE COUNCIL**

**PART I- ADMINISTRATIVE PROCEDURES GOVERNING APPEALS**

**Introduction**

1. Purpose. These administrative procedures govern how the Delta Stewardship Council considers appeals with regard to:

- a) Adequacy of certifications of consistency with the Delta Plan submitted to the Council by a state or local public agency pursuant to Water Code sections 85225.10 and 85225.30; and
- b) Determinations by the Department of Fish and Game that the Bay Delta Conservation Plan has met the requirements of Water Code section 85320 for inclusion in the Delta Plan.

NOTE: Authority cited: Water Code sections 85001, 85020(h), 85022, 85057.5, 85200, 85210, 85212, 85225, 85225.5, 85225.10, 85225.15, 85225.20, 85225.25, 85225.30, 85300, 85320(e).

**Review of certifications of consistency with Delta Plan**

2. Any state or local public agency proposing to undertake a covered action, as defined in Water Code section 85057.5 is encouraged to consult with the Council at the earliest possible opportunity, preferably no later than 30 days before submitting its certification to the Council pursuant to Water Code section 85225, to ensure that the project will be consistent with the Delta Plan. The Council's staff will meet with the agency's staff to review the consistency of the proposed action and to make recommendations, as appropriate. During this early consultation, the agency's staff may also seek clarification on whether the proposed project is a "covered action"; provided that the ultimate determination on whether it is a covered action shall be made by the agency, subject to judicial review.

NOTE: Authority cited: Water Code sections 85212, 85225, 85225.5, 85225.30.

3. At least 10 days prior to its submission of a certification to the Council, a state or local public

agency that is not subject to open meeting laws (that is, the Bagley-Keene Open Meeting Act [Gov.Code sec.11120 et seq.] or the Brown Act [Gov.Code sec.54950 et seq.]) with regard to its certification, shall post, for public review and comment, its draft certification conspicuously on its website and in its office, mail it to all persons requesting notice, and include any public comments received in the record submitted to the Council in the case of an appeal. A state or local public agency that is subject to open meeting laws with regard to its certification is encouraged to take those actions.

NOTE: Authority cited: Water Code sections 85225, 85225.30.

4.
  - a) Any certification of consistency filed by a state or local agency pursuant to Water Code section 85225 shall set forth detailed findings that the covered action is consistent with the Delta Plan. The Council shall prepare a checklist that agencies may use to assist them in preparing the certification and making the required findings.
  - b) A state or local agency shall submit to the Council, no later than 10 days after receiving notice of an appeal pursuant to Paragraph 8, the record that was before the state or local agency at the time it made its certification, including a table of contents of documents contained therein and a brief chronology of events and actions relevant to the covered action. The record shall be certified by the state or local agency as being “full and complete.” Given the tight, statutory deadlines for hearing and deciding appeals, a state or local agency is nevertheless strongly encouraged to submit the record at the time it files its certification of consistency, to ensure the opportunity for thorough review by the Council in the event of an appeal.
  - c) The failure by a state or local agency to submit the record to the Council on a timely basis as required by subparagraph (b), shall be grounds for the Council to affirm the appeal on the basis that there was not substantial evidence presented to support the certification of consistency.
  - d) Any filings required by this Paragraph (4) shall be submitted in electronic form to facilitate availability and public access, and shall be public records.

NOTE: Authority cited: Water Code sections 85225, 85225.30.

5. Any person, including any member of the Council or its executive officer, who claims that a proposed covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, that action will have a significant adverse impact on the achievement of one or both of the goals of the Act or implementation of government sponsored flood control programs to reduce risks to people and property in the Delta, may file an appeal with regard to a certification of consistency submitted to the Council no later than 30 calendar days after that submittal.

NOTE: Authority cited: Water Code sections 85225.10 (a), 85225.15, 85225.30.

6. The appeal shall clearly and specifically set forth the basis for the claim that the covered action is inconsistent with the Delta Plan. The appeal shall be in writing and set forth the following information:

- a) Appellant's name and address;
- b) The name and address of the party, if any, whose proposal is the subject of the appeal;
- c) A description of the covered action that is the subject of the state or local public agency certification;
- d) The identity of the state or local government body whose certification is being appealed;
- e) The specific grounds for appeal; and
- f) A detailed statement of facts on which the appeal is based.

The appeal shall be filed in electronic form.

NOTE: Authority cited: Water Code sections 85225.10 (b), 85225.30.

7. The appeal shall be considered "filed" with the Council when the appellant's appeal is received, determined by staff to contain all of the information listed in Paragraph 6, and a hard-copy is printed and stamped "Filed" by the Council staff with the date of filing indicated.

NOTE: Authority cited: Water Code sections 85225.10, 85225.20, 85225.30.

8. Within five working days of the filing of an appeal with the Council, the executive officer shall:

- a) Post a notice and brief description of the appeal and its effective date in a conspicuous location in the Council's office and on its website;
- b) Mail to the affected state or local public agency and to any third party whose proposal is the subject of the certification, a copy of the notice and a brief description, with a copy of the appeal documents filed with the Council;
- c) Mail copies of the appeal to each member of the Council, and to the Delta Protection Commission for informational purposes consistent with Public Resources Code section 29773; and
- d) Mail notice to the appellant that the appeal has been filed and stating the

effective date of filing.

NOTE: Authority cited: Water Code sections 85225.30.

9. The Council or its executive officer may request from the appellant further information necessary to clarify, amplify, correct, or otherwise supplement the information submitted with the appeal, within a reasonable period. The Council or by delegation its executive officer may dismiss the appeal for failure of the appellant to provide information requested within the period provided, if the information requested is in the possession of or under the control of the appellant.

NOTE: Authority cited: Water Code sections 85225.10, 85225.20, 85225.25, 85225.30.

10. The Council or its executive officer may supplement the record submitted by the state or local agency if the Council or its executive officer determines that additional information was part of the record before the agency, but was not included in the agency's submission to the Council.

NOTE: Authority cited: Water Code sections 85225.10, 85225.20, 85225.25, 85225.30.

11. The appellant, the state or local agency, the Delta Protection Commission, or any other person may testify before the Council regarding an appeal. Presentations may be oral or in writing, shall address only whether the record supports the certification of consistency, and shall be as brief as possible. Written submissions should be provided to the Council at least 10 days prior to the hearing to ensure that they, or in appropriate cases, summaries, may be circulated to Council members for their review ahead of the hearing. The Council's presiding officer may establish reasonable time limits for presentations.

NOTE: Authority cited: Water Code sections 85225.10, 85225.20, 85225.25, 85225.30.

12. All written submissions to the Council may be in electronic form.

NOTE: Authority cited: Water Code section 85225.30.

13. The Council shall hear all appeals of certifications of consistency filed pursuant to Water Code section 85225 within 60 days of filing unless:

a) The parties agree to a reasonable extension approved by the executive officer, taking into account the circumstances of the matter subject to appeal and the Council's hearing schedule and associated workload, or

b) The Council, or by delegation its executive officer, determines that the issue raised on appeal is not within the Council's jurisdiction or does not raise an appealable issue.

NOTE: Authority cited: Water Code sections 85225, 85225.20, 85225.30.

14. The Council shall make its decision on the appeal within 60 days of hearing the appeal, and shall make specific written findings defining the covered action under review and either denying the appeal or remanding the matter to the state or local public agency for reconsideration of the covered action based on the finding that the certification of consistency is not supported by substantial evidence in the record before the state or local public agency that filed the certification.

NOTE: Authority cited: Water Code sections 85225.20, 85225.25, 85225.30.

15. No covered action which is the subject of an appeal shall be implemented unless one of the following conditions has been met:

(F) The Council has denied the appeal;

(G) The public agency has pursuant to Water Code section 85225.5 decided to proceed with the action as proposed or modified and has filed with the Council a revised certification of consistency addressing each of the findings made by the Council, 30 days has elapsed and no person has appealed the revised certification; or

(H) The Council or its executive officer has dismissed the appeal for one or both of the following reasons:

The appellant has failed to provide information in her possession or under her control within the time requested or

The issue raised is not within the Council's jurisdiction or fails to raise an appealable issue.

NOTE: Authority cited: Water Code sections 85225.5, 85225.25, 85225.30.

### **Review of Bay Delta Conservation Plan**

16. If the Department of Fish and Game (department) determines that the Bay Delta Conservation Plan (BDCP) referred to in Water Code section 85053 meets all of the requirements of Water Code section 85320 for inclusion in the Delta Plan, it shall file the BDCP and its determination with the Council.

NOTE: Authority cited: Water Code sections 85053, 85225.30, 85320.

17. Upon receipt of the department's determination, the executive officer of the Council shall:

a) Post a notice and brief description of the BDCP, the department's determination, the date of filing and the right of any person to appeal that determination on its website

and in a conspicuous location in the Council's office;

b) Mail a notice and brief description of the BDCP, the department's determination and the right of appeal to any person requesting notice; and

c) Mail copies of the determination to each member of the Council.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

18. Any person, including any member of the Council or its executive officer, may appeal to the Council the determination of the department that the BDCP meets all of the requirements of Water Code section 85320 for inclusion in the Delta Plan.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

19. a) Any appeal to the Council made pursuant to Paragraph 18 shall be made within 30 days of the later of the following:

1. the filing with the Council of the department's determination that the BDCP meets all the requirements of Water Code section 85320 for inclusion in the Delta Plan, or

2. the conclusion of the Council's hearing or hearings held pursuant to Water Code section 85320(d).

b) The appeal shall be in writing and filed in electronic form. It shall clearly set forth the specific grounds for the appeal and the specific facts upon which it is based. These shall include a list of each specific requirement of Water Code section 85320 that the BDCP allegedly fails to meet. The appeal shall be considered filed with the Council when the appellant's appeal is received, determined by staff to contain all the information required in this paragraph, and a hard-copy is printed and stamped "Filed" by the Council staff with the date of filing indicated.

c) If an appeal is filed before the Council publicly notices a hearing to be held pursuant to Water Code section 85320(d), the Council, in its discretion, may combine the hearing on appeal and the hearing pursuant to Water Code section 85320(d).

NOTE: Authority cited: Water Code sections 85225.30, 85320.

20. Within five working days of the filing of an appeal pursuant to Paragraph 18, the executive director shall:

a) Post a notice and brief description of the appeal on its website and in a conspicuous location in the Council's office;

b) Mail a notice and brief description of the appeal to any person requesting copies of such appeals; and

- c) Mail copies of the appeal and a brief description of the appeal to each member of the Council.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

21. The Council or its executive officer may request from the appellant or the department additional information necessary to clarify, amplify, correct, or supplement the information submitted with the appeal within a reasonable period.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

22. Any appeal made pursuant to Paragraph 18 may be dismissed if the Council or its executive officer determines that it does not raise an appealable issue or if the appellant has failed to provide requested information to support her charge within a reasonable time, if that information is in the possession of or under the control of the appellant.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

23. The Council shall determine, based upon a preponderance of the evidence, whether the department correctly determined that the BDCP meets all of the requirements of Water Code section 85320 for inclusion in the Delta Plan. In reaching its decision, the Council shall give weight to the reasoning and factual findings of the department. The Council may seek clarification from the department of its reasoning and factual findings prior to the Council making its final determination.

NOTE: Authority cited: Water Code section 85225.30, 85320(b), (e).

23.5 a) The Council shall conduct any hearing on an appeal made pursuant to Paragraph 18 in a manner deemed most suitable to ensure fundamental fairness to all parties concerned, and with a view toward securing all relevant information and material necessary to render a decision without unreasonable delay.

b) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be considered if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a court proceeding.

Unduly repetitious or irrelevant evidence shall be excluded upon order of the Council or its chairperson.

c) Subject to Paragraph 23, evidence before the Council includes, but is not limited to, the record before the department. The record will not include a transcript of any proceedings before the department unless provided by a party to the proceedings or requested by the Council.

d) Any interested person may testify before the Council regarding an appeal concerning the BDCP. Speakers' presentations shall be to the point and shall be as brief as possible. Visual and other materials may be used as appropriate. The Council may establish reasonable time limits for presentations; such time limits shall be made known to all affected persons prior to any hearing. Where speakers use or submit to the Council visual or other materials, such materials shall become part of the hearing record and shall be identified and maintained as such. Speakers may substitute reproductions of models or other large materials but shall agree to make the originals available upon request of the executive director.

e) Council members may ask questions of the appellant, the department's representative(s), any third party appearing at the hearing or staff. Questioning of speakers at the hearing by other persons shall not be permitted except by permission of the Chairperson.

f) Interested persons may submit written comments concerning an appeal. Any such comments will be considered by the Council if they are received by the Council at or before the hearing on the appeal; provided that those written comments should be submitted to the Council at least 10 days prior to the hearing to ensure that they, or in appropriate cases, summaries, may be circulated to Council members for their review ahead of the hearing.

g) The Council may continue the hearing where it determines that a continuance would be appropriate.

NOTE: Authority cited: Water Code sections 85225.30, 85320(e).

24. The Council's decision shall include specific written findings. The Council shall post its decision on its website and mail copies to the department and all parties requesting notice.

NOTE: Authority cited: Water Code sections 85225.30, 85320(e).

25. If the Council decides that the department incorrectly determined that the BDCP meets all of the requirements of section 85320 for inclusion in the Delta Plan, and consequently grants the appeal, the department may revise its determination to meet the issues raised by the Council, or may respond to the Council's findings in detail, setting forth reasons why it has concluded that the BDCP meets all of the requirements of section 85320 for inclusion in the Delta Plan. Unless the Council decides that the department's determination, as submitted or revised, correctly concludes that the BDCP meets all of the requirements of section 85320 for inclusion in the Delta Plan, the BDCP shall not be incorporated in the Delta Plan and the public benefits associated with the BDCP shall not be eligible for state funding.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (a), (b), (e).

### **Ex Parte Contact Restrictions Applicable to All Appeals**

26. Hearings on appeals are subject to the ex parte communication restrictions of California Administrative Procedures Act (Gov. Code § 11430.10 et seq.). Under that Act, an ex parte communication is a "communication, direct or indirect, regarding any issue in the proceeding, to the [Council or Council member] from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication." (Gov. Code § 11430.10.) The restrictions apply from the date that the appeal is filed to the date that the Council reaches a final decision on the appeal.

NOTE: Authority cited: Government Code sections 11430.10, 11430.80, Water Code section 85225.30.

27. To ensure compliance with these provisions, members should avoid ex parte communications while an appeal is pending. If they nevertheless receive one, such as by an individual sending a letter to a member concerning a pending matter, the member should notify the Council's legal adviser or executive officer so that appropriate measures can be taken.

NOTE: Authority cited: Government Code sections 11430.10, 11430.80, Water Code section 85225.30.

28. At the first appropriate meeting after an appeal is anticipated or filed, the Council's legal adviser will remind the Council of this restriction and answer questions about its scope.

NOTE: Authority cited: Government Code sections 11430.10, 11430.80, Water Code section 85225.30.

### **Official Notice**

29. Notwithstanding any provision of these procedures to the contrary, the Council may take official notice in any hearing that it conducts, of any generally accepted technical or scientific matter within the Council's jurisdiction, and of any fact that may be judicially noticed by the courts of this State.

NOTE: Authority cited: Government Code section 11515, Water Code section 85225.30.

### **Filings and Mailings**

30. All filings and mailings required by sections 1-29 of these procedures may be made

electronically.

NOTE: Authority cited: Water Code section 85225.30.

### **Consolidation of Appeals**

31. The Council, at its discretion, may consolidate appeals raising similar issues.  
NOTE: Authority cited: Water Code section 85225.30.

## **PART II- STATUTORY PROVISIONS REQUIRING OTHER CONSISTENCY REVIEWS** **(AFTER ADOPTION OF THE DELTA PLAN)**

In several other sections of SB X7 1, the Council is directed to review for consistency with the Delta Plan, various plans of specified public agencies. This Part is directed at those reviews, which fall outside the scope of the procedures covered by Part I.

### 1. Delta Protection Commission's Economic Sustainability Plan.

Public Resources Code section 29759 requires the Delta Protection Commission (DPC), by July 1, 2011, to adopt an economic sustainability plan. That plan must include information and recommendations that inform the Council's policies regarding the socioeconomic sustainability of the Delta's region.

Public Resources Code section 29761.5(b) requires the DPC to transmit copies of the plan to the Council within 60 days of adoption. The Council is required, within 180 days of the adoption of the plan, to review the plan for consistency with the Delta Plan.

### 2. Local and Regional Planning Documents.

Water Code section 85057.5(b)(3), excepts from the definition of "covered action", regional transportation plans prepared pursuant to Government Code section 65080.

Paragraph (4) of that same section, excepts from the definition of "covered action", plans, programs, projects or activities within the secondary zone of the Delta that the applicable metropolitan planning organization under Government Code section 65080 has determined is consistent with either a sustainable communities strategy or an alternative planning strategy that would achieve specified greenhouse gas emission reduction targets as determined by the Air

Resources Board.

Because they are not “covered actions”, these types of local and regional planning documents are not subject to the statutory provisions governing consistency of state and local public agency actions (Water Code secs. 85225 et seq.), or the Council’s Administrative Procedures Governing Appeals (Part I, above), with one exception noted in paragraph (d), below.

However, Water Code section 85212 provides a separate requirement and process for consistency review by the Council of these types of local and regional planning documents.

In particular:

(a) The Council is required to review and provide timely advice to local and regional planning agencies regarding the consistency of local and regional planning documents, including sustainable communities strategies and alternative planning strategies prepared pursuant to Government Code section 65080, with the Delta Plan.

(b) The Council’s input must include, but not be limited to, reviewing the consistency of local and regional planning documents with the ecosystem restoration needs of the Delta and reviewing whether the lands set aside for natural resources protection are sufficient to meet the Delta’s ecosystem needs.

(c) A metropolitan planning organization preparing a regional transportation plan that includes land within the primary or secondary zones of the Delta must consult with the Council early in the planning process regarding the issues and policy choices relating to the Council’s advice.

(d) No later than 60 days prior to the adoption of a final regional transportation plan, the metropolitan planning organization must provide the Council with a draft sustainable communities strategy and an alternative planning strategy, if any. Concurrently, the metropolitan planning organization must provide notice of its submission to the Council in the same manner in which agencies file a certificate of consistency with regard to covered actions.

(e) If the Council concludes that the draft strategies are inconsistent with the Delta Plan, the Council must provide written notice of the claimed inconsistency to the metropolitan planning organization no later than 30 days prior to the adoption of the final regional transportation plan.

(f) If the Council provides timely notice of a claimed inconsistency, the metropolitan planning organization’s adoption of the final regional transportation plan must include a detailed response to the Council’s notice.

**PART III- OTHER FORMS OF REVIEW OR EVALUATION BY THE COUNCIL**

1. Interested parties, including federal, state and local public agencies, are encouraged to confer with the Council or its executive officer over the scope and potential impacts of the interim plan developed under Water Code section 85084. Interested parties will be provided an opportunity to comment and provide input on the interim plan as it is developed.
2. Similarly, prior to adoption of the Delta Plan, project proponents are encouraged to consult with the Council or its executive officer early in the planning stages of projects that may constitute “covered actions” under Water Code section 85057.5 once the Delta Plan is adopted. Subject to available resources, the Council may review and comment on planning documents and environmental review documents regarding potential “covered actions”.
3. Subject to available resources, the executive officer or his designee may meet with interested parties, upon their request, to help mediate relevant disputes, including disputes, once the Delta Plan is adopted, over whether a project constitutes a "covered action" under Water Code section 85057.5. The intent of this mediation will be to provide an objective and informal forum for dispute resolution that will serve as a more efficient alternative to costly and time- consuming litigation.
4. Interested parties, including federal, state and local agencies, are encouraged to confer and coordinate with the Council or its executive officer with regard to agency plans, studies, strategies, and recommendations required, or otherwise suggested, to be considered by the Council for incorporation into the Delta Plan.