State of California
Delta Stewardship Council

Final Statement of Reasons for Rulemaking, Including Summary of Public Comments and Agency Responses

Update of Initial Statement of Reasons

The initial statement of reasons is included in the rulemaking file. The information contained therein is updated as follows. Council staff modified the proposed regulation in response to comments received during the comment periods and public hearings on the proposed regulation. The modifications to the originally proposed regulation are summarized below. All references to sections 5001 to 5016 (originally 5001 to 5020) are to Title 23, Division 6 of the CCR. The following summary does not include modifications to correct typographical or grammatical errors, changes in numbering or formatting; nor does it include all of the non-substantive revisions made to improve clarity or correct references.

Section 5001. Definitions (originally 5001. General Definitions; 5002. Proposed Action Defined; and 5003 Covered Action Defined)

Definitions in Section 5001 were edited for clarity, to clarify intent of the proposed regulation, and pursuant to revisions or additions to the proposed regulation in response to comments. Substantial changes include:

- "Base flood," "Base flood elevation," and "Floodproofing," sections 5001(d), 5001(e), and 5001(s), respectively, were added as new definitions related to the revised Section 5013.
- The term "Best available science," section 5001(f), was revised for conciseness. Deleted information is included in Appendix 1A to the regulations.
- "Central Valley Flood Protection Board," section 5001(g), was added as a new definition related to the revised sections 5014 and 5015.
- The term "Covered action," section 5001(j), was revised to clarify intent. Language removed from the definition was more appropriately placed in section 5001(dd), "Significant impact."
- "Designated floodway" and "Regulated stream," sections 5001(m) and 5001(aa), respectively, were added as new definitions related to the revised section 5014.
- The definition of "Nonnative invasive species," section 5001(v), was added as a new definition related to the revised section 5009. The definition was taken from the California Department of Fish and Wildlife's 2008 *California Aquatic Invasive Species Management Plan*.
- Definitions of "Non-project levee" and "Project levee," sections 5001(w) and 5001(x), respectively, were added to distinguish between non-project and project levees.
- Categories of projects not having a "significant impact" on achievement of the coequal goals or a government-sponsored flood control program were moved from the definition of "covered action" and more appropriately placed in section 5001(dd), the definition of "Significant impact." Water transfers of one year or less are included among the categories of projects not having a "significant impact" in section 5001(dd)(3) until December 31, 2016. Previously, the "sunset date" had been December 31, 2014.

Section 5002 (originally 5004). Contents of Certification of Consistency

Changes to this policy include the following:

- Clarifies that covered actions need to be consistent with the Delta Plan.
- Clarifies how conservation measures pursuant to existing local natural community conservation plans or habitat conservation plans can be found consistent with the Delta Plan.
- Removes the requirement that the certification of consistency include a certification that the covered action complies with specified categories of applicable laws.

The revisions to this policy were primarily made to better conform to the Delta Reform Act or other provisions of California law, and/or existing authorities and jurisdictions of various State agencies. These changes concern the standards and procedures that will be used to determine whether a covered action is consistent with the Delta Plan.

Section 5003 (originally 5005). Reduced Reliance on the Delta through Improved Regional Water Self-Reliance

Changes to this policy include the following:

- Removes introductory statements and moves them to the Delta Plan narrative.
- Clarifies that this section applies only when one or more water suppliers would receive water as a result of a proposed action to export water from, transfer water through, or use water in the Delta.
- Adds quantification of previously included performance measures for demonstrating reduction in reliance on the Delta and improvement in regional self-reliance, and specifies a mechanism for reporting this information to the State.
- Clarifies that regional water storage is included in the list of programs and projects that could reduce reliance on the Delta.

The removal of the descriptive, introductory language has no effect on the scope of the policy. Clarifying performance measures and the contents of water management plans changes the planning and reporting that agencies must undertake pursuant to this policy. The addition of regional water storage projects clarifies the Council's intent that those projects may be considered in evaluating compliance with the policy.

Section 5004 (originally 5006). Transparency in Water Contracting

Changes to this policy include the following:

- Provides the citations to the Central Valley Project Improvement Act and the rules and regulations implementing that Act.

The addition of the law title and reference to the associated rules and regulations clarifies the language that was previously proposed.

Section 5005 (originally 5007). Update Delta Flow Objectives

Changes to this policy include the following:

- Reclassifies the recommendation to the State Water Resources Control Board to update flow objectives as a recommendation in the Delta Plan rather than included in this regulation.
- Clarifies that this section only applies to proposed actions that could "significantly" affect flow in the Delta.

This change removed recommendation language from the regulation and placed it into a recommendation in the Delta Plan for the purpose of improved accuracy. "Significantly" was added to clarify the Council's intent that this policy only apply to projects which significantly affect flow in the Delta.

Section 5006 (originally 5008). Restore Habitats at Appropriate Elevations

Changes to this policy include the following:

- Provides for deviations from the elevation map attached as Appendix 4 if a rationale based on best available science is provided.

Revisions to this policy were made to account for the California Department of Fish and Wildlife comment that the potential to deviate from a portion of the regulation be allowed if supported by sufficient scientific rationale.

Section 5007 (originally 5009). Protect Opportunities to Restore Habitat

Changes to this policy include the following:

- Clarifies that within the specified priority habitat restoration areas, significant "adverse" impacts to the opportunity to restore habitat must be avoided or mitigated, to a point where the impacts have no significant effect on the opportunity to restore habitat.
- Clarifies that impacts will be deemed to be avoided or mitigated if the project is designed and implemented so as not to preclude or otherwise interfere with the ability to restore habitat.

Revisions to this policy were made to specify how a project can avoid or mitigate potential reduction in the ability to restore habitat areas and to tie the avoidance and mitigation to section 5006 for clarity. "Adverse" was added to clarify the Council's intent that only significant adverse impacts must be avoided or mitigated.

Section 5008 (originally 5010). Expand Floodplains and Riparian Habitats in Levee Projects

Changes to this policy include the following:

- Reduces the requirement to evaluate and incorporate, where feasible, the use of setback levees to specified areas only.

Revisions to this policy would reduce the scope of its requirements from Delta-wide to only the specific areas listed in the policy.

This change reduced the estimated total cost to State and local agencies of evaluating the feasibility of setback levees. The Cost Analysis for Proposed Delta Plan Regulations and the STD 399 were revised accordingly and made available for public review.

Section 5009 (originally 5011). Avoid Introductions of and Habitat Improvements for Nonnative Invasive Species

Changes to this policy include the following:

- Added the word "invasive" in the title of the regulation for clarity.
- Expressly lists "striped bass and bass" to clarify that these species are covered by the policy.

As discussed previously, a related definition of "nonnative invasive species" was added to the regulatory definitions (see section 5001) to provide additional clarification. Bass and striped bass were already subject to the provision as originally proposed, but because questions were raised whether they were technically covered, the modified revision simply makes their inclusion explicit.

Section 5010 (originally 5012). Locate New Urban Development Wisely

Changes to this policy include the following:

- Clarifies that proposed development outside of the areas specified in the policy is permitted if it is consistent with the county general plan as of the date of Delta Plan adoption.
- Clarifies that the restrictions on the location of new urban development apply to residential, commercial, and industrial uses.

The revisions clarify what constitutes new urban development subject to the restrictions (residential, commercial, and industrial uses), and that these uses nevertheless may be permitted if they are consistent with the applicable county's general plan. Appendix 7 to the proposed regulation depicting the unincorporated Delta towns in Sacramento County was revised. Revisions to the maps were made regarding Hood, but not suggestions for Walnut Grove or Courtland, which proposed designations of sites not contiguous with these towns as part of the unincorporated town, or for Locke, where the county sought to include a large undeveloped site planned for commercial recreation as part of the unincorporated town. In addition, Appendix 7 maps for the cities of Tracy and Lathrop were revised to reflect the most current General Plans for these cities.

Section 5011 (originally 5013). Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats

Changes to this policy include the following:

- Clarifies, for purposes of avoiding land use conflicts with water management, ecosystem restoration and flood management projects encouraged by the Delta Plan, that conflicts should be avoided with not only existing uses but also with planned land use described or depicted in city and county general plans.

Revisions to this policy were made to clarify that planned uses are defined as those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence.

Section 5012 (originally 5014). Prioritization of State Investments in Delta Levees and Risk Reduction

Changes to this policy include the following:

- Removes subsections addressing recommended Delta Stewardship Council and Department of Water Resources actions to update Delta levees funding priorities and places them in the Delta Plan as a recommendation, as they are not regulatory.
- Removed the statement that State Legislature funding allocations to the Delta Levees Subventions Program is not a covered action.

Revisions to this policy appropriately reclassify the actions or studies needed to support the development of revised funding priorities as a recommendation rather than a regulatory policy.

Shifting the Council's participation in prioritization to a statutory obligation rather than a new regulatory obligation reduces the regulatory cost to the State. The Cost Analysis for Proposed Delta Plan Regulations and the STD 399 were revised accordingly and made available for public review.

Section 5013 (originally 5015). Require Flood Protection for Residential Development in Rural Areas

Changes to this policy include the following:

- Clarifies the specific level of flood proofing required for new residential development of five or more parcels so that it is at least 12 inches above the 100-year (compared to the prior requirement of 200-year protection) base flood elevation plus sufficient additional specified elevations to protect against a 55-inch sea level rise at the Golden Gate.

Revisions to this policy improve the level of flood protection for new residential development of five or more parcels in rural areas by changing from a requirement for 200-year protection (levees or floodproofing) to 100-year floodproofing plus additional freeboard elevation requirements to account for anticipated sea level rise within approximately the next 100 years. These changes are consistent with current legal requirements for floodproofing structures in rural areas, with an additional measure of risk reduction to account for sea level rise, as recommended by the Ocean Protection Council.

Section 5014 (originally 5016). Floodway Protection

Changes to this policy include the following:

- Changes the word "permitted" to "allowed or constructed" for accuracy.
- Acknowledges the Central Valley Flood Protection Board's (CVFPB) authority over "designated floodways" and "regulated streams," and clarifies that this policy only applies to floodways not regulated by the CVFPB, as defined in the definitions section (section 5001). Related definitions are added to the definitions (section 5001) of the regulations.

Changing "permitted" to "allowed or constructed" more appropriately tracks the Council's consistency review process. The other revisions to this policy clarify that the policy does not apply to those designated floodways and regulated streams which are subject to the authority of the CVFPB.

Section 5015 (originally 5017). Floodplain Protection

Changes to this policy include the following:

- Changes the word "permitted" to "allowed or constructed" and adds the word "adverse" in the policy for clarity.
- Clarifies the geographical extent of the Yolo Bypass addressed by the policy to be limited to the portion only within the Delta.

Changing "permitted" to "allowed or constructed" more appropriately tracks the Council's consistency review process. Adding "adverse" clarifies the Council's intent that only significant adverse impacts be covered by this regulation. The other revision to this policy clarifies that only the portions of the Yolo Bypass that are within the Delta are covered by the policy.

Section 5016. Miscellaneous Provisions (originally 5018. Just Compensation; 5019. Property Owner Rights; and 5020. No Increase in State's Flood Liability)

This section was changed to combine three sections into a single section.

Additional Clarification to the Initial Statement of Reasons as Provided in the Delta Plan

Changes were made in explanatory text in the Delta Plan to better describe the Council's rationale for its policy on water contracting transparency, section 5004 (originally 5006). The original explanation was included in the Initial Statement of Reasons, and the revised explanation is provided below:

> Accurate, timely, consistent, and transparent information on the management of California water supplies and beneficial uses is an important tool used in the achievement of the coequal goals. The State needs sufficient information to assess the current reliability of its water supplies or to meaningfully measure progress toward achievement of more reliable water supplies for California.

The section in the Initial Statement of Reasons titled "Other Technical and Empirical Studies, Reports, or Documents" states:

> The proposed regulatory policies contained in the Delta Plan are based on the best scientific information available to the Council, as documented in the bibliography of the November 2012 Final Draft Delta Plan.

The references listed at the end of each chapter and appendix of the Delta Plan constitute the bibliography. Changes made to the Delta Plan since the November 2012 Final Draft Delta Plan conform to the revisions to the proposed regulation sections described above. The final Delta Plan was adopted by the Council on May 16, 2013.

Additional Document(s) Added to the Record

Cost Analysis

The Delta Reform Act requires State or local agencies that propose to undertake covered actions to certify with the Council, before acting, that their proposed plans, programs, or projects are consistent with the Delta Plan. The Cost Analysis for Proposed Delta Plan Regulation in Support of Economic and Fiscal Impact Statement, dated November 2012, identified the economic and fiscal impacts to business associated with the proposed regulatory policies contained in the Delta Plan. The analysis was used to support estimates used in STD 399, Economic and Fiscal Impact Statement, and its attachment.

The Council staff modified the Cost Analysis for Proposed Delta Plan Regulations in response to comments received and to reflect the revisions to the regulation. The important revisions affecting the cost estimate are the changes to sections 5008 and 5012. In section 5008, the applicability of the evaluation of levee setbacks has been substantially narrowed. In section 5012, the direction for the Council to participate in levee prioritization has been removed as a regulatory provision, and the corresponding cost associated with that activity has been removed from the cost estimate. This change recognizes that the Council's participation is a statutory requirement. In response to comments, additional description of Delta Plan benefits and potential indirect costs has also been included.

In accordance with Government Code section 11347.1, the modified Cost Analysis for Proposed Delta Plan Regulations was made available for public review in the Notice of Public Availability of Modified Regulatory Text and Availability of Additional Documents.

STD 399, Economic and Fiscal Impact Statement

The revised analysis from the Cost Analysis for Proposed Delta Plan Regulations was used to update the estimates and conclusions contained in STD 399, Economic and Fiscal Impact Statement, and its attachment. While there is no legal requirement that a modified STD 399 be made available for public review and comment, the Council made the document available for public review with its Notice of Additional Document for Public Review, in keeping with its commitment to full transparency and open decision.

Summary and Response to Comments

- Attachment 1: Draft Master Response to Comments Received during the Notice Periods
- Attachment 2: Draft Response to Comments Received during the 45-day Notice Period November 30, 2012, through January 14, 2013, and during the Public Hearing January 24, 2013
- Attachment 3: Draft Response to Comments Received during the 15-day Notice Period April 8, 2013, through April 22, 2013
- Attachment 4: Draft Response to Comments Received during the 15-day Notice Period April 24, 2013, through May 9, 2013

Local Mandate

The Council has determined that the proposed regulatory action could impose a mandate on local agencies and school districts. However, the Council has also determined that many, if not all, local agencies and school districts have existing legal authority to recover costs of consistency certification and compliance with applicable policies through the use of fees, assessments, and charges. In this instance, the local mandate is not reimbursable pursuant Government Code section 17556(d). In the event, however, that any agency does not have or is unable to exercise such authority, Section 41 of the Delta Reform Act provides for the Commission on State Mandates to determine costs mandated by the State and for reimbursement to local agencies pursuant to Part 7 (commencing with section 17500) of Division 4 of Title 2 of the Government Code.

Consideration of Alternatives

Alternative approaches to individual policies were considered by the Council over the course of the Delta Plan development. Numerous drafts were prepared and hundreds of comments and suggestions from stakeholders and the public were provided and considered. Alternative approaches for fourteen proposed policies are summarized in the Initial Statement of Reasons (November 2012). The specific alternative approaches and the reasons they were not preferred are specific to the different policies. In general, reasons for selecting the proposed policy include:

- The proposed policy is required by the Delta Reform Act.
- Other approach does not adequately meet coequal goals.
- Other approach is infeasible or impractical.
- Other approach is inconsistent with existing law, regulation, or policy.
- Other approach is too costly or burdensome for the regulated entities.
- Other approach could have unacceptable environmental or economic impacts.

In addition, a Draft Program Environmental Impact Report (Draft PEIR) was prepared by the Council as the Project proponent and State lead agency under the California Environmental Quality Act (CEQA). In response to comments, a revised Delta Plan was developed and evaluated as the Revised Project in the Recirculated Draft PEIR.

The Recirculated Draft PEIR evaluated a range of alternatives to the Revised Project. The alternatives were developed based on information collected during the CEQA scoping process and during development of eight drafts of the Delta Plan. In accordance with CEQA Guidelines, the range of reasonable alternatives was developed and evaluated for the extent and feasibility of attaining most of the basic objectives of the Proposed Project and avoiding or substantially lessening any of the significant effects of the project. Alternatives were:

1. Less aggressive approach to increase local and regional water supplies and reduce reliance on Delta water supplies. Emphasis on consideration of benefits relative to costs.
2. Less aggressive approach to increase local and regional water supplies and reduce reliance on Delta water supplies. Emphasis on a phased approach.
3. More aggressive approach to increase local and regional water supplies, reduce reliance on Delta water supplies, and develop water quality and flow objectives to support public trust resources. Emphasis on a phased approach to ecosystem restoration and eliminating land uses that could increase the risk to human life due to levee failure.
4. Less aggressive approach to regional water balances for users within the Delta and Suisun Marsh. Emphasis on ecosystem restoration on publicly owned lands and minimizing major developments in flood risk areas.

For the reasons set forth in the Initial Statement of Reasons (ISOR), in Council staff's response to comments received during the 45- and 15-day comment periods, and in this document, the Council has determined that none of the alternatives considered or that have otherwise been identified and brought to the attention of the Council would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

Small Business Impact

The direct cost of the proposed regulatory policies falls on State and local public agencies, not on businesses. Businesses in general are affected by (1) costs passed on by a local agency through assessments, rates, fees, or other charges; and (2) benefits foregone or additional costs if a covered action must be modified to comply with Delta Plan policies. There is no evidence that small businesses would be disproportionately affected or overly burdened by the proposed regulation.

Several policies incorporated alternative approaches to avoid or minimize impacts on small businesses in the Delta. For example, limitations on construction or development in the Delta (section 5010) specifically exempt "commercial recreational visitor-serving uses or facilities for processing of local crops or that provide essential services to local farms." Section 5011 directs covered actions to avoid conflicts with existing land uses, including farming.

The Council expects and intends that substantial statewide benefits will result from achievement of the Delta Plan's goals of ecosystem restoration, water supply reliability, and flood protection. On a statewide basis, the resulting benefits to private businesses, including small businesses, and individuals are expected to outweigh any costs imposed on them.

For the reasons set forth in the ISOR, in Council staff's response to comments received during the 45- and 15-day comment periods, and in this document, the Council has determined that none of the alternatives considered or that have otherwise been identified and brought to the attention of the Council would be as effective and less burdensome to affected private persons, including small businesses, than the action taken by the Council.

In cases where a comment and response refer to a regulation section or Delta Plan appendix that has changed between the originally proposed regulatory text and modified regulatory text, the original reference is shown in strikeout and the revised reference is shown in normal text.

Attachment 1
Master Responses to Comments Received during the Notice Periods

Attachment 2
Responses to Comments Received
during the 45-day Notice Period November 30, 2012, through January 14, 2013, and during the Public Hearing January 24, 2013

Attachment 3
Responses to Comments Received
during the 15-day Notice Period April 8, 2013, through April 22, 2013

Attachment 4
Responses to Comments Received
during the 15-day Notice Period April 24, 2013, through May 9, 2013

Draft Master Responses to Comments Received on the Proposed Regulation during the Public Review Periods

MR1. Regulatory Authority (General)

Several commenters question the Council's authority to include a regulatory component in the Delta Plan. This Master Response addresses those comments.

The Sacramento-San Joaquin Delta Reform Act of 2009 ("Delta Reform Act") calls for an approach that includes a significant regulatory component. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. (Water Code section 85001(c); see also section 85020(h) [declaring the intent of the Legislature to create "a new governance structure with the authority . . . to achieve (listed) objectives].) The Legislature therefore established a regulatory approach under which "covered actions" must be consistent with the Delta Plan. (See, for example, Water Code sections 85022(a) [legislative intent that land use actions be consistent]; 85057.5 [definition of covered action]; 85225-85225.30 [requiring consistency for all covered actions].)

This regulatory structure enables the Council to meet the Act's requirement that the Delta Plan be consistent with "[t]he federal Coastal Zone Management Act of 1972 [CZMA]. . . or an equivalent compliance mechanism." (Water Code section 85300 (d) (A).) The CZMA's implementing regulations concerning compliance require "that the State demonstrates that there is a means of ensuring" compliance with the Coastal Management Plan's (i.e., Delta Plan's) enforceable policies. (15 C.F.R. section 923.40(b); 16 U.S.C. section 1455(d)(2)(D).) The Delta Plan must "identify the means by which the state proposes to exert control over the permissible land uses and water uses within the coastal zone." (15 C.F.R. section 923.41(a)(1).) In order to do so, the Plan must utilize one or more of the following three methods of oversight and enforcement: (1) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement; (2) direct State land and water use planning and regulation; or (3) state review for consistency with the Plan of all development plans, projects, or land and water use regulations proposed by any State or local authority or private party. (15 C.F.R. section 923.40(b); 16 U.S.C. section 1455(d)(11).) Whichever approach is utilized, it must be "sufficiently comprehensive and specific to regulate land and water uses, control development, and resolve conflicts among competing uses." (15 C.F.R. section 923.40(a).)

The Delta Plan must therefore include a significant regulatory component.

MR2. Appeals of Consistency Determination

This Master Response addresses comments pertaining to an appeal of certification of consistency. Commenters assert that the Council's appeals procedures preventing the agency from proceeding with a covered action unless no one appeals the revised certification or an appeal is filed and denied are 1) underground regulations and 2) unsupported by the terms of the Delta Reform Act.

The questioned appeals procedures, which are not part of this proposed regulation package, are not underground regulations because they are exempt from the Administrative Procedures Act (APA). Moreover, although not relevant to this APA response to comments, the appeals procedures are supported by the Delta Reform Act.

The Delta Reform Act provides that "[t]he council shall adopt administrative procedures governing appeals, which shall be exempt from" the APA. (Water Code section 85225.30, citing Government Code section 11340 et seq.) Given that exemption, the Council's procedures cannot be underground regulations. Pursuant to the Act, the Council adopted procedures governing appeals on September 23, 2010. Part I, section 15 of those procedures provides as follows:

> No covered action which is the subject of an appeal shall be implemented unless one of the following conditions has been met:
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> a) The council has denied the appeal;
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> b) 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
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> c) The council or its executive officer has dismissed the appeal for one or both of the following reasons:
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> 1. The appellant has failed to provide information in her possession or under her control within the time requested or
>
> 2. The issue raised is not within the council's jurisdiction or fails to raise an appealable issue.

Because the Council's procedures are exempt from the APA, the commenters are in essence arguing that the concept of a stay embodied in the above provision cannot be deemed a procedural matter under section 85225.30. Stays, however, are quintessentially procedural. For a few examples of judicial references to "stays" as being "procedural," see *In re Morgan* (2010) 50 Cal.4th 932, 948 ("The stay and abeyance procedure approved by the Supreme Court"); *People v. Benson* (1998) 18 Cal.4th 24, 41 ("the *Niles* stay procedure" *Selma Auto Mall II v. Appellate Department* (1996) 44 Cal.App.4th 1672, 1681 ("Code of Civil Procedure sections governing stays of enforcement in civil appeals"); *Robbins v. Foothill Nissan* (1994) 22 Cal.App.4th 1769, 1778 ("a stay procedure"); *Farmers Ins. Exchange v. Superior Court* (1992) 2 Cal.4th 377, 387 fn. 8 ("stay procedure under the primary jurisdiction doctrine."). Because the stay procedure was not subject to the APA, it cannot be an underground regulation.

The challenge to this procedure is not only irrelevant in this regulatory adoption process, given the APA exemption, it is also incorrect on the merits because the challenged procedure tracks the Delta Reform Act.

The Act provides that:

1) Agencies proposing to undertake a covered action must "prior to initiating the implementation" file a "certification of consistency" with the Council. (Water Code section 85225.)

2) Any person "may file an appeal with regard to a certification of consistency submitted to the council." (Water Code section 85225.10 (a).)

3) After hearing the appeal, the Council shall either deny the appeal or remand the matter back to the agency for reconsideration. (Water Code section 85225.25.)

4) On remand, if the agency decides to proceed, it shall "prior to proceeding with the action, file a revised certification of consistency" with the Council. (Water Code section 85225.25.)

The commenters would have the process stop there, and prohibit an appeal of that revised certification. The Act, however, expressly provides that any person "may file an appeal with regard to *a certification of consistency* submitted to the council." (Water Code section 85225.10 (a); emphasis added.) The revised "certification of consistency" is "a certification of consistency." The commenters would like to change the statutory language to state that any person "may file an appeal with regard to *an initial* certification of

consistency submitted to the council." The Legislature, however, did not limit appeals to "initial" certifications. The comments ignore express statutory language.

Given this express language, the comments' legislative history argument is not relevant. Where legislative language is clear and unambiguous, courts do not resort to legislative history. (See *DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal. 4th 983, 992.)

Moreover, the legislative history that the comments cite does not support their argument. They cite a prior version of section 85225.25 under which, after remand, an agency would not have been allowed to proceed with a project unless the Council had made specified written findings. The comments assert that the lack of that requirement in the adopted statute indicates a legislative intent that there cannot be further Council review. However, while the Legislature did change the review requirements where an agency decided to proceed with a covered action, the Legislature did not eliminate review. In the prior version, Council review was mandatory; it always occurred. In the enacted version, review is contingent; review does not occur unless a person files an appeal challenging the revised certification.

Finally, the commenters' approach would ignore the Legislative mandates, described in more detail elsewhere (see Master Response 3 [Land Use Authority]), 1) that the Council adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals (Water Code section 85001(c)), and 2) that the Delta Plan must be consistent with "[t]he federal Coastal Zone Management Act of 1972 [CZMA]. . . or an equivalent compliance mechanism." (Water Code section 85300 (d) (A).) Allowing an agency to proceed with a project that fails to comply with the Delta Plan as these comments suggest would undermine those enforcement mandates.

MR3. Land Use Authority

This Master Response addresses those comments questioning the Council's authority to regulate land uses or development and comments asserting that the proposed regulations are inconsistent with, and contrary to, local agency land use authority as set forth in California law.

The Delta Reform Act expressly provides that the Delta Plan is to regulate land uses and development. Water Code section 85022 (a) thus states as follows: "It is the intent of the Legislature that state and local land use actions identified as 'covered actions' pursuant to section 85057.5 be consistent with the Delta Plan." Section 85057.5, in turn, states that covered actions include a "project" as defined by the California Environmental Quality Act (CEQA) that will occur at least in part within the Delta. CEQA's definition of "project" encompasses among other things "development" ("an activity which may cause . . . a direct physical change in the environment . . ."). (Public Resources Code section 21065.)

In sharp contrast, the same legislation that established the Council (SBX 7 1) established the Sacramento-San Joaquin Delta Conservancy and expressly prohibited the Conservancy from regulating land use. (See Public Resources Code section 32381: "This division does not grant to the conservancy any of the following: (a) The power of a city or county to regulate land use. (b) The power to regulate any activities on land [except where it owns the land or the owner agrees].") The lack of a similar prohibition concerning the Council reinforces the express language giving it authority to regulate land uses and development.

Moreover, as noted in Master Response 1 (Regulatory Authority), the Delta Reform Act directs the Council to develop a Delta Plan consistent with the CZMA "or an equivalent compliance mechanism." (Water Code section 85300 (d) (A).) That mechanism mandates that a covered plan (in our case, the Delta Plan) exert control over development and land uses.

The CZMA's implementing regulations concerning compliance thus require "that the State demonstrates that there is a means of ensuring" compliance with the Coastal Management Plan's (i.e., Delta Plan's) enforceable policies. (15 C.F.R. section 923.40(b); 16 U.S.C. section 1455(d)(2)(D).) In other words, the

program must “identify the means by which the state proposes to exert control over the permissible land uses and water uses within the coastal zone.” (15 C.F.R. section 923.41(a)(1).) In order to do so, the Plan must utilize one or more of the following three methods of oversight and enforcement: (1) State establishment of criteria and standards for local implementation, subject to administrative review and enforcement; (2) direct State land and water use planning and regulation; or (3) State review for consistency with the Plan of all development plans, projects, or land and water use regulations proposed by any State or local authority or private party. (15 C.F.R. section 923.40(b); 16 U.S.C. section 1455(d)(11).) Whichever approach is utilized, it must be “sufficiently comprehensive and specific to regulate land and water uses, control development, and resolve conflicts among competing uses.” (15 C.F.R. section 923.40(a).)

One comment states that “This proposed Regulation is inconsistent with, and contrary to, local agency land use authority as set forth in California law.” (San Joaquin County Board of Supervisors.) The comment does not provide any further information beyond that quoted sentence. It appears that the comment asserts that an otherwise valid State regulation is invalid if it is contrary to a local land use law. To the extent that an otherwise valid State regulation conflicts with a local law, however, the State measure prevails. See, for example, *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 747 (local legislation that contradicts State law is void).

MR4. Authority to Consider Out-of-Delta Actions When Regulating In-Delta Actions

This Master Response responds to comments asserting that section 5005 (section 5003 in the revised regulation) impermissibly considers out-of-Delta actions in determining the validity of an in-Delta action.

The Delta Reform Act gives the Council the authority and discretion to regulate by providing that the validity of a covered action occurring at least in part within the Delta that would significantly harm the Delta’s ecosystem turns on whether the project is needed only because one or more out-of-Delta water suppliers receiving water are failing to implement conservation and local water supply development measures.

The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. (Water Code section 85001(c).) Moreover, the Delta Plan must be consistent with “[t]he federal Coastal Zone Management Act of 1972 [CZMA]. . . or an equivalent compliance mechanism.” (Water Code section 85300 (d) (A).) The CZMA’s implementing regulations concerning compliance in turn require “that the State demonstrates that there is a means of ensuring” compliance with the Coastal Management Plan’s (i.e., Delta Plan’s) enforceable policies. (15 C.F.R. section 923.40(b); 16 U.S.C. section 1455(d)(2)(D).) In other words, the Delta Plan must “identify the means by which the state proposes to exert control over the permissible land uses and water uses within the coastal zone.” (15 C.F.R. section 923.41(a)(1).)

The central enforcement tool available to the Council to meet that mandate is the Delta Reform Act's requirement that "covered actions" be consistent with the Delta Plan. (Water Code sections 85225 and 85022(a).) The Act provides that a plan, program, or project must at least "in part" occur within the Delta in order for these consistency requirements to apply. (Water Code section 85057.5(a)(l).) The Act incorporates CEQA's definition of "project," i.e., "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Water Code section 85057.5(a); Public Resources Code section 21065.)

As an example, a proposed project involving the export of water from the Delta, such as an increase in the size of existing Delta intakes, will generally be a covered action. The Council can, therefore, regulate that action by requiring it to be consistent with the Plan. Some comments question, however, whether the Council can require that the validity of the covered action turn on, in part, whether it is needed because, say, a Southern California recipient water supplier is failing to conserve water in accordance with the

regulation. The Council's authority can be seen by using a proposed expanded Delta intake as an example:

1) Assume that this particular proposal to pump water out of the Delta would have significant negative impacts on the Delta's ecosystem and that it therefore would be contrary to the statutory goal of "protecting, restoring and enhancing the Delta ecosystem." (Water Code section 85054.)

2) The expanded intake should nevertheless be allowed if it is needed to achieve the coequal goal of "providing a more reliable water supply for California." (Water Code section 85054.)

3) But because in this example the water supply goal could be met through out-of-Delta measures without undermining the ecosystem goal, the expanded in-Delta intake is not justified and is inconsistent with the Delta Plan.

Various provisions in the Delta Reform Act reinforce this reasoning. First, the Delta Reform Act's directions concerning the content of the Delta Plan indicate that the Council has the discretion to reach some water supply reliability actions taken outside of the Delta. Water Code section 85303 mandates that the Delta Plan "shall promote statewide water conservation, water use efficiency, and sustainable use of water." The Delta Plan must also include measures that "promote a more reliable water supply" generally, including addressing the broad issues of meeting needs for reasonable and beneficial uses of water and sustaining the state's economic vitality. (Water Code section 85302(d).)

Some comments assert that by using the term "promote," the Legislature intended to limit the Council's out-of-Delta authority to recommendations and similar non-regulatory provisions. They are correct that the term "promote" includes the notion of prodding. But it also includes promoting by regulating. The California Supreme Court thus explains that an agency charged with promoting a policy has the discretion to do so by adopting a regulation prohibiting an activity. In *Ralphs Grocery Co. v. Reimel* (1968) 69 Cal.2d 172, grocery stores asserted that a state agency lacked the authority to adopt a state regulation that prohibited beer wholesalers from granting discounts for quantity purchases. The Court rejected the claim, explaining that:

> the Legislature gave the department a general mandate: to use its expertise and power of continuous regulation as it sees fit to 'promote orderly marketing and distribution.' One tool available to accomplish this goal was the prohibition of quantity discounts. In not mentioning this method, the Legislature left the question of its propriety for the department.

Id. at 183 (emphasis added). Similarly, in *Bank of Italy v. Johnson* (1926) 200 Cal. 1, 22, the Court held that a rule using the word "require" was "in harmony" with a statute using the word "promoted."

Consistent with our Supreme Court's interpretation of the term "promote" as including prescriptive regulations, the Oxford Dictionaries defines the term as "support or actively encourage (a cause, venture, etc.); further the progress of: [for example] *some regulation is still required to promote competition*." (See http://oxforddictionaries.com/definition/english/promote [emphasis in original].) The Legislature likewise has expressly used the term "promote" to mean "require." (See, for example, Health & Safety Code section 1276.3(b)(1) [agency can "promote" by "requiring" certain actions]; Penal Code section 1016.5 [declares Legislature's intent to "promote fairness . . . by requiring" a specified warning].) In the Delta Reform-Act, the Legislature did not limit the term "promote" to non-regulatory actions. Rather, it gave the Council the discretion to determine how best to promote water conservation and related objectives.

Second, the Legislature's use of the phrase "shall promote" in the water supply context contrasts with its discussion of the Plan's out-of Delta reach with regard to ecosystem restoration and flood risk reduction. Ecosystem restoration and flood risk provisions may (not shall) reach outside the Delta if they meet specified conditions. (Water Code sections 85302(b), 85307(a).) This contrast indicates that the Legislature sought to require the Council to adopt more robust measures concerning out-of-Delta water conservation and local water supplier development than out-of-Delta ecosystem or flood risk measures.

Third, the requirement that the Delta Plan address statewide water conservation, efficiency and development of local water supplies in a meaningful way is necessary for the Council to achieve the various policies laid out in the Delta Reform Act. For example, Water Code section 85001(c) declares the intent of the Act is "to provide for a more reliable water supply for the state ..." (See also section 85004(b) [explaining that "providing a more reliable water supply for the state" involves a broad set of water efficiency, conservation, and infrastructure projects].) Section 85020 declares the State's policy regarding the Delta to include: "(a) manag[ing] . . . the water resources of the state over the long term," "(d) promot[ing] statewide water conservation, water use efficiency, and sustainable water use," and "(f) improv[ing] the water conveyance system and expand[ing] statewide water storage." The Legislature goes on to state that these objectives are not directed to an advisory body. Rather, it expressly "(h) establish[ed] a new governance structure with the authority, responsibility, accountability, scientific support, and adequate and secure funding to achieve these objectives."

In addition, section 85021 declares the State's policy is "to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." That section also mandates that "[e]ach region that depends on water from the Delta watershed shall improve its regional self-reliance." Thus, the Act itself includes a mandate that regions outside of the Delta take actions outside of the Delta in order to achieve the coequal goals. Finally, section 85023 provides that the public trust doctrine and the constitutional principle of reasonable use are the foundation of State water management policy. The requirement that the Council craft a Delta Plan capable of meeting the Delta Reform Act's ambitious statewide water policies is incompatible with an interpretation of the Act that prohibits a regulation that can take relevant out-of Delta actions into account in determining the validity of an in-Delta covered action.

The Delta Reform Act therefore gives the Council the authority and discretion to adopt a regulation that takes out-of-Delta water conservation and local water supply development actions into account when those actions have a direct causal relationship to the action within the Delta, i.e., where the out-of-Delta action significantly causes the need for the in-Delta action. If the regulation had to ignore those out-of-Delta actions, the Council's ability to meet the Delta Reform Act's mandates and goals relating to water conservation, efficiency, and sustainable use, and ultimately its ability to achieve the coequal goal of statewide water supply reliability, would be seriously limited.

MR5. Authority to Protect, Restore and Enhance the Delta Ecosystem

This Master Response addresses comments that question the Council's authority to protect and restore habitat.

Regulatory measures regarding habitat protection and restoration further the coequal goal of "protecting, restoring and enhancing the Delta ecosystem." (Water Code section 85054.) They also advance the "fundamental" statutory goals to "Protect, maintain, enhance, and, where feasible, restore the overall quality of the Delta environment and its natural and artificial resources" (Water Code section 85022(d)(1)) and to "protect existing habitats." (Water Code section 85022(d)(5).) The provisions also address the statutory mandate that the Delta Plan promote "Diverse and biologically appropriate habitats and ecosystem processes" (Water Code section 85302(c)(3)), that the plan advance the restoration of "large areas of interconnected habitats within the Delta (Water Code section 85302(e)(1)) and that it "Restore habitat necessary to avoid a net loss of migratory bird habitat and, where feasible, increase

migratory bird habitat to promote viable populations of migratory birds." (Water Code section 85302(e)(6).) The regulations intended to protect habitat are therefore authorized by the Delta Reform Act.

MR6. Avoidance of Regulatory Takings

This Master Response responds to comments asserting that section 5009 (section 5007 in the revised regulation) is an unlawful taking of private property rights.

One comment states that section 5009 "is a 'regulatory taking' as it limits the future use of private property on" certain areas. (Central Valley Flood Control Association.) Another states that the section "raises the specter of inverse condemnation/taking . . . due to depressed property values." (Solano County Department of Water Management.) A third states that "[t]his regulation coupled with the regulation pertaining to covered actions constitutes a regulatory taking . . . [because] [i]dentification of such areas . . . will diminish land values without compensation. (Central Delta Water Agency.) That comment also states that limiting use to facilitate future acquisition "constitutes an unlawful taking."

Regulations, however, can only amount to a "taking" if they are "so onerous" that they are "tantamount to a direct appropriation or ouster." (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 537.) To determine whether regulations are that onerous, courts engage in "ad hoc, factual inquiries . . . designed to allow careful examination and weighing of all the relevant circumstances." (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 322 [internal citations and quotation marks omitted].) Moreover, the "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *(Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 645 (1993).) Given the fact-specific nature of takings claims and the requirement of more than a diminution in value, the "mere enactment" of a regulation is rarely a taking. (*Tahoe-Sierra* at 321.) To show that the enactment is a taking, a person must "establish that no set of circumstances exists under which the regulation would be valid." (*Akhtar v. Burzynski* (9th Cir. 2004) 384 F.3d 1193, 1198.) See also *Yee v. City of Escondido* (1992) 503 U.S. 519, 534 [owner must show that the regulation is a taking "no matter how it is applied."].) Because the takings inquiry depends upon the particular facts of a case, it is difficult to see how section 5009 could be deemed a taking no matter how it is applied. That difficulty is reinforced by the section's provision that uses are permitted if their impacts are appropriately mitigated. Moreover, designating an area as potentially eligible for mitigation can actually enhance its value. (See *Hearts Bluff Bame Ranch, Inc. v U.S.* (Fed. Cir. 2012) 669 F.3d 1326, 1332, where a landowner asserted that it suffered a serious economic loss when the federal government refused to designate its land as eligible for participation in a federal mitigation bank program.) Finally, even if one could somehow show that no matter how section 5009 is applied it would impose a taking, section 5018 would preclude a taking because it calls for the Council and other entities to avoid applying any policy if its application would constitute a taking.

One comment adds that preventing an irretrievable conversion of lands suitable for restoration is an unlawful taking of private property rights if the land is not causing harm to the ecosystem. (Central Delta Water Agency). This comment suggests that the regulation takes property because protecting restoration opportunities in a priority restoration habitat area does not make sense. That suggestion, however, is unsupported. As explained in more detail in Master Response 5, the Legislature directed the Council to, among other things, include provisions seeking to restore large areas of interconnected habitats within the Delta. Preventing development that would preclude the restoration of habitat in a priority restoration habitat area furthers that goal. Moreover, even if the provision had not so clearly promoted a legitimate public use, the U.S. Supreme Court explains that the notion that a regulation "'takes' private property for public use merely by virtue of its ineffectiveness or foolishness is untenable." (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 543.) That applies to the California takings clause as well because in reviewing

regulatory takings claims, California courts construe the State's takings clause "congruently" with the federal clause. (*San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, 664.)

MR7. Avoidance of Conflict with the Authority of the Delta Protection Commission

This Master Response addresses comments stating that section 5012 (section 5010 in the revised regulation) conflicts with the responsibilities of the Delta Protection Commission. (comment from, for example, California Central Valley Flood Control Association)

Agency responsibilities often overlap. (See, for example, *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 866 ["One who would construct and operate a California power plant must first obtain an interconnected set of federal, state and regional agency approvals."]; *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 935 [timber harvest permit approvals are subject to a "regulatory scheme that encourages interagency teamwork" but does not strip "state agencies of their respective authority to protect resources"].)

The Delta Reform Act recognizes the overlap between the missions of the Council and of the Delta Protection Commission. It goes so far as to direct the Commission to propose measures that the Council might include in its Delta Plan "to protect, enhance, and sustain the unique cultural, historical, recreational, agricultural, and economic values of the Delta as an evolving place." (Water Code section 85301.) More generally, legislative findings concerning the Commission's mission overlap those of the Council. Like the legislative findings concerning the Council, those concerning the Commission thus emphasize the need to "protect, maintain, and, where possible, enhance and restore the overall quality of the delta environment, including, but not limited to, agriculture, wildlife habitat, and recreational activities" (Public Resources Code section 29701) and to protect "historical" and "cultural" values. (Public Resources Code section 29708.)

This legislatively directed overlap reflects, at least in part, the very different jurisdictional reach of the two entities. Due to that difference, even if the Council adopts a Commission rule verbatim, the rule's impact will be far different. The Commission only has jurisdiction over lands in the primary zone of the Sacramento-San Joaquin Delta, but not lands in its secondary zone. (Public Resources Code sections 29728, 29731, and 29764.) The Council's jurisdiction, in contrast, extends to projects in any part of the Sacramento-San Joaquin Delta, including its secondary zone, as well as to lands in the Suisun March. (Water Code sections 85301 and 85057.5(a)(1).)

Moreover, the Commission's Resource Management Plan has no regulatory control over federal agencies. In contrast, the Council's Delta Plan is to have such control. It needs to be consistent with "[t]he federal Coastal Zone Management Act of 1972 . . . or an equivalent compliance mechanism." (Water Code section 85300 (d) (A).) That provision and others (see, for example, Water Code section 85300 (d) (B) and (C)) are intended to facilitate Delta Plan control over federal agency actions. As explained in a key legislative report on the Delta Reform Act:

> *In order to encourage federal government participation under the State's leadership, AB 39 requires the Delta Plan to be developed consistent with certain statutes that allow for certain state discretion over federal activities. These statutes include the Coastal Zone Management Act (CZMA), the Reclamation Act of 1902 (which governs the Bureau of Reclamation's Central Valley Project), and the Clean Water Act. If the Council decides to adopt the Delta Plan pursuant to the CZMA, then the bill requires submission to the Secretary of Commerce for approval, so the State may exercise certain authority over federal agency actions. It is widely anticipated that California may need Congress to enact laws to protect the Delta consistent with the State's plan – perhaps a "Delta Zone Management Act." This bill allows for that eventuality, by providing for submission of the Delta Plan to whatever federal official a subsequent federal statute identifies. (See pages*

15-16 of the legislative staff report, presented to the Assembly Committee on Water, Parks and Wildlife on September 11, 2009.)

MR8. Avoidance of Infringement on Water Rights

This Master Response addresses comments asserting that the regulations infringe on water rights or impair water contracts.

A number of comments state that section 5005 (section 5003 in the revised regulation) improperly infringes on the water rights and statutory priorities of diverters within the Delta and other areas of origin. For three independent reasons, section 5005 does not infringe on the water rights or statutory priorities of diverters within the Delta or other areas of origin.

- First, section 5005 applies only to proposed projects that among other things "would have a significant adverse environmental impact in the Delta." The section bars the harmful project, unless at least one of two conditions exists: a) The harmful project is allowed if all water suppliers that will receive the water are complying with listed water conservation and related measures; and b) even if one or more water suppliers are not complying with those measures, the project is allowed if that failure is not a significant cause of the need for the project.[1] A regulation aimed at preventing environmental harm does not violate water rights or area of origin rights. For example, if an in-Delta water supplier wanted to destroy wetlands to build a water storage facility, an agency denying the permit due to that environmental impact would not be taking any water rights, even if the water supplier ended up with less usable water as a result of its inability to build the facility.

- Moreover, the regulation follows an approach that is similar to the one used by CEQA. Even where a project harms the environment, it is not prohibited under CEQA if among other things specified benefits outweigh that harm. (Public Resources Code section 21081.) By similar reasoning, section 5005 allows harm to the Delta environment in order to meet the coequal goal of "providing a more reliable water supply for California." (Water Code section 85054.) That override, however, is only available where Delta water recipients are already doing their part to try to avoid that harm by taking the conservation and local water supply development measures listed in section 5005.

- Second, the concern about water and area of origin rights is also misplaced because it is based upon the incorrect assumption that section 5005 "is simply a taking of the property of those with seniority and a gift to the contractors of the SWP and CWP receiving waters exported at the SWP and CVP pumps near Tracy." (Central Delta Water Agency.) Section 5005, however, does not require any involuntary water transfer. Rather, it calls for meeting water needs through conservation and local water supply development measures before undertaking a water project that would harm the Delta environment. If an in-Delta diverter is able to use its water more efficiently, and thereby needs less for existing demands, the freed up water would still be available for other in-Delta needs cited by the Central Delta Water Agency ("to provide salinity control for the Delta and provide an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban and recreational development."). (Internal quotation marks omitted.)

- Third, while section 85031 disavows any intent in the Act to diminish, impair or affect any water rights protections, the Legislature simultaneously reaffirmed the limitations on those rights under the reasonable use and public trust doctrines and declared that those limitations "are particularly

[1] Moreover, even if the project will harm the Delta environment, it is not covered by this regulation if it consists of a local public agency's "routine maintenance and operation of any facility."

important and applicable to the Delta." (Water Code section 85023.) Those legislatively reaffirmed restrictions are background principles that limit an owner's property interest in using water**.** (See, for example, *Allegretti v. County of Imperial* (2006), 138 Cal.App. 4th 1261, 1279 [no property right to unreasonable use of water]; *Joslin v. Marin Municipal Water Dist.* (1967) 67 Cal.2d 132, 140 [paramount consideration in determining reasonable use is "the ever increasing need for the conservation of water in this state."]; *Tulare Irr. Dist. v. Lindsay-Strathmore Irr. Dist.* (1935) 3 Cal.2d 489, 567 ["What is a (reasonable) beneficial use at one time may, because of changed conditions, become a waste of water at a later time."]; *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, 437 ["no vested right to use (water) rights in a manner harmful to the (public) trust.") Thus, diverters do not have a property right to use water in a manner that is inconsistent with the reasonable use or public trust doctrines.

Moreover, consistent with the reasonable use and public trust doctrines, the Legislature reinforced the importance of water conservation and local water supply development measures by directing the Council to adopt a Delta Plan "that furthers the coequal goals," and declaring that "inherent" in those goals is the promotion of "statewide water conservation, water use efficiency, and sustainable water use." (Water Code section 85020(d).) Similarly, the Legislature declared that "[e]ach region that depends on water from the Delta watershed" is directed to improve its regional self-reliance for water by a variety of measures aimed at increased efficiency, conservation and local water supply development. (Water Code section 85021.)

MR9. Avoidance of Encroachment on the Jurisdiction of the State Water Resources Control Board

Two comments state generally that the proposed regulations would improperly make the Council "a super-regulatory agency that trumps" other State regulatory agencies such as the State Water Resources Control Board (SWRCB). (San Louis & Delta-Mendota Water Authority; State Water Contractors, Inc.) These commenters, however, misread section 5005 as well as the structure of these regulations.

By statute, the proposed regulations do not apply to "[a] regulatory action of a state agency." (Water Code section 85057.5(b)(1). They do not, therefore, regulate SWRCB actions.

Agency responsibilities, however, often overlap. (See, for example, *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 866 ["One who would construct and operate a California power plant must first obtain an interconnected set of federal, state and regional agency approvals."]; *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 935 [timber harvest permit approvals are subject to a "regulatory scheme that encourages interagency teamwork" but does not strip "state agencies of their respective authority to protect resources"].) The Delta Reform Act encourages cooperation among State agencies. (See, for example, Water Code sections 85086 (c) (1), 85204, and 85300 (b) and (c).) The Act also grants the Council independent authority to protect Delta resources. As outlined in detail in Master Response 4 (Authority to Consider Out-of-Delta Actions When Regulating In-Delta Actions), section 5005 is among other things based on the Council's authority to protect Delta resources. (See also Master Response 5 [Authority to Protect, Restore and Enhance the Delta Ecosystem].) It is therefore proper.

MR10. Avoidance of Conflict with the Central Valley Flood Protection Board's Authority

This Master Response addresses comments suggesting that section 5016 and section 5017 (sections 5014 and 5015 in the revised regulation) may conflict with aspects of the Central Valley Flood Protection Board's authority. Agency responsibilities often overlap. (See, for example, *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 866 ["One who would construct and operate a California power plant must first obtain an interconnected set of federal, state and regional agency approvals."]; *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 935 [timber harvest permit approvals are subject to a "regulatory scheme that encourages interagency

teamwork" but does not strip "state agencies of their respective authority to protect resources"].) The Act grants the Council independent authority to include measures in the Delta Plan that reduce in-Delta risks. (Water Code section 85305(a).) The Legislature also expressed its intent that the Council would have an independent regulatory role concerning flood control issues 1) by authorizing the Council to include local plans of flood protection in the Delta Plan (Water Code section 85307(b)) and 2) by defining covered actions as including actions that will have a significant impact on flood control programs. (Water Code section 85305(a).)

MR11. Comments Relating to the Council's Determination that Single-Year Water Transfers Will Not Have a Significant Impact

Single-year water transfers through December 31, 2016, are among the list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from original section 5003(b), the definition of a covered action, to revised section 5001(dd), the definition of significant impact.

CEQA and the Act are distinct statutory schemes, operating for different purposes and imposing differing requirements on regulated entities. The Act is narrower to the extent it focuses on the Delta rather than CEQA's statewide approach, but broader to the extent it focuses on policy objectives beyond CEQA's objective to eliminate adverse environmental impacts. Nevertheless, the Legislature acknowledges and directs some overlap between the two statutes by cross-referencing CEQA concepts as part of the definition of "covered actions" over which the Council has jurisdiction. Thus, under section 85057.5(a)(1), a plan, program, or project must be a "project" under CEQA, Public Resources Code section 21065, to be a "covered action" under the Act.

While the intent and effect of the Act governing "covered actions" are distinct from CEQA's, the Council draws from existing CEQA statute and Guidelines where the statutory schemes overlap. Thus, where the Council finds that a project exempt from CEQA would similarly not have a significant impact on the coequal goals, it makes that finding in this regulation. Accordingly, for example, the Council has found that projects exempted from CEQA because they are ministerial, as a category, will not have an impact on the coequal goals.

Furthermore, the Council determined as a general matter that projects that are exempt from CEQA are not likely to have a significant impact on the coequal goals. Thus, this regulation presumes those CEQA-exempt projects will not have a significant impact on the coequal goals for purposes of Water Code section 85057.5(a)(4) and section 5003(a)(4) (section 5001(j)(1)(D) in the revised regulation), unless there are unusual circumstances indicating otherwise.

With respect to the Council's determination that single-year transfers will not have a significant impact on the coequal goals through December 31, 2016, the Council believes that water transfers contribute to California's water supply reliability. However, the Council also understands that water transfers may have a significant impact on the Delta's ecosystem, especially if these single-year transfers are repeated over consecutive years as a means to circumvent the CEQA review process for multi-year (repeat) transfers. At this time, the Council is not aware that single-year transfers are conducted in this manner. Accordingly, the Council has determined that, for the time being, one-year water transfers do not have a significant impact on the coequal goals. In order to provide time to evaluate the potential significant impacts caused by repeated single-year transfers, the Council sunsets this determination on December 31, 2016, unless the Council acts prior to the date. Until that time, there is no proposal to change or disrupt the current water transfer process. This review is consistent with WR R15, which recommends a stakeholder process to identify and recommend measures to reduce procedural and administrative impediments to water transfers and to address potential issues with recurring single-year transfers.

MR12. Requirement that Projects Not Exempt from CEQA Must Include Feasible Mitigation Measures Identified in the Delta Plan's Environmental Impact Report or Substitute Measures

Section 5003(b)(2) in the originally proposed regulation (now section 5001(dd) in the revised regulation) exists because it is mandated by CEQA. CEQA requires that an environmental impact report's (EIR's) mitigation measures "shall" be made "fully enforceable…, in the case of the adoption of a plan, policy, regulation, or other public project, by incorporating the mitigation measures into the plan, policy [or] regulation…." (Public Resources Code section 21081.6(b).) Section 5003(b)(2) is the vehicle to comply with this requirement.

Section 5003(b)(2) includes flexibility. It requires non-CEQA-exempt covered actions to include "applicable feasible" mitigation measures from the program EIR (PEIR). If a PEIR mitigation measure is not factually "applicable" to the specific covered action in question (e.g., because the facts of the specific covered action do not reveal a significant CEQA environmental impact requiring the specific mitigation in question) or not "feasible," then it would not be required, provided that the proposing agency explains why the measure is not applicable and/or feasible. Section 5003(b)(2) also provides flexibility that allows a proposing agency to tailor mitigation measures to the particular facts of a given proposed covered action by allowing "substitute mitigation measures that the agency that files the certification of consistency finds are equally or more effective." In sum, section 5003 (b)(2) ensures CEQA's requirement that mitigation measures be made enforceable "by incorporating the mitigation measures into the plan, policy [or] regulation" is satisfied (Public Resources Code section 21081.6(b)), while providing flexibility to tailor those measures to each factual situation without undermining the PEIR or harming the environment.

- This flexibility is consistent with the PEIR's recognition that "[t]he severity and extent of project-specific impacts on the physical environment would depend on the type of action or project being evaluated, its specific location, its size, and a variety of project- and site-specific factors that are undefined at the time of preparation of this program-level study." (PEIR Volume 3, page 2-26)
- This flexibility also inherently is consistent with a proposing agency's ability to adopt a Statement of Overriding Consideration under CEQA, which can only be done if the agency finds and justifies that mitigation measures are "infeasible." (Public Resources Code section 21081(a)(3), (b).)

The final list of PEIR mitigation measures relevant to section 5003(b)(2) will be adopted by the Council in its CEQA Findings (Public Resources Code section 21081) that will accompany the Council's adoption of a Final Delta Plan and will be listed in the mitigation monitoring and reporting program (Public Resources Code section 20180.6(a)(1)). Whether any of the measures, as identified in the PEIR, are "infeasible" (Public Resources Code section 21081(a)(3)) will be determined at that time.

The reasons for potential mitigation are explained in the PEIR. One commenter (Contra Costa Water District) asked why mitigation would be necessary at all for a project consistent with (or having a beneficial impact on) the coequal goals. As the PEIR concludes (see, e.g., PEIR Volume 3 at page ES-3), even projects that could have long-term beneficial impacts on the coequal goals could create significant adverse environmental impacts (e.g., construction impacts) in the short term if not mitigated.

Section 5003(b)(2) should not be confused with the standards that determine whether a proposed action is a "covered action." (East Bay Municipal Utility District) Once a proposed action becomes a "covered action," section 5003(b)(2) applies. Compliance with section5003 (b)(2) does not then render the proposed action no longer a "covered action."

All lead agencies for projects that are subject to CEQA must comply with CEQA regardless of the requirements of the Delta Reform Act or the policies of the Delta Plan. As stated above, because the Council is the CEQA lead agency for the Delta Plan, the Council is required to identify and adopt

measures to mitigate or avoid the significant effects on the environment of the Delta Plan, and to ensure that such measures are fully enforceable. (Public Resources Code sections 21002, 21002.1, and 20181.6(b).) In the case of adoption of a plan, such as the Delta Plan, CEQA provides that the mitigation measures should be adopted and incorporated into the project (Public Resources Code section 21081.6(b)), which is accomplished by Policy G P1 and section 5004(b)(2) (section 5002(b)(2) in the revised regulation). Pursuant to section 5004(b)(2), therefore, each lead agency making a consistency determination will determine whether the mitigation measures adopted by the Council and made part of the Delta Plan are applicable to the project and feasible.

Response to Comments
Received during the 45-day Notice Period November 30, 2012, through January 14, 2013, and during the Public Hearing January 24, 2013

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A	Authority of Proposed Regulations
Ne	Necessity of Proposed Regulations
Ct	Clarity of Proposed Regulations
Co	Consistency of Proposed Regulations with existing law/regulation
Du	Proposed Regulations' duplication of existing law/regulation
DP	Proposed Regulation comment dealing with changes in content to the corresponding Delta Plan policy/procedure
O	Proposed Regulation comment suggesting changes in wording of definitions or other language not verbatim from Delta Plan; other general responses
S	Statement of Reasons
E	Economic and Fiscal Analysis or Cost Report
Nr	Notice of Rulemaking or general rulemaking process

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
ADOPTED REGULATION: GENERAL COMMENTS

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Association of California Water Agencies	1/14/2012	Although unanimity is difficult to achieve among such diverse interests, our fundamental concern has been, and continues to be, that the Delta Stewardship Council has chosen to rely upon an essentially regulatory approach to achieving its objectives that is beyond the Council's limited legal authority. Instead, we have urged the Council to provide the leadership for an integrated management approach that relies upon collaboration with and leveraging of existing authorities of the many state and federal agencies and local interests that all share common interests in the Bay-Delta. We have raised this fundamental concern, that the Council should focus more on integrating and less on regulating, in each of our comment letters, in oral testimony, and in numerous meetings throughout this process.	A	This comment does not acknowledge the vast majority of the Delta Plan that is focused on integrated management and coordination efforts among state, federal and local agencies that are voluntary, and reflect the Council's leadership role. However, the Sacramento-San Joaquin Delta Reform Act of 2009 ("Delta Reform Act") calls for a Delta Plan that includes a significant regulatory component. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. (Water Code § 85001(c).) Moreover, the Delta Plan must be consistent with "[t]he federal Coastal Zone Management Act of 1972 [CZMA]. . . or an equivalent compliance mechanism." (Water Code section 85300 (d) (A).) The CZMA's implementing regulations concerning compliance require "that the State demonstrates that there is a means of ensuring" compliance with the Coastal Management Plan's (i.e., Delta Plan's) enforceable policies. (15 C.F.R. section 923.40(b); 16 U.S.C. section 1455(d)(2)(D).) In other words, the program must "identify the means by which the state proposes to exert control over the permissible land uses and water uses within the coastal zone." (15 C.F.R. section 923.41(a)(1).) In order to do so, the Plan must utilize one or more of the following three methods of oversight and enforcement: (1) state establishment of criteria and standards for local implementation, subject to administrative review and enforcement; (2) direct state land and water use planning and regulation; or (3) state review for consistency with the Plan of all development plans, projects, or land and water use regulations proposed by any state or local authority or private party. (15 C.F.R. section 923.40(b); 16 U.S.C. section 1455(d)(11).) Whichever approach is utilized, it must be "sufficiently comprehensive and specific to regulate land and water uses, control development, and resolve conflicts among competing uses." (15 C.F.R. section 923.40(a).) The Delta Plan must therefore include a significant regulatory component.
2. Association of California Water Agencies	1/14/2012	Further, we are committed to working with the Council to assure that the proposed regulations are consistent with the authorities granted to the Council by its enabling legislation, and in accordance with the procedural and substantive requirements of the Administrative Procedure Act (APA) as well as the regulations and guidance adopted by the Office of Administrative Law (OAL). Unfortunately, as we have commented consistently throughout the Delta Plan process, the regulatory approach has been flawed from the outset and these proposed regulations only accentuate those flaws.	A	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
3. Association of California Water Agencies	1/14/2012	For the Council to be successful in furthering the coequal goals within a sustainable and coherent governance structure, it must adopt clear, focused policies in accordance with OAL requirements and other state laws and regulations. The proposed text for addition to Title 23 of the California Code of Regulations fails this standard and instead itself creates obstacles to such progress. Moreover, the Council may only promulgate regulations within that specific authority granted to it by the Delta Reform Act (Act). In this respect, the proposed regulations also fail by overstepping that authority.	A, Ct	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
4. Association of California Water Agencies	1/14/2012	Many ACWA member agencies and others are submitting comprehensive and detailed comments on the Council's proposed regulations. Although we do not provide that here, our review of the proposal has led us to conclude that much needs to be corrected, revised or deleted to satisfy OAL criteria, to make the Delta Plan consistent with legislative intent, and to reflect the Council's statutorily defined role in furthering the coequal goals. To illustrate our perspective, we provide some general comments and specific examples of proposed Code sections with deficiencies below.	A, Ct	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.

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5. Association of California Water Agencies	1/14/2012	Many sections of the proposed regulatory language are inconsistent with the standards in the APA, including the "authority," "necessity," "non-duplication," and "consistency" standards set forth in Government Code section 11349.1, and corresponding definitions in section 11349. The proposed regulations include a significant amount of unnecessary narrative language and statements of policy that diminish the binding impact of the regulations more appropriately found in the Delta Plan. This creates difficulty for potentially regulated entities to discern precisely what would be required to comply with the regulations. It is imprudent to begin a new regulatory process in a manner which clouds rather than clarifies the objectives of the regulations. We therefore urge the Council to remove narrative and policy language in the proposed regulatory text. Further, unclear areas of the Final Draft Delta Plan that will be revised to reflect improved clarity, should be mirrored in the proposed regulations.	Ct	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
6. Association of California Water Agencies	1/14/2012	The Council should also use terminology in the regulations that is specifically defined in the Water Code. The structure and depth of the definition section is both inappropriate and confusing and is not helpful in proposed regulations. New definitions are excessively long and complex and include "actionable language" that makes it very difficult to discern the extent of the prescriptive or regulatory intent of the substantive provisions. The definitions should be clear and concise, defining only necessary terms. Further, regulatory requirements should not be embedded within a definition.	Ct	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
7. Association of California Water Agencies	1/14/2012	Administrative regulations are enacted to implement, interpret or carry out the provisions of a statute, and should not alter, amend or enlarge statutes lest they will confuse or otherwise impair a statute's scope or purpose. The Notice of Proposed Rulemaking sets forth twenty-four provisions of the Water Code that the proposed regulations are intended to implement, interpret or make specific. It further notes that the regulations make reference to more than twenty-four other provisions of the Water Code, as well as one provision of the Public Resources Code, several provisions of the federal Clean Water Act, Endangered Species Act, and National Flood Insurance statutes, and the CEQA regulations.	A	Duly noted
8. Association of California Water Agencies	1/14/2012	Many policies the proposed regulations seek to enforce, implement, or interpret, are statutory directives beyond the scope of the Council's authority. Moreover, the Act's actual provisions that most of the proposed regulations purport to implement, interpret, or carry out do not provide or imply the granting of such specific authorities or powers to the Council. Instead, they are articulations of general state policies or elements or objectives that should be included in the Delta Plan, but do not provide a foundation for the prescriptive regulations.	A	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
9. Association of California Water Agencies	1/14/2012	The APA requires OAL to review regulations using standards of: (1) necessity; (2) authority, (3) clarity; (4) consistency; (5) reference; and (6) nonduplication. (Gov. Code, § 11349.1(a).) Many of the proposed regulations do not meet these standards, are not necessary to effectuate the Act and many exceed the Council's authority. Some of the language is also not written in a manner that can be easily understood by the targeted entities, and in some cases it is difficult to even discern which entities are targeted by the provisions. (Gov. Code, §§ 11349.1(a)(3), 11349(c) ["Clarity means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."].) Several provisions also overlap or duplicate the requirements of other state and federal laws. (Gov. Code, §§ 11349.1(a)(6), 11349(f).) Below are examples of flaws contained in the draft regulatory language that must be revised to meet the APA standards.	Ne, Ct, Du	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
10. Association of California Water Agencies	1/14/2012	ACWA urges the Council to revise the proposed draft regulations to comply with the APA standards. Again, these comments are intended to provide examples of essential problems with the regulations, rather than be comprehensive. We also urge the Council to also consider and implement those comments submitted separately by ACWA and Ag Urban Coalition members.	O	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
11. Association of California Water Agencies	1/14/2013	We note that correcting the numerous deficiencies in the RDPEIR to satisfy CEQA will require substantive changes to the document and hence a recirculation of it. We urge the Council, while taking the time necessary to satisfy these CEQA deficiencies, to also take the opportunity to reevaluate its role in furthering the	A	We do not agree that recirculation is required.

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		achievement of the coequal goals, take a hard look at what authorities it does *and does not* possess to do so, and most importantly evaluate how it can best add value to management of the Delta consistent with the objectives inherent in the coequal goals (see §85320) and the fundamental legislative directives regarding the contents of the Delta Plan as stated in §85300 et. seq.		
12. Calaveras County Water District	1/4/2013	General Definitions, Section 5001(e)(1)(B) This section leaves out two important elements: one, directly taken from CWC §85021 and the other from the Delta Plan's Appendix P (Demonstrating Consistency with the Delta Plan Regarding Reduced Reliance on the Delta and Improved Regional Self-Reliance). To correct these deficiencies and errors of omission, Section 5001(e)(1)(B) should be rewritten as follows: "Regions that use water from the Delta watershed will reduce their reliance on this water ~~for reasonable and beneficial uses[1]~~ 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[2]~~. This will be done by improving, investing in, and implementing local and regional water supply projects[3], local 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. For the purposes of improving regional self-reliance water conservation is considered a new source of water supply, consistent with CWC §1011(a). Water so saved through these counts as a new source of supply as this water would have been needed to meet future demand. Thus, even if water use is increasing as a result of economic or population growth, a water supplier can demonstrate that its water use is more efficient and is contributing to reduced reliance on the Delta and improved regional self-reliance."[4] It is important that the definitions of Section 5001 be as clear as possible. Therefore, we urge the inclusion of the expanded language regarding "improving regional self-reliance" suggested from the Delta Plan's Appendix P. This language provides a clear explanation of exactly how this standard (of improving regional self-reliance) is met and how those agencies within the Delta Watershed may be assured their investments and management actions and policies are consistent with the Delta Plan objectives. [1] The term reasonable and beneficial use is included in Section 5001(e)(1)(A), which therein applies to all waters of the state. It is not necessary to specifically include the same terminology in Section 5001(e)(1)(B), which only applies to water used from the Delta watershed, and then, inexplicably, not apply it to water exported from the Delta as described in Section 5001(e)(1)(C). Using the term once, for the entire state, should be sufficient. [2] This specific reference to the reasonable use of water and the Public Trust Doctrine is only made in reference to water used from the Delta watershed. It would be better to delete such reference here and, instead, include it in Section 5001(e)(1)(A), which would be universally applied to all the waters of the state. [3] Taken directly from CWC §85021. [4]Delta Stewardship Council Final Draft Plan, Appendix P, page P-2, lines 30-35.	Ct, O	Section 5001 ~~5002, 5003~~(h)(1)(B) sets forth the Council's definition for what it means to achieve the coequal goal of providing a more reliable water supply for California for the purpose of clarifying for a proponent whether its proposed action is a covered action under section 5001 ~~5002, 5003~~ (j)(4). We disagree with the comment concerning the interpretation of section 5001 ~~5002, 5003~~ (h)(1)(C). Regions that use water from the Delta watershed include areas that receive water that has been exported from the Delta. We disagree that the language in section 5001 ~~5002, 5003~~ (h)(1)(B) is deficient or contains omissions. This paragraph draws upon Water Code section 85021 as well as other Water Code sections including 85004(b), (85020(d) and (f), 85023, 85302(d), and 85304. It is not limited to language from Water Code section 85021. To address the comment that local and regional water supply projects should be specifically included in section 5001 ~~5002, 5003~~ (h)(1)(B, the Council has added these words to the paragraph. To address the comment concerning the inclusion of language from Delta Plan's Appendix ~~P~~G on water conservation, the Council has a made the following revision to section 5003 ~~5005~~ (c)(2): "For the purposes of reporting, water efficiency is considered a new source of water supply, consistent with Water Code section 1011(a)."
13. California Central Valley Flood Control Association	1/14/2013	The Delta Reform Act was promoted by the Legislature as an effort to reduce the confusion and conflict that arises when more than 200 federal, state, and local agencies have authority in the Delta. The creation of the Delta Stewardship Council (Council) and mandate to develop a coherent, sustainable, unified, and enforceable Delta Plan that would coordinate government agencies and policies, resolve conflicts among agencies, and set a unified direction was intended to reduce the crisis that existed. Unfortunately, as currently proposed, this set of regulations is likely to result in increased confusion, duplication, and inconsistency which will continue to doom the Delta to conflict and gridlock.	O	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.

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14. California Central Valley Flood Control Association	1/14/2013	After participating in the Delta Stewardship Council's public development process of the Delta Plan for the past couple years, the CCVFCA remains committed to achieving the coequal goals for the Delta pursuant to the Delta Reform Act. However, we are finding it difficult to reconcile the proposed regulations with the statutory authority granted to the DSC in the Delta Reform Act or the suite of regulatory policies laid out in the Delta Plan. We are concerned the use of overly broad and subjective terms and the inadequate description of processes to follow for compliance, compromises the ability for the Delta Plan and these regulations to be understood or properly implemented by flood control agencies. In addition, many of the regulations are written to give the Council a great deal of discretionary power in determining what is “appropriate,” “adequate,” or “consistent” which can result in the regulation being unfairly applied to different regulated entities, resulting in inconsistent and inequitable treatment.	A, Ct	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
15. California Central Valley Flood Control Association	1/14/2013	In many cases, it is unclear which regulated entity must comply, to whom mandated analyses are to be submitted or how or who approves them, who determines what is adequate or appropriate, and which government entity is intended to implement and enforce the regulation. In addition, many of the provisions are not necessary to effectuate the Delta Reform Act and some exceed the authority provided by the Act. Several provisions also overlap or duplicate the requirements of other state and federal laws, or conflict with them causing confusion on which definition or mandate a regulated entity must comply. We respectfully request the Council to review the proposed regulatory text with specific reference to the Administrative Procedures Act (APA) standards, and to remove or revise provisions that fail to meet those standards.	Ne, Ct, Du	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
16. California Central Valley Flood Control Association	1/14/2013	We support the achievement of the coequal goals of statewide water supply reliability and the restoration of a sustainable Delta ecosystem while protecting and enhancing the unique cultural, recreational, natural resources, and agricultural values of the Delta as an evolving place. However, we believe that these regulations go beyond the duties and authorities of the Council and are so poorly drafted as to be unenforceable.	A, Ct	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
17. California Central Valley Flood Control Association	1/14/2013	Preliminarily, we note that the California Administrative Procedures Act (APA) requires that the Office of Administrative Law (OAL) review these draft regulations using standards of: (1) necessity; (2) authority; (3) clarity; (4) consistency; (5) reference; and (6) non-duplication, as set forth in Government Code section 11349. It is our belief that many of the proposed provisions do not meet these standards. Many of the provisions are not necessary to effectuate the Sacramento-San Joaquin Delta Reform Act (Delta Reform Act or Act) and some clearly exceed the authority provided in the Act. Some of the language is not written in a manner that can be easily understood by the targeted entities, and in many cases it is difficult to discern what entities are targeted by which provisions and which entities are to enforce certain prohibitions. Several provisions directly duplicate the requirements of other State or Federal laws. For these reasons, the draft regulations must be carefully reviewed, edited, and then reissued for public comment.	O	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
18. California Central Valley Flood Control Association	1/14/2013	Our most fundamental comment is that these regulations do not read like regulations implementing a program created by the Legislature. Rather, they read like a new statute creating entirely new programs, programs which go significantly farther than the legislative authority granted to the Council.	A	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
19. California Central Valley Flood Control Association	1/14/2013	We appreciate the opportunity to provide these comments. As the Council considers them and begins to redraft the regulations, we urge you to keep the following in mind: • Please ensure that your regulations do not expand your jurisdiction or create new programs not supported by the Act. • You should use terminology in the regulations that is consistent with and already specifically defined in current law. • The structure and depth of many sections is both inappropriate and confusing and neither trait is particularly desirable in new regulations.	O	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.

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		• Where new definitions are created they are excessively long and complex and include "actionable language" that makes it very difficult to discern the extent of the prescriptive or regulatory intent of the substantive provisions. • The regulations must be clearer and the definitions should be clear and concise, defining only terms where a definition is necessary, and regulatory requirements should not be embedded within a definition. • The regulations should not reference draft documents, by the Council or other agencies, nor potential projects which have not been officially commenced. [Footnote on this paragraph: For example, Section 5010 mandates the application of DWR criteria not yet finalized be used to determine appropriate locations for setback levees. Restoration under Section 5008 is to be consistent with Appendix C, which is a draft document. Section 5017 (a)(2) references the North Delta Flood Control and Ecosystem Restoration Project (McCormack-Williamson) as the boundary description for the Cosumnes River-Mokelumne River Confluence and (a)(3) uses the Lower San Joaquin River Floodplain Bypass Proposal as the boundary description for the Lower San Joaquin River Floodplain Bypass area.]		
20. California Department of Fish and Wildlife; Ecosystem Conservation Division/Water Branch	1/10/2013	As of January 1, 2013, our name has changed to the California Department of Fish and Wildlife, pursuant to legislation passed in 2012. This change should be reflected throughout the Proposed Regulations, Delta Plan, and Final PEIR.	O	Comment noted – copy editing task
21. California Department of Fish and Wildlife; Ecosystem Conservation Division/Water Branch	1/10/2013	We recommend that the proposed regulations clarify that updates or amendments to the Delta Plan shall not trigger mandatory updates to a permitted NCCP/HCP.	Ct	Delta Plan amendments do not apply retroactively.
22. California Department of Fish and Wildlife; Ecosystem Conservation Division/Water Branch	1/10/2013	The proposed regulations and text of the Final Draft Delta Plan (see Final Draft Delta Plan, pp. 52-53) remain unclear as to whether existing certifications of consistency must be revisited when the Delta Plan is amended. We recommend that the regulations make it clear that amendments do not require new certifications.	Ct, DP	Delta Plan amendments do not apply retroactively.
23. California Department of Water Resources	1/14/2013	Our comments below highlight some of the issues we have raised before that we think are critical in moving forward to carry out the Plan and the Delta Reform Act. These comments focus on the proposed regulations. We will not submit additional comments on the policies of the proposed Plan since there do not appear to be any substantive differences between the proposed policies and the proposed regulations. The attachment identifies language in the Regulatory Statement of Reasons that we think does not accurately state what we understand the intent of the regulations to be. We are continuing our review of the plan at a more specific level and may have some additional comments of an editorial nature that we hope you will consider even if they are after the deadline.	S	Comment noted

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24. California Department of Water Resources	1/14/2013	We request that DWR's letters dated February 2, 1012, June 13, 2012 and June 20, 2012 be part of the administrative record for the proposed regulations. Please let us know if you would like us to send copies of these letters.	O	Comment noted
25. California Department of Water Resources	1/14/2013	Water management in California, especially as it affects the Delta, is complex; involves multiple interrelationships; and can benefit from increased integrated water management planning that considers long-term sustainability. We look forward to working with the DSC on governance issues that will help to promote collaborative solutions and on implementing the plan in a way that takes these considerations into account, respects the responsibilities and work of the many agencies involved in the Delta, avoids duplication and moves project planning forward more expeditiously. The DSC is in an ideal position to help bring these agencies together and facilitate continued alignment of their roles and functions. The Plan recognizes that many agencies have statutory responsibilities and authorities with regard to regulatory and management activities in the Delta. We expect that the DSC will work with proposing agencies and other responsible agencies on ways to coordinate and streamline routine program activities in a way that accomplishes a successful delivery of the program activities; helps to meet the Delta Reform Act goals and objectives; and does not interfere with statutory authorities of agencies (for example the Central Valley Flood Protection Board and DWR with regard to flood maintenance activities). DWR expects that some (or many) of its covered actions will be plans or programs and that specific projects that fall under a plan or program for which a consistency certification has been made will be able to go forward without any further project specific certification.		It is the responsibility of the agency proposing a program or project to determine whether it is a covered action requiring a certification of consistency. Council staff is available for consultation with proposing agencies to assist in making this determination, pursuant to its adopted early consultation procedures. At this time, the Council does not believe the scenario the commenter has suggested, a programmatic consistency certification followed by project specific certifications (all by the same lead agency), will occur with any frequency. It is more likely that a state agency may submit a certification of consistency for a state sponsored program and that local agencies undertaking the projects are required to file certifications of consistency for the individual projects. In this manner, the state agency will not be required to develop a process to ensure future projects under a program consistent with the initial certification of consistency. If in the future, however, the Council feels this process does place unintended burdens on projects; it is in the Councils discretion to make changes.
26. California Department of Water Resources	1/14/2013	Article 3 (Regs 5005-5017): Looking at policies comprehensively in a way that achieves goals and objectives of the Delta Reform Act: Although the Plan states that it establishes an open and accountable governance mechanism for coordinating actions across agency jurisdictions and statutory objectives (page 21), the Proposed Regulations could be interpreted to approach the goals of water reliability, environmental preservation and restoration, protection of the delta as an evolving place, and flood management in isolation. While DWR understands that this may be necessary in the first instance in order to identify potential problems and solutions, the Delta Reform Act contemplates looking at these issues comprehensively and in a way that moves forward in solving them concurrently and consistent with other laws governing other agencies. DWR expects the DSC to encourage proponents of covered actions to look at their projects in way that considers whether and how they can advance the coequal goals and multiple objectives of the Delta Reform Act. By necessity, many of the Proposed Regulations are general and leave much to be worked out as the DSC and interested parties work through certifications of consistency for specific projects, including determinations as to whether an action is a covered action and challenges to consistency certifications. (Throughout this document we use the term "project" in include plans, programs, or projects). Critical to the success of the Plan and the Proposed Regulations is the fact that the legislation establishes two co-equal goals and a number of objectives, none of which has priority over others.		Comment Noted
27. California Department of Water Resources	1/14/2013	Climate Change. California is already seeing the effects of climate change, and planning for and adapting to these changes will be among the most significant challenges facing managers this century. The Final Draft of the Delta Plan acknowledges these potential impacts. The Delta Plan is intended to address intertwined challenges and establish foundational actions for long-term Delta management. To further this cause, we believe the DSC has a unique opportunity to provide leadership that improves climate change adaptation and mitigation planning and project implementation in the Delta. State and local agencies are starting to incorporate these considerations into project planning as a result of various state-level actions including EO S-3-05, EO S-13-08, SB97, AB32, and SB 375.	O	Comment Noted

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		Although we are not recommending any changes to the regulations along these lines, we look forward to working with you in the future to help further these efforts and to encourage and promote more consistent planning in the Delta with State guidance for addressing climate change. This guidance includes incorporating sea-level rise (SLR) projections into project planning and decision making and ensuring consistency with State adaptation and mitigation strategies, actions, and goals established in the 2009 California Climate Adaptation Strategy and the AB 32 Scoping Plan.		
28. California Farm Bureau Federation	1/14/2013	Not having gone through a formal rulemaking, the materials appended to the current Delta Plan as Appendix B ("Administrative Procedures Governing Appeals, Statutory Provisions Requiring Other Consistency Reviews, and Other Forms of Review or Evaluation by the Council") appear to be underground regulations. The same is true of any forms adopted by the Council without compliance with the APA which may contain any language meeting the definition of a "regulation" within the meaning of the exception to the exemption set forth in Government Code section 11340.9(c).	A	See MR2
29. Central Delta Water Agency	1/14/2013	Overall Objections Laws passed by the California Legislature and signed by the Governor do not override constitutional provisions of the State or United States. In addition to the regulations being contrary to the law as set forth above the statutory authority upon which the DSC relies, constitutes an overly broad and unlawful delegation of authority by the Legislature to the Delta Stewardship Council. The Central Delta Water Agency February 2, 2012 comments on the Delta Plan Draft Environmental Impact Report are incorporated herein by this reference as if stated in full herein.	Co	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
30. Central Valley Clean Water Association	1/14/2013	The RDPEIR and DPEIR Indicate that Projects Undertaken to Implement Regulatory Actions of Other State Agencies May Not be Exempt From Consistency Determinations The DPEIR contains a statement indicating that the Revised Project will involve the regulation (under the Delta Plan) of certain actions taken as a result of regulatory actions of other state agencies, a situation that may result in unnecessary delay in the implementation of projects that would likely have a positive impact on the environment. While the Final Draft Delta Plan excludes certain activities from the definition of a covered action, including regulatory actions by other state agencies, the DPEIR states that the underlying actions regulated by those agencies would not be exempt (DPEIR, p. 2A-2 – 2A-4). This apparent failure to exempt projects undertaken to implement regulatory requirements, such as wastewater treatment plant upgrades necessitated by a NPDES permit issued by the Central Valley Water Board, may have significant adverse consequences for these projects. Entities implementing regulatory requirements of other state agencies will be required to prepare detailed findings of consistency with the Delta Plan, and environmentally beneficial projects will inevitably be delayed. Such delays are unreasonable, counterproductive, and will have adverse environmental impacts that are not discussed in the RDPEIR. Instead of subjecting such actions to consistency determinations that will result in additional cost and unreasonable delay, the Delta Plan should do everything possible to facilitate and encourage projects that implement regulatory requirements. The Final Draft Delta Plan should be revised to clearly exempt projects that implement NPDES permits and similar regulatory requirements adopted for the protection of the environment, and, at a minimum, acknowledge and discuss the adverse environmental impacts that would result from not granting such an exemption.	Co	To the extent this comment addresses the scope of the regulations rather than comments on the RDPEIR and DPEIR, it is the responsibility of the proposing agency to determine whether a proposed action is a covered action pursuant to the Delta Reform Act and these regulations. Covered actions are defined by Water Code section 85057.5. That section excludes regulatory actions of state agencies, however it does not exclude actions taken by agencies to comply with regulations. Nevertheless, the Council does not view the filing of a certification of consistency on such a project as an additional cost or unreasonable delay. Much of the detailed findings that are required in the filing of a certification of consistency would be developed in the CEQA processes. In the example provided of a wastewater treatment plant upgrade, it is unlikely that such a project would be exempt from the requirements of the California Environmental Quality Act. As part of CEQA, the project must be undertaken in a manner that has the least environmental impacts. Similarly, the Council expects these projects to be undertaken in a manner that further the achievement of the coequal goals, or at least, do not have an adverse impact on the achievement of the coequal goals. This is achieved through consistency with the Delta Plan.
31. Central Valley Flood Protection Board	1/14/2013	Thank you for allowing me the opportunity to address the Delta Stewardship Council at the public meeting on Friday, January 11, 2013. As I mentioned during the meeting, the Central Valley Flood Protection Board (Board) has several comments relating to the text of the Council's proposed Title 23 regulations. We are planning to meet face to face with your staff on Tuesday January 15, 2013 to review the Board's comments and allow for constructive collaboration between the Council staff and Board staff. We believe this is the most expedient method for resolving concerns and producing regulations that are clearly articulated and consistent with the Board's authority, including the recently adopted Central Valley Flood Protection Plan. The Council assured me	O	Comment Noted

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		that our two agencies have a shared goal of clear and concisely written regulation language with no confusion between the regulatory roles of the Council and the Board. The Board staff plans to attend the upcoming public meeting on January 24, 2013, where the Council will hear public testimony on comments to proposed Title 23 regulations. We are optimistic that our two staffs will be able to agree on the text of language which will be acceptable to the Council.		
32. City of Sacramento	1/14/2013	It is our understanding that these regulations must be developed in accordance with the procedural and substantive requirements of the Administrative Procedure Act (APA) and the regulations and guidance adopted by the Office of Administrative Law (OAL). Our comments are intended to help ensure that the proposal submitted to OAL can be easily reviewed and expeditiously adopted and that the Council's Plan is in compliance with the authorities of the Sacramento — San Joaquin Delta Reform Act.	O	Comment noted
33. City of Sacramento	1/14/2013	Our overarching comment is that many sections of the regulatory language are inconsistent with the standards in the APA, including the "necessity," "nonduplication," and "consistency" standards set forth in Government Code sections 11349(a) and 11349(f). We believe that the proposed regulations include a significant amount of unnecessary narrative language and statements of policy that diminish the binding impact of the appropriate provisions and make it difficult for the potentially regulated entities to discern precisely what is required of them. It is imprudent to begin a new regulatory process in a manner that clouds rather than clarifies the objectives of the regulations. We believe that the more appropriate place for narrative language is within the Delta Plan and not within the regulation. We therefore urge the Council to make that distinction through changes to the proposed regulatory text. Further, where there are areas of the Final Draft Delta Plan that are unclear, those sections should be remedied within the Plan and that clarity then mirrored in any proposed regulations.	Ne, Ct, Dp	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
34. City of Sacramento	1/14/2013	We also urge the Council to use terminology in the regulations as is already specifically defined in the California Water Code (CWC). The structure and depth of the definition section is both inappropriate and confusing and neither is particularly desirable in new regulations. Where new definitions are created they are excessively long and complex and include "actionable language" that makes it very difficult to discern the extent of the prescriptive or regulatory intent of the substantive provisions. The definitions should be clear and concise, defining only terms where a definition is necessary, and regulatory requirements should not be embedded within a definition.	Ne, Ct	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
35. City of Sacramento	1/14/2013	For the Council to be successful in achieving the coequal goals within a sustainable and coherent governance structure, we urge the development and adoption of clear, targeted regulations consistent with the OAL regulations and other state laws and regulations. We do not believe the proposed text will achieve those objectives and instead may itself create an obstacle to such progress. We also caution the Council to only promulgate regulations within that specific authority granted to them by the Sacramento — San Joaquin Delta Reform Act.	Co	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
36. City of Sacramento	1/14/2013	Administrative regulations should be enacted to implement, interpret or carry out the provisions of a statute and should not alter or amend a statute or enlarge, confuse or otherwise impair its scope or purpose. The Notice of Proposed Rulemaking sets forth twenty-four provisions of the Water Code that the proposed regulations are intended to implement, interpret or make specific. It further notes that the regulations make reference to more than twenty-four other provisions of the Water Code, as well as one provision of the Public Resources Code, several provisions of the federal Clean Water Act, Endangered Species Act, and National Flood Insurance statutes, and the CEQA regulations. Many of the provisions that the proposed regulations are implementing, interpreting, or making specific, including the water efficiency provisions in SB 7X 7 are not statutes that the DSC is specifically charged with implementing, interpreting, or carrying out. Similarly, many of the Delta Reform Act provisions that the proposed regulations purport to implement, interpret, or carry out do not identify the specific authorities or	A	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.

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		powers of the Council. Instead, they are articulations of state policy or elements or objectives that should be included in the Delta Plan, but do not provide a basis for prescriptive regulations adopted by the Council.		
37. City of Sacramento	1/14/2013	The APA requires OAL to review regulations using standards of: (1) necessity; (2) authority, (3) clarity; (4) consistency; (5) reference; and (6) nonduplication. Sacramento is concerned that many of the proposed provisions may not meet these standards. Many of the provisions are not necessary to effectuate the Sacramento — San Joaquin Delta Reform Act and some exceed the authority provided by the Act. Some of the language is also not written in a manner that can be easily understood by the targeted entities, and in some cases it is difficult to even discern which entities are targeted by the provisions. Several provisions also overlap or duplicate the requirements of other state and federal laws. The proposed regulatory text should be reviewed with specific reference to the APA standards, and provisions that fail to meet each of the six standards should be removed.	A, Ne, Ct, DP	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
38. City of Sacramento	1/14/2013	The Rulemaking Package fails to clearly distinguish the regulatory difference between policies and recommendations in the Delta Plan and PEIR. The Notice of Propose Rulemaking states "The Delta Plan contains a foundational set of policies and recommendations to guide Plan Implementation. Consistent with the Delta Reform Act, the regulatory policies set a comprehensive, legally enforceable direction ..." The discussion does not clarify the enforceability of the recommendations. We are concerned that the State Water Board and Central Valley Water Board will interpret the recommendations as State Policy. The Delta Plan recommends that the State and Regional Water Boards apply special status considerations to the Delta; however, environmental impacts of this recommendation are not fully evaluated.	Nr	The Delta Plan contains policies and recommendations, and clarifies that recommendations are nonregulatory. Section 5005 ~~5007~~ will be revised to remove those portions that are not regulatory in nature. Sections (a) and (b) was deleted from the adopted regulations. It is now only in the Delta Plan as a recommendation. Proposed section 5005 ~~5007~~ has been changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan. (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and section 5001 ~~5003~~ (j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (c) covers a proposed action that could significantly affect flow in the Delta. Unclear what "special status considerations" means.
39. City of Sacramento	1/14/2013	Sacramento encourages the Council to review the text of the proposed draft regulations and to revise them as necessary by applying the requisite standards of; (1) necessity; (2) authority, (3) clarity; (4) consistency; (5) reference; and (6) nonduplication. The City continues to support the Council in its efforts to develop, adopt and implement a sustainable Delta Plan and appropriate regulations consistent with the duties and authorities provided in the Sacramento — San Joaquin Delta Reform Act.	O	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
40. City of Stockton	1/14/2013	The City will be substantially impacted by the Delta Plan and its accompanying Proposed Regulations. Specifically, over 50 percent (21,256 acres) of the City of Stockton's incorporated urban area and an additional 7,932 acres within the City's Sphere of Influence are located within the Secondary or Primary Zones of the Delta.	O	Comment Noted
41. City of Stockton	1/14/2013	California's Administrative Procedure Act (APA) provides, among other things, that the California Office Of Administrative Law (OAL) must review all regulations adopted and proposed for publication for compliance with the APA. (Gov. Code § 11349.1.) In doing so, the OAL is directed to use the following standards in its review: necessity, authority, clarity, consistency, reference, and nonduplication. (Gov. Code § 11349.1(a).) As relevant to this comment letter, the APA and regulations implementing the APA proscribe the following meaning to certain of these standards: ... [the commenter recites the relevant sections of Government code and regulations implementing the APA, describing the review standards]	O	Comment noted

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42. City of Stockton	1/14/2013	Article 3 (Regs 5005-5017): The Policies contained in the Delta Plan, that constitute the "regulations" contained in the Regulatory Package being submitted to OAL for approval, fail to satisfy the standards set forth in the APA. As a general matter, the proposed regulations include a significant amount of unnecessary narrative language and statements of policy that make it difficult for the potentially regulated entities to discern precisely what is required of them.	O	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
43. City of West Sacramento	1/14/2013	The City of West Sacramento is pleased to submit the following comments regarding the text of the Proposed Regulations. We support the achievement of the coequal goals of statewide water supply reliability and the restoration of a sustainable Delta ecosystem while protecting and enhancing the unique cultural, recreational, natural resources, and agricultural values of the Delta as an evolving place. However, we believe that these regulations go beyond the duties and authorities of the Council and are drafted in such a way as to be unenforceable.	A	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
44. City of West Sacramento	1/14/2013	Preliminarily, we note that the California Administrative Procedures Act requires that the Office of Administrative Law review these draft regulations using standards of: (1) necessity; (2) authority; (3) clarity; (4) consistency; (5) reference; and (6) non-duplication, as set forth in Government Code section 11349. It is our belief that many of the proposed provisions do not meet these standards. Many of the provisions are not necessary to effectuate the Sacramento-San Joaquin Delta Reform Act (Act) and some clearly exceed the authority provided in the Act. Several provisions directly duplicate the requirements of other State or Federal laws. For these reasons, the draft regulations must be carefully reviewed, edited, and then reissued for public comment.	A, Ne, Du	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
45. City of West Sacramento	1/14/2013	Our most fundamental comment is that these regulations do not read like regulations implementing a program created by the Legislature. Rather, they read like a new statute creating entirely new programs, programs which go significantly farther than the legislative authority granted to the Council. While legislation commonly reflects a grand compromise made by different interests in the passage of legislation, this instead reads as a heavy-handed attempt to implement a program with no acknowledgment of its one-sided nature.	A	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
46. City of West Sacramento	1/14/2013	We appreciate the opportunity to provide these comments. As the Council considers them and begins to redraft the regulations, we urge you to use terminology in the regulations that is consistent with and already specifically defined in current law. The structure and depth of many sections is both inappropriate and confusing. Where new definitions are created they are excessively long and complex and often include "actionable language" that makes it very difficult to discern the extent of the prescriptive or regulatory intent of the provisions. The regulations must be clearer and the definitions should be clear and concise, defining only terms where a definition is necessary, and regulatory requirements should not be embedded within a definition.	Ct, Co	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
47. Contra Costa County Water Agency	1/14/2013	1) Chapter 2, page 58, lines 20-23 — This section states that if an agency determines a project is not a covered action, the finding is not subject to Council review "...but is subject to judicial review as to whether it was reasonable, made in good faith, and is consistent with the Delta Reform Act and relevant provisions of this plan." I have two comments: (a) it is the courts, not the Council, that determine what is subject to judicial review and what isn't, so I suggest this wording be deleted, unless the Council can provide a basis for it; please provide a statutory basis for the statement. (b) I am unclear as to why the Delta Plan includes this statement, which seems to be a warning about potential litigation. If I am misinterpreting the statement entirely, clarification would be welcome.	DP	Judicial review is potentially available under various statutes, including Code of Civil Procedure section 1085 (writ of mandamus), section 1060 (declaratory relief), section 526 (injunctive relief) and section 526a (action against local officers). See also *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 29 (citizen suits to compel the performance of a public duty). The reference to judicial review is included to so that an agency does not inadvertently decline to treat an action as covered because it believes that its decision is totally discretionary.
48. Contra Costa County Water Agency	1/14/2013	2) Comment # 1 also applies to Appendix B, page 1, item 2, which states similarly that the determination on whether a project is a covered action shall be made by the agency "subject to judicial review." None of the California Water Code sections cited in Appendix B say anything about judicial review. Please indicate what statute supports this contention.	DP	Judicial review is potentially available under various statutes, including Code of Civil Procedure section 1085 (writ of mandamus), section 1060 (declaratory relief), section 526 (injunctive relief) and section 526a (action against local officers). See also *Connerly v. State Personnel Bd.* (2001) 92 Cal.App.4th 16, 29 (citizen suits to compel the performance of a public duty).

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49. Contra Costa County Water Agency	1/14/2013	3) Chapter 2, page 59, lines 32-33 — This sentence states that if the Council decides on appeal that a covered action is not consistent with the Delta Plan, "the project may not proceed until it is revised so that it is consistent with the Delta Plan." We disagree with this statement. We do not believe it is supported by state law. The Water Code does not require that the project be revised, as shown below in Section 85525.25 of the Water Code, with emphasis added by me: *"85525.25. After a hearing on an appealed action, the council shall make spec* written findings 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.* ***Upon remand, the state or local agency may determine whether to proceed with the covered action. If the agency decides to proceed with the action or with the action as modified*** *to respond to the findings of the council, the agency shall, prior to proceeding with the action, file a revised certification of consistency that addresses each of the findings made by the council and file that revised certification with the council." (Delta Reform Act, SB7-XI; California Water Code)* This is reconfirmed in the Delta Plan's own Appendix B, page 5, which quotes the same section of the Water Code, indicating that the project does not necessarily need to be revised. We believe these provisions of the Delta Plan should be revised to be consistent with the Water Code statutes.	Co	Please refer to MR2 for the Council's response to this comment.
50. Contra Costa County Water Agency	1/14/2013	8) Chapter 7, page 287-288, Policy RR - P1 -- This policy suggests several actions to be conducted by the Department of Water Resources that will be used to identify guiding principles, constraints, recommended cost share allocations, and strategic considerations for Delta investments. The first task (first bullet) is an assessment of existing Delta levee conditions, which lists two types of levee assessments and analysis. An additional, third, type of assessment should be included as a sub-bullet as follows: "Geotechnical/Structural levee assessment." This would include analysis of such items as levee materials, foundation, and permeability.	DP	Comment Noted.
51. Contra Costa County Water Agency	1/14/2013	9) Chapter 7, page 288, Policy RR - P I, second bullet point — This describes an island-by-island economics-based risk analysis. This island-by-island economics-based risk analysis is defined by a list of nine values that should be considered for protection. An additional sub bullet should be included to this list as follows: "Delta outflow".	DP	Comment Noted
52. East Bay Municipal Utility District	1/14/2013	Our overarching comment is that many sections of the regulatory language are inconsistent with the standards in the APA, including the "necessity," "nonduplication," and "consistency" standards set forth in Government Code Sections 11349(a) and 11349(f). The regulations include a significant amount of unnecessary narrative language and statements of policy that diminish the binding impact of the appropriate provisions and make it difficult for the potentially regulated entities to discern precisely what is required of them. The proposed regulations could be clarified by limiting the proposal to straightforward regulatory requirements that the DSC is empowered to adopt and removing narrative statements about the "policy of the State," items that the DSC "contemplates," and discussions of what "could" or "should" happen. These narrative discussions are more appropriate for the Delta Plan or the accompanying statement of reasons.	Ne, Ct, DP	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
53. East Bay Municipal Utility District	1/14/2013	Additionally, many of the substantive requirements of the regulations have been set forth in the definitions portion of the regulations, and the structure and depth of the definition section is both inappropriate and confusing. The definitions are excessively long and complex and include "actionable language" that makes it very difficult to discern the extent of the prescriptive or regulatory intent of the substantive provisions. Furthermore, some definitions, including the definition of "significant impact," differ substantially from common usage and will not only cause confusion among regulated entities, but create conflicts within the regulatory language itself. "Significant impact" has been defined to include beneficial impacts as well as negative impacts, which is inconsistent with CEQA and other regulatory policies and regulations currently in place. One needs to look no further than Section 5009(a) to sec the problem created by using the overly broad definition, as this section now prohibits any actions that might improve the opportunity to restore ecosystem habitat. We doubt this was the intended outcome. The definitions should be clear and concise, defining only terms where a definition is necessary, further, regulatory requirements should not be embedded within a definition.	Ne, Ct	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.

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54. East Bay Municipal Utility District	1/14/2013	Overall, in order to achieve the important and ambitious goal of the Delta Reform Act to establish a new governance approach for the Sacramento-San Joaquin Delta focused on promoting the achievement of the coequal goals, we urge the development and adoption of clear, targeted regulations consistent with the OAL regulations and other state laws and regulations.	Co	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
55. East Bay Municipal Utility District	1/14/2013	Administrative regulations generally should be enacted to implement, interpret, or carry out the provisions of a statute and should not alter or amend a statute or enlarge or impair its scope. The Notice of Proposed Rulemaking sets forth twenty-four provisions of the Water Code that the proposed regulations are intended to implement, interpret, or make specific. It further notes that the regulations make reference to more than twenty-four other provisions of the Water Code, as well as one provision of the Public Resources Code, several provisions of the federal Clean Water Act, Endangered Species Act, and National Flood Insurance statutes, and the CEQA regulations. Many of the provisions that the proposed regulations are implementing, interpreting, or making specific, including the water efficiency provisions in SB x7-7 are not statutes that the DSC is specifically charged with implementing, interpreting, or carrying out. Similarly, many of the Delta Reform Act provisions that the proposed regulations purport to implement, interpret, or carry out do not set forth specific authorities or powers of the DSC. Instead, they arc articulations of state policy or elements or objectives that should be included in the Delta Plan, but do not provide a basis for prescriptive regulations adopted by the DSC.	A	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
56. East Bay Municipal Utility District	1/14/2013	The APA requires OAL to review regulations using standards of: (1) necessity; (2) authority; (3) clarity; (4) consistency; (5) reference; and (6) nonduplication. We are concerned that many of the proposed provisions may not meet these standards. Many of the provisions are not necessary to effectuate the Delta Reform Act and some exceed the authority provided by the Act. Some of the language is also not written in a manner that can be easily understood by the targeted entities, and in some cases it is difficult to discern which entities are targeted by the provisions. Several provisions also overlap or duplicate the requirements of other state and federal laws. In general, the language should be reviewed with specific reference to the APA standards, and provisions that fail to meet each of the six standards should be removed.	A, Ne, Ct, Du	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
57. El Dorado County Water Agency	1/14/2013	General Definitions, Section 5001(e)(1)(B) This section leaves out two important elements: one, directly taken from CWC §85021 and the other from the Delta Plan's Appendix P (Demonstrating Consistency with the Delta Plan Regarding Reduced Reliance on the Delta and Improved Regional Self-Reliance). To correct these deficiencies and errors of omission, Section 5001(e)(1)(B) should be rewritten as follows: "Regions that use water from the Delta watershed will reduce their reliance on this water ~~for reasonable and beneficial uses[1]~~ 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[2]~~. This will be done by improving, investing in, and implementing local and regional water supply projects[3], local 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. For the purposes of improving regional self-reliance water conservation is considered a new source of water supply, consistent with CWC §1011(a). Water so saved through these counts as a new source of supply as this water would have been needed to meet future demand. Thus, even if water use is increasing as a result of economic or population growth, a water supplier can demonstrate that its water use is more efficient and is contributing to reduced reliance on the Delta and improved regional self-reliance."[4] It is important that the definitions of Section 5001 be as clear as possible. Therefore, we urge the inclusion of the expanded language regarding "improving regional self-reliance" suggested from the Delta Plan's Appendix P. This language provides a clear explanation of exactly how this standard (of improving regional self-reliance) is met and how those agencies within the Delta Watershed may be assured their investments and management actions and policies are consistent with the Delta Plan objectives.	Ct, O	Section 5001 ~~5002, 5003~~(h)(1)(B) sets forth the Council's definition for what it means to achieve the coequal goal of providing a more reliable water supply for California for the purpose of clarifying for a proponent whether its proposed action is a covered action under section 5001 ~~5002, 5003~~ (j)(4). We disagree with the comment concerning the interpretation of section 5001 ~~5002, 5003~~ (h)(1)(C). Regions that use water from the Delta watershed include areas that receive water that has been exported from the Delta. We disagree that the language in section 5001 ~~5002, 5003~~ (h)(1)(B) is deficient or contains omissions. This paragraph draws upon Water Code section 85021 as well as other Water Code sections including 85004(b), (85020(d) and (f), 85023, 85302(d), and 85304. It is not limited to language from Water Code section 85021. To address the comment that local and regional water supply projects should be specifically included in section 5001 ~~5002, 5003~~ (h)(1)(B, the Council has added these words to the paragraph. To address the comment concerning the inclusion of language from Delta Plan's Appendix ~~P~~G on water conservation, the Council has a made the following revision to section 5003 ~~5005~~(c)(2): "For the purposes of reporting, water efficiency is considered a new source of water supply, consistent with Water Code section 1011(a)."

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		[1] The term reasonable and beneficial use is included in Section 5001(e)(1)(A), which therein applies to all waters of the state. It is not necessary to specifically include the same terminology in Section 5001(e)(1)(B), which only applies to water used from the Delta watershed, and then, inexplicably, not apply it to water exported from the Delta as described in Section 5001(e)(1)(C). Using the term once, for the entire state, should be sufficient. [2] This specific reference to the reasonable use of water and the Public Trust Doctrine is only made in reference to water used from the Delta watershed. It would be better to delete such reference here and, instead, include it in Section 5001(e)(1)(A), which would be universally applied to all the waters of the state. [3] Taken directly from CWC §85021. [4]Delta Stewardship Council Final Draft Plan, Appendix P, page P-2, lines 30-35.		
58. Environmental Water Caucus	1/14/2013	The Environmental Water Caucus and its affiliated organizations have provided comments to each of the iterations of the Delta Plan since the original scoping comments January 2011 and we are pleased to continue; however, since so many of the comments discussed in our responses to the previous Draft Delta Plans and the Delta Plan DEIR are not considered with this Final Delta Plan, we include them again by reference in this set of comments to this Final Draft Delta Plan. This comments letter is organized into three sections, as follows, and in keeping with the Delta Stewardship Council (DSC) document organization: Section 1. Final Draft Delta Plan Comments Section 2. Recirculated DPEIR Comments (RDPEIR) Section 3. Rulemaking Package Comments	O	Comment Noted
59. Environmental Water Caucus	1/14/2013	Regs: General & EFIS: The benefits and costs of the Delta Plan are not analyzed. A proper Cost-Benefit analysis of the Plan and its regulations should not be confused with the so-called "Cost Analysis" accompanying the Proposed Regulation, which provides only general narrative, and omits a discussion of benefits. Without this information, decision makers cannot make informed decisions. A Cost-Benefit Analysis is an accepted method for financially evaluating proposed projects. If a Cost/Benefit analysis will be prepared for a proposal, NEPA provides guidelines to accomplish it. (See 40 CFR Sec. 1502.23) A fair and accurate Cost-Benefit Analysis provides assurances to agencies and the public that the expenditure of funds will in fact provide benefits that make the project a worthwhile undertaking, and a full consideration of the co-equal goals demands it. A valid consistency determination that weighs future habitat and conveyance projects cannot be made without a Cost-Benefit Analysis. In addition to performing this analysis on the Plan itself, the Delta Stewardship Council, through the Proposed Plan and Regulation, must require a Cost-Benefit Analysis for all major projects submitted for consistency determinations under the Delta Plan. Without such an analysis, the Delta Stewardship Council cannot make an informed decision as required by CEQA.	O, E	The comment is correct that the Cost Analysis prepared to support the Economic and Fiscal Impact Statement does not constitute a benefit-cost analysis. B-C analysis is not required for rulemaking, though benefits of the adopted regulation are summarized in either descriptive or quantitative manner. The comment is recommending that covered actions undergo a B-C analysis as part of the consistency certification process. The Council, in its discretion, considered many ideas for how to structure the consistency process and what to include as policies. It did not choose to make B-C analysis part of the requirement for covered actions.
60. Environmental Water Caucus	1/14/2013	Chapter 2: As mentioned in the cover letter to these comments, the Delta Plan must include a Water Supply Analysis for each certified project in order to insure the availability of adequate water for the restoration of Delta; it should require a detailed Cost-Benefit Analysis in order to assure the financial viability of a covered project, and; it must include a Public Trust Analysis as indicated in the Delta Reform Act which cites the Public Trust as the foundation of California water policy. We therefore recommend that an additional regulatory policy be created for the Delta Plan which requires these three actions be accomplished prior to the certification of consistency for any major Delta Plan project. Alternatively, three separate new policies could be created within the applicable chapters specific to each of these actions (Chapter 1 for the Public Trust Analysis, Chapter 3 for the Water Supply Analysis, and Chapter 8 for the Cost-Benefit Analysis).	DP	The Council considered many ideas for how to structure the consistency process and what to include as policies. The Delta Council, in its discretion, has determined not to request additional information regarding covered actions. The Council's regulations—as well as the Delta Reform Act itself—do, in part, reflect the public trust doctrine. For example, section 5003 ~~5005~~ promotes water use conservation and efficiency to reduce the strain on Delta resources. The Council does not, however, agree that the Delta Reform Act requires the Council to adopt a regulation mandating that agencies engage in a "public trust analysis" before proceeding with a covered action.

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61. Environmental Water Caucus	1/14/2013	Chapter 2: (Pages 59-62) G P1. Detailed Findings to Establish Consistency with the Delta Plan Section (b), first item, page 60. We recommend that the type of covered action described (that which does not meet "full consistency" obligations) should ALWAYS be reviewed by the Council. Because this is a complex and conflicting type of covered action, the Council should always do a review, and not have to go through the appeal process. These types of actions may not be reviewed by Council members, and as such, never be appealed. Hence, this type of action, which has conflicts in meeting "all relevant policies", could slip by without any Council review, which we feel would be a mistake.	DP	**This comment pertains to the Delta Plan and is not a comment on the regulations** The Council's authority with respect to covered actions is defined by the Delta Reform Act, Water Code sections 85225-85225.30. As detailed in Water Code section 85225.10(a), any person may file an appeal of a certificate of consistency with the Council. The Council also may review all certifications of consistency and, at its discretion, file an appeal.
62. Environmental Water Caucus	1/14/2013	Chapter 3: One of the best – and unrecognized – opportunities for reducing reliance on the Delta is by accomplishing a thorough economic analysis of Public Trust values, since this would require the examination of the alternatives to exported water. The alternatives to a continued high level of Delta exports are many, and they are contained in the efficiency and water use reduction solutions that are recommended in the EWC report: California Water Solutions Now, which is one of the alternatives being examined by the Council.	DP, E	The Council's regulations—as well as the Delta Reform Act itself—do, in part, reflect the public trust doctrine. For example, section 5003 ~~5005~~ promotes water use conservation and efficiency to reduce the strain on Delta resources. The Council does not, however, agree that the Delta Reform Act requires the Council to adopt a regulation mandating that agencies engage in a "public trust analysis" before proceeding with a covered action.
63. Environmental Water Caucus	1/14/2013	Chapter 3: Unwillingness of the Delta Plan to require a cost-benefit analysis for all projects submitted for Delta Plan approval (including BDCP – although that project has recently indicated that it will accomplish a cost-benefit analysis) in order to in order to assure that public monies are spent on the most cost effective projects among reasonable alternatives. This unwillingness on the part of the state and public agencies to accomplish a meaningful financial analysis constitutes abrogation of fiscal responsibilities to California citizens, taxpayers, and ratepayers.	DP, E	The comment is correct that the Cost Analysis prepared to support the Economic and Fiscal Impact Statement does not constitute a benefit-cost analysis. B-C analysis is not required for rulemaking, though benefits of the adopted regulation are summarized in either descriptive or quantitative manner. The comment is recommending that covered actions undergo a B-C analysis as part of the consistency certification process. The Council considered many ideas for how to structure the consistency process and what to include as policies. It did not choose to make B-C analysis part of the requirement for covered actions.
64. Environmental Water Caucus	1/14/2013	Chapter 3: [...It] is necessary to first conduct detailed analysis and study of [...], a valid cost-benefit analysis to determine what project or projects might make economic sense, […].	DP, E	Comment Noted
65. Environmental Water Caucus	1/14/2013	Chapter 3: [...The] recommendation in the economic Sustainability Plan to reinforce Delta levees above the PL 84-99 standard would cost far less than the $15 billion Delta Tunnels project. The Delta Plan fails as an informational document by failing to raise the question of why that would not be a better alternative than the Delta Tunnels to accomplish the same ends.	DP, E	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.
66. Environmental Water Caucus	1/14/2013	Chapter 3: The initial economic analysis performed by David Sunding for BDCP also specifically referenced the assumption that the state should attempt to sustain the explosive mid-2000s level of growth in inland Southern California, and to provide water for lawns in the resulting subdivisions in the desert. The economic analysis did not look at GHG impacts of subsidizing the use of fossil fuels to ship water 400 miles south to water lawns in the desert, and such an analysis would not be done in determining consistency with local GHG emission reduction plans.	DP, E	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.
67. Environmental Water Caucus	1/14/2013	Chapter 3: Failure to Perform Cost Benefit Analysis And Public Trust Balancing The reason the state has so far failed to perform cost benefit analysis or conduct public trust balancing with respect to the Delta Tunnels project is that the special water interests are in control of the process and know that a candid, honest process would result in the Delta Tunnels not being developed. Two thirds of the water taken away from the Delta would go to mega farming interests including those in Westlands Water District and the Kern County Water Agency which already get subsidized water to grow unsustainable crops on drainage-impaired land. They are growing cotton, almonds and other permanent water-intensive crops on arid-desert land. In addition, "these project rights are junior in priority to the rights held by water users in the Delta and within the Delta watershed." (82). In contrast to those water interests, many urban, residential, commercial, and industrial users are making great strides in terms of water conservation, water recycling, use of water from local and other sources, and use of other mechanisms to reduce reliance on the Delta as well as to save the costs of exporting water from the Delta.	DP, E	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.

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		Up to this point, the state has only conducted cost-benefit analysis in terms of whether benefits to the exporters would exceed cost to the exporters. There has been no true state-wide cost-benefit analysis, or cost-benefit analysis considering impacts on the Delta and Delta watershed interests and users because the exporters controlling the process know that the costs of the project would exceed any benefits. The recent indication by the BDCP to conduct a cost-benefit analysis, while seemingly encouraging, is also discouraging due to the apparent biases already being built into the cost-benefit analysis.		
68. Environmental Water Caucus	1/14/2013	Chapter 3: […] absence of cost-benefit analysis to determine what project or projects might make economic sense […]	DP, E	Comment Noted
69. Environmental Water Caucus	1/14/2013	Chapter 4: Page 179. The DPC's Economic Sustainability Plan (ESP, Figure C) estimates an annual crop loss of up to $20m resulting from the BDCP proposal for habitat restoration in the San Joaquin River Floodplain. Yolo Bypass Fishery Enhancements involve losses of $7m to $10m annually, dependent on flood duration. Restoring 65,000 acres of tidal marsh would involve $18m to $77m in crop losses, with the highest losses in the South Delta. Selection of agricultural land in the Lower San Joaquin River Floodplain and other areas of the Delta for conversion to any habitat not compatible with agriculture is inconsistent with the core strategy to "Maintain Delta agriculture as a primary land use, a food source, a key economic sector, and a way of life." (lines 27-28)	DP, E	The goal of maintaining Delta agriculture as a primary land use, a food source, a key economic sector, and a way of life at the regional scale can be achieved while some crop losses in specific areas occur.
70. Environmental Water Caucus	1/14/2013	Chapter 4: The definition of "water supply reliability" is important and can impact economic sustainability of the Delta. The Delta Plan acknowledges multiple strategies or objectives referenced in the Delta Reform Act that must be addressed to improve water supply reliability. A more specific definition of water reliability allows for economic analysis or at least the presentation of factors relevant to economic sustainability. For example, if water reliability is defined as export levels prior to 1970, reduced by the effects of climate change and needs within the watershed, this might represent the average level of exports which could realistically be more reliable. This level had less of an impact on fish populations than the impact of exports from 1970 to 2010. The 1970 level of export is conceivably sustainable with through Delta conveyance and this would have a different impact on economic sustainability than that of expanded exports. Expanded exports utilizing isolated facilities, which has been proposed in the BDCP, would have a footprint that takes farmland out of protection, off local tax rolls, and could alter channel flows threatening the salinity of the Delta. These conflicts with the Plan's proposed performance measure in Chapter 8, which states that progress toward improving economic sustainability of Delta land uses and protection of the Delta's agricultural values should be measured by "total agricultural acreage and gross revenue in the Delta (that) will be maintained or increased in the future." A more precise definition of "water supply reliability" could avoid these kinds of conflicts.	DP, E	The Council has used its discretion to define "water supply reliability" for the purposes of these regulations.
71. Environmental Water Caucus	1/14/2013	Chapter 8: This chapter is wholly lacking in any substantial recommendations or policies to determine whether plans for substantial public investments in new Delta conveyance and ecosystem restoration are worth it. As mentioned previously in EWC comments, a Public Trust balancing must occur along with an independent cost/benefit analysis and a water availability analysis. It is foolhardy to move ahead with multi-billion dollar investments in new infrastructure without knowing how much water is available pay for the project and whether or not the costs are less than the benefits.	DP, E	Analysis of the cost-effectiveness, benefits relative to costs, or financial feasibility of Delta conveyance options would be assessed as part of the BDCP.
72. Environmental Water Caucus	1/14/2013	Chapter 8: A Cost/Benefit Analysis is a standard way of doing business for any major construction project. CEQA guidelines suggest that it may be accomplished if warranted. If a Cost/Benefit analysis will be prepared for a proposal, NEPA provides guidelines to accomplish it. (See 40 CFR Sec. 1502.23) Given the history of significant cost overruns for major construction projects, a cost/benefit analysis only makes sense. The State of California and the federal government would be negligent to not include a legitimate cost/benefit analysis for BDCP and the Peripheral Tunnels.	DP, E	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities. Analysis of the cost-effectiveness, benefits relative to costs, or financial feasibility of Delta conveyance options would be assessed as part of the BDCP.

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73. Environmental Water Caucus	1/14/2013	Chapter 8: The Public Trust Doctrine is an affirmation of the duty of the state to protect the people's common heritage in streams, lakes, marshlands, and tidelands. The application of the Public Trust Doctrine requires an economic and sociological analysis of the public trust values of competing alternatives, as was directed by the State Water Board in the Mono Lake Case. Its applicability to alternatives for the Delta, where species recovery and ecosystem restoration are being pitted against further water exports, is exactly the kind of situation suited to a Public Trust balancing, which should be required by the Delta Plan. As required by Water Code §85203: "[t]he longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta." The Council, therefore, clearly has trustee responsibilities in balancing the public trust, but you have punted on that responsibility to date. Planning and allocation of limited and oversubscribed resources implies analysis and balancing of competing demands. Inexplicably, we find no effort whatsoever to balance the public trust obligations and resolve competing demands in previous drafts of the Delta Plan. The Delta Stewardship Council must include a Public Trust balancing for both the Delta Plan and BDCP as a condition of approval of BDCP and other projects submitted for the Delta Plan.	DP, E	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan. See MR4 to comments pertaining to Public Trust Doctrine.
74. Environmental Water Caucus	1/14/2013	Chapter 8: In addition to the above deficiencies in the Delta Plan, there is no mention of the concept of "price elasticity" and how it will affect the ability of participating water agencies to pay their share of costs. It is blindly assumed that ratepayers can continue to assimilate increased rates and that water consumption and agency revenues will remain the same. We have seen this not to be the case in many instances where water rates have risen and agency revenues have declined due to decreased consumption. The Montecito Water District is a classic example of price elasticity. Montecito is spending 39% of its budget on State Water Project water, yet is using none of it in 2012-2013 because demand has reduced to the point that SWP water is no longer needed because of price increases. Local sources are meeting all demands. A cost/benefit and Public Trust analysis for the Delta Plan and BDCP should take into consideration price elasticity in determining whether the project beneficiaries can actually afford the project. Many local water agencies are already experiencing budgetary difficulties due to continual cost increases that result in rising water rates and declines in revenue. The costs of personnel, materials, and energy are continually rising and causing rate increases. It is questionable whether many water agencies can afford the cost of the Peripheral Tunnels project.	DP, E	***Delta Plan comments will be addressed separately.**
75. Environmental Water Caucus	1/14/2013	Chapter 8: Finally, any economic analysis such as cost/benefit and Public Trust analyses must include the subsidies provided to agricultural interests, including but limited to Central Valley Project agricultural service contractors. For instance, the Environmental Working Group has identified significant public subsidies to San Luis Unit CVP contractors in the form of water, crop and energy subsidies. The Bureau of Reclamation also estimated a net loss of $5-15 million/year14 to provide drainage to the San Luis Unit and recommends that Congress authorize additional subsidies for the San Luis Unit. We are confident that the costs of providing water to south of Delta subsidized agricultural interests would not be worth the benefit and would, in some cases, increase subsidies.	DP, E	***Delta Plan comments will be addressed separately.**
76. Environmental Water Caucus	1/14/2013	Under the state administrative procedure act, all regulations proposed by an agency must satisfy authority and reference standards. (Cal. Gov't Code 11349.) Each regulation to be adopted must be within the scope of authority conferred. (Cal. Gov't Code 11342.1) A regulation that is not within the scope of an agency's express or implied rulemaking authority is void and cannot become effective.	O	Comment noted.
77. Environmental Water Caucus	1/14/2013	The proposed Delta Plan regulation exceeds these authority and reference standards by including regulatory provisions which exceed the statutory authority provided to the Delta Stewardship Council. As the title "Consistency with Regulatory Policies in the Delta Plan" suggests, the Proposed Regulation is to provide only the specific legal underpinnings to determine if "state and local land use actions identified as "covered actions" [...are] consistent with the Delta Plan." (Water Code § 85022(a).)	A	See responses to comments by this entity and others that concern specific adopted regulations.

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		The legislature envisioned a two-step decision-making process, which the Proposed Regulation facilitates: (1) Determine whether proposed actions are "covered actions" under the Delta Plan (Article 1); (2) determine whether "covered actions" are consistent with the Delta Plan (Articles 2 and 3). In practice, the November 16, 2012 Proposed Regulation both excludes actions that should be classified as "covered," and seeks to enshrine regulatory policies that plainly fall outside of the scope of determining whether covered actions are consistent with the Delta Plan.		
78. Friends of the River	1/14/2013	This organization, Friends of the River, objects to approval of the Delta Plan (DP), RDPEIR, and Regulations. This organization is included as a commenter in the detailed comments submitted by the Environmental Water Caucus (EWC). These brief additional comments are submitted solely on behalf of this organization. A fundamental threshold CEQA violation carried out by the Delta Plan, RDPEIR and Regulations is that they call for carrying out the "alternative" of developing facilities to divert huge quantities of freshwater from the Sacramento River upstream from the Delta for the benefit of exporters south of the Delta. These documents call for that even though no true alternative to developing new conveyance has ever been considered by either the Council or by the exporters creating the BDCP project. This failure to consider an alternative that would avoid or substantially lessen the massive environmental impacts that would occur with construction and operation of new water delivery conveyance must be remedied by full consideration of a reasonable range of alternatives in a recirculated Draft EIR.	O	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.
79. Friends of the River	1/14/2013	The Delta Plan and Regulations adopt the Revised Project alternative, and call for, recommend, or encourage "improving Delta conveyance and operations" "improving conveyance in the Delta", "optimizing diversions in wet years when more water is available" and establishing new diversions upstream from the Delta to transport water around or under the Delta to the pumping plants in the south Delta and the exporters. The RDEIR and Draft EIR have failed to consider the whole of the action and its impacts and the Delta Plan CEQA process has unlawfully segmented the project and conducted piecemeal environmental review.	O	The proposed BDCP is a reasonably foreseeable future project that is not part of the Delta Plan. It is being evaluated by the Department of Water Resources as the CEQA lead agency. The cumulative impacts of the proposed Delta Plan, in combination with the impacts of the proposed BDCP, are described in EIR Sections 22 and 23. Please refer to Master Response 1 Delta Plan EIR for further details. The Delta Reform Act requires the Delta Plan to promote options for new and improved infrastructure relating to, among other things, the water conveyance in the Delta. Water Code section 85304. It does this by encouraging successful completion of the BDCP by a date-certain. See Final Draft Delta Plan, p. 112 (Recommendation WR R12). As explained in Sections 23.1 and 23.2 of the Draft EIR (pp. 23-1 to 23-5), the BDCP is an HCP and NCCP, which is being developed through a collaboration of numerous parties that will cover new and existing water facilities, habitat restoration and enhancement, and research. Draft EIR, Sections 23.1 and 23.2, pp. 23-1 to 23-5. In the Project Description section of the Draft EIR, it is described as a Water Reliability conveyance project being undertaken by other agencies. Draft EIR Section 2.2.1.8, p. 2A-24. The Department of Water Resources ("DWR") is the CEQA lead agency for the BDCP. Draft EIR, p. 23-1. As explained below, the BDCP shall be incorporated into the Delta Plan (and the associated public benefits become eligible for state funding) if it satisfies the specific performance requirements set forth in the Delta Reform Act, as determined by the Department of Fish and Wildlife ("DFW"). Water Code section 85320(e). Delta Plan Recommendation WR R12 recommends that the BDCP be completed by December 31, 2014, but does not make any recommendations about the content of the BDCP. Final Draft Delta Plan, p. 112; RDEIR, p. 23-2. A partial Revised Administrative Draft Bay Delta Conservation Plan was released by the California Resources Agency in March 2013 (CRA 2013). This administrative draft contains revised planning goals that elaborate on the prior goals, and

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				conservation strategies for more species and natural communities than originally covered. As of the date of this response, the draft BDCP and the Draft EIR for the BDCP are scheduled to be released for public review and comment in late Summer 2013. If the DFW approves the BDCP as a Natural Communities Conservation Plan ("NCCP"), then the Council "shall have at least one public hearing concerning the incorporation of the BDCP into the Delta Plan" (Water Code section 85320(d)), and if the BDCP is also approved as a federal Habitat Conservation Plan ("HCP") "the Council shall incorporate the BDCP into the Delta Plan" if the DFW determines that the BDCP meets the statutory requirements, which determination is appealable to the Council. Water Code section 85320(e) (emphasis added). Regarding development of BDCP, DWR "shall consult with the [C]ouncil…during the development of the BDCP [and] [t]he [C]ouncil shall be a responsible agency in the development of the [BDCP] environmental impact report." Water Code section 85320(c); Draft EIR, p. 23-1. In other words, the Council is not the lead agency for BDCP.
80. Friends of the River	1/14/2013	The proposed regulations call for action to "improve Delta conveyance and operations" and states that "This will be done by improving conveyance in the Delta...to optimize diversions in wet years when more water is available". (§5001(e) (A),(C). It is being pointed out in the extensive written comments this same date by EWC, that in view of the specifics of the BDCP Delta Tunnels project announced by both the Governor and the DWR Deputy Director during the summer of 2012, the Delta Plan CEQA process has failed to provide an accurate, stable and finite project description which is required by CEQA. In addition to that violation, CEQA is also violated by unlawfully segmenting, also referred to as piecemealing, project approval and environmental review.	O	The proposed BDCP is a reasonably foreseeable future project that is not part of the Delta Plan. It is being evaluated by the Department of Water Resources as the CEQA lead agency. The cumulative impacts of the proposed Delta Plan, in combination with the impacts of the proposed BDCP, are described in EIR Sections 22 and 23. Please refer to Master Response 1 Delta Plan EIR for further details. The Delta Reform Act requires the Delta Plan to promote options for new and improved infrastructure relating to, among other things, the water conveyance in the Delta. Water Code section 85304. It does this by encouraging successful completion of the BDCP by a date-certain. See Final Draft Delta Plan, p. 112 (Recommendation WR R12). As explained in Sections 23.1 and 23.2 of the Draft EIR (pp. 23-1 to 23-5), the BDCP is an HCP and NCCP, which is being developed through a collaboration of numerous parties that will cover new and existing water facilities, habitat restoration and enhancement, and research. Draft EIR, Sections 23.1 and 23.2, pp. 23-1 to 23-5. In the Project Description section of the Draft EIR, it is described as a Water Reliability conveyance project being undertaken by other agencies. Draft EIR Section 2.2.1.8, p. 2A-24. The Department of Water Resources ("DWR") is the CEQA lead agency for the BDCP. Draft EIR, p. 23-1. As explained below, the BDCP shall be incorporated into the Delta Plan (and the associated public benefits become eligible for state funding) if it satisfies the specific performance requirements set forth in the Delta Reform Act, as determined by the Department of Fish and Wildlife ("DFW"). Water Code section 85320(e). Delta Plan Recommendation WR R12 recommends that the BDCP be completed by December 31, 2014, but does not make any recommendations about the content of the BDCP. Final Draft Delta Plan, p. 112; RDEIR, p. 23-2. A partial Revised Administrative Draft Bay Delta Conservation Plan was released by the California Resources Agency in March 2013 (CRA 2013). This administrative draft contains revised planning goals that elaborate on the prior goals, and conservation strategies for more species and natural communities than originally covered. As of the date of this response, the draft BDCP and the Draft EIR for the BDCP are scheduled to be released for public review and comment in late Summer

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				2013. If the DFW approves the BDCP as a Natural Communities Conservation Plan ("NCCP"), then the Council "shall have at least one public hearing concerning the incorporation of the BDCP into the Delta Plan" (Water Code section 85320(d)), and if the BDCP is also approved as a federal Habitat Conservation Plan ("HCP") "the Council shall incorporate the BDCP into the Delta Plan" if the DFW determines that the BDCP meets the statutory requirements, which determination is appealable to the Council. Water Code section 85320(e) (emphasis added). Regarding development of BDCP, DWR "shall consult with the [C]ouncil…during the development of the BDCP [and] [t]he [C]ouncil shall be a responsible agency in the development of the [BDCP] environmental impact report." Water Code section 85320(c); Draft EIR, p. 23-1. In other words, the Council is not the lead agency for BDCP.
81. Individual (Ken)	1/13/2013	The Council should include regulatory policies governing conveyance, including the peripheral canal, because we need you to be the judge of whether the canal harms the Delta. The water contractors are running the BDCP and we certainly can't depend on them. How can the Council decide what is good for the Delta when it doesn't take account of the peripheral canal? The canal is the biggest threat to the Delta. Trying to build a plan to restore the Delta while ignoring the canal just doesn't make sense. We are opposed to the giant tunnels that the water contractors are pushing to drain the Delta. We understand that you have decided you don't have any authority to determine if the tunnels are a threat to the Delta or not. How can this be? How can you be the chief protector of the Delta yet you don't have any say so over the tunnels? The Delta Plan says that you only have "contingent" authority over new conveyance facilities (AKA the GIANT tunnels). This makes no sense. You are responsible to see that the Delta is brought back to life. How can you accomplish your mission if you have to stand by and allow the water contractors to drain the Delta?	O	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.
82. Individual (Ken)	1/13/2013	We think the regulations don't make sense because they don't say anything at all about how you will decide to approve or disapprove the giant tunnels. You've been at this for years. Surely by now you could have developed some regulatory criteria to judge the tunnel project. Please go back to the drawing board and come up with some regulations that have teeth.	O	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.
83. Individual (Ken)	1/13/2013	Why don't the regulations require the water contractors to consider a plan where they would harvest the millions of gallons of water that are wasted when the big storms come and the flow of the Sacramento River is diverted down the Yolo Bypass and over the flood control weirs into farmers fields. It make more sense to take this water than to drain the Delta.	O	This proposal would require additional storage facilities. The Delta Plan includes a recommendation that the Department of Water Resources complete surface water storage investigations of off-stream surface water storage projects b y December 31, 2012 (see WR R13), as well as a recommendation that DWR and other state agencies identify opportunities for storage, use and water transfer projects (see WR 14). The Council in its discretion has determined that matter is inappropriate for a regulation.
84. Individual (Ackerly)	1/14/2013	• The Council should include regulatory policies governing conveyance, including the peripheral canal, because we need you to be the judge of whether the canal harms the Delta. The water contractors are running the BDCP and we certainly can't depend on them.	DP	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.
85. Individual (Ackerly)	1/14/2013	• We understand that the State Water Resources Control Board is supposed to provide you with information about how much water must stay in the Delta and how much can be exported. But you have completed the Delta Plan before you even have that information. How can you say what is needed for the Delta when you don't have the most basic scientific information?	DP	***Delta Plan comments will be addressed separately.**

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86. Individual (Ackerly)	1/14/2013	• Why does the Delta Plan assume that the only answer to California's water needs is the Giant tunnel project? Shouldn't you include in the regulations a range of alternatives that should be considered before deciding on the tunnels? What about the west Delta Intake Concept? What about harvesting flood waters from the Yolo Bypass or Sacramento Weir instead of taking water out of the Delta? • We think the regulations don't make sense because they don't say anything at all about how you will decide to approve or disapprove the giant tunnels. You've been at this for years. Surely by now you could have developed some regulatory criteria to judge the tunnel project. Please go back to the drawing board and come up with some regulations that have teeth.	DP	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.
87. Individual (Ackerly)	1/14/2013	• Why don't the regulations require the water contractors to consider a plan where they would harvest the millions of gallons of water that are wasted when the big storms come and the flow of the Sacramento River is diverted down the Yolo Bypass and over the flood control weirs into farmers' fields. It make more sense to take this water than to drain the Delta.	DP	This proposal would require additional storage facilities. The Delta Plan includes a recommendation that the Department of Water Resources complete surface water storage investigations of off-stream surface water storage projects b y December 31, 2012 (see WR R13), as well as a recommendation that DWR and other state agencies identify opportunities for storage, use and water transfer projects (see WR 14). The Council in its discretion has determined that matter is inappropriate for a regulation.
88. Individual (Bellrose, Cheryl)	1/14/2013	Regulatory issues also remain problematic. It is of primary concern that the contractors who support the peripheral canal are playing too much of a role in the decision making process. That you have only "contingent authority" over new conveyance facilities is of great concern. The Council should be making the determination as to the regulatory policies governing conveyance. Regulations pertaining to this large scale effort are vague in that there is no mention as to how you will decide to approve or disapprove the adequacy of the tunnel project either.	O	Appendix ~~G~~A provides a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan. Also see the Delta Steward Council's Administrative Procedures Governing Appeals, starting with Paragraph 16 ("Review of Bay Delta Conservation Plan"). Those procedures describe how the Council will review that Plan if an appeal is filed with the Council. Both documents are available at available at: http://deltacouncil.ca.gov/delta-plan/current-draft-of-delta-plan
89. Individual (Borison)	1/14/2013	The Delta Stewardship Council should include regulatory policies governing conveyances, including a peripheral canal or tunnels. The Council – and not water contractors -- need to be the judge of whether canals or tunnels harm the Delta.	DP	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.
90. Individual (Borison)	1/14/2013	I understand that the State Water Resources Control Board is supposed to provide you with information about how much water must stay in the Delta and how much can be exported. But you have completed the Delta Plan before you even have that information. How can you say what is needed for the Delta when you don't have the most basic scientific information?	DP	*Delta Plan comments will be addressed separately.
91. Individual (Borison)	1/14/2013	You should include in the regulations a range of alternatives that should be considered before deciding on the tunnels.	DP	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.
92. Individual (Borison)	1/14/2013	Why don't the regulations require water contractors to consider a plan where they would harvest the millions of gallons of water that are wasted when big storms come and the flow of the Sacramento River is diverted down the Yolo Bypass and over the flood control weirs into farmers fields? It makes more sense to take this water than to drain the Delta.	DP	This proposal would require additional storage facilities. The Delta Plan includes a recommendation that the Department of Water Resources complete surface water storage investigations of off-stream surface water storage projects by December 31, 2012 (see WR R13), as well as a recommendation that DWR and other state agencies identify opportunities for storage, use and water transfer projects (see WR 14). The Council in its discretion has determined that matter is inappropriate for a regulation.
93. Individual (Ludwig)	1/13/2013	The council should regulatory policies, including the peripheral canal. The water contractors are running the BDCP and we cannot depend on them. The peripheral canal is the biggest threat to the Delta. How can you be	DP	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision

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		the chief protector of the Delta and not have a say so over the giant tunnels? Do not allow the water contractors to drain the water from the Delta for the giant tunnels or the canal. If you do not have enough scientific information, how can you determine how much water must remain in the Delta. You need the information for an informed decision.		to defer consideration of this matter for a later update of the Delta Plan.
94. Individual (Ludwig)	1/13/2013	Are there no alternatives such as the smaller facility in the west Delta? How about alternatives presented by environmental groups? How about taking flood waters from Yolo Bypass or the Sacramento Weir, before taking water from the Delta? Can you not develop plans to harvest the millions of gallons of water wasted when big floods come and take this water south, rather than draining the Delta. Please consider the alternatives, and stop promoting the canal and the tunnels, damaging the Delta and the communities counting on this valuable water source.	DP	(1) Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan. (2) This proposal would require additional storage facilities. The Delta Plan includes a recommendation that the Department of Water Resources complete surface water storage investigations of off-stream surface water storage projects b y December 31, 2012 (see WR R13), as well as a recommendation that DWR and other state agencies identify opportunities for storage, use and water transfer projects (see WR 14). The Council in its discretion has determined that matter is inappropriate for a regulation.
95. Individual (McCleery)	1/14/2013	The Plan needs to contain scientific information about the amount of fresh water required, the X2 line, and needs to have firm regulations regarding limits to exporting. The Co-Equal Goals cannot include "additional exports" and instead needs to recommend reduced exports else the goals are not equal but conflicting.	DP	***Delta Plan comments will be addressed separately.**
96. Individual (McCleery, Janet)	1/13/2013	The Council should include regulatory policies governing conveyance, including the peripheral canal, because we need you to be the judge of whether the canal harms the Delta. The water contractors are running the BDCP and we certainly can't depend on them.	DP	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.
97. Individual (McCleery, Janet)	1/13/2013	Why does the Delta Plan assume that the only answer to California's water needs is the Giant tunnel project? Shouldn't you include in the regulations a range of alternatives that should be considered before deciding on the tunnels? What about the west Delta Intake Concept? What about harvesting flood waters from the Yolo Bypass or Sacramento Weir instead of taking water out of the Delta?	DP	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.
98. Individual (McCleery, Janet)	1/13/2013	We think the regulations don't make sense because they don't say anything at all about how you will decide to approve or disapprove the giant tunnels. You've been at this for years. Surely by now you could have developed some regulatory criteria to judge the tunnel project. Please go back to the drawing board and come up with some regulations that have teeth.	DP	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.
99. Individual (McCleery, Janet)	1/13/2013	Why don't the regulations require the water contractors to consider a plan where they would harvest the millions of gallons of water that are wasted when the big storms come and the flow of the Sacramento River is diverted down the Yolo Bypass and over the flood control weirs into farmers fields. It make more sense to take this water than to drain the Delta.	DP	This proposal would require additional storage facilities. The Delta Plan includes a recommendation that the Department of Water Resources complete surface water storage investigations of off-stream surface water storage projects b y December 31, 2012 (see WR R13), as well as a recommendation that DWR and other state agencies identify opportunities for storage, use and water transfer projects (see WR 14). The Council in its discretion has determined that matter is inappropriate for a regulation.
100. Individual (Snyder)	1/14/2013	I understand that the State Water Resources Control Board is supposed to provide you with information about how much water must stay in the Delta and how much can be exported. Is it true that you have completed the Delta Plan before you even have that information? How can you say what is needed for the Delta when you don't have the most basic scientific information? Do you think your plan will leave enough water for a habitat that will harbor healthy fish, birds and wildlife? If you have made a mistake will you stand up later and admit that the mistake was yours?	DP	***Delta Plan comments will be addressed separately.**
101. Ironhouse	1/10/2013	Comment One	O	Comment noted.

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Sanitary District		At page 286, the Delta Plan States: Problem Statement **No mechanism exists for ensuring that costs of levee maintenance are borne by all beneficiaries.** Current financing of levee operations and maintenance is not well coordinated, and future funding sources are uncertain. Financing of local levee operations, maintenance, emergency preparedness and response, and related data collection and reporting efforts would benefit from greater coordination and integration. [Emphasis added.] Policies No policies with regulatory effect are included in this section. Recommendations RR R2 Finance Local Flood Management Activities The Legislature should create a Delta Flood Risk Management Assessment District with fee assessment authority (including over State infrastructure) to provide adequate flood control protection and emergency response for the regional benefit of all beneficiaries, including landowners, infrastructure owners, and other entities that benefit from the maintenance and improvement of Delta levees, such as water users who rely on the levees to protect water quality. Part of the solution to the above stated problem is that the Delta Plan should contain and the Draft EIR should analyze the impacts of a regulatory policy with the force of law directing the Delta Stewardship Council to advocate for and seek federal legislation under which reclamation districts in the Delta are permitted to assess federal infrastructure projects for the collection of funds for their maintenance. On Jersey Island, the Western Area Power Administration (WAPA) operates transmission towers and lines which traverse it and other Delta islands. On Jersey Island, WAPA occupies easements which are 200 feet in width and are calculated to contain 86.81 acres. These transmission towers and line easements are protected by the Jersey Island Reclamation Works operated and maintained by RD 830. The RD 830 Board of Trustees has determined that the continuous maintenance and operation of the Reclamation Works does provide a benefit to the maintenance and operation of the WAPA high tower transmission lines within the District. This benefit accrues from the maintenance of the levees which in turn allow access over the land surface of the island for the continuous maintenance and operation of the high tower transmission lines. RD 830's annual assessment for WAPA is $49,853, or 14% of the total annual maintenance and operation costs of $860,430. WAPA has refused to pay this assessment, claiming that as an agency of the federal government, it "is tax exempt and not assessable for the purpose of providing funds for the construction, maintenance, repair or operation of Reclamation District No. 830 works." This exemption is based on the doctrine of sovereign immunity as embodied in case law, such as United States v. County of Allegheny (1944) 322 U. S. 174. Refusal by WAPA to pay its fair share of the RD 830 0 & M assessment, while likely legally correct, places an unreasonable burden on the other property owners who are subject to the assessment, including ISD ratepayers. This is because ISD is far and way the majority landowner on Jersey Island. Therefore, its ratepayers shoulder in majority part the financial burden shirked by WAPA. Congressional legislation is necessary to overrule relevant case law so that federal projects are no longer able to claim sovereign immunity from assessments imposed by local reclamation districts, such as RD 830, in order to fund the cost of maintaining the reclamation works for which they are responsible. For these reasons, the Delta Plan should contain and the Draft should analyze the impacts of a regulatory policy with the force of law directing the Delta Stewardship Council to advocate for and seek congressional legislation under which reclamation districts in the Delta are permitted to assess federal infrastructure projects which directly benefit from the operation and maintenance of their reclamation works.		
102. Local Agencies of the North Delta	1/14/2013	As explained in more detail in other comments, the rulemaking package is confusing and seems to contradict other requirements of the Delta Reform Act as well as other statutes, such as CEQA. The lack of value of the Rulemaking is demonstrated by the attempt to discuss benefits of the Rulemaking in the Initial Statement of	Ct, Co, S	The Initial Statement of Reasons describes each provision or group of similar provisions in the proposed regulation, its purpose, alternatives considered, and why the proposed approach was selected by the Council. Further, staff has revised

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		Reasons. There is no explanation of how the Proposed Regulations "provide the best means to achieve the coequal goals and additional goals and objectives required by the Act." (Initial Statement of Reasons, p. 11.) Additionally, many of the proposed regulations are inconsistent with Delta Plan previously developed Policies and Recommendations. For example, informative detail included in previous drafts of the Plan, such as the definitions of agricultural water suppliers and floodplains, is absent from or contradicted by the proposed Rulemaking.		the Cost Analysis to provide an expanded description of benefits of the Delta Plan policies.
103. Local Agencies of the North Delta	1/14/2013	Thank you for considering these comments. Water, reclamation and levee districts in the Delta are among the local stakeholders most affected by changes to land and water management in the Delta. LAND encourages the Council to properly implement the intent of the Delta Reform Act, including protecting and enhancing the Delta as a Place in the Delta Plan, the Delta Plan RDEIR and in the Rulemaking Package.		Comment noted.
104. Pacific Gas and Electric Company	1/14/2013	Routine Operations and Maintenance of PG&E Facilities PG&E believes that its routine operations and maintenance for facilities within the geographic boundaries covered by the Delta Plan generally should not be affected. Representatives from PG&E's State Agency Relations and Land & Environmental Management teams met with Council staff in September 2012 to confirm that only major new projects proposed by PG&E may be subject to the new provisions of the Delta Plan. Council Staff agreed that the majority of PG&E activities in the Delta would not be considered a "covered action" under the proposed screening criteria, as PG&E work on existing facilities is covered under existing the California Public Utilities Commission (CPUC) approval or exemption process, and would not be considered to have a significant impact on the Plan's coequal goals. The draft Plan should be clear in stating that these types of activities are not covered actions.	DP	Per Water Code section 85057.5(b)(5), as referenced in section ~~5003~~ 5001(j)(2), routine maintenance and operation of any facility located, in whole or in part, in the Delta, that is owned or operated by a local public agency does not meet the definition of a covered action. Section 5003(b)(2) contains a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language would be more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact. Section ~~5003(c)~~ 5001(j)(3) requires the state or local agency that proposes to carry out, approve, or fund a plan, program or project to determine if the activity is a covered action. The determination of whether a project is a covered action is not appealable to the Council.
105. Pacific Gas and Electric Company	1/14/2013	Promote Early Coordination for Specific Proposed Projects and Minimize Permitting Redundancy While the Plan and its associated EIR largely do not address actions at the project level, it is important to note that upgrading, relocating or protecting utility infrastructure can be a complex, time-consuming, and costly undertaking. Upon adoption of the Plan, we strongly urge future project proponents to work closely with PG&E during the earliest planning phases of projects within the Delta. To the extent feasible, maps and prioritization schedules should be adopted for levee and flood control facility changes. Early consultation can help to evaluate and plan for impacts and identify the best options for addressing any affected facilities that maximize achievement of the coequal goals and minimize or avoid both environmental impacts and service disruptions to electric or gas customers. In addition, to avoid redundant permit requirements and unnecessary permit approval delays, any newly introduced permitting requirements for covered projects should be closely coordinated with existing permit requirements such as CWA 401, 404, and existing habitat conservation plans. Council has also begun the work of establishing an Interagency Implementation Committee. The purpose of this committee will be to formally coordinate the multiple agencies with management responsibility and jurisdiction for permitting activities within the Delta, in order to achieve the co-equal goals of the Delta Plan. State and local agencies will be formal members of the committee, and relevant federal agencies will be invited and encouraged to participate. PG&E plans to continue to monitor the development of this group and may seek to coordinate with the committee, if needed, to address conflicting agency direction on our activities within the Delta.	DP	Comment noted

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106. Pacific Gas and Electric Company	1/14/2013	Allow Mitigation Flexibility for Major New Electric, Gas, or Generation Projects Major new projects (such as new electric transmission facilities) proposed within the Delta, would require any state or local government entity needing to grant discretionary approval for the project to also follow the new Certification of Consistency process proposed in the Delta Plan. This process, outlined in Policy GP 1 of the Final Draft Delta Plan "Detailed Findings to Establish Consistency with the Delta Plan," essentially requires the approving agency to make findings showing the project is consistent with the provisions of the Delta Plan. The screening criteria are listed on Page 55 of the Final Draft Delta Plan (FDDP), along with a decision tree for state and local agencies on possible covered actions (Figure 2-3). Lead agencies should be allowed flexibility in determining how to mitigate impacts of new infrastructure to be consistent with the Delta Plan, including for visual impacts from transmission towers. In a specific example, in the draft PEIR Section 8 Visual Resources (8.4.3.6.1 Mitigation Measure 8-1), the following mitigation measure was recommended, "Use single-pole electrical transmission towers instead of lattice-form towers for proposed large electrical transmission lines, and put transmission lines underground along areas with high visibility and high public use." We strongly urge that this Mitigation Measure be amended or removed. The safety and reliability of the electric grid should be the paramount concern when designing and engineering support structures for electrical transmission lines. Any proposed Mitigation Measure must allow lead agencies flexibility to assess specific project proposals and cannot be a "one size fits all" approach to the design and, engineering of transmission towers and lines.	DP	In response to this comment, please see text changes in Section 5 of the FEIR. The text of mitigation measure 8-1 has been modified as follows: "To the extent consistent with the safety and reliability of the electric grid, as well as site-specific considerations, use single-pole electrical transmission towers instead of lattice-form towers for proposed large electrical transmission lines, and put transmission lines underground along areas with high visibility and high public use."
107. Placer County Water Agency	1/14/2013	The Agency's consistent and constant message has been that the Council's authority is limited to actions taking place in the legal Delta and that upstream areas, such as Placer County, cannot physically reduce their reliance on water in the Delta watershed to less than 100%; there are no other sources of water.	A	The Council has the authority to regulate actions that occur in the Delta or partially in the Delta. The Council does not have authority to regulate actions in the upper watershed. Please see MR4 for additional information. While water suppliers in the Delta's upper watershed are not required to comply with adopted regulation section 5003, the Council strongly recommends all water suppliers within the Delta watershed voluntarily implement the actions contained in section 5003 ~~5005~~ to reduce their reliance on the Delta watershed and improve regional self reliance. The types of measures that could reduce reliance and improve regional self reliance are described in section 5003 ~~5005~~(c)(2) of the adopted regulation. These measures are further discussed in the Delta Plan.
108. Placer County Water Agency	1/14/2013	Further, the Plan clearly sets forth the limitation of the Council's jurisdiction to actions occurring within the legal Delta by its definition of "covered action," a subject of considerable debate, comment and conversation with the Council and its staff. The Agency appreciates this clarity.	A	COMMENT NOTED.
109. Regional Council of Rural Counties	12/27/2012	In conclusion, RCRC urges that the text of the draft regulations be reviewed and revised as needed to eliminate confusion as a result of the comingling of regulatory policy and non-regulatory recommendations.	Ct	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
110. Sacramento County	1/14/2013	1. Many of the "regulations" are characterized as policies, rather than regulations. While the provisions arguably provide policy direction for interpreting the Delta Reform Act (Act), they do not provide the type of clarity or objective parameters that readily permit implementation of either the Act or the Delta Plan. The provisions merely reiterate the policies contained in the November 2012 Final Draft Delta Plan. They do not elaborate upon, define, clarify or otherwise explain or set standards. To the contrary, the "regulations" will likely necessitate further clarification and regulation.	O	These adopted regulations intentionally reiterate all Delta Plan policies. That is because those policies are intended to have regulatory effect. As such, they are subject to this Administrative Procedures Act process and must be adopted as regulations. Otherwise, those policies would be underground regulations.
111. Sacramento County	1/14/2013	2. The regulations substantially focus on only one of the coequal goals, the provision of a more reliable water supply, with little to no recognition of the other coequal goal of protection, restoration, and enhancement of the Delta ecosystem. Such emphasis on the one goal to the exclusion of the other renders the proposed	Co	We disagree. The adopted regulation appropriately furthers the coequal goals as required by the Delta Reform Act (e.g. see sections 5005–5009 ~~5007-5011~~, inclusive).

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		regulations inconsistent with the Act.		
112. Sacramento County	1/14/2013	7. To the extent that the draft regulations are utilizing CEQA standards and definitions, those regulatory provisions should be cross-referenced. For example, Section 5001(k) defines the term "feasible." A definition of that term already exists in the CEQA Guidelines (14 CCR § 15364). As such, the definition is duplicative.	Co	CEQA and the Act are distinct statutory schemes, operating for different purposes and imposing differing requirements on regulated entities. The Act is narrower to the extent it focuses on the Delta rather than CEQA's statewide approach, but broader to the extent it focuses on policy objectives beyond CEQA's objective to eliminate adverse environmental impacts. While the intent and effect of the Act governing "covered actions" are distinct from CEQA's, the Council draws from existing law such as CEQA to the extent those established standards fit with the Council's implementation of the Delta Reform Act's objectives. Thus, as the comment notes, the Council defines "feasible" to have the same meaning for purposes of its regulations as defined by the CEQA Guidelines. Nevertheless, the definition is necessary and not duplicative because without it, the term's meaning with respect to its use in these regulations would not be clear. That a term or phrase appears elsewhere in statute or regulation does not determine the meaning of the same term or phrase used in a different context for the Council's regulations.
113. Sacramento Regional County Sanitation District	1/14/2013	The Sacramento Regional County Sanitation District (SRCSD) appreciates the opportunity to review and submit the following comments on the Delta Stewardship Council's (Council) Rulemaking Package submitted to the Office of Administrative Law on November 16, 2012. We have actively participated in the Final Draft Delta Plan (Delta Plan) development by attending meetings, reviewing and commenting on documents, and meeting with Council members and Council staff. This participation in the development of the Delta Plan has provided us with a wide knowledge base to evaluate the entire Rulemaking Package.	O	Comment Noted.
114. Sacramento Regional County Sanitation District	1/14/2013	California's Administrative Procedure Act (APA) provides, among other things, that the California Office of Administrative Law (OAL) must review all regulations adopted and proposed for publication for compliance with the APA. (Gov. Code § 11349.1.) In doing so, the OAL is directed to use the following standards in its review: necessity, authority, clarity, consistency, reference, and non duplication. (Gov. Code § 11349.1(a).) The Policies contained in the Delta Plan, that constitute the "regulations" contained in the Regulatory Package being submitted to OAL for approval, fail to satisfy the standards set forth in the APA. As a general matter, the proposed regulations include a significant amount of unnecessary narrative language and statements of policy that make it difficult for the potentially regulated entities to discern precisely what is required of them.	Ne	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
115. Sacramento Regional County Sanitation District	1/14/2013	The Proposed Regulations fail to meet the standards set forth in the APA for clarity, nonduplication, and necessity and must therefore be revised. The cost analysis must be redone to reflect the actual costs that will flow from the implementation of the Delta Plan. If you have any questions, please contact me at (916) 876-6092 or mitchellt@sacsewer.com or Linda Dorn at 916-876-6030 or dornl@sacsewer.com.	O	Benefit Cost Analysis Requirements: This is a summary of the comment letter's specific comments. Please refer to the responses to those specific comments.
116. Sacramento Regional County Sanitation District	1/14/2013	NOTE: SRCSD rulemaking comments are in letter 110		Comment noted.
117. San Joaquin County Board of Supervisors	1/14/2013	The proposed Regulations contain a fundamental flaw in that they do not recognize that certain existing water right holders have preferential or priority rights over other water users. The basis of California water law is premised on an established priority system where shortages among competing water right holders are resolved based on water right priorities. The Delta Reform Act expressly states that the Act does not diminish, impair, reduce, or otherwise affect the State's water right priority system. Wat. Code § 85031. As written, the proposed Regulations conflict with the current law by ignoring the water right priority system and the relevant protective	Co	See MR 8 for the Council's response to this comment.

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		statutes.		
118. San Joaquin County Board of Supervisors	1/14/2013	California Water Rights and Priority System California's water rights operate under a dual system that recognizes both riparian water rights and appropriative water rights. The riparian doctrine confers on the owner of land the right to divert and use the water flowing by that land for use on the land adjacent to the watercourse without regard to the priority in time of such use. Riparians are vested in common ownership of the water within a watercourse and in times of water shortages all riparians must reduce their usage proportionally. United States of America v. State Water Resources Control Board (1986) 182 Cal.App.3d 82, 101 (Racanelli). Riparians have no right to specific amount of water. Rather, they enjoy a correlative share of the natural flow. In times of shortages all riparians must share the available water. Racanelli at 104. During the Gold Rush era, the appropriative system of water rights emerged so that water could be used on land that was not riparian. The appropriation doctrine confers upon one who actually diverts and uses water the right to do so provided that the water is used for reasonable and beneficial uses and is surplus to that used by riparians or earlier appropriators. Racanelli at 101. Originally, appropriative water rights were perfected by actual diversion and use of the water. It was possible, but not necessary, to file a recording of such water right with the County Recorder. In 1914, the appropriative permit system was established as the exclusive method of acquiring appropriative water rights. As such, appropriative water rights consist of both pre-1914 water rights by appropriation which occurred prior to 1914 and post-1914 appropriative water rights by permit. The State Water Resources Control Board and its predecessors have had exclusive jurisdiction to grant an appropriative water right permit. Once the appropriative water right is granted, the appropriator has the right to take and use the water subject to the conditions of the permit. Water Code §§1381, 1455; Racanelli at 102. Appropriation rights are subordinate to riparian rights so that in times of shortage, riparians are entitled to fulfill their needs before appropriators are entitled to any use of the water. El Dorado Irr. Dist. v. SWRCB (2006) 142 Cal.App.4th 937, 961 (citing Racanelli at 102) (emphasis added). And, as between appropriators, the rule of priority is "first in time, first in right". Racanelli at 102; see Irwin v. Phillips (1855) 5 Cal. 140, 147. The senior appropriator is entitled to fulfill its needs before the junior appropriator is entitled to use any water. Racanelli at 102; see Phelps v. SWRCB (2007) 157 Cal.App.4th 89, 118. All users are limited by the Constitutional principle of reasonable use, even riparians. Riparians and appropriators alike are subject to the universal limitation that water use must be reasonable and for a beneficial purpose. Cal. Const., art. X, § 2; Racanelli at 105. However, even in the application of the Reasonable Use Doctrine the priority system of California water law must be considered. City of Barstow v. Mojave Water Agency (2000) 23 Cal.4th 1224, 1250. Thus, riparians take first and in the entire amount to fulfill the riparians' reasonable and beneficial uses, subject only to the correlative rights of other riparians. Then, senior appropriators may take from any surplus, followed by more junior appropriators. Competing demands for water by water right holders are properly resolved by applying the priority system, not by balancing. With respect to the Delta, any reductions in use of Delta waters required by the Delta Plan and accompanying proposed Regulations must adhere to this priority hierarchy. That is, reductions must first be borne by the most junior appropriator up to the entire amount of the water right permit before the water right holder of the next highest priority is affected.	Co	See MR 8 for the Council's response to this comment.
119. San Joaquin County Board of Supervisors	1/14/2013	In conjunction with the system of water right priorities, California has enacted several statutes to protect the water rights of residents in areas of origin. These area of origin statutes include the Watershed Protection Act (Water Code §§ 11460 et seq.), the Delta Protection Act (Water Code §§ 12200 et seq.), the County of Origin protection (Water Code §§ 10500 et seq.), and protected area provisions (Water Code §§ 1215 et seq.). The Watershed Protection Act was passed in 1933 as part of the Central Valley Project Act and ensures that	Co	See MR 8 for the Council's response to this comment.

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		water users within a watershed of origin will not be deprived of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein. Wat. Code § 11460. The provision was initially intended to apply to the Department of Water Resources, but was made applicable to the Federal Bureau of Reclamation under Water Code § 11128. Thus, the Bureau's CVP operation must not deprive water right holders in the Delta watershed the use of water originating therein necessary to supply all of the watershed's beneficial needs. The Delta Protection Act of 1959 was enacted to ensure that water right holders within the legal Delta have an adequate supply of good quality water. The Act requires that the CVP and the SWP coordinate to provide salinity control and an adequate water supply for the users of water in the Sacramento-San Joaquin Delta. Wat. Code § 12202. The Bureau and DWR are required to release stored water to meet salinity requirements set by the SWRCB to ensure that Delta water users have access to water sufficient to maintain and expand agriculture, industry, urban and recreational development in the Delta. Wat. Code § 12201; see Racanelli at 139. Further, no person, corporation, or public or private agency should divert water from the Delta to which the users within the Delta are entitled. Wat. Code § 12203. No water shall be exported if needed to meet the above requirements. Wat. Code § 12204. Thus, the Act prohibits exports if Delta water right holders are not first able to receive all the water to which they are entitled under those rights. The County of Origin protection was enacted in 1931 as an amendment to the Feigenbaum Act which authorized the State to obtain rights to unappropriated water. The enacted statutes ensure that water appropriated by the State will not be transferred for use outside the County of Origin when such water is necessary for the development of the County. Wat. Code § 10505.5. Several Counties of Origin exist within the Delta watershed and such Counties may not be deprived water necessary for County development by DWR's SWP operations. The protected area statutes were enacted in 1984 and mandate that water exporters shall not deprive the statutorily protected areas of the prior right to all the water reasonably required to adequately supply the beneficial needs of the protected area, or any of the inhabitants or property owners therein. Wat. Code § 1216. Water users in the protected area may obtain a water right that is senior in priority over the rights of an exporter. Wat. Code § 1217. The Delta is specifically named as a protected area. Wat. Code § 1215.5. Thus, any Delta water right holder's beneficial and reasonable use has priority senior to that of any exporter. Therefore, under the State's priority system, any required reductions of Delta water use must first be borne by exporters before any Delta water right holders are affected.		
120. San Joaquin County Board of Supervisors	1/14/2013	This proposed Regulation is unreasonable and creates a significant statewide adverse impact directly affecting business and no reasonable alternative has been proposed. Pursuant to the language of the proposed Regulation, if one water supplier, as defined, fails to meet the prescriptions of the proposed Regulation and does not fall within any exemption specified in the proposed Regulation, then no water shall be exported from, transferred through, or used in the Delta, even by other water suppliers or water users, including those who have legally-protected rights to such water or who are meeting the requirements of the proposed Regulation.	Ct, E	The Cost Analysis describes and, where possible quantifies, the potential costs and effects on businesses. The Initial Statement of Reasons describes alternatives considered by the Council, including many proposed by local agencies and other stakeholders, during development of the Delta Plan.
121. San Joaquin County Board of Supervisors	1/14/2013	This proposed Regulation, and the Delta Plan document upon which it relies, fails to demonstrate that it is the least burdensome effective alternative necessary to carry out the purpose of the proposed Regulation or to meet the co-equal goals of the Delta Reform Act. Additionally, this proposed Regulation could, but does not, provide measurable standards (rather than regulatory prescriptions) by which those covered under the Regulation would be deemed to be consistent with the provisions of the Delta Plan and the Delta Reform Act.	Ne, Ct	Staff disagrees with this comment. The Initial Statement of Reasons describes each provision (policy) or group of similar provisions in the proposed regulation, its purpose, alternatives considered, and why the proposed approach was selected by the Council. All of the policies were developed through an extensive public process during which many alternatives were suggested and discussed. Alternatives included some that were more prescriptive and potentially burdensome and some that were less so. The Council considered all of these and selected the policies that it believes achieve flexibility and cost-effectiveness while meeting the goals and mandates of the Act. The Delta Plan policies embodied in the proposed regulation do not mandate specific technologies or equipment. Many policies are stated as items to be studied

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				or considered by State or local agencies. Other policies define or restrict construction standards, locations, elevations, flood protection standards, and other characteristics of some activities in the Delta. When possible and appropriate, these are consistent with existing planning processes and standards of other agencies and do not impose a new burden. For example, section 5003 ~~5005~~ allows water suppliers to use the State's existing water management planning process to demonstrate compliance. As another example, section 5006 ~~5008~~ states that ecosystem restoration must be carried out consistent with the California Department of Fish and Wildlife's "Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions." The proposed regulation also provides flexibility through mitigation or consultation, and provides exceptions in some cases to accommodate existing economic uses in the Delta."
122. San Joaquin County Board of Supervisors	1/14/2013	The proposed Regulations are fundamentally flawed because they do not comply with the State's water right priority system and enacted protective statutes. Proposed Regulation Section 5001 states that the required reduced reliance on the Delta, for the purpose of achieving the co-equal goals, will be consistent with the existing water rights and the State's area of origin statutes. However, the proposed Regulations set forth requirements that ignore the current law and make no reference to the priority rights system.	Co	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
123. San Joaquin County Board of Supervisors	1/14/2013	Further, the proposed Regulations fail to comply with the relevant protection statutes. The Watershed Protection Act prohibits the Bureau from depriving Delta watershed water right holders the use of water originating in the watershed needed for beneficial use. Any required reduction by a water right holder within the Delta watershed of water needed for beneficial use while the Bureau maintains any water exports of Delta watershed water through CVP operation is inconsistent with the Watershed Protection Act. The proposed Regulations do not recognize this protection for water rights holders within the Delta watershed. The Delta Protection Act prohibits any diversions from the Delta of water to which in-Delta water users are entitled. Permitting any diversions of Delta water from the Delta while any in-Delta water right holder is required to reduce the use of Delta water to which they are entitled is inconsistent with the Delta Protection Act. The proposed Regulations do not recognize this protection for in-Delta water right holders. The "protected area" statutes similarly prohibit exports from the Delta to the detriment of in-Delta water users. In-Delta water users are ensured senior priority over the rights of an exporter. Again, the proposed Regulations do not recognize this protection for in-Delta water users because the water right priority system is absent.	Co	See MR 8 for the Council's response to this comment.
124. San Joaquin County Board of Supervisors	1/14/2013	Beyond the failure of the proposed Regulations regarding California water rights, the proposed Regulations create an impossible standard for regions within the Delta watershed. The proposed Regulations state that achieving the co-equal goal of providing a more reliable water supply for California means regions that use water from the Delta watershed will reduce their reliance on this water for reasonable and beneficial uses and improve regional self-reliance. The proposed Regulations simultaneously require reduced use of water from the Delta watershed and improved regional self-reliance. For regions within the Delta watershed, the two prongs of the requirement contradict each other. Required self-reliance by those within the Delta watershed necessarily requires continued use of that region's Delta water. The Commission should redraft the proposed Regulations in a manner that allows water users in the Delta watershed to effectively participate in the Delta Reform effort.	Ct	The Council has modified the language of section 5003 ~~5005~~ by removing subsections 5003 ~~5005~~ (a) and (b), and adding a new subsection 5003 ~~5005~~ (c)(1)(C). The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance on the Delta and improved regional self-reliance. The removed language describes the performance measures by which the effectiveness of the actions taken by water suppliers to achieve the policy of reducing reliance on the delta and improving regional self-reliance will be evaluated over the time. The added language clarifies how the expected outcome for measureable reduction in Delta reliance and improvement in regional-self-reliance shall be reported in the water management plans. We believe this sufficiently clarifies the intent of this section.
125. San Joaquin Tributaries Authorities	1/14/2013	The SJTA was pleased with the efforts of the DSC and its staff to rework Water Supply Reliability Policy 1 ("WR P1"), Reduce Reliance on the Delta and Improve Regional Self-Reliance, but feels the revised language is inconsistent with Water Code sections 85021 and 85302, and the language of SB X7 7.	O	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
126. San Joaquin	1/14/2013	The San Joaquin Tributaries Authority and its members ("SJTA") appreciate the opportunity to comment on the	O	The commenter expands on this introductory statement in subsequent comments

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Tributaries Authorities		regulatory package prepared for the Office of Administrative Law ("OAL"). As the Delta Stewardship Council ("DSC") is aware, the Administrative Procedure Act ("APA") governs an agency rulemaking process. The SJTA has concerns regarding the proposed regulations and requests that the DSC remedy the following issues prior to sending the package to the OAL.		on specific sections. Our responses to those subsequent comments respond to this introductory statement.
127. San Joaquin Tributaries Authorities	1/14/2013	California Government Code section 11349.1 provides standards for regulations which include necessity, authority, clarity, consistency, reference, and non-duplication. (Gov. Code, §11349.1(a)(1) – (6).) Several proposed regulations do not meet these standards. Specifically, the proposed regulations repeatedly do not meet the "authority, "clarity" and "consistency" standards. (Gov. Code, §11349.1(a)(2), (3), and (4), respectively.) Clarity "means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them" (Gov. Code, § 11349(c).) Consistency "means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (Gov. Code, § 11349(d).) Authority "means the provision of law which permits or obligates the agency to adopt, amend, o repeal a regulation."	O	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
128. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Nowhere does the Delta Reform Act authorize or require the Council to act as a "super-agency" with the authority or mandate to "achieve" the coequal goals through its appellate review of covered actions for consistency with the Delta Plan, or to impose reductions in water use from the Delta or the Delta watershed. Such action by the Council would exceed the authority conferred upon it in the Delta Reform Act. The Act simply requires the Council to "develop, adopt, and commence implementation of the Delta Plan pursuant to this part that furthers the coequal goals." (Wat. Code, § 85300(a), emphasis added.) Specifically, the Act states that "the Delta Plan shall include subgoals and strategies to assist in guiding state and local agency actions related to the Delta"; the Delta Plan "may also identify specific actions that state or local agencies may take to implement the subgoals" (ibid., emphasis added); and "[t]he Delta Plan shall promote statewide water conservation, water use efficiency, and sustainable use of water" (id., § 85303, emphasis added). As evidenced by the Legislature's specific word choices, there was no intent to provide or even imply a regulatory role for the Council with regard to broad water management activities. Indeed, to the contrary, the Council and the Delta Plan are directed to provide guidance and advisory recommendations to further the achievement of various pertinent state policies, with the limited exception of establishing an administrative scheme for reviewing appeals of consistency certifications only applicable to statutorily defined "covered actions" undertaken in the Delta and Suisun Marsh. Notably, the state policy in the Delta Reform Act pertaining to reduced reliance on the Delta to meet future water supply needs through a statewide strategy is not included in the statutory objectives the Legislature determined are inherent in the coequal goals (id., § 85020), and it is conspicuously absent from the specifically described elements of the Delta Plan (id., § 85300 et. seq.). Thus, nothing in the Delta Reform Act empowers the Council to force "significant reductions" in water use from the Delta watershed, or a significant reduction in water exports to meet current or historic water supply needs.	O	The Council disagrees with the comment's assertion that the Council lacks authority to regulate water management activities. While it will be the responsibility of the agency proposing an action to determine whether its action is a covered action that is required to be consistent with the Delta Plan and these regulations, the Delta Reform Act's definition of covered actions may include water management actions (section 85057.5(a).). Thus, pursuant to the statute, those water management covered actions must be consistent with the Delta Plan and will be subject to these regulations. The Act requires the Council to adopt a "legally enforceable Delta Plan" that will, among other things, "provide for the sustainable management of the Sacramento-San Joaquin Delta ecosystem." (Water Code section 85001(c).) The regulation that imposes limitations on covered actions that export water from, transfer water through, or use water in the Delta, section 5003, applies only when the covered action will harm the Delta environment. It is authorized by the Act because it satisfies the mandate that the Council provide for sustainable management of the Delta ecosystem. It is further authorized as a measure that promotes a more reliable water supply. (Water Code section 85302(d).) For more detailed explanation of the Council's authority to adopt and enforce regulations generally, see master response 1. For an explanation of the Council's authority to consider out-of-Delta actions when regulating in-Delta actions, see master response 4. To the extent the commenter expands on this introductory statement in subsequent comments on specific sections, our responses to those subsequent comments respond to this introductory statement.
129. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Moreover, the Delta Reform Act expressly recognizes the continuing authority of other state and federal regulatory regimes over the management and regulation of water and other resources in the Delta. (See, e.g., Wat. Code, §§ 85031(d), 85032.) This was made clear in the final analysis of SBX7-1 considered by the Senate before voting on the Act. The analysis concludes that the various savings clauses in the bill "maintain SWRCB jurisdiction and preserve regulatory authority generally, in order to clarify that the new Delta Stewardship Council is NOT a super-regulatory agency that trumps other regulatory agencies such as SWRCB and DFG."(4) Thus, the substantive mandates that the Council seeks to promulgate and enforce are inconsistent with the Delta Reform Act and other statutes.	Co	By statute, the proposed regulations do not apply to "[a] regulatory action of a state agency." (Water Code section 85057.5(b)(1).) The proposed regulations do not, therefore, apply to the regulatory actions of other state agencies such as State Water Resources Control Board actions. But, while the Council cannot direct other state regulatory agencies to take particular actions, the Council can exercise its own jurisdiction over subjects also addressed by those agencies. Agency responsibilities often overlap. For example, in reviewing timber harvest permits, our Supreme Court explained that approvals may

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		(4)Bill Analysis for SBX7-1 as amended November 3, 2009, p. 15, available at http://www.leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx7_1_cfa_20091104_035148_asm_floor.html.		be subject to a "regulatory scheme that encourages interagency teamwork," but that does not strip "state agencies of their respective authority to protect resources." (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 935.) While the Delta Reform Act encourages cooperation among state agencies, (see Water Code sections 85086(c)(1), 85204, 85300(b) and (c)), it also grants the Council independent regulatory authority to protect Delta resources and water supply reliability. The Legislature often gives agencies overlapping responsibilities when their jurisdiction differs or when they have a different focus. For example, while the Delta Protection Commission and the Council are both charged with protecting the Delta, their jurisdictional reach is very different. Due to that difference, even if the Council adopts a Commission rule verbatim, the rule's impact will be far different. The Commission only has jurisdiction over lands in the primary zone of the Sacramento-San Joaquin Delta, but not lands in its secondary zone. (Public Resources Code sections 29728, 29731, 29764.) The Council's jurisdiction, in contrast, extends to projects in any part of the Sacramento-San Joaquin Delta, including its secondary zone, as well as to lands in the Suisun March. (Water Code sections 85301, 85057.5(a)(1).) Moreover, the Commission's Resource Management Plan has no regulatory control over federal agencies. In contrast, the Legislature directed the Council to obtain that control by enacting a Delta Plan consistent with the Coastal Zone Management Act or an equivalent compliance mechanism. (Water Code section 85300(d)(1)(A).) To the extent the commenter expands on this introductory statement in subsequent comments on specific sections, our responses to those subsequent comments respond to this introductory statement.
130. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	In addition, the coequal goals are set forth in the statute as state policy. As demonstrated below, these policies are not legislative mandates, and they are clearly not mandates that the Legislature authorized the Council to enforce. Instead, the Delta Plan is expressly defined in a way that acknowledges it is but one tool that will provide policy makers with an important source of guidance for, and a means of tracking progress toward, achieving the coequal goals established by the Legislature. Rather than creating an agency charged with regulating the State's water resources, the Legislature established a framework for a collaborative and synergistic approach to improving overall Delta management and contributing to the achievement of the coequal goals by the pertinent local, state and federal agencies already responsible for carrying out or regulating various components of the Delta Plan. Because the Council is not authorized to impose substantive mandates regarding water use through the Delta Plan, the Public Water Agencies respectfully request that the Council revise its proposed regulations to remove any such mandates.	A	The Council disagrees with the comment that the Council is not tasked with enforcing the coequal goals. The Delta Reform Act tasks the Council with adopting and implementing "a legally enforceable Delta Plan" (Water Code section 85001(c)) that "furthers the coequal goals" (Water Code section 85300(a)). In addition to giving the Council a coordination role, the Legislature also gave the Council a regulatory role over covered actions. (See master response 1.) To the extent the commenter expands on this introductory statement in subsequent comments on specific sections, our responses to those subsequent comments respond to this introductory statement.
131. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	At the most fundamental level, the Proposed Regulations must be within the scope of the Council's statutory authority and consistent with controlling law. (Gov't Code, § 11342.1 ["Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law"].) An administrative agency such as the Council has no inherent power; it possesses only those powers granted to it by the Constitution or by statute. (Security National Guaranty, Inc. v. California Coastal Commission (2008) 159 Cal.App.4th 402, 419.) "That an agency has been granted some authority to act within a given area does not mean that it enjoys plenary authority to act in that area." (Ibid.) Thus, any act taken in excess of the power conferred upon an agency is void. (Ibid.)	A	Comment Noted.

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132. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Similarly, no regulation adopted by a state agency is "valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute." (Gov't Code § 11342.2; see Sabatasso v. Superior Court (2008) 167 Cal.App.4th 791, 796 ["agencies do not have discretion to promulgate regulations that are inconsistent with the governing statute or amend the statute or enlarge its scope," citation omitted]; Rich Vision Centers, Inc. v. Board of Medical Examiners (1983) 144 Cal. App. 3d 110, 114 [an agency "may exercise such additional powers as are necessary for the due and efficient administration of powers expressly granted by statute, or as may be fairly be implied from the statute granting the powers"].)	Co	Comment Noted.
133. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Government Code section 11349 et seq. governs the OAL review of regulations. OAL must make determinations of the necessity, authority, clarity, and consistency of proposed regulations in addition to ensuring compliance with the other procedural and substantive mandates of the Administrative Procedure Act ("APA"). As explained below, a number of provisions in the Proposed Regulations fail to meet the OAL's standards and must be removed or revised accordingly.	O	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
134. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	The Proposed Regulations Exceed The Council's Authority Granted To It Through The Water Code To be valid and effective, the Council must demonstrate that the Proposed Regulations are authorized by the Delta Reform Act, and do not conflict with controlling law. "Authority," as defined by Government Code section 11349(b), means "the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation." Proposed regulations are also invalid if they impair or conflict with the statute they purport to implement. (California Association of Psychology Providers v. Rank (1990) 51 Cal.3d 1, 11; Esberg v. Union Oil Co. (2002) 28 Cal.4th 262, 269.) The Proposed Regulations fail these standards as they exceed and transgress the Council's statutory authority and conflict with controlling law.	A, Co	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
135. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Sections of the Proposed Regulations Are Not Necessary or Are Unreasonable The OAL will review the Proposed Regulations for compliance with the "necessity" standard. Government Code section 11349(a) defines the necessity standard: "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion. To satisfy this standard, Council must provide: (1) a statement of the specific purpose of each adoption, amendment, or repeal; and (2) information explaining why each provision of the adopted regulations is required to carry out the described purpose of the provision. Such information shall include, but is not limited to, facts, studies, or expert opinion. When the explanation is based upon policies, conclusions, speculation, or conjecture, the rulemaking record must include, in addition, supporting facts, studies, expert opinion, or other information. An "expert" within the meaning of this section is a person who possesses special skill or knowledge by reason of study or experience which is relevant to the regulation in question. Numerous sections of the Proposed Regulations do not meet these legal standards.	Ne	The Initial Statement of Reasons describes each provision or group of similar provisions in the proposed regulation, its purpose, alternatives considered, and why the proposed approach was selected by the Council. To the extent the commenter expands on this introductory statement in subsequent comments on specific sections, our responses to those subsequent comments respond to this introductory statement.
136. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Sections of the Proposed Regulations Lack Clarity The OAL will review the Proposed Regulations to determine whether they comply with the "clarity" standard. (Gov. Code, § 11349.1(a)(3).) "Clarity" as defined by Government Code section 11349(c) means "written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." "Clarity" is further defined in California Code of Regulations, title 1, section 16(a): In examining a regulation for compliance with the "clarity" requirement of Government Code section 11349.1,	Ct	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.

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		OAL shall apply the following standards and presumptions: "(a) A regulation shall be presumed not to comply with the "clarity" standard if any of the following conditions exists: (1) the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning. . . ." Because the Proposed Regulations contain so many vagaries, the regulated community cannot know how they may be required to comply. The Council has an obligation to provide clear and complete regulations for public review and comment such that their requirements are readily apparent. The following examples illustrate where the Proposed Regulations do not satisfy that obligation.		
137. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	The State Water Contractors, Inc. and San Luis & Delta-Mendota Water Authority, collectively referred to herein as the "Public Water Agencies", submit this letter pursuant to the Notice of Proposed Rulemaking the Delta Stewardship Council ("Council") submitted to the Office of Administrative Law ("OAL") on November 16, 2012. The Public Water Agencies value the role the Legislature established for the Council. However, the regulations the Council submitted to OAL on November 16, 2012 and propose for adoption ("Proposed Regulations") go well beyond statutory authorities granted to the Council through the Sacramento/San Joaquin Delta Reform Act of 2009 (Wat. Code, § 85000 et seq., "Delta Reform Act" or "Act"). For that reason, as well as the Proposed Regulations failing to meet other important OAL requirements, the Proposed Regulations, if adopted, would be unlawful. The Public Water Agencies respectfully request that the Council revise the Proposed Regulations, consistent with these comments, before the Council considers their adoption.	O	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement
138. Santa Clara Valley Water District	1/14/2013	• Expansion of the Council's authority into local water management: Policy WR P1 as written implies that the Council may review and judge local water management decisions outside the legally defined Delta. However, the Delta Reform Act is clear that the Council's determination regarding consistency with the Delta Plan is limited to projects that "will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh." We believe the Council does not have authority to regulate local water management decisions outside of the Delta through implementation of WR P1 or through the covered action review process. In addition, instead of promoting efficient implementation of projects that will contribute to local and regional supply reliability, this would add another layer of potentially burdensome review that will likely impede progress as well as increase costs to the public. Agencies such as the District that are implementing local projects outside of the Delta and that have been successfully and proactively advancing local water supply reliability and environmental sustainability should not be subject to this process.	A	See MR 4 for the Council's response to this comment.
139. Santa Clara Valley Water District	1/14/2013	• Reduced reliance is required at the retailer level: Policy WR P1 specifically states that "water shall not be exported from, transferred through or used in the Delta if 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 specific requirements, including completion and implementation of urban or agricultural water management plans. This requirement puts at risk a water wholesaler's ability to provide water supply reliability if one or more of its retailers is not fully compliant with Urban Water Management Plan requirements. More specifically, the District is a wholesaler that provides water supply to 13 retailers over which it has no regulatory authority. Even if the District and the region as a whole comply with this policy, the independent actions of a single water retailer over which the District has no control could reduce the reliability of 40% of the Santa Clara County's water supply. A reduction or cessation of the District's imported supplies consistent with WRP1 would likely result in increased pumping from the local groundwater basin to compensate for reductions in treated water deliveries to retailers. Because the District has limited ability to control groundwater pumping, this could potentially result in overdrafting of the groundwater basin. The District's emergency surface and groundwater supplies could also be reduced, increasing the region's vulnerability to droughts and emergency situations. This is an example of how the Council's regulation of local activities could result in unintended consequences that subvert the co-equal goals. The draft EIR does not evaluate or consider these potential impacts.	DP	1) WR P1 - The Council recognizes that there will be proposed covered actions that will provide benefits to one coequal goal and have significant adverse impacts on the other. Policy WR P1 is intended to address the situation where a proposed action in the Delta that may improve water supply reliability also has significant adverse impacts on the ecosystem. To determine whether the covered action should go forward despite the adverse environmental impacts, the Council requires that a consistency determination show that the water suppliers that are receiving the benefit of the proposed action, even if they are located outside of the Delta, have timely completed legally required UWMPs/AWMPs (as applicable) and have commenced implementation of the technically feasible cost effective measures identified in the plan to reduce reliance on the Delta (consistent with the policy of the State). If the failure to complete one or more of these plans and to commence implementation of one or more of the identified actions is the primary reason for the need for the covered action, then the Council may determine, on appeal, that the proposed action is not consistent with the Delta Plan. The policy promotes compliance with existing state water planning and implementation laws, and encourages all water suppliers to pro-actively implement responsible water

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				management actions in order to avoid the scenario you describe. 2) EIR – see responses to comments on the EIR
140. Santa Clara Valley Water District	1/14/2013	• One-Year Transfers: Under California law, one-year transfers of water meeting certain specified requirements are not subject to the California Environmental Quality Act (CEQA). The Council has taken steps to exclude certain CEQA exceptions from its covered action review process, but in the case of one-year transfers, that exception will expire on January 1, 2015, unless the Council acts to extend the exemption prior to that date. One-year transfers are a critical tool for meeting the District's year-to-year shortfalls in supply. This vital water management tool is at risk if each transfer is subject to an appeal process that may take up to 150 days. One-year transfers are exempt from CEQA because the state legislature has made the determination that the impacts from one-year transfers on the environment would be minimal and thus no CEQA review would be required prior to their implementation. Accordingly, the Council should continue to exempt one-year transfers from its covered action review process. If the Delta Plan is not revised to eliminate the 2015 expiration, then the EIR should evaluate the impact to water agencies of reduced access to one-year transfers.	Co	Please refer to **MR11** for the Council's response to this comment.
141. Save the California Delta Alliance	1/14/2013	The Plan is legally deficient because it takes the view that the Council's regulatory authority over conveyance is merely "contingent regulatory authority." Delta Plan, Appendix G at G-2. In our comments of February 2, 2012, on the 5th Staff Draft, we pointed out that this reading is contrary to the express provisions of the Delta Reform Act. See STCDA comments of February 2, 2012 at 11. We incorporate our comments of February 2, 2012, in their entirety here by reference. As the final regulations continue to be built around the view that the Council's authority is only contingent, we renew and explain further our objections here.	DP	The Council believes that Appendix ~~G~~A accurately describes its authority in relation to the BDCP.
142. Save the California Delta Alliance	1/14/2013	B. Because The Council Has Not Adopted Conveyance Regulatory Policies It Cannot Evaluate Whether BDCP Has Considered A Reasonable Range of Alternatives. We respectfully disagree with the factual predicate underlying the Council's decision to not study conveyance options: that, within the meaning of the Delta Reform Act, "[c]onveyance options are currently being studied" by the BDCP. Delta Plan, Appendix G at G-2. As to a new point of diversion, the BDCP has considered only diverting water from a point on the Sacramento River upstream of the myriad sloughs of the Delta so that water that would otherwise flow through the Delta is diverted around or under the Delta. Water code section 85320(b)(2)(B) requires that in assessing the BDCP the Council must consider whether the BDCP has evaluated "[a] reasonable range of Delta Conveyance alternatives É including isolated conveyance alternatives." It is obvious to even the casual observer that considering only one concept for the point of diversion concept does not represent a reasonable range of options. We have previously pointed out to the Council and to the BDCP that the flood control structures on the Sacramento River north of the proposed point of diversion already divert millions of acre feet of water from the Sacramento River that does not then flow through the Delta. Installing the new point of diversion, for example, within the Yolo Bypass, or at the Fremont Weir, or at the Sacramento weir would present a true alternative. We have also previously pointed out that at times of peak flow each one of the half dozen flood control weirs diverts enough water in a few days to satisfy all the water needs of southern California for a year. When a member of STCDA made this point at a recent meeting of the Delta Independent Science Board, the Chair of the Science Board leaned forward to his microphone and corrected our member. He said that a few days flow over just one of the weirs would meet all of southern California's water needs "for several years." The opportunity to harvest storm flows is common knowledge in the scientific community. We have also pointed out that the CVP and SWP canals currently do not operate at all during times of peak water abundance. We have also pointed out that transporting water available at times of peak abundance and storing it in severely depleted groundwater aquifers throughout the state is feasible and could provide storage for millions of acre feet of water. Everyone agrees that the problem in California is not that there is a shortage of water. It is that we get too much water all at once, at the wrong time, in the wrong place, erratically—and	DP	Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.

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		that we have no way to capture or store the abundant water that nature gives to us in this way. The concept sketched out above actually addresses the heart of the problem. It does so in a way that would benefit the co-equal goal of restoring the Delta because it takes no water from the Delta and eliminates the need to take at least some of the water that is now taken. Dr. Robert Pyke has sketched a concept that he calls the Western Delta Intakes Concept that would locate the point of diversion at Sherman Island in the western Delta and would divert water that has already completed its passage through the Delta. Dr. Pyke's concept paper is attached. The currently proposed point of diversion concept in the BDCP (take water that would otherwise flow through the Delta), the point of diversion concept we just sketched above (take water that would not otherwise flow through the Delta), and Dr. Pyke's concept (take water after it has flowed through the Delta) would represent a reasonable range of alternatives. We do not claim that our option or Dr. Pyke's are the best available. They are general sketches and both need far more study. Likely other alternatives that follow the same general range would emerge from appropriate study. They do demonstrate that the BDCP is not considering a reasonable range of alternatives. Are these alternative feasible? Do they meet the requirements of the Delta Reform Act in ways that the BDCP concept does not? Would it be better to locate an intake upstream of the Fremont weir to serve the dual function (as envisioned by the CVP authorizing act) of flood control and water supply in the same piece of infrastructure? Could the upstream point of diversion then allow the Fremont Weir to be operated solely, or mostly, for conservation values? The Council cannot know the answers to these questions because the BDCP does not evaluate them. We find nothing in the Delta Reform Act that specifies the location of the new point of diversion. The only mentions of the location of the point of diversion we are aware of are found in Water Code § 85086(c)(2) and § 85088, which both use terminology discussing a change in the point of diversion "from the southern Delta" to "a point on the Sacramento River." We find no further specification as to where on the Sacramento River. The Yolo Bypass alternative, Sacramento Weir alternative, and Western Delta Intake alternative are all located at points on the Sacramento River and none are located in the southern Delta. The CVP/SWP is the largest contiguous piece of water delivery infrastructure in the world. The BDCP contemplates spending tens of billions of dollars on new conveyance. With that scale of infrastructure and expenditure it is self-evident that considering only one idea for a new point of diversion is inadequate. The law requires, and the people of California deserve, for the Council to conduct the extensive analysis and environmental review necessary for the adoption of regulatory policies. Only then can the Council make an informed decision as to whether the BDCP sufficiently evaluates a reasonable range of alternatives. The BDCP itself does not, and will not, contain adequate information for a judgment to be made as to whether or not it has evaluated an appropriate range of alternatives.		
143. Save the California Delta Alliance	1/14/2013	C. The Regulations Are Inadequate Because The Council Has Not Considered Statutorily Mandated Factors In Formulating Them: The Delta Reform Act Requires That SWRCB Flow Criteria Be Applied When Formulating The Delta Plan. The only way for the Council to determine if the BDCP contains "operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions," Cal. Water Code § 85320(b)(2)(A), is to first conduct the analysis and adopt the regulatory framework that will allow it to consider the BDCP in the context of the Delta Plan's larger statutorily mandated purposes—with the informed benefit of the flow criteria mandated by Cal. Water Code § 85085(c)(1). Water Code section 85086 provides that the State Water Resources Control Board ("SWRCB") shall "develop new flow criteria for the Delta ecosystem necessary to protect public trust resources." Cal. Water Code § 85086(c)(1). These new flow criteria are necessary "for facilitating the planning decisions that are required to achieve the objectives of the Delta Plan" and for "informing the planning decisions for the Delta Plan and the	DP	Comment noted.

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		Bay Delta Conservation Plan." Cal. Water Code. § 85086(c)(1). The legislature mandated that the flow criteria be promulgated "within nine months of the enactment" of the Delta Reform Act. Cal. Water Code § 85086(c)(1). The Delta Reform Act became effective on February 3, 2010. Therefore the deadline for the flow criteria was November 3, 2010. The criteria have not been promulgated and the latest estimate is that they will not be ready until sometime in 2014. The Delta Reform Act required that the Council adopt and implement the Delta Plan on or before January 1, 2012. Both deadlines have been missed, the SWRCB's egregiously so. However, the legislature clearly contemplated that the flow criteria would be promulgated relatively early in the process of formulating the Delta Plan and would be relied on by the Council to determine the contents of the Delta Plan. This is true as a matter of law and a matter of common sense. Perhaps the most frequent comment received by the Council has been that the regulatory policies with regard to water quality, water system reliability, and restoration of the Delta ecosystem are so amorphous and vague as to not constitute any plan at all. This is so because the Council is proceeding without the guidance of the essential science that was supposed to be available to the Council in the flow criteria. This also perhaps explains why the Council has chosen not to adopt any regulatory policies for conveyance: it simply didn't have the information needed to do so— information that the legislature mandated it would have before completing the Delta Plan. We are well aware that the Council is frustrated with the SWRCB's lack of progress on the flow criteria. However, the Delta Reform Act provides no provisions allowing the Council to proceed without the criteria. The Council has acknowledged that it has the capacity to develop equivalent criteria on its own and has on occasion considered threatening to do so in order to push the SWRCB forward. Water Code section 85300 provides that the "council shall report to the Legislature no later than March 31, 2012, as to its adoption of the Delta Plan." Perhaps the Council could have sought amendment of the Delta Reform Act to address its standoff with the SWRCB. However, absent legislation, the regulations are legally inadequate because the Council has failed to consider statutorily mandated factors (the flow criteria) in promulgating them. Likewise the BDCP has put the cart before the horse by developing the BDCP without the benefit of the flow criteria. No doubt, once the criteria are issued BDCP will declare that the plan meets the criteria or can be adjusted to do so. But that is post hoc rationalization and is not what the legislature ordained. The BDCP has already decided on the point of diversion concept without considering the flow criteria. Using the criteria only to calibrate operation of the canal, with a predetermined point of diversion is, again, putting the cart before the horse. We would not be surprised if the BDCP adopts its ROD and NOD before the flow criteria are issued. Likewise, the Council considering the flow criteria for the first time when the BDCP comes before the Council deprives the council of the regulatory framework by which the BDCP must be judged and that must be built on the foundation of the flow criteria. Proposed regulation § 5007(c) does not address these issues because the legislature mandated new flow criteria specifically aimed at achieving the co-equal goals and specifically intended to assess and control the BDCP.		
144. Save the California Delta Alliance	1/14/2013	D. Lack Of Conveyance Regulatory Policies Undermines The Council's Responsibility To Periodically Review And Update The BDCP. Water Code section 85300 provides that "[t]he council shall review the Delta Plan at least once every five years and may revise it as the council deems appropriate." Cal. Water Code § 85300(c). As the BDCP will be incorporated into the Delta Plan, the Council undoubtedly has authority to revise the BDCP after incorporation "as it deems appropriate." The only constraint that can be inferred with regard to revision of the BDCP after incorporation is that revision will not "change the terms and conditions of the permits issued by state and federal regulatory agencies." see Cal. Water Code § 85320(g). Although section 85320(g) deals with recommendations that the Council may make about implementation of the BDCP rather than its separate authority to revise the BDCP it is likely that revisions to the Plan would be restrained by the same concept. We interpret this provision to require the Council to review and revise the Plan as conditions change or information indicates the need to do so—the five year requirement states the maximum time that the plan can go without	DP	The Council disagrees with the assertion that the Council will be unable to meet its statutory requirement to periodically review the Delta Plan. Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.

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		review not the minimum. Because the Council will not have the benefit of the required evaluation and regulatory policies it cannot make an informed review of the BDCP portion of the Plan and cannot determine what revisions to the BDCP would be appropriate. It cannot, therefore, meet its statutory requirement to periodically review the Plan.		
145. Save the California Delta Alliance	1/14/2013	E. Lack Of Conveyance Regulatory Policy Frustrates The Council's Duty To Evaluate The BDCP's Real-Time Operational Decisionmaking Process. In addition to exercising its regulatory authority in an appellate posture with regard to DFG's findings pursuant to Cal. Water Code § 85320(e), the Council is required to consider whether the BDCP complies with Cal. Water Code § 85321 in the first instance. The review of DFG's findings is to determine if the BDCP "meets the requirements of this section §[85320]." Cal. Water Code § 85320(e). In addition the Council must consider the BDCP "in accordance with this chapter [Cal. Water Code Division 35, Part 4, Chapter 2]." Cal. Water Code § 85320(a). Cal Water Code § 85321 is part of Chapter 2 but not part of § 85320, so the Council considers compliance with § 85321 in the first instance. Section 85321 provides: 85321. The BDCP shall include a transparent, real-time operational decisionmaking process in which fishery agencies ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations. That legislature singled out section 85321 for special consideration by the Council because the "transparent, real-time operational decisionmaking process" that will govern water system operations is at the heart of the controversy over the canal. The entire battle over the canal can be summarized as "once the canal is built how will we every wrest control the faucet form the water contractors?" So far the BDCP has ducked the issue and promised compliance with section 85321 later. Section 85321 was intended to provide for "real-time" management of the canal in response to its measured effects on the Delta in order to address the (well founded) fear that once the canal is built there won't be adequate means to control it. The BDCP acknowledged in July 2012 that, despite tens of millions of dollars spent on modeling, it still didn't know how to operated the canal to achieve the statutory objectives, including the co-equal goal of restoring the Delta. The need for the Council to specify minimum requirements for real-time management through appropriate regulatory policy is palpable and acute. To be adequate, the BDCP's real-time monitoring must be capable of producing an output that would indicate when the canal faucet would need to be immediately shut off in response to real-time monitoring. Real-time means real-time, as in "if conditions x, y, and z are met" then diversion will be automatically suspended or curtailed in a pre-specified way as the case may be. We would expect the trigger conditions would include pre-specified parameters such as movement of fish populations, physical criteria with regard to water chemistry, such as dissolved oxygen and electrical conductivity, the behavior of X-2, etc. It does not mean appointing a committee to study the effects of the canal and making recommendations from time to time or making decisions about operations for the following water year. The regulatory policy could include such things as requirements for which conditions must be monitored and minimum disbursement of monitoring stations, how quickly the rate of diversion must be modified in response to monitored conditions, who would get notice and the kind of notice that would be required in response to changes in monitored conditions of specified magnitude or description, provisions for independent audit and oversight of real-time management, provisions governing emergency situations, etc.	DP	We disagree with the commenter's characterization of water code section 85321. We agree that this provision requires the BDCP to include a transparent, real-time operational decision-making process, and that the manner in which this requirement is implemented may be relevant to DFW's determination of whether BDCP meets the requirements of water code section 85320 (which determination may be appealed to the council). However, we do not agree that the Council must adopt a regulatory policy specifying the features of the transparent, real-time operational decision-making process required by water code section 85321.
146. Solano County Department of Resource Management	1/14/2013	We are concerned with the increasing focus on development in the Delta evidenced by a number of added policies and recommendations throughout the Plan and PEIR, despite the fact that a great deal of regulation of development already occurs through the DPC and County General Plans, as well as the Stewardship Council's focus on covered actions. Covered actions policies, already quite onerous, have become even so relative to reporting requirements (PEIR Chapter 2). While the County recognizes the importance of protecting not only the Delta, but people and property, it is important to not preclude appropriate activities that would aid agriculture and legacy towns through excessive bureaucratic regulation. In some respects, we see the Delta Plan as hostile	DP, E	The Delta Plan and the proposed regulation provide several important protections for agriculture. For example: • The limitation of development to areas designated in section 5010 ~~5012~~ reinforces existing County General Plans and promotes the State of California's interest in reducing flood risk and protecting farmland from development.

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		towards Delta Agriculture which is ironic given that Delta agriculture is far more sustainable than areas that are less hospitable to agriculture that would benefit by Delta Plan policies as currently drafted. Also, we believe the increased regulations places additional strain on already overtaxed resources of the Delta Counties, and constitutes yet another unfunded mandate.		• Section 5010 ~~5012~~specifically aims to aid agriculture by exempting facilities for processing of local crops or that provide essential services to local farms from the policy. This regulation also specifically allows new urban development in the unincorporated Delta towns of Clarksburg, Courtland, Hood, Locke, Ryde and Walnut Grove. • Section 5010 ~~5012~~also has been revised to add subsection (b), which allows new development outside the specified urban areas and towns "if it is consistent with land use designations in city and county general plans as of the date of the Delta Plan's adoption, and is consistent with this chapter", such as farm labor housing in areas designated for agriculture. The Cost Analysis acknowledges that local districts would need to recover costs using mechanisms that are within their authority and which, depending on the circumstance, may require a vote. The Cost Analysis also acknowledges that, in cases where local agencies are unable to recover costs through existing authority, section 41 of the Delta Reform Act provides for the Commission on State Mandates to determine costs mandated by the state and for reimbursement to local agencies pursuant to Part 7 (commencing with section 17500) of Division 4 of Title 2 of the Government Code.
147. Solano County Department of Resource Management	1/14/2013	On page 43 of the Plan, covered actions are included in a discussion of the best available science in decision-making. In addition to the previous question as to why development remains such a target, when in fact development on the Delta has been addressed for some time through local agencies and the DPC, the concept of broadening this approach to encompass any and all activities by those exporting water from the delta would be in order. Please see prior comments on covered actions and comments in the Rulemaking section of our comments.	DP	The Delta Stewardship Council does not have the authority to directly regulate land use outside the Legal Delta and the Suisun Marsh.
148. Solano County Department of Resource Management	1/14/2013	Financing of the Policies and recommendations in the Plan and PEIR should be described at some level of detail. We see only somewhat vague references to financing, a critical component, in the Plan and PEIR.	E	The Cost Analysis describes the potential costs to state and local agencies of Delta Plan policies and describes the potential mechanisms by which agencies could cover costs. This may not really be a Rulemaking comment.
149. Solano County Department of Resource Management	1/14/2013	Policy WR P1 on page 108 outlines regional self-sufficiency and reduced reliance on the delta. This is a very important component of the Delta Plan and one of relatively few policies that rely on the contributions of out-of-the-watershed beneficiaries. We question why the exact same policy would apply to junior water-rights or contractual water exporters for which the Delta is a secondary or tertiary supplementary source of water, and those for which Delta water is a sole, or primary source of supply (such as in-Delta users). Where the elements of conservation, and other efficiencies for example, are common to both, we believe some exception and/or flexibility should be provided for those in-Delta area-of-origin and primary users that do not have the flexibility to turn to other sources of water supply, and are not in a position to implement desalination or recycled water options (agricultural users, for example, or legacy communities). Finally, the caveat relative to cost-effectiveness of programs and projects that reduce self-reliance, as outlined on line 34 needs further definition and/or qualification. Documents detailing performance measures (summarized on page 116 of the Plan) should include exporter contingency plans in the event of much-reduced supply in below-average water years. Please not our comments on Rulemaking in our comments below.	DP	The Council believes that WR P1 allows sufficient flexibility for in-Delta users to comply. Furthermore, one of the primary tenets of the Delta Plan is that everyone needs to do their part. The Delta Plan recognizes that not every water supplier is the same, and each will have different opportunities to be more efficient or to develop additional local supplies. Existing law provides for the identification and evaluation of those opportunities that are cost effective and technically feasible in Urban or Agricultural Water Management Plans (as applicable), and provides the definitions of these terms. The comment on the performance measure is noted and will be evaluated in future development of performance measures for the Delta Plan.
150. Solano County Department of Resource Management	1/14/2013	Policy ER P2 on page 156 of the Plan discusses restoration of habitat at appropriate elevations. Where we agree that some level of habitat restoration is necessary for a healthy Delta, it appears as though most of the appropriate elevations exist in Solano County, and we suspect the state is planning to err on the side of too much rather than not enough in an attempt to compensate for lack of flow in the north and west Delta with the BDCP as currently proposed. Therefore we insist on involvement from inception to completion, minimization of	DP	The involvement of local government in habitat restoration projects is required by 5011 ~~5013~~, which requires water management facilities, ecosystem restoration, and flood management infrastructure to be sited to avoid or reduce conflicts with existing and planned uses, where feasible, considering comments from local

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		impacts and full (direct and indirect), including mitigation of economic impacts. We believe that Solano County should benefit, rather than just avoid harm, as others will be benefitting from a reliable water supply and restored ecosystem, as described in the Plan. We also strongly encourage the state to engage in pilot projects to gauge success prior to large-scale restoration.		agencies and Delta Protection Commission. The adaptive management framework included in Appendix 1B includes a step in which the project proponent would select the appropriate type of action (research, pilot or full-scale).
151. Solano County Department of Resource Management	1/14/2013	Policy ER P3, the protection of opportunities to restore habitats, is problematic in that it is over-reaching and unnecessary. In addition, it has the effect of diminishing land value in mapped areas, creating potential for inverse condemnation of land, as would Policy ER P4, regarding the expansion of floodplains. Encouragement of ecosystem restoration and floodplain expansion should be directed at identification of funding opportunities and a streamlined permit process as incentives and to cover costs, rather than at heavy-handed punitive regulatory schemes.	Ne, E	Regulations, however, can only amount to a "taking" if they are "so onerous" that they are "tantamount to a direct appropriation or ouster." (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 537.) To determine whether regulations are that onerous, courts engage in "ad hoc, factual inquiries . . . designed to allow careful examination and weighing of all the relevant circumstances." (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 322 [internal citations and quotation marks omitted].) Moreover, the "mere diminution in the value of property, however serious, is insufficient to demonstrate a taking." *(Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern California* (1993) 508 U.S. 602, 645 (1993).) Given the fact-specific nature of takings claims and the requirement of more than a diminution in value, the "mere enactment" of a regulation is rarely a taking. (*Tahoe-Sierra* at 321.) To show that the enactment is a taking, a person must "establish that no set of circumstances exists under which the regulation would be valid." (*Akhtar v. Burzynski* (9th Cir. 2004) 384 F.3d 1193, 1198. See also *Yee v. City of Escondido* (1992) 503 U.S. 519, 534 [owner must show that the regulation is a taking "no matter how it is applied."].) Because the takings inquiry depends upon the particular facts of a case, it is difficult to see how section 5009 could be deemed a taking no matter how it is applied. That difficulty is reinforced by the section's provision that uses are permitted if their impacts are appropriately mitigated. Moreover, designating an area as potentially eligible for mitigation can actually enhance its value. (See *Hearts Bluff Bame Ranch, Inc. v U.S.* (Fed. Cir. 2012) 669 F3d 1326, 1332, where a landowner asserted that it suffered a serious economic loss when the federal government refused to designate its land as eligible for participation in a federal mitigation bank program.) Finally, even if one could somehow show that no matter how section 5009 is applied it would impose a taking, section 5018 would preclude a taking because it calls for the Council and other entities to avoid applying any policy if its application would constitute a taking.
152. Solano County Department of Resource Management	1/14/2013	New policy DP P1 on page 273 is flawed, as discussed in our earlier comments and should be removed from the Plan for the reasons described above.	DP	Comment noted. See responses to comments made by Solano County Department of Resource Management above.
153. Solano County Department of Resource Management	1/14/2013	Policy RR P3 and P4 on page 290 requiring flood protection of floodways and floodplains would not appear to be consistent with existing state law (SB 5) and unnecessary, given the protections from development in other areas of the Plan, such as covered actions, the DPC Resource Management Plan and County General Plans.	Ne, Co	Comment noted
154. Solano County Department of Resource Management	1/14/2013	Thank you for the opportunity to review and comment on the proposed regulations associated with the Delta Plan, dated November 16, 2012 ("Regulations"). Although we appreciate the effort that has gone into drafting these Regulations, we have some concerns. We urge the Delta Stewardship Council to seriously consider them in finalizing the Regulations. As a general matter, there are three primary concerns with the Regulations. First, in many instances the	A, Co, DP	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.

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		Regulations would appear to go beyond the scope of the Sacramento-San Joaquin Delta Reform Act of 2009 (Water Code § 85000 et seq.; "Delta Reform Act") and other state laws, in conflict with the "consistency" requirement of Government Code section 11349(d). Second, in many instances they are duplicative of existing law, confusing or unclear. Lastly, the Regulations do not provide much in the way of guiding principles and/or mitigation for actions that conflict with existing in-Delta uses. More concern should be given to effects on in-Delta uses and communities, the protection and enhancement of which, after all, are a key component of the "coequal goals" (Water Code § 85054).		
155. South Delta Water Agency	1/14/2013	Article 3 (Regs 5005-5017): The Plan is insufficient in that the Policies and Recommendations are not consistent with the controlling statutes.	Co	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
156. State Water Resources Control Board	1/14/2013	The proposed regulation includes scientific appendices that contain material that could evolve over time as new information becomes available. For example, Section 5008(a) of the proposed regulation states: "Habitat restoration must be carried out consistent with 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 (Department of Fish and Game 2011), with minor alterations. It is hereby attached as Appendix 3. 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." This language does not appear to allow for the possibility that the information in this appendix could become superceded by new research during the life of the regulation. The Delta Stewardship Council may want to consider including flexibility in the proposed regulation language regarding the scientific appendices to acknowledge the potential for improvements in science over time.	DP	The Council retains the authority to update the plan as new information becomes available.
157. Tehama Colusa Canal Authority	1/14/2013	Although unanimity is difficult to achieve among such diverse interests, our fundamental concern has been, and continues to be, that the Delta Stewardship Council has chosen to rely upon an essentially regulatory approach to achieving its objectives that is beyond the Council's limited legal authority. Instead, we have urged the Council to provide the leadership for an integrated management approach that relies upon collaboration with and leveraging of existing authorities of the many state and federal agencies and local interests that all share common interests in the Bay-Delta. We have raised this fundamental concern, that the Council should focus more on integrating and less on regulating, in each of our comment letters, in oral testimony, and in numerous meetings throughout this process.	A	MR1 (an essentially regulatory approach)
158. Tehama Colusa Canal Authority	1/14/2013	Further, we are committed to working with the Council to assure that the proposed regulations are consistent with the authorities granted to the Council by its enabling legislation, and in accordance with the procedural and substantive requirements of the Administrative Procedure Act (APA) as well as the regulations and guidance adopted by the Office of Administrative Law (OAL). Unfortunately, as we have commented consistently throughout the Delta Plan process, the regulatory approach has been flawed from the outset and these proposed regulations only accentuate those flaws.	A	MR1 (an essentially regulatory approach)
159. Tehama Colusa Canal Authority	1/14/2013	For the Council to be successful in furthering the coequal goals within a sustainable and coherent governance structure, it must adopt clear, focused policies in accordance with OAL requirements and other state laws and regulations. The proposed text for addition to Title 23 of the California Code of Regulations fails this standard and instead itself creates obstacles to such progress. Moreover, the Council may only promulgate regulations within that specific authority granted to it by the Delta Reform Act (Act). In this respect, the proposed regulations also fail by overstepping that authority.	A, Ct	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
160. Tehama Colusa Canal Authority	1/14/2013	Many ACWA member agencies and others are submitting comprehensive and detailed comments on the Council's proposed regulations. Although we do not provide that here, our review of the proposal has led us to conclude that much needs to be corrected, revised or deleted to satisfy OAL criteria, to make the Delta Plan consistent with legislative intent, and to reflect the Council's statutorily defined role in furthering the coequal	A, Ct	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.

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		goals. To illustrate our perspective, we provide some general comments and specific examples of proposed Code sections with deficiencies below.		
161. Tehama Colusa Canal Authority	1/14/2013	Many sections of the proposed regulatory language are inconsistent with the standards in the APA, including the "authority," "necessity," "non-duplication," and "consistency" standards set forth in Government Code section 11349.1, and corresponding definitions in section 11349. The proposed regulations include a significant amount of unnecessary narrative language and statements of policy that diminish the binding impact of the regulations more appropriately found in the Delta Plan. This creates difficulty for potentially regulated entities to discern precisely what would be required to comply with the regulations. It is imprudent to begin a new regulatory process in a manner which clouds rather than clarifies the objectives of the regulations. We therefore urge the Council to remove narrative and policy language in the proposed regulatory text. Further, unclear areas of the Final Draft Delta Plan that will be revised to reflect improved clarity, should be mirrored in the proposed regulations.	Ct	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
162. Tehama Colusa Canal Authority	1/14/2013	The Council should also use terminology in the regulations that is specifically defined in the Water Code. The structure and depth of the definition section is both inappropriate and confusing and is not helpful in proposed regulations. New definitions are excessively long and complex and include "actionable language" that makes it very difficult to discern the extent of the prescriptive or regulatory intent of the substantive provisions. The definitions should be clear and concise, defining only necessary terms. Further, regulatory requirements should not be embedded within a definition.	Ct	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
163. Tehama Colusa Canal Authority	1/14/2013	Administrative regulations are enacted to implement, interpret or carry out the provisions of a statute, and should not alter, amend or enlarge statutes lest they will confuse or otherwise impair a statute's scope or purpose. The Notice of Proposed Rulemaking sets forth twenty-four provisions of the Water Code that the proposed regulations are intended to implement, interpret or make specific. It further notes that the regulations make reference to more than twenty-four other provisions of the Water Code, as well as one provision of the Public Resources Code, several provisions of the federal Clean Water Act, Endangered Species Act, and National Flood Insurance statutes, and the CEQA regulations.	A	Comment noted.
164. Tehama Colusa Canal Authority	1/14/2013	Many policies the proposed regulations seek to enforce, implement, or interpret, are statutory directives beyond the scope of the Council's authority. Moreover, the Act's actual provisions that most of the proposed regulations purport to implement, interpret, or carry out do not provide or imply the granting of such specific authorities or powers to the Council. Instead, they are articulations of general state policies or elements or objectives that should be included in the Delta Plan, but do not provide a foundation for the prescriptive regulations.	A	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
165. Tehama Colusa Canal Authority	1/14/2013	The APA requires OAL to review regulations using standards of: (1) necessity; (2) authority, (3) clarity; (4) consistency; (5) reference; and (6) nonduplication. (Gov. Code, § 11349.1(a).) Many of the proposed regulations do not meet these standards, are not necessary to effectuate the Act and many exceed the Council's authority. Some of the language is also not written in a manner that can be easily understood by the targeted entities, and in some cases it is difficult to even discern which entities are targeted by the provisions. (Gov. Code, §§ 11349.1(a)(3), 11349(c) ["Clarity means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them."].) Several provisions also overlap or duplicate the requirements of other state and federal laws. (Gov. Code, §§ 11349.1(a)(6), 11349(f).) Below are examples of flaws contained in the draft regulatory language that must be revised to meet the APA standards.	Ne, Ct, Du	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
166. Tehama Colusa Canal Authority	1/14/2013	ACWA urges the Council to revise the proposed draft regulations to comply with the APA standards. Again, these comments are intended to provide examples of essential problems with the regulations, rather than be comprehensive. We also urge the Council to also consider and implement those comments submitted separately by ACWA and Ag Urban Coalition members.	O	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.

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167. Tehama Colusa Canal Authority	1/14/2013	As detailed below, the Proposed Regulations include a number of provisions that fail to meet the standards of necessity, authority, clarity, consistency, reference, and non-duplication set forth in the Government Code. The Public Water Agencies and their member agencies object to the Proposed Regulations particularly because in numerous respects they exceed and conflict with the limited authority the Legislature conferred upon the Council through the Delta Reform Act.	O	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
168. The Grupe Company	12/4/2012	At your meeting of November 15, 2012, the Delta Stewardship Council (DSC) announced that the concurrent public review periods for the DSC's Final Delta Plan (FDP), the Supplement to the Draft Program Environmental Impact Report for the Final Delta Plan (SPEIR), and the corresponding Draft Regulations (DR) released by the California Office of Administrative Law will run for 45 days, from November 30, 2012 through January 14, 2013. The Grupe Company ("Grupe") intends to thoroughly review and comment on the above-referenced documents. However, due to the complexity, importance, and significance of these documents on our company and the fact that the review periods fall during a major holiday season, Grupe is respectfully and officially requesting that the DSC extend the concurrent public review periods for an additional 90 days, ending on April 15, 2013. We look forward to your favorable response to our time extension request. Grupe is committed to our continued coordination with the DSC members and DSC staff in the review of these documents and the future adoption and implementation of the Delta Plan. Should you have any questions or wish to discuss this request, please contact me at (209) 473-6024.	O	The Council exercised its discretion in deciding not to extend the comment period. The public has had numerous opportunities to comment on the various draft versions of the Delta Plan and the EIR as they have been developed over the past 2-1/2 years, and hundreds have taken these opportunities.
169. Tuolumne County Board of Supervisors	1/14/2013	Of primary concern to our Board is that there seems to be several omissions contained in the Proposed Rulemaking and Draft Regulations. As described in TUD's letter, in great detail, when language from California Water Code 85021 was incorporated into the Draft Regulations, key elements of the code were omitted. The second item of key concern is that the Draft Regulations should include or refer to the Delta Plan's Appendix P. This is of significant concern and we urge your Council to reevaluate this omission and expand the language regarding "improving regional self-reliance". This is essential in that it allows agencies within the Delta Watershed to be assured their investments and management actions and policies are consistent with the Delta Plan objectives.	O	See responses to the referenced letter from Tuolumne Utilities District.
170. Tuolumne County Board of Supervisors	1/14/2013	Of primary concern to our Board is that there seems to be several omissions contained in the Proposed Rulemaking and Draft Regulations. As described in TUD's letter, in great detail, when language from California Water Code 85021 was incorporated into the Draft Regulations, key elements of the code were omitted.	A	See responses to the referenced letter from Tuolumne Utilities District.
171. Tuolumne County Board of Supervisors	1/14/2013	The second item of key concern is that the Draft Regulations should include or refer to the Delta Plan's Appendix P. This is of significant concern and we urge your Council to reevaluate this omission and expand the language regarding "improving regional self-reliance". This is essential in that it allows agencies within the Delta Watershed to be assured their investments and management actions and policies are consistent with the Delta Plan objectives. [Note that attached to this letter is the comment letter on the Rulemaking package submitted by the Tuolumne Utilities District to the Delta Stewardship Council on 1/3/2013]	DP, O	The Council intended Appendix ~~P~~G to provide non-regulatory guidance, rather than requirements with regulatory effect. We believe the response to the comment from Tuolumne Utilities District on section (h)(1)(B) may also be of interest to the commenter: Section 5001 ~~5002, 5003~~ (h)(1)(B) sets forth the Council's definition for what it means to achieve the coequal goal of providing a more reliable water supply for California for the purpose of clarifying for a proponent whether its proposed action is a covered action under section 5001 ~~5002, 5003~~ (j)(4). We disagree with the comment concerning the interpretation of section 5001 ~~5002, 5003~~ (h)(1)(C). Regions that use water from the Delta watershed include areas that receive water that has been exported from the Delta. We disagree that the language in section 5001~~5002, 5003~~ (h)(1)(B) is deficient or contains omissions. This paragraph draws upon Water Code

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				section 85021 as well as other Water Code sections including 85004(b), (85020(d) and (f), 85023, 85302(d), and 85304. It is not limited to language from Water Code section 85021. To address the comment that local and regional water supply projects should be specifically included in section 5001 ~~5002, 5003~~ (h)(1)(B, the Council has added these words to the paragraph. To address the comment concerning the inclusion of language from Delta Plan's Appendix ~~P~~G on water conservation, the Council has a made the following revision to section 5003 ~~5005~~(c)(2): "For the purposes of reporting, water efficiency is considered a new source of water supply, consistent with Water Code section 1011(a)."
172. Tuolumne Utilities District	1/3/2013	General Definitions, Section 5001(e)(1)(B) This section leaves out two important elements: one, directly taken from CWC §85021 and the other from the Delta Plan's Appendix P (Demonstrating Consistency with the Delta Plan Regarding Reduced Reliance on the Delta and Improved Regional Self-Reliance). To correct these deficiencies and errors of omission, Section 5001(e)(1)(B) should be rewritten as follows: "Regions that use water from the Delta watershed will reduce their reliance on this water ~~for reasonable and beneficial uses[1]~~ 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[2]~~. This will be done by improving, investing in, and implementing local and regional water supply projects[3], local 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. For the purposes of improving regional self-reliance water conservation is considered a new source of water supply, consistent with CWC §1011(a). Water so saved through these counts as a new source of supply as this water would have been needed to meet future demand. Thus, even if water use is increasing as a result of economic or population growth, a water supplier can demonstrate that its water use is more efficient and is contributing to reduced reliance on the Delta and improved regional self-reliance."[4] It is important that the definitions of Section 5001 be as clear as possible. Therefore, we urge the inclusion of the expanded language regarding "improving regional self-reliance" suggested from the Delta Plan's Appendix P. This language provides a clear explanation of exactly how this standard (of improving regional self-reliance) is met and how those agencies within the Delta Watershed may be assured their investments and management actions and policies are consistent with the Delta Plan objectives. [1] The term reasonable and beneficial use is included in Section 5001(e)(1)(A), which therein applies to all waters of the state. It is not necessary to specifically include the same terminology in Section 5001(e)(1)(B), which only applies to water used from the Delta watershed, and then, inexplicably, not apply it to water exported from the Delta as described in Section 5001(e)(1)(C). Using the term once, for the entire state, should be sufficient. [2] This specific reference to the reasonable use of water and the Public Trust Doctrine is only made in reference to water used from the Delta watershed. It would be better to delete such reference here and, instead, include it in Section 5001(e)(1)(A), which would be universally applied to all the waters of the state. [3] Taken directly from CWC §85021. [4]Delta Stewardship Council Final Draft Plan, Appendix P, page P-2, lines 30-35.	Ct, O	Section 5001 ~~5002, 5003~~ (h)(1)(B) sets forth the Council's definition for what it means to achieve the coequal goal of providing a more reliable water supply for California for the purpose of clarifying for a proponent whether its proposed action is a covered action under section 5001 ~~5002, 5003~~ (j)(4). We disagree with the comment concerning the interpretation of section 5001 ~~5002, 5003~~ (h)(1)(C). Regions that use water from the Delta watershed include areas that receive water that has been exported from the Delta. We disagree that the language in section 5001 ~~5002, 5003~~ (h)(1)(B) is deficient or contains omissions. This paragraph draws upon Water Code section 85021 as well as other Water Code sections including 85004(b), (85020(d) and (f), 85023, 85302(d), and 85304. It is not limited to language from Water Code section 85021. To address the comment that local and regional water supply projects should be specifically included in section 5001~~5002, 5003~~ (h)(1)(B, the Council has added these words to the paragraph. To address the comment concerning the inclusion of language from Delta Plan's Appendix ~~P~~G on water conservation, the Council has a made the following revision to section 5003 ~~5005~~(c)(2): "For the purposes of reporting, water efficiency is considered a new source of water supply, consistent with Water Code section 1011(a)."

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173. United States Department of the Interior Bureau of Reclamation, Mid-Pacific Region Bay-Delta Office	1/14/2013	Under section 5000, General Definition, the Agricultural Water Supplier definition exempts the Department of Water Resources from completing a water management plan but does not mention Reclamation. Reclamation should also be exempt from completing a water management plan. Proposed regulations in Title 23, Water Code section 10828, state that Federal Central Valley Project (CVP) water service and repayment contractors who submit water conservation plans to Reclamation pursuant to either the Central Valley Project Improvement Act or the Reclamation Reform Act may meet the requirements of proposed Title 23, Water Code section 10826, under certain conditions. Reclamation supports proposed regulation Water Code section 10828. Reclamation has in all CVP water service and repayment contracts, executed since 1994, a requirement that all contractors develop and implement a water conservation plan that meets Reclamation existing criteria. We update our water conservation criteria every 3 years and our CVP contractors need to update their existing water conservation plans every 5 years. Reclamation reviews all plans to ensure that they meet the existing criteria. The delivery of Federal CVP water is conditioned in the CVP water contracts upon our CVP contractors developing and implementing their water conservation plans. Therefore, since all CVP contractors complete the plans, Reclamation, similar to the Department of Water Resources, should also be exempted from completing a water management plan. Our proposed language changes (in italics) for section 5000, General Definitions, Agricultural Water Supplier, are as follows: (c) "Agriculture Water Supplier" refers to both "agricultural retail water suppliers" and "agricultural wholesale water suppliers" under the Water Code, but not the Department of Water Resources or the Bureau of Reclamation or any non-Federal operating entity that conveys or delivers water on behalf of the United States through facilities owned by the United States, and includes both of the following:	Co	The Council concurs with this comment, and has revised the regulation accordingly.
174. Westlands Water District	1/14/2013	While it is unclear whether the November 2012 Final Draft Delta Plan is being analyzed as the proposed project or an alternative, it is clear that the proposed November 2012 Final Draft Delta Plan exceeds the statutory authority of the Delta Stewardship Council. Under the California Administrative Procedure Act ("APA") (Gov. Code, § 11349 et seq.), proposed regulations purporting to implement or interpret a statute must be consistent and not in conflict with statutory authority, and must be reasonably necessary to effectuate the statutory purpose. (Gov. Code, § 11342.2.) Regulations are invalid if they impair of 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.) The proposed regulations purporting to implement the November 2012 Final Draft Delta Plan exceed the Delta Stewardship Council's statutory authority, and are invalid pursuant to the Delta Reform Act of 2009 (Wat. Code, § 85001 et seq.), CEQA, and the APA.	A, Co	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
175. Westlands Water District	1/14/2013	CEQA requires analysis of the potentially significant impacts of the Council's proposed action — the proposed regulatory policies of the Delta Plan. (CEQA Guidelines, §§ 15064, subd. (d), 15126.2, subd. (a), 15130, 15355; Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553, 564.) "[F]ailure to provide enough information to permit informed decision-making is fatal." (Napa Citizens for Honest Government v. Napa County Board of Supervisors (2001) 91 Cal.App.4th 342, 361.) The Recirculated Delta Plan Draft PEIR fails to minimally comply with CEQA because it fails to properly describe the Delta Plan's proposed regulatory policies and fails to disclose the potentially significant effects of those policies, such as effects associated with reductions in the quantity of water conveyed through the Delta on agricultural resources, impacts of the use of substitute water sources such as groundwater, subsidence and water quality issues, adverse impacts to air quality from increased dust and particulate matter, and social and economic impacts of reduced water supplies on local communities.	O	This comment is about the EIR and CEQA, and not about the clarity of the proposed regulations or the Council's authority. The Final EIR adequately addresses the issues raised by the comment. Please see the Final EIR at http://deltacouncil.ca.gov/final-programmatic-eir, in particular (but not limited to) Master Responses 1, 2 and 5 contained in Volume 4 Binder 1.
176. Westlands Water District	1/14/2013	Further, the Council has not adequately considered economic and social factors in determining the feasibility of proposed mitigation measures to reduce or avoid the Delta Plan's significant environmental effects. (CEQA Guidelines, § 15131, subd. (c).) Severe impacts on agricultural communities, including job and income losses, increased food and housing costs, and lost economic output, are the reasonably foreseeable result of the	O, E	This is a comment on the draft EIR, and is being responded to as part of the EIR process.

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		proposed Delta Plan regulations. (See, e.g., Michael, et al., "A Retrospective Estimate of the Economic Impacts of Reduced Water Supplies to the San Joaquin Valley in 2009 (2010).) The environmental document ignores these effects and their relationship to the feasibility of the regulations themselves as well as proposed mitigation measures. Similarly, the environmental document fails to analyze the impacts of the proposed regulations due to the loss of productive agricultural lands to fallowing, levee setbacks, habitat restoration, or limitations on use based on potential for restoration, and ignores the relationship of these impacts to the feasibility of the proposed regulations and mitigation measures. In short, the Delta Plan's environmental document continues to ignore the impacts of its proposed regulatory policies.		
177. Westlands Water District	1/14/2013	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.	O	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
178. Westlands Water District	1/14/2013	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 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,' 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).	O	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
179. Westlands Water District	1/14/2013	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.	Ne	The Initial Statement of Reasons describes each provision or group of similar provisions in the proposed regulation, its purpose, alternatives considered, and why the proposed approach was selected by the Council.
180. Westlands Water District	1/14/2013	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 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.	Ct	The commenter expands on this introductory statement in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.
181. Westlands Water District	1/14/2013	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	A, Du	The commenter expands on this introductory statement regarding authority in subsequent comments on specific sections. Our responses to those subsequent comments respond to this introductory statement.

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		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.		
182. (Public Hearing Transcript: pg. 16 lines 9-13) Environmental Water Caucus: Nick DiCroce	1/24/2013	To summarize, EWC believes that the proposed regulation does not satisfy the mandate to carry out a legally enforceable Delta Plan that protects the coequal goals as set forth in the Delta Reform Act. Indeed the proposed regulation excludes actions that should be classified as covered actions, and includes policies that fall outside the regulations enabling statute.	A	Comment similar to 1/14/13 comment period by EWC
183. (Public Hearing Transcript: pg. 18 lines 15-19) Environmental Water Caucus: Nick DiCroce	1/24/2013	The regulation calling for improved -- meaning new conveyance -- also cannot be lawfully documented because there has been failure to perform the cost benefit, and the public trusts analysis to ensure protection of the Delta.	A	Comment similar to 1/14/13 comment period. (1) New conveyance facilities are not called for in the regulations. Appendix ~~G~~A provides a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan. (2) Rulemaking law requires the Economic and Fiscal Impact Statement (Form 399) to estimate the cost of the adopted regulation but not the benefit.
184. (Public Hearing Transcript: pg. 18 lines 20-25 and pg. 19 line 1-6) Environmental Water Caucus: Nick DiCroce	1/24/2013	Separately, because the Delta Stewardship Council is a trustee agency, the proposed regulation must require the Council to consider whether a covered action is consistent with the Public Trust Doctrine, and make a consistency determination on that basis. The Council must make a consistency determination that is administerial duty, which the Delta Stewardship Council must fulfill when judging a covered action. The proposed regulations failure to include a Public Trust's consistency determination as a component of judging a covered action violates the Public Trust Doctrine and associated Case Law on its face.	Co	The Council's regulations—as well as the Delta Reform Act itself—do, in part, reflect the public trust doctrine. For example, section 5003 ~~5005~~ promotes water use conservation and efficiency to reduce the strain on Delta resources. The Council does not, however, agree that the Delta Reform Act requires the Council to adopt a regulation mandating that agencies engage in a "public trust analysis" before proceeding with a covered action.
185. (Public Hearing Transcript: pg. 29 lines 9-25 and pg. 30 lines 1-10) East Bay Municial Utility District: Doug Wallace	1/24/2013	And secondly, of course, as a potentially regulated party, we're looking at these regulations and seeing some structural problems. And I will try to summarize. The bases that we've reviewed these regulations on was looking at the criteria in the Administrative Procedures Act. Several of them, including necessity, non-duplication, consistency and clarity. And we look through these regulations and see quite a bit of verbiage that is essentially not necessary. It's narrative in nature. We have a number of definitions that have policy language woven into them. And so the simplicity is missing. And, in fact, when we really boil down within these regulations, we think you and the regulatory parties would be a lot better off if they were slimmed down significantly. They could be clarified by limiting the proposal to straightforward regulatory requirements that you are empowered to promulgate by statute. And removing narrative statements that talk about policies of the state or items that the Council contemplates. Or discussions with what the State Board, for example, could or should do. That's a recommendation essentially that is not a regulation that you'll see in whatever section of the ranks. It's in there concerning the State Board flows and their process for amending the flow requirements. Definitions are very long and complex. As I said, they include actionable language.	O	The adopted regulation was revised to simplify the language. The definitions provided in the adopted regulation are appropriate. They define the terms used in this regulation.
186. (Public Hearing Transcript: pg. 30 lines 14-25 and pg. 31 lines 1-6) East Bay Municial Utility	1/24/2013	The improved transparency in water contracting. These provisions are already required by DWR and the Bureau. There's no evidence really provided that the compliance with those requirements is currently inadequate. So these are what we call duplicative and don't need to be in the regulations. And secondly, another example is the Council has included a section on prioritization of state investments in Delta levees. A very critical responsibility to Council. That's not something you have to regulate yourselves. This	Du	The Council is not proposing to add any additional requirements on those proposing to engage in water contracting processes that meet the definition of a covered action. In the past decade, both CVP and SWP have adopted new or modified policies relating to transparency and public participation in decisions on state and federal water contracts. The Council fully supports these measures. To be consistent with the Delta Plan, approval of new or modified contracts must have

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District: Doug Wallace		is something you can adopt by guideline, or it's in the Delta Plan. A tremendous amount of the regulatory language simply reiterates what's in the Delta Plan. And I think that's where that should be. Anybody who is going to be submitting a consistency determination, we should hope they read the Delta Plan. They don't need to have it reiterated and re-explained in the regulatory language.		taken place through administrative decision-making processes that are consistent with these policies. The purpose of the regulation is to provide the Council with the ability to assure compliance with these policies, and to provide an additional consequence for those who fail to comply. With respect to the commenter's example of state investments in Delta levees, the commenter correctly notes that the authority for the prioritization of State investments in Delta levees is set forth in Water Code sections 85305 and 85306. RRP1 5012 ~~5014~~ has been substantially revised to indicate that the Council already has the authority to proceed, and the excessive regulatory language has been removed.
187. (Public Hearing Transcript: pg. 31 lines 11-24) East Bay Municial Utility District: Doug Wallace	1/24/2013	On a substantive level, we want to ask the Council to reconsider the inclusion of actions -- of covered actions that have a beneficial impact on achieving the coequal goals. I've heard the explanation for this from staff. I understand it. But overall the concern is, if you look at the near-term actions, they unfortunately have become sometime-maybe actions. There are already so many obstacles in the way of achieving things. We all recognize our actions that need to take place in the Delta. And including those as a covered action, submitting a consistency of determination with all the costs involved is another regulatory barrier. And so I know that's part of the Delta Plan. But we would ask you to rethink that.	DP	Commented noted, but the Council, in its discretion, has decided the language will remain as currently stated. As an example, it is critical that projects that have a significant positive impact on the coequal goals, such as habitat restoration projects, are consistent with the Delta Plan. Habitat restoration is subject to the Delta Plan consistency to prevent habitats from being created at incompatible elevations or precluding the restoration of a more compatible habitat.
188. (Public Hearing Transcript: pg. 36 line 5-25 and pg. 37 lines 1-15) Santa Clara Valley Water District: Cindy Kao	1/24/2013	We are concerned that the proposed regulation to reduce reliance on the Delta attempts to give the Council the discretion to review and judge local water management decisions outside the legally defined Delta. The Delta Reform Act does not provide the Council with this authority. Instead of promoting efficient implementation of projects that will contribute to local and regional supply reliability, this would add another layer of potentially burdensome review that will likely impede progress as well as increase costs to the public. Agencies such as the district that have been successfully and proactively advancing local supply reliability and environment sustainability should not be subject to this process. The proposed regulations also state that water shall not be exported from, transferred through, or used in the Delta if one or more water suppliers that would receive this water has failed to adequately contribute to reduce reliance on the Delta and improve regional self-reliance. This requirement puts at risk a water wholesaler's ability to provide water supply reliability if one or more of its retailers is not fully compliant. The district is a wholesaler that provides water supply to 13 retailers over which it has no regulatory authority. Even if the district and the region as a whole comply with the policy, or even over-complies, the independent actions of a single water retailer over which the district has no control could reduce the reliability of 40 percent of Santa Clara County's water supply. A reduction or cessation of the district's imported supplies from the Delta consistent with this proposed regulation, could result in an over-drafting of the local groundwater basin, subsidence, and reduction in emergency supplies. This is an example of how the Council's regulation of local activities could result in unintended consequences that subvert the coequal goals.	A, O	Please see Master Response 4 for a response to the comment that the Council lacks authority to consider out-of-Delta actions when regulating in-Delta actions. Furthermore, the Council is required to determine the consistency of a proposed covered action with the Delta Plan and the coequal goals when it is appealed to the Council. The Council recognizes that there will be proposed covered actions that will provide benefits to one coequal goal and have significant adverse impacts on the other. Policy WR P1 is intended to address the situation where a proposed action in the Delta that may improve water supply reliability also has significant adverse impacts on the ecosystem. To determine whether the covered action should go forward despite the adverse environmental impacts, the Council requires that a consistency determination show that the water suppliers that are receiving the benefit of the proposed action, even if they are located outside of the Delta, have timely completed legally required UWMPs/AWMPs (as applicable) and have commenced implementation of the technically feasible cost effective measures identified in the UWMP/AWMP to reduce reliance on the Delta (consistent with the policy of the State). If the failure to complete one or more of these plans and to commence implementation of one or more of the identified actions is the primary reason for the need for the covered action, then the Council may determine that the proposed action is not consistent with the Delta Plan, with the ensuing consequences of that decision. The policy strongly promotes compliance with existing state water planning and implementation laws, and encourages all water suppliers to pro-actively implement responsible water management actions in order to avoid the scenario you describe. As a result, the Council has determined that additional changes to the policy at this time are not warranted.
189. (Public Hearing Transcript: pg. 37 lines 16-25 and pg. 38 line 1) Santa Clara	1/24/2013	Finally the proposed regulations exempt one-year transfers from the covered-action review process only until January 1st, 2015. One-year transfers are critical for meeting the districts dry year shortfalls in supply. This is an important and vital water management tool. It's time sensitive and could be at great risk if each transfer is subject to a review process. That may take up to 150 days. This would conflict with the coequal goal of improving water supply reliability. The council should continue to exempt one-year transfers from its covered-	DP	Single-year water transfers water transfers through December 31, 2016 are among the list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language would be more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of

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Valley Water District: Cindy Kao		action review process.		categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact. With respect to the Council's determination that single-year transfers will not have a significant impact on the coequal goals through December 31, 2016, the Council believes that water transfers contribute to California's water supply reliability. However, the Council also understands that in some cases, water transfers may have an adverse impact to the Delta's ecosystem, especially if these single year transfers are repeated over consecutive years as a means to circumvent the CEQA review process for multi-year (repeat) transfers. In order to provide time to evaluate the potential adverse impacts caused by repeated single year transfers, the Council proposes to provide a CEQA exemption from its covered action review process through January 1, 2016, at which time the exemption will sunset unless the Council acts to extend the exemption prior to the date. Until that time, there is no proposal to change or disrupt the current water transfer process. This review is consistent with WR R15 which recommends a stakeholder process to identify and recommend measures to reduce procedural and administrative impediments to water transfers and to address potential issues with recurring single year transfers.
190. (Public Hearing Transcript: pg. 39 lines 16-25 and pg. 40 lines 1-11) Central Delta Water Agency: Tom Zuckerman	1/24/2013	And my comments really are today that I think it's important that you consider those comments seriously. They make several suggestions for amendments to the regulations. They point out what we consider to be rather obvious inconsistencies between the proposed regulations and existing law. There are more or less self-cancelling provisions in your authorizing legislation and in those regulations. It talked about not being inconsistent with existing Water Rights Law in California and so forth and so on. Which render the regulations that you're proposing to adopt somewhat ambiguous. Because, as we point out, many of them are or appear to be directly inconsistent with laws that you purport not to be interfering with. And it's important that your actions be as clear as possible. I think the gentleman from East Bay MUD addressed more or less the same issue. And I think you need to go back through what you're proposing to do and make -- either declare your intention to be in conflict with the laws that we've sited in our comments, or correct your regulations so that they are not.	O	Comment similar to 1/14/13 comment period (Save the California Delta Alliance)
191. (Public Hearing Transcript: pg. 40 lines 12-25 and pg. 41 line 1-2) Central Delta Water Agency: Tom Zuckerman	1/24/2013	By and large, the other general criticism I think that we are making to put it into the context of super goal and all that is you appear to be running interference for some things that you purport not to be doing directly. And that is you're creating a blocking path for both the flow regulations that you anticipate getting from State Water Resources Control Board and the environmental proposals that you anticipate getting from the BDCP. I think both of those actions are really inappropriate here. The actions of the State Water Resources Control Board can stand on their own. The BDCP is going to have to stand on its own as well, and appears to be flailing around in that regard. So I realize it tends to make your plan or your regulations look a little bit more complete, but I think it's inappropriate the way you've approached that.	O	Comment similar to 1/14/13 comment period (Save the California Delta Alliance)
192. (Public Hearing Transcript: pg. 43 lines 20-25 and page 44 lines 1-16) San Luis and Delta-Mendota Water Authority	1/24/2013	The Water Authority explained in its written comments why the regulations proposed by the Council do not satisfy most of those criteria. Today I will not go into detail, but the detail was provided in the written comments. In the comments the Authority submitted, the Authority also raised concerns with the cost analysis that was prepared for the proposed regulations. And that cost analysis, too, is deficient. I wanted to highlight one point that we did make in our comments. The analysis suggests that the regulations do not add substantive requirements beyond what is already required under existing law. That assumption is not explicitly stated or supported by citation which is a legal deficiency in and of itself. But the assumption if made would render the regulations unlawful because of the necessity requirement established by the Administrative Procedure Act and OAL's administrations. Also, the assumption, if made, would be arbitrary. Given the expansion of the authority identified by the Water Authority in its comments and by the State Contractors in its	Ne	Comment similar to 1/14/13 comment period (City of Sacramento) Delta Plan policies are written to conform to existing laws, regulations, and policies. In many cases they do not add new requirements or costs on state or local agencies; never the less such policies serve two purposes. First, they add another consequence to state agencies that fail to conform to existing requirements – namely, that covered actions may not be consistent with the Delta Plan. Second, the Council believes that the Delta Plan policies work together to provide a comprehensive approach to Delta planning. The Delta Plan provides that comprehensive approach, and the adopted regulation incorporates the policies into

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		comments.		one consolidated, enforceable regulation.
193. (Public Hearing Transcript: pg. 47 lines 12-25 and pg. 48 lines 1-8) Local Agencies of the North Delta: Osha Meserve	1/24/2013	I just want to hit on two major concern areas that we have. In looking at the regulations that are being proposed, it looks like there are some repetition with other statutory definitions, and also conflicts with existing statutory and regulatory definitions. In particular, we're concerned about duplicating definitions that are already in CEQA and they're implementing regulations, and also conflicting with those same provisions. So like where as feasible as defined in the regulations is the same as in CEQA, significant impact is quite different and appears to have a quite lower threshold, and is quite confusing as well. Refers to a lot of other terms in CEQA that are interpreted over 40 years of Case Law baseline -- all the other things we work on in CEQA. And we've been raising this comment throughout the Delta Plan process. And I would urge Council for the district to look carefully at this issue and engage outside special council on CEQA to make sure we're not creating a lot more confusion than needs to occur with respect to these definitions and the regulations.	O	Comment similar to 1/14/13 comment period
194. (Public Hearing Transcript: pg. 49 lines 9-20) Local Agencies of the North Delta: Osha Meserve	1/24/2013	We're also concerned about the definitions of flood plan and floodway, and how those conflict with other definitions in the Central Valley Flood Plan and other places in the Water Code. There is also concern that it's not clearly described what the difference between routine maintenance and substantial rehabilitation of levees would be. We want to courage levee districts to do the maintenance that would reduce risk in the Delta and increase flood protection, to the extent that what we would consider to be routine maintenance becomes covered actions and becomes subject to a lot of additional analysis. It's going to make those projects infeasible.	O	The definition of floodway derives from the definition adopted by the Central Valley Flood Protection Board within Title 23, Division 1. Council staff has coordinated with CVFPB staff to ensure that definitions are correct and that regulations are not duplicative or unclear. These revisions will be reflected in the final rulemaking materials. Routine levee maintenance is exempt as a covered action, and should be distinct from substantial rehabilitation. The Council shall consult and coordinate with DWR on this issue should it arise.
195. (Public Hearing Transcript: pg. 49 lines 8-20) Local Agencies of the North Delta: Osha Meserve	1/24/2013	Also a lot of additional analysis to explain compliance with reduced reliance on the Delta for in-Delta water users, which as we've explained previously, in-Delta water users don't have any choice but to rely on Delta water. So we still don't agree with the policy, and then it's still got the same problem in the implementing regulation. And it would also create a lot of confusion because the rigs aren't clear that the smaller water districts, like under 25,000 acres, are clearly exempt from the water management plan requirements as in the Water Code. So, again, a clear pathway is not laid out for how the smaller districts are supposed to comply with reduced reliance provisions.	Ct	Comment similar to 1/14/13 comment period 1) In-Delta water suppliers affected by this section can demonstrate "reduced reliance on the Delta" by undertaking appropriate actions as defined in 5001 ~~5003~~ (c). 2) The Council believes the language of section 5001 ~~5003~~ (a) is clear that the regulation applies only to water suppliers. A definition of a water supplier is provided in section 5001 ~~5003~~ and is consistent with parties who are required to submit urban water and agricultural water management plans
196. (Public Hearing Transcript: pg. 40 lines 21-24) Local Agencies of the North Delta: Osha Meserve	1/24/2013	Additionally the floodplain restrictions for covered actions in the future are confusing and could lead to a lot of additional cost on what are already expensive projects. And that should be promoted.	Ct	Floodplain protection policy 5015 ~~5017~~ is intended to protect critical floodplains from encroachments that can have the potential to increase flood risk, as well as preclude the development of flood risk reduction measures, such as bypass development.
197. (Public Hearing Transcript: pg. 16 lines 16-25) Environmental Water Caucus: Nick DiCroce	1/24/2013	First of all, the covered actions are defined too narrowly. Under the definition of Section 5001, significant impacts is inappropriately defined as a change in baseline conditions. Rather than based on so-called baseline conditions, the definition we feel should be revised so that significant impact is measured as an absolute value. Without this change, there will be a large cross-section of actions with impacts on the coequal goals, which will be improperly excluded from covered actions under the Delta Plan.	O	The definition of a covered action has been provided by the Delta Reform Act of 2009 which was passed by the California state legislature. The Council does not have the authority to change the definition of a covered action.
198. (Public Hearing Transcript: pg. 17 lines 1-14) Environmental Water Caucus: Nick DiCroce	1/24/2013	(Reg: 5002 and 5003) Secondly, exemptions from the Delta Plan, Sections 5002 and 5003, exceed the statutory authority provided by the Delta Reform Act. The Delta Plan's coequal goals include economic and cultural values not contemplated by CEQA. Yet the draft regulations adopts the same exemption criteria as CEQA, but without CEQA's statutory basis for those exemptions. And impermissible conflating of the two statutes. CEQA exemption criteria may not be adopted by the proposed regulation without statutory authority, which it lacks. Likewise, statutory basis for the emergency exemption, 503, B2B is not contained in the Delta Reform Act, and therefore	A	Comment similar to 1/14/13 comment period (EWC)

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		should be no emergency exemption for compliance with the Delta Plan without adequate statutory authority.		
199. (Public Hearing Transcript: pg. 17 lines 15-22) Environmental Water Caucus: Nick DiCroce	1/24/2013	Exclusion of temporary water transfers, Section 5003, B2C. It is not stated why these transfers are excluded, as they would otherwise be covered actions under the Delta Plan. As we all know, temporary transfers can be very large, can reoccur for consecutive years, giving them the impact of a permanent transfer. This exemption for temporary transfers exceeds the statutory authority for the Delta Plan and should be removed.	A	Comment similar to 1/14/13 comment period (EWC)
200. (Public Hearing Transcript: pg. 17 lines 23-25 and pg. 18 lines 1-7) Environmental Water Caucus: Nick DiCroce	1/24/2013	Reduced reliance on the Delta, Section 5005, throughout the proposed regulation, but particularly in regard to reducing reliance on the Delta, a lack of measurable results, meaningful performance measures undermine the legitimacy of consistency determinations within the Delta Plan. Without quantifiable assessments in the consistency determination, the plan will not be legally enforceable. If the project does not make a quantifiable improvement in achieving the coequal goals, then it should not receive a consistency determination.	A	The Council disagrees that a legally enforceable plan means that a determination must be made that there is a quantifiable improvement in achieving the coequal goals or that this assessment is a requirement for a proposed covered action to receive a determination of consistency with the Delta Plan. The Delta Reform Act does require is that the Delta Plan "include quantified or otherwise measurable targets associated with achieving the objectives of the Delta Plan" and "where appropriate, utilize monitoring, data collection, and analysis for actions sufficient to determine progress toward meeting the quantified targets" as well as "describe the methods by which the council shall measure progress toward achieving the coequal goals" (Water Code section 85308 (b), (c) and (d)). The Delta Plan is a major planning document. These regulations are only a component of that document. The non-regulatory component of the Delta Plan specifies a quantifiable target for achieving the policy of the State of California to reduce reliance on the Delta and improving regional self-reliance. A draft version of section 5003 ~~5005~~ (a) had stated that success in achieving the statewide policy of reduced reliance on the Delta and improving regional self-reliance will be demonstrated through a significant reduction in the amount of water used, or the percentage of water used, from the Delta watershed. This language was deleted from section 5003 ~~5005~~ to avoid confusion in the implementation of this regulation. However, this language is one of the non-regulatory performance measures that the Council will use to evaluate the progress toward achieving the coequal goals and it was included in the non-regulatory portion of the Delta Plan, consistent with the requirements of the Delta Reform Act. With regard to section 5003 ~~5005~~, water suppliers can avoid a determination of inconsistency by having done the following: (A) Completed a current Urban or Agricultural Water Management Plan (Plan) which has been reviewed by the 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

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				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). Note that, to ensure that the Delta Plan includes provisions for data collection that will contribute to the assessment of progress toward meeting the quantifiable target, section 5003 ~~5005~~ (c) was revised to include the following language: "The expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance shall be reported in the (Agricultural or Urban Water Management) Plan as the reduction in the amount of water used, or in the percentage of water used, from the Delta watershed (emphasis added). For the purposes of reporting, water efficiency is considered a new source of water supply, consistent with Water Code section 1011(a)
201. (Public Hearing Transcript: pg. 18 lines 8-14) Environmental Water Caucus: Nick DiCroce	1/24/2013	Violations of CEQA and Public Trust Documents, Section 5005 E. The regulation including calling for improved Delta conveyance and operations and optimized versions in what years cannot be lawfully adopted, because there has been a failure to comply with CEQA for all the reasons set forth in our comments pertaining to the recirculated PEIR.	A	Comment similar to 1/14/13 comment period
202. (Public Hearing Transcript: pg. 54 lines 23 to 25 and pg. 55 lines 1-22) Metropolitan Water District of Southern California	1/24/2013	I wanted to make a few comments about the Reduced Reliance Policy, about proposed policy 5005. Within that policy, the Council gives itself broad discretion to review and judge local water management decisions outside the legally defined Delta. It also expands State Law in calling for an implementation of urban water management plans and agricultural management plans. Something that is not currently called for in State Law. It expands State Law by calling for an ambiguous, yet-to-be-defined provision that will go into 2015 urban water management plans and agricultural water management plans in the future. We believe that is an expansion -- that is outside the authority that was granted the Council to act. We believe that's true from the plain language of the act. But we also have in the detailed comments from the State Water Contractors on the San Luis and Delta-Mendota Water Authority detailed comments looking at the legislative history. And that legislative history looks at previous versions of the act; it looks at quotes from the sponsor of the different provisions of the Delta Reform Act, and has quotes from those sponsors, looking at the detailed provisions of even just the reduced reliance policy. So I urge you to review those.	A	Comment similar to 1/14/13 comment period (EWC)
203. (Public Hearing Transcript: pg. 19 lines 7-14) Environmental Water Caucus: Nick DiCroce	1/24/2013	Updated flow objectives, Section 5007. The Delta Reform Act does not require that the Delta Stewardship Council direct, manage, or provide guidance to the State Water Board setting of Delta flow requirements. Rather the Delta Reform Act requires the State Water Board update the Delta flow objective consistent with the Public Trust Doctrine based on recommendations from the Department of Fish and Wildlife, which is part of State Water Code. To emphasize the point, the Delta Reform Act clearly states that nothing in this division expands or otherwise alters the State Water Board's existing authority to regulate the diversion and use of water. And furthermore, the act does not affect the Public Trust Doctrine. As a result, the Council has no authority to propose a regulation that guides or places any condition on the State Water Board setting of Delta flow requirements. Instead, the State Water Board is required to submit its flow criteria determination pursuant to this section to the Council. Further, to the extent of this section of the proposed regulation purports to set out criteria to determine whether the Board's Delta flow requirements are consistent with the regulatory policies of the Delta Plan. It is plainly contrary to the scope of the act. This section exceeds the scope of the enabling statute and should be	A	The regulation now simply requires consistency with existing flow objectives already adopted by the State Water Resources Control Board. The language the comment found objectionable is no longer in the regulation and is instead in the Delta Plan as a recommendation. Sections (a) and (b) were deleted from the adopted regulations. They are now in the Delta Plan as a recommendation. Proposed section 5005 ~~5007~~ was changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan. (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and section 5001

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		removed. And finally, and perhaps most critically, the Delta Reform Act does not allow the Water Board to set Delta flows that are necessary to achieve the coequal goals. As stated in Section 5007, rather the Delta Reform Act and judicial precedent require the Board to set such goals consistent with the Public Trust Doctrine and the coequal goals are not synonymous with the protection of Public Trust resource. As written, this section perverts the expressed language of the Delta Reform Act regarding the Board's duty to abide by the Public Trust Doctrine when setting Delta flows, and should either be removed or modified.		~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (a~~c~~) covers a proposed action that could significantly affect flow in the Delta.
204. (Public Hearing Transcript: pg. 13 lines 21-25 and pg. 14 lines 1-21) Save the California Delta Alliance: Jan McCleery	1/24/2013	Lastly, Save the California Delta Alliance submitted a formal set of comments in response to the notice of proposed rulemaking Delta Plan. As detailed in that document, we respectfully request that revisions be made to the regulations. To look ahead and prepare for the time when the BDCP will come before the Council. One area where the Council will be hard pressed to review the BDCP with the current state of the Delta Plan is alternative. Various alternatives have been proposed, including Dr. Pike's concept for a new intake at Sherman Island, or restructuring the current location with state of the art fish screens. Or better still, options which avoid removing additional water from the Delta by leveraging the million-acre feed of water now diverted into the flood control structures on the Sacramento River north of the proposed point of diversion. Water which never flows through the Delta or south, the Two Layer Lake Basin Restoration Proposals or desalinization to improve regional self-sufficiency. We understand the position the Council has taken concerning the BDCP. But the BDCP is focused on only one alternative, exporting more water from the Delta than is currently exported. Which will increase salinity and deteriorate our water quality. We think that the Council can and should evaluate the merits and the feasibility of the various option. We need a bigger picture approach to the Delta Plan. Our home value depends on it; our economy depends on it; our community depends on it.	DP	Comment similar to 1/14/13 comment period Appendix ~~B~~D, pages 5-9 and Appendix ~~C~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.
205. (Public Hearing Transcript: pg. 55 lines 23-25 to pg. 59 line 1) Metropolitan Water District of Southern California: Brenda Burman	1/24/2013	Outside of the authority issue, the Office of Administrative Law also calls for new regulations to be clear, to be concise, to be understandable. To not be duplicative. I believe the Reduced Reliance Policy also fails on this. This provision -- the provision is confusing. So it starts off with a definition of success. The definition of success is: A significant reduction of water use in the Delta, water use from the Delta, or a significant reduction in the percentage of water use. Outside of this, I'd like to say that Metropolitan itself has dedicated itself to this goal before it was written by the Council. And that Metropolitan has pledged that all future expanded increased water demands will be met by local conservation by recycling. It won't be met by increased use from the Delta. But looking at the statute itself and getting away from where Metropolitan will be, the definition says this is what you should do. But we were assured back in July -- and I believe in July it wasn't part of the policy. It was sort of lead-in language that went into the policy. Now it's part of the policy. But we were assured in July, other contractors were assured, that's not our goal here. We're not mandating reduced supply, we're not mandating reduced percentage and supply. What we're mandating are these three things. And these three things are: You have to tell us you've done your urban or agricultural management plan if the law says you have to do one. You have to implement every part of that plan if it's feasible, if it's cost effective, if it's in your timeline. And you have to, by 2015, add a provision which we'll figure out later. When it does that, you are saying that the definition of success is not part of what we're telling you to do right now. But when you look at the initial statement of reasons in the OAL package it says that you are mandating reductions in water use. And I think that's confusing to those of us who are looking at the policies saying, "What is it supposed to accomplish? Is it really just supposed to accomplish a lot of water reporting? A lot of reporting on successes for Metropolitan?" We could talk about billions of dollars spent on conservation and recycling and	A, Ct	Comment similar to 1/14/13 comment period

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		storage over the last 20 years. Some other agencies have similar stories about huge successes with recycling, with groundwater recovery, with efficiency projects. And we are not concerned with kind of our ability to show off the successes of Southern California. But I am confused that you have a legal problem here. And that you have a legal problem with what authorities you're asserting. And you have a legal problem just with trying to tell people what they're supposed to do. Having confusing language.		
206. (Public Hearing Transcript: pg. 49 line 25 and pg. 50 lines 1-3) Local Agencies of the North Delta: Osha Meserve	1/24/2013	So the cost analysis, we are concerned that it minimizes the cost of the implementing the regulations in the Delta. And that it should be revised to more clearly reflect what the actual cost will be.	E	Comment similar to 1/14/13 comment period Delta Plan policies are written to conform to existing laws, regulations, and policies. In many cases they do not add new requirements or costs on state or local agencies; never the less such policies serve two purposes. First, they add another consequence to state agencies that fail to conform to existing requirements – namely, that covered actions may not be consistent with the Delta Plan. Second, the Council believes that the Delta Plan policies work together to provide a comprehensive approach to Delta planning. The Delta Plan provides that comprehensive approach, and the adopted regulation incorporates the policies into one consolidated, enforceable regulation.
207. (Public Hearing Transcript: pg. 60 lines 1-25 to pg. 62 lines 1-6) North Delta Water Agency and California Central Valley Flood Control	1/24/2013	But one thing we did not comment that the land folks did, which I agree with their comments, is on the cost analysis for the proposed Delta Plan regulations. The costs that are talked about on these are quite extensive. And you're talking 5.4 million to 25 million per mile. That was for the 200-year protection. It's 300,000 per mile for the levees. And part of the comparison that was used in this cost analysis mentions a lot of projects. There's a whole grid on page A1. Those are all urban districts. And I think -- the concern here is I think there's a real misunderstanding about the budgets that Delta Reclamation Delta District has compared to an urban district. So the cost associated with just trying to provide the analysis to show that they can't do a setback levee for whatever reason may exist on that island is really concerning because of their budgets. You'll have the unintended consequence of them not being able to do these levee improvements, these rehabilitation and improvement projects. So I don't think that is your intention, and of course it goes against the statutes to of course protect people from flood and protect the Delta as a place. They also have -- and you can say, "Okay. Melinda, they can go assess those people." There aren't a lot of people in some of these islands. So they're assessment capacity only has a certain point. So, again, if you make these costs so prohibitive, they can't do the project. And we will see a halt to a lot of these projects. And I've said this before, but that's concerning, particularly right now, when we still have prop 1E money and prop 84 money that these districts can use to do some levee improvements to keep up with sea level rise and other things that are affecting the levees. In addition, the setback is in the rags as being talked about for widening the flood plan and expanding Hyperion habitat. Those are benefits to the broader public, if you will, and not just to the island. And those are protected by those levees. So there is a broader public good here, yet the cost burden is really being born only by those people in order to provide that greater good. In particular, the habitat improvements that could be made, a lot of the habitat that is being talked about being done is being done in order to either allow the south Delta pumps to continue to have their ESA protections. That's some of the requirements they have under their bi-ops to do additional habitat. And then the BDCP of course is an HCP. That again is to allow them to continue to have ESA take for their south Delta pumps as well as for new north Delta pumps. So it wouldn't be fair and it doesn't seem appropriate for, again, a local area with their levees to them to be providing a benefit that would accrue to others outside of this area.	E	The commenter is concerned that the regulation would impose an excessive cost burden on local agencies for levee setback evaluations and implementation. The proposed regulation provides for the local or state agency to assess the feasibility of setback levees, and that assessment can include economic feasibility. Economic factors including financial capacity are considerations the local agency would use to self-determine whether the setback levee (or other habitat improvement) is feasible (see definition of "feasible" in section 5001). The feasibility evaluation costs presented in the Cost Analysis are based on a full feasibility assessment. If clear determination is made prior to undertaking a full feasibility assessment that an agency is financially incapable of such an undertaking, the feasibility evaluation cost estimate would be significantly reduced. The cost estimates of setback levees in Table A-3 of the Cost Analysis are identified as example costs, and vary widely according to conditions. In any case, those would be incurred only if such a levee is found to be feasible. A comparison of local costs and financial burden to local benefits may indicate the setback levee would be infeasible without outside (for example, state or federal) funding. In response to comments, regulatory requirements have been modified to reduce the cost burden. The applicability of evaluation of setback levees (section 5010 ~~5008~~) has been substantially narrowed. This change is reflected in the revised Cost Analysis.

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1.1	California Central Valley Flood Control Association	1/24/2013	In closing, we strongly encourage the Council to investigate the annual budgets of Delta Reclamation Districts, evaluate the financial impact to Delta RDs/landowners to comply with additional costs of this regulatory package, compare the costs identified in the Cost Analysis with the total value of each Delta island, and to consider amending the regulations to address the cost concerns we have raised. We also reaffirm our commitment to work with the Council to revise the regulations to ensure they are clear, concise, legally enforceable and financially feasible by the entities/persons upon which they are imposed.	E	Comment noted. See also responses to specific comments from this commenter regarding section 5010, section 5015, and the Economic and Fiscal Impact Statement.
2.1	Contra Costa Water District	1/11/2013	[Commenter included as an attachment the study "Historical Fresh Water and Salinity Conditions in the Western Sacramento-San Joaquin Delta and Suisun Bay" by the Contra Costa Water District Water Resources Dept., presented at the Delta Flow Criteria Informational Proceeding Before the State Water Resources Control Board on March 22, 2010]		Comment and information noted.
3.1	Environmental Water Caucus	1/24/2013	To summarize, EWC believes that the proposed regulation does not satisfy the mandate to carry out a legally enforceable Delta plan that protects the co-equal goals as set forth in the Delta Reform Act. Instead, the Proposed Regulation *excludes actions that should be classified as covered actions and includes policies that fall outside of the regulation's enabling statute.*	A, O	Comment noted. This is a summary of other comments - see responses to specific comments from this commenter below.
4.1	Environmental Water Caucus	1/24/2013	Separately, because the DSC is a trustee agency, the Proposed Regulation must require the Council to consider whether a covered action is consistent with the public trust doctrine **and make a consistency determination on that basis**. The Council **must** make a consistency determination—this is a ministerial duty which the DSC must fulfil when judging a covered action. The Proposed Regulation's failure to include a public trust consistency determination as a component of judging a covered action violates the public trust doctrine and associated case law on its face.	O	The Council's regulations—as well as the Delta Reform Act itself—do, in part, reflect the public trust doctrine. For example, section 5003 ~~5005~~ promotes water use conservation and efficiency to reduce the strain on Delta resources. The Council does not, however, agree that the Delta Reform Act requires the Council to adopt a regulation mandating that agencies engage in a "public trust analysis" before proceeding with a covered action.
5.1	Friends of the River	1/11/2013	Please include the attached three documents in the Administrative Record in your CEQA proceedings on the Final Draft Delta Plan and RDPEIR. These three documents have been or are being referred to in the written comments of the Environmental Water Caucus and/or Friends of the River and are as follows: **Release and Report in Brief,** National Academy of Sciences, A Review of the Use of Science and Adaptive Management in California's Draft Bay Delta Conservation Plan (May 5, 2011); **Eberhardt School of Business Forecasting Center**, Benefit-Cost Analysis of Delta Water Conveyance Tunnels (July 12, 2012); **California Natural Resources Agency,** Gov. Brown and Obama Administration Outline Path Forward for Bay Delta Conservation Plan, "The elements of a preferred proposal include the construction of water intake facilities with a total capacity of 9000 cubic feet per second... and a conveyance designed to use gravity flow..." (July 25, 2012) [All listed articles are attached. Commenter also attached a letter dated 1/11/2013 containing comments on the Final Draft Delta Plan, RDPEIR, and Proposed Delta Plan Rulemaking Package, previously submitted to the Delta Stewardship Council]		*Delta Plan comments and comments on the RDPEIR are addressed separately.
6.1	Individual (Conover)	1/24/2013	As an overview of issues we are concerned that adoption of the proposed Final Delta Plan will disproportionately impact certain agricultural properties, and would like them exempted from the Plan, based on both science and economics. In particular, Appendix 5, Recommended Areas for Prioritization and Implementation of Habitat Restoration. Figure 5-/ designates a large zone North of the Cosumnes-Mokelumne Confluence which covers the entire farming operation of John McCormack Company at Glannvale (erroneously labeled Glanville on maps) including hundred-year old pear orchards, as well as other property owners' vineyards within our block and across Twin Cities Road to the North. We have enclosed an expanded zoom view map transcribed by hand from your very high altitude Figure 5-/, down into greater detail to show relevant reference features. Also, expansion of Delta Meadows Park along Snodgrass Slough to the West, related levee use conversions could adversely impact our operations. Our packinghouse and roads for access between our fully mature orchards could be impacted.	DP	Impacts to existing land uses are addressed in the EIR for the Delta Plan. The map in Appendix 5 relates to section 5007 ~~5009~~, Protect Opportunities to Restore Habitat. Potential effects on existing land uses from this section would occur only if a covered action were proposed within the designated area. Criteria for an action to be a covered action include that the action would "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". Only If a project at an existing farming operation qualified as a covered action, would the action need to comply with section 5007 ~~5009.~~ Council staff would provide consultation to help identify appropriate mitigation.
7.1	Individual (Conover)	1/24/2013	We do not understand how the Rule-making authorizing this to be a "Final Plan" can be legitimate when there is so much that is still unknown within the "Best Available Science," including economic science. It seems to have	Nr	The Legislature directed that an enforceable Delta Plan be developed that incorporates the concepts of Best Available Science and Adaptive Management,

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			been accelerated on the fast track, with the minimal number of public hearings and shortest legally allowable review times after the proposed Final Plan was announced this fall. We still do not know how much water is needed for in-stream beneficial uses, such as endangered species like salmon, nor how much is likely to be available, nor its timing. That is crucial for determining how much might be available for agriculture. Final adoption and rulemaking should be delayed, and the lands North of the Cosumnes Mokelumne Confluence should be removed from consideration as habitat restoration areas. They are already in use for the protected agricultural priority for creating jobs and contributing to the State economy, core to the strategy of economic impact mitigation. [Commenter attached a map and photos]		recognizing that much will continue to be learned. The Council disagrees that this process has been "fast-tracked". The proposed regulation implements the policies developed as part of the Delta Plan, which has undergone extensive public input and review over a more than 2-year period. Delaying adoption and implementation of the Delta Plan and the regulation would allow continued uncertainty in water supply reliability and continued deterioration of the Delta's ecosystem. The specific areas included for protection or restoration was identified as part of that process. . Potential effects on existing land uses would occur only if a covered action were proposed within a designated area. Criteria for an action to be a covered action include that the action would "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". Only If a project at an existing farming operation qualified as a covered action, would the action need to comply.
8.1	Individual (McCleery)	1/24/2013	Lastly, Save the California Delta Alliance submitted a formal set of comments in response to the Notice of Proposed Rulemaking Delta Plan. As detailed in that document, we respectfully request that revisions be made to the regulations to look ahead and prepare for the time when the BDCP will come before the Council. One area where the Council will be hard pressed to review the BDCP with the current state of the Delta Plan is Alternatives. Various alternatives have been proposed including Dr. Pyke's concept for a new intake at Sherman Island or restructuring the current location with state-of-the-art fish screens. Or better still, options which avoid removing additional water from the Delta by leveraging the millions of acre feet of water now diverted into the flood control structures on the Sacramento River north of the proposed point of diversion, the Tulare Lake Basin Restoration proposals, or desalinization to improve regional self-sufficiency. We understand the position the Council has taken concerning the BDCP, but the BDCP is focused on only one alternative - exporting more water from the Delta than is currently exported which will increase salinity and deteriorate our water quality. We think the Council can and should evaluate the merits and feasibility of various options.	DP, Nr	Analysis of Delta conveyance alternatives would be assessed as part of the BDCP. Appendix B, pages 5-9 and Appendix G provide a discussion of the Council's role in California's water supply conveyance facilities and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.
9.1	Individual (Public Hearing Transcript 1/11/13) pg. 19 line 25 and pg. 26 lines 1-25) President Central Valley Flood Protection: William H. Edgar	1/11/2013	But getting back to the subject at hand, which is the Delta Stewardship Council's proposed regulations, we had, for the board -- the new board, we had our presentation given by the staff yesterday. It raised some concerns about regarding the regulations, namely inconsistencies. This was in the staff report. And I don't know whether this is true or not, we haven't had time to really look at it. But raises a lot of concerns regarding the regulations, inconsistencies between boards, Central Valley Flood Protection, Title 23 Regulations, and those proposed by the Stewardship Council staff. Overlapping responsibilities and the need for a jurisdictional authority between board and council, and inconsistencies with existing state laws and regulations, and the need for definitional clarity was raised. So after some discussion at the board meeting yesterday, and I believe Tim Ramirez can correct me if I'm wrong, that the Board did not believe that the legal council had the appropriate time to analyze our staff comments, nor has the Board had an opportunity to properly consider the issues raised. DWR's legal council was at the meeting and expressed some concerns about these kinds of issues. And they will be submitting comments to you by your deadline, and probably be making appearance at your public meeting on the 24th is what we're told.	Co	Comment Noted. Central Valley Flood Control Board (CVFPB) followed up with a letter and DSC staff has coordinated with CVFPB staff to ensure that definitions are correct and that regulations are not duplicative or unclear. These revisions are incorporated into the revised proposed regulation, including definitions in section 5001 related to floods and the Central Valley Flood Protection Board, and to sections 5012 (~~5014~~) through 5015 (~~5017~~) Also, see Master Response MR10 regarding a potential conflict or overlap of authority with the Central Valley Flood Protection Board.
10.1	Individual (Public Hearing Transcript 1/11/13: pg. 21 lines 1-25 and pg. 22 lines 1-17) President Central Valley	1/11/2013	So now some of the Board members and staff have asked that I ask you for a continuance or postponement of the deadline for comments. I'm not going to do that. Because I don't think you'll grant it, No. 1. And No. 2, I'm not sure you should. When our friend Melinda Terry asked us whether we would grant an extension for the Flood Plan decision, we said no. And the reason we said no is because we were up against the statutory deadline and a lot of pressure to get it adopted and so on. And I'm sure that's what the situation is. So I'm not going to ask for an extension. But we are going to ask for the ability -- and I think your staff has already offered that ability to work with the Board and try to: No. 1, work out these alleged inconsistencies or issues that have been identified by some of the attorneys.	O	Comment Noted. Central Valley Flood Control Board (CVFPB) followed up with a letter and DSC staff has coordinated with CVFPB staff to ensure that definitions are correct and that regulations are not duplicative or unclear. These revisions are incorporated into the revised proposed regulation, including definitions in section 5001 related to floods and the Central Valley Flood Protection Board, and to sections 5012 (~~5014~~) through 5015 (~~5017~~) Also, see Master Response MR10 regarding a potential conflict or overlap of authority with the Central Valley Flood Protection Board.

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	Flood Protection: William H. Edgar		And to that end, we are going to submit kind of a general letter by your deadline outlining some of the issues that we see on the regulations. We will establish a Board Committee to accompany our staff so that the Board is more up to speed on these issues. And we'll try to get them resolved in more of a face-to-face discussion and meetings, rather than everybody lawyering up and -- you know -- slugging it out. Because I don't think that's going to help anybody. So that's what we're proposing to do, and we'll then hopefully followup with a more detailed letter and so on. And we'd request your -- that you consider the comments and suggestions, and you work with us to see if we can make these things work out. And frankly, you're going to get a lot of comments on these kinds of issues. "Well, wait a minute, the Flood Board says -- the Title 23 Flood Boards says this, and yours says this." You're going to get a lot of that I'm sure from DWR, and a little bit from us. But quite frankly, we're not as far along as they are. They've been working on this for some time. On existing authorities of overlap of responsibilities and all of that is going to come before you. And those issues really need to be worked out and resolved, I think, on face-to-face examples.		
11.1	Individual (Public Hearing Transcript 1/11/13) pg. 22 line 18 to pg. 26 line 19) President Central Valley Flood Protection: William H. Edgar	1/11/2013	But I'm less interested in that as I am process. How is all this going to work? For example, we have authority over permitting encroachments on levees, project levees defined by the system. That's what we do. We also enforce encroachments. Not doing a great job with that, but that's what we're supposed to be doing. And so the question is, how -- if somebody comes in, makes a permit application to us to do some improvements, minor improvements, major improvements, whatever they are, to the levees. Or in the case of we found one encroachment in Cash Creek where a person actually dug into the levee and put in a wine cellar. MR. ISENBERG: Probably pretty cool. MR. EDGAR: We've got to do a better in enforcing those kinds of things. But the fact of the matter is, people don't get it. I mean, these are our first lines of public safety. You don't put wine cellars in the levees, and you don't put swimming pools in the levees. We -- just anecdotally, we took a look at a little pocket here. And what's the -- MR. ISENBERG: Not far from what Mr. Edgar, himself, lives. MR. EDGAR: I know. But what's the universe of the problem? We don't even know. We don't know what the encroachment problem is. We don't have a database, we don't have a map. I mean, we just don't know. And that's going to take a lot of work to figure out. But anecdotally, in six miles of the pocket area, just an example, there were 23 swimming pools. Many of which were encroaching into the clearance area. Some of which were actually embedded into the levees. Now, I guess if you keep the swimming pool filled, it would be okay. But you know how that works. So anyway, there's a lot of problems here. And I'm interested in somebody coming in, asking us for a permit, or we're required to enforce an encroachment in the Delta. How does that work exactly? Somebody submits a permit to us, we review it and we -- I guess we would send it on to you to make a finding of compliance with the Delta Plan, and then -- MR. ISENBERG: Mr. Edgar, I'd like to renew a suggestion we made long before you and Mr. Ramirez were appointed to the Board. One of your other current Board members, Mr. Valine and staff had come over and visited and we had mentioned that we had already entered into memorandums of agreement with the Bay Delta Conservation Commission and what is now called the Department of Fish and Wildlife of the State of California, essentially setting up a process of review and contact and evaluation. And we kind of generally made that offer both to the Board, but also to other state agencies and even local agencies. I think there is a lot to be said for that approach for your consideration. MR. EDGAR: Yeah. You have offered that, as I understand it from the staff. We have taken a look at that. It has to be a lot more specific as to describing the process. The title twenty -- you know me. I'm a city manager. I need to know how things are going to work, Phil. I mean, this stuff of policy and planning is fine. But tell me how it's going to work. Somebody comes in for an application, you go through the process -- which people hate, by the way. They think it's too long. They think it's onerous. And we're proposing that we charge for it. I've never heard	O	Comment noted. Central Valley Flood Control Board (CVFPB) followed up with a letter and DSC staff has coordinated with CVFPB staff to ensure that definitions are correct and that regulations are not duplicative or unclear. These revisions are incorporated into the revised proposed regulation, including definitions in section 5001 related to floods and the Central Valley Flood Protection Board, and to sections 5012 (~~5014~~) through 5015 (~~5017~~) CVFPB's permit actions are not covered actions, because they are regulatory actions of a state agency. (See Wat. Code § 85057.5(b)(1).) Rather, another state or local agency that proposes to undertake the action, such as a local agency that plans to approve the project, will need to submit a certification to the Council if the action meets the conditions of a covered action. (See Wat. Code §§ 85057.5 and 85225.) Also, see Master Response MR10 regarding a potential conflict or overlap of authority with the Central Valley Flood Protection Board.

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			of a system where you get free -- where you never collect a fee for a permit. We never did that at the city for heaven's sake. You come in and you pay for it. MR. ISENBERG: Never? MR. EDGAR: Never. Well, we shouldn't, anyway. It's a time process and they hate the whole thing. I think the memorandum agreement has to be done. We were told this morning that's kind of where everybody is going. They need to get together on these. They have to begin to manage horizontally, not vertically. That's exactly what we need to do. But still, this process, to me, is going to add time. And which will drive everybody crazy. So we need to do something to fix that. MR. ISENBERG: Even before the new members of the Board were appointed, I never thought there were fundamental barriers between council's activity, the new legislation that created us and gave us our duties, and the Flood Board. It just seems to me that they're compatible. You do, however, have a geographical range of activity up and down the Central Valley that is outside our statutory directed area. And conversely, we have territory that's not within the Flood Board's kind of thing. The heritage of government setting up multiple agencies to do similar kinds of things. So I'm confident that we can resolve some issues. And we've benefitted from the letters that have actually cranked out of the Flood Board in 2011 and 2012 on the plan, the environmental impact report and so on. MR. EDGAR: Yeah. As I said, I think those problems can be worked out, Phil. I'm interested in process. The Title 23, specific -- is very specific. And I know Chris has looked at those -- both Chrises -- and always looked at Title 23. Very specific as to what's required and so on. And we'll have to get in that kind of detail to deal with this, I believe. And we need to do that.		
12.1	Individual (Public Hearing Transcript 1/11/13: pg. 36 line 12 to pg. 38 line 1) Environmental Water Caucus: Bob Wright	1/11/2013	The next subject I'd like to spend a moment on is just the backwards description of the project purpose and conflict with the Water Code. Your recirculated environmental impact report claims that the revised project will lead to reduced reliance on Delta exports. That's in the executive summary at page 2. Your plan at page 72 admits that the Delta Reform Act established a new policy in the Water Code of reducing reliance on the Delta and in meeting California's water supply needs. So we can understand why the claim is made. But when you look at the undisputed facts, when you talk about creating massive new conveyance and intake structures that are projected to cost around $14-billion, that isn't reducing reliance on the Delta. That's increasing it. That's a huge expensive Public Work's Project. And what we call upon you to do is either, well, drop the call for new conveyance, improve conveyance, anything other than maintaining existing through-Delta conveyance. Or require your EIR consultants and repairs to candidly set forth that this would not reduce reliance on the Delta. The truth is this would increase reliance on the Delta. And that's what we call upon you to do. Is either drop it -- that's our first choice. But if you don't drop it, require candor and serve the people and all of the folks involved in this and interested in it with a really candid admission. Because that's the kind of thing that nobody is really going to buy that. It's just kind of like if I was to claim right now that it's nighttime outside. Well, it's not. It's daytime. Anybody can say that, but it doesn't make it so. And in fact in your recirculated environmental document in section 24 at pages 13 and 14, there that sets out that when you use resources, you make a large commitment of resources, that makes removal or nonuse therefore unlikely and generally commits future generations to similar uses. So in other words, if you build it, it's going to be used. And that's going to be increasing reliance on the Delta, not reducing.	Co	The adopted regulation does not authorize or approve conveyance associated with BDCP. The proposed BDCP is a reasonably foreseeable future project that is not part of the Delta Plan. It is being evaluated by the Department of Water Resources as the CEQA lead agency. The cumulative impacts of the proposed Delta Plan, in combination with the impacts of the proposed BDCP, are described in EIR Sections 22 and 23. Comments on the RDPEIR are addressed in more detail separately in the Final PEIR.
13.1	Individual (Public Hearing Transcript 1/11/13: pg. 42 line 22 to pg. 43 to line 10) Environmental Water Caucus:	1/11/2013	What I'm telling you is that by proceeding now to adopt the Delta Plan and regulations calling for new conveyance, since that work that they thought was going to be done didn't get done, the process kind of would stand indicted and convicted by your own draft EIR. And that's a pretty serious problem. Again, our point is that some public agency has to do this work under SEQUA, the Public Trust Doctrine, before new conveyance is called for. That's the most important part of the whole decision making process. Whether or not to build or not to build. To build or not to build new conveyance. That's huge, and that's what has simply been absolutely overlooked; just treated as a given, an ipse dixit or an assumption.	O	Comment continued from previous comment above. See response above.

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	Bob Wright				
14.1	Individual (Public Hearing Transcript 1/11/13: pg. 47 lines 4-11) Environmental Water Caucus: Bob Wright	1/11/2013	I would simply wrap up and conclude by saying that the first step in this whole deal is whether to call for new conveyance. That's a huge deal. That's on your plate. What we do is we object to approval of the plan and regulations in so far as they call for new conveyance, optimizing diversions, improve conveyance, and say that it's necessary to do the work, do the analysis before calling for that.	O	Comment continued from previous comment above. See response above.
15.1	Individual (Public Hearing Transcript 1/11/13: pg. 58 line 21 to pg. 59 line 4) RCRC: Kathy Mannion	1/11/2013	This first set of comments is regarding the final draft Delta Plan. The Delta Plan policies and recommendations WRP-1, which is reduced reliance on the Delta and improved self-reliance. What we've done is provide language that would clarify the intent of WRP-1 by indicating that you're referring to urban and agricultural water suppliers who propose to undertake a current action. And we believe that clarification is needed so not to confuse a reader as to the scope of the council's authority.	A, Ct	***Delta Plan comments are addressed separately.** WRP-1 is incorporated as section 5003 (~~5005~~) of the proposed regulation. The Council agrees that the section applies to agricultural and urban water suppliers who propose a covered action. This section was revised in response to comments received, and Council believes the revised section is clear on this point.
16.1	Individual (Public Hearing Transcript 1/11/13: pg. 59 lines 5-16) RCRC: Kathy Mannion	1/11/2013	Our second comment was on page Roman Numeral 18. Again, Delta policies and recommendations WRP-1 update Delta flow in that we indicated to the council that we believe the language is confusing in that it includes ERP-1, which is a regulatory policy. And the council's recommendation that the State Water Board take certain actions by specified stakes. We indicate that we believe ERP-1 should be limited to that which is within the authority of the council and that would be that the council would utilize the existing flow objective to determine consistency with the Delta Plan, until such time as the Water Board may revise the flow objectives.	A, Ct	The comment is addressing section 5005 (~~5007~~) of the proposed regulation, Delta Flow Objectives. The proposed regulation was revised in response to comments
17.1	Individual (Public Hearing Transcript 1/11/13: pg. 59 line 20 to pg. 60 line 6) RCRC: Kathy Mannion	1/11/2013	On page 59 lines 13 through 17 dealing with covered actions, consistency appeals, chapter 2 of the Delta Plan. This is in regards to the appeals. We believe that given that the council is charged with making the determination of consistency, allowing a member of the council or a staff member to file an appeal raises a variety of questions. And we would recommend that the plan, in order to maintain the objectivity of the plan, should instead specifically state that the members of the council and the staff may not file an appeal in regards to the certification of the consistency. You can see the issue there.	DP	***Delta Plan comments are addressed separately.** The appeal procedures discussed in the Delta Plan are not part of the proposed regulation. See Master Response MR-2.
18.1	Individual (Public Hearing Transcript 1/11/13: pg. 62 line 24 to pg. 63 line 8) RCRC: Kathy Mannion	1/11/2013	Then as to the notice of proposed rule making we have indicated in our previous letters concern in regards to the lack of clarity in the Delta Plan, and that that could have been flow over to the regulations. And I believe that we have seen that as a result of the Delta Plan language itself. And the crux of the problem we've identified is the co-mingling of the Delta Plan regulatory policy with Delta Plan recommendations. In the proposed regulations. And we've provided several examples.	Nr	This is an introductory summary comment. See responses to specific comments from this commenter.
19.1	Individual (Public Hearing Transcript 1/11/13: pg. 63 lines 9-14) RCRC: Kathy Mannion	1/11/2013	The first example is the co-mingling that can be found in the definition of achieving the coequal goals of providing a more reliable water supply in California. And then just as an example, we find the definition of WRP-1, which is a regulatory policy, and WRR-1 and WRR-4, both of which are contained in the Delta Plan as recommendations.	O	WR P1 is incorporated as section 5003 (~~5005~~) of the adopted regulation. Section 5001(h~~e~~)(1) defines terminology used in section 5003 (~~5005~~).
20.1	Individual	1/11/2013	[Commenter attached 2 maps:		Comment attachments Noted.

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	(Wilson)		Oil, Gas, and Geothermal Fields in California 2001 Additional map called Oil-Gas]		
21.1	Local Agencies of the North Delta	1/24/2013	Re: Additional Comments on Proposed Rulemaking Package Local Agencies of the North Delta ("LAND")1 previously submitted comments on the Rulemaking Package and Economic Analysis in a letter dated January 14, 2013. These comments supplement those previous comments. Our concern is that the proposed regulations are not easily understandable, have insufficient rationale, and are not the least burdensome, effective alternative. Moreover, the proposed regulations are both duplicative of, and inconsistent with, other statutory and regulatory authority. Last, the economic analysis of the Rulemaking Package is incomplete and misleading as to the economic costs to local communities and districts in particular. For these reasons, LAND requests that the Council revise the Rulemaking Package to conform with applicable requirements prior to submittal to the Office of Administrative Law. (1 footnote: 1 LAND is a coalition comprised of reclamation and water districts covering about 90,000 acres in the northern geographic area of the Delta. LAND participants include: Reclamation Districts 3, 150, 307, 317, 407, 551, 554, 755, 813, 999, 1002, 2067 and the Brannon-Andrus Levee Maintenance District. Some of these agencies provide both water delivery and drainage services, while others only provide drainage services. These districts also assist in the maintenance of the levees that provide flood protection to homes and farms.)	O, E	Delta Plan policies are written to conform to existing laws, regulations, and policies. In addition, Council staff coordinated with staff of other agencies to ensure that definitions are correct and that regulations are not duplicative or unclear. In many cases, Delta Plan policies, and therefore the associated regulation sections, do not add new requirements or costs on state or local agencies; nevertheless, such policies serve two purposes. First, they add another consequence to state or local agencies that fail to conform to existing requirements – namely, that covered actions may not be consistent with the Delta Plan. Second, the Council believes that the Delta Plan policies work together to provide a comprehensive approach to Delta planning. The Delta Plan provides that comprehensive approach, and the adopted regulation incorporates the policies into one consolidated, enforceable regulation.
22.1	Local Agencies of the North Delta	1/24/2013	LAND is concerned that several of the regulations proposed for adoption conflict with existing law. In particular, several terms within the Rulemaking Package are already defined in the California Environmental Quality Act (Pub. Resources Code, §§ 21000 et seq. ("CEQA")) or its implementing regulations (Cal. Code Regs., tit. 14, §§ 14000 et seq.).	Co	CEQA and the Delta Reform Act are distinct statutory schemes, operating for different purposes and imposing differing requirements on regulated entities. The Act is narrower to the extent it focuses on the Delta rather than CEQA's statewide approach, but broader to the extent it focuses on policy objectives beyond CEQA's objective to eliminate adverse environmental impacts. While the intent and effect of the Act governing "covered actions" are distinct from CEQA's, the Council draws from existing law such as CEQA to the extent those established standards fit with the Council's implementation of the Delta Reform Act's objectives.
23.1	Local Agencies of the North Delta	1/24/2013	In order to minimize cost burdens from implementation of the Delta Plan, additional work on the Certification of Consistency Form for Covered Actions to make it understandable for local Delta districts. The Certification of Consistency Form for Covered Actions for consistency with WR P1 appears to require that all three of the reduced reliance measures be met. (Exhibit A to Cost Analysis, pp. 3-4.) As described in prior comments, these measures are unnecessary and unreasonable for in-Delta water users with no alternative water supplies. A pathway for in-Delta water users to comply with WR P1 must be provided.	DP, E	Water Code Section 85021 declares the State's policy is "to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." That section also mandates that "[e]ach region that depends on water from the Delta watershed shall improve its regional self-reliance." Water Code section 85303 mandates that the Delta Plan "shall promote statewide water conservation, water use efficiency, and sustainable use of water." The Delta Plan must also include measures that "promote a more reliable water supply" generally, including addressing the broad issues of meeting needs for reasonable and beneficial uses of water and sustaining the state's economic vitality. (Water Code section 85302(d).) Section 85004(b) explains that "providing a more reliable water supply for the state" involves a broad set of water efficiency, conservation, and infrastructure projects. Section 85020 declares the State's policy regarding the Delta to include: "(a) manag[ing] . . . the water resources of the state over the long term," "(d) promot[ing] statewide water conservation, water use efficiency, and sustainable water use". The three measures contained in Section 5003(c)(1) (or WR P1) of the adopted regulation are therefore measures and pathways for all regions in the State to contribute to reduced reliance on the Delta.
24.1	Local Agencies of the North Delta	1/24/2013	The Certification of Consistency Form also identifies the levee evaluation requirement for ER P4, but provides no specificity for how that requirement will be met. (Exhibit A to Cost Analysis, p. 5.) This places small district engineers in the position of completing potentially complex and expensive analyses without any guidance. Such guidance would assist local districts in making decisions about which projects would meet the feasibility criteria.	DP, E	Section 5001(pk) of the proposed regulation provides a definition to guide feasibility evaluations in complying with Section 5008 (5010) (or ER P4). Furthermore, as stated in the Administrative Procedures Governing Appeals contained in Appendix B of the Delta Plan, 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,

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				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.
25.1 Save the California Delta Alliance	1/24/2013	[Commenter attached two aerial images of Discovery Bay]		Comment attachment noted.

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1. Association of California Water Agencies	1/14/2012	Section 5001(e) – The definition of "coequal goals" is already succinctly defined in Water Code §85054. The new definition is unnecessary, confusing and over a page and a half in length, while the definition in statute is just two sentences. The new definition does not provide clarity or interpret the existing definition found in the Water Code. The new definition contains three "further defined" phrases, which have their own separate definitions in Section 5001(e), as well as other terms defined separately in Section 5001. The second sentence of the definition uses prescriptive regulatory language to express how the goal "shall be achieved" and then the definition goes on to define "achievement," including language establishing prescriptive requirements applicable to "regions that use water from the Delta watershed" and to undefined entities. The structure of mixing definitions and regulatory language is confusing to the potentially regulated community. As we pointed out "coequal goals" is already defined by statute (CWC §85054) and it is not clear why it is also necessary to define "achieving the coequal goals." Subparagraphs (e)(1)-(3) appear to be expressing either the Delta Stewardship Council's aspirations, or statements of intent regarding what it hopes to promote through implementation of the Delta Plan, rather than adding any clarity. These sections do not add clarity and, as a component of regulatory text are unnecessary.	Ct	The Council intended the definition of "achievement" of the coequal goals of water supply reliability and ecosystem in section 5001(e)(1) and (e)(2) to assist project proponents in determining whether a project meets the definition of "covered action" as defined in section 5003 of the regulations and section 85057.5 of the Act. Thus, the definition is offered to clarify whether a project has a significant impact on achieving the coequal goals pursuant to sections 5003(a)(4) and 85057.5(a)(4). The definitions are not prescriptive because they are not tied to any substantive provision of the regulations. They do not mandate any person or entity undertake particular action, nor is a covered action required to be consistent with them. Rather, they simply define what "achieving" the coequal goals means for the purpose of determining whether a project has a significant impact on achieving those goals and, therefore, whether a project is a "covered action" and must be consistent with the regulatory policies in this chapter. To clarify this intent, the Council has proposed a revision to the language in (e).
2. Association of California Water Agencies	1/14/2012	Subparagraphs (e)(1)(A)-(C) use vague and relative terminology such as "better matching" "more closely match" and "reduce their reliance" which make it difficult for a potentially regulated entity to understand how these "definitions" will apply in a coherent and reasonable regulatory setting.	Ct	This is not a policy with which a covered action must be consistent. Nevertheless, the use of relative terminology is further explained in the context of the definition. For example, "better matching the state's demands for reasonable and beneficial uses of water to the available water supply" is further explained in the next sentence, which states how better matching will be accomplished.
3. Association of California Water Agencies	1/14/2012	In addition, language in subparagraphs (e)(1)(A) and (e)(1)(B) is duplicative in many respects, differing only in the general applicability to undefined entities and "regions that use water from the Delta watershed." To the extent that these definitions are establishing prescriptive mandates, they find no support in the general statement of State policy in Water Code §85021. Water Code §85021 is a general statement of legislative policy that the Council has no authority to expand or use as a basis to limit basic water management activities. In short, they are regulations that the Council has no authority to promulgate.	A, Du	The Council has the authority to define terms in the Delta Reform Act, including when an action is a covered action (see MR1). The definitions provided in section 5001(e)(1)(A) and 5001(e) (1)(B) do not establish prescriptive requirements, but rather define what actions will qualify as a covered action because they have a "significant impact" on "achieving the coequal goal of providing a more reliable water supply for California". We disagree that this language is duplicative. The definition provided in 5001(e)(1)(A) addresses what it means for the state to achieve a more reliable water supply and the definition provide in 5001(e) (1)(B) addresses what it means for regions of the state to achieve a more reliable water supply.
4. Association of California Water Agencies	1/14/2012	Moreover, subparagraphs (e)(3)(A)-(F) set forth numerous "strategies" for protecting the unique values of the Delta, without explaining specifically how these strategies relate to "achievement" of the coequal goals or assist in interpreting or further clarifying the statutory definition. This language should, at a minimum, be removed from the definition section and removed entirely from the regulatory language.	Ct, DP	Section 5001(e)(3) provides specificity to Water Code section 85054's requirement that the coequal goals 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.
5. Calaveras County Water District	1/4/2013	General Definitions, Section 5001 The definition of a "Covered Action" is already provided in CWC §85057.5, and that complete definition, taken directly in its entirety from the statute, should be included immediately following subsection 5001(f). There is no reason to leave out a clear, statutory definition of this important term in this section.	Co, O	The Council has moved the definition of a "Covered Action" to 5001(J). Section 5003(b)(2) contains a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language would be more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact.
6. Calaveras County Water District	1/4/2013	Change General Definitions, Section 5001(h) to read: "'Delta Plan' means the comprehensive, long-term management plan (<u>including its appendices</u>) 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." The Appendices are part of the circulated Delta Plan and are systemic to it as they provide clarity to the policies,	O	Appendices are formal parts of the Delta plan, and therefore the definition of the Delta Plan includes them. Note that the provisions in the Delta Plan and appendices are only regulations if they are set forth in the adopted regulation.

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		recommendations and narrative of the Plan.		
7. California Central Valley Flood Control Association	1/14/2013	The term "agricultural water supplier" is different than the Delta Reform Act's definition of "Public water agency" in Water Code Section 85064 without any explanation as to why this is or should be.	Co	The comment asserts the two phrases are inconsistent, however does not explain how they are inconsistent. The inclusion of the definition of "public water agency" in the Act is superfluous, as it defines a phrase that is not linked to any substantive or operative language in the Act. Furthermore, section 85057.5 uses a different phrase to define what actions the Council has authority over. Under that section, an action must be carried out, approved, or funded by a "state or local public agency" for it to be a covered action over which the Council has authority. Thus, section 85064 does not limit the Council's authority to those agencies. Likewise, the Council's definition of "agricultural water supplier" does not conflict with that provision. The Delta Plan must meet the standards set forth in the Act, including section 85302's requirement that the Plan include measures addressing the need for a more reliable water supply. The regulations address agricultural water suppliers, as defined in section 5001(b) and Water Code section 10608.12, in section 5005 of the regulations to satisfy this legislative directive. The definition is necessary to define the scope of the phrase as used in the regulations.
8. California Central Valley Flood Control Association	1/14/2013	The term "co-equal goals" is defined in a troubling way. Please see Appendix A of this letter for a list of the challenges.	Ct	Comment noted, but is not specific. See responses to specific comments.
9. California Central Valley Flood Control Association	1/14/2013	The term "encroachment" is defined both broadly and confusingly. How can an encroachment be the removal of vegetation? Because the definition of floodplain is so broad (as described below), an encroachment could be an existing home in the middle of an island being remodeled. Under the definition, an encroachment could be a levee. In addition, the definition of "encroachment" should be compared to the existing definitions found in SB 5, the Central Valley Flood Protection Plan, and the Central Valley Flood Protection Board's regulations, and then modified to be consistent with those existing definitions.	Ct, Co	The definition of encroachment used herein is derived from the regulations of the Central Valley Flood Protection Board, Title 23, Division 1, Waters, Article 2, section 4(m) in which the removal of vegetation is referenced as a potential encroachment. This is interpreted by the CVFPB to refer to the activity of removing vegetation as a being a potential encroachment, by the use of machinery, large equipment, etc. In terms of the scope of impact on activities, note that this is as much a comment on section 5016 ~~5014~~ and 5015's ~~5017's~~ regulation of encroachments as it is a comment on the definition of encroachment. With regard to the examples given of routine agricultural practices, planting crops, remodel of an existing home, and installing wells, (1) section 5016 ~~5014~~ applies to floodways, which would not interfere with these activities because they will not take place in floodways and (2) section 5015 ~~5017~~ restricts encroachments in specific floodplains, not throughout the Delta. Thus, only activities in these identified high-priority areas must be consistent with section 5015 ~~5017~~. Furthermore, such encroachments are not prohibited by section 5015 ~~5017~~, but the proponent must demonstrate that they will not interfere with floodplain values and functions. Also note that consistency is required only for "covered actions," as defined by section 85057.5 and section 5001 ~~5003~~, which requires that a public agency approves, carries out, or funds the activity and that the activity has a significant impact on the achievement of the coequal goals. The examples of remodeling an existing home and installing wells will rarely, if ever, meet these requirements.
10. California Central Valley Flood Control Association	1/14/2013	The term "floodplain" is defined as any land susceptible to being inundated by flood waters. According to the Council, the entire Delta is susceptible to inundation. Is it the Council's intention to designate the entire Delta as a floodplain? This definition appears to have been taken from FEMA regulations, which use the term floodplain for a wholly different and inconsistent purpose (an insurance-based program). In addition, the definition of	Ct, Co	The proposed policies do not address designating the entire Delta as a floodplain. The definitions proposed by the Council are consistent with those defined and published by the CVFPB within Title 23, Division 1.

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		"Floodplain" should be compared to existing definitions found in the SB 5, the Central Valley Flood Protection Plan, and the Central Valley Flood Protection Board's regulations, and then modified to be consistent with those existing definitions.		
11. California Central Valley Flood Control Association	1/14/2013	Footnote: The draft regulations cite Water Code section 85210(i) as the authority for each section in this package. This section does list several powers granted to the Council, however the Council's ability to adopt regulations found in subsection (i) is limited by the following controlling language: "To adopt regulations or guidelines as needed to carry out the powers and duties identified in this division." [emphasis added] This provision does not give broad expansive authority to the Council to adopt regulations on every topic, but is limited to only adopting regulations associated with the "powers and duties" in the Delta Reform Act. Therefore, each section of this regulatory package should cite the specific statute where the Legislature directs the Council or confers on them a "power or duty" to require such a regulation. If no such "power or duty" to require a specific regulation/mandate can be identified in a statute in this division, then the regulation should be deleted as exceeding the "powers and duties" of the Council and the Plan.	A	The commentator is asserting that the Council may nor may not be exceeding its "powers and duties" without providing any examples or specifics. The Council has develop several Master Responses that deal with the Councils regulatory authority. MR 1 discusses, in general terms, the Council's regulatory authority. MR 3 discusses the Council's land use authority MR 4 discusses the Council's authority to consider Out-of-Delta actions when regulating In-Delta actions. MR 5 discusses the Council's authority to protect, restore and enhance the Delta ecosystem.
12. California Central Valley Flood Control Association	1/14/2013	The term "floodway" should be compared to existing definitions found in SB 5, the Central Valley Flood Protection Plan, and the Central Valley Flood Protection Board's regulations, and modified to be consistent with those existing definitions. In addition, it is not clear who determines what "portion" is "effective" under the definition.	Ct, Co, DP	The Council's definition of a floodway is consistent with the Central Valley Flood Protection Board's definition of floodway (see 23 CCR Division 1 Chapter 1, Article 2, Section 4(n)). The state or local agency that is undertaking a covered action that may encroach in a floodway must make the determination of consistency with Section 5014. It may do so based on relevant state and federal guidance, including FEMA's *National Flood Insurance Program (NFIP) Floodplain Management Requirements: A Study Guide and Desk Reference for Local Officials*, which is referenced in the Delta Plan.
13. California Central Valley Flood Control Association	1/14/2013	The term "Government-sponsored flood control program to reduce risk to people, property, and State interests in the Delta" is defined as a "State or Federal strategy," when it should be defined as a "State, Federal, or Local strategy." This is especially required if the laundry list of programs includes "Local Plans of Flood Protection" as noted in subsection (3).	Co, DP	Local Plans of Flood protection are included within the definition of Government Sponsored Flood Control Programs set forth in section 5001, as they are consistent with the CVFPP.
14. California Central Valley Flood Control Association	1/14/2013	The term "setback levee" is defined as creating additional "floodplain" when it should be defined as creating additional "floodway." The floodway is where the water commonly goes, whereas a floodplain is anywhere the water could go (such as a whole island).	DP	Thank you for the comment. The Council, in its discretion, has chosen not to modify this definition as suggested. The Council feels the term "floodplain" better describes the areas between the existing levees and the newly constructed levee.
15. California Central Valley Flood Control Association	1/14/2013	The term "covered action" has been defined as an action that meets all of five criteria. However, one of the criteria requires that the agency taking the action determine whether the action will have significant impact on achievement of the co-equal goals or will have a significant impact on implementation of a government-sponsored flood control program. While it is logical to have a covered action include actions which impact the co-equal goals (the heart of the Council's role), what is the basis for an action being a covered action if it does not impact the co-equal goals but does impact implementation of a government-sponsored flood control program?	DP	The definition of a covered action is defined in statute per Water Code section 85057.5, as passed by the legislature as part of the 2009 Delta Reform Act.
16. California Central Valley Flood Control Association	1/14/2013	5001(e)(A-C) – These three provisions all have language that says "This will be done" which indicates a mandate, but the language is unclear on who the mandate applies to. Does it apply to individual water users, individual projects or programs, agricultural water suppliers, public water agencies, or "regions" that use water from the Delta watershed? If these three provisions apply to "regions" then where are these regions defined? What is the process for these "regions" to prove to the Council that the measures identified in these three provisions have in fact been "done?" If the language "This will be done" is in fact intended by the Council to be a mandate, then it is an overreach of their authority under Section 85303 which limits the Council's authority to "promote" statewide water conservation, water use efficiency, and sustainable use of water; Section 85304	A, Ct	The definitions are not prescriptive mandates. To the extent the comment challenges the Council's authority to include prescriptive mandates elsewhere in the regulations, see the response to general comments regarding the Council's authority to adopt prescriptive requirements. Likewise, to the extent the comment asserts the Council is limited to an advisory role, see response to comment regarding the Council's authority over local land use agencies. Additionally, the legislature's use of the term "promote" does not limit the Council's authority as the comment suggests. While the term "promote" includes the notion of

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		which limits the Council's authority to "promote options" for new and improved infrastructure relating to the water conveyance in the Delta, storage systems, and for the operation of both. CWC Section 85020 states the "objectives" which are "inherent in the coequal goals" which includes subsection (d) "**Promote** statewide water conservation, water use efficiency, and sustainable water use." [emphasis added]		recommending, it also includes promoting by regulating. Thus the legislature itself has expressly used the term "promote" to mean "require." (For example Health & Safety Code section 1276.3(b)(1) states that an agency can "promote" by "requiring" certain actions.) This is consistent with the common definition of "promote," which is to "further the progress of" something. (http://oxforddictionaries.com/definition/english/promote, defining "promote" as "support or actively encourage (a cause, venture, etc.); further the progress of: [for example] some regulation is still required to promote competition).)
17. California Central Valley Flood Control Association	1/14/2013	First, Section 85020 is policy and objectives that apply to the state as a whole and therefore all state agencies, not just the Delta Stewardship Council, so this objective could apply to DWR, SWRCB, and possibly other state agencies. Secondly, it is only an objective to "promote" not mandate/require the actions proposed in Section 5001 of this regulatory package. CWC Section 85021 does state that it is the policy of the state to reduce reliance on the Delta through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency – but it does **not** identify the Delta Stewardship Council as the agency to implement **nor** does it state it is to be included as a requirement in the Delta Plan. If this regulatory language is intended by the Council to be a mandate, then it is also in conflict and overreaches the Delta Plan's authority granted in Section 85300(a) to "*include subgoals and strategies to **assist in guiding** state and local agency actions related to the Delta*." [emphasis added] Section 85300(a) further states, "*The Delta Plan **may** also identify specific actions that state or local agencies **may take** to implement the subgoals and strategies*." [emphasis added] Both of these sentences from Section 8530(a) clearly limit the role of the Delta Plan as advisory to state and local agencies and therefore this regulatory language should be modified accordingly. CWC 85022(b) also indicates the actions of the Council shall be guided by the findings, policies, and goals expressed in that section, however it also limits the Council's actions to "***when reviewing decisions of the commission***." [emphasis added] Therefore, it is not a broad granting of authority to the Council specifically. The regulatory provisions in Section 5001 also fail to identify at what point whoever these provisions apply has done enough. It is impossible for every entity intended to be covered by these provisions to know if they have met the threshold of compliance because this language fails to properly identify targets and thresholds that are to be met. Without identification of quantifiable targets, regulated entities are in an endless loop of providing more and more with no end in sight, which is in conflict with the Delta Plan's mandate in Section 85308(b) to "*Include quantified or otherwise measurable targets associated with achieving the objectives of the Plan.*"; (c) to "*Where appropriate, utilize monitoring, data collection, and analysis of actions sufficient to determine progress toward meeting the quantified targets.*"; and (d) "*Describe the methods by which the council shall measure progress toward achieving the coequal goals*." CWC Section 85212 also requires the Delta Plan to "include performance measurements that will enable the council to track progress in meeting the objective of the Delta Plan." Without these measurable targets being specific in these regulations for regulated entities, the "regions" or the categories of measures that "will be done" pursuant to these provisions, these requirements become endless and subject to varying degrees of compliance that will not be objective and inequitably applied between the regulated entities.	A, Ct	Comment is correct that the term "promote" includes the notion of prodding. However, it also includes promoting by regulating. Thus, the term is defined as "support or actively encourage (a cause, venture, etc.); further the progress of: [for example] *some regulation is still required to promote competition*. (See Oxford Dictionaries' definition at http://oxforddictionaries.com/definition/english/promote [emphasis in original].) Consistent with this definition, both the Legislature and the California Supreme Court have expressly used the term "promote" to mean "require." (See, for example, Health & Safety Code section 1276.3(b)(1) [agency can "promote" by "requiring" certain actions]; Penal Code section 1016.5 [declares Legislature's intent to "promote fairness . . . by requiring" a specified warning]; *Bank of Italy v. Johnson* (1926) 200 Cal. 1, 22 [rule that used the word "require" was "in harmony" with statute that used the word "promoted."].) In the Delta Reform Act, the Legislature neither limited the term to non-regulatory actions nor required regulatory actions. Rather, it left that determination to the Council's discretion. Section 5001 does not require any compliance, rather this section is definitions. If the Commentator is referring to the regulatory policies (Sections 5002 through 5015), we disagree with the commentator's assertion that there is ambiguity in determining compliance with these regulatory sections. Each individual regulatory section details how consistency with that Section will be achieved. With respect to comments regarding the lack of measureable targets associated with achieving the plan's objectives, those comments are on the Delta Plan and not the regulatory polices of these sections. Performance measures are discussed and identified in the Delta Plan.
18. California Central Valley Flood Control Association	1/14/2013	5001(e)(1)(A) – The terminology "better matching," "available water supply," "resiliency," and "state's water systems," lack definition and context which causes further confusion for the regulated community.	Ct	This is not a policy a covered action must be consistent. Nevertheless, the use of relative terminology is further explained in the context of the definition. For example, "better matching the state's demands for reasonable and beneficial uses of water to the available water supply" is further explained in the next sentence, which states how better matching will be accomplished.
19. California Central Valley Flood Control	1/14/2013	5001(e)(1)(C) – The terminology "will more closely match" lacks definition and context which causes further confusion for the regulated community. In addition, these regulations fail to specify/define "water supplies available to be exported" or "based on water year type," which is inconsistent with Section 85308(b-d) which requires the Delta Plan to include quantified and measurable targets associated with achieving objectives of the	Ct	This is not a policy with which a covered action must be consistent. Nevertheless, the use of relative terminology is further explained in the context of the definition. For example, "better matching the state's demands for reasonable and beneficial uses of water to the available water supply" is further explained in the next

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Association		Plan so that progress toward meeting the targets can be determined.		sentence, which states how better matching will be accomplished. We disagree that the identified regulations are inconsistent with WC Section 85308 (b) – (d), which the commentor correctly points out requires the Delta Plan to include performance measures. These requirements do not require the enforceable regulatory policies to include quantifiable, measureable targets.
20. California Central Valley Flood Control Association	1/14/2013	5001(e)(2) – This definition fails to identify quantified and measurable targets associated with establishing "resilient, functioning estuary" or "viable populations" of native resident and migratory species. Therefore this provision is vague and difficult to implement as a regulation.	Ct	The definitions provided in section 5001(e)(2) is to assist project proponents in determining whether a project meets the definition of "covered action" as defined in section ~~5001~~ 5003 of the regulations and section 85057.5 of the Act. Thus, the definition does not establish prescriptive requirements, but rather define what actions will qualify as a covered action because they have a "significant impact" on "achieving the coequal goals pursuant to sections 5001 ~~5003~~(a)(4) and 85057.5(a)(4).
21. California Farm Bureau Federation	1/14/2013	Section 5001(e)(1)(C) Describing one of the hallmarks of "achievement" of the "more reliable water supply" goal of the co-equal goals, proposed section 5001(e)(1)(C) states that "[a]chieving the coequal goal of providing a more reliable water supply for California means," among other things, that "[w]ater exported from the Delta will more closely match water supplies available to be exported, based on water year type and consistent with the coequal goal of protecting, restoring, and enhancing the Delta ecosystem." The text explains further that: 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 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. Not only in concept is this correct, but there is in fact broad agreement among stakeholders that a system that could physically maximize wet period diversions and storage of surplus flows, so as to minimize impacts at other more biologically and ecologically sensitive times, is a critically important objective for the Delta. So-called 'sip-gulp' operations and accompanying infrastructure are also enormously important to the Delta Plan's goal to "protect[], restor[e], and enhance[e] the Delta ecosystem" by "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" (See proposed section 5001(e)(2)), and the goal to restore "more natural Delta flows," and "improving ecosystem water quality" (See proposed section 5001(q)). Unfortunately, without additional storage, and without the ability to significantly increase diversions at times of surplus and significantly decrease them in times of scarcity, modest or marginal conveyance improvements in the Delta will not address this need. While the mentioned water supply reliability objective is a critically important, the current trajectory of statewide planning is not on track to meet this objective. To correct this problem and ensure consistency of proposed actions affecting the Delta, the Council, the Delta Plan, and state government in general will need to take a more aggressive stance on development of adequate storage and wet period conveyance. Without this element, balanced implementation of the co-equal goals is not likely possible. Furthermore, if the current impasse and lack of meaningful progress on either Delta conveyance and storage continues, it may be incumbent upon the Council to revisit and expand the suite options and potential solutions that can more quickly and effectively accomplish the co-equal goals.	O	The definitions provided in section 5001(e)(1)(A) and 5001(e) (1)(B) do not establish prescriptive requirements, but rather define what actions will qualify as a covered action because they have a "significant impact" on "achieving the coequal goal of providing a more reliable water supply for California". As noted in the comment, this definition includes expanded storage and improved conveyance. The need for additional storage and improved conveyance is addressed in the Delta Plan.

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
ADOPTED REGULATION: SECTION 5001 ~~5002, 5003~~

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22. California Farm Bureau Federation	1/14/2013	Section 5001(i) Proposed section 5001(i) defines an "encroachment" as "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." Comment: Farm Bureau is concerned that section 5001(i)'s definition of "encroachment" is overly broad and that the proposed definition could potentially interfere with routine agricultural practices, activities, improvements, and economic and real property interests in the mentioned floodplains. Farm Bureau has similar concerns with the language in proposed sections 5016(a) and 5017(a). To avoid confusion and potential conflicts, the regulations should specifically exempt agricultural uses in the mentioned floodplains from the Council's consistency finding and appeals processes, and also from the mitigation the requirements referenced in section 5009 ("Protect Opportunities to Restore Habitat"). Such clarification is also necessary to avoid internal conflicts with other provisions in the Council's proposed regulations (and with the related provisions of Delta Reform Act itself), including sections 5001(e)(3)(B) ("Plan to protect the Delta's lands and communities"), 5001(e)(3)(C) ("Maintain Delta agriculture as a primary land use, a food source, a key economic sector, and a way of life"), and 5001(e)(3)(E) ("Sustain a vital Delta economy that includes a mix of agriculture, tourism, recreation, commercial and other industries, and vital components of state and regional infrastructure").	Ct, O	The definition of encroachment used herein is derived from the regulations of the Central Valley Flood Protection Board, Title 23, Division 1, Waters, Article 2, section 4(m) in which the removal of vegetation is referenced as a potential encroachment. This is interpreted by the CVFPB to refer to the activity of removing vegetation as a being a potential encroachment, by the use of machinery, large equipment, etc. Note that section 5001(e)(3) has been revised in response to comments. Nevertheless, the inclusion of routine agricultural activities, for example planting crops, as "encroachment" does not conflict with the Act's intent to maintain the agricultural nature of the Delta because such activities will rarely be covered actions, and if they are, will rarely be inconsistent with section 5014 ~~5016~~ and 5015 ~~5017~~ (see response above regarding example of remodeling home, and installing wells). In addition, the phrase "floodplain values and functions" referred to in section 5015 ~~5017~~ and 5001(m) includes agriculture as one of the values of floodplains. (See 33 CFR 320.4(l)(1)(iv).) Thus, agricultural values are explicitly considered a value of such floodplains under section 5001(m) which encroachments cannot have a significant impact on under section 5015 ~~5017~~.
23. California Farm Bureau Federation	1/14/2013	Section 5001(s) Section 5001(s) defines the term "significant impact," in relation to required "consistency findings" and proposed sections 5003(a)(4), 5009, and 5017, as "[any] change in baseline conditions that is directly or indirectly caused by a project and that, on its own, or when considered "cumulatively" in connection with the effects of past projects, other current projects, and probable future projects, will have a substantial impact on the 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." Comment: The proposed definition is unclear and ambiguous, and potentially exceeds the scope of legislative authority delegated to the Council. Considered in terms of "direct or indirect" impacts, whether "'cumulatively' in connection with the effects of past projects, other current projects, and probable future projects," the argument could be made that virtually any non-exempt activity proposed anywhere in the Delta might have a potential "significant impact." Such an interpretation would in turn open virtually any activity proposed anywhere in the Delta to costly and time-consuming covered action and consistency finding consultations, possible conditions, mitigation requirements, and appeals. The definition is made even more problematic and broad by the expansive of definition of "project" and by the operation of various policies, whereby local water management and water planning activities throughout the state would ostensibly now fall within the purview of the Council. The definition of "significant impact" must be narrowed or will be rendered defective and unworkable by its over-expansive and unnecessary scope and reach.	O	The concept of baseline has been removed in response to comments.
24. Central Delta Water Agency	1/14/2013	Section 5001.(d) "Best Available Science" The proposed definition lacks substance and clarity and should include a requirement that the science is based on historic or other verifiable data showing cause and effect. A glaring example of this shortcoming is the reliance on the development of tidal and floodplain habitat in the Delta as a solution to the decline of fish populations. As tidal and floodplain habitat has been increasing in the Delta since the 1980s, fish populations have been decreasing with the most dramatic declines occurring in the last decade.	Ct, DP	We disagree. Appendix ~~A~~C spells out the criteria that the Council intends to use to evaluate whether or not BAS was used in moving forward with implementation. The proposed additional criterion "(4) It is based on historic or other verifiable data showing cause and effect" is unnecessary as BAS changes over time, and decisions may need to be revisited as new scientific information becomes available. As is often the case, cause-and-effect relationships are tenuous at best in the initial stages of scientific investigations, which may represent BAS at that moment in time. The criteria spelled out in Appendix ~~A~~C will capture "historic or other

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		The following should be added: "(4) It is based on historic or other verifiable data showing cause and effect."		verifiable data showing cause and effect," if, in fact, appropriate data exist.
25. Central Delta Water Agency	1/14/2013	Section 5001.(e)(1) "Achieving the coequal goal of providing a more reliable water supply for California" (A) This section ignores the need to limit the development of arid lands which require water from sources which will directly or indirectly increase demand for water exported by the SWP and CVP from the Delta watershed. There is already a huge imbalance caused in major part by the SWP failure to develop projects in the North Coast Watersheds sufficient to supplement inflow to the Delta by 5 million acre feet per year. Without such a restoration it is likely that new demand could increase the imbalance between supply and demand and a more reliable supply for all of California will not be achievable. The following should be added to the listing in the second sentence in (A): "limiting the development of arid lands which require water from sources which will directly or indirectly increase demand for water exported by the SWP and CVP from the Delta watershed."	DP	The Council's regulatory authority is over "covered actions" and their consistency with the Delta Plan. A project must occur, at least in part, in the Delta to be a "covered action." Accordingly, the Council's authority is limited to addressing projects that occur at least in part in the Delta. See also master response regarding out-of-Delta authority relating to section 5005 [MR4].
26. Central Delta Water Agency	1/14/2013	Section 5001.(e)(1)(A)(B)&(C) The importance of improving Delta levees to maintain ocean salinity repulsion and reduce the risk of interruption of local Delta water urban and agricultural diversions, as well as diversions for export, is overlooked in (A), (B), and (C). The levee systems are necessary to protect the various islands and tracts which provide irreplaceable habitat for numerous species, including the hundreds of thousands of waterfowl of the Pacific Flying which winter on the Delta croplands. The levees provide and protect hundreds of miles of meandering sheltered waterways and shoreline habitat critical to the protection and enhancement of the unique cultural, recreational, natural resource, and agricultural values of the Delta. Protection of Delta lands from flooding is necessary to avoid the huge loss of freshwater due to the increased evaporation from the resulting waterbody in comparison to that from the farming of crops. The difference is estimated to be about 2 acre feet per acre per year which if extended over thousands of acres, which could be as high as 400,000 acres, would greatly aggravate the effort to provide a reliable water supply for California. "improve Delta levees" should be inserted in (A) line 5 after "expand storage". "Delta levees and" should be inserted in (C) line 3 after "improving" and before "conveyance".	DP	The definitions provided in section 5001(e)(1)(A) and 5001(e) (1)(B) do not establish prescriptive requirements, but rather define what actions will qualify as a covered action because they have a "significant impact" on "achieving the coequal goal of providing a more reliable water supply for California". Language in 5001(e)(1)(A) includes conveyance improvements, and 5001(e)(1)(C) specifically calls out improvements needed to prevent levee failures. The need for levee improvements is addressed in the Delta Plan.
27. Central Delta Water Agency	1/14/2013	Section 5001.(e)(1)(A),(B),(C) The proposed regulation is inconsistent with Water Code section 85004(b) which specifically references new and improved infrastructure in addition to water storage and Delta conveyance facilities. Infrastructure certainly includes levees. The regulation at the very least must include those elements required by statute.	Co	Section 85004(b) is a legislative finding about potential means to provide a more reliable water supply for the state and does not dictate that levees be addressed by the Delta Plan. The Act, section 85305(a), declares the Delta Plan must "attempt to reduce risks to people, property, and state interests in the Delta by promoting effective emergency preparedness, appropriate land uses, and strategic levee investments." Accordingly, the regulations include substantive provisions relating to flood protection in the Delta (see sections 5014-5017), and the Delta Plan includes further recommendations relating to flood protection (see Delta Plan pp. 259-295).
28. Central Delta Water Agency	1/14/2013	Section 5001.(e)(1)(A),(B),(C) The failure to include the improvement of levees presents a direct conflict with Water Code 12981 which provides: "§ 12981. Unique resources with statewide significance; preservation (a) The Legislature finds and declares that the delta is endowed with many invaluable and unique resources and that these resources are of major statewide significance. (b) The Legislature further finds and declares that the delta's uniqueness is particularly characterized by its hundreds of miles of meandering waterways and the many islands adjacent thereto; that, in order to preserve the delta's invaluable resources, which	Co	Water Code section 12981 is not part of the Council's mandate. Nevertheless, the Council's regulations are consistent with that provision, which is a legislative declaration relating to the preservation of Delta resources, including recreational, agricultural, wildlife, and fisheries resources. The declaration further acknowledges it may not be economically justified to maintain all Delta islands and encourages funds be used to promote habitat and agricultural land uses in the Delta. The Delta Plan and regulations are consistent with this legislative declaration (see e.g. sections 5006 ~~5008~~ - -5007 ~~5009~~ [habitat restoration in the Delta]; section 5009

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		include highly productive agriculture, recreational assets, fisheries, and wildlife environment, the physical characteristics of the delta should be preserved essentially in their present form; and that the key to preserving the delta's physical characteristics is the system of levees defining the waterways and producing the adjacent islands. However, the Legislature recognizes that it may not be economically justifiable to maintain all delta islands. (c) The Legislature further finds and declares that funds necessary to maintain and improve the delta's levees to protect the delta's physical characteristics should be used to fund levee work that would promote agricultural and habitat uses in the delta consistent with the purpose of preserving the delta's invaluable resources."		~~5011~~ [non-native Invasive species]; section 5010 ~~5012~~ [new development limited to existing developed areas]).
29. Central Delta Water Agency	1/14/2013	Section 5001.(e)(1)(B) The regulation on lines 3 and 4 which provides "consistent with existing water rights and the State's area of origin statutes and Reasonable Use and Public Trust Doctrines" omits reference to Water Code section 12200 to 12220 inclusive which includes Water Code sections 12200 thru 12205 which has been commonly referred to as the Delta Protection Act or Delta Protection Statute rather than an area of origin statute. This omission places the proposed regulation in direct conflict with the provisions in Water Code section 85031 which specifically limits the authority of the Delta Stewardship Council. The language should be changed to read "consistent with the limitations in Water Code section 85031 and Reasonable Use and Public Trust Doctrines." Water Code sections 12200 thru 12205 are particularly important in that such sections were adopted in 1959 as foundational to the operation of the State Water Resources Development System. The Act was contemporaneously interpreted by the Department of Water Resources in its December 1960 Bulletin 76 Report to the Legislative titled Delta Water Facilities. At page 12 it was stated: "Further increase in water use in areas tributary to the Delta will worsen the salinity incursion problem and complicate the already complex water rights situation. <u>To maintain and expand the economy of the Delta, it will be necessary to provide an adequate supply of good quality water and protect the lands from the effects of salinity incursion. In 1959 the State Legislature directed that water shall not be diverted from the Delta for use elsewhere unless adequate supplies for the Delta are first provided.</u>" (emphasis added.) The affirmative obligations of providing protection against the effects of salinity incursion, and providing an adequate supply of good quality water to maintain and expand the economy of the Delta limits the export of water from the Delta to a far greater extent than "consistent with existing water rights and the State's area of origin statutes". The provisions of the Delta Protection Act are as follows: "§12200. Legislative findings and declaration The Legislature hereby finds that the water problems of the Sacramento-San Joaquin Delta are unique within the State; the Sacramento and San Joaquin Rivers join at the Sacramento-San Joaquin Delta to discharge their fresh water flows into Suisun, San Pablo and San Francisco bays and thence into the Pacific Ocean; the merging of fresh water with saline bay waters and drainage waters and the withdrawal of fresh water for beneficial uses creates an acute problem of salinity intrusion into the vast network of channels and sloughs of the Delta; the State Water Resources Development system has as <u>one of its objectives the transfer of waters from water-surplus areas in the Sacramento Valley and the north coastal area to water-deficient areas to the south and west of the Sacramento-San Joaquin Delta via the Delta; water surplus to the needs of the areas in which it originates is gathered in the Delta and thereby provides a common source of fresh water supply for water-deficient areas</u>. It is, therefore, hereby declared that a general law cannot be made applicable to said Delta and that the enactment of this law is necessary for the protection, conservation, development, control and use of the waters in the Delta for the public good. (Added by Stats. 1959, c. 1766, p. 4247, §12201. Necessity of maintenance of water supply	Co, DP	The comment asserts that section 5001(e)(1)(B) is inconsistent with provisions in the Water Code relating to access of in-Delta water users to water, but it does not explain how the regulation is inconsistent. The definition in 5001(e)(1)(B) does not establish prescriptive requirements, but rather defines what actions will qualify as a covered action because they have a “significant impact” on “achieving the coequal goal of providing a more reliable water supply for California.” To the extent this comment seeks to assert that the regulations in general violate area of origin laws or infringes on water rights, see response to comment on section 5003 ~~5005~~ [MR8]. Furthermore, the definition is consistent with the Water Code provisions discussed by the comment (Water Code sections 12200-12205). Those provisions require that entitlements to water within the Delta be fulfilled when determining what water is available to export. Section 5001(e)(1)(B) defines “achieving the coequal goal of providing a more reliable water supply for California” to mean that regions using water from the Delta reduce reliance on the Delta by, for example, increasing efficiency. This does not interfere with the requirement of Water Code sections 12203-12205 that entitlements of water in the Delta be met when considering availability of water to export outside the region.

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		The Legislature finds that the maintenance of an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban, and recreational development in the Delta area as set forth in section 12220, Chapter 2, of this part, and to provide a common source of fresh water for export to areas of water deficiency is necessary to the peace, health, safety and welfare of the people of the State, except that delivery of such water shall be subject to the provisions of section 10505 and sections 11460 to 11463, inclusive, of this code. (Added by Stats. 1959, c. 1766, p 4247, §1.) §12202. Salinity control and adequate water supply; substitute water supply; delivery Among the functions to be provided by the State Water Resources Development System, in coordination with the activities of the United States in providing salinity control for the Delta through operation of the Federal Central Valley Project, shall be the provision of salinity control and an adequate water supply for the users of water in the Sacramento-San Joaquin Delta. If it is determined to be in the public interest to provide a substitute water supply to the users in said Delta in lieu of that which would be provided as a result of salinity control no added financial burden shall be placed upon said Delta water users solely by virtue of such substitution. Delivery of said substitute water supply shall be subject to the provisions of section 10505 and sections 11460 to 11463, inclusive, of this code. (Added by Stats. 1959, c. 1766, p 4247, §1.) §12203. Diversion of waters from channels of delta It is hereby declared to be the policy of the State that no person, corporation or public or private agency or the State or the United States should divert water from the channels of the Sacramento-San Joaquin Delta to which the users within said Delta are entitled. (Added by Stats. 1959, c. 1766, p 4249, §1.) §12204. Exportation of water from delta In determining the availability of water for export from the Sacramento-San Joaquin Delta no water shall be exported which is necessary to meet the requirements of sections 12202 and 12203 of this chapter. (Added by Stats. 1959, c. 1766, p 4249, §1.) §12205. Storage of water; integration of operation and management of release of water It is the policy of the State that the operation and management of releases from storage into the Sacramento-San Joaquin Delta of water for use outside the area in which such water originates shall be integrated to the maximum extent possible in order to permit the fulfillment of the objectives of this part. (Added by Stats. 1959, c. 1766, p 4249, §1.)" Of particular note is the intent: 1) that the interior Delta be a common source of fresh water supply or common pool for both local and export use; 2) that the maintenance of an adequate supply of good quality water is to be sufficient for maintenance and expansion of agriculture, industry, urban, and recreational development in the Delta; 3) that the Delta is to have priority over exports; and 4) that release of water from storage for export shall be integrated to the maximum extent possible to fulfill the objectives of the act. i.e. common pool, salinity control and adequate supply of good quality water to maintain and expand agriculture, industry, urban and recreational development in the Delta. The proposed regulation is inconsistent with and conflicts with both Water Code section 12200 et seq. and Water Code section 85031.		
30. Central Delta	1/14/2013	Section 5001.(e)(2) and (3) "Achieving the coequal goal of protecting, restoring, and enhancing the Delta	A, Ct, Co, DP	The commenter misunderstands the purpose of the reference provision.

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Water Agency		ecosystem" The proposed regulation inappropriately elevates and separates a goal of establishing a terrestrial landscape supporting viable populations of native resident and migrating species from the goal of protecting the unique cultural, recreational, natural resource, and agricultural values of the California Delta as an evolving place. Populations of native resident and migratory species are of course part of the natural resource value of the delta. The cultural, recreational, natural resource, and agricultural values are all part of the Delta ecosystem. The reference to evolving place should not be interpreted as a negative evolution, but merely as a recognition of change over time. Water Code section 85054 Coequal Goals provides: "'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." Natural resource values along with cultural, recreational and agricultural values achieve in a manner that protects and enhances values as an evolving place. No preference is indicated in said section. Water Code section 85020 provides: "(b) Protect and enhance the unique cultural, recreational and agricultural values of the California Delta as an evolving place." In contrast to Water Code section 85054 "Natural Resource" values are not included in the requirement to protect and enhance. Water Code section 85020(c) provides: "(c) Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem." Protect and enhance indicates the intent to improve. Restore would presumably indicate a goal of some historic level. Water Code section 11912 which was adopted in 1961 required as a reimbursable cost to State Water Project contractors the cost for preservation of fish and wildlife. While restoration to the 1961 levels would be an improvement for fish over present conditions, there is no suggestion that agriculture in contravention of the mandate to protect and enhance is to be displaced or harmed to provide habitat. As stated above, Water Code section 85031 does not authorize, and in fact precludes, the Delta Stewardship Council from limiting or otherwise affecting the application of Water Code sections 12200-12205 to provide salinity control and an adequate water supply sufficient to maintain and expand agriculture, industry, urban and recreational development. Displacement of agricultural land for habitat is inconsistent with the objective of maintenance and expansion of agriculture. Section 5001(e)(2) elevates a limited portion of "Natural Resource Values" to a priority over the other values mandated to be protected and enhanced. The regulation is inconsistent with statutes and law. Much of the Delta is Swamp and Overflowed land. Construction of levees along and surrounding the Swamp and Overflowed lands was pursuant to the efforts of the State of California to reclaim the Swamp and Overflowed Lands granted to it by the United States. Such lands were acquired by the State of California from the Federal Government by virtue of the Act of Congress of September 28, 1850 (9 U.S. Stats. at Large, p. 519), generally known as the Arkansas Act. In accepting the grant		The proposed definitions do not erode the statutory requirements to protect and enhance the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place. Rather, the definition responds to questions, posed during the Delta Plan's development, about the meaning of "an evolving place." Consistent with the direction in Water Code 85300(a), the definition draws upon the Delta Vision Strategic Plan's acknowledgement and the Delta Vision Task Force Report's recognition that that the Delta will change, but that its core values as a unique place must be preserved and enhanced in the future. The definition also follows the construction of definitions in (1) and (2) by outlining core strategies for achieving this goal. The objective of supporting valuable species of non-native game and fish is encompassed within the definition and is an outcome of the strategies outlined in 5001(e)(3)(C) and (D). Maintaining agriculture as a primary land use, an outcome of the strategy of 5001(e)(3)(C), also sustains a land base to support agriculture, which is further enhanced through activities that add value to the farm economy, including production of higher value commodities, crop processing, agritourism, farm services, and other activities encouraged by the Delta Plan. The Economic Sustainability Plan (ESP) acknowledges or encourages these activities within the Delta's primary zone. However, within the Delta's secondary zone and in Suisun Marsh, which are not covered by the ESP, other sectors than agriculture are primary economic drivers. Furthermore, the comment misunderstands the state's obligations under the land grant of Swamp and Overflowed Lands in the Arkansas Act. In the Arkansas Act, Congress granted California Swamp and Overflowed Lands "to enable" the state to reclaim the land. (43 U.S.C.A. section 982.) Accordingly, Congress required the proceeds from sales of those lands be applied exclusively to the reclaiming of those lands. (43 U.S.C.A. section 983.) Thus that Act did not require the State to reclaim all the land granted it by Congress, but rather obligated it to use all proceeds received from the sale of the land to reclaim the land. Only the United States may question the State's disposition of the lands or the proceeds from their sales. (Kings County v. Tulare County (1898) 119 Cal. 509.)

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		from the Federal Government the State is bound to carry out in good faith the objects for which the grant was made and thereby assumed an obligation to reclaim the lands. "The object of the Federal Government in making this munificent donation to the general States was to promote the speedy reclamation of the lands and thus invite to them population and settlement, thereby opening new fields for industry and increasing the general prosperity." See Kimball v. Reclamation Fund Commissioners (1873) 45 Cal. 344, 360. The State patented such lands into private ownership conditioned on efforts towards reclamation. Swampland Districts (Reclamation Districts) organized pursuant to State law were typically the mechanism whereby such reclamation efforts were accomplished. The local governmental entities and interests built the levees for the primary purpose of Delta Stewardship Council 8 January 14, 2013 draining the Delta lands and tracts so that they could be put to productive use which in many cases was fanning. Other productive uses include commercial, industrial and residential uses. The original non-project levees were in a number of cases later improved as a part of a federal project and are now "project levees". Conversion of Swamp and Overflowed land to wetlands and particularly the breaching or removal of levees for such purpose would appear to be in violation of the State obligations to reclaim. If the levees are project levees the entire purpose of the federal project and expenditure would be destroyed. The regulation limits the goal to supporting viable populations of native species. Much of the recreational value in the Delta is fishing for striped bass, black bass and other non-native fish. There is also a significant amount of recreation involving hunting of non-native species such as pheasants and Eurasian doves. Non-native species are also a significant part of the natural resource values of the Delta. Water Code section 85020(c) does not limit the restoration requirement to native species. The statutory requirement to protect and enhance or restore is not furthered by limiting the goal to supporting viable populations of native fish. The use of the term "viable" does not incorporate the requirement to protect, enhance or restore. Black's Law Dictionary defines "viable" as "Liveable, having the appearance of being able to live". Supporting viable populations falls far short of restoration and/or protection and enhancement. Section 5001(e)(3) further erodes the statutory requirements to protect and enhance the unique cultural, recreational and agricultural values of the California Delta as an evolving place (Water Code section 85020(b)) and to restore the Delta ecosystem, including its fisheries and wildlife (Water Code section 85020(c)). The regulation provides "including change associated with achieving the coequal goals". Including this language renders the goal of protecting, restoring and enhancing the Delta ecosystem as secondary to the goal of providing a more reliable water supply. This is contrary to law, including Water Code sections, 85054, 85020, 85022, 85031, 12200 thru 12205, 12981 and 11910 thru 11915.5. Section 5001(e)(3)(B) is ambiguous as to the nature of the plan or its intent. Section 5001(e)(3)(C) is contrary to the statutes in that it limits the actions to "maintaining" Delta agriculture rather than "protecting and enhancing" agricultural values. The regulation ignores the Economic Sustainability Plan provided by the Delta Protection Commission contrary to Water Code section 85301 which requires consideration and incorporation into the Delta Plan. This provision also ignores the importance of Delta agriculture as providing critical habitat for numerous terrestrial and aquatic species, including migratory waterfowl of the Pacific Flyway.		
31. Central Delta	1/14/2013	Section 5001.(i) Encroachment	Co	The definition of encroachment used herein is derived from the regulations of the Central Valley Flood Protection Board, Title 23, Division 1, Waters, Article 2, section

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Water Agency		The regulation includes "removal of vegetation" as an encroachment. Such inclusion is inconsistent with Water Code sections 85020 and 85054 in that maintenance and enhancement of levees and floodways is critical to the protection and enhancement of the unique cultural, recreation, natural resource, and agricultural values of the Delta. Removal of vegetation is part of "Routine maintenance and operation" of levees, flood channels, and drainage canals. Requirements for removal of vegetation are contained in the operation and maintenance manuals for project levees and in the regulations of the Central Valley Flood Protection Board. By way of example, California Code of Regulations Title 23 section 131(d) provides: "With the exception of naturally occurring vegetation which the owner of the underlying land has no responsibility to maintain, any vegetation which interferes with the successful execution, functioning, maintenance or operation of the adopted plan of flood control, must be removed by the owner. If the owner does not remove such vegetation upon request, the board reserves the right to have the vegetation removed at the owner's expense." Title 23 section 131(g)(2) provides: "Invasive or difficult-to-control vegetation, whether naturally occurring or planted, that impedes or misdirects floodflows is not permitted to remain on a berm or within the floodway or bypass." Contracts between the State and United States and between local maintaining agencies and the State require removal of vegetation from levees and floodways. Such contracts are written to comply with State and Federal Statutes and regulations. The proposed regulation constitutes an unlawful interference with contracts as well as a serious conflict with statutes and regulations. The definition should be revised to delete "or removal of vegetation". Water Code section 85057.5(5) specifically excludes from covered actions "Routine maintenance and operation of any facility located, in whole or in part, in the Delta, that is owned or operated by a local public agency."		4(m) in which the removal of vegetation is referenced as a potential encroachment. This is interpreted by the CVFPB to refer to the <u>activity</u> of removing vegetation as a being a potential encroachment, by the use of machinery, large equipment, etc.
32. Central Delta Water Agency	1/14/2013	Section 5001.(i) "Enhancement" or "Enhancing" The regulation example of "flooding the Yolo Bypass more often" ignores the possible detrimental impact to other values such as cultural, recreational and agricultural, and therefor is inconsistent with Water Code sections 85020 and 85054. The regulation should be changed to require consistency with protection and enhancement of recreational and agricultural values. The regulation should include as an example the enhancement to fish and wildlife which may result from protection and enhancement of recreational and agricultural values.	Co, DP	This comment mischaracterizes the nature of the referenced definition. The term “enhancement” is defined for purposes of the phrase “achievement of the coequal goal of restoring protecting and enhancing the delta ecosystem,” which in turn, is defined for the purpose of determining whether a plan, program or project meets the definition of a “covered action” under section 5001(j).
33. Central Delta Water Agency	1/14/2013	Section 5001.(p) "Protection" or "Protecting" Preventing an irretrievable conversion of lands suitable for restoration which is not causing harm to the ecosystem is not "protection", but rather an unlawful take of property rights in contravention of the State and United States Constitutions and the statutes relating thereto. This regulation is also inconsistent with Water Code sections 85020 and 85054 which require protection and enhancement of cultural, recreational and agricultural values as well as the unrelated natural resource value of habitat.	Co, DP	For the main response to this comment, see the response to the taking of property comments concerning section 5009 [MR6]. In addition, to the extent that the comment suggests that the regulation takes property because protecting restoration opportunities does not make sense, the suggestion is unsupported. As explained in more detail in the response to section 5009 [MR6], the legislature directed the Council to among other things include provisions seeking to restore large areas of interconnected habitats within the Delta. Preventing the construction of, for example, a shopping center on a potential restoration site furthers that goal. Moreover, even if the provision had not so clearly promoted a legitimate public use, the U.S. Supreme Court explains that the notion that a regulation “’takes’” private property for public use merely by virtue of its ineffectiveness or foolishness is untenable.” Lingle v. Chevron U.S.A. Inc. (2005) 544

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				U.S. 528, 543. That applies to the California takings clause as well, because in reviewing regulatory takings claims, California courts construe the State's takings clause "congruently" with the federal clause. San Remo Hotel L.P. v. City And County of San Francisco (2002) 27 Cal.4th 643, 664. See response to comment on definition of "enhancement." [L-5001-32] This definition applies only to the use of the term in the context of "protecting" the ecosystem in 5001(e)(2), and not its use with respect to "protecting" the Delta as an evolving place under section 5001(e)(3) or elsewhere in the Act and regulations.
34. Central Delta Water Agency	1/14/2013	Section 5001(e)(3)(D): "Encourage recreation and tourism" falls short of the statutory requirement to "protect and enhance the unique cultural, recreational, and agricultural values . . . ." (Water Code sections 85020(b) & 85054.) The regulation is inconsistent with the statutes.	Co	The Delta Reform Act (Water Code section 85054) requires coequal goals "...be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of then Delta as an evolving place." Section 5001(e)(3)(A)-(F) provides specificity to this statutory requirement
35. Central Delta Water Agency	1/14/2013	Section 5001(e)(3)(E): This regulation uses the term "sustain" for the Delta economy when the statutes mandate "protect and enhance the unique cultural, recreational and agricultural values . . ." (Water Code sections 85020(b) & 85054.) Sustaining is not enhancing. Including agriculture as part of a mix ignores the Economic Sustainability Plan of the Delta Protection Commission which determined that agriculture was the primary driver of the present and future economy of the Delta. The regulation is contrary to the statutes.	Co	The Delta Reform Act (Water Code section 85054) requires coequal goals "...be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of then Delta as an evolving place." Section 5001(e)(3)(A)-(F) provides specificity to this statutory requirement.
36. Central Delta Water Agency	1/14/2013	Section 5001(e)(3)(F): This regulation is inconsistent with Water Code section 85020(g), which provides: "Reduce risks to people, property, and state interests in the Delta by effective preparedness, appropriate land uses, and <u>investments in flood protection</u>." (Emphasis added.) The regulation omits the critical elements necessary to reduce flood risks. The language of the statute should replace the proposed language in (F).	Co	The Delta Reform Act (Water Code section 85054) requires coequal goals "...be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of then Delta as an evolving place." Section 5001(e)(3)(A)-(F) provides specificity to this statutory requirement.
37. City of Sacramento	1/14/2013	Section 5001(e) — The new definition of "coequal goals," which is already succinctly defined in Water Code §85054 is unnecessary and confusing. The new definition is over a page and a half in length, while the definition in statute is just two sentences. The new definition itself contains three "further defined" phrases, which have their own separate definitions in Section 5001(e), as well as other terms defined separately in Section 5001. The second sentence of the definition uses prescriptive regulatory language to express how the goal "shall be achieved" and then the definition goes on to define "achievement," including language establishing prescriptive requirements applicable to "regions that use water from the Delta watershed" and to undefined entities. This structure of mixing definitions and regulatory language is confusing to the potentially regulated community to which it is presumably intended to apply. As we pointed out "coequal goals" is already defined by statute (CWC §85054) and it is not clear why it is also necessary to then define "achieving the coequal goals." Subparagraphs (e)(1)-(3) appear to be expressing either the Delta Stewardship Council's aspirations or statements of intent regarding what it hopes to promote through implementation of the Delta Plan, rather than adding any clarity. These sections, as a component of regulatory text are unnecessary. In subparagraphs (e)(1)(A)-(C) the use of vague and relative terminology such as "better matching" "more closely match" and "reduce their reliance" make it difficult for a potentially regulated entity to understand how these "definitions" will be applied in a coherent and reasonable regulatory setting.		The Council intended the definition of "achievement" of the coequal goals of water supply reliability and ecosystem in section 5001(e)(1) and (e)(2) to assist project proponents in determining whether a project meets the definition of "covered action" as defined in section ~~5001~~ 5003 of the regulations and section 85057.5 of the Act. Thus, the definition is offered to clarify whether a project has a significant impact on achieving the coequal goals pursuant to sections 5001 ~~5003~~(a)(4) and 85057.5(a)(4). The definitions are not prescriptive because they are not tied to any substantive provision of the regulations. They do not mandate any person or entity undertake particular action, nor is a covered action required to be consistent with them. Rather, they simply define what "achieving" the coequal goals means for the purpose of determining whether a project has a significant impact on achieving those goals and, therefore, whether a project is a "covered action" and must be consistent with the regulatory policies in this chapter. To clarify this intent, the Council has proposed a revision to the language in (e). This is not a policy a covered action must be consistent with. Nevertheless, the use of relative terminology is further explained in the context of the definition. For example, "better matching the state's demands for reasonable and beneficial uses of water to the available water supply" is further explained in the next sentence, which states how better matching will be accomplished.
38. City of Sacramento	1/14/2013	In addition, the language in subparagraphs (e)(1)(A) and (e)(1)(B) is duplicative in many respects, differing only in the general applicability of subparagraph (e)(1)(A) to undefined entities, while (e)(1)(B) is directed at "regions that use water from the Delta watershed." To the extent that these definitions are establishing prescriptive mandates, they are duplicative of the general requirement in Water Code §85021, which is a provision that the	Du	The Council has the authority to define terms in the Delta Reform Act including when an action is a covered action (see MR1). The definitions provided in section 5001(e)(1)(A) and 5001(e)(1)(B) do not establish prescriptive requirements, but rather define what actions will qualify as a covered

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		Council is not specifically charged with enforcing. In short, they are regulations that the Council has no authority to promulgate.		action because they have a "significant impact" on "achieving the coequal goal of providing a more reliable water supply for California". We disagree that this language is duplicative. The definition provided in 5001(e)(1)(A) addresses what it means for the state to achieve a more reliable water supply and the definition provide in 5001(e)(1)(B) addresses what it means for regions of the state to achieve a more reliable water supply.
39. City of Sacramento	1/14/2013	The language of subparagraphs (e)(3)(A)-(F), moreover, sets forth numerous "strategies" for protecting the unique values of the Delta, without explaining specifically how these strategies relate to "achievement" of the coequal goals or assist in interpreting or further clarifying the statutory definition. This language should, at a minimum, be moved from the definition section, or should be eliminated entirely from the regulatory language.	Ne, Ct	The Delta Reform Act (Water Code section 85054) requires coequal goals "...be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of then Delta as an evolving place." Section 5001(e)(3)(A)-(F) provides specificity to this statutory requirement.
40. City of West Sacramento	1/14/2013	The definitions of "encroachment", "floodplain" and "floodway" should be compared to the existing definitions found in SB 5, the Central Valley Flood Protection Plan, and the Central Valley Flood Protection Board's regulations, and then modified to be consistent with those existing definitions. In addition, it is not clear who determines what "portion" is "effective" under the definition. Finally, the definition of floodplain derives from the FEMA regulations and is applicable to an insurance program, not a program of habitat restoration and water supply reliability.	Ct, Co, DP	Comment noted, and addressed within the responses specific to the applicable sections of the adopted regulation. Revisions clarify the regulation sets standards for encroachments in floodplains not already governed by the Central Valley Flood Control Board. Under the Delta Reform Act, the state or local public agency that proposes to carry out, approve or fund a covered action makes the initial determination. (See section 85225) If a person appeals a public agency's certification of consistency to the Council, the Council reviews that determination pursuant to Water Code section 85225.25.
41. City of West Sacramento	1/14/2013	The term "Government-sponsored flood control program to reduce risk to people, property, and State interests in the Delta" is defined as a "State or Federal strategy." It should be modified and defined as a "State, Federal, or Local strategy." This is especially necessary if the laundry list of programs includes "Local Plans of Flood Protection" as noted in subsection (3).	DP	Local Plans of Flood Protection are referenced and covered under Water Code 8200 and are thus covered under existing State programs.
42. City of West Sacramento	1/14/2013	The term "setback levee" is defined as creating additional "floodplain" when it should be defined as creating additional "floodway."	DP	Setback levees can create both additional floodway and floodplain space.
43. City of West Sacramento	1/14/2013	The term "covered action" has been defined as an action that meets all of five criteria. However, one of the criteria requires that the agency taking the action determine whether the action will have significant impact on achievement of the co-equal goals or will have a significant impact on implementation of a government-sponsored flood control program. While it is logical to have a covered action include actions which impact the co-equal goals (the heart of the Council's role), what is the basis for an action being a covered action if it does not impact the co-equal goals but does impact implementation of a government-sponsored flood control program?	DP	The Delta Reform Act mandates that impacts to government sponsored flood control program's be considered when determining covered actions (Sec. 85057.5) Section 85057.5(a)(4) of the Delta Reform Act defines covered action to include a plan, program or project that impacts implementation of a government-sponsored flood control program.
44. Contra Costa Water District	1/14/2013	Our general observation is that a number of parts of the proposed regulations contain significant amounts of discussion and explanatory text which unnecessarily lengthens the document and obfuscates the important regulatory provisions. This is particularly true in Article 1: Definitions where, for example, the definition of "Coequal goals" describes in great detail various methods of achieving the coequal goals and gives examples of what achieving the goals would mean. If there are regulations in this section, they are lost. If clear prescriptive requirements are necessary, they should be clearly stated in the policy section of the regulations, not in definitions. The narrative text is better suited for the Delta Plan itself or guidelines for implementing the plan.	Ne, O	The Council intended the definition of "achievement" of the coequal goals of water supply reliability and ecosystem in section 5001(e)(1) and (e)(2) to assist project proponents in determining whether a project meets the definition of "covered action" as defined in section 5003 of the regulations and section 85057.5 of the Act. Thus, the definition is offered to clarify whether a project has a significant impact on achieving the coequal goals pursuant to sections 5003(a)(4) and 85057.5(a)(4). The definitions are not prescriptive because they are not tied to any substantive provision of the regulations. They do not mandate any person or entity undertake particular action, nor is a covered action required to be consistent with them. Rather, they simply define what "achieving" the coequal goals means for the purpose of determining whether a project has a significant impact on achieving

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				those goals and, therefore, whether a project is a "covered action" and must be consistent with the regulatory policies in this chapter. To clarify this intent, the Council has proposed a revision to the language in (e).
45. Contra Costa Water District	1/14/2013	Section 5001(d) - Definition of "best available science". It is inappropriate and inconsistent with Appendix 1A to require that all of the listed attributes be present for scientific information to qualify as "best available science". These attributes may be considered desirable, but if made mandatory, could result in the exclusion of valid scientific information from decision-making processes. There is no reason to provide summary details from Appendix IA in the text of the regulation. CCWD recommends simplifying the definition as follows: "5001(d) '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 IA."	Ne, O	Comment noted. Section 5001(d)(1)-(3) has been modified to include your recommendation.
46. Contra Costa Water District	1/14/2013	Section 5001(e) - Definition of "coequal goals". This definition should be limited to the statutory definition of "coequal goals" in Water Code section 85054. As mentioned above, the long discussion of how to achieve the coequal goals and what "achievement" of the goals means is not appropriate to the definitions section and would be more useful in the Delta Plan or implementing guidelines. If there are intended regulations within the expanded definition of "coequal goals", they need to be rewritten to be more specific as to who is required to do what to achieve what specific standard. It would be difficult to enforce vague and relative standards like "better matching" and "more closely match" and "reduce their reliance". Similarly, the definitions of what it means to achieve the coequal goals are subjective and lack measurable standards. CCWD recommends limiting the definition of "coequal goals" to the statutory definition and deleting section 5001(e)(1)-(3).	Ne, O	The Council intended the definition of "achievement" of the coequal goals of water supply reliability and ecosystem in section 5001(e)(1) and (e)(2) to assist project proponents in determining whether a project meets the definition of "covered action" as defined in section 5003 of the regulations and section 85057.5 of the Act. Thus, the definition is offered to clarify whether a project has a significant impact on achieving the coequal goals pursuant to sections 5003(a)(4) and 85057.5(a)(4). The definitions are not prescriptive because they are not tied to any substantive provision of the regulations. They do not mandate any person or entity undertake particular action, nor is a covered action required to be consistent with them. Rather, they simply define what "achieving" the coequal goals means for the purpose of determining whether a project has a significant impact on achieving those goals and, therefore, whether a project is a "covered action" and must be consistent with the regulatory policies in this chapter. To clarify this intent, the Council has proposed a revision to the language in (e). This is not a policy a covered action must be consistent with. Nevertheless, the use of relative terminology is further explained in the context of the definition. For example, "better matching the state's demands for reasonable and beneficial uses of water to the available water supply" is further explained in the next sentence, which states how better matching will be accomplished.
47. Contra Costa Water District	1/14/2013	Section 5001(j) - Definition of "enhancement". CCWD suggests striking the specific reference to the Yolo Bypass project; general examples to help understand the meaning of the term are sufficient.	O	Example is included to help provide clarity, and the Council need not include every possible example. It does not alter the scope of the definition. Furthermore, the definition is consistent with sections 85020 and 85054. It refers only to the use of the term "enhance" in section 5001(e)(2) which defines achieving the coequal goal of enhancing the Delta ecosystem, and it therefore does not relate to the term as it used in other contexts in the Act or regulations. It does not define the term for section 5001(e)(3) or otherwise in the context of protecting and "enhancing" the Delta as an evolving place. For this reason, it need not include the other cultural, recreational, or agricultural values referenced by the comment.
48. Contra Costa Water District	1/14/2013	Section 5001(s) - Definition of "significant impact". CCWD suggests that the CEQA definition of significant impact be used for consistency and clarity. A "significant impact" has the connotation of adverse or negative effects, and is used that way under CEQA. The beneficial impacts of a project would be described as just that, beneficial impacts. Use of separate terms for adverse and beneficial impacts will add clarity to the regulations.	Co, O	The definition has been revised in response to the comment regarding section 5007 ~~5009.~~ Beneficial impacts are included in the definition because the Delta Reform Act uses two phrases in different contexts. A proposed action is a covered action, requiring consistency with the Delta Plan, if, among other things, it has "a significant impact" on the coequal goals or government sponsored flood control. On the other hand, a

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				covered action's consistency determination may only be appealed to the Council if the appellant alleges a "significant adverse impact" on the coequal goals or government sponsored flood control. The Legislature is presumed to have used the different phrases to have a different meaning. (See Kleffman v. Vonage Holdings Corp. (2010) 49 Cal.4th 334, 341 [rule of statutory construction that every word in a statute must be given meaning to avoid making any word "surplusage" or meaningless].) Thus, in section 85057.5, where the Legislature omitted the limiting term "adverse," the Legislature intended a broader meaning—i.e., that positive as well as adverse impacts be considered when determining whether a proposed action is a "covered action." Furthermore, the Legislature's decision to require projects with significant impacts of any kind to file consistency determinations, while limiting the Council's appellate review authority to allegations of significant adverse impacts, makes sense. If consistency determinations were required only when the project proponent identified adverse impacts to a coequal goal, the public would be denied the ability to review the project for consistency with the Delta Plan and appeal to the Council. Furthermore, it appears from language elsewhere in the Delta Reform Act that the Legislature intended that projects having beneficial impacts, such as an ecosystem restoration project benefiting endangered species, must meet standards to be consistent with the Act. (E.g., 85308(f) [requiring adaptive management for ongoing ecosystem restoration and water management decisions]; section 85302 [requiring the Delta Plan to promote specific characteristics of a Delta ecosystem].)
49. East Bay Municipal Utility District	1/14/2013	Section 5001(d) — Definition of "best available science." The definition is overly restrictive and inconsistent with Appendix 1A in that it requires best available science to have "all" of the attributes listed in subparagraphs (dX1)-(3). Very little available science will have all of those attributes. Appendix IA acknowledges that "There are several sources of scientific information and tradeoffs associated with each" and that although "peer-reviewed publications" arc the "most desirable," there are other sources of scientific information that may qualify as best available, including "science expert opinion" and "traditional knowledge." The inclusion of subparagraphs (d)(1)-(3), which summarize some of the information found in the appendix, but are not consistent with the appendix, make it difficult for the reader and the regulated community directly affected by the proposed regulations to understand the scope and nature of the requirements. As an example, subparagraph (d)(3)(F) would require the science to be peer reviewed in order to be considered "best available science?' That concept is not consistent with the language or intent of Appendix 1A. Overall, the definition is overly restrictive and will have a substantive impact that exceeds the intent of the Delta Reform Act, which is simply to ensure that in developing the Delta Plan, the DSC will make use of best available science. The definition of "best available science" should be modified as follows: 5001(d) "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 IA. Subsections 5001(d)(1)-(3) should be deleted for the sake of clarity, consistency, and necessity.	Ne, Ct	Comment noted. Section 5001(d)(1)-(3) has been modified to include your recommendation. It is not clear this is a separate comment from EBMUD, given that EBMUD's suggested language addresses only its other comments regarding Appendix 1A. Nevertheless, in addition to requiring the Delta Plan be based on best available science, the Act requires the Plan to recommend integration of science and monitoring results into ongoing Delta water management (section 85308(e)) and to include formal, science-based adaptive management for certain decisions (ongoing ecosystem restoration and water management decisions) (section 85308(d)). Additionally, the Act declares the importance of science to decision-making in the Delta (see sections 85308 [especially section 85308(c), requiring the Delta Plan to, "where appropriate, utilize monitoring, data collection, and analysis of actions sufficient to determine progress toward meeting quantified targets"], 85302(g), 85280) and thus it is within the Council's authority to mandate its use. Accordingly, a definition of best available science is appropriate and within Council authority.
50. East Bay Municipal Utility District	1/14/2013	Section 5001(e) — The enhanced definition of "coequal goals," which is defined in Water Code Section 85054, continues for a page and a half and contains three "further defined" phrases which have their own separate definitions in Section 5001(c), as well as other terms defined separately in Section 5001. The second sentence of the definition uses prescriptive regulatory language to express how the goal "shall be achieved" and then the definition goes on to define "achievement," including language establishing prescriptive requirements applicable to "regions that use water from the Delta watershed" and to undefined entities. This structure of mixing definitions and regulatory language is confusing to the potentially regulated community to which it is	Ct	Council intended the definition of "achievement" of the coequal goals of water supply reliability and ecosystem in section 5001(e)(1) and (e)(2) to assist project proponents in determining whether a project meets the definition of "covered action" as defined in section 5003 of the regulations and section 85057.5 of the Act. Thus, the definition is offered to clarify whether a project has a significant impact on achieving the coequal goals pursuant to sections 5003(a)(4) and 85057.5(a)(4).

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		presumably intended to apply. Because "coequal goals" is already defined by statute, it is not clear why it is also necessary to define "achieving the coequal goals." Subparagraphs (0(1)43) appear to be expressing the DSC's aspirations or statements of intent regarding what it hopes to promote through implementation of the Delta Plan, rather than adding any necessary clarity to the definition of "coequal goals" already set forth in the statute. In subparagraphs (e)(1)(A)-(C) the use of vague and relative terminology such as "better matching" "more closely match" and "reduce their reliance" make it difficult for a potentially regulated entity to understand how the "definitions" will be applied in a regulatory setting.		The definitions are not prescriptive because they are not tied to any substantive provision of the regulations. They do not mandate any person or entity undertake particular action, nor is a covered action required to be consistent with them. Rather, they simply define what “achieving” the coequal goals means for the purpose of determining whether a project has a significant impact on achieving those goals and, therefore, whether a project is a “covered action” and must be consistent with the regulatory policies in this chapter. To clarify this intent, the Council has proposed a revision to the language in (e).
51. East Bay Municipal Utility District	1/14/2013	In addition, the language in subparagraphs (e){ 1)(A) and (e)(1)(B) is duplicative in many respects, differing only in the general applicability of subparagraph (e)(1)(A) to undefined entities, while (e)(1)(B) is directed at "regions that use water from the Delta watershed." To the extent that these definitions are establishing prescriptive mandates, they are duplicative of the general requirement in Water Code Section 85021, which is a provision that the DSC is not specifically charged with enforcing.	Du	The Council has the authority to define terms in the Delta Reform Act including when an action is a covered action (see MR1). The definitions provided in section 5001(e)(1)(A) and 5001(e)(1)(B) do not establish prescriptive requirements, but rather define what actions will qualify as a covered action because they have a "significant impact" on "achieving the coequal goal of providing a more reliable water supply for California". We disagree that this language is duplicative. The definition provided in 5001(e)(1)(A) addresses what it means for the state to achieve a more reliable water supply and the definition provide in 5001(e)(1)(B) addresses what it means for regions of the state to achieve a more reliable water supply.
52. East Bay Municipal Utility District	1/14/2013	The language of subparagraphs (eX3)(A)-(F), moreover, sets forth numerous "strategics" for protecting the unique values of the Delta, without explaining specifically how these strategies relate to "achievement" of the coequal goals or assist in interpreting or further clarifying the statutory definition. This language should, at a minimum, be moved from the definition section, or should be eliminated from the regulatory language.	Ne, Ct	The Delta Reform Act (Water Code section 85054) requires coequal goals "...be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of then Delta as an evolving place." Section 5001(e)(3)(A)-(F) provides specificity to this statutory requirement
53. East Bay Municipal Utility District	1/14/2013	Section 5001(i) — The definition of "encroachment" is not consistent with the commonly understood definition, which typically includes illegal intrusions or invasions, with or without obstruction, on greater range of areas than floodways or floodplains and would not in most circumstances include "removal of vegetation." It would be helpful to explain the need and reason for setting forth a different and narrower definition of the term; if the commonly understood definition of the term would be acceptable, the definition should be eliminated and any appropriate prescriptions on removing vegetation should be moved to the substantive provisions.	Ct, Co	The definition of encroachment used herein is derived from the regulations of the Central Valley Flood Protection Board, Title 23, Division 1, Waters, Article 2, section 4(m) in which the removal of vegetation is referenced as a potential encroachment. This is interpreted by the CVFPB to refer to the <u>activity</u> of removing vegetation as a being a potential encroachment, by the use of machinery, large equipment, etc. Thus, the definition is consistent with the use of that term elsewhere in California law.
54. East Bay Municipal Utility District	1/14/2013	Section 5001(q) — The definition of "restoration" or "restoring" merely references the statutory definition set forth in Water Code Section 85066 in order to define a term set forth in the lengthy and confusing enhanced definition of "coequal goals." This separate definition does little to interpret or carry out the statutory provisions and should be removed.	Ne, Ct	In addition to being consistent with the statutory definition provided by section 85066, this definition adds examples of what it may include, thereby offering additional clarification to the statutory definition and its use in these regulations.
55. East Bay Municipal Utility District	1/14/2013	Section 5001(s) — The definition of "significant impact" improperly includes changes that when considered cumulatively in connection with the effects of past projects, other current projects, and probable future projects, will have a substantial impact on the achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs. It further improperly includes impacts that may be positive, even though, inexplicably, Section 5009 requires the avoidance or mitigation of "significant impacts" to the opportunity to restore habitat, a mandate that would require entities to refrain from undertaking any actions that could benefit opportunities to restore habitat at the delineated elevations. If the DSC determines that it is necessary to define "significant impact" in these regulations, we urge the adoption of a definition consistent with Section 15382 of the CEQA Guidelines. "Significant impact" should be defined as "a substantial adverse change in baseline conditions." This is consistent with the intent of Water	Co	The concept of baseline has been removed in response to comments. The Act adds a layer of regulation, separate from CEQA’s requirements, to actions that qualify as “covered actions.” The two statutes provide for different review for different purposes—one requiring review of projects proposed throughout the state for significant adverse environmental impacts and mitigation of those impacts, the other requiring consistency of projects proposed in the Delta with the coequal goals. Thus, in addition to complying with CEQA and all other applicable laws, public agencies proposing covered actions must also comply with the Act and implementing regulations, which have requirements separate from CEQA. The definition of “significant impact” defines the use of the phrase with respect to the

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		Code Sections 85031 and 85032, which state that the Delta Reform Act does not alter CEQA or supercede or modify certain other provisions. It will also eliminate internal inconsistencies in the regulatory package.		Act and its implementing regulations, and it does not alter or affect the environmental review framework under CEQA or a project proponent's obligations under that statute in any way. Accordingly, the regulation is consistent with sections 85031 and 85032. For the same reasons, the regulation's definition of substantial impact need not be the same as CEQA's definition and using the exact same definition does not make sense in light of the differing contexts (see response discussing the inclusion of beneficial impacts). That a term or phrase appears elsewhere in another statute or regulation does not determine the meaning of the same term or phrase used in a different context. The Act's use of phrases, such as "significant impact on the coequal goals," that have some similarities to phrases used in CEQA and its Guidelines, such as "significant effect on the environment," does not mean the phrases have the same meaning in their distinct contexts. Nevertheless, to the extent the similar phrases' intent and context overlaps, it is appropriate and reasonable for the Council to draw from concepts used in other statutes and regulations when defining phrases used in the Act and its own regulations. Using terminology from other statutes and regulations has the advantage of being readily understood by the regulated community because the terms and their meaning are well-established. The Council uses concepts and definitions from existing law to the extent such definitions are appropriate in the context of its regulations. Here, the Council uses concepts from CEQA and the CEQA guidelines, specifically defining "significant impact" to mean "substantial" impact (similar to Public Resources Code section 21068) and to include cumulative impacts of closely-related past, present, and reasonably foreseeable future projects (as in Public Resources Code section 21083(b)(2) and CEQA Guideline 15355), to define "significant impact" on the coequal goals for purposes of the Act and these regulations. The definition has been revised in response to the comment regarding section 5009. Beneficial impacts are included in the definition because the Delta Reform Act uses two phrases in different contexts. A proposed action is a covered action, requiring consistency with the Delta Plan, if, among other things, it has "a significant impact" on the coequal goals or government sponsored flood control. On the other hand, a covered action's consistency determination may only be appealed to the Council if the appellant alleges a "significant <u>adverse</u> impact" on the coequal goals or government sponsored flood control. The Legislature is presumed to have used the different phrases to have a different meaning. (See Kleffman v. Vonage Holdings Corp. (2010) 49 Cal.4th 334, 341 [rule of statutory construction that every word in a statute must be given meaning to avoid making any word "surplusage" or meaningless].) Thus, in section 85057.5, where the Legislature omitted the limiting term "adverse," the Legislature intended a broader meaning—i.e., that positive as well as adverse impacts be considered when determining whether a proposed action is a "covered action." Furthermore, the Legislature's decision to require projects with significant impacts of any kind to file consistency determinations, while limiting the Council's appellate review authority to allegations of significant adverse impacts, makes sense. If

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				consistency determinations were required only when the project proponent identified adverse impacts to a coequal goal, the public would be denied the ability to review the project for consistency with the Delta Plan and appeal to the Council. Furthermore, it appears from language elsewhere in the Delta Reform Act that the Legislature intended that projects having beneficial impacts, such as an ecosystem restoration project benefiting endangered species, must meet standards to be consistent with the Act. (E.g., 85308(f) [requiring adaptive management for ongoing ecosystem restoration and water management decisions]; section 85302 [requiring the Delta Plan to promote specific characteristics of a Delta ecosystem].)
56. El Dorado County Water Agency	1/14/2013	General Definitions, Section 5001 The definition of a "Covered Action" is already provided in CWC §85057.5, and that complete definition, taken directly in its entirety from the statute, should be included immediately following subsection 5001(f). There is no reason to leave out a clear, statutory definition of this important term in this section.	Co, O	Covered Action is defined as part of section 5003.
57. El Dorado County Water Agency	1/14/2013	Change General Definitions, Section 5001(h) to read: "'Delta Plan' means the comprehensive, long-term management plan (<u>including its appendices</u>) 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." The Appendices are part of the circulated Delta Plan and are systemic to it as they provide clarity to the policies, recommendations and narrative of the Plan.	O	Appendices are formal parts of the Delta plan, and therefore the definition of the Delta Plan includes them. Note that the provisions in the Delta Plan and appendices are only regulations if they are set forth in the adopted regulation.
58. Environmental Water Caucus	1/14/2013	(§ 5001) Definitions: “Significant impact”: this term is inappropriately defined as a “change in baseline conditions.” Baseline is not defined, however, so this term is ambiguous and requires clarification to be legally valid. What are “baseline conditions”? If baseline conditions are the same as existing conditions, then a significant impact from a proposed covered action is possible even with no change in baseline conditions – if the action itself is considered part of the baseline. For example, a permit renewal would not be considered a significant impact under this definition because its impacts would be incorporated into baseline conditions, even though such a permit renewal would in fact have a measurable impact on one or more of the co-equal goals. The definition should be revised so that “significant impact” is measured on an absolute scale, so that its overall impact can be determined independently of its incorporation into baseline conditions. The result of limiting “significant impact” to a change in baseline conditions is to severely limit the scope of actions considered covered by the Delta Plan under Section 5003(a)(4). This limitation does not appear anywhere in the Delta Reform Act, and exceeds that act’s statutory authority. An anticipated response to this criticism is that there is a baseline consideration made when considering CEQA projects. However, the use of baseline in CEQA is distinguishable from the proposed use in the Draft Regulation, because CEQA considers only environmental impacts, while the Delta Plan includes additional, non-environmental considerations.	Co	The concept of baseline has been removed in response to comments.
59. Local Agencies of the North Delta	1/14/2013	§ 5001, subdivision (c) - Agricultural Water Supplier Definition. The broad definition of agricultural water supplier is inconsistent with the definition provided in the Final Draft Delta Plan, which correctly states that: "Agricultural water suppliers (those that provide water to 25,000 or more irrigated acres, or 10,000 irrigated acres and who receive State funding to implement the plan provisions) have a similar requirement similar to urban suppliers and must prepare Agricultural Water Management Plans." (Final Draft Delta Plan, p. 100.) The definition proposed in section 5001, subdivision (c) is inconsistent with statutory limitation on the requirement to submit Agricultural Water Management Plans applicable to agricultural water suppliers than provide water to less than 25,000 irrigated acres. Under Water Code section	Co	The comment asserts the two phrases are inconsistent, however does not explain how they are inconsistent. The inclusion of the definition of “public water agency” in the Act is superfluous, as it defines a phrase that is not linked to any substantive or operative language in the Act. Furthermore, section 85057.5 uses a different phrase to define what actions the Council has authority over. Under that section, an action must be carried out, approved, or funded by a “state or local public agency” for it to be a covered action over which the Council has authority. Thus, section 85064 does not limit the Council’s authority to those agencies. Likewise, the Council’s definition of “agricultural water supplier” does not conflict with that

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		10853, preparation of such plans is not required unless sufficient funding is provided to the supplier to implement these provisions. This definition must be corrected to be consistent with existing law. No authority is provided for use of a more expansive definition of agricultural water supplier for purposes of the Delta Plan than is already included in the Water Code.		provision. The Delta Plan must meet the standards set forth in the Act, including section 85302's requirement that the Plan include measures addressing the need for a more reliable water supply. The regulations address agricultural water suppliers, as defined in section 5001(b) and Water Code section 10608.12, in section 5005 of the regulations to satisfy this legislative directive. The definition is necessary to define the scope of the phrase as used in the regulations. The requirements of section ~~5003~~ 5005 relating to agricultural water management plans are consistent with Water Code section 10853 because the exemption referred to by the commenter is included in the definition of "water supplier" section 5001(x).
60. Local Agencies of the North Delta	1/14/2013	§ 5001, subdivision (l) Floodplain Definition. The definition of floodplain is inconsistent with the FEMA definition of this term, which is typically an area flooded at a 100-year interval. The proposed definition is unreasonably broad and not defined scientifically. The definition should be revised to be consistent with an objective, scientific standard. No authority is cited for a more expansive definition of this term.	A, Co	Comment noted. FEMA's definition is defined for the purposes of its flood insurance program. The definition used herein is a generic description of a floodplain.
61. Regional Council of Rural Counties	12/27/2012	As RCRC noted in our comments on the September 5, 2012 Proposed Final Draft Delta Plan, according to the Office of Administrative Law (OAL) website agency regulations are to be "clear, necessary, legally valid, and available to the public". Additionally, according to the document entitled Now to Participate in the Rulemaking Process under Standards for Regulations is found "A regulation must be easily understandable, have a rationale, and be the least burdensome, effective alternative. A Regulation cannot alter, amend, enlarge, or restrict a statute, or be inconsistent or in conflict with a statute." RCRC expressed concern in our comment letter dated September 13, 2012, that if the Delta Plan itself lacks clarity that the regulations based upon the Delta Plan policies may likewise lack sufficient clarity. RCRC continues to have concerns in this regards. The crux of the problem is the comingling of Delta Plan regulatory policy with Delta Plan recommendations in the proposed regulations. The first example of this comingling can be found in the definition of "Achieving the coequal goal of providing a more reliable water supply for California" (Section 5001. General Definitions). Mingled in the definition are WR P1 (Reduce Reliance on the Delta and Improve Regional Self Reliance) - a regulatory policy that comes into play only when water is exported from, transported through, or used in the Delta, and WR R1 (Implement Water Efficiency and Water Management Planning Laws) and WR R4 (Expanded Water Supply Reliability Element) both of which are contained in the Delta Plan as recommendations.	Ct	WR P1 is incorporated as section 5005 of the adopted regulation. Section 5001(e)(1) defines terminology used in section 5005.
62. Sacramento County	1/14/2013	3. The definition of "coequal goals" in Section 50001(e) is not actually a definition of those goals. It does no more than reiterate and duplicate Public Resources Code section 85054. The so-called definition relates exclusively to the conceptual manner of achieving the co-equal goals. However, there is no linkage to actual implementation of the coequal goals. Furthermore, the strategies identified as protecting and enhancing the values of the Delta are conceptual and undefined. For example, in Section 5001(e) (3), what is meant by "encourage recreation and tourism?" What performance measure, standard or criteria is being adopted?	Ct	The Council has the authority to define terms in the Delta Reform Act including when an action is a covered action (see MR1). The Delta Reform Act (Water Code section 85054) requires coequal goals "...be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of then Delta as an evolving place." Section 5001(e)(3)(A)-(F) provides specificity to this statutory requirement The definitions provided in section 5001(e)(1)(A) and 5001(e)(1)(B) do not establish prescriptive requirements, but rather define what actions will qualify as a covered action because they have a "significant impact" on "achieving the coequal goal of providing a more reliable water supply for California".
63. Sacramento County	1/14/2013	4. In Section 5001(g), the statutory citation should be to the Section 12220 of the Water Code, not the Public Resources Code.	A	We agree. Change made to the statutory citation.

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
ADOPTED REGULATION: SECTION 5001 ~~5002, 5003~~

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64. Sacramento County	1/14/2013	5. The definition of "encroachment" in Section 5001(i) (and related provisions of the draft regulations) is overly broad, duplicative and unnecessary. It is unnecessary because State law already vests the Central Valley Flood Protection Board (and local governments, under the Cobey-Alquist Act) with comprehensive regulatory authority to address encroachments in floodplains The definition is also overbroad because it includes literally every activity that could occur in a floodplain. Conceivably even routine agricultural practices such as planting crops, removing invasive weeds and installing wells would constitute encroachments under this definition.	Ne, Ct	The definition of encroachment used herein is derived from the regulations of the Central Valley Flood Protection Board, Title 23, Division 1, Waters, Article 2, section 4(m) in which the removal of vegetation is referenced as a potential encroachment. This is interpreted by the CVFPB to refer to the activity of removing vegetation as a being a potential encroachment, by the use of machinery, large equipment, etc. In terms of the scope of impact on activities, note that this is as much a comment on sections 5014 ~~5016~~ and 5015's ~~5017~~ regulation of encroachments as it is a comment on the definition of encroachment. With regard to the examples given of routine agricultural practices, planting crops, remodel of an existing home, and installing wells, (1) section 5014 ~~5016~~ applies to floodways, which would not interfere with these activities because they will not take place in floodways and (2) section 5015 ~~5017~~ restricts encroachments in specific floodplains, not throughout the Delta. Thus, only activities in these identified high-priority areas must be consistent with section 5015 ~~5017~~. Furthermore, such encroachments are not prohibited by section 5015 ~~5017~~, but the proponent must demonstrate that they will not interfere with floodplain values and functions. Also note that consistency is required only for "covered actions," as defined by section 85057.5 and section 5001 ~~5003~~, which requires that a public agency approves, carries out, or funds the activity and that the activity has a significant impact on the achievement of the coequal goals. The examples of remodeling an existing home and installing wells will rarely, if ever, meet these requirements.
65. Sacramento County	1/14/2013	6. The definition of "floodway" in Section 5001(1) is duplicative of other provisions of state law and, therefore, unnecessary. For example, regulations adopted by the Central Valley Flood Protection Board define both "designated floodway" and "floodway." See 23 Cal.Code Regs. §4. A parallel definition of this term is unnecessary, as is a duplicative regulatory process relating to encroachments and other activities in floodways.	Du	The definitions proposed are consistent with those developed by the Central Valley Flood Protection Board. The CVFPB regulates only "designated floodways," whereas this adopted regulation concerns those floodways within the Legal Delta which are not defined as CVFPB Designated Floodways. This definition is necessary because without it, the term's meaning with respect to its use in these regulations would not be clear. That a term or phrase appears elsewhere in statute or regulation does not determine the meaning of the same term or phrase used in a different context for the Council's regulations. Nevertheless, the Council uses concepts and definitions from existing law to the extent such definitions are appropriate in the context of its regulations. Thus it is appropriate and necessary for the Council to clarify the meaning of terms it uses in its regulations, particularly when using terms or phrases already defined elsewhere in the law.
66. Sacramento County	1/14/2013	8. In Section 5001(t) and (u), the definitions of "urban area" and "urbanizing area" are consistent with Government Code 65507(j) and the terminology used in the 2012 Central Valley Protection Plan (CVFPP), it conflicts with the definition of "urban" set forth in the Delta Protection Commission's Land Use Resource Management Plan (LURMP). This inconsistency needs to be resolved in order avoid implementation issues when applying the new development and flood protection regulations to the unincorporated (legacy) Delta communities.	Co	The regulation does not conflict with local agency efforts and plans to protect agricultural lands. Regarding the assertion of conflict with the authority of the Delta Protection Commission, see MR7.
67. Sacramento Regional County Sanitation District	1/14/2013	Section 5001(d) — Definition of "best available science."The definition of "best available science" is overly restrictive and inconsistent with Appendix 1A in that it requires best available science to have "all" of the attributes listed in subparagraphs (d)(1)-(3). Very little available science will have all of these attributes, though they should. Appendix 1A acknowledges that "There are several sources of scientific information and tradeoffs associated with each" and that although "peer-reviewed publications" are the "most desirable," there are other sources of scientific information that may qualify as best available, including "science expert opinion" and	Ct, DP	Comment noted. Section 5001(d)(1)-(3) has been modified to include your recommendation.

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		"traditional knowledge." The inclusion of subparagraphs (d)(1)-(3), which summarize some of the information found in the appendix, but are not consistent with the appendix, make it difficult for the reader and the regulated community directly affected by the proposed regulations to understand the scope and nature of the requirements. As an example, subparagraph (d) (3) (F) would require the science to be peer reviewed in order to be considered "best available science." That concept is not consistent with the language or intent of Appendix 1A.		
68. San Joaquin County Board of Supervisors	1/14/2013	As to Section 5001(e)(3), San Joaquin County concurs in the submitted objections and comments of Solano County and Yolo County regarding this definitional language and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.	Ct, Co	Comment noted. See responses to those comments
69. San Joaquin County Board of Supervisors	1/14/2013	As to Section 5001(i), San Joaquin County concurs in the submitted objections and comments of Solano County and Yolo County regarding this definitional language and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.	Ct	Comment noted. See responses to those comments.
70. San Joaquin County Board of Supervisors	1/14/2013	As to Section 5001(1), San Joaquin County concurs in the submitted objections and comments of Solano County regarding this definitional language and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.	Ct	Comment noted. See responses to those comments.
71. San Joaquin County Board of Supervisors	1/14/2013	As to Section 5001(s), San Joaquin County concurs in the submitted objections and comments of Solano County regarding this definitional language and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.	Ct	Comment noted. See responses to those comments.
72. San Joaquin County Board of Supervisors	1/14/2013	As to Section 5001(n), San Joaquin County concurs in the submitted objections and comments of Yolo County regarding this definitional language and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.	Ct	Comment noted. See responses to those comments.
73. San Joaquin County Board of Supervisors	1/14/2013	This proposed Regulation is, in many respects, vague, unclear and internally inconsistent. For instance, the proposed Regulation relies on definitions which are circular (Section 5001(s): "significant impact" is defined as "substantial impact"). Moreover, the "significant impact" definition refers to a change in baseline conditions but the Delta Plan prescribes no baseline conditions, leaving the proposed Regulation meaningless and unenforceable.	Ct	The concept of baseline has been removed in response to comments.
74. San Joaquin Tributaries Authorities	1/14/2013	Article 1, section 5001(s) Section 5001(s) defines a "significant impact" to mean a "change in baseline conditions[.]" "Baseline conditions" is not defined and is subject to several interpretations, thereby falling short of the clarity of standard. To remedy this defect, section 5001(s) must define a particular baseline condition.	O	The concept of baseline has been removed in response to comments.
75. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	The Proposed Definition of "Significant Impact" Is Inconsistent with CEQA and Should Be Removed or Substantially Revised Section 5001(s): The proposed regulatory definition of "significant impact" impermissibly attempts to alter and amend established CEQA principles regarding baseline conditions and assessment of impacts (direct, indirect, and cumulative), and is in direct conflict with controlling law. (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, § 15125; In re Bay-Delta Coordinated Proceedings (2008) 43 Cal.4th 1143, 1167-1168; Communities for a Better Environment v. South Coast Air Quality Management District (2010) 48 Cal.4th 310, 315, 320-322; Citizens for East Shore Parks v. State Lands Commission (2011) 202 Cal.App.4th 549, 557-566.) The Council has no authority to alter the fundamental framework of environmental review, which is concerned with whether approval of a proposed action may result in a significant adverse physical change in the existing environment. (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, §§ 15060 (c)(2), 15061, 15064,	Co	The concept of baseline has been removed in response to comments. The Act adds a layer of regulation, separate from CEQA's requirements, to actions that qualify as "covered actions." The two statutes provide for different review for different purposes—one requiring review of projects proposed throughout the state for significant adverse environmental impacts and mitigation of those impacts, the other requiring consistency of projects proposed in the Delta with the coequal goals. Thus, in addition to complying with CEQA and all other applicable laws, public agencies proposing covered actions must also comply with the Act and implementing regulations, which have requirements separate from CEQA. The definition of "significant impact" defines the use of the phrase with respect to the Act and its implementing regulations, and it does not alter or affect the environmental review framework under CEQA or a project proponent's obligations

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		15125, 15358, 15360, 15378(a); 15382.) Of special concern is the Council's inclusion of an overbroad definition of any proposed project that appears to include any contribution, no matter how insignificant, to any existing cumulatively significant impact on achievement of the coequal goals. It is conceivable that a proposed project may have an insignificant contribution to a cumulatively significant impact that has resulted from over a century of development in the Delta and Delta watershed. At a minimum, the definition of "significant impact" should be revised to expressly exclude such projects from the definition.		under that statute in any way. For the same reasons, the regulation's definition of substantial impact need not be the same as CEQA's definition and using the exact same definition does not make sense in light of the differing contexts. That a term or phrase appears elsewhere in another statute or regulation does not determine the meaning of the same term or phrase used in a different context. The Act's use of phrases, such as "significant impact on the coequal goals," that have some similarities to phrases used in CEQA and its Guidelines, such as "significant effect on the environment," does not mean the phrases have the same meaning in their distinct contexts. Nevertheless, to the extent the similar phrases' intent and context overlaps, it is appropriate and reasonable for the Council to draw from concepts used in other statutes and regulations when defining phrases used in the Act and its own regulations. Using terminology from other statutes and regulations has the advantage of being readily understood by the regulated community because the terms and their meaning are well-established. The Council uses concepts and definitions from existing law to the extent such definitions are appropriate in the context of its regulations. Here, the Council uses concepts from CEQA and the CEQA guidelines, specifically defining "significant impact" to mean "substantial" impact (similar to Public Resources Code section 21068) and to include cumulative impacts of closely-related past, present, and reasonably foreseeable future projects (as in Public Resources Code section 21083(b)(2) and CEQA Guideline 15355), to define "significant impact" on the coequal goals for purposes of the Act and these regulations.
76. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Section 5001: In the Initial Statement of Reasons, the Council states that the definitions in section 5001 "are necessary to clarify the meaning of terms used in the regulations." (Initial Statement of Reasons at p.2.) However, at least the following five provisions within the proposed definitions are unnecessary. Subsection 5001(k): The proposed regulatory definition of "feasible" merely repeats the language of Public Resources Code section 21061.1. (See also Cal. Code Regs., tit. 14, § 15364.) As such, the regulation is unnecessary and duplicative. Subsection 5001(s): The proposed regulatory definition of "significant impact" conflicts with existing statutory and regulatory definitions of the same term used in the same context. (Pub. Resources Code, § 21068; Cal. Code Regs., tit. 14, § 15382.) The Council's proposed regulation is confusing and unnecessary as well as inconsistent with controlling law. (Pub. Resources Code, § 21068; Cal. Code Regs., tit. 14, § 15382; see also In re Bay-Delta Coordinated Proceedings (2008) 43 Cal.4th 1143, 1167-1168; Communities for a Better Environment v. South Coast Air Quality Management District (2010) 48 Cal.4th 310, 315, 320-322; Citizens for East Shore Parks v. State Lands Commission (2011) 202 Cal.App.4th 549, 557-566.)	Ne, Co, Du	These definitions are necessary because without them, the terms' meaning with respect to their use in these regulations would not be clear. That a term or phrase appears elsewhere in statute or regulation does not determine the meaning of the same term or phrase used in a different context for the Council's regulations. Nevertheless, the Council uses concepts and definitions from existing law to the extent such definitions are appropriate in the context of its regulations. Thus it is appropriate and necessary for the Council to clarify the meaning of terms it uses in its regulations, particularly when using terms or phrases already defined elsewhere in the law. Regarding the definition of "significant impact," The Act adds a layer of regulation, separate from CEQA's requirements, to actions that qualify as "covered actions." The two statutes provide for different review for different purposes—one requiring review of projects proposed throughout the state for significant adverse environmental impacts and mitigation of those impacts, the other requiring consistency of projects proposed in the Delta with the coequal goals. Thus, in addition to complying with CEQA and all other applicable laws, public agencies proposing covered actions must also comply with the Act and implementing regulations, which have requirements separate from CEQA. The definition of "significant impact" defines the use of the phrase with respect to the Act and its implementing regulations, and it does not alter or affect the environmental review framework under CEQA or a project proponent's obligations under that statute in any way. For the same reasons, the regulation's definition of substantial impact need not be the same as CEQA's definition and using the exact same definition does not make

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				sense in light of the differing contexts. That a term or phrase appears elsewhere in another statute or regulation does not determine the meaning of the same term or phrase used in a different context. The Act's use of phrases, such as "significant impact on the coequal goals," that have some similarities to phrases used in CEQA and its Guidelines, such as "significant effect on the environment," does not mean the phrases have the same meaning in their distinct contexts. Nevertheless, to the extent the similar phrases' intent and context overlaps, it is appropriate and reasonable for the Council to draw from concepts used in other statutes and regulations when defining phrases used in the Act and its own regulations. Using terminology from other statutes and regulations has the advantage of being readily understood by the regulated community because the terms and their meaning are well-established. The Council uses concepts and definitions from existing law to the extent such definitions are appropriate in the context of its regulations. Here, the Council uses concepts from CEQA and the CEQA guidelines, specifically defining "significant impact" to mean "substantial" impact (similar to Public Resources Code section 21068) and to include cumulative impacts of closely-related past, present, and reasonably foreseeable future projects (as in Public Resources Code section 21083(b)(2) and CEQA Guideline 15355), to define "significant impact" on the coequal goals for purposes of the Act and these regulations.
77. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Subsection 5001(s): As noted above, the Initial Statement of Reasons states that the definitions in section 5001 "are necessary to clarify the meaning of terms used in the regulations." (Initial Statement of Reasons at p.2.) However, the proposed definition of "significant impact" is confusing. Subsection 5001(s) does not explain what would constitute a "substantial impact on the achievement of one or both of the coequal goals," which is a key component of the proposed definition of "significant impact." (Emphasis added.) Thus, in addition to being unnecessary and inconsistent with controlling law, subsection 5001(s) lacks clarity.	Ct, Co	The Council disagrees. The definition of significant impact, read as a whole, clarifies the meaning of the phrase as used by these regulations. The Council uses concepts and definitions from existing law to the extent such definitions are appropriate in the context of its regulations. Here, the Council uses concepts from CEQA and the CEQA guidelines, specifically defining "significant impact" to mean "substantial" impact (similar to Public Resources Code section 21068) and to include cumulative impacts of closely-related past, present, and reasonably foreseeable future projects (as in Public Resources Code section 21083(b)(2) and CEQA Guideline 15355), to define "significant impact" on the coequal goals for purposes of the Act and these regulations.
78. Solano County Department of Resource Management	1/14/2013	• Subsection (e)(3) would appear to contradict the clear legislative mandate in Water Code section 85054 that the "coequal goals <u>shall</u> 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" (emphasis added). Inserting the word "shall" for "can" in the fifth line would at least help in this regard. Moreover, referring to the Delta as always-changing would appear to go above and beyond both this statute and the intent to create a sustainable Delta. "Evolving" should not necessarily be equated with "indefinitely changing."	Co	The language has been revised in response to this and other comments. The use of the word "can" in the revised language does not transfer the statutory mandate in section 85054 that the coequal goals "shall" be achieved in a manner that protects the Delta as an evolving place into a permissive consideration. Instead, the phrase "protects and enhances the unique values of the Delta as an evolving place," as used in section 85054 and elsewhere, is defined to acknowledge that the unique characteristics of the Delta can be protected and enhanced while the Delta evolves. Thus, change indeed cannot stop in order for this statutory objective to be attained.
79. Solano County Department of Resource Management	1/14/2013	• The definition of the term "encroachment" in subsection (i) is overly broad (see comments on sections 5016-5017 below).	Ne, Ct	Comment addressed in specific responses made in sections 5014 ~~5016~~ and 5015 ~~5017~~ In terms of the scope of impact on activities, note that this is as much a comment on sections 5014 ~~5016~~ and 5015's ~~5017~~ regulation of encroachments as it is a comment on the definition of encroachment. With regard to the examples given of routine agricultural practices, planting crops, remodel of an existing home, and installing wells, (1) section 5014 ~~5016~~ applies to floodways, which would not interfere with these activities because they will not take place in floodways and (2)

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				section 5015 ~~5017~~ restricts encroachments in specific floodplains, not throughout the Delta. Thus, only activities in these identified high-priority areas must be consistent with section 5015 ~~5017~~. Furthermore, such encroachments are not prohibited by section 5015 ~~5017,~~ but the proponent must demonstrate that they will not interfere with floodplain values and functions. Also note that consistency is required only for "covered actions," as defined by section 85057.5 and section 5003, which requires that a public agency approves, carries out, or funds the activity and that the activity has a significant impact on the achievement of the coequal goals. The examples of remodeling an existing home, and installing wells will rarely, if ever, meet these requirements.
80. Solano County Department of Resource Management	1/14/2013	• Section 5001(l)'s definition of "floodplain" is overly broad. In reading it, it's hard to imagine what part of California would <u>not</u> be considered part of a "floodplain."	Ne, Ct	Comment noted. The definitions proposed by the Council are consistent with those defined and published by the CVFPB within Title 23, Division 1.
81. Solano County Department of Resource Management	1/14/2013	• Section 5001(s) does not provide a definition for "baseline conditions," so it's not clear what this section means, precisely. Furthermore, it is our reading and expectation that such conditions/impacts go beyond physical conditions/impacts and encompass social and economic conditions/impacts.	Ct	The concept of baseline has been removed in response to comments.
82. State Water Resources Control Board	1/14/2013	The Delta Stewardship Council could consider adding clarifying language to the rulemaking package that indicates the Delta Stewardship Council is proposing to include the fourteen policies of the Delta Plan as part of the proposed regulation, and that the Delta Plan's recommendations will not be part of the regulation.	O	Comment noted and was considered, but determined to be unnecessary. Only portions of the Delta Plan that have regulatory effect are needed.
83. Tehama Colusa Canal Authority	1/14/2013	Section 5001(e) – The definition of "coequal goals" is already succinctly defined in Water Code §85054. The new definition is unnecessary, confusing and over a page and a half in length, while the definition in statute is just two sentences. The new definition does not provide clarity or interpret the existing definition found in the Water Code. The new definition contains three "further defined" phrases, which have their own separate definitions in Section 5001(e), as well as other terms defined separately in Section 5001. The second sentence of the definition uses prescriptive regulatory language to express how the goal "shall be achieved" and then the definition goes on to define "achievement," including language establishing prescriptive requirements applicable to "regions that use water from the Delta watershed" and to undefined entities. The structure of mixing definitions and regulatory language is confusing to the potentially regulated community. As we pointed out "coequal goals" is already defined by statute (CWC §85054) and it is not clear why it is also necessary to define "achieving the coequal goals." Subparagraphs (e)(1)-(3) appear to be expressing either the Delta Stewardship Council's aspirations, or statements of intent regarding what it hopes to promote through implementation of the Delta Plan, rather than adding any clarity. These sections do not add clarity and, as a component of regulatory text are unnecessary.	Ct	The Council intended the definition of "achievement" of the coequal goals of water supply reliability and ecosystem in section 5001(e)(1) and (e)(2) to assist project proponents in determining whether a project meets the definition of "covered action" as defined in section 5003 of the regulations and section 85057.5 of the Act. Thus, the definition is offered to clarify whether a project has a significant impact on achieving the coequal goals pursuant to sections 5003(a)(4) and 85057.5(a)(4). The definitions are not prescriptive because they are not tied to any substantive provision of the regulations. They do not mandate any person or entity undertake particular action, nor is a covered action required to be consistent with them. Rather, they simply define what "achieving" the coequal goals means for the purpose of determining whether a project has a significant impact on achieving those goals and, therefore, whether a project is a "covered action" and must be consistent with the regulatory policies in this chapter. To clarify this intent, the Council has proposed a revision to the language in (e).
84. Tehama Colusa Canal Authority	1/14/2013	Subparagraphs (e)(1)(A)-(C) use vague and relative terminology such as "better matching" "more closely match" and "reduce their reliance" which make it difficult for a potentially regulated entity to understand how these "definitions" will apply in a coherent and reasonable regulatory setting.	Ct	This is not a policy a covered action must be consistent with. Nevertheless, the use of relative terminology is further explained in the context of the definition. For example, "better matching the state's demands for reasonable and beneficial uses of water to the available water supply" is further explained in the next sentence, which states how better matching will be accomplished.
85. Tehama Colusa Canal Authority	1/14/2013	In addition, language in subparagraphs (e)(1)(A) and (e)(1)(B) is duplicative in many respects, differing only in the general applicability to undefined entities and "regions that use water from the Delta watershed." To the extent that these definitions are establishing prescriptive mandates, they find no support in the general statement of State policy in Water Code §85021. Water Code §85021 is a general statement of legislative policy	A, Du	We disagree that this language is duplicative. The definition provided in (e)(1)(A) addresses what it means for the state to achieve a more reliable water supply and the definition provided in (e)(1)(B) addresses what it means for regions of the state to achieve a more reliable water supply.

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		that the Council has no authority to expand or use as a basis to limit basic water management activities. In short, they are regulations that the Council has no authority to promulgate.		The definitions provided in (e)(1)(A) and (e)(1)(B) do not establish prescriptive requirements, but rather define what actions will qualify as a covered action because they have a "significant impact" on "achieving the coequal goal of providing a more reliable water supply for California". The Council has the authority to define terms in the Delta Reform Act including when an action is a covered action (see MR1)
86. Tehama Colusa Canal Authority	1/14/2013	Moreover, subparagraphs (e)(3)(A)-(F) set forth numerous "strategies" for protecting the unique values of the Delta, without explaining specifically how these strategies relate to "achievement" of the coequal goals or assist in interpreting or further clarifying the statutory definition. This language should, at a minimum, be removed from the definition section and removed entirely from the regulatory language.	Ct, DP	The Delta Reform Act (Water Code section 85054) requires coequal goals "...be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of then Delta as an evolving place." Section 5001(e)(3)(A)-(F) provides specificity to this statutory requirement
87. Tuolumne Utilities District	1/3/2013	General Definitions, Section 5001 The definition of a "Covered Action" is already provided in CWC §85057.5, and that complete definition, taken directly in its entirety from the statute, should be included immediately following subsection 5001(f). There is no reason to leave out a clear, statutory definition of this important term in this section.	Co, O	Covered Action is defined as part of section 5003.
88. Tuolumne Utilities District	1/3/2013	Change General Definitions, Section 5001(h) to read: "'Delta Plan' means the comprehensive, long-term management plan (<u>including its appendices</u>) 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." The Appendices are part of the circulated Delta Plan and are systemic to it as they provide clarity to the policies, recommendations and narrative of the Plan.	O	Appendices are formal parts of the Delta plan, and therefore the definition of the Delta Plan includes them. Note that the provisions in the Delta Plan and appendices are only regulations if they are set forth in the adopted regulation.
89. Westlands Water District	1/14/2013	The Delta Plan's proposed regulatory definition of "achieving the coequal goal of providing a more reliable water supply for California" also conflicts with the authorizing statute. (Wat. Code, § 85302, subd. (d)(1).) 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.	DP	The Council intended the definition of "achievement" of the coequal goals of water supply reliability and ecosystem in section 5001(e)(1) and (e)(2) to assist project proponents in determining whether a project meets the definition of "covered action" as defined in section 5003 of the regulations and section 85057.5 of the Act. Thus, the definition is offered to clarify whether a project has a significant impact on achieving the coequal goals pursuant to sections 5003(a)(4) and 85057.5(a)(4). The definitions are not prescriptive because they are not tied to any substantive provision of the regulations. They do not mandate any person or entity undertake particular action, nor is a covered action required to be consistent with them. Rather, they simply define what "achieving" the coequal goals means for the purpose of determining whether a project has a significant impact on achieving those goals and, therefore, whether a project is a "covered action" and must be consistent with the regulatory policies in this chapter. To clarify this intent, the Council has proposed a revision to the language in (e).
90. Westlands Water District	1/14/2013	Section 5001(s) The proposed regulatory definition of "significant impact" impermissibly attempts to alter and amend established CEQA principles regarding baseline conditions and assessment of impacts (direct, indirect, and cumulative), and is in direct conflict with controlling law. (Pub. Resources Code, §§ 21065, 21068; CEQA Guidelines, § 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; CEQA Guidelines, §§ 15060, subd. (c)(2), 15061, 15064,	Co	The Act adds a layer of regulation, separate from CEQA's requirements, to actions that qualify as "covered actions." The two statutes provide for different review for different purposes—one requiring review of projects proposed throughout the state for significant adverse environmental impacts and mitigation of those impacts, the other requiring consistency of projects proposed in the Delta with the coequal goals. Thus, in addition to complying with CEQA and all other applicable laws, public agencies proposing covered actions must also comply with the Act and implementing regulations, which have requirements separate from CEQA. The definition of "significant impact" defines the use of the phrase with respect to the

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		15125, 15358, 15360, 15378, subd. (a); 15382.)		Act and its implementing regulations, and it does not alter or affect the environmental review framework under CEQA or a project proponent's obligations under that statute in any way. Accordingly, the regulation is consistent with sections 85031 and 85032. For the same reasons, the regulation's definition of substantial impact need not be the same as CEQA's definition and using the exact same definition does not make sense in light of the differing contexts (see response discussing the inclusion of beneficial impacts). That a term or phrase appears elsewhere in another statute or regulation does not determine the meaning of the same term or phrase used in a different context. The Act's use of phrases, such as "significant impact on the coequal goals," that have some similarities to phrases used in CEQA and its Guidelines, such as "significant effect on the environment," does not mean the phrases have the same meaning in their distinct contexts. Nevertheless, to the extent the similar phrases' intent and context overlaps, it is appropriate and reasonable for the Council to draw from concepts used in other statutes and regulations when defining phrases used in the Act and its own regulations. Using terminology from other statutes and regulations has the advantage of being readily understood by the regulated community because the terms and their meaning are well-established. The Council uses concepts and definitions from existing law to the extent such definitions are appropriate in the context of its regulations. Here, the Council uses concepts from CEQA and the CEQA guidelines, specifically defining "significant impact" to mean "substantial" impact (similar to Public Resources Code section 21068) and to include cumulative impacts of closely-related past, present, and reasonably foreseeable future projects (as in Public Resources Code section 21083(b)(2) and CEQA Guideline 15355), to define "significant impact" on the coequal goals for purposes of the Act and these regulations.
91. Westlands Water District	1/14/2013	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 meeting 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.	Co	The Council intended the definition of "achievement" of the coequal goals of water supply reliability and ecosystem in section 5001(e)(1) and (e)(2) to assist project proponents in determining whether a project meets the definition of "covered action" as defined in section 5003 of the regulations and section 85057.5 of the Act. Thus, the definition is offered to clarify whether a project has a significant impact on achieving the coequal goals pursuant to sections 5003(a)(4) and 85057.5(a)(4). The definitions are not prescriptive because they are not tied to any substantive provision of the regulations. They do not mandate any person or entity undertake particular action, nor is a covered action required to be consistent with them. Rather, they simply define what "achieving" the coequal goals means for the purpose of determining whether a project has a significant impact on achieving those goals and, therefore, whether a project is a "covered action" and must be consistent with the regulatory policies in this chapter. To clarify this intent, the Council has proposed a revision to the language in (e).
92. Westlands Water District	1/14/2013	Section 5001(s) The proposed regulatory definition of "significant impact" impermissibly attempts to alter and amend established CEQA principles regarding baseline conditions and assessment of impacts (direct, indirect, and cumulative), and is in direct conflict with controlling law. (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, § 15125; In re Bay-Delta Coordinated Proceedings (2008) 43 Cal.4th 1143, 1167-1168 ("In re Bay-Delta"); Communities for a Better	Co	The Act adds a layer of regulation, separate from CEQA's requirements, to actions that qualify as "covered actions." The two statutes provide for different review for different purposes—one requiring review of projects proposed throughout the state for significant adverse environmental impacts and mitigation of those impacts, the other requiring consistency of projects proposed in the Delta with the coequal goals. Thus, in addition to complying with CEQA and all other applicable laws, public agencies proposing covered actions must also comply with the Act and

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		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.)		implementing regulations, which have requirements separate from CEQA. The definition of "significant impact" defines the use of the phrase with respect to the Act and its implementing regulations, and it does not alter or affect the environmental review framework under CEQA or a project proponent's obligations under that statute in any way. Accordingly, the regulation is consistent with sections 85031 and 85032. For the same reasons, the regulation's definition of substantial impact need not be the same as CEQA's definition and using the exact same definition does not make sense in light of the differing contexts (see response discussing the inclusion of beneficial impacts). That a term or phrase appears elsewhere in another statute or regulation does not determine the meaning of the same term or phrase used in a different context. The Act's use of phrases, such as "significant impact on the coequal goals," that have some similarities to phrases used in CEQA and its Guidelines, such as "significant effect on the environment," does not mean the phrases have the same meaning in their distinct contexts. Nevertheless, to the extent the similar phrases' intent and context overlaps, it is appropriate and reasonable for the Council to draw from concepts used in other statutes and regulations when defining phrases used in the Act and its own regulations. Using terminology from other statutes and regulations has the advantage of being readily understood by the regulated community because the terms and their meaning are well-established. The Council uses concepts and definitions from existing law to the extent such definitions are appropriate in the context of its regulations. Here, the Council uses concepts from CEQA and the CEQA guidelines, specifically defining "significant impact" to mean "substantial" impact (similar to Public Resources Code section 21068) and to include cumulative impacts of closely-related past, present, and reasonably foreseeable future projects (as in Public Resources Code section 21083(b)(2) and CEQA Guideline 15355), to define "significant impact" on the coequal goals for purposes of the Act and these regulations.
93. Westlands Water District	1/14/2013	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.	A, Ne	Definitions provide clarification regarding the use of terms and phrases throughout the regulations. They do not contain prescriptive mandates themselves. However the use of the terms or phrases elsewhere in the substantive regulations may include prescriptive requirements that relate to those terms or phrases as defined here. To the extent this is a comment specific to the definition of coequal goals (section 5001(e), see response relating to that definition.
94. Westlands Water District	1/14/2013	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.	Du	This definition is necessary because without it, the term's meaning with respect to its use in these regulations would not be clear. That a term or phrase appears elsewhere in statute or regulation does not determine the meaning of the same term or phrase used in a different context for the Council's regulations. Nevertheless, the Council uses concepts and definitions from existing law to the extent such definitions are appropriate in the context of its regulations. Thus it is appropriate and necessary for the Council to clarify the meaning of terms it uses in its regulations, particularly when using terms or phrases already defined elsewhere in the law.

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95. Westlands Water District	1/14/2013	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 Ca1.4th 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.)	Ne, Ct, Co	See response L-5001-41: above.
96. Yolo County, Office of the County Counsel	1/14/2013	Section 5001(e)(3) This subsection defines the phrase "[a]chieving 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." The definition suffers from at least two defects, each of which brings it into conflict with the consistency standard for regulations set forth in Government Code Section 11349(d). First, the statutory language at issue (i.e., "achieving the coequal goals") refers to the manner in which the coequal goals are to be implemented. The definition, however, focuses primarily on general concepts of protecting and enhancing certain values. A statement of concepts--for example, "[d]esignate the Delta as a special place worthy of natural and state attention" in subsection (e)(3)(A)--is of little value unless the implementation of those concepts is linked to implementation of the coequal goals. This linkage is central to the statutory language that Section 5001(e)(3) purports to define, as the County has previously explained. (See Yolo County letter commenting on the Final Staff Draft at p. 2 (June 13, 2012)). Its omission results in truncated and invalid definition of a critical component of the Delta Reform Act.	Co	Some of the language in the definition is proposed to be dropped or revised. The definition provided in the adopted regulation does not override the clear direction provided in the statute.
97. Yolo County, Office of the County Counsel	1/14/2013	Section 5001(e)(3) Second, the definition states in part that the "values" referenced in the statutory language at issue "can be preserved and enhanced while accommodating these changes . . ." (i.e., changes associated with implementing the coequal goals). The use of permissive language in purporting to define a statutory mandate is inappropriate. In effect, this permissive language converts the original statutory mandate into a mere consideration of no binding effect. This approach plainly violates the consistency standard.	Co	The language has been revised in response to this and other comments. The use of the word “can” in the revised language does not transfer the statutory mandate in section 85054 that the coequal goals “shall” be achieved in a manner that protects the Delta as an evolving place into a permissive consideration. Instead, the phrase “protects and enhances the unique values of the Delta as an evolving place,” as used in section 85054 and elsewhere, is defined to acknowledge that the unique characteristics of the Delta can be protected and enhanced while the Delta evolves. Thus, change indeed cannot stop in order for this statutory objective to be attained.
98. Yolo County, Office of the County Counsel	1/14/2013	Section 5001(i) This subsection defines the term "encroachment" as any "obstruction or physical intrusion" in a floodplain or floodway, even including the planting or (oddly) removal of vegetation. This definition is unnecessary, duplicative, and overly broad. First, this definition is unnecessary because state law already vests the Central Valley Flood Protection Board (and local governments, under the Cobey-Alquist Act) with comprehensive regulatory authority to address encroachments in floodplains and floodways. There is no credible reason for the Delta Stewardship Council to claim precisely the same regulatory role for itself. This definition and related provisions of the draft regulations thus violate both the necessity and nonduplication standards for regulation set forth in Government Code Section 11349(a) and (f).	Ne	The definition of encroachment used herein is derived from the regulations of the Central Valley Flood Protection Board, Title 23, Division 1, Waters, Article 2, section 4(m) in which the removal of vegetation is referenced as a potential encroachment. This is interpreted by the CVFPB to refer to the activity of removing vegetation as a being a potential encroachment, by the use of machinery, large equipment, etc. The CVFPB has the authority to designate floodways, for which it has done so. Almost none of the floodways in the Delta have been designated as such by the CVFPB, thus that is the area the Delta Plan addresses.
99. Yolo County, Office of the County Counsel	1/14/2013	Section 5001(i) Second, the definition is overly broad because it includes literally every activity that could occur in a floodplain or floodway, even activities that plainly are not "encroachments" under any sensible definition of the term. In theory, even routine agricultural practices such as planting crops, removing invasive weeds, and installing wells would constitute encroachments under this definition and theoretically fall within the regulatory reach of the Delta Stewardship Council. For these reasons, the definition is beyond the statutory authority of the Council as it would effectively expand the power of the Council to include a range of activities beyond the ambit of the Delta Reform Act.	Ct	The definition of encroachment used herein is derived from the regulations of the Central Valley Flood Protection Board, Title 23, Division 1, Waters, Article 2, section 4(m) in which the removal of vegetation is referenced as a potential encroachment. This is interpreted by the CVFPB to refer to the activity of removing vegetation as being a potential encroachment, by the use of machinery, large equipment, etc. In terms of the scope of impact on activities, note that this is as much a comment

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				on sections 5014 ~~5016~~ and 5015's ~~5015~~ regulation of encroachments as it is a comment on the definition of encroachment. With regard to the examples given of routine agricultural practices, planting crops, remodel of an existing home, and installing wells, (1) section 5014 ~~5016~~ applies to floodways, which would not interfere with these activities because they will not take place in floodways and (2) section 5015 ~~5017~~ restricts encroachments in specific floodplains, not throughout the Delta. Thus, only activities in these identified high-priority areas must be consistent with section 5015 ~~5017~~. Furthermore, such encroachments are not prohibited by section 5015 ~~5017~~, but the proponent must demonstrate that they will not interfere with floodplain values and functions. Also note that consistency is required only for "covered actions," as defined by section 85057.5 and section 5003, which requires that a public agency approves, carries out, or funds the activity and that the activity has a significant impact on the achievement of the coequal goals. The examples of remodeling an existing home, and installing wells will rarely, if ever, meet these requirements. The authority of the Council to require consistency of covered actions involving removal of vegetation on levees is found in following sections: section 85020(g) [reduce risks to people, property, state interests in the Delta by . . . investments in flood protection]; (b) [protect and enhance values of Delta as evolving place]; (c) [restore ecosystem]; (f) [improve conveyance]; section 85057.5(a)(4) [significant impact on coequals or implementation of government sponsored flood control]; section 85304 [promote options for new and improved infrastructure relating to water conveyance]; section 85305(a) [Delta Plan shall attempt to reduce risks in Delta by promoting…strategic levee investments]; section 85306 [Delta Plan shall recommend priorities for state investments in levee operation, maintenance and improvements, including project and non-project levees].
100. Yolo County, Office of the County Counsel	1/14/2013	Section 5001(n) This subsection defines the term "floodway," a term that is already defined in other provisions of state law. For example, regulations adopted by the Central Valley Flood Protection Board--which has comprehensive regulatory authority over floodways--define both "designated floodway" and "floodway." (See 23 Cal. Code Regs § 4.) There is no need for the Delta Stewardship Council to adopt a parallel definition of this term or, more importantly, create a duplicative regulatory process relating to encroachments and other activities in floodways.	Du	The CVFPB has the authority to designate floodways, for which it has done so. Almost none of the floodways in the Delta have been designated as such by the CVFPB, thus that is the area the Delta Plan addresses. Revisions clarify the regulation sets standards for encroachments in floodplains not already governed by the Central Valley Flood Control Board. This definition is necessary because without it, the term's meaning with respect to its use in these regulations would not be clear. That a term or phrase appears elsewhere in statute or regulation does not determine the meaning of the same term or phrase used in a different context for the Council's regulations. Nevertheless, the Council uses concepts and definitions from existing law to the extent such definitions are appropriate in the context of its regulations. Thus it is appropriate and necessary for the Council to clarify the meaning of terms it uses in its regulations, particularly when using terms or phrases already defined elsewhere in the law.

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1. Calaveras County Water District	1/4/2013	Section 5002 Proposed Action Defined. The "proposed action" definition is an unnecessary complication to the clarity provided for covered actions found in CWC §85057.5: "'Covered action' means a plan, program, or project as defined pursuant to Section 21605 of the Public Resources Code that meets all of the following conditions: 1. Will occur in whole or in part within the boundaries of the Delta or Suisun Marsh. 2. Will be carried out or approved or funded by the state or a local public agency. 3. Is covered by one or more provisions of the Delta Plan 4. 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." Please note that all four of the listed conditions must be met for a plan, program or project to be a "covered action." However, on page 5 of the text of the proposed regulations, any "proposed action" is described as being classified as a "covered action" if it, "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 §5003(a)(5)." The inclusion of the term "proposed action" is unnecessary and confusing, but if the Council is wedded to the term "proposed action" then Section 5002(b) should simply state, "A proposed action <u>is a covered action if it meets all the criteria of a covered action as defined in CWC Section 85057.5</u>." In short, not all proposed actions are covered actions, but all covered actions are proposed actions. Inasmuch as the CWC is completely clear on this point, there is no apparent reason to further complicate the matter by use of the term "proposed action" in these regulations.	Ct, O	The adopted regulation provides criteria to identify covered actions. In order to describe the process within the regulation, there is a need to describe things that might be covered actions but have not yet been determined to be covered by a Delta Plan policy. Council staff considered using the term “potential covered actions” but chose instead to call them “proposed actions.”
2. East Bay Municipal Utility District	1/14/2013	Section 5002 - Proposed Action Defined. It is not clear that there is any need for a separate definition of "proposed action" in Section 5002, particularly if this term is defined as meaning all plans, program, or projects meeting the covered action screening criteria. It would be better to follow the Water Code language and simply define "covered action" and then include the language in Section 5003(b) noting the plans, programs, and projects excluded from the definition.	Ne	The adopted regulation provides criteria to identify covered actions. In order to describe the process within the regulation, there is a need to describe things that might be covered actions but have not yet been determined to be covered by a Delta Plan policy. Council staff considered using the term “potential covered actions” but chose instead to call them “proposed actions.”
3. El Dorado County Water Agency	1/14/2013	Section 5002 Proposed Action Defined. The "proposed action" definition is an unnecessary complication to the clarity provided for covered actions found in CWC §85057.5: "'Covered action' means a plan, program, or project as defined pursuant to Section 21605 of the Public Resources Code that meets all of the following conditions: 1. Will occur in whole or in part within the boundaries of the Delta or Suisun Marsh. 2. Will be carried out or approved or funded by the state or a local public agency. 3. Is covered by one or more provisions of the Delta Plan 4. 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." Please note that all four of the listed conditions must be met for a plan, program or project to be a "covered action."	Ct, O	The adopted regulation provides criteria to identify covered actions. In order to describe the process within the regulation, there is a need to describe things that might be covered actions but have not yet been determined to be covered by a Delta Plan policy. Council staff considered using the term “potential covered actions” but chose instead to call them “proposed actions.”

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
		However, on page 5 of the text of the proposed regulations, any "proposed action" is described as being classified as a "covered action" if it, "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 §5003(a)(5)." The inclusion of the term "proposed action" is unnecessary and confusing, but if the Council is wedded to the term "proposed action" then Section 5002(b) should simply state, "A proposed action is a covered action if it meets all the criteria of a covered action as defined in CWC Section 85057.5." In short, not all proposed actions are covered actions, but all covered actions are proposed actions. Inasmuch as the CWC is completely clear on this point, there is no apparent reason to further complicate the matter by use of the term "proposed action" in these regulations.		
4. Environmental Water Caucus	1/14/2013	(§§ 5002, 5003) Exemptions to Delta Plan exceed statutory authority. The Delta Reform Act contains only four criteria to determine whether an action is covered by the Delta Plan: (1) It will occur in the boundaries of the Delta or Suisun Marsh; (2) Will be carried out, approved or funded by the state or a local public agency; (3) Is covered by one or more provisions of the Delta Plan; and (4) Will have a significant impact on achievement of one or both of the co-equal goals. (Cal. Water Code 85057.5(a).) The exemptions to actions covered by the Delta Plan are then enumerated in Water Code section 85057.5 (b). These exemptions are also included in the draft regulation at § 5003(b)(1), but they are improperly expanded upon in (b)(2):	A	The five criteria in section 5003b are consistent with the four criteria in Water Code section 85057.5(a), except they are organized slightly differently for purposes of clarity. Most of this comment deals with section 5003, not section 5002. See responses to the same or similar comments under section 5003.
5. Tuolumne Utilities District	1/3/2013	Section 5002 Proposed Action Defined. The "proposed action" definition is an unnecessary complication to the clarity provided for covered actions found in CWC §85057.5: "'Covered action' means a plan, program, or project as defined pursuant to Section 21605 of the Public Resources Code that meets all of the following conditions: 1. Will occur in whole or in part within the boundaries of the Delta or Suisun Marsh. 2. Will be carried out or approved or funded by the state or a local public agency. 3. Is covered by one or more provisions of the Delta Plan 4. 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." Please note that all four of the listed conditions must be met for a plan, program or project to be a "covered action." However, on page 5 of the text of the proposed regulations, any "proposed action" is described as being classified as a "covered action" if it, "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 §5003(a)(5)." The inclusion of the term "proposed action" is unnecessary and confusing, but if the Council is wedded to the term "proposed action" then Section 5002(b) should simply state, "A proposed action is a covered action if it meets all the criteria of a covered action as defined in CWC Section 85057.5." In short, not all proposed actions are covered actions, but all covered actions are proposed actions. Inasmuch as the CWC is completely clear on this point, there is no apparent reason to further complicate the matter by use of the term "proposed action" in these regulations.	Ct, O	The adopted regulation provides criteria to identify covered actions. In order to describe the process within the regulation, there is a need to describe things that might be covered actions but have not yet been determined to be covered by a Delta Plan policy. Council staff considered using the term “potential covered actions” but chose instead to call them “proposed actions.”

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1. Alameda County Flood Control and Water Conservation District, Zone 7	1/14/2013	Section 5003(b)(2)C One-Year Transfers. Under California law, one-year transfers of water are not subject to the California Environmental Quality Act (CEQA). The Council has taken steps to exclude other CEQA exceptions from its covered action review process, but in the case of one-year transfers, that exception is only valid through 2014. One-year transfers are critical for meeting year-to-year shortfalls in supply. This vital water management tool is at risk if each transfer is subject to an appeal process that may take up to 150 days.	A, Co	Please refer to **MR11** for the Council's response to this comment.
2. Association of California Water Agencies	1/14/2012	Section 5003 – Covered action defined. Similar to the enhanced definition of "coequal goals," this definition is already defined in Section 85057.5 and now sets forth unclear substantive regulatory requirements. Section 5003(b)(2)(C) exempts one-year transfers from being considered a covered action, which is consistent with Section 1729 of the Water Code. However, Section 5003(b)(2)(C) sunsets the exemption on 1/1/2015, creating a limitation that is not consistent with Section 1729 of the Water Code. This is a confusing and inconsistent regulatory requirement that could result in an agency undertaking an environmental review of a one-year transfer to satisfy the requirements for certifying consistency with the Delta Plan, even though the legislature has exempted these from the requirements for CEQA review.	Co	The Council is not changing the definition of a covered action. The Council is clarifying the definition by including additional language that requires the determination whether a proposed plan, program, or project is a covered action be reasonable and made in good faith. The Council disagrees with the assertion that it is inconsistent with section 1729 of the Water Code because it does not exempt single-year water transfers from the definition of a covered action the same way single-year transfers are statutorily exempt from CEQA. Please refer to **MR11** for the Council's response.
3. Association of California Water Agencies	1/14/2012	Additionally, section 5003(b)(2) contains narrative expression of the Council's intent and examples, and is therefore unnecessary. It does not provide clarity for the regulated community does not meet the standards of necessity for regulatory language and must be removed.	Ct	Section 5003(b)(2) contains a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language would be more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact.
4. Association of California Water Agencies	1/14/2012	Section 5003(c) should not include prescriptive requirements applicable to state and local agencies and section 5003(d) should not include the clause that limits "the application of the definition." This is language is structured in a manner that renders the regulatory requirements unclear to the regulated community.	Ct	With respect to the comment on section ~~5003(c)~~ 5001(j) (3), consistent with the Act (section 85225), this provision requires a public agency to determine whether its proposed plan, program, or project is a "covered action." The provision further requires this determination to be reasonable and made in good faith. The determination that a proposed action is a covered action is not a legislative decision, but rather is an adjudicative one. (See *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34, n.2 ["[L]egislative action is formulation of a rule to be applied in all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts."]) The cases cited by the comments discussing the judicial standards of review over legislative decisions are therefore inapplicable. Furthermore, requiring that this determination be reasonable and made in good faith is an objective standard, not a subjective standard. (See *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 103 n.32 [where "good faith" standard is associated with "reasoned analysis" or "reasonableness," it is an objective standard].) Finally, it is appropriate for the Council to require agencies to make reasonable decisions in good faith, as other agencies frequently require. (E.g., CEQA Guidelines section 15151 [standard for adequacy of EIR is "good faith effort" at full disclosure]; Cal. Code Regs. tit. 14, section 18839 [requiring "good faith effort" and "reasonable effort" in implementing recycling program]; 36 C.F.R. 800.4(b)(1) [requiring federal agencies make "reasonable and good faith effort" in identifying historic properties]. With respect to the comment on section ~~5003(d)~~ 5001(j)(4), this provision appropriately limits the application of the regulation to avoid an unlawful application of it. In addition, this language is part of the statutory definition of a covered action as passed by the legislature as part of the 2009 Delta Reform Act.

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ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
5. California Central Valley Flood Control Association	1/14/2013	Section 5003 – Covered Action. This section defines what actions are covered by the Council's regulations. Please clarify how a private property owner needing a permit from Fish and Wildlife, the Central Valley Flood Protection Board, or other State, local, or Federal agencies, is covered by these regulations? In such a case, is the private landowner required to comply with all of the provisions.	Ct	An activity that is carried out by a private property owner that does not require approval or funding by a state or local public agency does not meet the definition of a covered action. If an activity that is carried out by a private property owner does require the approval (permit) by a state or local public agency, that activity meets one of the requirements of a covered action. To be a covered action, that activity will also need to: • Be a "project", as defined pursuant to section 21065 of the Public Resources Code; • Occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh; • 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, • Be 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. In the event the activity is a covered action, then the state or local public agency (the CEQA lead agency), not the private property owner, will be required to file a certification of consistency with the Council and comply with all the regulatory requirements of the Delta Plan.
6. California Department of Fish and Wildlife; Ecosystem Conservation Division/Water Branch	1/10/2013	Section 5003(b)(2): The Delta Plan states that conservation measures taken to implement Natural Community Conservation Plans (NCCPs) or Habitat Conservation Plans (HCPs) approved and permitted by CDFW prior to the effective date of the Delta Plan are presumed to be consistent with the ecosystem restoration policies of the Delta Plan (see Final Draft Delta Plan, p. 156). However, this is not stated in the proposed regulations, and the process for invoking the presumption is unclear. We suggest explicitly describing this presumption and its process in the regulations. We recommend that this administrative exemption be included in the list of administrative exemptions under section 5003(b)(2) of the proposed regulations.	Ct, Du	The Council has included the following language to section ~~5004~~5002 - Detailed Findings to Establish Consistency with the Delta Plan: *(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 Department of Fish and Wildlife prior to the date of the Delta Plan's adoption* *Is deemed to be consistent with sections ~~5007~~ 5005 through ~~5011~~ 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 Department of Fish and Wildlife.*
7. California Department of Fish and Wildlife; Ecosystem Conservation Division/Water Branch	1/10/2013	Section 5003(b)(2)(D): The cross-reference in section 5003(b)(2)(D) of the proposed regulations appears to be incorrect. We believe it should cross-reference section 5001(s).	Ct, O	Thank you. The Council will correct the reference to ~~5001(s)~~ 5001(dd).
8. California Department of Water Resources	1/14/2013	5003(b). Covered Action Defined - What is included and what is excluded. This Section lists specific actions that are not considered covered actions. These include the statutory exemptions of Water Code Section 85075.5 (Section 5003(b)(1)) and specific administrative exemptions included in the Delta Plan (Section 5003(b)(2)). DWR agrees that the administrative exemptions listed in Section 5003(b)(2) are not covered actions. However, we do not view the specific listing of one type of possible proposed project as an administrative exemption to mean that all other projects that might be covered under a statutory exemption are therefore covered actions. For example, Section 5003(b)(2)(C) lists temporary water	Ct	Section 5003(b)(2) contains a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language would be more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact. With respect to the Council's determination that single-year transfers will not have a significant impact on the coequal goals through December 31, 2016, the Council believes that

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		transfers of one year as administratively exempt. Arguably, such transfers might also be exempt as one of many types of projects covered under other statutory exemptions. Including one year transfers as an administrative exemption does not thereby mean that other transfers, agreements or actions are not exempt pursuant to other exemptions simply because they were not specifically listed. They may or may not be exempt depending on the facts involved.		water transfers contribute to California's water supply reliability. However, the Council also understands that in some cases, water transfers may have an adverse impact to the Delta's ecosystem, especially if these single year transfers are repeated over consecutive years as a means to circumvent the CEQA review process for multi-year (repeat) transfers. In order to provide time to evaluate the potential adverse impacts caused by repeated single year transfers, the Council proposes to provide a CEQA exemption from its covered action review process through January 1, 2016, at which time the exemption will sunset unless the Council acts to extend the exemption prior to the date. Until that time, there is no proposal to change or disrupt the current water transfer process. This review is consistent with WR R15 which recommends a stakeholder process to identify and recommend measures to reduce procedural and administrative impediments to water transfers and to address potential issues with recurring single year transfers.
9. California Department of Water Resources	1/14/2013	Section 5003(b) We expect there may be differing opinions among interested parties as to what the statutory exemptions cover; for example what is routine operation and maintenance under Water Code Section 85075.5(b)(2) and (5) or what kinds of projects are covered by the exemption for projects approved prior to September 20, 2009 under Water Code Section 85075.5(b)(6). We also expect there will be differing opinions on whether a project "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." (Section 5003(a) (4)). We believe that many projects will have to be reviewed on a case by case basis depending on the facts involved.	Ct	This comment is consistent with the Council's intent.
10. California Department of Water Resources	1/14/2013	5003(b). Covered Action Defined - Administrative Exemptions. The Delta Reform Act specifically exempts routine maintenance and operation of the State Water Project or the Central Valley Project (Section 85075.5(b)(2)) and routine maintenance and operation of any facility located, in whole or in part, in the Delta, that is owned or operated by a local public agency (such as routine maintenance of levees by a reclamation district (Section 85075.5(b)(5)). It does not include routine maintenance and operation of flood control or other facilities operated by state agencies. The May 2012 draft included administrative exemptions for routine dredging and we suggested a similar exemption for state facilities. The current draft does not include administrative exemptions for routine maintenance and operation of any facilities owned or operated by state agencies. While most of routine maintenance and operation of flood control facilities is done by local agencies and therefore covered under Water Code Section 85075.5(b(5), DWR itself carries out some critical routine maintenance and operation of flood control facilities. If state facilities are exempt from CEQA they are most likely not covered actions. However, other state projects subject to NDs or MNDs could be covered actions. We continue to support an exemption of <u>routine maintenance and operation activities of any facility located, in whole or in part, in the Delta, that is owned or operated by a state agency</u>. Such an exemption is consistent with the statutory routine maintenance and operation exemptions and would cover routine flood control activities of by state agencies.	DP	As pointed out in the comment, routine maintenance and operation of any facility located, in whole or in part, in the Delta that is owned or operated by a local public agency is a statutory exemption to the definition of a covered action. The Council, in its discretion, has developed its own list additional categories of actions that will not have a significant impact on the coequal goals under Water Code section 85057.5. The Council has decided not include routine maintenance and operation of any facility located in the Delta that is owned or operated by a state agency in this list. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact.
11. California Department of Water Resources	1/14/2013	5003(c). Covered Action Defined - Review of determination of a covered action. This Section states "that 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".	A	With respect to the comment on section ~~5003(c)~~ 5001(j) (3), consistent with the Act (section 85225), this provision requires a public agency to determine whether its proposed plan, program, or project is a "covered action." The provision further requires this determination to be reasonable and made in good faith. The determination that a proposed action is a covered action is not a legislative decision, but rather is an adjudicative one. (See *Strumsky v. San Diego County Employees Retirement Assn.*

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		DWR agrees with the part of the section which states that the agency proposing a project initially makes the determination of whether a project is a covered action and that review of that determination is subject to judicial review, not to review by the DSC. (Section 2 of the DSC regulations on appeals also states that the "ultimate determination on whether it is a covered action shall be made by the agency, subject to judicial review). We are not sure what the DSC is attempting to clarify or add by the language that the determination "must be reasonable, made in good faith and consistent with the Delta Reform Act and this chapter". If it is an attempt to summarize the standard of review the trial court would use, we think it better to say nothing and let the trial court make that determination. If it is an attempt to change or determine in advance a standard of review, we object to the DSC making this determination, because we think such a determination is beyond the scope of the DSC's authority. DWR generally agrees that the determination must be reasonable, made in good faith and consistent with the Delta Reform Act and the regulations (chapter), to the extent that the regulations are consistent with and do not conflict with the Delta Reform Act. Even after approval of the regulations by OAL, it is possible that a section of the chapter might be determined to be in conflict with the Delta Reform Act. In that case, of course, the statutory requirement would rule of over the administrative requirement. We strongly recommend deleting the phrase because it is potentially confusing and/or beyond the scope of the DSC. DSC's regulations at http://deltacouncil.ca.gov/doing-business-council establish the process for reviewing certifications of consistency. We agree that an agency proposing a project initially makes the decision of whether a project is consistent; that the DSC reviews that decision for whether it is supported by substantial evidence; and that a DSC determination can be appealed to a court of appropriate jurisdiction.		(1974) 11 Cal.3d 28, 34, n.2 [“[L]egislative action is formulation of a rule to be applied in all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts.”]) The cases cited by the comments discussing the judicial standards of review over legislative decisions are therefore inapplicable. Furthermore, requiring that this determination be reasonable and made in good faith is an objective standard, not a subjective standard. (See *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 103 n.32 [where “good faith” standard is associated with “reasoned analysis” or “reasonableness,” it is an objective standard].) Finally, it is appropriate for the Council to require agencies to make reasonable decisions in good faith, as other agencies frequently require. (E.g., CEQA Guidelines section 15151 [standard for adequacy of EIR is “good faith effort” at full disclosure]; Cal. Code Regs. tit. 14, section 18839 [requiring “good faith effort” and “reasonable effort” in implementing recycling program]; 36 C.F.R. 800.4(b)(1) [requiring federal agencies make “reasonable and good faith effort” in identifying historic properties].)
12. California Farm Bureau Federation	1/14/2013	Section 5003(b)(2)(c) Farm Bureau cautions the Council against potentially penalizing short-term voluntary water transfers. Such transfer provide a practical and effective way to alleviate water supply reliability concerns and achieve overall efficiency by allowing water markets to optimize geographic distribution and economic uses of the state’s limited water resources, while at the same time respecting the underlying vested water rights. While the Water Reliability Recommendation 15 sounds well-meaning enough, and while revised administrative rules could potentially streamline future water transfers, the Council should be careful not to exacerbate the problem of already lengthy and cumbersome water transfer procedures. Any procedure or Council regulation that has potential to make water markets less and not more efficient could in fact be deemed inconsistent with the Delta Reform Act’s legislative goal to improve statewide “water reliability.”	Co	Single-year water transfers through December 31, 2016 are among the list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language is more appropriately contained under the definition of “significant impact” and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact. With respect to the Council’s determination that single-year transfers will not have a significant impact on the coequal goals through December 31, 2016, the Council believes that water transfers contribute to California’s water supply reliability. However, the Council also understands that water transfers may have a significant impact on the Delta’s ecosystem, especially if these single year transfers are repeated over consecutive years as a means to circumvent the CEQA review process for multi-year (repeat) transfers. At this time, the Council is not aware that single year transfers are conducted in this manner. Accordingly, the Council has determined that, for the time-being, one-year water transfers do not have a significant impact on the coequal goals. In order to provide time to evaluate the potential significant impacts caused by repeated single year transfers, the Council sunsets this determination on December 31, 2016, unless the Council acts prior to the date. Until that time, there is no proposal to change or disrupt the current water transfer process. This review is consistent with WR R15 which recommends a stakeholder process to identify and recommend measures to reduce procedural and administrative impediments to water transfers and to address potential issues with recurring single year transfers.

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
ADOPTED REGULATION: SECTION 5001 ~~5003~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
13. California Farm Bureau Federation	1/14/2013	Section 5003(d) provides that "[n]othing 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." Section 5018 provides that "[t]he 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." Section 5019 provides that "[t]he provisions in this Chapter are not intended to affect the rights of any owner of property under the Constitution of the State of California or the United States." Comment: All three of these provisions are appropriate and absolutely necessary to avoid potential improper application or interpretation of the proposed regulations.	O	Comment noted.
14. Castaic Lake Water Agency	1/10/2013	Section 5003(b)(2)C One-Year Transfers Under California law, one-year transfers of water are not subject to the California Environmental Quality Act (CEQA). The Council has taken steps to exclude other CEQA exceptions from its covered action review process but, in the case of one-year transfers, that exception is only valid through 2014. One-year transfers are critical for meeting year-to-year shortfalls in supply. This vital water management tool is at risk if each transfer is subject to an appeal process that may take up to 150 days - or, in other words, half of the one-year transfer period.	A, Co	Please refer to **MR11** for the Council's response to this comment.
15. Central Delta Water Agency	1/14/2013	Section 5003. "Covered Action" and 5004 "Contents of Certifications of Consistency" To the extent covered actions include those actions referenced as being inconsistent with statutes and other provisions of law elsewhere in our comments to the regulations, these sections are also inconsistent with such statutes and law. 5003 A section should be added to clarify that actions in an area south of the Delta served with water exported through the SWP or CVP pumping facilities may be covered actions since such pumping facilities are located in the Delta.	Co, DP	Comment - Part 1 Response – The comment does not provide any detail or context. Comment - Part 2 Response -Comment noted. The example provided in the comment (areas South of the Delta served with water exported through the SWP or CVP facilities) does not meet the definition of a covered action because it does not occur in part or in whole in the Delta. However, the act of transferring of water through the Delta may be a covered action if it meets the entire definition of a covered action.
16. City of Sacramento	1/14/2013	Section 5003 — Covered action defined. Similar to the enhanced definition of "coequal goals," this enhancement of the definition of "covered action," which is already defined in Section 85057.5, sets forth substantive regulatory requirements that are unclear.	Ct	The Council is not changing the definition of a covered action. The Council is clarifying the definition by including additional language that requires the determination whether a proposed plan, program, or project is a covered action be reasonable and made in good faith.
17. City of Sacramento	1/14/2013	Section 5003(b)(2)(C) exempts one-year transfers from being considered a covered action, which is consistent with Section 1729 of the Water Code. However, Section 5003(b)(2)(C) sunsets the exemption on 1/1/2015, a limitation that is not consistent with Section 1729 of the Water Code. This creates a potentially confusing regulatory requirement that could result in an agency undertaking an environmental review of a one-year transfer to satisfy the requirements for certifying consistency with the Delta Plan, even though the legislature has exempted these from the requirements for CEQA review.	Co	With respect to the comment's assertion this section is inconsistent with Water Code section 1729, please refer to **MR11** for the Council's response.
18. City of Sacramento	1/14/2013	The last sentence of section 5003(b)(2)(C), starting with "The Council contemplates..." is simply a narrative expression of the Council's intent and is unnecessary. It does not provide clarity for the regulated community and does not meet the standards of necessity for regulatory language.	Ne	Section 5003(b)(2) contains a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact.
19. City of Sacramento	1/14/2013	In Section 5003(b)(2)(D), there appears to be an error in the first sentence reference to Section 5001(n) of this Chapter, which is the definition of "floodway."	A	The Council will correct the reference to ~~5001(s)~~ 5001 (dd)

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
20. City of Sacramento	1/14/2013	Section 5003(b)(2)(D)(i)-(ii) provides two narrative "examples" of unusual circumstances that could arise. It may not be appropriate to include examples in the regulatory language. Such language is more appropriate to the Plan. Section 5003(c) includes prescriptive requirements applicable to state and local agencies that should not be included within a "definition" and section 5003(d) inexplicably includes a clause that limits "the application of the definition." This is language that should be removed from the definitions portion of the proposal. As this portion of the proposal is currently structured the regulatory requirements are not clear to the regulated community. We question the need to include the statement that a determination is subject to judicial review, or any of the prescriptive requirements that the proposed regulations appear to be applying to state or local public agencies, when they are simply reiterations of the requirements of Water Code §85225 or processes set forth in statute.	Ne, Du	Section 5003(b)(2) contains a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact. With respect to the comment on section ~~5003(c)~~ 5001(j) (3), consistent with the Act (section 85225), this provision requires a public agency to determine whether its proposed plan, program, or project is a "covered action." The provision further requires this determination to be reasonable and made in good faith. The determination that a proposed action is a covered action is not a legislative decision, but rather is an adjudicative one. (See *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34, n.2 ["[L]egislative action is formulation of a rule to be applied in all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts."]) The cases cited by the comments discussing the judicial standards of review over legislative decisions are therefore inapplicable. Furthermore, requiring that this determination be reasonable and made in good faith is an objective standard, not a subjective standard. (See *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 103 n.32 [where "good faith" standard is associated with "reasoned analysis" or "reasonableness," it is an objective standard].) Finally, it is appropriate for the Council to require agencies to make reasonable decisions in good faith, as other agencies frequently require. (E.g., CEQA Guidelines section 15151 [standard for adequacy of EIR is "good faith effort" at full disclosure]; Cal. Code Regs. tit. 14, section 18839 [requiring "good faith effort" and "reasonable effort" in implementing recycling program]; 36 C.F.R. 800.4(b)(1) [requiring federal agencies make "reasonable and good faith effort" in identifying historic properties]. With respect to the comment on section ~~5003(d)~~ 5001(j)(4), this provision appropriately limits the application of the regulation to avoid an unlawful application of it. In addition, this language is part of the statutory definition of a covered action as passed by the legislature as part of the 2009 Delta Reform Act.
21. City of Stockton	1/14/2013	Covered Action is already specifically defined in Water Code section 85057.5. It is not clear why the proposed regulation repeats, verbatim, portions of Water Code section 85057.5 and changes and adds other language. In this regard, Section 5003 fails the Clarity, Nonduplication, and Necessity standards of the APA. Instead of attempting to redefine "Covered Action," the regulations, if anything, should simply define terms contained within the statutory definition. Additional confusion arises from phrases and words like "unusual circumstances" contained in Section 5003(b)(2)(D), and the narrative examples provided in Section 5003(b)(2)(D)(i) and (ii).	Ct, Du	The Council disagrees that the adopted regulation is duplicative. The Council has included additional language that requires the determination whether a proposed plan, program, or project is a covered action be reasonable and made in good faith. Section 5001 ~~5003~~(b)(2) contains a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact.
22. City of Stockton	1/14/2013	In addition, Section 5003 conflicts with those provisions of the Public Resources Code governing projects that are exempt from CEQA (Pub. Res. Code §§21080 et seq.). Water Code section 85075.5 uses CEQA's definition of "project," yet the regulations purport to only incorporate some of the CEQA exemptions. The conflict it creates is that various projects are exempt from CEQA (require no environmental review) and, by making them subject to the Council's "consistency" determinations, those projects that should be exempt from environmental (CEQA)	Ct, Co	Section 5001 ~~5003~~(b)(2) contains a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact.

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
		review will nonetheless have to undergo significant environmental review in the context of consistency with the Delta Plan. This at least appears to be a consequence of using CEQA's project definition but only including a limited number of CEQA's exemptions. The regulations should more clearly delineate what will be subject to environmental review, and the Council should explain why not all CEQA exemptions are included.		The Delta Reform Act adds a layer of regulation, separate from CEQA's requirements, to actions that qualify as "covered actions." The two statutes provide for different review for different purposes—one requiring review of projects proposed throughout the state for significant adverse environmental impacts and mitigation of those impacts, the other requiring consistency of projects proposed in the Delta with the coequal goals. Thus, in addition to complying with CEQA and all other applicable laws, public agencies proposing covered actions must also comply with the Act and implementing regulations, which have requirements separate from CEQA. While the intent and effect of the Act governing "covered actions" are distinct from CEQA's, the Council draws from existing CEQA statute and Guidelines where the statutory schemes overlap. Thus, where the Council finds that a project exempt from CEQA would similarly not have a significant impact on the coequal goals; it makes that finding in this regulation. Accordingly, for example, the Council has found that projects exempted from CEQA because they are ministerial, as a category, will not have an impact on the coequal goals. Furthermore, the Council determined as a general matter that projects that are exempt from CEQA are not likely to have a significant impact on the coequal goals. Thus, this regulation presumes those CEQA-exempt projects will not have a significant impact on the coequal goals for purposes of 85057.5(a)(4) and ~~5003(a)(4)~~ 5001(j)(1)(D), unless there are unusual circumstances indicating otherwise.
23. City of West Sacramento	1/14/2013	The City is concerned that there appears to be no mention of the exemption for plans and projects located in the secondary zone that are found to be consistent with a sustainable communities strategy (SCS), such as the SCS approved by SACOG in April 2012. The definition of "covered action" in Appendix D of the Delta Plan exempts projects and plans that are found to be consistent with an SCS but this is not included in the draft regulations.	DP	Water Code section 85057.5(a)(4) details the exemptions with respect to sustainable communities strategy and is included, by reference, in section ~~5003(b)(1)~~ 5001(j)(2).
24. Contra Costa Water District	1/14/2013	Section 5003 - Covered Action Defined. This definition includes regulatory or process information (5003(D)(c) and (d) that should be moved out of the definition section. Additionally, the DSC should review the limitation on the exemption for temporary water transfers for consistency with the Water Code and the authority of other state agencies to regulate transfers.	Co, O	The Council disagrees that these sections are process or regulatory. The language is included to clarify the definition of a covered action. With respect to the comment on section ~~5003(c)~~ 5001(j) (3), consistent with the Act (section 85225), this provision requires a public agency to determine whether its proposed plan, program, or project is a "covered action." The provision further requires this determination to be reasonable and made in good faith. The determination that a proposed action is a covered action is not a legislative decision, but rather is an adjudicative one. (See *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34, n.2 ["[L]egislative action is formulation of a rule to be applied in all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts."]) The cases cited by the comments discussing the judicial standards of review over legislative decisions are therefore inapplicable. Furthermore, requiring that this determination be reasonable and made in good faith is an objective standard, not a subjective standard. (See *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 103 n.32 [where "good faith" standard is associated with "reasoned analysis" or "reasonableness," it is an objective standard].) Finally, it is appropriate for the Council to require agencies to make reasonable decisions in good faith, as other agencies frequently require. (E.g., CEQA Guidelines section 15151 [standard for adequacy of EIR is "good faith effort" at full disclosure]; Cal. Code Regs. tit. 14, section 18839 [requiring "good faith effort" and "reasonable effort" in implementing recycling program]; 36 C.F.R. 800.4(b)(1) [requiring federal agencies make "reasonable and good faith effort" in identifying historic properties].

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				With respect to the comment on section ~~5003(d)~~ 5001(j)(4), this provision appropriately limits the application of the regulation to avoid an unlawful application of it. In addition, this language is part of the statutory definition of a covered action as passed by the legislature as part of the 2009 Delta Reform Act. With respect to the portion of the comment that refers to water transfers specifically, the Council has received several comments very similar to this one. Please refer to **MR11** for the Council's response.
25. East Bay Municipal Utility District	1/14/2013	Section 5003 - Covered action defined. Similar to the enhanced definition of "coequal goals," this enhancement of the definition of "covered action," which is already defined in Section 85057.5, sets forth substantive regulatory requirements that are unclear.	Ct	The Council is not changing the definition of a covered action. The Council is clarifying the definition by including additional language that requires the determination whether a proposed plan, program, or project is a covered action be reasonable and made in good faith. Section 5003(b)(2) contains a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact.
26. East Bay Municipal Utility District	1/14/2013	Section 5003(b)(2)(C) exempts one-year transfers from being considered a covered action, which is consistent with Section 1729 of the Water Code. However, Section 5003(bX2)(C) sunsets the exemption on January 1, 2015, a limitation that is not consistent with Section 1729 of the Water Code. This creates a potentially confusing regulatory requirement that could result in an agency undertaking an environmental review of a one-year transfer to satisfy the requirements for certifying consistency with the Delta Plan, even though the legislature has exempted these from the requirements for CEQA review.	Co	The Council disagrees with the assertion that it is inconsistent with section 1729 of the Water Code because it does not exempt single-year water transfers from the definition of a covered action the same way single-year transfers are statutorily exempt from CEQA. Please refer to **MR11** for the Council's response.
27. East Bay Municipal Utility District	1/14/2013	The last sentence of Section 5003(b)(2)(C), starting with "The Council contemplates..." is simply a narrative expression of the DSC's intent and is unnecessary. It does not provide clarity for the regulated community and does not meet the standards of necessity for regulatory language.	Ne	Section 5003(b)(2) contains a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact.
28. East Bay Municipal Utility District	1/14/2013	In Section 5003(b)(2)(D), there appears to be an error in the first sentence reference to Section 5001(n) of this Chapter, which is the definition of -floodway." We have provided a separate comment regarding Section 5001(s), the definition of "significant impact."	A	The Council will correct the reference to ~~5001(s)~~ 5001(dd)

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
29. East Bay Municipal Utility District	1/14/2013	Section 5003(bX2)(D)(i)-(ii) provides two narrative "examples" of unusual circumstances that could arise. It may not be appropriate to include examples in the regulatory language. Section 5003(c) includes prescriptive requirements applicable to state and local agencies that should not be included within a "definition" and Section 5003(d) inexplicably includes a clause that limits "the application of the definition." This is language that should be removed from the definitions portion of the proposal. As this portion of the proposal is currently structured the regulatory requirements are not clear to the regulated community. We question the need to include the statement that a determination is subject to judicial review, or any of the prescriptive requirements that the proposed regulations appear to be applying to state or local public agencies when they are simply reiterations of the requirements of Water Code Section 85225 or processes set forth in statute.	Ne, Du	Section 5003(b)(2) contains a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact. With respect to the comment on section ~~5003(c)~~ 5001(j) (3), consistent with the Act (section 85225), this provision requires a public agency to determine whether its proposed plan, program, or project is a "covered action." The provision further requires this determination to be reasonable and made in good faith. The determination that a proposed action is a covered action is not a legislative decision, but rather is an adjudicative one. (See *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34, n.2 ["[L]egislative action is formulation of a rule to be applied in all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts."]) The cases cited by the comments discussing the judicial standards of review over legislative decisions are therefore inapplicable. Furthermore, requiring that this determination be reasonable and made in good faith is an objective standard, not a subjective standard. (See *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 103 n.32 [where "good faith" standard is associated with "reasoned analysis" or "reasonableness," it is an objective standard].) Finally, it is appropriate for the Council to require agencies to make reasonable decisions in good faith, as other agencies frequently require. (E.g., CEQA Guidelines section 15151 [standard for adequacy of EIR is "good faith effort" at full disclosure]; Cal. Code Regs. tit. 14, section 18839 [requiring "good faith effort" and "reasonable effort" in implementing recycling program]; 36 C.F.R. 800.4(b)(1) [requiring federal agencies make "reasonable and good faith effort" in identifying historic properties]. With respect to the comment on section ~~5003(d)~~ 5001(j)(4), this provision appropriately limits the application of the regulation to avoid an unlawful application of it. In addition, this language is part of the statutory definition of a covered action as passed by the legislature as part of the 2009 Delta Reform Act.
30. Environmental Water Caucus	1/14/2013	(§§ 5003(b)(2)(B) and(D)) Use of CEQA Exemptions. The Draft Regulation adopts much of the same exemption criteria as CEQA, but without CEQA's statutory basis for those exemptions – an impermissible conflating of the two statutes. The statutory basis for the emergency exemption (§ 5003(b)(2)(B)) is not contained within the Delta Plan statute, though there in such an exemption in CEQA. But because the two statutes are not synonymous, and each has different goals, this provision should be removed from the regulation as it lacks statutory basis. There should be no emergency exemption for compliance with the Delta Plan without adequate statutory basis.	A	Section 5003(b)(2) contains a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact.
31. Environmental Water Caucus	1/14/2013	Section 5003(b)(2)(D) Likewise, the general exemption corresponding to CEQA exemptions (§ 5003(b)(2)(D)) should be removed from the Proposed Regulation, as it provides too much leeway for projects to claim CEQA exemption as the basis for exclusion from the Delta Plan. The Delta Plan does not stand as a proxy for CEQA; the two use different measures of impacts, with the Delta Plan's impacts going beyond those considered environmental, and it is reasonable to expect many projects to be covered by the Delta Plan but excluded from CEQA, and vice-versa.	A	Section ~~5001~~ 5003(b)(2) contains a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact.

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
		This provision lacks a proper statutory basis and should be removed.		CEQA and the Act are distinct statutory schemes, operating for different purposes and imposing differing requirements on regulated entities. The Act is narrower to the extent it focuses on the Delta rather than CEQA's statewide approach, but broader to the extent it focuses on policy objectives beyond CEQA's objective to eliminate adverse environmental impacts. Nevertheless, the legislature acknowledges and directs some overlap between the two statutes by cross-referencing CEQA concepts as part of the definition of "covered actions" over which the Council has jurisdiction. Thus, under section 85057.5(a)(1), a plan, program, or project must be a "project" under CEQA, Public Resources Code section 21065, to be a "covered action" under the Act. While the intent and effect of the Act governing "covered actions" are distinct from CEQA's, the Council draws from existing CEQA statute and Guidelines where the statutory schemes overlap. Thus, where the Council finds that a project exempt from CEQA would similarly not have a significant impact on the coequal goals, it makes that finding in this regulation. Accordingly, for example, the Council has found that projects exempted from CEQA because they are ministerial, as a category, will not have an impact on the coequal goals. Furthermore, the Council determined as a general matter that projects that are exempt from CEQA are not likely to have a significant impact on the coequal goals. Thus, this regulation presumes those CEQA-exempt projects will not have a significant impact on the coequal goals for purposes of 85057.5(a)(4) and ~~5003(a)(4)~~ 5001(j)(1)(D), unless there are unusual circumstances indicating otherwise. Finally, the Council must avoid the imposition of unnecessary or unreasonable regulatory requirements. (See Government Code section 11346.3.) The Council has determined projects exempt from CEQA are categorically unlikely to have a significant impact on the coequal goals and thus, to avoid imposing excessive regulation, agencies proposing those projects need not file a certification of consistency as a general matter. However, if unusual circumstances indicate a reasonable possibility the proposed project will have a significant impact on the coequal goals, the agency must file a certificate to comply with the Act and this Chapter. (section 5003(b)(2)(D)).
32. Environmental Water Caucus	1/14/2013	(§5003(b)(2)(C)) Exclusion of Temporary Water Transfers. It is not stated why these transfers are excluded, as they would otherwise be included as covered actions under the Delta Plan. The Proposed Regulation clearly anticipates problems with this provision as it sunsets after one year (unless renewed). The provision cites to the Delta Plan's Water Resource Recommendation No.15, but this recommendation simply re-states the need to address the policy problem of temporary water transfers by other state agencies, which neither the Delta Stewardship Council nor the Delta Plan's enabling statute control. Temporary transfers can be very large, at least 100,000 acre-feet, and they can re-occur for many consecutive years, giving them the magnitude and effect of a permanent transfer. Were it not for this exclusionary provision, temporary transfers would be considered covered actions under Section 5005(c) of the Delta Plan; the change in ownership of the use rights of water, even though temporary, may have a significant economic and/or environmental impact on one or more of the co-equal goals. The exemption for temporary transfers exceeds the statutory authority for the Delta Plan, and should be removed.	A	Section 5003(b)(2) contains a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5, including single-year transfers though December 31, 2016. This language is appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact. With respect to the Council's determination that single-year transfers will not have a significant impact on the coequal goals through December 31, 2016, the Council believes that water transfers contribute to California's water supply reliability. However, the Council also understands that water transfers may have a significant impact on the Delta's ecosystem, especially if these single year transfers are repeated over consecutive years as a means to circumvent the CEQA review process for multi-year (repeat) transfers. At this time, the Council is not aware that single year transfers are conducted in this manner. Accordingly, the Council has determined that, for the time-being, one-year water transfers do not have a significant impact on the coequal goals. In order to provide time to evaluate the potential significant impacts caused by repeated single year transfers, the Council sunsets this determination on December 31, 2016, unless the Council acts prior to the date. Until that time, there is no proposal to change or disrupt the current water transfer process. This review is consistent with

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				WR R15 which recommends a stakeholder process to identify and recommend measures to reduce procedural and administrative impediments to water transfers and to address potential issues with recurring single year transfers.
33. Environmental Water Caucus	1/14/2013	Section 5003 and 5004: Summary. As explained above, the two central problems with the Proposed Regulation concern whether an action is considered a "covered" action, and whether a covered action is "consistent" with the Delta Plan. As mentioned in the cover letter to the EWC comments for the Final Delta Plan, covered actions must include a Water Supply Analysis for each certified project in order to insure the availability of adequate water for the restoration of the Delta; such an analysis must in turn require a detailed Cost-Benefit Analysis in order to assure the financial viability of a covered project, and; it must include a Public Trust Analysis as indicated in the Delta Reform Act which cites the Public Trust as the foundation of California water policy. We therefore recommend that an additional regulatory policy be incorporated into Section 5005 of the Delta Plan Proposed Regulation which require these three actions be accomplished prior to the certification of consistency for any Delta Plan project or the approval of this Rulemaking Package. These three analytical actions are necessary in order to assure that: 1. Adequate water is actually available for the recovery of the Delta as well as other beneficial uses (Water Supply Analysis); 2. That each major project undertaken as part of the Delta Plan is a cost-effective activity for the state (Cost-Benefit Analysis) and; 3. That Public Trust values are considered and compared with other beneficial uses of water (Public Trust Analysis).	DP, E	The Delta Council, in its discretion, has determined not to request additional information regarding covered actions.
34. Sacramento County	1/14/2013	9. With respect to Section 5003, the term "covered action" is already defined in state law. The draft regulatory definition is duplicative of Water Code section 85057.5.	Du	The Council disagrees that the adopted regulation is duplicative. The Council has included additional language that requires the determination whether a proposed plan, program, or project is a covered action be reasonable and made in good faith.
35. Sacramento County	1/14/2013	10. Section 5003(c) requires that covered action determinations must be "reasonable, made in good faith and consistent with the Delta Reform Act and this chapter." However, it is not appropriate to require that the local legislative body act reasonably or in good faith in making its determination. The sole issue is the correctness of the legislative body's determination that an activity constitutes a covered action and is consistent with the Act. Subjective inquiries into the "good faith" or "reasonableness" of public agency decision makers is barred. See e.g. Board of Supervisors v. Los Angeles Co. (1995) 32 Cal.App.4th 1616; Co. of Los Angeles v. Superior Court (1975) 13 Cal.3d 721.	DP	Consistent with the Act (section 85225), this provision requires a public agency to determine whether its proposed plan, program, or project is a "covered action." The provision further requires this determination to be reasonable and made in good faith. The determination that a proposed action is a covered action is not a legislative decision, but rather is an adjudicative one. (See *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34, n.2 ["[L]egislative action is formulation of a rule to be applied in all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts."]) The cases cited by the comments discussing the judicial standards of review over legislative decisions are therefore inapplicable. Furthermore, requiring that this determination be reasonable and made in good faith is an objective standard, not a subjective standard. (See *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 103 n.32 [where "good faith" standard is associated with "reasoned analysis" or "reasonableness," it is an objective standard].) Finally, it is appropriate for the Council to require agencies to make reasonable decisions in good faith, as other agencies frequently require. (E.g., CEQA Guidelines section 15151 [standard for adequacy of EIR is "good faith effort" at full disclosure]; Cal. Code Regs. tit. 14, section 18839 [requiring "good faith effort" and "reasonable effort" in implementing recycling program]; 36 C.F.R. 800.4(b)(1) [requiring federal agencies make "reasonable and good faith effort" in identifying historic properties].)

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
ADOPTED REGULATION: SECTION 5001 ~~5003~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
36. Sacramento County	1/14/2013	11. Section 5003(b)(2)(D)(ii) needs to define the term "small-scale habitat restoration Projects."	Ct	The Council has modified the language of this section to read: *(B) Small-scale habitat restoration projects, as referred to in CEQA Guidelines 15333, 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).* CEQA guidelines section 15333 refers to "…projects not to exceed five acres in size…"
37. Sacramento Regional County Sanitation District	1/14/2013	Section 5003 — Covered Action Defined Covered Action is already specifically defined in Water Code section 85057.5. It is not clear why the proposed regulation repeats, verbatim, portions of Water Code section 85057.5 and changes and adds other language. In this regard, Section 5003 fails the Clarity, Nonduplication, and Necessity standards of the APA. Instead of attempting to redefine "Covered Action," the regulations, if anything, should simply define terms contained within the statutory definition. Additional confusion arises from phrases and words like "unusual circumstances" contained in Section 5003(b)(2)(D), and the narrative examples provided in Section 5003(b)(2)(D)(i) and (ii).	Ct, Co, Du	The Council disagrees that the adopted regulation is duplicative. The Council has included additional language that requires the determination whether a proposed plan, program, or project is a covered action be reasonable and made in good faith. The Council has developed a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact.
38. Sacramento Regional County Sanitation District	1/14/2013	In addition, Section 5003 conflicts with those provisions of the Public Resources Code governing projects that are exempt from CEQA (Pub. Res. Code §§21080 et seq.). Water Code section 85075.5 uses CEQA's definition of "project," yet the regulations purport to only incorporate some of the CEQA exemptions. The conflict it creates is that various projects are exempt from CEQA (require no environmental review) and, by making them subject to the Council's "consistency" determinations, those projects that should be exempt from environmental (CEQA) review will nonetheless have to undergo significant environmental review in the context of consistency with the Delta Plan. This at least appears to be a consequence of using CEQA's project definition but only including a limited number of CEQA's exemptions. The regulations should more clearly delineate what will be subject to environmental review, and the Council should explain why not all CEQA exemptions are included.	Co	The Council has developed a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact. CEQA and the Act are distinct statutory schemes, operating for different purposes and imposing differing requirements on regulated entities. The Act is narrower to the extent it focuses on the Delta rather than CEQA's statewide approach, but broader to the extent it focuses on policy objectives beyond CEQA's objective to eliminate adverse environmental impacts. Nevertheless, the legislature acknowledges and directs some overlap between the two statutes by cross-referencing CEQA concepts as part of the definition of "covered actions" over which the Council has jurisdiction. Thus, under section 85057.5(a)(1), a plan, program, or project must be a "project" under CEQA, Public Resources Code section 21065, to be a "covered action" under the Act. While the intent and effect of the Act governing "covered actions" are distinct from CEQA's, the Council draws from existing CEQA statute and Guidelines where the statutory schemes overlap. Thus, where the Council finds that a project exempt from CEQA would similarly not have a significant impact on the coequal goals, it makes that finding in this regulation. Accordingly, for example, the Council has found that projects exempted from CEQA because they are ministerial, as a category, will not have an impact on the coequal goals. Furthermore, the Council determined as a general matter that projects that are exempt from CEQA are not likely to have a significant impact on the coequal goals. Thus, this regulation presumes those CEQA-exempt projects will not have a significant impact on the coequal goals for purposes of 85057.5(a)(4) and ~~5003(a)(4)~~ 5001(j)(1)(D), unless there are unusual circumstances indicating otherwise.

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39. San Bernardino Valley Municipal Water District	1/14/2013	Section 5003(b)(2)C One-Year Transfers: Under California law, one-year transfers of water are not subject to the California Environmental Quality Act (CEQA). The Council has taken steps to exclude other CEQA exceptions from its covered action review process, but in the case of one-year transfers, that exception is only valid through 2014. One-year transfers are critical for meeting year-to-year shortfalls in supply. This vital water management tool is at risk if each transfer is subject to an appeal process that may take up to 150 days.	A, Co	Please refer to **MR11** for the Council's response to this comment.
40. San Gorgonio Pass Water Agency	1/11/2013	Section 5003(b)(2)C One-Year Transfers. Under California law, one-year transfers of water are not subject to the California Environmental Quality Act (CEQA). The Council has taken steps to exclude other CEQA exceptions from its covered action review process, but in the case of one-year transfers, that exception is only valid through 2014. One-year transfers are critical for meeting year-to-year shortfalls in supply. This vital water management tool is at risk if each transfer is subject to an appeal process that may take up to 150 days.	A, Co	Please refer to **MR11** for the Council's response to this comment.
41. San Joaquin County Board of Supervisors	1/14/2013	Impact of Proposed Regulations on Agriculture Although recent drafts of the Delta Plan have discussed the subject of "covered actions" in more detail than previous drafts, there remains much ambiguity. Due to the lack of specificity in the Plan's description of covered actions, the types of activities that may be covered actions could be open to different interpretations. Because of this ambiguity, potential impacts the "covered actions" provisions of the Plan may have on Delta agriculture is difficult to assess. However, using the Plan's definition of "covered actions", there are two examples of already highly regulated farming practices that may be considered covered actions. They are applications of restricted pesticides and irrigation water discharge.	Ct	The language regarding covered actions very closely tracks the definition of the covered actions as passed by the legislature as part of the 2009 Delta Reform Act. The two examples provided as part of the comment, the use of restricted pesticides and irrigation water discharge, may not, as described, meet the definition of a covered action. There is insufficient detail regarding these two actions to determine what impacts they may have on the coequal goals or if either of these two actions will be covered by one or more provisions of the Delta Plan. However the Council does not determine what is or isn't a covered action. If either of these two actions are carried out, approved, or funded by the state or al local public agency, then the state or local public agency must determine whether that action is a covered action.
42. San Joaquin County Board of Supervisors	1/14/2013	Because growers are required to obtain permits from County Agricultural Commissioners before using restricted pesticides, some may argue that the use of restricted pesticides in the Delta is considered a "covered action." Presently, the California Department of Pesticide Regulation and the County Agricultural Commissioners have sole authority and responsibility over the use of pesticides in California. Pesticide use in California is subject to Division 6 and 7 of the California Food and Agricultural Code. However, as a covered action, restricted pesticide use in the Delta may now be deemed to require certification of consistency with the Delta Plan and approval by the Delta Stewardship Council if the certification is challenged. Consequently, the Delta Plan and these proposed Regulations become a new body of law governing pesticide use and the Delta Stewardship Council could be deemed to be new authority for authorizing pesticide usage. Presently, staff in the County Agricultural Commissioners' offices has neither the expertise nor the training to certify restricted pesticide consistency with the Delta Plan. Additionally, there are no established criteria or guide to help them with this certification task. It is also unclear whether every permit that is issued requires a separate evaluation as to its consistency with the Delta Plan or whether the general use of restricted pesticides in the Delta is granted a blanket certification of consistency (or non-consistency).	A, Co	For the example of restricted pesticide application to be a covered action, the project would have to meet the definition of a covered action. Specifically, the project would have to have a significant impact on the achievement of one or both off the coequal goals or the implementation of a government sponsored flood control program AND the Delta Plan would have to contain a provision (regulatory policy) pertaining to pesticide application. Currently, none of the regulatory policies pertain to the application of restricted pesticides. However the California Department of Pesticide Regulation or the County Agricultural Commissioners must determine whether this example, as described, is a covered action.
43. San Joaquin County Board of Supervisors	1/14/2013	In addition to the possible covered actions impacts on the use of restricted pesticides in the Delta, the ability for growers to discharge their irrigation waters into the Delta may also be impacted. Presently, the California Regional Water Quality Control Board allows growers to discharge irrigation water into the "waters of the state" under the conditions of an "agricultural waiver." Since irrigation discharge is permitted by a State agency, the CRWQCB Region 5 agricultural waiver may require certification of consistency with the Delta Plan before Delta growers discharge irrigation water under the terms of the waiver. Adding another regulatory requirement to these and other permitted activities potentially puts	A, Co	For the example of irrigation discharge to be a covered action, the project would have to meet the definition of a covered action. Specifically, the project would have to have a significant impact on the achievement of one or both off the coequal goals or the implementation of a government sponsored flood control program AND the Delta Plan would have to contain a provision (regulatory policy) pertaining to water quality or irrigation discharges.. Currently, none of the regulatory policies would pertain to irrigation discharges. However CRWQCB Region 5 must determine whether this example, as described, is a covered action.

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		an unnecessary regulatory burden on already highly regulated and protective activities. Furthermore, the Delta Stewardship Council has no authority in regulating pesticides or irrigation water discharge. There are other agencies dealing with these issues and they already have in place the authority, laws and permitting processes to protect the environment and water quality.		
44. San Joaquin County Board of Supervisors	1/14/2013	As to Section 5003, San Joaquin County concurs in the submitted objections and comments of Solano County and Yolo County regarding this definitional language and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.	Ct	Comment noted.
45. San Joaquin County Board of Supervisors	1/14/2013	Section 5005(b)(5), contains vague and confusing language that requires the local agency to include in the certification of consistency a certification that the covered action complies with all applicable laws regarding water resources, biological resources, flood risk, and land use and planning. Based upon this language, it appears that the Department will be responsible for enforcement of measures required to make findings of consistency upon which to base the certification of consistency. It would then follow that such measures would need to be incorporated into project approval, prior to certification, so that they can be enforced. In order to do this, the best available science will need to be done prior to project approval, so that measures ensuring consistency can be identified during the CEQA process, and incorporated into project approval. Accordingly, the expense of "best available science" will be incurred by the applicant before the applicant even has an approved project.	DP, E	**Comment is on section 5002(b)(5)**. The Council has removed 5002 (b)(5).
46. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Section 5003(b)(2)(C): One-year temporary CVP- and SWP-related water transfers occur regularly and are subject to all terms and conditions and other environmental protections imposed on the SWP and CVP. They therefore are “routine operations” of the SWP and CVP and expressly excluded from the definition of “covered action” by Water Code section 85057.5(b)(2). Moreover, one-year transfers approved by State Water Resources Control Board are exempt from the application of CEQA pursuant to Water Code section 1729, and therefore are not a “project” under Public Resources Code section 21065. Although the proposed regulation administratively exempts one-year temporary water transfers, it does so “only through December 31, 2014.” This proposed sunsetting of the covered action exclusion is inconsistent with the express language in the Delta Reform Act and will hinder achievement of the coequal goal of improving water supply reliability. Accordingly, this Section should be removed from the Proposed Regulations.	A, Co	It is the agency proposing the action’s responsibility to determine whether an action is a covered action pursuant to section 85057.5 and these regulations, subject to judicial review. Nevertheless, the Council disagrees that one-year temporary transfers are excluded from the definition of a covered action because they are “routine operations” of the SWP and CVP. By their very nature, one-year transfers cannot be routine because the participating water suppliers, the amount of the transfer, when the transfer will occur, or even the need for a transfer cannot be anticipated in advance with any certainty. The Council disagrees with the assertion that it is inconsistent with section 1729 of the Water Code because it does not exempt single-year water transfers from the definition of a covered action the same way single-year transfers are statutorily exempt from CEQA. Please refer to **MR11** for the Council’s response.
47. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Section 5003(b)(2)(D): The proposed definition of “covered actions” impermissibly attempts to alter and amend established CEQA principles regarding the definition of a “project,” as well as the application of statutory and categorical exemptions, and is in direct conflict with controlling law. (Pub. Resources Code, § 21065; Cal. Code Regs., tit. 14, §§ 15300.2 (c), 15378; 15382.) Statutory exemptions under CEQA are absolute; they reflect legislative policy determinations and are not subject to any exceptions for “unusual circumstances.” (Cal. Code Regs., tit. 14, § 15061(b)(2); Sunset Sky Ranch Pilots Association v. County of Sacramento (2009) 47 Cal.4th 902, 907; Great Oaks Water Co. v. Santa Clara Water Dist. (2009) 170 Cal.App.4th 9576, 966, fn. 8; Communities for a Better Environment v. California Resources Agency (2002) 103 Cal.App.4th 98, 128-129.) The Proposed Regulations directly conflict with these established principles. Furthermore, “unusual circumstances” as they pertain to categorical CEQA exemptions have been defined and interpreted under CEQA. (Cal. Code Regs., tit. 14, §§ 15300.2(c); see, e.g., Banker’s Hill v. City of San Diego (2006) 139 Cal.App.4th 249, 261; Turlock Irrigation District v. Zanker (2006) 140 Cal.App.4th 1047; Santa Monica Chamber of Commerce v. City of Santa Monica (2002) 101 Cal.App.4th 786, 800; Fairbank v.	A, Co	The Council is not altering or amending CEQA by adopting these regulations. CEQA and the Act are distinct statutory schemes, operating for different purposes and imposing differing requirements on regulated entities. The Act is narrower to the extent it focuses on the Delta rather than CEQA’s statewide approach, but broader to the extent it focuses on policy objectives beyond CEQA’s objective to eliminate adverse environmental impacts. Thus, in addition to complying with CEQA and all other applicable laws, public agencies proposing covered actions must also comply with the Act and implementing regulations, which have requirements separate from CEQA. Nevertheless, the legislature acknowledges and directs some overlap between the two statutes by cross-referencing CEQA concepts as part of the definition of “covered actions” over which the Council has jurisdiction. Thus, under section 85057.5(a)(1), a plan, program, or project must be a “project” under CEQA, Public Resources Code section 21065, to be a “covered action” under the Act. While the intent and effect of the Act governing “covered actions” are distinct from CEQA’s, the Council draws from existing CEQA statute and Guidelines where the statutory schemes

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		City of Mill Valley (1999) 75 Cal.App.4th 1243, 1260-1261.) The Council has no authority to fundamentally alter controlling law.		overlap. Thus, where the Council finds that a project exempt from CEQA would similarly not have a significant impact on the coequal goals, it makes that finding in this regulation. Accordingly, for example, the Council has found that projects exempted from CEQA because they are ministerial, as a category, will not have an impact on the coequal goals. Furthermore, the Council determined as a general matter that projects that are exempt from CEQA are not likely to have a significant impact on the coequal goals. Thus, this regulation presumes those CEQA-exempt projects will not have a significant impact on the coequal goals for purposes of 85057.5(a)(4) and ~~5003(a)(4)~~ 5001(j)(1)(D), unless there are unusual circumstances indicating otherwise.
48. Solano County Department of Resource Management	1/14/2013	• Subsection (b)(2)(D) should refer to section 5001(s), not section 5001(n).	O	We will correct the reference to ~~5001(s)~~ 5001(dd).
49. Solano County Department of Resource Management	1/14/2013	• Subsection 5003(c) requires that a public agency's covered action determination must, among other things, be "reasonable [and] made in good faith." However, the key measure is not whether an agency acts reasonably or in good faith in making a covered action determination; consistency with the Delta Reform Act and its Regulations is what's key. This part of the subsection should therefore be deleted.	Ct, DP	Consistent with the Act (section 85225), this provision requires a public agency to determine whether its proposed plan, program, or project is a "covered action." The provision further requires this determination to be reasonable and made in good faith. The determination that a proposed action is a covered action is not a legislative decision, but rather is an adjudicative one. (See *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34, n.2 ["[L]egislative action is formulation of a rule to be applied in all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts."]) The cases cited by the comments discussing the judicial standards of review over legislative decisions are therefore inapplicable. Furthermore, requiring that this determination be reasonable and made in good faith is an objective standard, not a subjective standard. (See *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 103 n.32 [where "good faith" standard is associated with "reasoned analysis" or "reasonableness," it is an objective standard].) Finally, it is appropriate for the Council to require agencies to make reasonable decisions in good faith, as other agencies frequently require. (E.g., CEQA Guidelines section 15151 [standard for adequacy of EIR is "good faith effort" at full disclosure]; Cal. Code Regs. tit. 14, section 18839 [requiring "good faith effort" and "reasonable effort" in implementing recycling program]; 36 C.F.R. 800.4(b)(1) [requiring federal agencies make "reasonable and good faith effort" in identifying historic properties].)
50. Solano County Department of Resource Management	1/14/2013	• The Delta Reform Act requires that only actions identified as "covered actions" pursuant to Water Code section 85057.5 must be consistent with the Delta Plan. (Water Code § 85022.) However, as detailed elsewhere in these comments, many of the provisions in Article 3 of the Regulations would appear to encompass some non-covered actions. This (or another) section should clarify that the Regulations only affect "covered actions."	Ct	The Delta Reform Act requires State and local actions that fit the legal definition of a covered action be consistent with the Delta Plan. Section ~~5003~~ 5001(j) defines a covered action. It is not clear how provisions of Article 3 would appear to encompass some non-covered actions.
51. State Water Resources Control Board	1/14/2013	Section 5003(b)(2), which identifies exemptions to the definition of "Covered action" is potentially confusing because it references a water right action (a temporary water transfer) subject to the State Water Board's regulatory authority. Water Code section 85057.5(b) excludes regulatory actions of a state agency, such as the State Water Board, from the definition of a "Covered action." Section 5003(b)(1) appropriately references the exemptions under Water Code section 85057.5(b) in defining a "Covered action." Section 5003(b)(2)(C), however, specifically and temporarily excludes "temporary water transfers of up to one-year in duration" from this definition. This proposed temporary exemption from the definition of a "Covered	Ct	The regulations do not cover the State Water Board's regulatory authority over water transfers. Section ~~5003(b)~~ 5001(j)(2) states: *(b) "Covered action" does not include any plan, program, or project that is exempted pursuant to Water Code section 85057.5(b).* Water Code section 85057.5(b)(1) exempts a regulatory action of a state agency.

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		action" would be repealed as of January 1, 2015, unless the Council takes further action to extend the exemption. Thus, it is possible that after January 1, 2015, temporary water transfers would no longer be excluded from the definition of "Covered action." Because the State Water Board's action on a petition for temporary water transfer under Water Code section 1725 et seq. is a regulatory action that is exempt under Water Code section 85057.5(b), we assume that this provision is not intended to apply to the State Water Board's exercise of its regulatory authority over water transfers, but instead to any transfers already approved by the Board. We recommend revising the proposed regulation to clarify its applicability.		
52. Tehama Colusa Canal Authority	1/14/2013	Section 5003 – Covered action defined. Similar to the enhanced definition of "coequal goals," this definition is already defined in Section 85057.5 and now sets forth unclear substantive regulatory requirements. Section 5003(b)(2)(C) exempts one-year transfers from being considered a covered action, which is consistent with Section 1729 of the Water Code. However, Section 5003(b)(2)(C) sunsets the exemption on 1/1/2015, creating a limitation that is not consistent with Section 1729 of the Water Code. This is a confusing and inconsistent regulatory requirement that could result in an agency undertaking an environmental review of a one-year transfer to satisfy the requirements for certifying consistency with the Delta Plan, even though the legislature has exempted these from the requirements for CEQA review.	Co	The Council is clarifying the definition by including additional language that requires the determination whether a proposed plan, program, or project is a covered action be reasonable and made in good faith. The Council disagrees with the assertion that it is inconsistent with section 1729 of the Water Code because it does not exempt single-year water transfers from the definition of a covered action the same way single-year transfers are statutorily exempt from CEQA. Please refer to **MR11** for the Council's response.
53. Tehama Colusa Canal Authority	1/14/2013	Additionally, section 5003(b)(2) contains narrative expression of the Council's intent and examples, and is therefore unnecessary. It does not provide clarity for the regulated community does not meet the standards of necessity for regulatory language and must be removed.	Ct	The Council has developed a list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code section 85057.5. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from section ~~5003(b)~~ 5001(j), the definition of a covered action, to section ~~5001(s)~~ 5001(dd), the definition of significant impact.
54. Tehama Colusa Canal Authority	1/14/2013	Section 5003(c) should not include prescriptive requirements applicable to state and local agencies and section 5003(d) should not include the clause that limits "the application of the definition." This is language is structured in a manner that renders the regulatory requirements unclear to the regulated community.	Ct	With respect to the comment on section ~~5003(c)~~ 5001(j)(3), consistent with the Act (section 85225), this provision requires a public agency to determine whether its proposed plan, program, or project is a "covered action." The provision further requires this determination to be reasonable and made in good faith. The determination that a proposed action is a covered action is not a legislative decision, but rather is an adjudicative one. (See *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34, n.2 ["[L]egislative action is formulation of a rule to be applied in all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts."]) The cases cited by the comments discussing the judicial standards of review over legislative decisions are therefore inapplicable. Furthermore, requiring that this determination be reasonable and made in good faith is an objective standard, not a subjective standard. (See *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 103 n.32 [where "good faith" standard is associated with "reasoned analysis" or "reasonableness," it is an objective standard].) Finally, it is appropriate for the Council to require agencies to make reasonable decisions in good faith, as other agencies frequently require. (E.g., CEQA Guidelines section 15151 [standard for adequacy of EIR is "good faith effort" at full disclosure]; Cal. Code Regs. tit. 14, section 18839 [requiring "good faith effort" and "reasonable effort" in implementing recycling program]; 36 C.F.R. 800.4(b)(1) [requiring federal agencies make "reasonable and good faith effort" in identifying historic properties]. With respect to the comment on section ~~5003(d)~~ 5001(j)(4), this provision appropriately limits the application of the regulation to avoid an unlawful application of it. In addition, this

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				language is part of the statutory definition of a covered action as passed by the legislature as part of the 2009 Delta Reform Act.
55. Tulare Lake Basin Water Storage District	1/11/2013	Section 5003(b)(2)C One-Year Transfers: Under California law, one-year transfers of water are not subject to the California Environmental Quality Act (CEQA). The Council has taken steps to exclude other CEQA exceptions from its covered action review process, but in the case of one-year transfers, that exception is only valid through 2014. One-year transfers are critical for meeting year-to-year shortfalls in supply. This vital water management tool is at risk if each transfer is subject to an appeal process that may take up to 150 days.	A, Co	Please refer to **MR11** for the Council's response to this comment.
56. Westlands Water District	1/14/2013	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 9576, 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.	A, DP	The Council disagrees with the assertion that it is inconsistent with section 1729 of the Water Code because it does not exempt single-year water transfers from the definition of a covered action the same way single-year transfers are statutorily exempt from CEQA. Please refer to **MR11** for the Council's response.
57. Westlands Water District	1/14/2013	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; CEQA Guidelines, §§ 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." (CEQA Guidelines, § 15061, subd. (b)(2); Sunset Sky Ranch Pilots Association v. County of Sacramento (2009) 47 Cal.4th 902, 907; Great Oaks Water Co. v. Santa Clara Water Dist. (2009) 170 Cal.App.4th 9576, 966, fn. 8; Communities for a Better Environment v. California Resources Agency (2002) 103 Cal.App.4th 98, 128-129.) The 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. (CEQA Guidelines, §§ 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.	Co, DP	The Council is not altering or amending CEQA by adopting these regulations. CEQA and the Act are distinct statutory schemes, operating for different purposes and imposing differing requirements on regulated entities. The Act is narrower to the extent it focuses on the Delta rather than CEQA's statewide approach, but broader to the extent it focuses on policy objectives beyond CEQA's objective to eliminate adverse environmental impacts. Nevertheless, the legislature acknowledges and directs some overlap between the two statutes by cross-referencing CEQA concepts as part of the definition of "covered actions" over which the Council has jurisdiction. Thus, under section 85057.5(a)(1), a plan, program, or project must be a "project" under CEQA, Public Resources Code section 21065, to be a "covered action" under the Act. While the intent and effect of the Act governing "covered actions" are distinct from CEQA's, the Council draws from existing CEQA statute and Guidelines where the statutory schemes overlap. Thus, where the Council finds that a project exempt from CEQA would similarly not have a significant impact on the coequal goals, it makes that finding in this regulation. Accordingly, for example, the Council has found that projects exempted from CEQA because they are ministerial, as a category, will not have an impact on the coequal goals. Furthermore, the Council determined as a general matter that projects that are exempt from CEQA are not likely to have a significant impact on the coequal goals. Thus, this regulation presumes those CEQA-exempt projects will not have a significant impact on the coequal goals for purposes of 85057.5(a)(4) and ~~5003(a)(4)~~ 5001(j)(1)(D), unless there are unusual circumstances indicating otherwise.
58. Westlands Water District	1/14/2013	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.	A, DP	Duplicate Comment

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
59. Westlands Water District	1/14/2013	Section 5003(b)(2)(0) 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; 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.	A, Co	Duplicate Comment
60. Westlands Water District	1/14/2013	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.	Ne, Co	The Council disagrees with the assertion that it is inconsistent with section 1729 of the Water Code because it does not exempt single-year water transfers from the definition of a covered action the same way single-year transfers are statutorily exempt from CEQA. Please refer to **MR11** for the Council's response.
61. Yolo County, Office of the County Counsel	1/14/2013	This section defines the term "covered action," which is already defined in state law. At least in part, the definition is thus duplicative of Water Code Section 85057.5 and in conflict with the nonduplication standard (Government Code Section 11349(f)). With one exception, however, the County does not object to the inclusion of a regulatory definition of "covered action" and believes that certain language in the regulatory definition is useful to clarify Section 85057.5.	Du	The Council disagrees that the adopted regulation is duplicative. The Council has included additional language that requires the determination whether a proposed plan, program, or project is a covered action be reasonable and made in good faith.
62. Yolo County, Office of the County Counsel	1/14/2013	The one exception relates to subsection (c) of Section 5003, which states that public agency covered action determinations must be "reasonable, made in good faith, and consistent with the Delta Reform Act and this chapter." Only the final part of this language (relating to consistency with the Delta Reform Act and related regulations) is appropriate. Put simply, it makes no difference whether an agency acts reasonably or in good faith in making a covered action determination--it matters only whether the determination is correct. Moreover, inquiries into the "good faith" or "reasonableness" of public agency decision makers are barred by the deliberative process privilege and long-established principles of law (e.g., Board of Supervisors of Los Angeles County v. Superior Court, 32 Cal. App. 4th 1616, 1623 (1995); County of Los Angeles v. Superior Court, 13 Cal.3d 721 (1975)). This language is thus unnecessary and beyond the authority of the Council.	Ct, DP	Consistent with the Act (section 85225), this provision requires a public agency to determine whether its proposed plan, program, or project is a "covered action." The provision further requires this determination to be reasonable and made in good faith. The determination that a proposed action is a covered action is not a legislative decision, but rather is an adjudicative one. (See *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34, n.2 ["[L]egislative action is formulation of a rule to be applied in all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts."]) The cases cited by the comments discussing the judicial standards of review over legislative decisions are therefore inapplicable. Furthermore, requiring that this determination be reasonable and made in good faith is an objective standard, not a subjective standard. (See *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 103 n.32 [where "good faith" standard is associated with "reasoned analysis" or "reasonableness," it is an objective standard].)

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
ADOPTED REGULATION: SECTION 5001 ~~5003~~

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				Finally, it is appropriate for the Council to require agencies to make reasonable decisions in good faith, as other agencies frequently require. (E.g., CEQA Guidelines section 15151 [standard for adequacy of EIR is "good faith effort" at full disclosure]; Cal. Code Regs. tit. 14, section 18839 [requiring "good faith effort" and "reasonable effort" in implementing recycling program]; 36 C.F.R. 800.4(b)(1) [requiring federal agencies make "reasonable and good faith effort" in identifying historic properties].)

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
ADOPTED REGULATION: SECTION 5001

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1.1 Central Valley Flood Protection Board	1/24/2013	Add "Board Regulations" means the regulations of the Central Valley Flood Protection Board as published in the California Code of Regulations, Title 23, Division 1, Waters, which may be viewed at the Board's website at http://cvfpb.ca.gov/regulations/.	O	Thank you for the comment. The Council, in its discretion, has chosen not to add this definition as the term is not used in the regulatory policies.
2.1 Central Valley Flood Protection Board	1/24/2013	Add "Central Valley Flood Protection Board" or "Board" means the Central Valley Flood Protection Board (formerly The Reclamation Board) of the California Resources Agency of the State of California as provided in Water Code section 8521	O	The Council will add this definition.
3.1 Central Valley Flood Protection Board	1/24/2013	Add "Central Valley Flood Protection Plan (CVFPP)" means a State plan prepared by the Department of Water Resources that describes the challenges, opportunities, and a vision for improving integrated flood management in the Central Valley. The CVFPP documents the current and future risks associated with flooding and recommends improvements to the State-federal flood protection system to reduce the occurrence of major flooding and the consequence of flood damage that could result. The 2012 CVFPP was adopted by the Board on June 29, 2012, and is to be updated every five years thereafter	O	Thank you for the comment. The Council, in its discretion, has chosen not to add this definition.
4.1 Central Valley Flood Protection Board	1/24/2013	Add "Designated Floodway" means a floodway adopted by the Board which either: a) The channel of the stream and that portion of the adjoining floodplain reasonably required to provide for the passage of a design flood, as indicated by floodway encroachment line on an adopted map; or b) The floodway between existing levees as adopted by the Board or the Legislature. Maps of Board-adopted designated floodways may be viewed on the Board's website at http://cvfpb.ca.gov/maps/ by clicking on the "Best Available Maps" link	O	Thank you for the comment. The Council, in its discretion, has chosen not to use the definition you have suggested, rather the definition the Council has chosen is: "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
5.1 Central Valley Flood Protection Board	1/24/2013	Add "Design Flood" means the flood against which protection is provided or may eventually be provided by means of flood protection or control works, or that flood which the Board otherwise determines to be compatible with future developments.	O	Thank you for the comment. The Council, in its discretion, has chosen not to add this definition as the term is not used in the regulatory policies.
6.1 Central Valley Flood Protection Board	1/24/2013	Add "Levee" means a man-made barrier constructed of soil along a water course for the primary purpose of providing flood protection. "Non-project levee" means a levee or floodwall that is not a project levee. "Project levee" means a levee within the Board's jurisdiction that has been approved or adopted by the Board or the Legislature.	O	Thank you for the comment. The Council, in its discretion, has chosen not to add this definition. The Council has included the definitions of "project levees", "nonproject levee" and "setback levee".
7.1 Central Valley Flood Protection Board	1/24/2013	Add "Regulated stream" means those streams under Board jurisdiction as listed in Board Regulations, § 112.	O	The Council will add this definition.
8.1 Central Valley Flood	1/24/2013	Add "Regulatory action". The Board requests this be defined in the proposed regulations. While Board permit decisions and enforcement actions would clearly not be subject to the Delta	O	Thank you for the comment. The Council, in its discretion, has chosen not to add this definition as the term is not used in the regulatory policies.

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	Protection Board		Reform Act, other Board-sponsored projects and plans in the Delta may be subject to the Act.		
9.1	Central Valley Flood Protection Board	1/24/2013	Add "State-Federal Flood Protection System" means the collective works or facilities of the State Plan of Flood Control (California Water Code Section 9602(c)), including but not limited to project levees, bypasses, designated floodways, and regulated streams.	O	Thank you for the comment. The Council, in its discretion, has chosen not to add this definition as the term is not used in the regulatory policies. The Council has included a definition of "Government-sponsored flood control program to reduce risk to the people, property, and State interests in the Delta".
10.1	Central Valley Flood Protection Board	1/24/2013	Modify: "Floodway" (including Board designated floodways) 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).	O	Thank you for the comment. The Council, in its discretion, has chosen not to change the definition or to use the definition you have suggested.
11.1	Central Valley Flood Protection Board	1/24/2013	Modify: "Urban area" means a developed area in which there are 10,000 residents or more (Government Code Section 65007(j)).	O	The Council has chosen to use the definition: *"Urban area" means a developed area in which there are 10,000 residents or more.*
12.1	Central Valley Flood Protection Board	1/24/2013	Modify: "Urbanizing area" means a developed area or an area outside a developed area that is planned or anticipated to have 10,000 residents or more within the next 10 years (Government Code Section 65007(k)).	O	The Council has chosen to use the definition: *"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.*
13.1	Environmental Water Caucus	1/24/2013	First, the covered actions are defined too narrowly. Under the definitions of Section 5001(s), "Significant Impact" is inappropriately defined as a "change in baseline conditions." Rather than based on so-called baseline conditions, the definition should be revised so that "significant impact" is measured on an absolute scale. Without this change there will be a large cross-section of actions with impacts on the co-equal goals which will be improperly excluded from covered actions under the Delta Plan.	O	The definition of a covered action has been provided by the Delta Reform Act of 2009 which was passed by the California state legislature. The Council does not have the authority to change the definition of a covered action.
14.1	Friends of the River	1/24/2013	§5001. General Definitions. (e)(1)(A) Delete "expand storage, and improve Delta conveyance and operations." (e)(1)(C) Delete entire subsection including but not limited to the calls for "improving conveyance" and "to optimize diversions in wet years."	O	Thank you for the comment. The Council, in its discretion, has chosen not to modify this definition as suggested. The need for additional storage and improved conveyance is addressed in the Delta Plan. See response below.
15.1	Friends of the River	1/24/2013	Our Proposed Amendments to the definitions in Section 5001, are intended to remove planning decisions calling for improved, meaning new, conveyance made in the guise of definitions. The most important and fundamental planning decision made in the history of the Delta will be whether or not to develop massive, new upstream conveyance from the Delta, for the benefit of the exporters and to the detriment of the Delta. That is a planning decision that can only be considered rationally, let alone made, after comprehensive CEQA analysis and public trust doctrine analysis have been performed, and not made at the outset in the guise of being called "definitions".	O	We disagree with the allegation that the identified definitional provisions "are intended to remove planning decisions calling for improved, meaning new, conveyance made in the guise of definitions." The definitions provided in section 5001(e)(1)(A) and 5001(e) (1)(B) do not establish prescriptive requirements, but rather define what actions will qualify as a covered action because they have a "significant impact" on "achieving the coequal goal of providing a more reliable water supply for California". As noted in the comment, this definition includes expanded storage and improved conveyance. The need for additional storage and improved conveyance is addressed in the Delta Plan.
16.1	Local Agencies of the North Delta	1/24/2013	§ 5001, subdivision (c) "Feasible" - This definition is the same as in CEQA (Pub. Resources Code, § 21061.1). It is not clear why a duplicative definition is necessary for purposes of implementing the Delta Reform Act. In the CEQA context, the definition of feasible is the means by which a lead agency determines whether project alternatives and/or mitigation measures should be adopted. The regulations should clarify whether the feasibility determinations for implementation of Delta Plan policies (such setback levee feasibility) would be based on those same standards (including the judicial review standard) or whether some other approach to	Du	This definition is necessary and not duplicative because without it, the term's meaning with respect to its use in these regulations would not be clear. The regulations use the term "feasible" in various contexts that are different than CEQA. For example, section 5002(b)(1) addresses situations where full consistency with all relevant regulatory policies may not be feasible. A definition of the term, as used in these regulations, is therefore needed. That a term or phrase appears elsewhere in statute or regulation does not determine the

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		feasibility determinations is contemplated.		meaning of the same term or phrase used in a different context for the Council's regulations. Nevertheless, the Council uses concepts and definitions from existing law to the extent such definitions are appropriate in the context of its regulations. Thus it is appropriate and necessary for the Council to clarify the meaning of terms it uses in its regulations, particularly when using terms or phrases already defined elsewhere in the law. As to the applicable standard for review, it will depend upon the context in which review occurs. For example, Water Code section 85225.25 provides that the council hearing a consistency appeal looks at whether the agency's consistency determination is "supported by substantial evidence in the record before the state or local public agency that filed the certification."
17.1 Local Agencies of the North Delta	1/24/2013	§ 5001, subdivision (s) "Significant impact" – This definition "a change in baseline conditions..." is inconsistent with the definition found in CEQA (Pub. Resources Code, § 21068, referring to "a substantial, or potentially substantial, adverse change in the environment"). The definition provided is confusing and uses several terms of art particular to CEQA (e.g., baseline, substantial impact, cumulative impact and project). As previously commented in the context of the Delta Plan policies and recommendations, the Delta Plan and any implementing regulations need to be clear about how they relate to existing requirements and definitions/terms of art that have been developed over the 40+ year life of the CEQA statute.	Co	The definition of "significant impact" and the concept of baseline has been removed in response to comments. The Act adds a layer of regulation, separate from CEQA's requirements, to actions that qualify as "covered actions." The two statutes provide for different review for different purposes—one requiring review of projects proposed throughout the state for significant adverse environmental impacts and mitigation of those impacts, the other requiring consistency of projects proposed in the Delta with the coequal goals. Thus, in addition to complying with CEQA and all other applicable laws, public agencies proposing covered actions must also comply with the Act and implementing regulations, which have requirements separate from CEQA. The definition of "significant impact" defines the use of the phrase with respect to the Act and its implementing regulations, and it does not alter or affect the environmental review framework under CEQA or a project proponent's obligations under that statute in any way. Accordingly, the regulation is consistent with §§ 85031 and 85032. For the same reasons, the regulation's definition of substantial impact need not be the same as CEQA's definition and using the exact same definition does not make sense in light of the differing contexts (see response discussing the inclusion of beneficial impacts). That a term or phrase appears elsewhere in another statute or regulation does not determine the meaning of the same term or phrase used in a different context. The Act's use of phrases, such as "significant impact on the coequal goals," that have some similarities to phrases used in CEQA and its Guidelines, such as "significant effect on the environment," does not mean the phrases have the same meaning in their distinct contexts. Nevertheless, to the extent the similar phrases' intent and context overlaps, it is appropriate and reasonable for the Council to draw from concepts used in other statutes and regulations when defining phrases used in the Act and its own regulations. Using terminology from other statutes and regulations has the advantage of being readily understood by the regulated community because the terms and their meaning are well-established. The Council uses concepts and definitions from existing law to the extent such definitions are appropriate in the context of its regulations. Here, the Council uses concepts from CEQA and the CEQA guidelines, specifically defining "significant impact" to mean "substantial" impact (similar to Public Resources Code § 21068) and to include cumulative impacts of closely-related past, present, and reasonably foreseeable future projects (as in Public Resources Code § 21083(b)(2) and CEQA Guideline 15355), to define "significant imp act" on the coequal goals for purposes of the Act and these regulations.

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ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1.1 Central Valley Flood Protection Board	1/24/2013	Add new language to address the following situation: Regulatory actions of the Board are not a covered action as defined under the Delta Reform Act, however flood control encroachment permit and project decisions made by local agencies would be subject to the Act. The proposed regulations contain no means by which the Board would be notified of appeals to the Council for these projects. The Board requests the Council add language giving specific notice to the Board of appeals received relating to projects subject to the Board's jurisdiction.	O	Section 5003(b) 5001(j)(2) states: *(b) "Covered action" does not include any plan, program, or project that is exempted pursuant to Water Code Section 85057.5(b).* WCS 85057.5(b)(1) exempts a regulatory action of a state agency which includes any regulatory actions by the Central Valley Flood Protection Board. However, as discussed in the Delta Plan, although a regulatory action by a State agency is not a covered action, the underlying action regulated by that agency can be a covered action (provided it otherwise meets the definition). The Council has adopted "Administrative Procedures Governing Appeals" (Appendix B) which detail the formal procedures the Council will follow when a party appeals a covered action's certification of consistency to the Council. Any additional notifications needed will be determined on a case-by-case basis. The Council may develop an automatic notification process to notify stakeholders when any new certification of consistency is filed with the Council or if a certification of consistency is appealed.
2.1 Central Valley Flood Protection Board	1/24/2013	Modify the following definitions: "Covered Action" (4) Will have a significant impact on achievement of one or both of the coequal goals or the implementation of State or federal government-sponsored flood control programs to reduce risks to people, property, and State interests in the Delta; and,	O	The definition of a covered action has been provided by the Delta Reform Act of 2009 which was passed by the California state legislature. The Council does not have the authority to change the definition of a covered action.
3.1 Central Valley Flood Protection Board	1/24/2013	(Reg: 5003, 5004) The Board requests the Council modify the proposed regulations to address the following situations: Under the current proposed Council regulations, it is possible that both the Council and the Board may exercise authority over flood control projects in the Delta. However, in order to ensure the most effective flood protection and limit the State's potential liability for flooding, the Council should closely coordinate with the Board regarding the State's obligations to the U.S. Army Corps of Engineers and the effects of any proposed project system-wide as envisioned and articulated in the Central Valley Flood Protection Plan. Because the Board has special expertise in flood management, the Council should at a minimum consult with and defer to the Board on these issues. The Council regulations should be revised to specify when and how this consultation would occur.	O	In consultation with the Central Valley Flood Protection Board, the Council distinguished the jurisdiction of the Council from that of the Board by revising Section 50016 and adding Section 5001(m) and 5001(aa). The Council also added the Board to the definitions (Section 5001(g)). The Board staff concurred that these modifications are sufficient and appropriate, and the Board submitted no further comments. Council staff also restated its commitment to consult with the Board and other agencies. These regulations do not contain procedures for how the Council will consult with other agencies in the event of an appeal of a certification of consistency filed with Council. The Delta Plan contains an appendix, *Administrative Procedures Governing Appeal, Statutory Provisions Requiring Other Consistency Reviews, and Other Forms of Review or Evaluation By the Council*, which describe how the Council will handle the appeal of a certification of consistency. These procedures were adopted by the Council on 9/23/2010. The Council agrees that consulting with other agencies will be critical to ensuring the appropriate expertise is provided to the Council when considering an appeal. A more appropriate process for memorializing agency consultation may me through Inter Agency Agreements.
4.1 Central Valley Flood Protection Board	1/24/2013	(Reg: 5003, 5004) The Board requests the Council modify the proposed regulations to address the following situations: Under the proposed regulations and appeal procedures, there is the potential for a project to be appealed to the Council after a Board permit has already been issued. If the Council grants the appeal, the applicant may be required to amend their Board permit. While it is unclear how often this could occur, there is the potential for the Board to expend additional resources reviewing and approving Board permit amendments. The proposed regulations and appeal procedures should be amended to require the certificate of consistency to be filed prior to obtaining a Board permit and requiring the project proponent to give notice to the Board if an appeal has been filed.	O	In consultation with the Central Valley Flood Protection Board, the Council distinguished the jurisdiction of the Council from that of the Board by revising Section 50016 and adding Section 5001(m) and 5001(aa). The Council also added the Board to the definitions (Section 5001(g)). Council staff also restated its commitment to consult with the Board and other agencies. The Board staff concurred that these modifications are sufficient and appropriate, and the Board submitted no further comments. Regarding to appeals to the Council: an appeal to the Council can only be made after a public agency determines that a project is a "covered action," and then files a certification of consistency with the Council (see Section 5001 (j)). The Delta Reform Act did not specify when a certification of consistency should be filed with the Council. The Council recommends that the certification of consistency should not be submitted to the Council until the covered action

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					has been fully described and the impacts associated with the covered action have been identified; this coincides with the completion of the CEQA process.
5.1	Environmental Water Caucus	1/24/2013	Exclusion of Temporary Water Transfers (Section 5003, h, 2, C). It is not stated why these transfers are excluded, as they would otherwise be covered actions under the Delta Plan. As we know, temporary transfers can be very large and can reoccur for consecutive years, giving them the impact of a permanent transfer. The exemption for temporary transfers exceeds the statutory authority for the Delta Plan and should be removed.	A	This comment pertains to the administrative exemptions listed in Section 5003(b)(2), including temporary water transfers (5003(b)(2)(C). Section 5003(b)(2) contains a list of list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code Section 85057.5. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from Section ~~5003(b)~~ 5001(j), the definition of a covered action, to Section ~~5001(s)~~ 5001(dd), the definition of significant impact.
6.1	Individual (Kimberling)	1/24/2013	Covered action defined, water transfers Section 5003(b)(2)(C) exempts one-year transfers from being considered a covered action, which is consistent with Section 1729 of the Water Code. However, Section 5003(b)(2)(C) sunsets the exemption on 1/1/2015. I think this is good, as otherwise there maybe year to year transfers that go on without environmental review.	DP	Comment noted. With respect to the Council's determination that single-year transfers will not have a significant impact on the coequal goals through December 31, ~~2014~~ 2016, the Council believes that water transfers contribute to California's water supply reliability. However, the Council also understands that in some cases, water transfers may have an adverse impact to the Delta's ecosystem, especially if these single year transfers are repeated over consecutive years as a means to circumvent the CEQA review process for multi-year (repeat) transfers. In order to provide time to evaluate the potential adverse impacts caused by repeated single year transfers, the Council proposes to provide a CEQA exemption from its covered action review process until January 1, ~~2015~~ 2017, at which time the exemption will sunset unless the Council acts to extend the exemption prior to the date. Until that time, there is no proposal to change or disrupt the current water transfer process.

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1.1	Environmental Water Caucus	1/24/2013	Second, exemptions from the Delta Plan (Sections 5002, and 5003), exceed the statutory authority provided by the Delta Reform Act. The Delta Plan's co-equal goals include economic and cultural values not contemplated by the California Environmental Quality Act, or CEQA. Yet the Draft Regulation adopts much the same exemption criteria as CEQA, but without CEQA's statutory basis for those exemptions — an impermissible conflating of the two statutes. CEQA's exemption criteria may not be adopted by the Proposed Regulation without statutory authority, which it lacks. Likewise, statutory basis for the emergency exemption (5003, b, 2, B) is not contained in the Delta Reform Act; there should be no emergency exemption for compliance with the Delta Plan without adequate statutory basis.	A	This comment pertains to the administrative exemptions listed in Section 5003(b)(2). Section 5003(b)(2) contains a list of list of categories of actions that the Council, in its discretion, has determined will not have a significant impact on the coequal goals under Water Code Section 85057.5. This language is more appropriately contained under the definition of "significant impact" and thus the Council has moved the list of categories of actions from Section ~~5003(b)~~ 5001(j), the definition of a covered action, to Section ~~5001(s)~~ 5001(dd), the definition of significant impact.
2.1	Individual (Conover)	1/24/2013	Sec. 5002. Proposed action and Covered action would authorize further evaluations according to criteria that would prioritize areas based on historic marshes. Restoration to tidal influence might require breaching of levees that we built to keep tidal brackish and salty waters out, to let tidal waters in and potentially flood vineyards and orchards. It is all planted now, or already in progress of planting. Projected saltwater intrusion up the Sacramento River near its present extent around Sherman Island, would put increasingly salty water onto agricultural lands and interfere with plant growth. Brackish water extended during the /937 drought all the way up to Courtland, several miles upriver from there before flushing actions from storm pushed the boundary downriver	O	***Delta Plan comments are addresses separately.**

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		again. Walnut Grove is at zero elevation, tidal influence is seen here, and tidal intrusion would have to come through a purposeful break in the levee. Past breaks in the levee between 2 storms flooded this whole region, closing I-5 for weeks, disrupting traffic from Canada to Mexico, necessitating re-routing of truck traffic around the US. These kinds of impacts are not discussed in this plan. We enclose here photos from those 1986 floods, which also inundated much of the Central Valley. Flooding where feasible for enhancement, discussed in definitions for encroachment, enhancement, including removal of barriers, for flooding, will affect our ability to get flood insurance from FEMA, unless there are setback levees to protect existing homes and ag-related structures. Further, the elevation map and upland delineation on which the Habitat Prioritization Map is based does not appear to take into effect the projected inland extent or depth of waters expected to occur as the result of sea level rise. 4.5 feet will make the daily rise and fall of tidal influence needed for goslings and salmon fry and smolts to feed on algae, bugs and plankton in protection of tule reed shallows temporary and short-term. 4-1/2 feet with sea level rise will make the depths far less useful, and will by then border on open water, which is less needed by those organisms at those life stages. Other chapters of the Recirculated Environmental Impact Report (REIR) say that more research is needed on the usefulness of open water to pelagic organisms at various life stages.		

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1. Calaveras County Water District	1/4/2013	Section 5004(a) Contents of Certification of Consistency. Please change as follows: "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 after a state or local public agency has determined that a proposed plan, program or project is a covered action because it meets the definition of Ca covered action in CWC§85057(a). to be a covered action because it is covered by one or more of the regulatory policies contained in Article 3. Inconsistency of with this policy may be the basis for an appeal".	Ct	Comment noted. The Council has carefully defined the term "proposed action" in section ~~5002~~ 5001(v) to provide clarity on how to determine if a project meets the definition of a covered action. The language the comment suggests does not provide any additional clarity.
2. California Department of Fish and Wildlife; Ecosystem Conservation Division/Water Branch	1/10/2013	Section 5004: The proposed regulations do not describe the "short form" certification of consistency that applies to qualifying "covered activities" under the Bay Delta Conservation Plan (BDCP) if it is approved and incorporated into the Delta Plan (see Final Draft Delta Plan, p. 59). We suggest including a subsection under section 5004 of the proposed regulations that describes the process for "short form" certifications of consistency.	Ct	The Council has not yet developed a "short form" certification. Once the Bay Delta Conservation Plan has been approved, the Council will develop the short form.
3. California Department of Fish and Wildlife; Ecosystem Conservation Division/Water Branch	1/10/2013	Section 5004: With respect to section 5004, for purposes of the ecosystem restoration policies of the Delta Plan, the short-form certification of consistency should also apply to qualifying "covered activities" and measures taken to implement landscape level, multi-species NCCPs and/or HCPs developed by local governments in the Delta and approved after the approval and effective date of the Delta Plan. In addition, we emphasize that any Delta Stewardship Council review of an NCCP approval would be limited to its consistency with the Delta Plan, and would not modify the regulatory effect of the underlying determination by CDFW that the NCCP complies with the Natural Community Conservation Planning Act.	O	The Council has not yet developed a "short form" certification. Until the Council does develop such a form and decides what activities will be allowed to use such a form, all covered actions are required to file a certificate of consistency consistent with section ~~5004~~ 5002. The approval of an NCCP by the Department of Fish and Wildlife is not subject to a review by the Council because Water Code sec. 85057.5(b)(1) exempts regulatory actions from covered actions. With respect to activities that may be a covered action, if a state or local agency determines that a covered action is consistent with the Delta Plan and files a certification of consistency and that certification is appealed to the Council, the Council will review the agency's determination that it is consistent with the Delta Plan.
4. California Department of Water Resources	1/14/2013	5004(b)(1). Contents of Certifications of Consistency - consistency with all relevant policies may not be feasible. This Section states the "Delta Stewardship Council acknowledges that in some cases, based upon the nature of the covered action, full consistency with all relevant policies may not be feasible. In those cases, the agency that files the certification of consistency may determine that the covered action is consistent with the Delta Plan. That determination must include a clear identification of areas where consistency 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". It is a little confusing as to whether the proposing agency must show consistency with the Delta Plan, the coequal goals and/or the Delta Reform Act if it cannot show full consistency with all relevant policies. As DWR reads all the Regulatory Policies together, including this section, the agency proposing the action can show consistency with the Delta Plan by showing that the project is consistent with the Delta Reform Act legislation and its mandate to achieve the two co-equal goals. Although the Plan clearly applies to specific projects, DWR expects that it, and probably other agencies, will be bringing whole programs or plans to the DSC with consistency findings. This is because DWR current planning efforts are designed to achieve the goals and objectives of the Delta Reform Act and conform with the principles of Integrated Water Management and DWR's Sustainability and Environmental Stewardship Policies. While some parts of the program or plan may appear to be inconsistent with one or more policies; overall the program or plan will be designed to advance all the goals and objectives.	Ct	The Council has modified the language of ~~5004(b)(1)~~ 5002(b)(1) to clarify the Council's intent that covered actions are to be consistent with the Delta Plan. *(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;*

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5. California Department of Water Resources	1/14/2013	5004(b)(2). Contents of Certifications of Consistency - CEQA. This Section states that "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". DWR reads Section 5004(b)(1) and this section together as recognizing that CEQA lead and responsible agencies maintain their ability and responsibility to reject mitigation measures in the Plan EIR as not applicable or infeasible and to adopt Statements of Overriding Considerations even if there are no substitute mitigation measures that are equally or more effective. A contrary reading of the sections would limit DWR's exercise of the discretion vested in it by state law.	A, Co	This comment pertaining to the requirement that projects not exempt from CEQA must include feasible mitigation measures identified in the Delta Plan's EIR or substitute measures is similar to other comments. The response to this comment and the other similar comments is labeled **MR12**. Please refer to **MR12**.
6. California Department of Water Resources	1/14/2013	5004(b)(3) and(4). Contents of Certifications of Consistency - Best available science and adaptive management. These Sections deal with requirements regarding use of best available science and, for ecosystem restoration and water management covered actions, implementation of adaptive management. Many potential covered actions will be routine and/or small but still subject to a Negative Declaration or Environmental Impact Report under CEQA and therefore a covered action. DWR expects that the DSC will accept analyses for such projects that provide reduced or limited discussions of topics such as best available science and adaptive management and that it will facilitate streamlined review of some of these projects as their scope becomes clearer.	Ct	These requirements only apply to covered actions. Without specifics on the nature and scope of the covered action the Council cannot comment on what best available science or adaptive management would be required for that covered action.
7. California Department of Water Resources	1/14/2013	5004(b)(3) and(4). Contents of Certifications of Consistency -Certification that action complies with applicable laws. This Section states that "If the agency that files the certification of consistency will carry out the covered action, the certification of consistency must also include a certification from that agency that the covered action complies with all applicable laws pertaining to water resources, biological resources, flood risk, and land use and planning. If the agency that files the certification of consistency will not carry out the covered action (but will approve or fund the action), the certification of consistency must include a certification from that agency that the covered action complies with all applicable laws of the type listed above over which that agency has enforcement authority or with which that agency can require compliance". DWR does not read this policy as meaning that the agency certifying the action or DSC can interpret those laws to determine compliance. DWR understands that the basis for an agency's certification would be that no agency or court has found that the covered action does not comply with those laws.	Ct	The commenter's understanding of the policy is consistent with the Council's intent.
8. City of Stockton	1/14/2013	Subdivision (a) is narrative and appears unnecessary. Subdivision (b) is unclear. It provides, among other things, that "[c]overed actions must be consistent with the coequal goals, as well as with each of the regulatory policies contained in Article 3 implicated by the covered action." First, it is not clear how, if at all, the "regulatory policies" contained in the Delta Plan are different from the "coequal goals." Presumably, the Delta Plan's regulatory scheme is in furtherance of the coequal goals. Water Code section 85225 provides that a written certification of consistency must include detailed findings as to whether the covered action is consistent with the Delta Plan. The regulation is confusing because a local agency cannot determine whether consistency with the Delta Plan is also consistent with the coequal goals. This provision suggests that a covered action could be consistent with the Delta Plan but be inconsistent with the coequal goals.	Ne, Ct	Subdivision (a) is necessary as it differentiates between the other regulatory policies that are used in determining if an action is a covered action and this policy which is not used in the determination. Actions determined by the state or local public agency to meet the definition of a covered action must be consistent with all regulatory policies, including section ~~5004~~ 5002. The Council has modified the language of ~~5004(b)(1)~~ 5002(b)(1) to clarify the Council's intent that covered actions are to be consistent with the Delta Plan. *(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*

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				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;
9. City of Stockton	1/14/2013	Subdivision (b)(4) provides mandatory language regarding adaptive management related to ecosystem restoration and "water management covered actions." However, it is unclear what is meant by "water management covered actions." Subdivision (b)(4) also provides that these actions must "include adequate provisions, appropriate to the scope of the covered actions, to assure continued implementation of adaptive management." The regulations, however, do not explain what "adequate provisions" are, explain what is meant by "appropriate to the scope of the covered actions," or what is needed to "assure" continued implementation. Are the assurances sought financial? Legal? Physical? Local agencies cannot be left to guess precisely what needs to be included in Certifications of Consistency. Section 5004 fails to comply with the Necessity and Clarity standards contained in the APA.	Ne, Ct	A "water management covered action" is a covered action does one or more of the following: improves the resiliency of the state's water systems, increases water efficiency and conservation, increases water recycling and use of advanced water technologies, improves groundwater management, expands storage, improves Delta conveyance and operations, improves water quality to protect human health and the environment, reduces flood risk. "Adequate provisions" means adequate resources to carry out an adaptive management plan consistent with Appendix 1B, not withholding financial, legal or physical resources. As stated in the Initial Statement of Reasons, more detailed requirements were considered for this section and were rejected to provide "agencies some flexibility".
10. Contra Costa Water District	1/14/2013	Section 5004 - Contents of Certifications of Consistency. This section is confusing and begs a number of questions. By definition, a covered action has a significant impact (positive, negative or a blend) on the coequal goals. Unless that impact is beneficial, it is not clear how a finding of consistency with the coequal goals can be made as required under Section 5004(b)(1). Additionally, mitigation is required for all projects not exempt from CEQA. But if considered consistent with the coequal goals, or if the project has a beneficial impact on achieving the coequal goals, why would mitigation be necessary? Is it sufficient to provide the mitigation needed under CEQA to meet this requirement? For purposes of rulemaking, it may be prudent to succinctly list the findings needed for consistency and provide more detailed descriptions of specifics in a handbook or instructions on completing the certification form.	Ct	The Council has modified the language of ~~5004(b)(1)~~ 5002(b)(1) to clarify the Council's intent that covered actions are to be consistent with the Delta Plan. *(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;* This comment pertaining to the requirement that projects not exempt from CEQA must include feasible mitigation measures identified in the Delta Plan's EIR or substitute measures is similar to other comments. The response to this comment and the other similar comments is labeled **MR12**. Please refer to **MR12**.
11. East Bay Municipal Utility District	1/14/2013	Section 5004 — Contents of Certifications of Consistency. Subsection 5004(a) specifies a "policy" that "applies" after a "proposed action" (a term that is defined as the equivalent of a "covered action") has been determined to be a "covered action" because it is controlled by one or more of the "regulatory policies" set forth in the article that follows this section. This language is narrative and unnecessary.	Ne	Subdivision (a) is necessary as it differentiates between the other regulatory policies that are used in determining if an action is a covered action and this policy which is not used in the determination. Actions determined by the state or local public agency to meet the definition of a covered action must be consistent with all regulatory policies, including section ~~5004~~ 5002.
12. East Bay Municipal Utility District	1/14/2013	In addition, the intent of the last sentence stating, "Inconsistency with this policy may be the basis for an appeal," is unclear. If inconsistency is the only basis for an appeal, it would be better phrased as: "Inconsistency with this policy is the only basis for an appeal."	Ct	This language was included to clarify that even though this regulation is not to be used in determination of what is a covered action; consistency with this regulation is required by all covered actions. Inconsistency with any of the regulatory policies, including this one, provides a basis for an appeal.
13. East Bay Municipal Utility District	1/14/2013	The statutory basis for the requirements in Section 5004(b)(2) should also be more clearly explained. It is not clear whether this provision is intended to require a certificate of consistency to include mitigation measures beyond those required by CEQA. If this is the case, then the basis for the requirement should be further explained. Otherwise, it should be made clear that	Ct	This comment pertaining to the requirement that projects not exempt from CEQA must include feasible mitigation measures identified in the Delta Plan's EIR or substitute measures is similar to other comments. The response to this comment and the other similar comments

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		applicable mitigation measures are only those feasible mitigation measures or substitute measures necessary to reduce the impacts to a level that no longer results in a significant impact to the coequal goals or the implementation of flood control measures.		is labeled **MR12**. Please refer to **MR12.**
14. El Dorado County Water Agency	1/14/2013	Section 5004(a) Contents of Certification of Consistency. Please change as follows: "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 after a state or local public agency has determined that a proposed plan, program or project is a covered action because it meets the definition of a covered action in CWC§85057(a). to be a covered action because it is covered by one or more of the regulatory policies contained in Article 3. Inconsistency of with this policy may be the basis for an appeal".	Ct	Comment noted. The Council has carefully defined the term "proposed action" in section ~~5002~~ 5001(v) to provide clarity on how to determine if a project meets the definition of a covered action. The language the comment suggests does not provide any additional clarity.
15. Environmental Water Caucus	1/14/2013	(§ 5004) Certification of Consistent Actions Judicial Review and Administrative Appeal The Proposed Regulation allows, but does not provide specifics, as to how determinations by state agencies and the Council under the Delta Plan may be challenged through administrative appeal and judicial review. These details regarding appeal of a consistency determination, both to the Council and to court, should be explained in this section of the Proposed Regulation.	Ct	The administrative procedures governing the appeal of the consistency of covered actions with the Delta Plan was adopted by the Council on 9/23/2010 and has the force of law. Please refer to Appendix ~~B~~D of the Delta Plan.
16. Sacramento County	1/14/2013	12. Section 5004(b)(2) provides that covered actions not exempt from CEQA must include feasible mitigation measures identified in the Delta Plan's Program EIR or substitute measures. However, under CEQA, mitigation is only required for significant impacts. Absent clarification, this provision legislates an additional CEQA mandate. In addition, mitigation measures should be dictated by CEQA, not by a separate mitigation requirement imposed by the Act.	A, Co	This comment pertaining to the requirement that projects not exempt from CEQA must include feasible mitigation measures identified in the Delta Plan's EIR or substitute measures is similar to other comments. The response to this comment and the other similar comments is labeled **MR12**. Please refer to **MR12**.
17. Sacramento County	1/14/2013	13. Section 5004 is titled contents of certifications of consistency, but neither it nor any of the other draft regulations provide any guidance or criteria for determining whether and to what extent a project that is only partially consistent with one of the coequal goals is "on whole" consistent for purposes of Section 5004. Nor does Section 5004 provide any guidance, standard or regulation relating to the time of the certificate of consistency.	Ct	The Council has modified the language of ~~5004(b)(1)~~ 5002(b)(1) to clarify the Council's intent that covered actions are to be consistent with the Delta Plan. *(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;* The Delta Reform Act did not specify when a certification of consistency should be filed with the Council. The Council envisions that a certification of consistency should be filed with the Council concurrently with the filing of a Notice of Determination after the approval of a project. At this time, the project has been identified and the environmental analyses have been completed. It should be noted that, similar to the CEQA process, if a project changes substantially after the submission of the certification of consistency, than a new certification of consistency will have to be filed with the Council before the project can be implemented.
18. Sacramento Regional County Sanitation District	1/14/2013	Section 5004 — Certifications of Consistency Subdivision (a) is narrative and appears unnecessary. Subdivision (b) is unclear. It provides, among other things, that "[c]overed actions must be consistent with the coequal goals, as well as with each of the regulatory policies contained in Article 3 implicated by the covered action."	Ct	The Council has modified the language of ~~5004(b)(1)~~ 5002(b)(1) to clarify the Council's intent that covered actions are to be consistent with the Delta Plan. *(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*

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		First, it is not clear how, if at all, the "regulatory policies" contained in the Delta Plan are different from the "coequal goals." Presumably, the Delta Plan's regulatory scheme is in furtherance of the coequal goals. Water Code section 85225 provides that a written certification of consistency must include detailed findings as to whether the covered action is consistent with the Delta Plan. The regulation is confusing because a local agency cannot determine whether consistency with the Delta Plan is also consistent with the coequal goals. This provision suggests that a covered action could be consistent with the Delta Plan but be inconsistent with the coequal goals.		*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;*
19. Sacramento Regional County Sanitation District	1/14/2013	Subdivision (b) (4) provides mandatory language regarding adaptive management related to ecosystem restoration and "water management covered actions." However, it is unclear what is meant by "water management covered actions." Subdivision (b) (4) also provides that these actions must "include adequate provisions, appropriate to the scope of the covered actions, to assure continued implementation of adaptive management." The regulations, however, do not explain what "adequate provisions" are; explain what is meant by "appropriate to the scope of the covered actions," or what is needed to "assure" continued implementation. Local agencies cannot be left to guess precisely what needs to be included in Certifications of Consistency. As such, Section 5004 fails to comply with the Necessity and Clarity standards contained in the APA.	Ct	A "water management covered action" is a covered action does one or more of the following: improves the resiliency of the state's water systems, increases water efficiency and conservation, increases water recycling and use of advanced water technologies, improves groundwater management, expands storage, improves Delta conveyance and operations, improves water quality to protect human health and the environment, reduces flood risk. "Adequate provisions" means adequate resources to carry out an adaptive management plan consistent with Appendix 1B, not withholding financial, legal or physical resources. As stated in the Initial Statement of Reasons, more detailed requirements were considered for this section and were rejected to provide "agencies some flexibility".
20. San Joaquin County Board of Supervisors	1/14/2013	Policy G P1 "Detailed Findings to Establish Consistency with the Delta Plan"; Proposed Regulation Article 2, Section 5004. This proposed Regulation is inconsistent with and intrudes upon the authority of CEQA. Additionally, the proposed Regulation usurps the authority of the Legislature to enact or amend laws dealing with the subject matter of the Regulation.	A, Co	The comment does not provide any detail or context. If the comment is referencing section 5004(b)(2) and the requirement that projects not exempt from CEQA must include feasible mitigation measures identified in the Delta Plan's EIR or substitute measures, then the commenter is directed to comment response **MR12**.
21. San Joaquin County Board of Supervisors	1/14/2013	This proposed Regulation is, in many respects, unclear and internally inconsistent. For one example, among many, Section 5004 (b) (3) reads as follows: "As relevant to the purpose and nature of the project, all covered actions must document use of best available science (as described in Appendix 1A);" Precisely what does "must document" mean? Does it mean that those who are certifying consistency simply state that best available science was or was not used? Does it mean that those who are certifying consistency must show what was used as the best available science? Does it mean that those who are certifying consistency simply refer to peer-reviewed publications which may justify the certification conclusions? The language of this proposed Regulation, while certainly wordy, is so vague as to leave those who are subject to the regulation guessing as to their obligations under this proposed Regulation.	Ct	Based on the revised regulation defining "Best available science" in section ~~5001(d)~~ 5001(f). Best available science shall be consistent with the guidelines and criteria found in Appendix 1A. Appendix 1A states, "Proponents of covered actions should document their scientific rationale for applying the criteria in Table 1A-1 (i.e., the format used in a scientific grant proposal)."
22. San Joaquin County Board of Supervisors	1/14/2013	This proposed Regulation is not reasonably necessary because the Delta Plan and this proposed Policy do not sufficiently ascertain what the Delta's baseline conditions are, in terms of water quality and quantity, environmental conditions, and economic conditions, such that the proposed Regulation would protect and enhance, even though such information was developed in the peer-reviewed Economic Sustainability Plan adopted by the Delta Protection Commission. California case law requires that proposed regulations are to be based on developed substantial evidence showing the necessity for the regulation rather than a requirement that parties covered by the regulation gather the evidence necessary to support the proposed regulation in the first place.	Ne	The Council disagrees with the comment's assertion that this regulation is unnecessary. This regulation is necessary to in interpret, and make specific, the requirements of Water Code section 85225 which requires a state or local public agency that proposes to undertake a covered action, prior to initiating the implementation of that covered action, prepare a written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan and shall submit that certification to the council.
23. San Joaquin County Board of Supervisors	1/14/2013	This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.	A, Co	The comment does not provide any detail or context. It appears the comment asserts that an otherwise valid state regulation is invalid if it is contrary to a local land use law. To the extent that an otherwise valid state regulation conflicts with a local law, however, the state measure

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				prevails. See, for example, Morehart v. County of Santa Barbara (1994) 7 Cal.4th 725, 747 (local legislation that contradicts state law is void). Moreover, as explained in detail in the response to a comment on section ~~5012~~ 5010, the Delta Reform Act expressly provides that the Delta Plan is to regulate land uses.]
24. San Joaquin County Board of Supervisors	1/14/2013	All non-ministerial projects within both the Primary and Secondary Zones of the Delta will be subject to the determination of whether or not they meet the definition of covered action. If they are determined to be a covered action, the Community Development Department of San Joaquin County (Department) will be required to file a certification of consistency. The certification of consistency will require the Department to make specific findings of consistency with both the coequal goals of the Delta Plan, and each of the proposed Regulations articulated in Article 3 implicated by the covered action. As San Joaquin County has stated in comments on previous versions of the Delta Plan, the preparation of the certification of consistency and underlying findings will be costly and time-consuming to both the project applicant and Department.	DP, E	The Council has modified the language of ~~5004(b)(1)~~ 5002(b)(1) to clarify the Council's intent that covered actions are to be consistent with the Delta Plan. *(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;* The Council anticipates that very few of the projects San Joaquin County undertakes will meet the definition of a covered action. The Community Development Department will have to determine if all covered actions are consistent with the regulatory policies of the Delta Plan. By being consistent with the Delta Plan, the covered action is considered consistent with the coequal goals.
25. San Joaquin County Board of Supervisors	1/14/2013	The Department likely will have to require the project applicant to prepare and submit draft consistency findings based upon best available science for Department consideration, and then base the consistency certification upon those draft consistency findings. In turn, this likely will require applicants to retain a consultant to prepare the draft consistency findings. This will be expensive and time-consuming and subject to appeal to the Delta Stewardship Council. The planning and permitting process in California is often criticized for being cumbersome, complicated, expensive and lengthy. These new requirements will serve to make the situation worse.	DP, E	In addition to requiring the Delta Plan be based on best available science, the Act requires the Plan to recommend integration of science and monitoring results into ongoing Delta water management (section 85308(e)) and to include formal, science-based adaptive management for certain decisions (ongoing ecosystem restoration and water management decisions) (section 85308(d)). Furthermore, several provisions in the Act declare or indicate the importance of science to decision-making in the Delta (see sections 85308 [especially section 85308(c), requiring the Delta Plan to, "where appropriate, utilize monitoring, data collection, and analysis of actions sufficient to determine progress toward meeting [] quantified targets"], 85302(g), 85280) and thus it is within the Council's authority to mandate its use with respect to covered actions.
26. San Joaquin County Board of Supervisors	1/14/2013	As to Section 5004(b)(2), San Joaquin County concurs in the submitted objections and comments of Yolo County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.	DP	This comment pertaining to the requirement that projects not exempt from CEQA must include feasible mitigation measures identified in the Delta Plan's EIR or substitute measures is similar to other comments. The response to this comment and the other similar comments is labeled **MR12**. Please refer to **MR12**.
27. San Joaquin County Board of Supervisors	1/14/2013	As to Sections 5004(a) and (b)(5), San Joaquin County concurs in the submitted objections and comments of Solano County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.	DP	The quotation marks are to emphasize the term "proposed action", as it is used in this subsection, refers to the definition stated section ~~5002~~ 5001(v) and does not refers to any other meaning. The Council has removed the language of section 5002~~5004~~(b)(5) from the regulations.
28. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	The Substantive Mandates in Proposed Sections 5004 and 5005 Exceed the Council's Statutory Authority and Conflict with Controlling Law; Therefore, They Must Be Removed from the Proposed Regulations Section 5004: The requirements imposed through this section of the Proposed Regulations are intended to govern certifications of consistency filed by state or local public agencies with	A, Co	The response to this comment, and subsequent comments asserting that Council provisions preventing the agency, who has filed a certification of consistency with the Council, from proceeding with the proposed action unless either no one appeals the revised certification, or an appeal is filed and denied, are 1) underground regulations and 2) unsupported by the terms of the Delta Reform Act, is labeled **MR2**. Please see **MR2.**

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		regard to covered actions. The proposed requirements, however, are not fully set forth in the Proposed Regulations. On page 59 of the current draft of the Delta Plan, it states: "If the covered action is found to be inconsistent, the project may not proceed until it is revised so that it is consistent with the Delta Plan." (Emphasis added.) In other words, the Council claims the authority to preempt already established statutory processes and to itself prohibit the action from moving forward until it has determined the project is consistent with the Delta Plan. That claim of what is essentially permitting authority is inconsistent with the language of the Delta Reform Act, as well as its legislative history. It also is unenforceable because it is an unlawful "underground regulation" that has not been submitted to OAL.		
29. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	<u>The Plain Language of the Delta Reform Act Does Not Authorize the Council to Prohibit a Covered Action Until It Determines It Is Consistent with the Delta Plan:</u> Under the Delta Reform Act the proponent of a proposed action potentially affecting the Delta must determine if it is a "covered action." If the agency determines it is a covered action, it must certify to the Council that it is consistent with the Delta Plan. (Wat. Code, § 85225.) Absent an appeal, the agency may continue to pursue regulatory approvals and implement the action. If the certification is appealed, the Council must determine whether the certification is supported by substantial evidence. If the Council determines the certification is not so supported, it remands it to the agency. (Wat. Code, §§ 85225.10-85225.25.) On remand the "agency may determine whether to proceed with the covered action." (Wat. Code, § 85225.25.) Its options are to (i) "proceed with the action" as proposed or (ii) proceed with "the action as modified to respond to the findings of the council." (Ibid.) In either case it must, "prior to proceeding with the action file a revised certification of consistency that addresses each of the findings by the council." (Ibid.) That is the end of the certification process. Nothing in this language prohibits the agency from proceeding with the covered action even if the Council has deemed it inconsistent, so long as the agency files a revised certification addressing the Council's findings. The Council's assertion that a covered action is prohibited unless the Council deems it consistent simply is not supported by the plain language in the Delta Reform Act.	A	The response to this comment, and subsequent comments asserting that Council provisions preventing the agency, who has filed a certification of consistency with the Council, from proceeding with the proposed action unless either no one appeals the revised certification, or an appeal is filed and denied, are 1) underground regulations and 2) unsupported by the terms of the Delta Reform Act, is labeled **MR2**. Please see **MR2**.
30. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	<u>The Delta Reform Act's Legislative History also Undermines the Council's Assertion of Authority to Prohibit Implementation of a Covered Action Until an Appeal Is Resolved to the Council's Satisfaction.</u> The October 2008 Delta Vision Strategic Plan, an early step in developing the governance structure that resulted in the Delta Reform Act, would have created a Council as a "regulatory and oversight body" with numerous and broad regulatory authorities. (Delta Vision Strategic Plan, pp. 121-24.) These would have included the power to determine the consistency of covered actions and to "ensure federal and state consistency with the [Plan]." (Delta Vision Strategic Plan, pp. 123-24.) The Delta Reform Act significantly pared these proposals down. In particular, the authority to determine consistency in the first instance and the authority to "ensure" consistency overall before a project may be implemented are both absent from the Delta Reform Act. The legislative history of the Delta Reform Act demonstrates that the Legislature purposefully removed provisions that would have authorized the Council to prevent an inconsistent "covered action" from being implemented. Proposed Conference Report No. 1, dated September 9, 2009, contains an appeals process similar to that in the enacted Delta Reform Act. Like the enacted version, it provided that a covered action may be implemented if no appeal is filed to the consistency certification. However, the pre-print version of section 85225.25 provided: "Upon remand, the state or local agency may determine not to proceed with the covered action or may modify the appealed action and resubmit the certification of consistency to the council.	A	The response to this comment, and subsequent comments asserting that Council provisions preventing the agency, who has filed a certification of consistency with the Council, from proceeding with the proposed action unless either no one appeals the revised certification, or an appeal is filed and denied, are 1) underground regulations and 2) unsupported by the terms of the Delta Reform Act, is labeled **MR2**. Please see **MR2**.

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		A proposed covered action appealed pursuant to these provisions shall not be implemented until the council has adopted written findings, based on substantial evidence in the record, that the covered action, as modified, is consistent with the Delta Plan." Delta Reform Act section 85225.25 as enacted is significantly changed from this earlier version. While the prior version gives the agency the option of either not proceeding with the action or modifying the action to satisfy the Council, the enacted version gives the agency the option to "proceed with the action" without modification, or as modified, provided it files a revised certification. Finally, the Legislature pointedly removed the prohibition that the proposed action "shall not be implemented" without a Council consistency determination. Despite the Legislature's purposeful refusal to adopt a statute mandating that a covered action shall not be implemented absent a Council blessing, the Council is attempting to reinsert that rejected mandate. This attempt clearly is an illegal alteration, amendment and enlargement of the statute that is beyond the Council's authority. (Gov't Code, §§ 11342.2 & 11349.1; see also OAL Handbook, p. 19.) These changes to subsequent versions of the Act and the language of the Delta Reform Act expressly permit implementation of a covered action when the Council disagrees with an implementing agency's consistency certification. Upon remand from an appeal, an agency is not required to modify a proposed covered action, but only to file a revised certification addressing the Council's findings. The plain language of the Act and its legislative history manifest the Legislature's intent to preserve the authority of state and local agencies to proceed with "covered actions" even if the Council ultimately disagrees with a proffered consistency certification.		
31. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	<u>Attempts to Implement Underground Regulation Are Unlawful:</u> The APA specifically prohibits an agency from making use of a rule which meets the definition of a "regulation" but has not been submitted to the OAL for approval, referred to as an "underground regulation." (Gov't Code, § 11340.5(a); OAL Handbook, pp. 12-16.) "Underground regulations" are a means to avoid the requirements of the APA and can take the form of "'policies,' 'interpretations,' 'instructions,' 'guides,' 'standards,' or the like, and are contained in internal organs of the agency." (OAL Handbook, pp. 13-14, citing Armistead v. State Personnel Board (1978) 22 Cal.3d 198.) Here, the Council claims the authority to prohibit an agency from proceeding with a project unless the Council has deemed it consistent with the Delta Plan: "If the covered action is found to be inconsistent, the project may not proceed until it is revised so that it is consistent with the Delta Plan." (Draft Delta Plan at p. 59.) As explained above, this proposed rule is not within the Council's authority. Nevertheless, the Council has included it in the Delta Plan.(5) Although the Council has not designated it as a Regulatory Policy, it clearly would meet the definition of "regulation" under Government Code Section 11342.600, that is, a "rule, regulation, order or standard" contained in a Delta Plan adopted by the Council purportedly "to implement, interpret, or make specific the law . . . administered by it." The proposed mandate meets the three part test specified in the OAL Handbook at p. 14: (1) it is a rule of standard or general application with respect to the consistency process; (2) it is a policy adopted by the Council to implement or make specific the law administered by it; and (3) it is not exempt under the APA. The Council's assertion of the authority to prohibit implementation of an action it deems inconsistent with the Delta Plan is not supported by the language or legislative history of the Delta Reform Act and is an unlawful "underground regulation." The Council's assertion of authority is unenforceable and should be deleted from the Delta Plan.	A	The response to this comment, and subsequent comments asserting that Council provisions preventing the agency, who has filed a certification of consistency with the Council, from proceeding with the proposed action unless either no one appeals the revised certification, or an appeal is filed and denied, are 1) underground regulations and 2) unsupported by the terms of the Delta Reform Act, is labeled **MR2**. Please see **MR2**.

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		(5) The Council is authorized to adopt "administrative procedures governing appeals" that are not required to be submitted to OAL. (Wat. Code, § 85225.30.) However, the provision at issue is not procedural. It is instead a substantive rule of law affecting the State's or a public agency's ability to carry out its statutory responsibilities, and it impairs the property rights of an entity applying for the permit or other approval at issue.		
32. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Section 5004(b)(3): The Proposed Regulations state that "[a]s relevant to the purpose and nature of the project, all covered actions must document use of best available science (as described in Appendix 1A)." (Emphasis added.) The Council asserts that this regulatory requirement is necessary for consistency with the Delta Plan "to ensure that all significant actions [affecting the Delta] utilize best available science or adaptive management in particular." (Initial Statement of Reasons at p. 2.) The use of best available science in evaluating the merits of a covered action should be encouraged. However, this proposed regulation exceeds the Council's authority to the extent that it imposes higher standards for state and local agency actions than can be found in the Delta Plan or elsewhere in controlling law. (See, e.g., Code Civ. Proc., § 1094.5(c) [substantial evidence in light of the whole administrative record]; Pub. Resources Code, § 21168.5 [abuse of discretion established for purposes of CEQA if a determination or decision is not supported by substantial evidence]; Cal. Code Regs., tit. 14, § 15384 [defining substantial evidence].) The Council lacks authority to limit or alter the scope of local agency discretion by requiring that all covered actions that have a significant impact on the achievement of the coequal goals must use (and document the use of) best available science and adaptive management, even where no other applicable law imposes such a requirement. The Council's stated basis for this requirement is that "despite the Delta's special status, there are no overarching guidelines or best management practices to ensure that all significant actions utilize best available science or adaptive management in particular." (Initial Statement of Reasons at p. 2.) However, the Delta Reform Act does not require proponents of covered actions to support their decisions with the best available science or utilize adaptive management in all situations . The Council's adoption of the Delta Plan must be supported by the best available science. (Wat. Code, §§ 85302(g), 85308(a).) But nothing in the Act authorizes the Council to impose that evidentiary standard on covered actions. In addition, the Delta Plan itself can be based upon the best available science without requiring every covered action to also be based on the best available science. Thus, the proposed requirement is not reasonably necessary for the Council to fulfill its obligation to use the best available science. In addition, such a requirement would result in a new standard for implementing agency decision making. This new standard could, in turn, expose implementing agencies and the Council to potential litigation over the intensively fact-specific determination whether an implementing agency has used the best available science, whether it has adequately documented such use, and whether the Council's determination to that effect in a certification appeal is supported by substantial evidence in the administrative record.	A	In addition to requiring the Delta Plan be based on best available science, the Act requires the Plan to recommend integration of science and monitoring results into ongoing Delta water management (section 85308(e)) and to include formal, science-based adaptive management for certain decisions (ongoing ecosystem restoration and water management decisions) (section 85308(f)). Furthermore, several provisions in the Act declare or indicate the importance of science to decision-making in the Delta (see sections 85308 [especially section 85308(c), requiring the Delta Plan to, "where appropriate, utilize monitoring, data collection, and analysis of actions sufficient to determine progress toward meeting [] quantified targets"], 85302(g), 85280) and thus it is within the Council's authority to mandate its use with respect to covered actions. Accordingly, a definition of best available science is appropriate and within Council authority. The Delta Reform Act requires the Delta Plan to include a formal, science-based adaptive management strategy for certain decisions (ongoing ecosystem restoration and water management decisions) (section 85308(d)) and to recommend integration of science and monitoring results into ongoing Delta water management (section 85308(e)). The Council accomplishes these legislative directives by requiring adaptive management for ecosystem restoration and water management covered actions. Furthermore, several provisions in the Act indicate the importance of science to decision-making in the Delta (see sections 85308 [especially section 85308(c), requiring the Delta Plan to, "where appropriate, utilize monitoring, data collection, and analysis of actions sufficient to determine progress toward meeting quantified targets"], 85302(g), 85280). Requiring adaptive management for the specified actions furthers the collection of data and the measuring of progress toward achieving the objectives of the Delta Plan and the coequal goals pursuant to these provisions in the Act. (See sections 85211, 85308(b).) Finally, the Council is instructed to base the Delta Plan on the advice of the Delta Independent Science Board (section 85308(a)), which recommended the incorporation of adaptive management for these actions (Memos to Phil Isenberg, Chair, Delta Stewardship Council from Richard Norgaard, Chair Delta Independent Science Board (DISB) dated 8 May 2011, 16 Sept 2011 and 12 June 2012).
33. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	5004(b)(3): To the extent that such a requirement is already imposed by other statutes or regulations, the regulation is duplicative, and would add nothing but another layer of paperwork to an implementing agency's regulatory burden. Thus, the proposed requirement is not only unauthorized, unnecessary, and administratively burdensome, it could lead to unintended consequences for implementing agencies as well as the Council.	Du	In addition to requiring the Delta Plan be based on best available science, the Act requires the Plan to recommend integration of science and monitoring results into ongoing Delta water management (section 85308(e)) and to include formal, science-based adaptive management for certain decisions (ongoing ecosystem restoration and water management decisions) (section 85308(f)). Furthermore, several provisions in the Act declare or indicate the importance of science to decision-making in the Delta (see sections 85308 [especially section 85308(c), requiring the Delta Plan to, "where appropriate, utilize monitoring, data collection,

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		The requirement that all covered actions that significantly impact the achievement of the coequal goals must use and document the use of the best available science should be removed from the Proposed Regulations.		and analysis of actions sufficient to determine progress toward meeting quantified targets"], 85302(g), 85280) and thus it is within the Council's authority to mandate its use with respect to covered actions. Accordingly, a definition of best available science is appropriate and within Council authority.
34. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Section 5004(b)(5): This subsection requires a certifying agency that will carry out a covered action to also certify that "the covered action complies with all applicable laws pertaining to water resources, biological resources, flood risk, and land use and planning[,]" and if the certifying agency will approve or fund, but not carry out, the covered action, then it must "include a certification .. . that the covered action complies with all applicable laws of the type listed above over which that agency has enforcement authority or with which that agency can require compliance." These additional certifications are not authorized in the Delta Reform Act, and they are unnecessary and duplicative of existing laws. If these additional certifications are required by regulation, then, in addition to any potential liability for an alleged failure to comply with the substantive mandates of those other applicable laws, project opponents could also bring an appeal before the Council, and potentially file litigation in state court challenging the certification of compliance with other substantive laws, and the Council's determination of consistency on any appeal, in addition to litigation in state or federal court challenging the alleged failure to comply with the substantive mandates of the law. Consequently, this requirement should be removed because it would increase regulatory burdens on agencies, including the Council, and it would increase the potential for litigation and the attendant costs and delays without providing any benefits in terms of compliance with the law, consistency with the Delta Plan, or furthering achievement of the coequal goals.	A, Du	The Council has removed the language of section 5002~~5004~~(b)(5) from the regulations.
35. Solano County Department of Resource Management	1/14/2013	• In subsection 5004(a), "proposed action" does not need to be in quotation marks.	O	The quotation marks are to emphasize the term "proposed action", as it is used in this subsection, refers to the definition stated section ~~5002~~ 5001(v) and does not refers to any other meaning.
36. Solano County Department of Resource Management	1/14/2013	• Subsection (b)(5)'s insistence that an agency's "certification of consistency must also include a certification from that agency that the covered action complies with all applicable laws pertaining to water resources, biological resources, flood risk, and land use and planning," goes well beyond the scope of Water Code section 85225.	A	The Council has removed the language of section 5002~~5004~~(b)(5) from the regulations.
37. Tuolumne Utilities District	1/3/2013	Section 5004(a) Contents of Certification of Consistency. Please change as follows: "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 <u>after a state or local public agency has determined that a proposed plan, program or project is a covered action because it meets the definition of a covered action in CWC§85057(a).</u> to be a covered action because it is covered by one or more of the regulatory policies contained in Article 3. Inconsistency of with this policy may be the basis for an appeal".	Ct	Comment noted. The Council has carefully defined the term "proposed action" in section ~~5002~~ 5001 (v) to provide clarity on how to determine if a project meets the definition of a covered action. The language the comment suggests does not provide any additional clarity.
38. Westlands Water District	1/14/2013	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 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.	A	Duplicate Comment

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
ADOPTED REGULATION: SECTION 5002 ~~5004~~

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39. Westlands Water District	1/14/2013	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.	A	In addition to requiring the Delta Plan be based on best available science, the Act requires the Plan to recommend integration of science and monitoring results into ongoing Delta water management (section 85308(e)) and to include formal, science-based adaptive management for certain decisions (ongoing ecosystem restoration and water management decisions) (section 85308(d)). Furthermore, several provisions in the Act declare or indicate the importance of science to decision-making in the Delta (see sections 85308 [especially section 85308(c), requiring the Delta Plan to, "where appropriate, utilize monitoring, data collection, and analysis of actions sufficient to determine progress toward meeting [] quantified targets"], 85302(g), 85280) and thus it is within the Council's authority to mandate its use with respect to covered actions. Accordingly, a definition of best available science is appropriate and within Council authority.
40. Yolo County, Office of the County Counsel	1/14/2013	The County concurs with and incorporates by reference the comments of San Joaquin County on Section 5004 of the proposed regulations. In addition, the County offers the following specific comments.	O	Comment noted. Please refer to the responses provided to the comments by San Joaquin County on section 5002~~5004~~.
41. Yolo County, Office of the County Counsel	1/14/2013	Subsection (b)(2) states that "[c]overed actions not exempt from CEQA must include applicable feasible mitigation measures identified in the Delta Plan's Program Environmental Impact Report . . . or substitute mitigation measures that the agency that files the certification of consistency finds are equally or more effective." The County has two objections to this approach. First, under CEQA, mitigation is only required for significant impacts. This provision does not appear to incorporate that limitation. To eliminate this inconsistency with CEQA, this provision should (at a minimum) therefore be modified to state that the mitigation requirement applies only to the significant impacts of a covered action. Second, the County reiterates its prior objection that this requirement is legally untenable. (See Yolo County Comment Letter on Final Staff Draft Delta Plan, p. 7 (June 13, 2012).) Under CEQA, mitigation measures adopted as part of the overall "program" studied in an EIR apply only to projects undertaken in furtherance of that program. Many covered actions, however, are primarily regulated by the Delta Plan rather than undertaken in furtherance thereof. State or local agencies will typically serve as lead agencies, not responsible agencies, for such projects under CEQA. For agencies acting in this capacity, mitigation measures adopted by the Council based on the Delta Plan EIR are legally irrelevant under CEQA. Those agencies have an independent, existing legal obligation under CEQA to mitigation the significant impacts of projects they carry out or approve. Subsection (b)(2) is thus unnecessary, in conflict (among other things)with the role of lead agencies for individual projects under CEQA, and beyond any legal authority conferred upon the Council by the Delta Reform Act.	Co	This comment pertaining to the requirement that projects not exempt from CEQA must include feasible mitigation measures identified in the Delta Plan's EIR or substitute measures is similar to other comments. The response to this comment and the other similar comments is labeled **MR12**. Please refer to **MR12**.

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ADOPTED REGULATION: SECTION 5002 ~~5004~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1.1 California Water Research	1/24/2013	Section 5004 of the proposed regulations fails to implement the statutory duty of the Delta Stewardship Council to provide independent oversight of science and adaptive management in the Delta through the Independent Science Board, or to implement any procedure for review by the Delta Stewardship Council of the statutory requirements for incorporation of the Bay Delta Conservation Plan in the Delta Plan, prior to such incorporation. As such it would appear to impermissibly delegate essential duties of the Delta Stewardship Council to other agencies.	Co	The commenter expands on this introductory statement in subsequent comments on specific sections. The Council's responses to those subsequent comments respond to this introductory statement.
2.1 California Water	1/24/2013	SB 7x1 explicitly described the role of the Independent Science Board in oversight of scientific research, monitoring, and assessment programs that support adaptive management of the Delta:	Co	The Council disagrees with this comment.

ASSOCIATION		DATE	COMMENT	CODES	RESPONSE
	Research		(3) The Delta Independent Science Board shall provide oversight of the scientific research, monitoring, and assessment programs that support adaptive management of the Delta through periodic reviews of each of those programs that shall be scheduled to ensure that all Delta scientific research, monitoring, and assessment programs are reviewed at least once every four years. (4) The Delta Independent Science Board shall submit to the council a report on the results of each review, including recommendations for any changes in the programs reviewed by the board. (SB 7x1 Section 803504(a)) Instead, the proposed rules delegate oversight of science and adaptive management in the Delta to other state agencies proposing actions in the Delta:		This comment is a broad assertion that does not provide any specifics or examples of any regulation that undermines any of the Delta Reform Act's requirements concerning the Delta Independent Science Board. (See Wat. Code section 85280.)~~.~~
3.1	California Water Research	1/24/2013	(3) As relevant to the purpose and nature of the project, all covered actions must document use of best available science (as described in Appendix 1A); (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. Appendix 1A of the proposed regulations, "Best Available Science," does not even mention the Delta Independent Science Board. This appears contrary to the intent of the legislature.	Co	The reference to Appendix 1A has been removed from this section.
4.1	California Water Research	1/24/2013	With respect to Appendix 1B of the proposed regulations, "Adaptive Management," there is no mention of the mandate in SB 7x1 to require the Bay Delta Conservation Plan to include fishery agencies in real-time decisionmaking about water system operations. 85321. The BDCP shall include a transparent, real-time operational decisionmaking process in which fishery agencies ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations. Again, this appears contrary to the intent of the legislature.	Co	The commentator's reference to section 85321 applies only to the BDCP and is not a requirement of a covered action. The assertion that the BDCP is a covered action overlooks the Council's more limited authority under Water Code section 85320(e). That section provides that the Council "shall incorporate the BDCP into the Delta Plan" if specified conditions are met.
5.1	California Water Research	1/24/2013	2. Requirements for the Bay Delta Conservation Plan to be Incorporated into the Delta Plan The proposed regulations fail not address the requirements in SB 7X1, Section 85320 for the Bay Delta Conservation Plan to be incorporated into the Delta Plan: (b) The BDCP shall not be incorporated into the Delta Plan and the public benefits associated with the BDCP shall not be eligible for state funding, unless the BDCP does all of the following: (2) Complies with Division 13 (commencing with Section 21000) of the Public Resources Code, including a comprehensive review and analysis of all of the following: (A) A reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy the criteria for approval of a natural community conservation plan as provided in subdivision (a) of Section 2820 of the Fish and Game Code, and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses. (C) The potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the environmental impact report. (D) The potential effects on migratory fish and aquatic resources. (G) The potential effects of each Delta conveyance alternative on Delta water quality. With respect to section (B), there have been numerous requests by the Environmental Water Caucus and its member organizations for the Delta Stewardship Council to require a water availability analysis before incorporating the Bay Delta Conservation Plan into the Delta Plan. There are no provisions in section 5004 to ensure that the Bay Delta Conservation Plan includes such an analysis prior to incorporation in the Delta Plan.1 (footnote - 1: See also "Water Supply for Diversions in the Delta by the Central Valley Project and the State Water Project,"	DP	The commentator's reference to section 85320 (et. Seq.) applies only to the BDCP and is not a requirement of a covered action. The assertion that the BDCP is a covered action overlooks the Council's more limited authority under Water Code section 85320(e). That section provides that the Council "shall incorporate the BDCP into the Delta Plan" if specified conditions are met.

ASSOCIATION		DATE	COMMENT	CODES	RESPONSE
			California Water Research, October 2012. Available at http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/docs/comments111312/deirdre_desjar dins.pdf Incorporated by reference.)		
6.1	California Water Research	1/24/2013	With respect to section (C), there are no provisions in section 5004 to ensure that the Bay Delta Conservation Plan includes a comprehensive review and analysis of the potential changes in precipitation and runoff due to climate change, prior to incorporation in the Delta Plan. 2 (footnote - 2 See "Comments on the Delta Plan, climate change analysis in BDCP and the requirements of the Delta Reform Act," California Water Research. Submitted as comments on the Delta Plan RPEIR. Incorporated by reference.)	DP	The commentator's reference to section 85320(b)(2)(C) is a requirement only of the BDCP and is not a requirement of a covered action. The assertion that the BDCP is a covered action overlooks the Council's more limited authority under Water Code section 85320(e). That section provides that the Council "shall incorporate the BDCP into the Delta Plan" if specified conditions are met.
7.1	California Water Research	1/24/2013	With respect to section (G), there are no provisions in section 5004 to ensure that the Bay Delta Conservation Plan analyzes the effects of each conveyance alternative on Delta water quality. In addition, the Delta Plan does not continue the existing state policy of maintaining water quality in the Delta.3 (footnote - 3 See "Comments on Comments on the RPEIR, water quality recommendations, and piecemealing under CEQA," California Water Research. Submitted as comments on the Delta Plan RPEIR. Incorporated by reference	DP	The commentator's reference to section 85320(b)(2)(G) is a requirement only of the BDCP and is not a requirement of a covered action. The assertion that the BDCP is a covered action overlooks the Council's more limited authority under Water Code section 85320(e). That section provides that the Council "shall incorporate the BDCP into the Delta Plan" if specified conditions are met.
8.1	California Water Research	1/24/2013	These omissions could allow incorporation of the Bay Delta Conservation Plan into the Delta Plan, without it meeting the requirements. This is clearly contrary to the intent of the legislature in Section 85320. The statute says "the Bay Delta Conservation Plan shall not be incorporated into the Delta Plan.. unless the BDCP does all of the following." Section 5004 of the draft regulations only states, "Inconsistency with this policy may be the basis for an appeal." [emphasis added.] The regulations must provide for adequate review of the Bay Delta Conservation Plan with respect to the requirements in section 85320, prior to incorporation in the Delta Plan.	DP	The assertion that the BDCP is a covered action overlooks the Council's more limited authority under Water Code section 85320(e). That section provides that the Council "shall incorporate the BDCP into the Delta Plan" if specified conditions are met.

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ADOPTED REGULATION: SECTION 5003 ~~5005~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Alameda County Flood Control and Water Conservation District, Zone 7	1/14/2013	Policies must fall within the Council's legal authority. The Delta Plan should clearly state its goals to encourage statewide water use efficiency and avoid using language that could be misinterpreted to regulate local water management decisions outside of the Delta through the covered action review process. In the current draft Delta Plan's policy recommendation WR Pl, the Council gives itself the discretion to review and judge local water management decisions outside the legally-defined Delta, inappropriately expanding the role of the Council beyond that outlined in statute and subjecting local agencies to an additional and potentially burdensome review process, irrespective of their water stewardship practices. We appreciate the verbal assurances from Council members that they want this discretion only to address alleged "bad actors", but the 2009 Delta Reform Act did not give the Council the jurisdiction to review and judge local water management decisions outside of the Delta. As a water agency that has been proactively working towards increasing our local water supply reliability through investments in conservation and portfolio diversification, among other water management practices, we object to this proposed policy.	A	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. We disagree with the comment that section 5003 of the adopted regulation does not fall within the scope of the Council's regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to a proposed covered action in the Delta. See Master Response 4 for more information. Further, the comment misconstrues the provisions of section 5003. This section does not provide the Council with discretion to review or judge local water management decisions, nor does it subject local suppliers to a potentially additional and burdensome review process. Please note that section 5003 has been revised to further clarify the language.
2. Calaveras County Water District	1/4/2013	Section 5005(a) Reduce Reliance on the Delta through Improved Regional Water Self-Reliance. Please change as follows: "The policy of the State of California is to reduce reliance on the Delta in meeting future water supply needs and that each region that depends on water from the Delta watershed shall improve its region self-reliance. Success in achieving the statewide policy of reduced reliance on the Delta and improving regional self reliance will be demonstrated through significant reduction in the amount of water used, or in the percentage of water used from the Delta watershed. <u>This will be done by improving, investing in, and implementing local and regional water supply projects[5], local 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. For the purposes of improving regional self-reliance water conservation is considered a new source of water supply, consistent with CWC §1011(a). Water so saved through these projects and programs counts as a new source of supply as this water would have been needed to meet future demand. Thus, even if water use is increasing as a result of economic or population growth, a water supplier can demonstrate that its water use is more efficient and is contributing to reduced reliance on the Delta and improved regional self-reliance.[6]</u> It is important that there is clarity within Section 5005 regarding the subject of reduced reliance on the Delta and improved regional self-reliance. Section 5005 should be consistent with CWC §85021 and the Final Draft Delta Plan. [5] Taken directly from CWC §85021. [6] Delta Stewardship Council Final Draft Plan, Appendix P, page P-2, lines 30-35.	Ct, DP	The Council has modified the language of section <u>5003</u> by removing subsections <u>5003</u> (a) and 5003 (b), and adding a new subsection <u>5003</u> (c)(1)(C). The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance on the Delta and improved regional self-reliance. The removed language describes the performance measures by which the effectiveness of the actions taken by water suppliers to achieve the policy of reducing reliance on the delta and improving regional self-reliance will be evaluated over the time. The added language, which reflects most of the commenter's recommended edits, clarifies how the expected outcome for measureable reduction in Delta reliance and improvement in regional-self-reliance shall be reported in the water management plans. We believe this sufficiently clarifies the intent of this section.
3. California Central Valley Flood Control Association	1/14/2013	Section 5005 – Reduce reliance on the Delta. The Association's primary role is to advocate on behalf of its members on issues related to flood control policy. However, some of the Association's members in the Delta also have a water supply function. Therefore, the Association provides the following limited comment on this section. California Water Code Section 85021 declares reduced reliance and regional self-reliance as policies of the State of California and does not specifically confer on the Council or any other	A	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. We disagree with the comment that section 5003 of the adopted regulation does not fall within the scope of the Council's regulatory authority. The Delta Reform Act gives the Council

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		state agency the authority, power, or directive to dictate through regulation how and when this will be done. Therefore, the requirement for "significant reductions" in the amount of water used or percentage of water used lacks any statutory authority for the Delta Plan to include this requirement and therefore it is beyond the scope of the Council's authority to propose this as a regulation.		the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information. Regarding the comment on the requirement for "significant reductions": The Council has modified section 5003 to simplify and clarify this language. Subsections 5003(a) and 5003 (b) have been removed and a new subsection 5003 (c)(1)(C) has been added. The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance and improved regional self-reliance. The removed language describes the performance measures by which the statewide effectiveness of the actions taken by achieve the policy of reducing reliance on the Delta and improving regional self-reliance will be evaluated by the Delta Plan over time. The added language clarifies how the expected outcome for measureable reduction in delta reliance and improvement in regional self-reliance shall be reported in the Urban and Agricultural Water Management Plans. We believe that this appropriately clarifies the language in this section.
4. California Central Valley Flood Control Association	1/14/2013	This section also states that water may not be used in the Delta if the user: (1) has not contributed to reduced reliance on the Delta, (2) that failure to reduce results in a need to use water, and (3) the use has a significant environmental impact. Many of the water users in the Delta hold riparian, Pre-1914, or senior Post-1914 appropriative rights. These holders are not required to reduce water diversions until other more junior water users reduce their diversions. Thus, this provision directly conflicts with existing California law and encroaches on the jurisdiction of the State Water Resources Control Board.	Co	We disagree with the comments. Nothing in section 5003 of the adopted regulation improperly infringes on the water rights and statutory priorities of diverters and other areas of origin. Please see Master Response 8 for more information. Further, nothing in section 5003 expands or otherwise alters the existing authority of the State Water Resources Control Board to regulate the diversion and use or water or the courts' existing concurrent jurisdiction over California water rights. Please see Master Response 9 for more information.
5. California Central Valley Flood Control Association	1/14/2013	In addition, the wording used in this section is vague in terms of meaning and in terms of to whom it applies. Who defines what a "significant reduction" is and whether it has been "demonstrated?" Who exactly must "demonstrate" these reductions? Does the regulation apply to individual water users, water agencies, water suppliers, or "regions?" If the regulation applies to "regions" then who defines what these regions are? How and who will determine if covered actions proposed by a regulated entity is meeting any kind of "significant reductions" that must occur in a "region?" What is the process for these "regions" or the regulated community to "demonstrate" they have significantly reduced water used? At what point has an entity regulated under this provision achieved the maximum amount of reductions of water used? Or is it unlimited and reductions must be continued until the regulated community has reduced to a level of 0%? Are these reductions calculated on an annual basis? The regulatory provisions in Section 5005 fail to identify at what point "whoever" these provisions apply has done enough.	Ct	The Council has modified the language of section 5003 by removing subsections 5003 (a) and 5003 (b), and adding a new subsection 5003 (c)(1)(C). The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance on the Delta and improved regional self-reliance. The removed language describes the performance measures by which the effectiveness of the actions taken by water suppliers to achieve the policy of reducing reliance on the delta and improving regional self-reliance will be evaluated over the time. The added language clarifies how the expected outcome for measureable reduction in Delta reliance and improvement in regional-self-reliance shall be reported in the water management plans. We believe that this appropriately clarifies the language in this section.
6. California Central Valley Flood Control Association	1/14/2013	Subsection (e)(1) creates a presumption of reduced diversion when an agency has prepared a plan under Water Code Division 6, Parts 2.55, 2.6, and 2.8. However, a careful review of those parts reveals that many medium and small water agencies are exempted from the need to prepare such a plan. Thus, this offering of the presumption is discriminatory to these medium and small agencies which have been exempted due to their size and the cost of preparing such a plan. For these reasons, any agency which is exempted under Water Code Division 6 (see, for example: Water Code section 10853) should automatically receive the presumption here, without the need to prepare an expensive plan.	DP	The language of section 5003 of the adopted regulation only applies to water suppliers that are currently required, by California law, to prepare, adopt and implement Urban Water Management Plans or Agricultural Water Management Plans. The definition of water suppliers is provided in section 5001 (see section 5001(b), (c) (1) and (2), (hh)(1) and (2) and (ii)).

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7. California Central Valley Flood Control Association	1/14/2013	Finally, in-Delta landowners cannot "diversify local water supply portfolios" as they are area-of-origin Delta watershed water users and have no other sources of water. Section 5005 as a whole appears to conflict with Water Code Section 85031(d) regarding the SWRCB's authority which states: "Unless otherwise expressly provided, nothing in this division supersedes, reduces, or otherwise affects existing legal protections, both procedural and substantive, relating to the state board's regulation of diversion and use of water, including, but not limited to, water right priorities, the protection provided to municipal interests by Sections 106 and 106.5, and changes in water rights. Nothing in this division expands or otherwise alters the board's existing authority to regulate the diversion and use of water or the courts' existing concurrent jurisdiction over California water rights."	Co	The Council has the authority to regulate actions that occur in the Delta or partially in the Delta. Please see Master Response 4 for additional information. We disagree with the comment that in-Delta land owners cannot diversify local water supply portfolios. The types of measures that could reduce reliance and improve regional self-reliance are described in section 5003(c)(2) of the adopted regulation. These measures, including water conservation and water efficiency, are further discussed in the Delta Plan. In addition, for the purposes of reporting the expected outcome for measureable reduction in Delta reliance and improvement in regional self-reliance, water efficiency is identified as a new source of water supply in section 5003(3)(1)(C). We disagree on the comments regarding water rights. Nothing in section 5003 improperly infringes on the water rights and statutory priorities of diverters and other areas of origin. Please see Master Response 8 for additional information. Further, nothing in section 5003 expands or otherwise alters the existing authority of the State Water Resources Control Board to regulate the diversion and use or water or the courts' existing concurrent jurisdiction over California water rights. Please see Master Response 9 for more information.
8. California Department of Water Resources	1/14/2013	5005. Reduce Reliance on the Delta through Improved Regional Water Self-Reliance. Policy. This Section states that it is the "policy of the State of California is to reduce reliance on the Delta in meeting future water supply needs and that each region that depends on water from the Delta watershed shall improve its regional self-reliance. Success in achieving the statewide policy of reduced reliance on the Delta and improving regional self-reliance will be demonstrated through a significant reduction in the amount of water used, or in the percentage of water used, from the Delta watershed". If viewed in isolation, the language of this section could be viewed as an absolute limit or even reduction in existing uses of water from the Delta without looking to whether other policies are met. However, Water Code Section 85021, which is the basis for the regulation, itself speaks to reduced reliance by encouraging regional self-reliance, not to reduced use of water. The proposed regulation points to reductions in the percentage of water used as a demonstration of success and states that compliance with specifically-described items is evidence that water suppliers are contributing to reduced reliance on the Delta and improved regional self-reliance and are therefore consistent with this policy. As we have pointed out in our second comment, the regulations should not be viewed in isolation. The Delta Reform Act contemplates looking at issues comprehensively and in a way that moves forward in solving them concurrently and consistent with other laws governing other agencies considering whether and how they can advance the coequal goals and multiple objectives of the Delta Reform Act. With regard to providing a more reliable water supply, this policy must also be read in context with the legislative goals contained in section 85020, 85032, 85302(d), and 85304 which promote among other things increased storage, reliable water supply, meeting the needs of beneficial uses, and sustaining the economy and with the authority of Section 1 of the Porter Cologne Act (Water Code Section 13000) which requires the State Water Resources Control Board to balance public interests, including use of water for urban and agricultural uses and reasonable restrictions.	Co	The language quoted by the comment has been deleted from the regulation and placed into the Delta Plan text because it is intent language and not part of the regulation imposed on covered actions. Section 5003 requires certain water suppliers to reduce reliance on the Delta and improve regional self-reliance. The regulation goes on to describe actions a water supplier can take to comply with this requirement, including 5003(c)(1)(A) [completing an appropriate water management plan], 5003(c)(1)(B) [identifying and implementing programs and projects in the water management plan that will reduce reliance on the Delta], and 5003(c)(1)(C) [include in the water management plan the expected outcome for reduction in Delta reliance and improved regional self reliance, reported as a reduction in the amount or percentage of water used from the Delta watershed]. The comment is correct in noting that a water supplier could meet 5003(c)(1)(C) by reducing either the amount of Delta water used or the percentage of Delta water used. The Council agrees that the regulation should not be viewed in isolation from the Delta Reform Act, including the provisions cited by the comment. Note also that nothing in this division expands or otherwise alters the State Water Resources Control Board's authority to regulate diversion and use of water or the court's existing jurisdiction over California water rights.

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9. California Department of Water Resources	1/14/2013	5005. Reduce Reliance on the Delta through Improved Regional Water Self-Reliance. Implementation. As DWR has said in its comments before, it has many questions about how this policy will be applied. The policy applies to exports or transports of water from the Delta and Delta use. It requires water suppliers to reduce reliance on the Delta by a significant reduction in net water use, or in the percentage of water used, from the Delta watershed. One way of doing this is for water suppliers to show they are complying with the laws regarding water conservation, water efficiency and urban and agricultural water management planning. DWR exports or transports water from the Delta, but it is not a water supplier. The SWP contractors and their members are water suppliers but they do not export water from the Delta. DWR has questions as to whether this policy would apply to DWR exports or transfers. We have said that DWR plans to work with its contractors and other water suppliers to meet the policy and to respond to the recommendations relating to this policy. This is one of many issues that we expect will be worked out through the implementation process.	Ct	We disagree that there are questions about how this policy will apply to DWR. Although DWR is not a water supplier, section 5003 will apply to DWR if it proposes to export or transfer water from the Delta and its proposal meets the other "proposed action" requirements. (See section 5001(y), defining proposed action.) Section 5003 prohibits DWR from engaging in such a proposed export or transfer if one or more water suppliers that would receive water as a result of DWR's project have failed to adequately contribute to reduced reliance on the Delta and improved regional self-reliance as specified in section 5003, that failure has significantly caused the need for DWR's project, and DWR's project would have a significant adverse environmental impact on the Delta.
10. California Department of Water Resources	1/14/2013	5005(e). Review by DWR for compliance. This Section states that, in order for water suppliers to show that they are consistent with the policy, they must show that they have "completed a current Urban or Agricultural Water Management Plan which has been reviewed by the Department of Water Resources for compliance with the applicable requirements of Water Code Division 6, Parts 2.55, 2.6, and 2.8. As we have stated before, DWR does not have the authority or the ability to review these plans for compliance. We would suggest changing the language to say <u>which has been reviewed by the Department of Water Resources for compliance with the applicable requirements of Water Code Division 6, Parts 2.55, 2.6 and 2.8 to the extent that the Department of Water Resources has authority to review for compliance</u>. If no changes are made in the language, we would interpret this section to apply only to the authority DWR already has since the DSC cannot, by regulation, give DWR authority it does not have. As a reminder, DWR does have many roles with regard to these laws. DWR receives and reviews water plans to make sure they include all required elements. In 2013 for agricultural plans and 2016 for urban plans, DWR will review and document whether suppliers have implemented the specific actions required by SBx7-7; the implementation of efficient water management practices for agricultural water uses and meeting the 2015 interim water use target for urban water users. These actions directly affect water supplier grant and loan eligibility. In a few cases where mandated by legislation, DWR works with the California Water Commission to establish regulations. Through the California Water Plan and other DWR documents, DWR provides information and guidance to local water suppliers.	A, Co	We disagree with the comment that the language in 5003(c)(1) of the adopted regulation requires additional action by DWR to review completed Urban or Agricultural Water Plans. As the comment describes, DWR is required by existing law to review urban and agricultural water management plans for conformance with the applicable requirements of Water Code Division 6, Parts 2.55, 2.6, and 2.8.
11. California Farm Bureau Federation	1/14/2013	Section 5005(c), pertaining to "reduce[d] [regional] reliance on the Delta in meeting future water supply needs," provides that: 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 (e); (2) That failure has significantly caused the need for the export, transfer or use; and	Ne, Ct, Co	Section 5003 (c) of the adopted regulation was revised to clarify how the expected outcome for a measureable reduction in Delta reliance and improvement in regional self-reliance would be reported. Starting in 2015, water suppliers will report on the expected outcome of the measures they are implementing in their Urban or Agricultural Water Management Plan to reduce reliance on the Delta and improve regional self-reliance. Their progress will be reported in these Plans as a reduction in the amount of water used, or in the percentage of water used, from the Delta watershed. Existing law requires Urban and Agricultural Water Management Plans to be updated every five years, so progress in achieving reduced reliance will be reflected in these updates. Additionally, DWR provides information and guidance to urban and agricultural water suppliers for how they are to report on past, present and future water uses and sources, including the publication of a 2010 guide for the preparation of Urban Water

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		(3) The export, transfer, or use would have a significant adverse environmental impact in the Delta. Comments: The regulations should clarify what is meant by "future water supply needs." For example, does this mean water use above a certain baseline, a change in existing water uses, or does it mean all uses of water at some future time? The regulations should also clarify that, for areas in the Delta, "reliance on the Delta" is and will almost necessarily always be near 100 percent reliance. Thus, it is fairly nonsensical to say that the Delta must rely on some source other than the Delta—and rather, for the Delta itself, there must be some different and more appropriate metric. Also, in areas of the Delta where significant leaching fractions are required, where more water must sometimes be pumped out than piped in, where lands are literally surrounded by an abundance of naturally occurring water, and where significant amounts applied water percolate back into Delta channels, ordinary notions of water efficiency may have little application. Without necessary clarifications on these points, the proposed regulation will potentially violate the "clarity," and also the "consistency" and "necessity" elements of a valid regulation.		Management Plans and a 2012 guide for the preparation of Agricultural Water Management Plans. We disagree with the comment that the section needs to define "future" water supply needs, as this term is not included in the adopted regulation. The Council has addressed the use of the word "future" as it appears in Water Code section 85021 in a letter to the State and Federal Contractors' Water Agency (SFCWA) dated November 15, 2010. Please refer to this letter for more information. We disagree with the comment that water suppliers within the Delta cannot reduce their reliance on water from the Delta. The types of measures that could contribute to achieving reduced reliance are described in section 5003 (c)(2) of the adopted regulation. These measures, including water conservation and water efficiency, are further discussed in the Delta Plan. In addition, for the purposes of reporting the expected outcome for measureable reduction in Delta reliance and improvement in regional self-reliance, water efficiency is identified as a new source of water supply in section 5003(c)(1)(C). Finally the comment misconstrues the language in section 5003. As specified in(c)(1)(B) of section 5003, water suppliers determine which measures should be included in their Plans, and their decision is based, in part, upon their assessment that these measures are locally cost effective and technically feasible for reducing reliance on the Delta. See Master Response 4 and 8 for more information.
12. Castaic Lake Water Agency	1/10/2013	Policies must fall within the Council's legal authority The Delta Plan should clearly state its goals to encourage statewide water use efficiency and avoid using language that could be misinterpreted to regulate local water management decisions outside of the Delta through the covered action review process. In the current draft Delta Plan, Policy WR P1 gives the Council the discretion to review and judge local water management decisions outside the legally-defined Delta, inappropriately expanding the role of the Council beyond that outlined in statute and thus subjecting local agencies to an additional and potentially burdensome review process, irrespective of their water stewardship practices. We appreciate the verbal assurances from Council members that they want this discretion only to address alleged "bad actors", but the 2009 Delta Reform Act did not give the Council the jurisdiction to review and judge local water management decisions outside of the Delta. As an agency that has been successful in advancing local water supply reliability through investments in conservation and recycling, among other water management practices, we object to this proposed policy.	A	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. We disagree with the comment that section 5003 in the adopted regulation does not fall within the scope of the Council's regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes water conservation and local water supply development actions into account, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information on the Council's authority to consider out-of-Delta actions when regulating in-Delta actions. Further, the comment misconstrues the provisions of section 5003. This section does not provide the Council with discretion to review or judge local water management decisions, nor does it subject local agencies to a potentially additional and burdensome review process. Please note that section 5003 has been revised to further clarify the language.
13. Central Delta Water Agency	1/14/2013	Section 5005. Reduce Reliance on the Delta through Improved Regional Water Self Reliance The regulation ignores water right and statutory priorities afforded to the Delta and other areas of origin and is therefore inconsistent with Water Code section 85031 which is an overriding limitation on Division 33 of the Water Code. The regulations and Delta Plan must require that the exports from the Delta by the State Water Project (SWP) and Central Valley Project (CVP) be curtailed first before any reduction in reliance on the Delta is imposed on diverters in the Delta and other areas of origin within the Delta Watershed. The priorities of senior water right holders and those in the protected areas subject to Water Code section 1215 et seq. must also be recognized and protected.	Co, DP	We disagree with the comment. Nothing in section 5003 of the adopted regulation improperly infringes on the water rights and statutory priorities of diverters and other areas of origin. Please see Master Response 8 for more information. We disagree with the commentator's assertion that the "Delta Plan must require that the exports from the Delta by the State Water Project (SWP) and Central Valley Project (CVP) be curtailed first before any reduction in reliance on the Delta is imposed on diverters in the Delta and other areas of origin within the Delta Watershed". The regulatory policies of the Delta Plan will not expand or otherwise alter the existing authority of the State Water Resources Control Board to regulate the diversion and use or water or the courts' existing concurrent jurisdiction over California water rights. Please see Master Response 9 for more information.

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		Water Code §85031(a) provides as follows: "§85031. Effect on existing water rights; diversion and conveyance of water not to deem area immediately adjacent or capable of being conveniently supplied; applicability of other water Code provisions; effect on existing legal protections (a) This division does not diminish, impair, or otherwise affect in any manner whatsoever any area of origin, watershed of origin, county of origin, or any other water rights protections, including, but not limited to, rights to water appropriated prior to December 19, 1914, provided under the law. This division does not limit or otherwise affect the application of Article 1.7 (commencing with Section 1215) of Chapter 1 of Part 2 of Division 2, Sections 10505, 10505.5, 11128, 11460, 11461, 11462, and 11463, and Sections 12200 to 12220, inclusive." (Emphasis added) Water Code §§12200 through 12205 are particularly specific as to the requirements to provide salinity control for the Delta and provide an "adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban and recreational development." For ease of reference, the following Water Code sections are quoted with emphasis added: 112200. Legislative findings and declaration The Legislature hereby finds that the water problems of the Sacramento-San Joaquin Delta are unique within the State; the Sacramento and San Joaquin Rivers join at the Sacramento-San Joaquin Delta to discharge their fresh water flows into Suisun, San Pablo and San Francisco bays and thence into the Pacific Ocean; the merging of fresh water with saline bay waters and drainage waters and the withdrawal of fresh water for beneficial uses creates an acute problem of salinity intrusion into the vast network of channels and sloughs of the Delta; the State Water Resources Development system has as one of its objectives the transfer of waters from water-surplus areas in the Sacramento Valley and the north coastal area to water-deficient areas to the south and west of the Sacramento-San Joaquin Delta via the Delta; water surplus to the needs of the areas in which it originates is gathered in the Delta and thereby provides a common source of fresh water supply for water-deficient areas. It is, therefore, hereby declared that a general law cannot be made applicable to said Delta and that the enactment of this law is necessary for the protection, conservation, development, control and use of the waters in the Delta for the public good. (Added by Stats. 1959, c. 1766, p. 4247, §1.) §12201. Necessity of maintenance of water supply The Legislature finds that the maintenance of an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban, and recreational development in the Delta area as set forth in Section 12220, Chapter 2, of this part, and to provide a common source of fresh water for export to areas of water deficiency is necessary to the peace, health, safety and welfare of the people of the State, except that delivery of such water shall be subject to the provisions of Section 10505 and Sections 11460 to 11463, inclusive, of this code. (Added by Stats. 1959, c. 1766, p 4247, §1.) §12202. Salinity control and adequate water supply; substitute water supply; delivery Among the functions to be provided by the State Water Resources Development System, in coordination with the activities of the United States in providing salinity control for the Delta through operation of the Federal Central Valley Project, shall be the provision of salinity control and an adequate water supply for the users of water in the Sacramento-San Joaquin Delta. If it is determined to be in the public interest to provide a substitute water supply to the users in said Delta in lieu of that which would be provided as a result of salinity control no added financial burden shall be placed upon said Delta water users solely by virtue of such substitution. Delivery		

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		of said substitute water supply shall be subject to the provisions of Section 10505 and Sections 11460 to 11463, inclusive, of this code. (Added by Stats. 1959, c. 1766, p 4247, §1.) §12203. Diversion of waters from channels of delta It is hereby declared to be the policy of the State that no person, corporation or public or private agency or the State or the United States should divert water from the channels of the Sacramento-San Joaquin Delta to which the users within said Delta are entitled. (Added by Stats. 1959, c. 1766, p 4249, §1.) §12204. Exportation of water from delta In determining the availability of water for export from the Sacramento-San Joaquin Delta no water shall be exported which is necessary to meet the requirements of Sections 12202 and 12203 of this chapter. (Added by Stats. 1959, c. 1766, p 4249, §1.) §12205. Storage of water; integration of operation and management of release of water It is the policy of the State that the operation and management of releases from storage into the Sacramento-San Joaquin Delta of water for use outside the area in which such water originates shall be integrated to the maximum extent possible in order to permit the fulfillment of the objectives of this part. (Added by Stats. 1959, c. 1766, p 4249, §1)" In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water there from, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein. (Added by Stats. 1943, c. 370, p. 1896. Amended by Stats. 1957, c. 1932, p. 3410, § 296.)" The December 1960 Bulletin 76 (Attachment A) which is a contemporaneous interpretation by DWR of Water code Section 12200 through 12205 provides at page 12: "In 1959 the State Legislature directed that water shall not be diverted from the Delta for use elsewhere unless adequate supplies for the Delta are first provided." (emphasis added.) A summary of the promises made on behalf of the United States to those in the areas of origin is contained in the 84th Congress, 2D Session House Document No. 416, Part One Authorizing Documents 1956 at Pages 797-799 as follows: "My Dear Mr. Engle: In response to your request to Mr. Carr, we have assembled excerpts from various statements by Bureau and Department officials relating to the subject of diversion of water from the Sacramento Valley to the San Joaquin Valley through the operation of the Central Valley Project. A factual review of available water supplies over a period of more than 40 years of record and the estimates of future water requirements made by State and Federal agencies makes it clear that there is no reason for concern about the problem at this time. For your convenience, I have summarized policy statements that have been made by Bureau of Reclamation and Department of the Interior officials. These excerpts are in the following paragraphs: On February 20, 1942, in announcing the capacity for the Delta-Mendota Canal, Commissioner John C. Page said, as a part of his Washington D.C., press release:		

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		"The capacity of 4,600 cubic feet per second was approved, with the understanding that the quantity in excess of basic requirements mainly for replacement at Mendota Pool, will not be used to serve new lands in the San Joaquin Valley if the water is necessary for development in the Sacramento Valley below Shasta Dam and in the counties of origin of such waters." On July 18, 1944, Regional Director Charles E. Carey wrote a letter to Mr. Harry Barnes, chairman of a committee of the Irrigation Districts Association of California. In that letter, speaking on the Bureau's recognition and respect for State laws, he said: "They [Bureau officials] are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigation development in the West by the Federal Government under the Federal reclamation laws is carried forward in conformity with State water laws." On February 17, 1945, a more direct answer was made to the question of diversion of water in a letter by Acting Regional Director R. C. Calland, of the Bureau, to the Joint Committee on Rivers and Flood Control of the California State Legislature. The committee had asked the question, "What is your policy in connection with the amount of water that can be diverted from one watershed to another in proposed diversions?" In stating the Bureau's policy, Mr. Calland quoted section 11460 of the State water code, which is sometimes referred to as the county of origin act, and then he said: "As viewed by the Bureau, it is the intent of the statute that no water shall be diverted from any watershed which is or will be needed for beneficial uses within that watershed. The Bureau of Reclamation, in its studies for water resources development in the Central Valley, consistently has given full recognition to the policy expressed in this statute by the legislature and the people. The Bureau has attempted to estimate in these studies, and will continue to do so in future studies, what the present and future needs of each watershed will be. The Bureau will not divert from any watershed any water which is needed to satisfy the existing or potential needs within that watershed. For example, no water will be diverted which will be needed for the full development of all of the irrigable lands within the watershed, nor would there be water needed for municipal and industrial purposes or future maintenance of fish and wildlife resources." On February 12, 1948, Acting Commissioner Wesley R. Nelson sent a letter to Representative Clarence F. Lea, in which he said: "You asked whether section 10505 of the California Water Code, also sometimes referred to as the county of origin law, would be applicable to the Department of the Interior, Bureau of Reclamation. The answer to this question is: No, except insofar as the Bureau of Reclamation has taken or may take assignments of applications which have been filed for the appropriation of water under the California Statutes of 1927, chapter 286, in which assignments reservations have been made in favor of the county of origin. The policy of the Department of the Interior, Bureau of Reclamation, is evidenced in its proposed report on a Comprehensive Plan for Water Resources Development—Central Valley Basin, Calif., wherein the Department of the Interior takes the position that "In addition to respecting all existing water rights, the Bureau has complied with California's `county of origin' legislation, which requires that water shall be reserved for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus water will be exported elsewhere." On March 1, 1948, Regional Director Richard L. Boke wrote to Mr. A. L. Burkholder, secretary of the Live Oak Subordinate Grange No. 494, Live Oak, Calif., on the same subject, and said:		

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		"I can agree fully with the statement in your letter that it would be grossly unjust to 'take water from the watersheds of one region to supply another region until all present and all possible future needs of the first region have been fully determined and completely and adequately provided for.' That is established Bureau of Reclamation policy and, I believe, it is consistent with the water laws of the State of California under which we must operate." On May 17, 1948, Assistant Secretary of the Interior William E. Warne wrote a letter to Representative Lea on the same subject, in which he said: "The excess water made available by Shasta Reservoir would go first to such Sacramento Valley lands as now have no rights to water." Assistant Secretary Warne goes on to say, in the same letter: "As you know, the Sacramento Valley water rights are protected by: (1) Reclamation law which recognizes State water law and rights there under; (2) the State's counties of origin act, which is recognized by the Bureau in principle; and (3) the fact that Bureau filings on water are subject to State approval. I can assure you that the Bureau will determine the amounts of water required in the Sacramento Valley drainage basin to the best of its ability so that only surplus waters would be exported to the San Joaquin. We are proceeding toward a determination and settlement of Sacramento Valley waters which will fully protect the rights of present users; we are determining the water needs of the Sacramento Valley; and it will be the Bureau's policy to export from that valley only such waters as are in excess of its needs." On October 12, 1948, Secretary of the Interior Krug substantiated former statements of policy in a speech given at Oroville, Calif. Secretary Krug said, with respect to diversion of water: "Let me state, clearly and finally, the Interior Department is fully and completely committed to the policy that no water which is needed in the Sacramento Valley will be sent out of it." He added: "There is no intent on the part of the Bureau of Reclamation ever to divert from the Sacramento Valley a single acre-foot of water which might be used in the valley now or later." Water Code section 1216 provides as follows: "§ 1216. Depriving protected area of adequate supplies of water prohibited A protected area shall not be deprived directly or indirectly of the prior right to all the water reasonably required to adequately supply the beneficial needs of the protected area, or any of the inhabitants or property owners therein, by a water supplier exporting or intending to export water for use outside a protected area pursuant to applications to appropriate surface water filed, or groundwater appropriations initiated, after January 1, 1985, that are not subject to Section 11460. (Added by Stats.1984, c. 1655, § 2.)" The failure to honor the water right and statutory priorities as required by Water Code section 85031 is simply a taking of the property of those with seniority and a gift to the contractors of the SWP and CVP receiving waters exported at the SWP and CVP pumps near Tracy. The resulting injustice from the proposed regulation is highlighted by the fact that the SWP was to develop sufficient projects in North Coast watersheds to supplement flows into the Delta of 5 million acre feet per year by the year 2000. These supplemental flows were needed to meet the approximately 4.25 million acre feet of SWP contract entitlement as well as other project responsibilities such as salinity control for the Delta. The North Coast development did not take place yet the SWP continues to export water from the Delta. The failure of the Secretary of		

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		Interior to comply with the condition that the San Luis Unit of the CVP not go forward unless a Valley Drain with an outlet to the Bay or Ocean was assured also highlights the injustice resulting from the Delta Stewardship Council effort. The regulations must be rewritten to require curtailment of SWP and CVP exports from the Delta to areas south of the Delta before imposition of any burden on other water users, and then in accordance with the water right and statutory priorities. To be effective, the restraint on such SWP and CVP exports should limit the service or transport of water to new development of arid lands which will directly or indirectly increase demand for SWP or CVP export pumping from the Delta. In addition to and consistent with the above, 5005.(c) must be revised to delete "or used in the Delta' and insert "or" before "transferred". 5005.(c)(1) insert "or" before "transfer" and delete "or use". 5005.(c)(2) insert "or" before "transfer" and delete "or use". 5005.(c)(3) insert "or" before "transfer" and delete "or use". 5005.(d) insert "or" before "transfer" and delete "or use water in".		
14. City of Burbank Water and Power	1/10/2013	Regulatory Authority: The Delta Plan should clearly state its goals to encourage statewide water use efficiency and avoid utilizing language that could be misinterpreted to regulate local water management decisions outside of the Delta through the covered action review process. In the current draft Delta Plan, policy WR P1, the Council gives itself the discretion to review and judge local water management decisions outside the legally-defined Delta, inappropriately expanding the role of the Council beyond that outlined in statute and subjecting local agencies to an additional and potentially burdensome review process, irrespective of their water stewardship practices. As currently drafted, the Delta Plan may penalize responsible agencies for the failings of other neighboring districts simply because they share the same wholesale resource for imported water. We appreciate assurances from Council members that they want this discretion only to address alleged "bad actors," but as an agency that has been successful in advancing local water supply reliability through investments in conservation and recycling, among other water management practices, we object to this proposed policy as currently expressed.	A	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a “legally enforceable Delta Plan” that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council’s regulatory authority. We disagree with the comment that section 5003 does not fall within the scope of the Council’s regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information. Further, the comment misconstrues the provisions of section 5003. This section does not provide the Council with discretion to review or judge local water management decisions, nor does it subject local agencies to a potentially additional and burdensome review process. Please note that section 5003 has been revised to further clarify the language.
15. City of Sacramento	1/14/2013	Section 5005 - Reduce Reliance on the Delta through Improved Regional Water Self-Reliance. Sections 5005(a) and (b) set forth narrative expressions of "policies of the State" and do not serve a regulatory purpose. Their inclusion in the regulatory language makes it difficult for potentially regulated entities to determine their responsibilities. The sections are not necessary and should be deleted.	Ne	The Council has modified the language of section 5003 by removing subsections 5003 (a) and 5003 (b), and adding a new subsection 5003 (c)(1)(C). The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance on the Delta and improved regional self-reliance. The removed language describes the performance measures by which the effectiveness of the actions taken by water suppliers to achieve the policy of reducing reliance on the delta and improving regional self-reliance will be evaluated over the time. The added language clarifies how the expected outcome for measureable reduction in Delta reliance and improvement in regional-self-reliance shall be reported in the water management plans. We believe this sufficiently clarifies the intent of this section.
16. City of Sacramento	1/14/2013	Section 5005(e)(1) and subparagraphs (A) — (C) are awkward and unclear. Whereas subparagraph (A) refers to an "Urban or Agricultural Water Management Plan," subparagraph (B) refers to "the management plan" and (C) refers to "the plan." The terminology should be consistent so that it is clear that each of these paragraphs, (A) through (C), is referring to the same plan.	Ct	We agree. The Council has modified the language of section 5005.

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17. City of Sacramento	1/14/2013	It is not clear whether or not 5005(e)(1)(B) is referring only to "programs and projects" that are included in the "management plan." It should be made clear that this subparagraph is referring only to the identification, evaluation, and implementation of projects that are included in the urban or agricultural management plan.	Ct	We agree. The Council has modified the language of section 5005.
18. City of Sacramento	1/14/2013	Section 5005(e)(1) distorts the purpose of the urban/agricultural water management plan. These plans are long-range planning documents that change over time as conditions and technologies change. The implementation schedules set forth in the plans are goals established by the water suppliers and are intended to remain flexible for purposes of adaptability. In order to protect the integrity of the water management plans as a useful planning document, Section 5005(e)(1)(B) should delete the phrase "consistent with the implementation schedule set forth in the management plan."	Co	We disagree with the comment. Existing law requires water suppliers to update their Urban and Agricultural Water Management Plans every five years, including the implementation schedule set forth in the Plan. The language in section 5003 of the adopted regulation is appropriate.
19. City of Sacramento	1/14/2013	Section 5005(e)(2) appears to be entirely narrative and not regulatory in nature. For the sake of clarity it should be deleted.	Ne	The Council has included this language in the regulation to provide necessary clarity on how to comply with the regulation.
20. City of Stockton	1/14/2013	Section 5005 sets forth a proscription against, among other things, using water in the Delta. However, this provision is unclear. For example, subdivision (c)(1) provides that a water supplier cannot "use" water from the Delta unless, among other things, the water supplier has "adequately contribute[d] to reduced reliance on the Delta and improved regional self-reliance consistent with all of the requirements listed" in subdivision (e)(1). Subdivision (e)(1) provides that water suppliers that have done all of the things contained in the paragraph "are contributing to reduced reliance on the Delta . . ." The regulation is unclear as to whether "contributing to reduced reliance" as set forth in subdivision (e)(1) have "adequately contribute[d]" for the purpose of subdivision (c)(1).	Ct	The Council disagrees with the assertion that section 5003 sets forth a prescription against using water in the Delta. Section 5003(c)(1) describes the actions a water supplier must take to be consistent with this section. If a water supplier complies with section 5003(c)(1), the water supplier is consistent with the regulation and has "adequately contributed to reduced reliance on the Delta…" for the purpose of paragraph (a)(1). Note that the Council has modified the language of section 5003 by removing subsections 5003 (a) and 5003 (b), and adding a new subsection 5003 (c)(1)(C). The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance on the Delta and improved regional self-reliance. The removed language describes the performance measures by which the effectiveness of the actions taken by water suppliers to achieve the policy of reducing reliance on the delta and improving regional self-reliance will be evaluated over the time. The added language clarifies how the expected outcome for measureable reduction in Delta reliance and improvement in regional-self-reliance shall be reported in the water management plans. We believe this sufficiently clarifies the intent of this section.
21. City of Stockton	1/14/2013	Moreover, Section 5005 conflicts with California Water Code section 11460 and 10505, among others, which provides a preference to the use of water in the "areas of origin." Section 5005 can be read to favor the export of water for use outside the areas of origin (the Delta) over the use of water in the areas of origin, in direct conflict with Water Code sections 10505 and 11460, among others.	Co	We disagree with the comment. Nothing in section 5003 of the adopted regulation improperly infringes on the water rights and statutory priorities of diverters and other areas of origin. Please see Master Response 8 for more information.
22. City of West Sacramento	1/14/2013	Reduce reliance on the Delta. California Water Code Section 85021 declares reduced reliance and regional self-reliance as policies of the State of California and does not specifically confer on the Council or any other state agency the authority, power, or directive to dictate through regulation how and when this will be done. Therefore, the requirement for "significant reductions" in the amount of water used or percentage of water used lacks any statutory authority for the Delta Plan to include this requirement and therefore it is beyond the scope of the Council's authority to propose this as a regulation.	A	We disagree with the comment that section 5003 does not fall within the scope of the Council's regulatory authority. First, the Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. Second, section 5003 is based upon multiple statutory authorities in the Delta Reform Act, including, but not limited to, Water Code section 85021. Further, the Council has the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur

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				in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information. Regarding the comment on "significant reductions," please note that the Council has modified section 5003 to simplify and clarify this language. Subsections 5003(a) and 5003 (b) have been removed and a new subsection 5003 (c)(1)(C) has been added. The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance and improved regional self-reliance. The removed language describes the performance measures by which the statewide effectiveness of the actions taken by achieve the policy of reducing reliance on the Delta and improving regional self-reliance will be evaluated by the Delta Plan over time. The added language clarifies how the expected outcome for measureable reduction in delta reliance and improvement in regional self-reliance shall be reported in the Urban and Agricultural Water Management Plans. We believe that this appropriately clarifies the language in this section.
23. City of West Sacramento	1/14/2013	Section 5005 as a whole appears to conflict with Water Code Section 85031(d) regarding the SWRCB's authority which states: "Unless otherwise expressly provided, nothing in this division supersedes, reduces, or otherwise affects existing legal protections, both procedural and substantive, relating to the state board's regulation of diversion and use of water, including, but not limited to, water right priorities, the protection provided to municipal interests by Sections 106 and 106.5, and changes in water rights. Nothing in this division expands or otherwise alters the board's existing authority to regulate the diversion and use of water or the courts' existing concurrent jurisdiction over California water rights."	A, Co	We disagree with the comment. Nothing in section 5003 of the adopted regulation expands or otherwise alters the existing authority of the State Water Resources Control Board to regulate the diversion and use or water or the courts' existing concurrent jurisdiction over California water rights. Please see Master Response 9 for more information.
24. Contra Costa Water District	1/14/2013	Section 5005 - Reduce Reliance on the Delta through Improved Regional Water Self-Reliance. Again, this section contains information that is not necessary to the regulations and does not add to the reader's understanding of the regulations. For example, paragraphs (a) and (b) discuss policies of the state, and discuss laws implemented through other regulations and by other agencies. These should be deleted. Under section 5005(e)(1), it should be clear that these new regulations do not change the existing regulations related to Urban or Agricultural Water Management Plans administered by DWR. It should be sufficient to provide evidence that the DWR requirements have been met.	Ne, DP	The Council modified the language of section 5003 by removing subsections 5003 (a) and 5003 (b), and adding a new subsection 5003 (c)(1)(C). Section 5003 does not alter existing regulations administered by other agencies relating to water management plans. However, providing evidence that DWR requirements have been met alone would not satisfy the requirements of the policy because these do not require urban water suppliers to take any action. Rather, they require urban water suppliers to prepare a plan to evaluate and manage water supplies and demands, including planning for interruption of water supplies due to drought or other events and for compliance with the State's water efficiency requirements, and to update these plans and submit them to DWR at five-year intervals. The Council, however, believes that both planning and implementation are necessary to reduce reliance on the Delta and improve regional self-reliance. Therefore, section 5003 provides that all water suppliers that have "completed a current Agricultural or Urban Water Management Plan (Plan)" and have "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" are "contributing to reduced reliance on the Delta and improved regional self-reliance and are therefore consistent with this policy (i.e. section 5003)." Furthermore, section 5003 requires, beginning in 2015, that both agricultural and urban water suppliers report in their Plans, an expected outcome for measureable reduction in Delta reliance and improvements in self-reliance (i.e. the reduction in the amount of water used, or in the percentage of water used, from the Delta watershed). Even where existing law and section 5003 are the same (as for planning and implementation requirements for agricultural water suppliers), section 5003 provides an additional consequence beyond existing law (existing law withholds grants if certain actions are not taken). Here, under certain conditions, non-compliance could mean that a proposed in-Delta action that would benefit the water supplier does not comply with the regulation and therefore may not be able to go forward.

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
ADOPTED REGULATION: SECTION 5003 ~~5005~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
25. Cucamonga Valley Water District	1/14/2013	Regulatory Authority: The Delta Plan should clearly state its goals to encourage statewide water use efficiency and avoid utilizing language that could be misinterpreted to regulate local water management decisions outside of the Delta through the covered action review process. In the current draft Delta Plan, policy WR P1, the Council gives itself the discretion to review and judge local water management decisions outside the legally-defined Delta, inappropriately expanding the role of the Council beyond that outlined in statute and subjecting local agencies to an additional and potentially burdensome review process, irrespective of their water stewardship practices. As currently drafted, the Delta Plan may penalize responsible agencies for the failings of other neighboring districts simply because they share the same wholesale resource for imported water. We appreciate assurances from Council members that they want this discretion only to address alleged "bad actors", but as an agency that has been successful in advancing local water supply reliability through investments in conservation and recycling, among other water management practices, we object to this proposed policy as currently expressed.	A	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. We disagree with the comment that section 5003 of the adopted regulation does not fall within the scope of the Council's regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information on the Council's authority to consider out-of-Delta actions when regulating in-Delta actions. Further, the comment misconstrues the provisions of section 5003. This section does not provide the Council with discretion to review or judge local water management decisions, nor does it require a burdensome review process. If water suppliers share the same wholesale resource for imported water, and some suppliers have not complied with the provisions of section 5003, the proposed covered action would only be deemed inconsistent with the regulation if the failure of those suppliers to comply significantly caused the need for the action *and* the proposed action would have a significant adverse impact on the Delta (see section 5003(a), emphasis added). Please note the Council has revised the language of section 5003 to further simply and clarify the provisions of section 5003.
26. East Bay Municipal Utility District	1/14/2013	Section 5005. Reduce Reliance on the Delta - Sections 5005(a) and (b) set forth narrative expressions of "policies of the State," do not serve a regulatory purpose, and duplicate requirements enforced by other state agencies. Their inclusion in the proposed regulations makes it difficult for potentially regulated entities to determine their responsibilities.	Ne, Du	The Council has modified the language of section 5003 by removing subsections 5003 (a) and 5003 (b), and adding a new subsection 5003 (c)(1)(C). The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance on the Delta and improved regional self-reliance. The removed language describes the performance measures by which the effectiveness of the actions taken by water suppliers to achieve the policy of reducing reliance on the delta and improving regional self-reliance will be evaluated over the time. The added language clarifies how the expected outcome for measureable reduction in Delta reliance and improvement in regional-self-reliance shall be reported in the water management plans. We believe this sufficiently clarifies the intent of this section.
27. East Bay Municipal Utility District	1/14/2013	Section 5005(c) sets forth a general prescription applicable to exports from the Delta, transfers through it, or use from it. The language does not explicitly specify the entities to which it applies or how it will be enforced, and Section 5005(d) does little to add these necessary details or clarify the intent of the section.	Ct	We disagree with the comment. The language of section 5003 of the adopted regulation only applies to water suppliers that are currently required, by California law, to prepare, adopt and implement Urban Water Management Plans or Agricultural Water Management Plans. The definition of water suppliers is provided in section 5001 (see section 5001(b), (c) (1) and (2), (hh)(1) and (2) and (ii)).
28. East Bay Municipal Utility District	1/14/2013	Section 5005(e)(1) and subparagraphs (A) — (C) are unclear. Subparagraph (A) refers to the completion of an "Urban or Agricultural Water Management Plan," while subparagraph (B) refers to "the management plan" and subparagraph (C) refers to "the plan" and a requirement that will not commence until 2015. The terminology should be consistent so that it is clear that each of these paragraphs, (A) through (C), is referring to the same plan.	Ct	We agree. The Council has modified the language of section 5005.
29. East Bay Municipal Utility District	1/14/2013	It is not clear whether or not 5005(e)(1)(B) is referring only to "programs and projects" that arc included in the "management plan." To be consistent with the DSC's statutory authority, this provision should make it clear that the requirement in this subparagraph refers only to an obligation to identify, evaluate, and implement projects that are included in the urban or agricultural management plan.	Ct	We agree. The Council has modified the language of section 5005.

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30. East Bay Municipal Utility District	1/14/2013	Section 5005(e)(1) also misrepresents urban and agricultural water management plans. These plans are long-range planning documents that change over time as conditions and technologies change, and, as noted in the language, the Department of Water Resources (DWR) is charged with reviewing them and determining compliance with the statutory requirements. The implementation schedules set forth in the plans arc goals established by the water suppliers and are intended to remain flexible for purposes of adaptability. In order to protect the integrity of the water management plans as a useful planning document, all references to implementation should be deleted. Subsection 5005(e)(I)(B) should be revised as follows: "Identified and evaluated all programs and projects in the Urban or Agricultural Water Management Plan that are locally cost effective, technically feasible, and which would reduce reliance on the Delta."	Co	We disagree with the comment. Existing law requires water suppliers to update their Urban and Agricultural Water Management Plans every five years, including the implementation schedule set forth in the Plan. The language in section 5003 is appropriate.
31. East Bay Municipal Utility District	1/14/2013	Section 5005(e)(2) appears to be entirely a narrative list setting forth programs that could reduce reliance on the Delta. For the sake of clarity it should be deleted.	Ne	The Council has included this language in the regulation to provide necessary clarity on how to comply with the regulation.
32. Eastern Municipal Water District	1/14/2013	Regulatory Authority: The Delta Plan should clearly state its goals to encourage statewide water use efficiency and avoid utilizing language that could be misrepresented to regulate local water management decisions outside of the Delta through the covered action review process. In the current draft Delta Plan, policy WR P1, the Council gives itself the discretion to review and judge local water management decisions outside the legally-defined Delta, inappropriately expanding the role of the Council beyond what is outlined in statute and subjecting local agencies to an additional and potentially burdensome review process, irrespective of their water stewardship practices. As currently drafted, the Delta Plan may penalize responsible agencies for the failings of other neighboring districts simply because they share the same wholesale resource for imported water. We appreciate assurances from Council members that they want this discretion only to address alleged "bad actors", but as an agency that has been successful in advancing local water supply reliability through investments in conservation and recycling, among other management practices, EMWD objects to this proposed policy as currently expressed.	A	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. We disagree with the comment that section 5003 of the adopted regulation does not fall within the scope of the Council's regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information on the Council's authority to consider out-of-Delta actions when regulating in-Delta actions. Further, the comment misconstrues the provisions of section 5003. This section does not provide the Council with discretion to review or judge local water management decisions, nor does it require a burdensome review process. If water suppliers share the same wholesale resource for imported water, and some suppliers have not complied with the provisions of section 5003, the proposed covered action would only be deemed inconsistent with the regulation if the failure of those suppliers to comply significantly caused the need for the action *and* the proposed action would have a significant adverse impact on the Delta (see section 5003(a), emphasis added). Please note the Council has revised the language of section 5003 to further simply and clarify the provisions of this section.
33. El Dorado County Water Agency	1/14/2013	Section 5005(a) Reduce Reliance on the Delta through Improved Regional Water Self-Reliance. Please change as follows: "The policy of the State of California is to reduce reliance on the Delta in meeting future water supply needs and that each region that depends on water from the Delta watershed shall improve its region self-reliance. Success in achieving the statewide policy of reduced reliance on the Delta and improving regional self reliance will be demonstrated through significant reduction in the amount of water used, or in the percentage of water used from the Delta watershed. <u>This will be done by improving, investing in, and implementing local and regional water supply projects[5], local projects and programs that increase water conservation and efficiency, increase water recycling and use of advanced water</u>	Ct, DP	The Council has modified the language of section <u>5003</u> by removing subsections <u>5003</u> (a) and 5003 (b), and adding a new subsection <u>5003</u> (c)(1)(C). Subsections (a) and (b) were removed because they are intent language and not part of the regulation imposed on covered actions. The added language in subsection (c) clarifies how the expected outcome for measureable reduction in Delta reliance and improvement in regional-self-reliance shall be reported in the water management plans. The language added in subsection (c) generally addresses the comment's recommended edits. The Council believes section 5003 is consistent with both the Final Draft Delta Plan and the Delta Reform Act, including Water Code section 85021.

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		technologies, expand storage, improve groundwater management, and enhance regional coordination of local and regional water supply development efforts. For the purposes of improving regional self-reliance water conservation is considered a new source of water supply, consistent with CWC §1011(a). Water so saved through these projects and programs counts as a new source of supply as this water would have been needed to meet future demand. Thus, even if water use is increasing as a result of economic or population growth, a water supplier can demonstrate that its water use is more efficient and is contributing to reduced reliance on the Delta and improved regional self-reliance.[6] It is important that there is clarity within Section 5005 regarding the subject of reduced reliance on the Delta and improved regional self-reliance. Section 5005 should be consistent with CWC §85021 and the Final Draft Delta Plan. [5] Taken directly from CWC §85021. [6] Delta Stewardship Council Final Draft Plan, Appendix P, page P-2, lines 30-35.		
34. Environmental Water Caucus	1/14/2013	Chapter 3: The single most significant and negative policy change is that the Revised Project WR P1 changes the definition of "Reduced Reliance on the Delta". The prior definition included a policy calling for a reduction of net water used from the Delta watershed. The new definition omits references to water use in the Delta watershed and only applies to water "exported from, transferred through or used in the Delta." The ramification of this change in definition is that it appears that all diversions upstream of the Delta would not be required to comply with the proposed prohibitions on Delta exports, or the legally mandated requirement to reduce reliance on the Delta, because they are not using water exported from, transferred through or used in the Delta.	DP	We disagree with the comment. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, but only where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information on the Council's authority to consider out-of-Delta actions when regulating in-Delta actions. Water suppliers that do not receive water directly from the Delta, such as suppliers located in the Delta's upper watershed, are not subject to the provisions of section 5003. However the Delta Plan recommends that all water suppliers located within the Delta watershed voluntarily implement the measures contained in section 5003 to reduce their reliance on water from the Delta watershed and to improve regional self-reliance. Further we disagree with the comment regarding the change in the definition of reduced reliance on the Delta. The revised language in section 5003 appropriately addresses the requirements of the Delta Reform act.
35. Environmental Water Caucus	1/14/2013	Chapter 3: Policy WR P1 (108) limits exports from the Delta depending on three apparent findings. The third finding requires for limitation, that "the export, transfer, or use would have a significant adverse environmental impact in the Delta." These Policies turn proper planning upside down. Existing exports have already a significant adverse environmental impact in the Delta. The Delta needs more freshwater, not less freshwater. Instead of attempting to turn burdens upside down, placing burdens on those seeking to preserve the Delta, a limit needs to be set on exports, with no water being exported above the set limits. Whether or not water suppliers have instituted conservation or improved regional self-reliance, exports must be limited to amounts consistent with restoring the Delta.	DP	We disagree with the comment. The purpose of section 5003 of the adopted regulation is to promote water efficiency and ensure that water suppliers are taking appropriate action to conserve water and develop local water supplies that will contribute to achieving the coequal goal of providing a more reliable water supply for California and to the related state goal of reducing reliance on the Delta and improving regional self-reliance, not to set export limits. Further, the State Water Resources Control Board, not the Council, is responsible for establishing appropriate flow objectives and related export limits through the Board's Bay Delta Water Quality Control Plan. Section 5005 requires that the Council use the Board's flow objectives, both current and when they are revised, to determine consistency with the Delta Plan.
36. Environmental Water Caucus	1/14/2013	Chapter 3: The Plan in its policy sections calls for improving, meaning increasing, conveyance. (111-112). As shown above, there is no existing informational or analytical basis supporting development of the Delta Tunnels. There is no basis for the Plan's assumption that "The completion of the BDCP.... are needed but may take many years to implement". (111-112). It would take many years to complete the Delta Tunnels, but they are not needed. Moreover, as shown above, with increasing salinity resulting from climate change and diversions, and increasing dry years and fewer wet years as result of climate change, there would be no need or	DP	We disagree with the comment. Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.

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		viable use for the Delta Tunnels by the time they would be constructed. As pointed out above, findings in the Plan such as "The State does not have sufficient information to assess the current reliability of its water supplies or to meaningfully measure progress toward achievement of more reliable water supplies for California" (113) demonstrates that nothing other than pre-decisional bias supports the conclusory statements that the BDCP should be completed (112, WR R12), and that larger amounts of water should be exported from the Delta during wet years requiring expansion of conveyance capacity, meaning the Delta Tunnels. (111).		
37. Environmental Water Caucus	1/14/2013	(§ 5005) Reduced Reliance on the Delta. Inclusion of Performance Measures Throughout the Proposed Regulation, but particularly in regards to reducing reliance on the Delta, a lack of measureable results (i.e. performance measures) undermine the legitimacy of consistency determinations with the Delta Plan. The Delta Reform Act requires that the Delta Plan is "legally enforceable" (WC § 85001), and that the Plan include "performance measures that will enable the council to track progress in meeting the objectives of the Delta Plan," and "shall" include "quantifiable or otherwise measureable assessments" of improvements in the Delta ecosystem and water reliability. (WC § 85212.) If legal enforceability and performance objectives are required by the Delta Reform Act, then meeting these measureable objectives must be considered as criteria for consistency with the Delta Plan. In other words, the only practical means for the Plan to react to or promote measureable improvements is to make them conditions for consistency determinations by state and local agencies—so these conditions should be described in detail in the Proposed Regulation. Without such quantifiable assessments in the consistency determinations, the Plan will be neither legally enforceable nor will its consistency determinations be tied to achieving measureable results for the co-equal goals. In order to fulfill the statutory mandates of the Delta Reform Act, the Delta Plan itself must contain suitable metrics, and the Proposed Regulation must contain provisions for how a project will meet these performance measures as a condition of a successful consistency determination. If the project does not make a quantifiable improvement in achieving the co-equal goals, then it simply should not receive a consistency determination from a local agency. These performance measures should be incorporated into §§ 5005, 5008, and 5009, and should be added as a requirement to make a consistency determination in § 5004.	Ct, DP	We disagree that a legally enforceable plan means that a determination must be made that there is a quantifiable improvement in achieving the coequal goals or that this assessment is a requirement for a proposed covered action to receive a determination of consistency with the Delta Plan. The Delta Reform Act does require is that the Delta Plan "include quantified or otherwise measurable targets associated with achieving the objectives of the Delta Plan" and "where appropriate, utilize monitoring, data collection, and analysis for actions sufficient to determine progress toward meeting the quantified targets" as well as "describe the methods by which the council shall measure progress toward achieving the coequal goals" (Water Code section 85308 (b), (c) and (d). The Delta Plan specifies a quantifiable target for achieving the policy of the State of California to reduce reliance on the Delta and improving regional self-reliance. Section 5003 ~~5005~~ (a) states that success in achieving the statewide policy of reduced reliance on the Delta and improving regional self-reliance will be demonstrated through a significant reduction in the amount of water used, or the percentage of water used, from the Delta watershed. This language has been deleted from section 5003 ~~5005~~ to avoid confusion in the implementation of this regulation. However, this language is one of the performance measures that the Council will use to evaluate the progress toward achieving the coequal goals and it will be included in the Delta Plan, consistent with the requirements of the Delta Reform Act. With regard to section 5003 ~~5005~~, water suppliers can avoid a determination of inconsistency by having done the following: (A) Completed a current Urban or Agricultural Water Management Plan (Plan) which has been reviewed by the 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). Note that, to ensure that the Delta Plan includes provisions for data collection that will contribute to the assessment of progress toward meeting the quantifiable target, section ~~5005~~ (c) was revised to include the following language: "The expected outcome for measurable

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				reduction in Delta reliance and improvement in regional self-reliance shall be reported in the (Agricultural or Urban Water Management) Plan as the reduction in the amount of water used, or in the percentage of water used, from the Delta watershed (emphasis added). For the purposes of reporting, water efficiency is considered a new source of water supply, consistent with Water Code section 1011(a)
38. Environmental Water Caucus	1/14/2013	(§ 5005(c)) Certifying "Reduced Reliance" on Delta Water Exports. Reducing reliance on the Delta is one of the co-equal goals, and Section 5005 of the Draft Regulation explains that the intent of this policy is to make sure water suppliers are "taking appropriate actions to contribute to the achievement of reduced reliance on the Delta." This goal is fulfilled in part by Section 5005(C), which prohibits exports from or through the Delta unless certain conditions are met. However, the prohibition on water exports contains two inappropriate clauses: for the prohibition on export to be triggered, not only must a water supplied have not adequately contributed to reduced reliance on the Delta (§ 5005(c)(1)), but the failure must have "significantly caused the need for the export, transfer or use" and the "export, transfer or use would have a significant adverse impact in the Delta." (§ 5005(c)(2) and (3).) These two limits on the export prohibitions make it difficult, if not impossible, to limit exports based on a demonstration (or failure thereof) to reduce reliance on the Delta. First and foremost, there should be no express connection required for the failure to reduce reliance on the Delta to have actually caused the export or transfer of water to occur. As a policy matter, exports should not be allowed if the exporting agency has not reduced reliance on the Delta, regardless of whether a particular export was made necessary by this failure. Further, this requirement will be next to impossible, because a certifying agency will be unable to prove that the reduced reliance caused the export. This requirement at §5005(c)(2) is both unnecessary and destructive to the overall policy, and should be removed. Second, the requirement at §5005(c)(3) that the export would have a significant impact on the environment is wrongly limited to environmental impacts, when the Delta Plan is supposed to consider economic and cultural impacts as well. This section should remove the term "environmental" so that it reads the export, transfer or use would have a significant adverse impact in the Delta on an absolute scale." As explained elsewhere, the "absolute scale" modifier is necessary because "significant impact" has been improperly defined as a change in baseline conditions, when an export to be considered under §5005 could have been incorporated into baseline conditions and would therefore not register as "significant" under this definition. The regulation is also internally inconsistent: it states that the measurement of success of this provision is to achieve "a significant reduction in the amount of water used, or in the percentage of water used, from the Delta watershed."	Ct, DP, E	The comment misconstrues the provisions of section 5003 of the adopted regulation. This section does not prohibit water exports. The purpose of section 5003 is to promote water efficiency and ensure that water suppliers conserve water and develop local water supplies that will contribute to achieving the coequal goal of providing a more reliable water supply for California and to the related state policy of reducing reliance on the Delta and improving regional self-reliance, not to set export limits. The Council is required to determine the consistency of a proposed covered action with the Delta Plan and the coequal goals. The Council recognizes that there will be proposed covered actions that will provide benefits for one coequal goal and harm the other. Section 5003 is intended to address the situation where a proposed action in the Delta that may improve water supply reliability also has significant adverse impacts on the Delta ecosystem. To determine whether the covered action should go forward despite the adverse environmental impacts, the Council requires that a consistency determination show that the water suppliers that are receiving the benefit of the proposed action, even if they are located outside the Delta, are taking appropriate action to conserve water and develop local water supplies in order to reduce their need for the proposed action. Please see Master Response 4 for more information. Please note the Council has revised the language of section 5003 to further simply and clarify the provisions of this section.
39. Environmental Water Caucus	1/14/2013	(§5005(e)) Inadequate Demonstration of Reduced Reliance on Delta. As explained above, the section on reduced reliance should contain more detailed metrics in subdivision (e)(1)(C). In particular, these metrics must go beyond reviewing whether there is an adequate Urban Water Management Plan, with a clear, measureable standard, so that an agency's consistency determination also certifies a project will actually reduce reliance on the Delta by a given percent. In contrast, the current phrasing "the expected outcome for measureable reduction in Delta reliance and regional self reliance" is ambiguous and confusing – what measureable reduction is this provision referring to, and more importantly, what measure is considered an acceptable "measurable reduction"?	Ne, DP	We disagree with the comment. The adopted regulation appropriately addresses the requirements of the Delta Reform Act for "quantified or otherwise measureable targets associated with achieving the objectives of the Delta Plan."

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		The requirement of §5005(e) (1) that agencies demonstrate reduced reliance on the Delta is good in theory, but practically accomplished nothing. What is the use of requiring that an Urban Water Management Plan comply with laws that it already must comply with—except if those plans had to reduce Delta exports, but UWMP's do not. In fact, there is no guarantee that a completed Urban Water Management Plan, even if reviewed by DWR, will in fact contain measures that reduce reliance on the Delta, because there is no necessary connection between reduced self-reliance and reduced exports from the Delta; the contracting agency could meet its conservation requirement and merely reduce its supply from, say, groundwater supplies instead. For this subsection to be effective, this subsection should be revised to require that the UWMP's conservation measures are being met and that these measures have, in fact, reduced reliance on exports from the Delta, and certify by what measure such deliveries have been reduced. Then, if an agency's reduction in actual, measured, Delta exports are commensurate with the metrics required to be created by the Council, then an action cannot be deemed consistent. Without such changes this section lacks measureable performance measures, and thus lacks the ability to ensure that covered actions are consistent with reductions in Delta exports mandated by the Delta Reform Act.		
40. Environmental Water Caucus	1/14/2013	5005(e) Finally, the delay in measuring reductions in Delta exports until 2015 is wholly without justification or any statutory basis in the Delta Reform Act. This provision exceeds the scope of the enabling statute and should be removed or altered so that the measurements become effective the same year the statute is enacted.	A, DP	We disagree with the comment. Upon the adoption of the Delta Plan in 2013, the first round of Urban and Agricultural Water Management Plans to which section 5003 may apply, are those that are required by existing law to be completed in 2015.
41. Environmental Water Caucus	1/14/2013	"(5005(E) Violations Of CEQA And Public Trust Doctrine And Conflicts With Substantive Laws. The Regulations including calling for "improve Delta conveyance and operations", and "optimize diversions in wet years. . ." (5001)(e)(1)(A) and (C) cannot be lawfully adopted because there has been failure to comply with CEQA for all the reasons set forth in the portion of these comments pertaining to the RDPEIR. The Regulations calling for improved, meaning new, conveyance also cannot be lawfully adopted because there has been failure to perform cost benefit and public trust doctrine analysis to ensure protection of the Delta as set forth in other portions, including the RDPEIR portions of these comments. All portions of these comments pertaining to the Delta Plan and the RDPEIR are incorporated herein by this reference as reasons why Regulations 5001(e)(1)(A) and (C) cannot be lawfully adopted. Consideration for adoption must be deferred until there has been CEQA compliance including circulation of a Revised Draft EIR and completion of cost benefit and public trust doctrine analysis. Moreover, these Regulations cannot be adopted because they conflict with governing law as set forth elsewhere in these comments, including but not limited to, increasing rather than reducing reliance on the Delta in meeting California's future water supply needs and failing to develop a governing definition of "more reliable water supply" supported by substantial evidence and adequate findings."	A, DP	Comment noted.
42. Las Virgenes Municipal Water District	1/10/2013	Regulatory Authority: The Delta Plan should clearly state its goals to encourage statewide water use efficiency and avoid utilizing language that could be misinterpreted to regulate local water management decisions outside of the Delta through the covered action review process. In the current draft Delta Plan, policy WR P1, the Council gives itself the discretion to review and judge local water management decisions outside the legally-defined Delta. This would appear to be an inappropriate expansion of the Council's role beyond that outlined in statute. The effect could subject local agencies to an additional and potentially burdensome review process, irrespective of their water stewardship practices. As currently drafted, the Delta Plan may penalize responsible agencies for the failings of other districts simply because they share the same wholesale resource for imported water. LVMWD appreciates assurances from Council members saying this discretion is only to address alleged "bad actors", but as an agency that has been	A	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. We disagree with the comment that section 5003 of the adopted regulation does not fall within the scope of the Council's regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information on the Council's authority to consider out-of-Delta

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		successful in advancing local water supply reliability through significant investments in conservation and recycling, as well as other water management practices, we object to this proposed policy as currently expressed.		actions when regulating in-Delta actions. Further, the comment misconstrues the provisions of section 5003. This section does not provide the Council with discretion to review or judge local water management decisions, nor does it require a burdensome review process. If water suppliers share the same wholesale resource for imported water, and some suppliers have not complied with the provisions of section 5003, the proposed covered action would only be deemed inconsistent with the regulation if the failure of those suppliers to comply significantly caused the need for the action *and* the proposed action would have a significant adverse impact on the Delta (see section 5003(a), emphasis added). Please note the Council has revised the language of section 5003 to further simply and clarify the provisions of section 5003.
43. Los Angeles Department of Water and Power	1/14/2013	Regulatory Authority: LADWP continues to believe that the Delta Reform Act did not give the Council regulatory authority to review water management decisions outside of the Delta. As currently drafted, the Delta Plan may penalize responsible agencies for the failings of other neighboring districts, simply because they share the same wholesale resource for imported water. While we appreciate assurances from Council members, the intent of this discretion is to address alleged "bad actors". We continue to object to this proposed policy as currently expressed.	A, O	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a “legally enforceable Delta Plan” that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council’s regulatory authority. We disagree with the comment that section 5003 of the adopted regulation does not fall within the scope of the Council’s regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information. Further, the comment misconstrues the provisions of section 5003. This section does not provide the Council with discretion to review or judge local water management decisions, nor does it require a burdensome review process. If water suppliers share the same wholesale resource for imported water, and some suppliers have not complied with the provisions of section 5003, the proposed covered action would only be deemed inconsistent with the regulation if the failure of those suppliers to comply significantly caused the need for the action *and* the proposed action would have a significant adverse impact on the Delta (see section 5003(a), emphasis added). Please note that section 5003 has been revised to further clarify the language.
44. Mojave Water Agency	1/14/2013	Regulatory Authority. In the current draft Delta Plan policy WR P1, the Council gives itself the discretion to review and judge local water management decisions outside the legally-defined Delta, inappropriately expanding the role of the Council beyond that outlined in statute and subjecting local agencies to an additional and potentially burdensome review process, irrespective of their water stewardship practices. We ask that the DSC avoid including language in the Delta Plan that could be misinterpreted to regulate local water management decisions outside of the Delta through the covered action review process.	A	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a “legally enforceable Delta Plan” that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council’s regulatory authority. We disagree with the comment that adopted regulation section 5003 does not fall within the scope of the Council’s regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information. Further, the comment misconstrues the provisions of section 5003. This section does not provide the Council with discretion to review or judge local water management decisions, nor does it subject local agencies to a potentially additional and burdensome review process. Please note that section 5003 has been revised to further clarify the language.

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45. Rancho California Water District	1/14/2013	Regulatory Authority: The Delta Plan must adhere to its statutory direction to promote statewide water use efficiency rather than insert in any policy language that could be interpreted as a regulation of local water management decisions through the covered action/consistency review determination process. If the Delta Stewardship Council loses its focus from its legal jurisdiction of the Delta and Suisun March, it and the Delta Plan will ultimately not succeed. Water agencies throughout Southern California have embraced the need to reduce reliance on the Delta for future needs by enhancing conservation efforts and expanding local supplies. Adding yet another layer of State agency review on the pile of State agencies local water providers must navigate to implement projects will slow the pace of advance, and by our reading is a clear power reach outside of statute.		The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. We disagree with the comment that section 5003 of the adopted regulation does not fall within the scope of the Council's regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information. Further, the comment misconstrues the provisions of section 5003. This section does not provide the Council with discretion to review or judge local water management decisions, nor does it subject local agencies to a potentially additional and burdensome review process. Please note that section 5003 has been revised to further clarify the language.
46. Regional Council of Rural Counties	12/27/2012	Another example is Section 5005. Reduce Reliance on the Delta through Improved Regional Water Self-Reliance. The Council's regulatory authority outside of the Delta is limited to when water is exported from, transferred through, or used in the Delta. RCRC recommends that Sections 5005 (a) and (b) of the proposed regulations be deleted. Sections 5005 (c) (d) (e) and Section 5005 (2) are germane and within the scope of the Council's regulatory authority.	Ct	The Council has modified the language of section 5003 by removing subsections 5003 (a) and 5003 (b), and adding a new subsection 5003 (c)(1)(C). The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance on the Delta and improved regional self-reliance. The removed language describes the performance measures by which the effectiveness of the actions taken by water suppliers to achieve the policy of reducing reliance on the delta and improving regional self-reliance will be evaluated over the time. The added language clarifies how the expected outcome for measureable reduction in Delta reliance and improvement in regional-self-reliance shall be reported in the water management plans. We believe this sufficiently clarifies the intent of this section.
47. Regional Council of Rural Counties	12/27/2012	As noted in RCRC's comments on the Final Draft Delta Plan, water suppliers are required to comply with a variety of existing laws relating to water (water conservation, water use efficiency, etc.). Confirming that these various requirements are being met is not within the purview of the Council - unless an action is determined to be a covered action.	A, Nr	The Council agrees that only covered actions are subject to section 5003.
48. Regional Council of Rural Counties	12/27/2012	Page xv. Delta Plan Policies and Recommendations. WR P1. Reduce Reliance on the Delta and Improve Regional Self Reliance The paragraph explaining the intent of WR P1 should be clarified to read "The intent of WR P1 is to ensure that urban and agricultural water suppliers who propose to undertake a covered action are taking appropriate actions to contribute to the achievement of reduced reliance on the Delta by……". This clarification is needed so as to not confuse the reader as to the scope of the Delta Stewardship Council's (Council) authority - which is limited to activities determined to meet the definition of a "covered action". The Delta Plan correctly states on Page 56, for example, under the heading of What is a Covered Action? that the diversion and use of water in the Delta watershed that is entirely upstream of the statutory Delta or Suisun Marsh would not satisfy this criterion." Water suppliers are, of course, required to comply with a variety of existing laws relating to water (water conservation, water use efficiency, etc.). Confirming that these various requirements are being met is not within the purview of the Council - unless an action is determined to be a covered action.	Ct	The Council agrees that only covered actions are subject to section 5003. The Council believes that its jurisdiction is adequately described in the Delta Reform Act, and does not need to be repeated in this, or other sections of this regulation.

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49. Regional Council of Rural Counties	12/27/2012	Page 108. Lines 15-20. WR P1. Reduce Reliance on the Delta and Improve Regional Self Reliance. Chapter 3. A More Reliable Water Supply for California Please see RCRCs comments above for recommended changes to the intent language.	Ct	Please see responses to previous, more-specific comments on WR P1/section 5003.
50. Regional Water Authority; Mountain Counties Water Resources Association; Northern California Water Association; Sacramento Area Council of Governments	1/14/2013	The Plan, however, still retains language in Policy WR P1 regarding reduced reliance on the Delta and improved regional self-reliance (Plan, p. 108), and the added Appendix P that attempts to explain how agencies should implement the goal of "reduced reliance." Beside the fact that Appendix P is confusing and ambiguous, the Council continues to misconstrue both the scope of its jurisdiction and its core statutory mission of working with state agencies to coordinate Delta policies and actions. Despite our continual comments as various drafts have emerged, we believe the Plan confuses and misconstrues the way "reduced reliance" applies to water diversion and use outside of the legal Delta, yet in the Delta watershed. Policy WR P1 continues to define success as the demonstration of "a significant reduction in the amount of water used, or in the percentage of water used, from the Delta watershed." (Plan, p. 108.) As we have stated in numerous letters and comments (See e.g., our September 11, July 11, and June 12, 2012 letters), this simply does not make sense for water management in areas upstream of the Delta and it is not workable for water suppliers we represent in the Delta watershed, which are completely dependent on local water supplies from the watershed. Moreover, WR P1 is inconsistent with 1) Water Code §109 and Water Code §85031(a), which ensure that water rights and area of origin provisions will not be impacted in any manner; and 2) the co-equal goals in Water Code §85054 that calls for "providing more reliable water supply for California," including areas upstream of the Delta. We again urge the Council to reconsider the way it approaches areas upstream of the Delta and clarify the language improperly suggesting that success in implementing this policy requires reduced reliance on the Delta in areas in the Delta watershed, but outside the Delta.	A, Ct	The council has modified language in section 5003 of the adopted regulation (with corresponding changes in WR P1 in the Delta Plan) by removing Subsections 5003(a) and 5003 (b) and adding a new subsection 5003 (c)(1)(C). The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance and improved regional self-reliance. The removed language describes the performance measures by which the statewide effectiveness of the actions taken by achieve the policy of reducing reliance on the Delta and improving regional self-reliance will be evaluated by the Delta Plan over time. The added language clarifies how the expected outcome for measureable reduction in delta reliance and improvement in regional self-reliance shall be reported in the Urban and Agricultural Water Management Plans. We believe that this appropriately clarifies the language in this section. Note that water suppliers that do not receive water directly from the Delta, such as suppliers located in the Delta's upper watershed, are not subject to the provisions of section 5003. However the Delta Plan recommends that all water suppliers located within the Delta watershed, including areas upstream of the Delta, voluntarily implement the measures contained in section 5003 to reduce their reliance on water from the Delta watershed and to improve regional self-reliance. We disagree with the comment that water suppliers in upstream areas from the Delta cannot reduce their reliance on water from the Delta and improve regional self-reliance. The types of measures that could contribute to achieving reduced reliance are described in section 5003 (c)(2) of the adopted regulation. These measures, including water conservation and water efficiency, are further discussed in the Delta Plan. In addition, for the purposes of reporting the expected outcome for measureable reduction in Delta reliance and improvement in regional self-reliance, water efficiency is identified as a new source of water supply in section 5003(c)(1)(C). The revised language in section 5003 appropriately addresses the requirements of the Delta Reform act. Further, we disagree on the comments regarding water rights. Nothing in section 5003 improperly infringes on the water rights and statutory priorities of diverters and other areas of origin. Please see Master Response 8 for additional information.

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51. San Bernardino Valley Municipal Water District	1/14/2013	Policies must fall within the Council's legal authority. The Delta Plan should clearly state its goals to encourage statewide water use efficiency and avoid using language that could be misinterpreted to regulate local water management decisions outside of the Delta through the covered action review process. In the current draft Delta Plan, policy WR P1, the Council gives itself the discretion to review and judge local water management decisions outside the legally-defined Delta, inappropriately expanding the role of the Council beyond that outlined in statute and subjecting local agencies to an additional and potentially burdensome review process, irrespective of their water stewardship practices. We appreciate the verbal assurances from Council members that they want this discretion only to address alleged "bad actors", but the 2009 Delta Reform Act did not give the Council the jurisdiction to review and judge local water management decisions outside of the Delta. As an agency that has been successful in advancing local water supply reliability through investments in conservation and recycling, among other water management practices, we object to this proposed policy.	A	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. We disagree with the comment that section 5003 of the adopted regulation does not fall within the scope of the Council's regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information. Further, the comment misconstrues the provisions of section 5003. This section does not provide the Council with discretion to review or judge local water management decisions, nor does it subject local agencies to a potentially additional and burdensome review process. Please note that section 5003 has been revised to further clarify the language.
52. San Gorgonio Pass Water Agency	1/11/2013	Policies must fall within the Council's legal authority. The Delta Plan should clearly state its goals to encourage statewide water use efficiency and avoid using language that could be misinterpreted to regulate local water management decisions outside of the Delta through the covered action review process. In the current draft Delta Plan, policy WR P1, the Council gives itself the discretion to review and judge local water management decisions outside the legally-defined Delta, expanding the role of the Council beyond that outlined in statute and subjecting local agencies to an additional and potentially burdensome review process, irrespective of their water stewardship practices. We appreciate the verbal assurances from Council members that they want this discretion only to address alleged "bad actors", but the 2009 Delta Reform Act did not give the Council the jurisdiction to review and judge local water management decisions outside of the Delta. As an agency that has been successful in advancing local water supply reliability through investments in conservation and storage, we object to this proposed policy.	A	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. We disagree with the comment that section 5003 of the adopted regulation does not fall within the scope of the Council's regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes water into account conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information. Further, the comment misconstrues the provisions of section 5003. This section does not provide the Council with discretion to review or judge local water management decisions, nor does it subject local agencies to a potentially additional and burdensome review process. Please note that section 5003 has been revised to further clarify the language.
53. San Joaquin County Board of Supervisors	1/14/2013	Policy WR P1 "Reduce Reliance on the Delta and Improve Regional Self Reliance", Proposed Regulation Article 3, Section 5005. This proposed Regulation is inconsistent with and violates established California water rights and priorities laws, California area of origin laws, and California County of origin laws. It divests holders of established water rights of their property and is inconsistent with and contravenes the common pool standard for the Delta. It also is inconsistent with and intrudes on the authority of entities and agencies vested with regulatory and adjudicatory authority with respect to water rights and entitlements.	A, Co	We disagree with the comment. Nothing in section 5003 of the adopted regulation improperly infringes on the water rights and statutory priorities of diverters and other areas of origin. Please see Master Response 8 for additional information.
54. San Joaquin County Board of Supervisors	1/14/2013	The State Water Resources Control Board and the courts have exclusive jurisdiction over California water rights. Amending or restricting a valid water right is not within the scope of the Stewardship Council's authority. Thus, the required reductions and prohibitions contained in the regulations are not enforceable by the Council. The regulations should only include measures authorized by the State Legislature under the Delta Reform Act.	A	We disagree with the comment. Nothing in section 5003 of the adopted regulation expands or otherwise alters the existing authority of the State Water Resources Control Board to regulate the diversion and use or water or the courts' existing concurrent jurisdiction over California water rights. Please see Master Response 9 for more information.

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55. San Joaquin County Board of Supervisors	1/14/2013	Proposed Regulation Section 5005 requires reduced reliance on the Delta through improved regional self-reliance and significant reductions in the amount of water used from the Delta watershed. That Section purports to prohibit the export, transfer, or use of water in the Delta unless a receiving water supplier adequately contributes to the reduced reliance on the Delta. Such prohibition may result in additional reductions by a water right holder. Under the water right priority system, any reductions must first be borne by the most junior water right holder. A senior water right holder is not required to reduce the amount of water used unless all junior holders have eliminated their use completely. To be consistent with existing water rights, as the proposed Regulations attest to be, reductions must first be required of junior appropriators, then more senior appropriators, and then riparians. Balancing the burden and requiring all water rights holders to share in the reductions rather than basing reductions on the hierarchy of water right priority is inconsistent with California water law. Thus, the proposed Regulations should clarify that any reduction of water use by water right holders will follow the priority system.	Ct, Co	We disagree with the comment. Nothing in section 5003 of the adopted regulation improperly infringes on the water rights and statutory priorities of diverters and other areas of origin. Please see Master Response 8 for additional information. Nor does section 5003 expand or otherwise alter the existing authority of the State Water Resources Control Board to regulate the diversion and use or water or the courts' existing concurrent jurisdiction over California water rights. Please see Master Response 9 for more information.
56. San Joaquin County Board of Supervisors	1/14/2013	The proposed Regulations also fail to provide all water users with a means for demonstrating reduced reliance on the Delta. A water supplier is presumptively contributing to reduced reliance on the Delta if it completes an Urban or Agricultural Water Management Plan and identifies and implements locally cost-effective and technically feasible programs set forth in the plan. However, not all water users that are required to reduce reliance must adopt such plans. The proposed Regulations should identify how non-water suppliers—particularly in-Delta users, many of which are individual farmers—may evidence their reduced reliance on the Delta and improved regional self-reliance.	Ct	Section 5003 of the adopted regulation only applies to water suppliers that receive water from a proposed covered action. The definition of water suppliers is provided in section 5001 (see Subsections 5001(b), (c) (1) and (2), (hh)(1) and (2) and (ii)). We agree with the comment that there are water suppliers and other water users within the Delta watershed that could also contribute to reduced reliance on the Delta and improved regional self-reliance. The Delta Plan recommends that all water suppliers located within the Delta watershed, including areas upstream of the Delta, voluntarily implement the measures contained in section 5003 to reduce their reliance on water from the Delta watershed and to improve regional self-reliance.
57. San Joaquin County Board of Supervisors	1/14/2013	The proposed Regulations state that the policy of the State of California is to reduce reliance on the Delta. However, the proposed Regulations also state that success in achieving that policy is demonstrated through a reduction in use of water from the Delta watershed. The Delta and the Delta watershed are two vastly different demarcations with the latter encompassing the former, but also extending through the Sacramento River and San Joaquin River hydrological regions. Requiring reduced reliance on the Delta is not the same as requiring a reduction in use of water from the Delta watershed. The proposed Regulations should clarify that the geographic scope they purport to regulate is only the legal Delta and not the entire Delta watershed. Regulating outside the legal Delta is beyond the authority of the Commission. The Delta Reform Act limits the geographic scope of the Delta Plan to the Delta except that the Plan may make recommendations for projects outside the Delta or identify actions to be taken outside the Delta only if such actions significantly reduce flood risks in the Delta. Wat. Code §§ 85302, 85307. Nevertheless, if the proposed Regulations are intended to cover the Delta watershed, that should be stated clearly and unconditionally.	A, Ct	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information on the Council's authority to consider out-of-Delta actions when regulating in-Delta actions. Water suppliers that do not receive water directly from the Delta, such as suppliers located in the Delta's upper watershed, are not subject to the provisions of section 5003 of the adopted regulation. However the Delta Plan recommends that all water suppliers located within the Delta watershed, including areas upstream of the Delta, voluntarily implement the measures contained in section 5003 to reduce their reliance on water from the Delta watershed and to improve regional self-reliance. Please note that section 5003 has been revised to further clarify the language.
58. San Joaquin County Board of Supervisors	1/14/2013	This proposed Regulation is confusing and, if strictly interpreted, impracticable and unenforceable. As a reasonable person would understand this proposed Regulation, all three conditions stated in the proposed Regulation must occur before water export, transfer or use by a water supplier can be prohibited. Pages 2-4, lines 7-23 of the Delta Plan's recirculated PEIR appears to support this assessment. If this is the case, then a water supplier may export water during a dry year even though a significant adverse environmental impact in the Delta may	Ct, Co	The comment misconstrues the provisions of section 5003 of the adopted regulation. The purpose of section 5003 is to promote water efficiency and ensure that water suppliers conserve water and develop local water supplies that will contribute to achieving the coequal goal of providing a more reliable water supply for California and to the related state policy of reducing reliance on the Delta and improving regional self-reliance, not to make Delta exports harder or easier.

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		occur as long as the supplier has a water management plan in place with scheduled water-saving projects. On the flip side, the policy seems to read that if water export does not result in a significant adverse environmental impact in the Delta, then no management plan is required for the water export. This seems counter to what WR P1 is trying to accomplish. Policy WR P1 may actually make water exports from the Delta easier because water suppliers do not have to worry about environmental concerns if they have implemented a water management plan. This is not consistent with the Delta Plan's co-equal goal of a reliable water supply (for the Delta).		The Council is required to determine the consistency of a proposed covered action with the Delta Plan and the coequal goals. The Council recognizes that there will be proposed covered actions that will provide benefits for one coequal goal and harm the other. Section 5003 is intended to address the situation where a proposed action in the Delta that may improve water supply reliability also has significant adverse impacts on the Delta ecosystem. To determine whether the covered action should go forward despite the adverse environmental impacts, the Council requires that a consistency determination show that the water suppliers that are receiving the benefit of the proposed action, even if they are located outside the Delta, are taking appropriate action to conserve water and develop local water supplies in order to reduce their need for the proposed action. Please see Master Response 4 for more information. Please note the Council has revised the language of section 5003 to further simply and clarify the provisions of this section.
59. San Joaquin Tributaries Authorities	1/14/2013	As the DSC is well-aware, Water Code section 85021 states that "[t]he policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." The goal is limited to reducing reliance on the Delta. Therefore, this provision cannot be used to regulate upstream agencies and stakeholders which do not rely on water from the Delta. Provided the limitation above, the current version of WR P1 goes beyond the authority provided by section 85021 because it states compliance "will be demonstrated through a significant reduction in the amount of water use, or in the percentage of water used, from the Delta watershed." Upstream water users, who do not rely on the Delta, are not required to mitigate for users' reliance on the Delta; requiring this goes beyond the State's policy and the DSC's authority. Further, WR P1 threatens to infringe on the priority of existing water rights because it would require water users which benefit from an earlier priority to forego the water which would otherwise be diverted and distributed pursuant to those rights, and allow downstream users to take that water—sometimes without a water right at all. This is contrary to existing statutory and case law. In addition WR P1 is contrary to language of SB X7 7. Water Code section 10608.8(c), part of SB X7 7, states: This part does not require a reduction in the total water used in the agricultural or urban sectors, because other facts, including, but not limited to, changes in agricultural economics or population growth may have greater effects on water use. WR P1 specifically requires a "significant reduction in the amount of water use." Thus, the compliance required by WR P1 is directly inapposite to SB X7 7, which expressly states that it "does not require a reduction in the total water used." Therefore, as currently drafted WR P1 is contrary to existing law and it is impossible to achieve its intent to comply with SB X7 7.	A, Co	We agree that water suppliers that do not receive water directly from the Delta, such as suppliers located in the Delta's upper watershed, are not subject to the provisions of section 5003 of the adopted regulation. It should be noted, however, that the Delta Plan recommends that all water suppliers located within the Delta watershed, including areas upstream of the Delta, voluntarily implement the measures contained in section 5003 to reduce their reliance on water from the Delta watershed and to improve regional self-reliance. We disagree with the comment that section 5003 goes beyond the authority provided by Water Code section 85021. Section 5003 is based upon multiple statutory authorities in the Delta Reform Act, including, but not limited to, Water Code section 85021. Please note that the Council has modified the language in this section to simplify and clarify the regulation. Subsections 5003(a) and 5003 (b) have been removed and a new subsection 5003 (c)(1)(C) has been added. The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance and improved regional self-reliance. The removed language describer the performance measures by which the statewide effectiveness of the actions taken by achieve the policy of reducing reliance on the Delta and improving regional self-reliance will be evaluated by the Delta Plan over time. The added language clarifies how the expected outcome for measureable reduction in delta reliance and improvement in regional self-reliance shall be reported in the Urban and Agricultural Water Management Plans. We believe this appropriately clarifies the intent of this section. We disagree with the comment regarding water rights. Nothing in section 5003 improperly infringes on the water rights and statutory priorities of diverters and other areas of origin. Please see Master Response 8 for more information. Finally the comment misconstrues section 5003 regarding how the expected outcome for measureable reduction in Delta reliance and improvement in regional self-reliance will be reported in the Urban and Agricultural Water Plans. This outcome will be reported as either a reduction in the amount of water used from the Delta *or a reduction in the percentage of water used from the Delta watershed* (emphasis added). Further, for the purposes of reporting, water efficiency is considered a new source of supply. This means that a water supplier experiencing growth in water demand can show how increased conservation and development of additional local supplies to meet those water needs is contributing to a reduction in the percentage of water used from the Delta watershed. The water conservation that is achieved through SB 7X X will contribute to reduced reliance on the Delta and improved regional self-reliance. Thus, we disagree with the comment that section 5003 (and the corresponding WR P1 in the Delta Plan) is contrary to the language of SB X7 7.

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60. San Joaquin Tributaries Authorities	1/14/2013	WR P1 is also contrary to Water Code section 85302 which identifies that the geographic scope for projects and programs identified in the Delta Plan "shall be the Delta[.]" (Water Code, § 85302(b).) While section 85302(b) allows for recommendations outside of the Delta, it is unambiguous that the Delta Plan shall remain focused on the legal Delta. WR P1 goes beyond the authority allowed by the legislature and will not be able to withstand a legal challenge. The SJTA therefore requests the DSC revise WR P1 to remove the language which applies to the Delta watershed (i.e. upstream water users) and that which "require[s] a reduction in the total water used." In the alternative, WR P1 could be changed to a recommendation.	A	See MR4
61. San Joaquin Tributaries Authorities	1/14/2013	Article 3, section 5005 Section 5005 is the language of WR P1, which misses the mark with regard to the legislature's intent in Water Code section 85021 and fails to meet the authority, clarity and consistency standards because it is inconsistent with existing law, and is vague and ambiguous as to the definition of "reduced reliance." Section 5005 contains several statements which render the policy flawed in such a way that it will not meet regulatory standards. First, section 5005 begins by stating that compliance "will be demonstrated through a significant reduction in the amount of water use, or in the percentage of water used, from the Delta watershed." Upstream water users, who do not rely on the Delta, are not required to mitigate for users' reliance on the Delta; requiring this goes beyond the State's policy and the DSC's authority. Further, section 5005 threatens to infringe on the priority of existing water rights because it would require water users which benefit from an earlier priority to forego the water which would otherwise be diverted and distributed pursuant to those rights, and allow downstream users to take that water—sometimes without a water right at all. This is contrary to existing statutory and case law.	A, Ct, Co	The Council has modified section 5003 of the adopted regulation to simplify and clarify this language. Subsections 5003(a) and 5003 (b) have been removed and a new subsection 5003 (c)(1)(C) has been added. The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance and improved regional self-reliance. The removed language describes the performance measures by which the statewide effectiveness of the actions taken by achieve the policy of reducing reliance on the Delta and improving regional self-reliance will be evaluated by the Delta Plan over time. The added language clarifies how the expected outcome for measureable reduction in delta reliance and improvement in regional self-reliance shall be reported in the Urban and Agricultural Water Management Plans. We believe that this appropriately clarifies the language in this section. We do not agree with comment regarding the definition of reduced reliance. The language appropriately addresses the requirements of the Delta Reform Act. The comment misconstrues the language in section 5003. Water suppliers that do not receive water directly from the Delta, such as suppliers located in the Delta's upper watershed, are not subject to the provisions of this section. Please note, however, that the Delta Plan recommends that all water suppliers located within the Delta watershed, including areas upstream of the Delta, voluntarily implement the measures contained in section 5003 to reduce their reliance on water from the Delta watershed and to improve regional self-reliance. We disagree with the comment regarding water rights. Nothing in section 5003 improperly infringes on the water rights and statutory priorities of diverters and other areas of origin. Please see Master Response 8 for more information.

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62. San Joaquin Tributaries Authorities	1/14/2013	Section 5005 is also contrary to Water Code section 85302 which identifies that the geographic scope for projects and programs identified in the Delta Plan "shall be the Delta[.]" (Water Code, § 85302(b).) While section 85302(b) allows for recommendations outside of the Delta, it is unambiguous that the Delta Plan shall remain focused on the legal Delta. Section 5005 goes beyond the authority allowed by the legislature and will not be able to withstand a legal challenge. The SJTA therefore requests the DSC revise section 5005 to remove the language which applies to the Delta watershed (i.e. upstream water users) and that which "require[s] a reduction in the total water used." In the alternative, section 5005 could be changed to a recommendation in the Delta Plan and removed as a proposed regulation.	A, Co	We disagree with the comment that section 5003 of the adopted regulation goes beyond the scope of the Council's regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information. Further, the comment misconstrues the provisions of section 5003. Water suppliers that do not receive water directly from the Delta, such as suppliers located in the Delta's upper watershed, are not subject to the provisions of section 5003. However the Delta Plan recommends that all water suppliers located within the Delta watershed, including areas upstream of the Delta, voluntarily implement the measures contained in section 5003 to reduce their reliance on water from the Delta watershed and to improve regional self-reliance. Please note that the Council has modified section 5003 of the adopted regulation to simplify and clarify this language. Subsections 5003(a) and 5003 (b) have been removed and a new subsection 5003 (c)(1)(C) has been added. The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance and improved regional self-reliance. The removed language describes the performance measures by which the statewide effectiveness of the actions taken by achieve the policy of reducing reliance on the Delta and improving regional self-reliance will be evaluated by the Delta Plan over time. The added language clarifies how the expected outcome for measureable reduction in delta reliance and improvement in regional self-reliance shall be reported in the Urban and Agricultural Water Management Plans. We believe that this appropriately clarifies the language in this section.
63. San Joaquin Tributaries Authorities	1/14/2013	Next, section 5005(b) states that the intent of the policy is to ensure water suppliers comply with statutory requirements of SB X7 7. This statement is contrary to language of SB X7 7. Water Code section 10608.8(c), part of SB X7 7, states: This part does not require a reduction in the total water used in the agricultural or urban sectors, because other facts, including, but not limited to, changes in agricultural economics or population growth may have greater effects on water use. Section 5005 specifically requires a "significant reduction in the amount of water use." Thus, the compliance required by section 5005 is directly inapposite to SB X7 7, which expressly states that it "does not require a reduction in the total water used." Therefore, as currently drafted, section 5005 is contrary to existing law and fails to meet the consistency standard. Further, section 5005 fails to meet the "reference" standard because it does not cite to the statutes which arose from SB X7 7. (Gov. Code, §§ 11349, 11349.1(5).)	A	The comment misconstrues section 5003 in the adopted regulation regarding how the expected outcome for measureable reduction in Delta reliance and improvement in regional self-reliance will be reported in the Urban and Agricultural Water Plans. This outcome will be reported as either a reduction in the amount of water used, or a reduction in the percentage of water used, from the Delta watershed. Further, for the purposes of reporting, water efficiency is considered a new source of supply. This means that a water supplier experiencing growth in water demand can show how increased conservation and development of additional local supplies to meet those water needs is contributing to a reduction in the percentage of water used from the Delta watershed. The water conservation that is achieved through SB 7X X will contribute to reduced reliance on the Delta and improved regional self-reliance. Thus, we disagree with the comment that section 5003 is contrary to the language of SB X7 7 and to existing law.
64. San Joaquin Tributaries Authorities	1/14/2013	Section 5005 also fails to properly define "reduced reliance on the Delta." As currently drafted, section 5005 states that reliance will be reduced when water suppliers identify, evaluate, and commence implementation of "all programs and projects that are local cost effective and technically feasible that reduce reliance on the Delta." The conundrum with this is that section 5005 defines "reduced reliance" with "programs and projects which reduce reliance." This is unhelpful and offers no guidance to water suppliers because it defines "reduced reliance" with "reduce reliance," thereby failing to meet the clarity standard.	Ct	We disagree that section 5003 of the adopted regulation fails to properly define reduced reliance on the Delta. In order to provide further clarification, the Council has modified Subsection 5003 (c)(1)(C) to include the expected outcome for measureable reduction in Delta reliance and improvement in regional self-reliance. The expected outcome will be reported as the reduction in the amount of water used, or in the percentage of water used, from the Delta watershed. In addition, Subsection 5003 (c)(2) provides a listing of the types of programs and projects that could reduce reliance on the Delta and improve regional self-reliance.
65. San Joaquin Tributaries Authorities	1/14/2013	The language of section 5005 falls drastically short of meeting the standards set forth in the APA; the SJTA therefore requests that the DSC revise section 5005 to ensure compliance.	O	The comment does not explain how section 5003 "falls drastically short" of meeting the APA standards. We disagree with the comment.

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66. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Section 5005: The proposed "regulatory policy" WR P1 unlawfully asserts regulatory power to undertake the enforcement of a new policy of the State to "reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." (Wat. Code, § 85021.) In the Notice of Proposed Rulemaking, the Council claims that requiring reduced reliance on the Delta is "consistent with the Delta Reform Act contained in Water Code §85021 (Notice of Proposed Rulemaking at 3), but this assertion of authority reaches far beyond the substantive and geographic scope of its authorities as explicitly delineated by the Legislature. Furthermore, because the Delta Reform Act does not expressly give the Council a duty or the power to enforce or regulate the general state policy of seeking to "reduce reliance on the Delta in meeting future water supply needs," there is no implied authority to promulgate regulations pertaining to that policy. The only specific language articulated in the Act arguably related to such potential authority merely directs the Council to "promote" conservation and other water management activities that would contribute to furthering the state policy expressed in Section 85021 and elsewhere in the Act and other bills that were part of the comprehensive water package of which the Act was only a part.	A	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. We disagree with the comment that section 5003 of the adopted regulation does not fall within the scope of the Council's regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information. We disagree with the comment that section 5003 goes beyond the authority provided by Water Code section 85021. Section 5003 is based upon multiple statutory authorities in the Delta Reform Act, including, but not limited to, Water Code section 85021.
67. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	<u>The Language of the Statute Does Not Support the Council's Asserted Authority to Require a Significant Reduction in Water Use.</u> Nowhere in the Act's sections providing explicit direction to the Council regarding content of the Delta Plan (see Wat. Code, §§ 85300-85308) is the reduced reliance policy mentioned or cited as a focus of the Delta Plan. The reduced reliance policy in Section 85021 of the Act is simply a statement of policy, not a delegation to the Council of power to expand or enforce the policy. The Council is not even mentioned in section 85021, let alone authorized to enforce the policy through forced reductions in current or historic supplies pumped from the southern Delta. It is telling that while the Act did not include any standards or criteria in the Section 85021 policy statement, other bills included as part of the comprehensive water package did specifically target establishing statewide standards and criteria related to increasing water conservation throughout California.(6) In fact, Section 85021 does not require a "reduction" in current supplies from the Delta at all, let alone a "significant reduction." Instead, it states a policy to take positive actions to increase local supplies and water efficiency through investment as a means to reduce reliance on the Delta "in meeting California's future water supply needs." The Council's proposed Section 5005 attempts to turn that positive, statewide investment policy into a prescriptive rule prohibiting entities that need to export, transfer through, or use water in the Delta or in the entire Delta watershed from doing so unless they have demonstrated "a significant reduction in the amount of water used, or in the percentage of water used, from the Delta watershed." The Council's attempt to add this requirement where the Legislature did not would "alter or amend [the] statute or enlarge or impair its scope" and therefore "is void and must be struck down by a court." (OAL Handbook at p. 19.) (6) See generally 2009 Water Bills SBx7-7 and SBx7-8, which specifically discuss and seek to reduce per capita use of water in the context of statewide strategies related to conservation, diversification of water supply portfolios, and funding to further achieve those policy goals.	A	We disagree with the comment that section 5003 of the adopted goes beyond the authority provided by Water Code section 85021. Section 5003 is based upon multiple statutory authorities in the Delta Reform Act, including, but not limited to, Water Code section 85021. We disagree with the comment that section 5003 does not fall within the scope of the Council's regulatory authority. See Master Response 4 for more information. Please note that the Council has modified section 5003 of the adopted regulation to simplify and clarify this language. Subsections 5003(a) and 5003 (b) have been removed and a new subsection 5003 (c)(1)(C) has been added. The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance and improved regional self-reliance. The removed language describes the performance measures by which the statewide effectiveness of the actions taken by achieve the policy of reducing reliance on the Delta and improving regional self-reliance will be evaluated by the Delta Plan over time. The added language clarifies how the expected outcome for measureable reduction in delta reliance and improvement in regional self-reliance shall be reported in the Urban and Agricultural Water Management Plans. This shall be reported as the reduction in the amount of water used, or in the percentage of water used, from the Delta watershed. We believe that this appropriately clarifies the language in this section.

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68. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Moreover, the Council ignores the Legislature's focus on reducing reliance in meeting California's future water supply needs and instead attempts to require a reduction from current use. But on its face, section 85021, through the express use of the term "future," applies solely to water supply needs that do not currently exist as opposed to current water supply needs. In Tenet/Centinela Hospital Medical Center v. Workers' Compensation Appeals Board (2000), the court, in interpreting a statute, was required to distinguish between "continuing" or "further" medical treatment and "future" treatment. (80 Cal.App.4th 1041, 1046.) Looking to the Webster Dictionary, a common reference for statutory interpretation, the Court concluded that whereas "continuing" means "constant" and "further" means "going or extending beyond what exists", the term "future" means "existing or occurring at a later time." (Id.) The court went on to find that "future" medical care suggested medical attention that would be required at a later date but is not ongoing. (Id.) Using this definition of the term "future," Section 85021 applies to water supply needs that do not currently exist but would arise in the future due to population an economic growth absent the statewide investment strategy called for in Water Code section 85021. The principles of statutory interpretation require that each word in a statute be given significance. (Dyna-Med, Inc. v. Fair Employment and Housing Comm'n (1987) 43 Cal.3d 1379, 1386-87.) The Council's interpretation that Section 85021 calls for a reduction in the use of Delta water from current water supply levels renders the term "future" as surplusage. Under that interpretation, Section 85021 would have stated a policy to reduce reliance on the Delta in meeting California's water supply needs, generally, which the Legislature explicitly chose not to do. (7) This is clearly revealed by the legislative history described below, which also illuminates the significance of the Legislature's use of the phrase "reduce reliance" on the Delta, in contrast to "reduce dependence." The legislative history confirms that the Legislature did not intend the Delta Plan to be an enforcement mechanism for the newly established policy of reducing reliance on the Delta to meet future water supply needs, or for the Council to be its enforcer.	A	The Council disagrees with this comment. First, the term "future" is not used in our adopted regulation. The regulation at most calls for a reduction in the amount of water used, or in the percentage of water used, from the Delta watershed. (At most because the regulation only applies if various contingencies are met.) The comment does not explain how its interpretation of the use of the word "future" in section 85021 is inconsistent with a reduction in the amount **or percentage** of Delta water used. Second, the authority for the regulation is based upon many statutory provisions, of which section 85021 is only one. See Master Response 4. Finally, the Council has, in any event, addressed the use of this language in 85021 in a letter to the State and Federal Contractors' Water Agency (SFCWA) dated November 15, 2010. The relevant portion of this letter is reproduced below: > The commenter argues that the legislative policy requiring reduced reliance on Delta diversions is inapplicable to the BDCP because it is directed only to *future*, not current, water supply needs. This argument is based on a misunderstanding of the intent and purpose of Water Code section 85021 and the Act as a whole. > The term "future water supply needs" does not just refer to "the increment of increased demands due to population or other growth," as the SFCWA claims (see SFCWA Letter to Council, Oct. 18, 2010). > The Delta Council believes that the phrase includes all current water supply needs *as these needs will continue into the future.* It is impossible to imagine that the broad policy goals of the legislation could be met in any way if Delta exports are not part of the discussion. The sentence under discussion talks about conservation and water use efficiency. Surely that refers to current practices, not the "the increment of increased demands due to population or other growth." > Our interpretation is consistent with the overall goals and policies of the Act, which make plain the Legislature's intent to reform *current* unsustainable water uses in the Delta and to protect and restore the Delta ecosystem. For example, the Legislature declared that "[t]he Sacramento-San Joaquin Delta watershed and California's water infrastructure are in crisis and existing Delta policies are not sustainable. Resolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources." (Water Code section 85000(a), emphasis added.) This also comports with the operational reality of having to adapt our current system to a changing climate, the effects of which we are already beginning to experience. For instance, we are already experiencing declining snowpack and the scientific community tells us that climate change models consistently predict a system yield that is likely to significantly decline in the future. Prudent and resilient management must seek to redesign the system in ways that allow for the probability of reduced exports and reduced water available for the ecosystem. It is clear however that the legislature expects our water supply system, and the economy that relies upon it, to be more resilient and <u>less reliant</u> on the Delta.
69. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Moreover, two other significant sections of the Delta Reform Act are inconsistent with the Council's position. In Section 85020, the section immediately preceding Section 85021, the Legislature spelled out in specific detail the objectives "inherent in the coequal goals for management of the Delta." Rather than requiring, as the Council would, the "significant reduction" in use of water from the Delta watershed, the Legislature stated the objective is to "promote" statewide water conservation, water use efficiency and sustainable water use. This Legislative objective demonstrates that the Legislature did not choose to confer regulatory authority on the Council but instead provided discretion to "promote" activities related to	A	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. We disagree with the comment that section 5003 of the adopted regulation does not fall within the scope of the Council's regulatory authority. See Master Response 4 for more information, including why the term "promote" gives the Council discretion to adopt

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		"sustainable water use." The Legislature's use of "promote" cannot legitimately be interpreted to mean "mandate." Part 4, Chapter 1 of the Delta Reform Act (Wat. Code, §§ 85300-85309) also demonstrates that Section 85021, while a general policy statement that is certainly relevant when considering actions affecting the Delta, does not delegate any enforcement authority to the Council or even to any of the agencies that do have regulatory authority in the Delta. In particular, while the Legislature devoted these several sections to specifying in detail the elements to be required in the Delta Plan, it did not include or refer to the general Section 85021 policy. What it did do was require that the Delta Plan "shall promote statewide water conservation, water use efficiency, and sustainable use of water." (Wat. Code, § 85303.) This is yet another demonstration that the Legislature did not empower the Council to regulate water use but instead directed it to "promote" good water management in line with section 85021. (See also Wat. Code, § 85302(d)(1), (2) [directing the inclusion of measures to "promote" a more reliable water supply that "[m]eet[s] the needs for reasonable and beneficial uses of water" and "[s]ustain[s] the economic vitality of the state"].) In addition, the Delta Reform Act limits the Council's consistency review authority to "covered actions," which are limited to projects that "[w]ill occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh." (Wat. Code, § 85057.5.) Thus, the Council's assertion of authority to mandate reductions in the use of water anywhere in the State is clearly beyond the geographic scope of the Council's authority.		regulatory measures, and how Water Code section 85021 is only one of many sources of the Council's authority to adopt section 5003. Finally, even if section 85021 had been the only source of authority, the comment concedes that it "is certainly relevant when considering actions affecting the Delta." At a minimum, therefore, section 85021 provides the Council with implied authority to adopt section 5003. See Government Code section 11342.2 (implied authority sufficient.) We disagree with the assertion that the Council is mandating reduction in the use of water anywhere in the State. Section 5003 only applies to Covered Actions which are clearly within the geographic scope of the Council's authority. See MR 4 for more information regarding the Council authority regarding Section 5003.

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70. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Moreover, the Council's assertion of authority over water use is inconsistent with several savings clauses in the Delta Reform Act. The statute provides that: "Unless otherwise expressly provided, nothing in this division supersedes, reduces, or otherwise affects existing legal protections, both procedural and substantive, relating to the [State Water Resources Control Board's] regulation of diversion and use of water, including, but not limited to, water rights priorities, the protection provided to municipal interests by Sections 106 and 106.5, and changes in water rights. Nothing in this division expands or otherwise alters the board's existing authority to regulate the diversion and use of water or the court's existing concurrent jurisdiction over California water rights. (Wat. Code, § 85031(d).)" The Council's assertion of authority to mandate reductions in water diversions and water use throughout the State is inconsistent with these important savings provisions in the statute, and would intrude upon the exclusive concurrent jurisdiction of the State Water Resources Control Board and the courts to adjudicate and regulate water diversions and water rights. The courts have held that general statements of legislative intent do not create an affirmative duty or authority on the part of the agency to impose a mandate in furtherance of the policy. (E.g., City of Arcadia v. State Water Resources Control Bd. (2011) 191 Cal.App.4th 156, 175-176; Shamsian v. Dept. of Conservation (2006) 136 Cal.App.4th 621, 633.) Therefore, the Council's assertion of authority to regulate water use is inconsistent with the express statutory language and an enlargement of the Council's authorities beyond those provided in the Delta Reform Act. Ultimately, while it is consistent with the statutory scheme for the Council to "promote" activities that could contribute to reducing reliance on the Delta in meeting future water supply needs, the proposed section 5005 mandate is not "reasonably necessary to effectuate the purpose" of the Delta Reform Act, and it is therefore beyond the Council's authority and should be removed from the Proposed Regulations. (Gov't Code §§ 11342.2, 11349(a)(1) & (2).) Thus, this provision should be removed from the Proposed Regulations.	A	We disagree with comment that section 5003 should be removed from the adopted regulations. See Master Response 1 and 4 for more information regarding the Council's regulatory authority. Nothing in section 5003 improperly infringes on the water rights and statutory priorities of diverters and other areas of origin. Please see Master Response 8 for more information. Further, nothing in section 5003 expands or otherwise alters the existing authority of the State Water Resources Control Board to regulate the diversion and use or water or the courts' existing concurrent jurisdiction over California water rights. Please see Master Response 9 for more information.

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71. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Section 5005(c): The prohibition of exports from the Delta proposed in subsection (c) is also not authorized by the Delta Reform Act for the reasons explained above; and it is also inconsistent with the Delta Reform Act's exclusion of routine project operations from the definition of covered actions and with its several savings clauses. The Delta Reform Act specifically excludes from the definition of "covered action" "[r]outine maintenance and operation of the State Water Project or the federal Central Valley Project." (Wat. Code, § 85057.5(b)(2).) In addition, as demonstrated, the Delta Reform Act provides that "[n]othing in the application of this section shall be interpreted to authorize the abrogation of any vested right whether created by statute or common law" (id., § 85057.5(c)), and "[n]othing in this division expands or otherwise alters the [State Water Resources Control Board's] existing authority to regulate the diversion and use of water or the courts' existing concurrent jurisdiction over California water rights" (id., § 85031(d)). Thus, the Council lacks the authority to require a reduction in exports of water via the routine operation of the State Water Project ("SWP") or the federal Central Valley Project ("CVP"), and this provision should be removed from the Proposed Regulations.	A, Co	This comment misconstrues the language in section 5003 of the adopted regulation. This section does not prohibit exports from the Delta, but rather establishes conditions under which the consistency of a proposed covered action with the Delta Plan and the coequal goals can be determined. The Council recognizes that there will be proposed covered actions that will provide benefits for one coequal goal and harm the other. Section 5003 is intended to address the situation where a proposed action in the Delta that may improve water supply reliability also has significant adverse impacts on the Delta ecosystem. To determine whether the covered action should go forward despite the adverse environmental impacts, the Council requires that a consistency determination show that the water suppliers that are receiving the benefit of the proposed action, even if they are located outside the Delta, are taking appropriate action to conserve water and develop local water supplies in order to reduce their need for the proposed action. Please see Master Response 4 for more information. We disagree with the comment that Subsection 5003 (a) (as renumbered) is inconsistent with the Delta Reform Act's exclusion of routine project operations. Under Water Code section 85057.5(b), as well as the adopted regulation's own terms (see section 5001(j)), the regulations to not cover actions exempted by that statutory provision. Water Code section 85057.5(b)(2) excludes the "[r]outine maintenance and operation of the State Water Project or the federal Central Valley Project." Therefore, those actions are not covered by the adopted regulations. In contrast, actions concerning one or both of those projects that are either not routine, or not maintenance and operation, are potentially covered actions. Nothing in section 5003 improperly infringes on the water rights and statutory priorities of diverters and other areas of origin. Please see Master Response 8 for more information. Further, nothing in section 5003 expands or otherwise alters the existing authority of the State Water Resources Control Board to regulate the diversion and use or water or the courts' existing concurrent jurisdiction over California water rights. Please see Master Response 9 for more information.
72. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	The Legislative History Directly Contradicts the Council's Assertion of Regulatory Authority to Prohibit or Mandate the Actions Required in Section 5005: While it is clear from the face of the statute that the Council does not have the authority to promulgate the mandates in Section 5005, the legislative history provides additional evidence of the Legislature's intent that the reduced reliance policy promote general water management activities and programs to meet future water supply needs, rather than delegating authority to the Council to mandate a requirement that water use be "significantly reduced." Statements by legislators who were key in the sponsorship, drafting and adoption of the Act explicitly sought to clarify the reach of Section 85021 as it was being considered. They agreed it was a "broad statement of a policy goal... certainly not a mandate." And they agreed that reducing dependence on the Delta to meet California's water supply needs was not an appropriate policy objective. These conclusions were articulated at a September 3, 2009, joint Senate and Assembly conference committee hearing discussing the various bills that would result in the Delta Reform Act, including SBx7-1, which established the Council and outlined in detail the contents and purposes of the Delta Plan: Senator Aanestad: "To say that we are going to be able to decrease dependency on the Delta is an impossible goal . . . . The solution is the second part of this paragraph [revised 85021 referring to statewide strategy of investment] and that is to improve efficiency, conservation, etc. . . . , it's foolishness to say we are going to become less dependent on the Delta. I think it's imperative to say we're going to be more responsible with the water that goes through the Delta .. . ."	A	The Council disagrees with this comment. First, the authority for the regulation is based upon many statutory provisions, of which section 85021 is only one. See Master Response 4. Second, while we agree that section 85021 does not mandate that the Council include this exact policy in its regulations, it at a minimum impliedly authorizes the Council to adopt a policy along its lines. Finally the comment's discussion concerning the use of the word "future" in section 85021, ignores the fact that the regulation does not use that term. The regulation at most calls for a reduction in the amount of water used, <u>or</u> in the <u>percentage</u> of water used, from the Delta watershed. (At most because the regulation only applies if various contingencies are met.) The comment does not explain how its interpretation of the use of the word "future" in section 85021 is inconsistent with a reduction in the amount **<u>or percentage</u>** of Delta water used. In any event, the council has addressed the use of this language in 85021 in a letter to the State and Federal Contractors' Water Agency (SFCWA) dated November 15, 2010. The relevant portion of this letter is reproduced below: > The commenter argues that the legislative policy requiring reduced reliance on Delta diversions is inapplicable to the BDCP because it is directed only to *future*, not current, water supply needs. This argument is based on a misunderstanding of the intent and purpose of Water Code section 85021 and the Act as a whole. > The term "future water supply needs" does not just refer to "the increment of increased demands due to population or other growth," as the SFCWA claims (see

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		Colloquy between Senator Steinberg (Senate Majority Leader and coauthor of SBx7-1) and Assemblyman Huffman (Chairman of the Assembly Water, Parks and Wildlife Committee and author of Preprint Assembly Bill No. 1, the Assembly's version of SBx7-1): Senator Steinberg: "[O]ne question for consideration is whether or not the proponents of this language [section 85021] intended it to have legal import or is it a statement of intent." Assemblyman Huffman: "I think, Mr. Chair, ***we know how to write mandates when we want to, that's not how this reads, it reads as a broad statement of policy of a goal that will guide things going forward*** .... You reduce dependence by following some of the ***conservation measures that we are asking folks to do in separate legislation. . . .*** So, I think it reflects a prudent policy guidance for the state going forward but certainly ***not a mandate.***" [Emphasis added.] Senator Cogdill (Lead sponsor of the companion Water Bond): "[I]t ought to be more about how we make the Delta a more reliable source of water rather than to say we are going to do everything we can to limit exports from that very important source." The Legislators' agreement reflected in these exchanges is supported by the Legislative drafting history of section 85021 and related sections. As originally drafted Water Code Section 85021 read: "The policy of the State of California is to ***reduce dependence on water from the Delta watershed, over the long-term,*** for statewide water supply reliability. Each region that depends on water from the Delta shall improve its regional self-reliance for water through investment in water-use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts. (Preprint SB 1 (Aug. 4, 2009).) [Emphasis added.]" That language was amended on September 9, 2009,8 after the September 3 discussions quoted above, to the language adopted ultimately and now codified in section 85021: "The policy of the State of California is to ***reduce reliance on the Delta*** in meeting California's ***future water supply needs*** through a ***statewide strategy*** of investing in improved regional supplies, conservation, and water-use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water-use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local and regional water supply efforts. [Emphasis added.]" The significant changes to the first sentence of the section are italicized and bolded to emphasize the differences between the earlier draft version, and the ultimately adopted version of section 85021. The first revision changes "reduce dependence" on water from the Delta watershed "over the long-term" to "reduce reliance" on the Delta "in meeting California's future water needs." Similar to the discussion above of Tenet/Centinela Hospital Medical Center v. Workers' Compensation Appeals Board, the adopted term "future" (as opposed to "continuing" or "existing") means "existing or occurring at a later time." In other words, the Section 85021 policy envisions reduced reliance on use of Delta water over use that would exist or occur in the future if the policy were not implemented. It does not mean reduce "continuing" or "existing" reliance on Delta water "beyond what exists" currently or historically. The second significant change is the addition of the language regarding a "statewide strategy of investment." This is an important reflection of legislative intent that meeting the policy directive		SFCWA Letter to Council, Oct. 18, 2010). The Delta Council believes that the phrase includes all current water supply needs *as these needs will continue into the future.* It is impossible to imagine that the broad policy goals of the legislation could be met in any way if Delta exports are not part of the discussion. The sentence under discussion talks about conservation and water use efficiency. Surely that refers to current practices, not the "the increment of increased demands due to population or other growth." Our interpretation is consistent with the overall goals and policies of the Act, which make plain the Legislature's intent to reform *current* unsustainable water uses in the Delta and to protect and restore the Delta ecosystem. For example, the Legislature declared that "[t]he Sacramento-San Joaquin Delta watershed and California's water infrastructure are in crisis and existing Delta policies are not sustainable. Resolving the crisis requires fundamental reorganization of the state's management of Delta watershed resources." (Water Code section 85000(a), emphasis added.) This also comports with the operational reality of having to adapt our current system to a changing climate, the effects of which we are already beginning to experience. For instance, we are already experiencing declining snowpack and the scientific community tells us that climate change models consistently predict a system yield that is likely to significantly decline in the future. Prudent and resilient management must seek to redesign the system in ways that allow for the probability of reduced exports and reduced water available for the ecosystem. It is clear however that the legislature expects our water supply system, and the economy that relies upon it, to be more resilient and <u>less reliant</u> on the Delta.

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		set forth in Section 85021 is to be achieved on a "statewide" basis that would include local initiatives and investments, statewide bond initiatives, or other funding mechanisms. Notably, nowhere does this language expressly or impliedly authorize the Council to impose an obligation to "significantly reduce" the current use of water from the Delta watershed, or an authorization to the Council to "enforce" its particular interpretation of Section 85021 through the Delta Plan.		
73. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	The Proposed "Significant Reduction" Requirement Is Inconsistent with the Legislature's Deletion from the Bill of a Similar Requirement: Another indication the Legislature did not intend to require (or authorize the Council to regulate) a reduction of current use of water is its consideration and rejection of a proposed section 85219. That section would have prohibited construction of a conveyance facility within or around the Delta until the Council made a determination that agencies relying on the facility for water deliveries had submitted "long-term plan[s] for reducing reliance on those exports." (Preprint SB 1 (Aug. 4, 2009).) That language, which could have been interpreted to support the "significant reduction" requirement the Council is attempting to impose, was deleted at the same time Section 85021 was amended to add "future water supply needs" and the "statewide strategy of investment" language. The substantive mandate in proposed Section 5005 is inconsistent with both the plain language of the Delta Reform Act and its legislative history, and should be removed from the Proposed Regulations.	A	See response to prior comment (number 72). Moreover, the regulation's provision concerning "measurable reduction" includes the possibility of increased exports as long as there is a reduction in the percentage of Delta water used. Finally, a proposal to prohibit certain conveyance facilities unless agencies submitted plans to reduce reliance on the Delta is considerably more far reaching than the adopted regulation, which 1) only applies if various contingencies exist, and even more significantly 2) cannot prohibit any conveyance facility if a Bay Delta Conservation Plan authorizing such a facility is incorporated into the Delta Plan.
74. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Section 5005(e)(1): The language of the statute does not support the Council's asserted authority to require (e)(1)(A), (B), and (C), as a prerequisite for using, exporting, or transferring water through the Delta. For example, subdivision (A) mandates that every water supplier that might receive water from the "covered action" has an urban and agricultural management plan. This is a current requirement under law for certain water suppliers, and is therefore duplicative and unnecessary. (Wat. Code, § 10620 [urban water suppliers]; id., §10820 [agricultural water suppliers].) Of more concern, as currently proposed Subsections 5005(c) – (e) appear to create a new consequence for water supplies that fail to meet novel requirements that the Council has proposed for inclusion in urban and agricultural water management plans in subsections (e)(1)(B) and (C); namely, a potential denial of the ability to use or export water from, or transfer water through, the Delta. Current law, however, has very limited specific repercussions for a failure to adopt these plans in compliance with the specific requirements set forth in the Water Code. (Wat. Code, §§10608.56(a), (c), (e), (f); 10631.5 [terms of and eligibility for certain water management grants or loans for urban water suppliers]; id., §§ 10608.56(b), (e), (f); 10852 [agricultural water suppliers].) Nothing in the Delta Reform Act provides authority for the novel requirements for urban and agricultural water management plans proposed in subsections (e)(1)(B) and (C) of Section 5005. In addition, insofar as these subsections duplicate existing law, they are unnecessary and create confusion in the regulated community. Furthermore, Section 5005(e)(1)(B) distorts the purpose of urban and agricultural water management plans. These plans are internal long-range documents that are to be revised over time as conditions and technologies change. Therefore, the implementation schedules set forth in the plans must remain flexible and adaptable. These plans are meant to inform local water management planning, not to create a new forum for regulation by the Council. Similarly, in subsection 5005(e)(1)(C) the Council grants itself the authority to require a new provision in all water management plans starting in 2015. The Delta Reform Act does not give the Council this authority, and there is no such requirement in existing law. (See Wat. Code, § 10631 [elements of an urban water management plan]; id., § 10826 [agricultural water management plan]; id., §	A	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. We disagree with the comment that section 5003 does not fall within the scope of the Council's regulatory authority. See Master Response 4 for more information. We disagree with the comment that the language in section 5003 is duplicative of existing law. This section builds on current requirements for water suppliers to prepare Urban and Agricultural Water Management Plans to minimize the burden on water suppliers as they comply with a "legally enforceable Delta Plan" and contribute to both achieving the coequal goal of improving the reliability of the state's water supply and the state's policy of reducing reliance on the Delta and improving regional self-reliance. The comment's statement that to the extent the adopted regulation overlaps existing law it is unnecessary, ignores the comment's prior point that the regulation creates "a new consequence." We agree that the regulation adds a new consequence. As a result, it encourages compliance, and thereby adds to existing law. We further disagree that section 5003 distorts the purpose of Urban and Agricultural Water Management Plans. Existing law requires water suppliers to update their Urban and Agricultural Water Management Plans every five years, including the implementation schedule set forth in the Plan. The language in section 5003 is both clear and appropriate.

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		10608 et seq. [requirements for urban and agricultural water management plans related to sustainable water use and demand reduction].) Thus, Subsections 5005(c) – (e) should be removed from the Proposed Regulations.		
75. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	The Definition of "Achieving the Coequal Goal of Providing a More Reliable Water Supply for California" Includes Unlawful Substantive Mandates to Reduce Water Use Section 5001(e)(1): The Council proposes to include a definition of "achieving the coequal goal of providing a more reliable water supply for California" to include "[b]etter matching the state's demands for reasonable and beneficial uses of water to the available water supply" (§ 5001(e)(1)(A)), and states that "[r]egions that use water from the Delta watershed will reduce their reliance on this water for reasonable and beneficial uses, and improve regional self-reliance" (§ 5001(e)(1)(B), emphasis added), and "[w]ater exported from the Delta will more closely match water supplies available to be exported, based on water year type and consistent with the coequal goal of protecting, restoring, and enhancing the Delta ecosystem" (§ 5001(e)(1)(C), emphasis added). In addition, the proposed definition states: "Delta water that is stored in wet years will be available for water users during dry years, when the limited amount of available water must remain in the Delta, making water deliveries more predictable and reliable." (§ 5001(a)(1)(C), emphasis added.) The proposed regulatory definition of "achieving the coequal goal of providing a more reliable water supply for California" conflicts with the language and structure of the Delta Reform Act. (Wat. Code, § 85302(d)(1).) Specifically, the statute mandates that "[t]he Delta Plan shall include measures to promote a more reliable water supply that address all of the following," including "[m]eeting the needs for reasonable and beneficial uses of water." (Ibid.) Furthermore, the Delta Reform Act's coequal goal for water supply is to provide "a more reliable water supply for California . . . ." (Wat. Code, §§ 85054, 85020(a).) The Legislature has declared that seven specific objectives "are inherent in the coequal goals for management of the Delta[,]" including the objectives to "[i]mprove the water conveyance system and expand statewide water storage." (Wat. Code, § 85020(f).) First, the proposed definition of achievement of the coequal goal of a more reliable supply of water does not promote or identify actions that will meet water needs. Instead, it defines achieving the coequal goal of a more reliable water supply in a manner that limits use of water from anywhere in the Delta watershed, and limits water exports from the Delta. Specifically, the proposed definition purports to impose a substantive requirement on all those who use water that originates anywhere in the Delta watershed to "reduce reliance on this water for reasonable and beneficial uses." This mandate is an unauthorized expansion beyond the policy of the State of California articulated in the Delta Reform Act "to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency." (Wat. Code, § 85021, emphasis added.) As demonstrated above, the Legislature did not include the statewide policy of reduced reliance on the Delta to meet future water supply needs in the policies "inherent" in the coequal goals, or in its specified elements required to be part of the Delta Plan. (Wat. Code, §§ 85020, 85300 et. seq.) Thus, the Legislature has not authorized the Council to adopt a new mandate applicable to all users of water from the Delta watershed regarding current or historic water supply needs based on this general expression of state policy that depends on a statewide strategy to reduce reliance on the Delta to meet future water supply needs. (See Wat. Code, §§ 85210	A	The comment asserts that section 5001(h)(1)(B) conflicts with the Delta Reform Act because it "imposes a substantive requirement on all those who use water that originates anywhere in the Delta watershed." The comment further asserts that the Council lacks authority to adopt such a mandate. The comment fundamentally misconstrues section 5001(h)(1)(B). This section is a definition that does not establish prescriptive requirements, but rather defines what actions will qualify as covered actions because they have a "significant impact" on "achieving the coequal goal of providing a more reliable water supply for California." Thus, it is not a mandate on anyone who uses water originating from the Delta watershed. The Council has authority to define terms used within the Delta Reform Act and its regulations. Furthermore, this definition is consistent with the Delta Reform Act. For example, the definition explains that providing a more reliable water for California "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." Similarly, Water Code section 85004 (b) explains that "[p]roviding a more reliable water supply for the state involves implementation of water use efficiency and conservation projects, wastewater reclamation projects, desalination, and new and improved infrastructure, including water storage and Delta conveyance facilities."

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		[enumerated powers of the Council notably lacks any authority to convert state policy into new substantive mandates]; 85212 [authorizing Council to "provide timely advice to local and regional planning agencies regarding consistency of local and regional planning documents. . . with the Delta Plan," emphasis added]; 85300(a) [requiring the Council to develop a Delta Plan pursuant to the Delta Reform Act "that furthers the coequal goals" and includes "subgoals and strategies to assist in guiding state and local agency actions related to the Delta," emphasis added].) The precatory and permissive language in the Delta Reform Act cannot be reasonably interpreted as authorizing the Council to mandate reductions in water use or water exports.		
76. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	5005(e)(1): Second, the proposed definition purports to require that those who export water from the Delta, i.e., the Department of Water Resources and U.S. Bureau of Reclamation, reduce exports in "dry years, when the limited amount of available water must remain in the Delta. .. ." This provision in the proposed definition implies that consumptive uses will only get what is available after other "in-stream" uses are met. In addition, the statement is ambiguous, suggesting that in undefined "dry years," exports may be reduced to zero because "the limited amount of available water must remain in the Delta . . . ." The failure to recognize or even reference the "public interest" integral to the reasonable and beneficial use of water and the Public Trust doctrine is a fatal deficiency in the Council's unsubstantiated interpretation of the objective to further the achievement of the coequal goal of a more reliable water supply. Nowhere in the Delta Reform Act did the Legislature authorize the Council to adopt a mandate that state and federal agencies must reduce exports from the Delta. Instead, any limits on exports are governed by other statutory and regulatory requirements administered by other state and federal agencies, including the State Water Resources Control Board, Department of Fish and Wildlife, the U.S. Fish and Wildlife Service, and the National Marine Fisheries Service. The proposed definition conflicts with the savings clauses in the Delta Reform Act that expressly acknowledge the authority of other state and federal laws and regulations that affect the management of water resources in the Delta and Delta watershed. (See Wat. Code, §§ 85031 [limitations on division], 85032 [subjects not affected by division]; see also Wat. Code, § 85320(e)-(g) [recognizing that the Department of Water Resources, Department of Fish and Wildlife, and other agencies besides the Council are "charged with BDCP implementation," and that the Council's authority is limited to making recommendations to the BDCP implementing agencies regarding implementation of the BDCP, which is to be incorporated into the Delta Plan].)	A, Co	This is a comment on section 5001(h)(1)(C). The Council disagrees with this comment. Section 5001(h)(1) is a definition that does not establish prescriptive requirements, but rather defines what actions will qualify as covered actions because they have a "significant impact" on "achieving the coequal goal of providing a more reliable water supply for California." Thus, it is not a mandate on those who export water from the Delta. The Council has authority to define terms used within the Delta Reform Act and its regulations. Furthermore, the comment misconstrues the purpose and effect of paragraph (C), which calls for "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 less likely, and limit diversions in dry years when conflicts with the ecosystem are more likely." The intent is to ensure that water is available for exports, even in dry years. Finally, this section does not alter other bodies of law administered by other agencies governing the management of water resources in the Delta or the Delta watershed. Nor does it infringe on the concurrent jurisdiction of those other agencies referenced by the comment. Thus, it does not conflict with the provisions of the Delta Reform Act cited by the comment.
77. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Section 5005: The Initial Statement of Reasons describes section 5005 as necessary to "ensure[] that urban and agricultural water suppliers are taking appropriate actions to contribute to the achievement of reduced reliance on the Delta . . ." (Initial Statement of Reasons at p. 4.) In addition, the text of section 5005 of the Proposed Regulations requires use of water from the Delta watershed to be "significantly reduced." The Council's proposed implementation of that requirement violates the Savings Clauses of the Delta Reform Act. (Wat. Code, §§ 85031-85032.) Moreover, the legislative purpose of the Act was to further the coequal goals through the establishment of the Council to improve coordination of state agency actions in the Delta, develop a new Science Program to improve water and ecosystem management in the Delta, and ensure activities of the State and local governments in the Delta did not preclude progress toward achievement of the coequal goals. These outcomes were to be achieved through the Delta Plan, under which the Council was given the authority to review appeals of consistency certifications for "covered actions." Regulations seeking to reduce water use statewide and SWP and CVP water deliveries are not necessary for the Council to	A, Ne, S	Regarding the comment on the requirement for "significant reductions": The Council has modified section 5003 of the adopted regulation to simplify and clarify this language. Subsections 5003(a) and 5003 (b) have been removed and a new subsection 5003 (c)(1)(C) has been added. The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance and improved regional self-reliance. The removed language describes the performance measures by which the statewide effectiveness of the actions taken by achieve the policy of reducing reliance on the Delta and improving regional self-reliance will be evaluated by the Delta Plan over time. The added language clarifies how the expected outcome for measureable reduction in delta reliance and improvement in regional self-reliance shall be reported in the Urban and Agricultural Water Management Plans. We believe that this appropriately clarifies the language in this section. The comment misconstrues the language of section 5003 as seeking to reduce "SWP and CVP water deliveries." The purpose of section 5003 of the adopted regulation is to promote water efficiency and ensure that water suppliers are taking appropriate action to conserve water and

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		effectuate these purposes of the Delta Reform Act, which the Legislature directed it to pursue with very limited, rather than expansive, authorities provided in the Act.		develop local water supplies that will contribute to achieving the coequal goal of providing a more reliable water supply for California and to the related state goal of reducing reliance on the Delta and improving regional self-reliance, not to set export limits. Further, the State Water Resources Control Board, not the Council, is responsible for establishing appropriate flow objectives and related export limits through the Board's Bay Delta Water Quality Control Plan. Section 5005 requires that the Council use the Board's flow objectives, both current and when they are revised, to determine consistency with the Delta Plan. Finally, see Master Responses 1 and 4 concerning the Council's regulatory authority.
78. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Subsection 5005(c): Water Code section 85021 calls for a statewide strategy of investment in regional water supply and management actions as a means to help reduce reliance on the Delta in meeting future water supply needs. However, proposed subsection 5005(c) turns this statutory, forward-looking investment policy into a highly punitive threat to current and future water supplies. In doing so, the Council has proposed a regulation that is unnecessary, unreasonable, and inconsistent with the statute itself and that "does not reasonably effectuate the statute." (Gov. Code, §§ 11342.2, 11346.3, 11349.1(a).) The Council's proposed section 5005(c) could prevent water supply entities the use of their water rights, or their contract rights to water service, even if those entities meet all statutory requirements, simply because the Council has decided that another entity has not, in the Council's opinion, adequately reduced its reliance on water from the Delta watershed. For example, the Council apparently claims the authority (1) to determine that one entity sharing a supply with others (e.g., several retailers served by the same wholesale supplier) has not implemented "all programs and projects" identified in its water management plan as cost effective and technically feasible; and (2) to prohibit the delivery to other parties sharing that supply and for which water management plan compliance has not been questioned. Under this proposed regulation, if "one or more" water suppliers have not satisfied the Council, it claims the right to consider that factor in deciding whether to halt delivery of any of that water to all of the entities sharing that supply. Not only is this assertion of power untenable and not supported by the language of the statute or its legislative history, it also is invalid and ineffective under Government Code section 11342.2.	A, Ne	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. We disagree with the comment that section 5003 of the adopted regulation does not fall within the scope of the Council's regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information. We disagree with the comment that section 5003 goes beyond the authority provided by Water Code section 85021. Section 5003 is based upon multiple statutory authorities in the Delta Reform Act, including, but not limited to, Water Code section 85021. The comment misconstrues the authority of the Council to review the Urban and Agricultural Water Management Plans. As specified in Subsection 5003 (c) (1) (A), water suppliers must have completed Plans which have been reviewed by the Department of Water Resources for compliance with applicable laws. Further, the comment misconstrues the provisions of section 5003. This section does not provide the Council with discretion to review or judge local water management decisions (see Subsection (c)(1)(A). The provisions of section 5003 are reasonable. If water suppliers share the same wholesale resource for imported water, and some suppliers have not complied with the provisions of section 5003, the proposed covered action would only be deemed inconsistent with the regulation if the failure of those suppliers to comply significantly caused the need for the action *and* the proposed action would have a significant adverse impact on the Delta (see section 5003(a), emphasis added). With respect to comments related to water rights, nothing in section 5003 improperly infringes on the water rights and statutory priorities of diverters and other areas of origin. Please see Master Response 8 for additional information. Further, nothing in section 5003 expands or otherwise alters the existing authority of the State Water Resources Control Board to regulate the diversion and use or water or the courts' existing concurrent jurisdiction over California water rights. Please see Master Response 9 for more information.

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79. Save the California Delta Alliance	1/14/2013	Regs 5005, 5014: The Conveyance Regulatory Framework Should Be As Specific As the Levee Regulatory Framework. Proposed ¤ 5014, dealing with Levees is highly specific and one can tell that the Council means business about getting something done and specifying the standards for future actions. The Council knows how to promulgate a regulation with concrete standards to guide future actions. We respectfully request that the same rigor be brought to regulations specifying conveyance requirements. II. Other Comments. § 5005(e)(1) add the following after subparagraph (C); "(D) "No later than January 1, 2020, demonstrated an actual significant reduction in the amount of water used, or in the percentage of water used, from the Delta." § 5005(e)(2): Add the following: "projects designed to take advantage of abundant water available at times of peak flows by capturing and transporting peak flows and storing transported water in depleted groundwater aquifers for beneficial use at times of scarcity."	DP	We disagree with proposed changes to section 5003 of the adopted regulation. The current language appropriately addresses the requirements of the Delta Reform Act.
80. Solano County Department of Resource Management	1/14/2013	In carrying out this section and Water Code section 85021, it would behoove the Delta Stewardship Council to recognize the unique circumstances of in-Delta users. In terms of the ability to reduce reliance on the Delta in meeting future water needs, there is a marked difference between the export community and riparian in-Delta users, both in terms of the ability to use other water sources and the feasibility of investing in water-saving measures.	DP	The Council recognizes that some water suppliers, such as those located in the Delta, will have fewer options for actions to reduce their reliance on the Delta and to improve regional self-reliance. Section 5003 of the adopted regulation requires that each water supplier identify, evaluate and commence implementation of those measures which will reduce reliance on the Delta that are locally cost effective and technically feasible.
81. Three Valleys Municipal Water District	1/8/2013	Regulatory Authority: The Delta Plan should clearly state its goals to encourage statewide water use efficiency and avoid utilizing language that could be misinterpreted to regulate local water management decisions outside of the Delta through the covered action review process. In the current draft Delta Plan, policy WR P1, the Council gives itself the discretion to review and judge local water management decisions outside the legally defined Delta, inappropriately expanding the role of the Council beyond that outlined in statute and subjecting local agencies to an additional and potentially burdensome review process, without regard to their water stewardship practices. As currently drafted, the Delta Plan may penalize responsible agencies for the failings of other neighboring districts simply because they share the same wholesale resource for imported water. We appreciate assurances from Council members that they want this discretion only to address alleged "bad actors", but as an agency that has been successful in advancing local water supply reliability through investments in conservation, water supply projects and other management practices, we object to this proposed policy as currently expressed.	A	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. We disagree with the comment that section 5003 of the adopted regulation does not fall within the scope of the Council's regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information on the Council's authority to consider out-of-Delta actions when regulating in-Delta actions. Further, the comment misconstrues the provisions of section 5003. This section does not provide the Council with discretion to review or judge local water management decisions, nor does it require a burdensome review process. If water suppliers share the same wholesale resource for imported water, and some suppliers have not complied with the provisions of section 5003, the proposed covered action would only be deemed inconsistent with the regulation if the failure of those suppliers to comply significantly caused the need for the action *and* the proposed action would have a significant adverse impact on the Delta (see section 5003(a), emphasis added). Please note the Council has revised the language of section 5003 to further simply and clarify the provisions of section 5003.

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82. Tulare Lake Basin Water Storage District	1/11/2013	Policies must fall within the Council's legal authority. The Delta Plan should clearly state its goals to encourage statewide water use efficiency and avoid using language that could be misinterpreted to regulate local water management decisions outside of the Delta through the covered action review process. In the current draft Delta Plan, policy WR P1, the Council gives itself the discretion to review and judge local water management decisions outside the legally-defined Delta, inappropriately expanding the role of the Council beyond that outlined in statute and subjecting local agencies to an additional and potentially burdensome review process, irrespective of their water stewardship practices. We appreciate the verbal assurances from Council members that they want this discretion only to address alleged "bad actors", but the 2009 Delta Reform Act did not give the Council the jurisdiction to review and judge local water management decisions outside of the Delta. As an agency that has been successful in advancing local water supply reliability through investments in conservation and recycling, among other water management practices, we object to this proposed policy.	A	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. We disagree with the comment that section 5003 of the adopted regulation does not fall within the scope of the Council's regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information. Further, the comment misconstrues the provisions of section 5003. This section does not provide the Council with discretion to review or judge local water management decisions, nor does it subject local agencies to a potentially additional and burdensome review process. Please note that section 5003 has been revised to further clarify the language.
83. Tuolumne Utilities District	1/3/2013	Section 5005(a) Reduce Reliance on the Delta through Improved Regional Water Self-Reliance. Please change as follows: "The policy of the State of California is to reduce reliance on the Delta in meeting future water supply needs and that each region that depends on water from the Delta watershed shall improve its region self-reliance. Success in achieving the statewide policy of reduced reliance on the Delta and improving regional self reliance will be demonstrated through significant reduction in the amount of water used, or in the percentage of water used from the Delta watershed. <u>This will be done by improving, investing in, and implementing local and regional water supply projects[5], local 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. For the purposes of improving regional self-reliance water conservation is considered a new source of water supply, consistent with CWC §1011(a). Water so saved through these projects and programs counts as a new source of supply as this water would have been needed to meet future demand. Thus, even if water use is increasing as a result of economic or population growth, a water supplier can demonstrate that its water use is more efficient and is contributing to reduced reliance on the Delta and improved regional self-reliance.[6]</u> It is important that there is clarity within Section 5005 regarding the subject of reduced reliance on the Delta and improved regional self-reliance. Section 5005 should be consistent with CWC §85021 and the Final Draft Delta Plan. [5] Taken directly from CWC §85021. [6] Delta Stewardship Council Final Draft Plan, Appendix P, page P-2, lines 30-35.	Ct, DP	The Council has modified the language of section <u>5003</u> by removing subsections <u>5003</u> (a) and 5003 (b), and adding a new subsection <u>5003</u> (c)(1)(C). Subsections (a) and (b) were removed because they are intent language and not part of the regulation imposed on covered actions. The added language in subsection (c) clarifies how the expected outcome for measureable reduction in Delta reliance and improvement in regional-self-reliance shall be reported in the water management plans. The language added in subsection (c) generally addresses the comment's recommended edits. The Council believes section 5003 is consistent with both the Final Draft Delta Plan and the Delta Reform Act, including Water Code section 85021.
84. Western Municipal Water District	1/9/2013	Regulatory Authority: The Delta Plan should clearly state its goals to encourage statewide water use efficiency and avoid utilizing language that could be misinterpreted to regulate local water management decisions outside of the Delta through the covered action review process. In the current draft Delta Plan, policy WR P1, the Council gives itself the discretion to review and judge local water management decisions outside the legally-defined Delta, inappropriately expanding the role of the Council beyond that outlined in statute and subjecting local agencies to an additional and potentially burdensome review process, irrespective of their water stewardship	A	The Council has the authority to include a regulatory component in the Delta Plan. The Delta Reform Act requires the Council to adopt a "legally enforceable Delta Plan" that seeks to achieve the coequal goals. See Master Response 1 for more information on the Council's regulatory authority. We disagree with the comment that section 5003 of the adopted regulation does not fall within the scope of the Council's regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation

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		practices. As currently drafted, the Delta Plan may penalize responsible agencies for the failings of other neighboring districts simply because they share the same wholesale resource for imported water. We appreciate assurances from Council members that they want this discretion only to address alleged "bad actors", but as an agency that has been successful in advancing local water supply reliability through investments in conservation and recycling, among other water management practices, we object to this proposed policy as currently expressed.		and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action in the Delta. See Master Response 4 for more information on the Council's authority to consider out-of-Delta actions when regulating in-Delta actions. Further, the comment misconstrues the provisions of section 5003. This section does not provide the Council with discretion to review or judge local water management decisions, nor does it require a burdensome review process. If water suppliers share the same wholesale resource for imported water, and some suppliers have not complied with the provisions of section 5003, the proposed covered action would only be deemed inconsistent with the regulation if the failure of those suppliers to comply significantly caused the need for the action *and* the proposed action would have a significant adverse impact on the Delta (see section 5003(a), emphasis added). Please note the Council has revised the language of section 5003 to further simply and clarify the provisions of section 5003.
85. Yolo County, Office of the County Counsel	1/14/2013	The County concurs with and incorporates by reference the comments of San Joaquin County on Section 5005 of the proposed regulations.	O	Comment noted. See responses to San Joaquin County

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1.1 California Water Research	1/24/2013	There are substantial deficiencies in this section of the proposed rules, which were noted by Jared Huffman, Chair of the Assembly Water, Parks, and Wildlife Committee. Subsection c,d, and e of Section 5005 state: (c) 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 (e); (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. (d) For purposes of Water Code Section 85057.5(a)(3) and Section 5003(a)(5) of this Chapter, this policy covers a proposed action to export water from, transfer water through, or use water in the Delta. (e)(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 which has been reviewed by the 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 management plan, of all programs and projects 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.	DP	We disagree with the commentator's assertions that this section is insufficient to meet the Delta Policy of CWC 85021. Section ~~5005(e)~~ 5003(c) has been modified and now includes language taken directly from 85021. The new language reads: (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

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		Sections(c-e) are not sufficient to ensure that water agencies using water exported from, or transferred through the Delta meet the mandate of the Delta Reform Act to reduce reliance on the Delta: 85021. The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation, and water use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects, and improved regional coordination of local [emphasis added]		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.
2.1 California Water Research	1/24/2013	With respect to subsection (A) of section (e)(1), the Urban Water Management Plans approved by the Department of Water Resources do not necessarily reduce reliance on Delta exports. They may only reduce per-capita use, or reduce use from an artificial baseline, which may project usage if current plumbing codes and tiered water rates were not in effect.1 (footnote: 1See, for example, Metropolitan Water District's 2010 Regional Urban Water Management Plan. Available at http://mwdh2o.com/mwdh2o/pages/yourwater/RUWMP/RUWMP_2010.pdf Incorporated by reference.) Agricultural Water Management Plans may not take into account actual water deliveries, but may assume 100% of contracted water deliveries, which has occurred in very few years since 1990. 2 (footnote: 2 See, for example, Westlands Water District's 2007 Agricultural Water Management Plan. Available at http://www.westlandswater.org/long%5C201002%5Cwmp_2007.pdf Incorporated by reference.)	DP	The final version of Section 5003(c)(1)(C) provides that "…(T)he 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)." The Council in its discretion believes this to be an appropriate way of dealing with the matter of reducing reliance on the Delta.
3.1 California Water Research	1/24/2013	Subsection (B) only requires implementation of projects which are "locally cost-effective." Water conservation, water recycling, and alternative supply projects such as brackish groundwater desalination may not be "locally cost effective" when compared with subsidized water exports from the Delta, but are necessary to reduce reliance on the Delta in accordance with state policy as mandated in SB 7x1. SB 7x1 does NOT state that "it is the policy of the state of California to reduce reliance on the Delta ... to the extent that it is locally cost-effective." The requirement to reduce reliance on the Delta is absolute, and should be compared to the mandate to increase California's portfolio of renewable energy in the state. Just as expanding California's portfolio of renewable energy reduces reliance on fossil fuels, expanding California's water supply portfolio reduces reliance on the Delta and helps ensure a reliable water supply in the face of future droughts and reductions in climate change.3 (footnote: 3 See "Incorporating Drought Risk from Climate Change Into California Water Planning", California Water Research, August 2012. Available at http://www.scribd.com/doc/102969559/Incorporating-Drought-Risk-Into¬California-Water-Planning Incorporated by reference.)	DP	The Council has modified Section ~~5005~~ 5003 of the adopted regulation. Subsections ~~5005(a)~~ 5003(a) and ~~5005(b)~~ 5003 (b) have been removed and a new subsection 5003 (c)(1)(C) has been added. The concept of "locally cost effective and technically feasible" is borrowed from SBX7_7 (Statutes of 2009, Wat. Code Division 6, Parts 2.55 and 2.8). These parts allow water suppliers to only consider water conservation and/or demand management measures that meet these criteria in their Water Management Plans. The Council in its discretion determined that its regulations should reflect other statutory provisions.
4.1 California Water Research	1/24/2013	Subsection (C) improperly delegates the role of the Council in setting metrics for reduced reliance on the Delta, and may result in metrics which only measure reduction in per-capita use, or reduction from artificial baselines, which do not meet the mandates of SB7x1.	DP	The final version of Section 5003(c)(1)(C) provides that "(T)he expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance shall be reported in the (Agricultural or Urban Water Management) 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)". Per capita water use is not a metric used in the regulation. The Council in its discretion determined that either a reduction in the amount of water used, or the percentage of water used from the Delta watershed is an appropriate way to measure reduction in Delta reliance and improvement in regional self-reliance. These are to be included in water management plans, as described in the cited paragraph, to ensure that data are available to measure whether the expected outcome is being realized.

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5.1	California Water Research	1/24/2013	With respect to section 5005(c-e), Assemblymember Jared Huffman made it clear that the legislative intent was to absolutely reduce reliance on the Delta: [Referenced Letter as Attachment?] (Footnote 4 : 4 Letter read by Tina Cannon Leahy, Principal Consultant for the Assembly Water, Parks & Wildlife Committee, into the record at the Delta Stewardship Council meeting, June 2012.) Section 5005 must be revised to ensure that it is in conformance with state policy as expressed in SB7x1.	DP	We disagree with the comment that asserts this regulatory policy is not in conformance with SBX7 1. The Council believes Section ~~5005~~ 5003 fully complies with CWC Sections 85211, 85302(d) and 85303 which provide direction on measures that must be included in the Delta Plan.
6.1	Environmental Water Caucus	1/24/2013	Reduced Reliance on the Delta (Section 5005). Throughout the Proposed Regulation, but particularly in regard to reducing reliance on the Delta, a lack of measurable results, meaningful performance measures, undermine the legitimacy of consistency determinations within the Delta Plan. Without quantifiable assessments in the consistency determinations, the plan will not be legally enforceable. If a project does not make a quantifiable improvement in achieving the co-equal goals, then it should not receive a consistency determination.	O	The final version of Section 5003(c)(1)(C) provides that "(T)he expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance shall be reported in the (Agricultural or Urban Water Management) 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)". The Council in its discretion determined that either a reduction in the amount of water used, or the percentage of water used from the Delta watershed is an appropriate way to measure reduction in Delta reliance and improvement in regional self-reliance. These are to be included in water management plans, as described in the cited paragraph, to ensure that data are available to measure whether the expected outcome is being realized. The Council in its discretion decided not to require a project proponent to show that there has been a specified reduction for every covered action. Rather, in an effort to make this policy workable, it builds upon and expands existing requirements concerning Agricultural and Urban Water Management Plans.
7.1	Environmental Water Caucus	1/24/2013	Violations Of CEQA And Public Trust Doctrine (Section 5005(E). The Regulations including calling for "improve Delta conveyance and operations", and "optimize diversions in wet years. . ." cannot be lawfully adopted because there has been failure to comply with CEOA for all the reasons set forth in our comments pertaining to the Recirculated PE1R, The Regulations calling for improved - meaning new - conveyance also cannot be lawfully adopted because there has been failure to perform cost benefit and public trust doctrine analysis to ensure protection of the Delta.	O	The proposed regulation does not mandate that the State improve conveyance or optimize diversions in wet years - those phrases are included in the definition of achieving the coequal goals and are among a number of mechanisms that the State could use to achieve "the coequal goal of providing a more reliable water supply for California" (5001(h)(1)). The Council has complied with CEQA and has completed and lawfully certified its PEIR on May 16, 2013. The Council's regulations—as well as the Delta Reform Act itself—do, in part, reflect the public trust doctrine. The Council does not, however, agree that the Delta Reform Act requires the Council to adopt a regulation mandating that agencies engage in a "cost benefit and public trust doctrine analysis" before proceeding with a covered action.
8.1	Individual (Public Hearing Transcript 1/11/13: pg. 63 lines 15-22) RCRC: Kathy Mannion	1/11/2013	Another example is section 5005, which is to reduce reliance on the Delta through approved regional water self-reliance. We've looked at that, we're recommending that sections 505 A and B of the proposed regulations be deleted. We found that 505 C, D and E and section 505-2 are germane from within the scope of the council's regulatory authority. So we propose the changes there.	A, O	The Council has modified the language of Section 5003 by removing subsections 5003 (a) and 5003 (b), and adding a new subsection 5003 (c)(1)(C). The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance on the Delta and improved regional self-reliance. The removed language describes the performance measures by which the effectiveness of the actions taken by water suppliers to achieve the policy of reducing reliance on the delta and improving regional self-reliance will be evaluated over the time. The added language clarifies how the expected outcome for measureable reduction in Delta reliance and improvement in regional-self-reliance shall be reported in the water management plans. We believe this sufficiently clarifies the intent of this section.
9.1	Local Agencies of the North Delta	1/24/2013	§ 5005 Reduced Reliance on the Delta through Improved Regional Self Reliance – As is the case with WR P1 and as described more fully in previous comments, it is still not clear exactly how water suppliers within the Delta are expected to show reduced reliance since no other water	Ct	The Council recognizes that some water suppliers, such as those located in the Delta, will have fewer options for actions to reduce their reliance on the Delta and to improve regional self-reliance. Section 5003 of the adopted regulation requires that each water supplier identify,

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		supplies are available besides Delta water. Moreover, water suppliers for agencies serving less than 25,000 acres must have a clear pathway to compliance other than preparing the water management plans from which they are specifically exempted in Water Code section 10853.		evaluate and commence implementation of those measures which will reduce reliance on the Delta that is locally cost effective and technically feasible. The exemption referred to by the commenter is included in the definitions of "agricultural water supplier" in section 5001(c), and "water supplier" in section 5001(ii).
10.1 Local Agencies of the North Delta	1/24/2013	Moreover, as mentioned above, proposed section 5005 does not provide a clear pathway for compliance with the provisions for agencies otherwise exempted from preparation of water management plans due to their size under Water Code section 10853. For those agencies that are not, due to their size, required to prepare agricultural water management plans, it is incorrect for the Cost Analysis to assume that no additional costs would be incurred as a result of implementing section 5005. The lack of guidance for in-Delta water uses that might be covered actions in the future makes such costs even higher than they might otherwise be.	E	The definitions of "agricultural water supplier," "urban water supplier" and "water supplier" (Section 5001(c), 5001(hh) and 5001(ii), respectively) provide minimum criteria for acreage, number of service connections, etc. that would exclude private farms and small water districts. The exemption referred to by the commenter is included in the definition of agricultural water supplier in sections 5001(c) and 5001(ii). Those sections exempt agricultural water suppliers serving less than a threshold of irrigated acreage, consistent with Water Code sections 10608.12 and 10853. Only agricultural water suppliers as defined are subject to this section, so suppliers that are not subject, including those that fall below the threshold irrigated acreage, were not and did not need to be considered in the Cost Analysis. Note also that section 5003 (~~5005~~) was revised in response to comments.

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1. California Department of Water Resources	1/14/2013	5006. Improved Transparency in Water Contracting. This Section states that the "contracting process for water from the State Water Project (SWP) and/or the Central Valley Project (CVP) must be done in a publicly transparent manner consistent with applicable polices of the Department of Water Resources and the Bureau of Reclamation" referenced in the section. DWR appreciates the changes that have been made to this policy to help clarify its application. The policies referenced with regard to DWR include language that requires negotiation in public on major amendments to or permanent transfers of Table A water with regard to DWR's long term water supply contracts. DWR understands that the policy does not create any new requirements with regard to public review and that it does not apply to other kinds of contracts. Changing the title to "Continued Transparency in Water Contracting" would help in making this understanding clearer. This is consistent with the determination in the Costs Analysis (pages 13-14) that this section does not involve any increased costs because the contracting agencies are already following established procedures.	Ct	The Council agrees with this comment, and has changed the title of the Regulation to "Transparency in Water Contracting." This should clarify that the Council is not proposing new requirements and is only seeking implementation of the existing SWP and CVP Transparency policies.
2. Contra Costa Water District	1/14/2013	Section 5006 -- Improved Transparency in Water Contracting. The purpose of this section is not clear. The statement of reasons indicates that the "lack of accurate, timely, consistent, and transparent information on the management of California's water supplies and beneficial uses is a significant impediment to the achievement of the coequal goals." It is not clear how a new regulation requiring that DWR and Reclamation follow their existing policies for a transparent contracting process will improve transparency. There is no evidence that the existing policies are not being followed. Additionally, it is not clear that DSC has any authority to compel enforcement of the regulations and policies if they were not being implemented. This section is not necessary and should be deleted.	A, Ct	The Council disagrees with this comment. In the past decade, both CVP and SWP have adopted new or modified policies relating to transparency and public participation in decisions on state and federal water contracts. The Council fully supports these measures. To be consistent with the Delta Plan, approval of new or modified contracts that are covered actions must have taken place through administrative decision-making processes that are consistent with these policies. The purpose of the regulation is to provide the Council with the ability to assure compliance with these policies, and to provide an additional consequence for those who fail to comply.
3. East Bay Municipal Utility District	1/14/2013	Section 5006. Improved Transparency in Water Contracting — The provisions in Section 5006(a)-(b) are duplicative, unnecessary, and unclear. The statement of reasons indicates that the "lack of accurate, timely, consistent, and transparent information on the management of California's water supplies and beneficial uses is a significant impediment to the achievement of the coequal goals." However, the solution proposed by the regulatory language is to reiterate existing state and federal policies and regulations that arc enforced by other agencies. Furthermore, the regulatory package provides no documentation or evidence suggesting that the existing state and federal polices and regulations are not currently being enforced. As such, this entire section appears inconsistent with both the standards of necessity and nonduplication. This section is not necessary, as there is no evidence that the existing policies and regulations are not currently being implemented and enforced, and it is also not clear that these policies and regulations, or the statutes pursuant to which they were adopted, can be enforced by the DSC.	Ne, Du	The Council disagrees with this comment. In the past decade, both CVP and SWP have adopted new or modified policies relating to transparency and public participation in decisions on state and federal water contracts. The Council fully supports these measures. To be consistent with the Delta Plan, approval of new or modified contracts that are covered actions must have taken place through administrative decision-making processes that are consistent with these policies. The purpose of the regulation is to provide the Council with the ability to assure compliance with these policies, and to provide an additional consequence for those who fail to comply.

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4. Environmental Water Caucus	1/14/2013	(§ 5006) Transparency in Water Contracting. This section calls for "improved transparency in water contracting." However, the stated requirements of this section only mandate compliance with already-existing requirements for contracting for water with the state Department of Water Resources and the Bureau of Recreation. The usefulness of this provision can be expressed as follows: if the DWR or USBR assert that a project meets their respective transparency measures, could the Council nonetheless declare an action inconsistent with the Plan on these grounds? On the one hand, there is no measure of "improvement" in achieving the status quo. But on the other hand, none of the statutory provisions cited by the Proposed Regulation actually discuss transparency in water contracting. The purpose of this provision is unclear and should either be strengthened or removed.	Ne	The Council disagrees with this comment. In the past decade, both CVP and SWP have adopted new or modified policies relating to transparency and public participation in decisions on state and federal water contracts. The Council fully supports these measures. To be consistent with the Delta Plan, approval of new or modified contracts that are covered actions must have taken place through administrative decision-making processes that are consistent with these policies. The purpose of the regulation is to provide the Council with the ability to assure compliance with these policies, and to provide an additional consequence for those who fail to comply. Given the additional consequence, the regulation is not redundant.
5. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Section 5006 Includes an Unauthorized Assertion of Regulatory Authority over State and Federal Water Contracting Section 5006: The Proposed Regulations require "improved transparency in water contracting." The Council does not have the statutory authority to impose that requirement merely because it is based on a Council determination that water contracting is a "covered action." While the Delta Reform Act authorizes the Council to review on appeal whether a covered action is consistent with the Delta Plan, it has no role in the initial determination whether a proposed action is a "covered action." As described above, early language had proposed to give the Counsel a direct role, but the Legislature declined to do so as reflected in the Act. The Council recognizes this at page 54 of the Delta Plan—"The state or local agency. . . determines whether the proposed plan, program or project is a covered action . . ." Nevertheless, Section 5006(b) appears to be an attempt to administratively declare that the Department of Water Resources' and U.S. Bureau of Reclamation's administration of their contracts are covered actions. The Legislature, however, has explicitly provided otherwise by excluding routine operations of the SWP and CVP—which includes routine execution and amendment of a water supply contract—in Water Code Section 85057(b)(2). The Delta Reform Act does not authorize the Council to regulate the contract renewal process, and its attempt to do so is inconsistent with the Delta Reform Act. In addition, any attempt by the Council to alter or amend those contracting policies would be inconsistent with supremacy principles under federal law, which governs the contracting process for water supplied by the Central Valley Project; the Burns-Porter Act (see, e.g., Wat. Code § 12937), which governs the State Water Project; and the Delta Reform Act savings clause (including the provision that nothing in the Act affects the Burns-Porter Act). (Wat. Code, § 85032(e).) For the foregoing reasons, Section 5006 should be removed from the Proposed Regulations.	A, Co, Du	The Council disagrees with the comment's assertion that section ~~5006~~ 5004 is an attempt to administratively declare that the administration of water contracts by DWR or the Bureau of Reclamation are covered actions. To be a covered action, the proposed activity must meet the definition of a covered action, as described in Water Code section 85057.5 and in section ~~5003~~ 5001(j) of these regulations. It is likely that not all water contracting activities will meet the criteria. Water Code section 85057.5(b)(2), for example, excludes the "[r]outine maintenance and operation of the State Water Project or the federal Central Valley Project." Therefore, those actions are not covered by the adopted regulations. In contrast, actions concerning one or both of those projects that are either not routine, or not maintenance and operation, are potentially covered actions if they meet other statutory criteria. The Council has consistency review authority, on appeal, over those water contracting activities that will have a significant impact on the coequal goals and meet the other criteria of a covered action. The Council is not asserting jurisdiction over the Bureau of Reclamation. However, some Bureau contracts may be with local agencies. Those local agencies must determine if the water contracting activity is a covered action and, if necessary, file a certification of consistency. The Council disagrees this regulation is inconsistent with the supremacy principal. The commenter does not explain why it is inconsistent with "supremacy principles under federal law" and the "Burns-Porter Act." As to the federal assertion, to the extent that the commenter suggest that the Council lacks authority over federal agencies, it is only correct for the near term. The Delta Reform Act directs the Council to adopt a Delta Plan that will eventually be able to have regulatory authority over federal agencies. (See last paragraph in Master Response 7 for a more detailed explanation of this point.) Once that compliance mechanism is in place, the Delta Plan will be enforceable as to federal agencies. As to inconsistency with the Bern-Porter Act, the commenter only cites Water Code section 12937 as an example of a problematic section of that Act. That section provides that the Legislature shall not impair certain water contracts. We do not see how it applies to section 5004. Section 5004 does not impair contracts. By its terms, it does not apply to existing contracts, but only to proposals to amend or enter into a new contract. Section 5004 only requires that certain future contracts and amendments adhere to Department of Water Resources policies that require transparency.

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6. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Section 5006: In the Initial Statement of Reasons, the Council asserts that section 5006 is intended to remedy the "lack of accurate, timely, consistent, and transparent information on the management of California's water supplies and beneficial uses" through "improved public involvement and transparency in decision making processes by enforcing . . . existing contracting policies within the [DWR] and the Bureau of Reclamation." (Initial Statement of Reasons at p. 5.) However, the requirement in the Proposed Regulation of "improved transparency in water contracting" is redundant of existing policies, as shown in the Council's own appendices. The specific language merely requires the Department of Water Resources and U.S. Bureau of Reclamation to follow contracting policies that each has developed and is currently utilizing. There is no need for the requirement.	Ne, Du, S	In the past decade, both CVP and SWP have adopted new or modified policies relating to transparency and public participation in decisions on state and federal water contracts. The Council fully supports these measures. To be consistent with the Delta Plan, approval of new or modified contracts must have taken place through administrative decision-making processes that are consistent with these policies. The purpose of the regulation is to provide the Council with the ability to assure compliance with these policies, and to provide an additional consequence for those who fail to comply. Given the additional consequence, the regulation is not redundant.
7. San Joaquin County Board of Supervisors	1/14/2013	Section 5005(b)(5), contains vague and confusing language that requires the local agency to include in the certification of consistency a certification that the covered action complies with all applicable laws regarding water resources, biological resources, flood risk, and land use and planning. Based upon this language, it appears that the Department will be responsible for enforcement of measures required to make findings of consistency upon which to base the certification of consistency. It would then follow that such measures would need to be incorporated into project approval, prior to certification, so that they can be enforced. In order to do this, the best available science will need to be done prior to project approval, so that measures ensuring consistency can be identified during the CEQA process, and incorporated into project approval. Accordingly, the expense of "best available science" will be incurred by the applicant before the applicant even has an approved project.	DP, E	**Comment is on <u>section 5002(b)(5)</u>.** The Council has removed 5002 (b)(5).
8. United States Department of the Interior Bureau of Reclamation, Mid-Pacific Region Bay-Delta Office	1/14/2013	The second area of comment is in section 5006, Improved Transparency in Water Contracting. The proposed regulations cite two Federal laws, the Central Valley Project Improvement Act and the Reclamation Reform Act. However, Rules and Regulations — Code of Federal Regulations, Part 426 — Acreage Limitations Rules and Regulations, have already been issued on Public Law (P.L.) 97-293 and these rules do address section 226 of the law. Additionally, the Central Valley Project Improvement Act has already been amended by the Consolidated Appropriations Act of 2012, P.L. 112-74. Reclamation proposes the following minor changes (in italics) to acknowledge what has already occurred and provide a mechanism for future Congressional or Department of the Interior actions without conflicting or amending your proposed regulations. Section 5006 (a) The contracting process for water from the State Water Project (SWP) and/or the Central Valley Project (CVP) must be done in a publicly transparent manner consistent with applicable policies of the Department of Water Resources and the Bureau of Reclamation referenced below. (b) For the purposes of Water Code section 8507.5(a) (3) and Section 5003(a) (5) of this Chapter, this policy covers the following: (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 P.L. 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.	Co	The Council will make the suggested changes to the regulation.

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ADOPTED REGULATION: SECTION 5005 ~~5007~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Calaveras County Water District	1/4/2013	Section 5007(a & b) Update Delta Flow Objectives. Please change as follows: "Section 5007(a)(1) The SWRCB should update the Bay-Delta Water Quality Control Plan immediately following the completion of the Bay Delta Conservation Plan. Flow objectives to protect identified beneficial uses consistent with CWC §13000 et seq." "(2) Flow objectives should be established and implemented consistent with the coequal goals. Until the SWRCB has completed the Water Quality Control Plan update, existing water rights flow requirements shall constitute compliance with the Delta Plan." (1) "By June 2, 2014 adopt and implement updated flow objectives for the Delta that are necessary to achieve the coequal goals; (2) By June 2, 2018, adopt and as soon as reasonably possible, implement flow objectives for high priority tributaries in the Delta watershed that are necessary to achieve the coequal goals; and, (3) For the purposes of paragraph 2, the State Water Resources Control Board staff will work with the Delta Stewardship Council and the Department of Fish and Game to determine priority streams. As an example, priority streams could include the Merced River, Tuolumne River, Stanislaus River, Lower San Joaquin River, Deer Creek (tributary to Sacramento River), Lower Butte Creek, Mill Creek (tributary to Sacramento River), Consumnes River, and American River. (b) Flow objectives could be implemented through several mechanisms including negotiation and settlement, Federal Energy Regulatory Commission (FERC) relicensing, or water rights hearing. Implementation through water rights hearings or FERC relicensing is expected to take longer than negotiation and settlement. Than the deadlines listed in paragraphs (1) and (2) of subsection (a). Prior to the establishment of revised flow objectives as described in subsection (a) and (b) the existing Bay Delta Water Quality Control Plan flow objectives shall be used to determine consistency with the Delta Plan. After flow objectives are revised, the revised flow objectives shall be used to determine consistency with the Delta Plan. (d) For the purposes of Water Code Section 85057(a)(3) and Section 5003(a)(5) of this Chapter, the policy set forth in Section 5007(a)(2) subsection (c) covers applies to a covered action. that could affect flow in the Delta."	DP	Section 5005 ~~5007~~ (a)(1) - Update of the Bay Delta Water Quality Control Plan (BDWQCP) and revision of the requisite flow objectives should not be delayed until after BDCP. The Delta Stewardship Council supports the recommended 2014 and 2018 adoption dates for updates to the BDWQCP. Updated flow objectives will allow federal, state and local agencies to make fully informed decisions on such things as potential amendments to the Council's Delta Plan; successful completion of the BDCP, adoption and implementation of the Central Valley Flood Plan, and many more. The proposed process for adaptive management of the Delta Plan contemplates that ongoing changes to the Delta Plan will be required for a variety of reasons; including regulatory processes and decisions by other agencies. However, because 5005 ~~5007~~ (a)(1) is a recommendation and nonregulatory in nature, it has been deleted from 5005 ~~5007~~ and has been retained as a recommendation in the Delta Plan. Section 5005 ~~5007~~ (a)(2) - Prior to the BDWQCP Update, the existing flow objectives should be used, not water rights flow requirements. Existing water rights provide authority to divert and use water under certain conditions and are subject to a number of laws and limitations. Water Right diversion amounts or any included bypass requirements are not equivalent to flow objectives, and should not be a substitute for lawfully adopted flow objectives. However, because 5005 ~~5007~~ (a)(2) is a recommendation and nonregulatory in nature, it has been deleted from 5005 ~~5007~~ and has been retained as a recommendation in the Delta Plan. Section 5005 ~~5007~~ (b~~d~~) - Changing "covers a proposed action" to "applies to a covered action" presents a circular logic. For a proposed project to be a covered action, it must the criteria in Water Code section 85057(a)(3) and section 5001 ~~5003~~ of this Chapter. This includes section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, which specifies that a covered action is one that is "covered by … one or more of the regulatory policies contained in Article 3." Section 5005 ~~5007~~ is one such regulatory policy.
2. California Central Valley Flood Control Association	1/14/2013	Section 5007 – Update Delta Flood Objectives. This section includes a "recommendation" by the Council of an action for another state agency to take and is therefore not appropriate as a regulation. In addition, there is no statutory authority or directive for the SWRCB to "work with the Delta Stewardship Council" and "to determine priority streams" as proposed in this regulatory provision.	A	The commenter asserts that portions of Section 5005 ~~5007~~ are permissive and not directory, and are essentially recommendations for action by another agency that are not appropriate to include as a regulation. They also assert that the Council does not have authority to direct Water Board processes or activities. Sections (a) and (b) were deleted from the adopted regulations. They are now only in the Delta Plan as a recommendation. Proposed section 5005 ~~5007~~ (c) has been changed to: (~~c~~a) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan.
3. California Department of Water Resources	1/14/2013	5007. Update Delta Flow Objectives. This Section states that "Development, implementation, and enforcement of new and updated flow objectives for the Delta and high priority tributaries are key to the achievement of the coequal goals. The State Water Resources Control Board should update the Bay-Delta Water	O	Comment noted. There is no clear proposal here, other than to suggest that the Water Board consider factors they are already required to consider in revising the BDWQCP.

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		Quality Control Plan objectives as follows" and then sets dates for the Delta and high priority tributaries in the Delta watershed. As we have pointed out in our second comment, the regulations should not be viewed in isolation The Delta Reform Act contemplates looking at issues comprehensively and in a way that moves forward in solving them concurrently and consistent with other laws governing other agencies considering whether and how they can advance the coequal goals and multiple objectives of the Delta Reform Act. With regard to protecting, restoring, and enhancing the Delta ecosystem, this policy must also be read in context with the legislative goals and objectives contained in the rest o the Delta Reform Act and with the statutory duty of the SWRCB to consider and balance all beneficial uses and to update all the Delta water quality objectives. This approach would appear t be consistent with the Delta Stewardship Council's recommendation to the State Water Resources Control Board that "any proposed changes to the existing water quality objectives and their alternatives should be considered as part of a holistic comprehensive analysis that considers all th factors that are having significant adverse impacts on the Delta ecosystem. The State Water Boar should investigate the interrelationships between these factors in an effort to create innovative approaches to advance the coequal goals though its revisions to the Bay-Delta Plan."		
4. California Farm Bureau Federation	1/14/2013	Proposed section 5007 declares that the State Water Resources Control Board "should" update Delta Water Quality Control Plan objectives for the Bay-Delta by June 2, 2014, and for "high-priority tributaries" in the Delta watershed by June 2, 2018. The proposed regulation likewise observes that, if the State Water Resources Control Board indeed undertakes to set the mentioned flow objectives, this "could be implemented through several mechanisms including negotiation and settlement, Federal Energy Regulatory Commission ("FERC") relicensing, or water rights hearing[s]," whereas "[i]mplementation through water rights hearings or [a] FERC relicensing is expected to take longer than the [mentioned] deadlines." The Council's selection of the word permissive "should," rather than mandatory "shall" is a prudent choice, as to use the word "shall" would result in fundamental inconsistency with sections 85031, 85032, 85057.5(b)(1), and 85057.5(c).	Co	The commenter asserts that portions of section 5005 ~~5007~~ are permissive and not directory, and are essentially recommendations for action by another agency that are not appropriate to include as a regulation. Sections (a) and (b) were deleted from the adopted regulations. They are now only in the Delta Plan as a recommendation. Proposed section 5005 ~~5007~~ (c) has been changed to: (~~c~~a) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan.
5. Central Delta Water Agency	1/14/2013	Section 5007. Update Delta Flow Objectives In compliance with the limitations contained in Water Code section 85031, the regulation must be revised to include the requirement that imposition of flow requirements must adhere to the water right and statutory priorities. Flow necessary for mitigation of harm caused by the SWP and CVP, and to meet salinity control in the Delta, and to meet the affirmative obligations of the Projects such as the SWP obligation to preserve fish and wildlife, and the CVP obligation to double the natural production of anadromous fish must be provided by the SWP and CVP.	DP	It is outside the Council's authority to require that the Water Board subject their decisions to "water right and statutory priorities." (section 85057.5(B)(1).) Additionally, subsequent implementation of the proposed flow objectives in the BDWQCP may necessitate changes to existing water rights, not the other way around.
6. City of Sacramento	1/14/2013	For example, the proposed regulations should be clarified by limiting the language of those regulations to straightforward regulatory requirements that the DSC is empowered to adopt absent any narrative statements about the "policy of the State," items that the Council "contemplates," and discussions of what "could" or "should" happen. Those are more appropriate to a narrative discussion in the Plan. One example of this is subsections (a) and (b) of Section 5007, which provide a narrative discussion of what the SWRCB "should" do to update flow objectives, and how objectives "could" be implemented. These provisions are not regulatory in nature, and as such are unnecessary and should be deleted.	Ne, Ct	The commenter asserts that portions of section 5005 ~~5007~~ are permissive and not directory, and are essentially recommendations for action by another agency that are not appropriate to include as a regulation. Sections (a) and (b) were deleted from the adopted regulations. They are now only in the Delta Plan as a recommendation. Proposed section 5005 ~~5007~~ has been changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan.

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				(b~~d~~) For purposes of Water Code section 85057.5(a)(3) and section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (a~~c~~) covers a proposed action that could significantly affect flow in the Delta.
7. City of Stockton	1/14/2013	Section 5007, subdivision (a), provides a "recommendation" to the SWRCB that it "should update the Bay-Delta Water Quality Control Plan objectives" within certain time frames. Subdivision (a) is unnecessary, as it simply provides a suggestion to another State agency.	Ne	The commenter asserts that portions of section 5005 ~~5007~~ are permissive and not directory, and are essentially recommendations for action by another agency that are not appropriate to include as a regulation. Sections (a) and (b) were deleted from the adopted regulations. They are now only in the Delta Plan as a recommendation. Proposed section 5005 ~~5007~~ has been changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan. (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (a~~c~~) covers a proposed action that could significantly affect flow in the Delta. Sections (a) and (b) were deleted from the adopted regulations. It is now only in the Delta Plan as a recommendation. Proposed section 5005 ~~5007~~ has been changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan. (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (a~~c~~) covers a proposed action that could significantly affect flow in the Delta.
8. City of Stockton	1/14/2013	Subdivision (d) provides that certain policies cover "a proposed action that could affect flow in the Delta." It is unclear, however, what is meant by "could affect flow." For example, the construction of a bridge abutment "could affect flow". The construction of a dam could also "affect flow," as could the diversion or discharge of water. It is entirely unclear what this regulation is intended on impacting. It is also unclear whether this regulation seeks to regulate activities that affect the timing, magnitude, quality, or frequency of flow. Section 5007 does not comply with the Clarity or Necessity standards in the APA.	Ct	The commenter asserts that use of the term "could affect flow" is unclear, as virtually any structure in the Delta could have even a minimal effect on flow. The intent is to clarify that covered actions must comply with the flow objectives in the current Bay Delta Water Quality Control Plan, and that this regulation is intended to address those projects that may impact those flow objectives. Section (d) has been changed as follows: (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (c) covers a proposed action that could significantly affect flow in the Delta.
9. Contra Costa Water District	1/14/2013	Section 5007 - Update Delta Flow Objectives - This section is not regulatory in nature, discusses existing regulations that are within another agency's jurisdiction and sets a timeline for the work of an agency over which DSC does not have control. Flow criteria is a critical element in the Delta Plan, but is not relevant to the rulemaking process and should be deleted here.	A, Ne	It is presumed that the commenter's reference to "flow criteria" is a mistake, and was intended to be "flow objectives." The commenter asserts that portions of section 5007 are permissive and not directory, and are essentially recommendations for action by another agency that are not appropriate to include as a regulation. Sections (a) and (b) were deleted from the adopted regulations. They are now only in the Delta Plan as a recommendation. Proposed section 5005 ~~5007~~ has been changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ The State Water Resources Control Board's Bay Delta Water Quality Control Plan flow

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				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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan. (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (a~~c~~) covers a proposed action that could significantly affect flow in the Delta.
10. East Bay Municipal Utility District	1/14/2013	Section 5007. Update Delta Flow Objectives - Section 5007(a), suggesting what the State Water Resources Control Board (SWRCB) "should" do with regard to the Bay-Delta Water Quality Plan and when it should do this is narrative and does not set forth a regulatory requirement. Section 5007(a) is unnecessary and should be deleted. Similarly, Section 5007(b) is a narrative discussion of how the SWRCB-established flow objectives "could" be implemented by other agencies, and is not regulatory in nature. This section is unnecessary and should be deleted.	Ne	The commenter asserts that portions of section 5005 ~~5007~~ are permissive and not directory, and are essentially recommendations for action by another agency that are not appropriate to include as a regulation. Sections (a) and (b) were deleted from the adopted regulations. They are now only in the Delta Plan as a recommendation. Proposed section 5005 ~~5007~~ has been changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan. (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and section 5001 ~~5003~~ (j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (a~~c~~) covers a proposed action that could significantly affect flow in the Delta.
11. El Dorado County Water Agency	1/14/2013	Section 5007(a & b) Update Delta Flow Objectives. Please change as follows: "Section 5007(a)(1) The SWRCB should update the Bay-Delta Water Quality Control Plan immediately following the completion of the Bay Delta Conservation Plan. Flow objectives to protect identified beneficial uses consistent with CWC §13000 et seq." "(2) Flow objectives should be established and implemented consistent with the coequal goals. Until the SWRCB has completed the Water Quality Control Plan update, existing water rights flow requirements shall constitute compliance with the Delta Plan." (1) "By June 2, 2014 adopt and implement updated flow objectives for the Delta that are necessary to achieve the coequal goals; (2) By June 2, 2018, adopt and as soon as reasonably possible, implement flow objectives for high priority tributaries in the Delta watershed that are necessary to achieve the coequal goals; and, (3) For the purposes of paragraph 2, the State Water Resources Control Board staff will work with the Delta Stewardship Council and the Department of Fish and Game to determine priority streams. As an example, priority streams could include the Merced River, Tuolumne River, Stanislaus River, Lower San Joaquin River, Deer Creek (tributary to Sacramento River), Lower Butte Creek, Mill Creek (tributary to Sacramento River), Consumnes River, and American River. (b) Flow objectives could be implemented through several mechanisms including negotiation and settlement, Federal Energy Regulatory Commission (FERC) relicensing, or water rights hearing. Implementation through water rights hearings or FERC relicensing is expected to take longer than negotiation and settlement. Than the deadlines listed in paragraphs (1) and (2) of subsection (a). Prior to the establishment of revised flow objectives as described in subsection (a) and (b) the existing Bay Delta Water Quality Control Plan flow objectives shall be used to	DP	Section 5005 ~~5007~~ (a)(1) - Update of the Bay Delta Water Quality Control Plan (BDWQCP) and revision of the requisite flow objectives should not be delayed until after BDCP. The Delta Stewardship Council supports the recommended 2014 and 2018 adoption dates for updates to the BDWQCP. Updated flow objectives will allow federal, state and local agencies to make fully informed decisions on such things as potential amendments to the Council's Delta Plan; successful completion of the BDCP, adoption and implementation of the Central Valley Flood Plan, and many more. The proposed process for adaptive management of the Delta Plan contemplates that ongoing changes to the Delta Plan will be required for a variety of reasons; including regulatory processes and decisions by other agencies. However, because 5005 ~~5007~~ (a)(1) is a recommendation and nonregulatory in nature, it has been deleted from 5005~~7~~ and has been retained as a recommendation in the Delta Plan. Section 5005 ~~5007~~ (a)(2) - Prior to the BDWQCP Update, the existing flow objectives should be used, not water rights flow requirements. Existing water rights provide authority to divert and use water under certain conditions and are subject to a number of laws and limitations. Water Right diversion amounts or any included bypass requirements are not equivalent to flow objectives, and should not be a substitute for lawfully adopted flow objectives. However, because 5005 ~~5007~~ (a)(2) is a recommendation and nonregulatory in nature, it has been deleted from 5005 ~~5007~~ and has been retained as a recommendation in the Delta Plan. Section 5005 ~~5007~~ (b~~d~~) - Changing "covers a proposed action" to "applies to a covered action" presents a circular logic. For a proposed project to be a covered action, it must the criteria in Water Code section 85057(a)(3) and section 500~~3~~1 of this Chapter. This includes section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, which specifies that a covered action is one that is "covered by … one or more of the regulatory policies contained in Article 3." Section 5005 ~~5007~~ is one such regulatory policy.

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		determine consistency with the Delta Plan. After flow objectives are revised, the revised flow objectives shall be used to determine consistency with the Delta Plan. (d) For the purposes of Water Code Section 85057(a)(3) and Section 5003(a)(5) of this Chapter, the policy set forth in Section 5007(a)(2) subsection (c) covers applies to a covered action. that could affect flow in the Delta."		
12. Environmental Water Caucus	1/14/2013	(§ 5007) Updated Flow Objectives. The Delta Reform Act does not require that Delta flow objectives be updated as part of the Delta Plan, or that the Delta Stewardship Council direct, manage, or provide guidance for the State Water Board's setting of Delta flow requirements. Rather, the Delta Reform Act requires that the State Water Board update Delta flow objectives consistent with the public trust doctrine, based on recommendations from the Department of Fish and Game. (Water Code § 85086.) To emphasize this point, the Delta Reform Act clearly states that "nothing in this division expands or otherwise alters the State Water Board's existing authority to regulate the diversion and use of water" (Water Code § 85031), and furthermore, the Act "does not affect" the public trust doctrine. (Water Code § 85032(i).) As a result, the Council has no authority to propose a regulation that guides or places any conditions on the State Water Board's setting of Delta flow requirements. Instead, the State Water Board is required to "submit its flow criteria determinations pursuant to this section to the council." Further, to the extent that this section of the Proposed Regulation purports to set out criteria to determine whether the Board's delta flow requirements are consistent with the regulatory policies of the Delta Plan, it is plainly contrary to the scope of the Act: the flow determination is a regulatory action excluded under Section 85057.5(b)(1). This section exceeds the scope of the enabling statute and should be removed.	A	The commenter asserts that portions of section 5005 ~~5007~~ are permissive and not directory, and are essentially recommendations for action by another agency that are not appropriate to include as a regulation. They also assert that the Council does not have authority to direct Water Board processes or activities. Sections (a) and (b) were deleted from the adopted regulations. They are now only in the Delta Plan as a recommendation. Proposed section 5005 ~~5007~~ has been changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan. (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (a~~c~~) covers a proposed action that could significantly affect flow in the Delta.
13. Environmental Water Caucus	1/14/2013	Perhaps most critically, the Delta Reform Act does not permit the Board to set Delta flows that are "necessary to achieve the co-equal goals," as stated in § 5007(a)(1) and (2), because the Delta Reform Act and judicial precedent require the Board to set such goals consistent with the Public Trust doctrine, and the co-equal goals are not synonymous with the protection of Public Trust resources. Rather, the public trust doctrine protects traditionally navigable waters, related habitat, and dependent wildlife, which is why the Board is required by the Act to set flow requirements after consultation with the Department of Fish and Game, and not the Delta Stewardship Council. As written, this section perverts the express language of the Delta Reform Act regarding the Board's duty to abide by the public trust doctrine when setting Delta flows, and should be either removed or modified to read "necessary to protect Public Trust resources" in order to be in compliance with the Act.	A, Co	No change based on this comment. However, based on other comments, we are proposing that sections 5005 ~~5007~~ (a) and (b) be deleted. We believe the authority to implement the co-equal goals in Water Code section 85054, and the eight inherent objectives in Water Code section 85020 are consistent with 5005 ~~5007~~; and are consistent with the elements that Water Boards are required to consider under their public trust authority in adopting the BDWQCP.
14. Regional Council of Rural Counties	12/27/2012	The third and last example of the confusing nature of the proposed regulations is Section 5007. Update Delta Flow Objectives. Section 5007 (a) and (b) are recommendations contained in the Delta Plan that the State Water Resources Control Board take certain actions relating to flow objectives by specified dates. As you know, the Council has no authority over the State Water Resources Control Board, and can only recommend certain actions. RCRC is of the opinion that Section 5007 (a) and (b) are inappropriately included in the proposed regulations and that they should be deleted. The language of Section 5007 (c) and (d) is germane to the regulations. RCRC recommends that Section 5007 (c) be revised as follows: (c) Prior to the establishment of revised flow objectives as described in subsection-s-(a} and (b), the existing Bay Delta Water Quality Control Plan flow objectives shall be used to determine consistency with the Delta Plan until such time as the State Water Resources Control Board may	Ct	The commenter asserts that portions of section 5005 ~~5007~~ are permissive and not directory, and are essentially recommendations for action by another agency that are not appropriate to include as a regulation. Sections (a) and (b) were deleted from the adopted regulations. They are now only in the Delta Plan as a recommendation. Proposed section 5005 ~~5007~~ has been changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan.

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15. Regional Council of Rural Counties	12/27/2012	Page xviii. Delta Plan Policies and Recommendations. ER P1. Update Delta Flow Objectives As you know, the Council was granted specific regulatory and appellate authority over certain actions that take place in whole or in part in the Delta. The authority granted does not include authority over the activities of the State Water Resources Control Board (State Water Board). RCRC is of the opinion that it is confusing to include in ER P1 (a regulatory policy) the Council's recommendation that the State Water Board take certain actions by specified dates. As noted in the Recirculated Draft Delta Plan on Page 2-3 in Section 2, Description of Revised Project, "Recommendations are non-regulatory in nature for both covered and non-covered actions. Most of the recommendations are directed at other agencies, which may or may not choose to implement all or a part of the recommended actions." ER P1 should be limited to that which is within the authority of the Council i.e. that the Council will utilize the existing flow objectives to determine consistency with the Delta Plan until such time as the State Water Board may revise them. This confusing mingling of regulatory policy and non-regulatory recommendations in ER P1 is also carried over into the Council's proposed regulations dated November 16, 2012. RCRC has recommended that Section 5007 (a) and (b) of the proposed regulations be deleted, and that Section 5007 (c) be revised as follows: ~~(c) Prior to the establishment of revised flow objectives as described in subsections (a) and (b) t~~The existing Bay Delta Water Quality Control Plan flow objectives shall be used to determine consistency with the Delta Plan until such time as the State Water Resources Control Board may revise the flow objectives. Upon revision of ~~After~~ the flow objectives ~~are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan.	Ct	The commenter asserts that portions of section 5005 ~~5007~~ are permissive and not directory, and are essentially recommendations for action by another agency that are not appropriate to include as a regulation. They also assert that the Council does not have authority to direct Water Board processes or activities. Sections (a) and (b) were deleted from the adopted regulations. They are now only in the Delta Plan as a recommendation. Proposed section 5005 ~~5007~~ has been changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan. (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (a~~c~~) covers a proposed action that could significantly affect flow in the Delta.
16. Regional Council of Rural Counties	12/27/2012	Pages 155-156. Lines 37-10. ER P1. Update Delta Flow Objectives. Chapter 4. Protect, Restore, and Enhance the Delta Ecosystem Please see RCRCs previous comments regarding the inclusion of what are recommendations in ER P1.	Ct	***Delta Plan comments will be addressed separately.** See above response to this issue.
17. Sacramento Regional County Sanitation District	1/14/2013	Section 5007 ~ Update Delta Flow Objectives Section 5007, subdivision (a), provides a "recommendation" to the SWRCB that it "should update the Bay-Delta Water Quality Control Plan objectives" within certain time frames. Subdivision (a) is unnecessary, as it simply provides a suggestion to another State agency. Subdivision (d) provides that certain policies cover "a proposed action that could affect flow in the Delta." It is unclear, however, what is meant by "could affect flow." For example, the construction of a bridge abutment "could affect flow." The construction of a dam could also "affect flow," as could the diversion or discharge of water. It is entirely unclear what this regulation is intended on impacting. It is also unclear whether this regulation seeks to regulate activities that affect the timing, magnitude, quality, or frequency of flow. Section 5007 does not comply with the Clarity or Necessity standards in the APA.	Ne, Ct	The commenter asserts that portions of section 5005 ~~5007~~ are permissive and not directory, and are essentially recommendations for action by another agency that are not appropriate to include as a regulation. Sections (a) and (b) were deleted from the adopted regulations. They are now only in the Delta Plan as a recommendation. Proposed section 5005 ~~5007~~ has been changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan. The commenter also asserts that use of the term "could affect flow" is unclear, as virtually any structure in the Delta could have even a minimal effect on flow. The intent is to clarify that covered actions must comply with the flow objectives in the current Bay-Delta Water Quality

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				Control Plan, and that this regulation is intended to address those projects that may impact those flow objectives. Section (d) has been changed as follows: (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (a~~c~~) covers a proposed action that could significantly affect flow in the Delta.
18. San Joaquin County Board of Supervisors	1/14/2013	Policy ER P1 "Update Delta Flow Objectives"; Proposed Regulation Article 3, Section 5007. This proposed Regulation, based on the language used therein, is not necessary. The operative words of the proposed regulation are "should" (Section 5007(a)) and "could" (Section 5007(b)). The proposed Regulation recites that development, implementation and enforcement of new and updated flow objectives are key to the achievement of the co-equal goals of the Delta Reform Act. Yet the language of the proposed Regulation is simply a recommendation to the State Water Resources Control Board.	Ne	The commenter asserts that portions of section 5005 ~~5007~~ are permissive and not directory, and are essentially recommendations for action by another agency that are not appropriate to include as a regulation. Sections (a) and (b) were deleted from the adopted regulations. They are now only in the Delta Plan as a recommendation. Proposed section 5005 ~~5007~~ has been changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan. (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (a~~c~~) covers a proposed action that could significantly affect flow in the Delta.
19. San Joaquin County Board of Supervisors	1/14/2013	This proposed Regulation is vague and unclear and internally inconsistent. While the proposed Regulation recites that new and updated flow objectives are the key to achievement of the co-equal goals of the Delta Reform Act, and while the purpose of the Delta Plan, with which this proposed Regulation requires consistency, is to meet those co-equal goals, proposed Regulation sub-Section (c) requires reference to flow standards which are themselves inconsistent with the Delta Reform Act and the Delta Plan itself.	Ct, Co	The commenter asserts that the language in 5005 ~~5007~~ (c) requires flow standards that are inconsistent with the Delta Reform Act and the Delta Plan, but offers no reason or example to demonstrate this inconsistency. The proposed requirement to demonstrate compliance with existing flow standards is consistent with the need to demonstrate compliance with existing laws governing flow requirements necessary to protect water quality in the Delta.
20. San Joaquin County Board of Supervisors	1/14/2013	This proposed Regulation, specifically sub-Section (d), is not "clearly understandable", as required by rulemaking review standards. When the references to the Delta Reform Act, cited in the proposed Regulation, sub-Section (d), are literally parsed out and included in the language of the proposed Regulation, the result is a confusing, circular, and vague directive. It leaves those covered by the proposed Regulation, and those assessing consistency with the proposed Regulation, to guess at its meaning, application, and effect.	Ct	The commenter asserts that the language in 5005 ~~5007~~ (d) is not clearly understandable, and that "the result is a confusing, circular, and vague directive." The intent is to clarify that covered actions must comply with the flow objectives in the current Bay-Delta Water Quality Control Plan, and that this regulation is intended to address those projects that may impact those flow objectives. Section (d) has been changed as follows: (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (a~~c~~) covers a proposed action that could significantly affect flow in the Delta.
21. San Joaquin County Board of Supervisors	1/14/2013	Proposed Section 5007 states that flow objectives could be implemented through several mechanisms including negotiation and settlement. Pursuant to the Porter-Cologne Water Quality Control Act, setting flow objectives for the Delta is solely within the jurisdiction of the State Water Resources Control Board. Subsequently, the Board has exclusive jurisdiction to implement the flow objectives by amending existing water rights. Given the Board's solitary authority regarding flow objectives, negotiation and settlement is not an appropriate mechanism.	A, Co	The commenter asserts that section 5005 ~~5007~~ (b) is permissive and not directory, and is essentially a recommendation for action by another agency that are not appropriate to include as a regulation. They also assert that the Council does not have authority to direct Water Board processes or activities. Because this is only a recommended approach and is not binding on the Water Board's process for development of flow objectives, it is not regulatory in nature. We propose deleting 5005 ~~5007~~ (b).

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22. San Joaquin County Board of Supervisors	1/1/2013	The Delta Plan continues to move towards implementation without revised flow objectives. This proposed Regulation states that revised flow objectives are key to the achievement of the co-equal goals. The Delta flow update must be completed before the Delta Plan's full environmental impacts can be determined. Therefore, until the SWRCB's flow objectives and criteria update are completed, the proposed Regulations dealing with or impacting Delta flows, as well as the related Delta Plan and recirculated PEIR must remain in "draft" form and be the subject of additional public review when the Delta flow update is completed.	Co, DP	The commenter asserts that since flow objectives in the Delta are key to achieving the co-equal goals, and since they are in the process of being adopted by the Water Board, that the full impact of the future flow objectives cannot be known. They state that the proposed regulations must remain draft form until the Water Board adopts final flow objectives. The Delta Reform Act dictates that these two processes (SWRCB's development of flow objectives and the Council's adoption of the Delta Plan) occur separately, not that the Council must wait for the SWRCB to complete its instream flow studies before proceeding to adopt its Delta Plan. Section 85087 requires the SWRCB to develop a prioritized schedule to complete instream flow studies for the Delta and high priority tributaries in the Delta watershed by 2012 and for other major rivers by 2018. Yet, section 85300(a) requires the Council to adopt the Delta Plan by January 2012. Section 85086 requires the SWRCB to develop public trust flow criteria within nine months of the Act's enactment, to inform planning decisions in the Delta Plan. These public trust flow criteria were produced by the SWRCB and the Council considered them in the development of the Delta Plan.
23. San Joaquin Tributaries Authorities	1/14/2013	ER P1 oversteps DSC authority. The Delta Plan acknowledges that the Delta Reform Act allows for the DSC to have regulatory jurisdiction over covered actions, and that "entities proposing covered actions must comply with the regulations (policies) in the Delta Plan." (Delta Plan, at 5.) It further states that the Delta Plan contains "policies that will be enforced by the Council's appellate authority and oversight" (p. 39), and "The current regulatory provisions of the Delta Plan, including the consistency review and appeals process, apply to only covered actions[.]" (Sidebar, p. 50) It does not make sense, then, that ER P1 is a policy rather than a recommendation because the DSC does not have the authority to mandate an action of the State Water Board that is explicitly exempt as a covered action. The State Water Board's review of the Bay-Delta Plan is expressly exempt as a covered action. (Delta Plan, at 57 ["These exemptions include ... A regulatory action of a State agency (such as the adoption of a water quality control plan by the SWRCB ..."].) Therefore ER P1 cannot have regulatory authority since the DSC regulatory jurisdiction is limited to covered actions. Further, ER P1 unambiguously calls only for an action by the State Water Board which is exempt as a covered action, leaving the policy with no other covered action to govern.	A	***Delta Plan comments will be addressed separately.** See below response to this issue for section 5005 ~~5007~~.
24. San Joaquin Tributaries Authorities	1/14/2013	Finally, the DSC has regulatory authority over covered actions which occur partly or wholly within the Delta. The State Water Board has made the decision to phase its review of the Bay-Delta Plan, with each phase having its own environmental review. Therefore, should the DSC choose to keep ER P1 in place as a policy notwithstanding the fatal flaws outlined above, it must be clear as to which Phases the deadlines apply. For instance Phase 1 of the State Water Board review occurs entirely outside of the Delta and is therefore not subject to compliance with policies in the Delta Plan (in addition to the express exemption discussed above). Therefore, ER P1 again oversteps the DSC authority in attempting to regulate outside of the statutory Delta.	A	***Delta Plan comments will be addressed separately.** See below response to this issue for section 5005 ~~5007~~.
25. San Joaquin Tributaries Authorities	1/14/2013	Section 5007 oversteps DSC authority. The Delta Plan acknowledges that the Delta Reform Act allows the DSC regulatory jurisdiction over covered actions, and that "entities proposing covered actions must comply with the regulations (policies) in the Delta Plan." (Final Draft Delta Plan, at 5) It further states that the Delta Plan contains "policies that will be enforced by the Council's appellate authority and oversight" (Id., at 39), and "The current regulatory provisions of the Delta Plan, including the consistency review and appeals process, apply to only covered actions[.]" (Id., Sidebar, at 50) Further, the DSC's authority is limited "to adopt regulations or guidelines as needed to carry out the powers and duties identified in [Division 35, Sacramento-San Joaquin Delta Reform Act of 2009]." (Water Code, § 85210.) The DSC does not have	A, Ct	The commenter asserts that portions of section 5005 ~~5007~~ are permissive and not directory, and are essentially recommendations for action by another agency that are not appropriate to include as a regulation. They also assert that the Council does not have authority to direct Water Board processes or activities. Sections (a) and (b) were deleted from the adopted regulations. They are now only in the Delta Plan as a recommendation. Proposed section 5005 ~~5007~~ has been changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ The State Water Resources Control Board's Bay Delta Water Quality Control Plan

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		authority to require the State Water Resources Control Board ("State Water Board") to update the Bay-Delta Water Quality Control Plan, nor does it allow for the DSC to set a timeline for such update. Further, this regulation oversteps the authority of the DSC by proposing to govern actions that are not covered actions. The State Water Board review of the Bay-Delta Plan is expressly exempt as covered action. (Delta Plan, at 57 ["These exemptions include ... A regulatory action of a State agency (such as the adoption of a water quality control plan by the SWRCB ..."].) Therefore section 5007 cannot have regulatory authority because the DSC's regulatory jurisdiction is limited to covered actions; it cannot regulate the State Water Board review of the Bay-Delta Plan. Further, section 5007 unambiguously calls only for an action by the State Water Board which is exempt as a covered action, leaving the policy with no other covered action to govern. Next, the deadlines in section 5007 fail to meet the clarity standard. Section 5007 calls for updated and implemented flow objectives "for the Delta" by June 2, 2014. The State Water Board has made the decision to phase its review of the Bay-Delta Plan, with each phase having its own environmental review. The State Water Board released its Substitute Environmental Document ("SED") for Phase 1, occurring outside of the Delta, on December 31, 2012 and has not yet scheduled a date for release of an SED for the phase(s) which may include the Delta. The SED is a draft environmental document, to which months of a comment period is afforded, with the final later being adopted. A 2014 deadline for final flow objectives, as well as implementation, for the Delta is beyond unlikely to occur and it is unclear to which Phase(s) this regulation it applies. Therefore section 5007 also fails to meet the clarity standard. For the reasons set forth above, the SJTA requests the DSC remove section 5007 from the regulatory package.		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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan. (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (a~~c~~) covers a proposed action that could significantly affect flow in the Delta.
26. State Water Resources Control Board	1/14/2013	Section 5007 of the proposed regulation and various sections of the Final Draft Delta Plan state that flow objectives for high-priority tributaries in the Delta watershed will be developed as part of the Bay-Delta Water Quality Control Plan. Although the State Water Board plans to develop flow objectives for high-priority tributaries in the Delta watershed, these objectives will not be part of the Bay-Delta Water Quality Control Plan.	DP	The commenter states that development of flow objectives for "high-priority tributaries" is not being developed as part of the current revision of the Bay-Delta Water Quality Control Plan. We propose deleting section 5005 ~~5007~~ (a) for other reasons. It is now only in the Delta Plan as a recommendation.
27. State Water Resources Control Board	1/14/2013	Section 5007(b) also provides examples of how flow objectives could be implemented, including through a "water rights hearing." We recommend replacing the word "hearing" (or "hearings") with "adjudicative proceeding" (or "adjudicative proceedings" as appropriate) because the latter term more fully describes the process under Chapter 4.5 of the Administrative Procedure Act (Gov. Code, § 11400 et seq.) and the State Water Board's regulations in which the Board holds an evidentiary hearing to determine facts by which the Board then reaches a decision.	DP	The commenter recommends minor changes to the language in 5005 ~~5007~~ (b). We propose deleting section 5005 ~~5007~~ (b) for other reasons. It is now only in the Delta Plan as a recommendation.
28. Suisun Resource Conservation District	1/9/2013	Regs 5007, 5008: ER P1 & P2 - Any increases in local and regional salinities in the Suisun Marsh due to changes in Delta outflow, increased upstream diversions, changes to timing and duration of Delta outflow, and/or the ecosystem restoration activities in Suisun Marsh and other priority habitat restoration areas in the Delta, will negatively impact the Suisun Marsh. Increases in salinities in the Suisun Marsh will decrease existing wetland diversity, decrease wintering waterfowl carrying capacity, decrease habitat quality for resident and migratory wildlife, decrease the operational life of managed wetland water management infrastructure and increase the costs of seasonal wetland habitat management activities. These significant adverse and unavoidable environmental effects must be analyzed, disclosed and adequately mitigated.	E	Statement of opinion - no proposed change.

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29. Tuolumne Utilities District	1/3/2013	Section 5007(a & b) Update Delta Flow Objectives. Please change as follows: "Section 5007(a)(1) The SWRCB should update the Bay-Delta Water Quality Control Plan immediately following the completion of the Bay Delta Conservation Plan. Flow objectives to protect identified beneficial uses consistent with CWC §13000 et seq." "(2) Flow objectives should be established and implemented consistent with the coequal goals. Until the SWRCB has completed the Water Quality Control Plan update, existing water rights flow requirements shall constitute compliance with the Delta Plan." (1) "By June 2, 2014 adopt and implement updated flow objectives for the Delta that are necessary to achieve the coequal goals; (2) By June 2, 2018, adopt and as soon as reasonably possible, implement flow objectives for high priority tributaries in the Delta watershed that are necessary to achieve the coequal goals; and, (3) For the purposes of paragraph 2, the State Water Resources Control Board staff will work with the Delta Stewardship Council and the Department of Fish and Game to determine priority streams. As an example, priority streams could include the Merced River, Tuolumne River, Stanislaus River, Lower San Joaquin River, Deer Creek (tributary to Sacramento River), Lower Butte Creek, Mill Creek (tributary to Sacramento River), Consumnes River, and American River. (b) Flow objectives could be implemented through several mechanisms including negotiation and settlement, Federal Energy Regulatory Commission (FERC) relicensing, or water rights hearing. Implementation through water rights hearings or FERC relicensing is expected to take longer than negotiation and settlement. Than the deadlines listed in paragraphs (1) and (2) of subsection (a). Prior to the establishment of revised flow objectives as described in subsection (a) and (b) the existing Bay Delta Water Quality Control Plan flow objectives shall be used to determine consistency with the Delta Plan. After flow objectives are revised, the revised flow objectives shall be used to determine consistency with the Delta Plan. (d) For the purposes of Water Code Section 85057(a)(3) and Section 5003(a)(5) of this Chapter, the policy set forth in Section 5007(a)(2) subsection (c) covers applies to a covered action. that could affect flow in the Delta."	DP	Section 5005 ~~5007~~ (a)(1) - Update of the Bay Delta Water Quality Control Plan (BDWQCP) and revision of the requisite flow objectives should not be delayed until after BDCP. The Delta Stewardship Council supports the recommended 2014 and 2018 adoption dates for updates to the BDWQCP. Updated flow objectives will allow federal, state and local agencies to make fully informed decisions on such things as potential amendments to the Council's Delta Plan; successful completion of the BDCP, adoption and implementation of the Central Valley Flood Plan, and many more. The proposed process for adaptive management of the Delta Plan contemplates that ongoing changes to the Delta Plan will be required for a variety of reasons; including regulatory processes and decisions by other agencies. However, because 5005 ~~5007~~ (a)(1) is a recommendation and nonregulatory in nature, it has been deleted from 5005 ~~5007~~ and has been retained as a recommendation in the Delta Plan. Section 5005 ~~5007~~ (a)(2) - Prior to the BDWQCP Update, the existing flow objectives should be used, not water rights flow requirements. Existing water rights provide authority to divert and use water under certain conditions and are subject to a number of laws and limitations. Water Right diversion amounts or any included bypass requirements are not equivalent to flow objectives, and should not be a substitute for lawfully adopted flow objectives. However, because 5005 ~~5007~~ (a)(2) is a recommendation and nonregulatory in nature, it has been deleted from 5005 ~~5007~~ and has been retained as a recommendation in the Delta Plan. Section 5005 ~~5007~~ (b~~d~~) - Changing "covers a proposed action" to "applies to a covered action" presents a circular logic. For a proposed project to be a covered action, it must the criteria in Water Code section 85057(a)(3) and section 500~~3~~1 of this Chapter. This includes section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, which specifies that a covered action is one that is "covered by … one or more of the regulatory policies contained in Article 3." Section 5005 ~~5007~~ is one such regulatory policy.
30. Yolo County, Office of the County Counsel	1/14/2013	The County concurs with and incorporates by reference the comments of San Joaquin County on Section 5007 of the proposed regulations.	O	See responses to San Joaquin County.

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1.1 Environmental Water Caucus	1/24/2013	Updated Flow Objectives. (Section 5007). The Delta Reform Act does not require that that the Delta Stewardship Council direct, manage, or provide guidance for the State Water Board's setting of Delta flow requirements. Rather, the Delta Reform Act requires that the State Water Board update Delta flow objectives consistent with the public trust doctrine, based on recommendations from the Department of Fish and Game, part of the State Water Code. To emphasize this point, the Delta Reform Act clearly states that "nothing in this division expands or otherwise alters the State Water Board's existing authority to regulate the diversion and use of water" and furthermore, the Act "does not affect" the public trust doctrine. As a result, the		The commenter asserts that portions of Section 5005 ~~5007~~ are permissive and not directory, and are essentially recommendations for action by another agency that are not appropriate to include as a regulation. They also assert that the DSC does not have authority to direct Water Board processes or activities. We believe the authority to implement the co-equal goals in Water Code §85054, and the eight inherent objectives in Water Code §85020 are consistent with 5005 ~~5007~~; and are consistent with the elements that Water Boards are required to consider under their public

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		Council has no authority to propose a regulation that guides or places any conditions on the State Water Board's setting of Delta flow requirements. Instead, the State Water Board is required to "submit its flow criteria determinations pursuant to this section to the council." Further, to the extent that this section of the Proposed Regulation purports to set out criteria to determine whether the Board's delta flow requirements are consistent with the regulatory policies of the Delta Plan, it is plainly contrary to the scope of the Act. This section exceeds the scope of the enabling statute and should be removed. Perhaps most critically, the Delta Reform Act does not allow the Water Board to set Delta flows that are "necessary to achieve the co-equal goals," as stated in § 5007. Rather, Delta Reform Act and judicial precedent require the Board to set such goals consistent with the *Public Trust doctrine*, and the co-equal goals are not synonymous with the protection of Public Trust resources. As written, this section perverts the express language of the Delta Reform Act regarding the Board's duty to abide by the public trust doctrine when setting Delta flows, and should be either removed or modified.		trust authority in adopting the BDWQCB. Sections (a) and (b) were deleted from the adopted regulations. They are now only in the Delta Plan as a recommendation. Proposed Section 5005 ~~5007~~ has been changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan. (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and Section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (a~~c~~) covers a proposed action that could significantly affect flow in the Delta.
2.1 Friends of the River	1/24/2013	Proposed Amendments §5007. Update Delta Flow Objectives. [Retain subsections (a) and (b) from 11/16/12 Draft] [Delete Subsections (c) and (d) in 11/16/12 draft, and replace with new subsections (c) and (d) as shown below]. [New subsection (c)] (c) In the absence of development of new and updated flow objectives for the Delta and high-priority tributaries including public trust doctrine analysis by the State Water Resources Control Board (Board); in the absence of the "comprehensive review and analysis" including "a reasonable range of flow criteria, rates of diversion, and other operational criteria. . . and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses", "a reasonable range of Delta conveyance alternatives, including through-Delta", "the potential effects of climate change, possible sea level rise up to 55 inches,", "the potential effects on migratory fish and aquatic resources", and the "potential effects of each Delta conveyance alternative on Delta water quality" (Draft EIR 23-3, 4) supposedly to be provided in the future by the BDCP CEQA process; and in the absence of water supply availability analysis, quantification, and analysis of the environmental impacts of supplying specific quantities of water required by CEQA as determined by the California Supreme Court's decision in Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412; it is not possible at this time for the Council to lawfully call for, plan for, encourage, recommend, or require development of new conveyance upstream from the Delta for the exporters. Sufficient analysis including CEQA and public trust doctrine analysis has not been performed to be able to lawfully select an alternative at this time calling for development of new upstream conveyance as opposed to continuing through-Delta conveyance and/or reducing exports.	DP	The new language proposed for subsections (c) and (d) in essence advocates a particular approach to BDCP and conveyance. The Council disagrees with this approach. The Council's approach to BDCP and conveyance is described in Appendix G (The Delta Stewardship Council's Role Regarding Conveyance) and WR R12 (**Complete Bay Delta Conservation Plan**) of the Delta Plan and therefore the Council has not made these specific changes to the regulation. In any event, the Council, based on comments unrelated to this has chosen to revise the regulation as follows: Sections (a) and (b) were deleted from the adopted regulations. They are now only in the Delta Plan as a recommendation. Proposed Section 5005 ~~5007~~ has been changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan. (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and Section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (a~~c~~) covers a proposed action that could significantly affect flow in the Delta.
3.1 Friends of the River	1/24/2013	(d) These Regulations and the Delta Plan do not call for, plan for, encourage, recommend, or require development of new conveyance, intakes, tunnels, canals and/or diversions upstream from the Delta for the exporters, improved Delta conveyance and operations, or optimizing diversions in wet years when more water is available. Nothing in these Regulations and the Delta Plan, or the draft EIR or RPDEIR establishes support for any future decision including but not limited to the BDCP process to favor selection of an alternative of development of new conveyance and diversions upstream from the Delta for the exporters as opposed to the alternatives of maintaining through-Delta conveyance and/or reducing exports. This provision is imperative to ensure that the Delta Plan and these Regulations do not violate CEQA and/or lead	DP	The new language proposed for subsections (c) and (d) in essence advocates a particular approach to BDCP and conveyance. The Council disagrees with this approach. The Council's approach to BDCP and conveyance is described in Appendix G (The Delta Stewardship Council's Role Regarding Conveyance) and WR R12 (**Complete Bay Delta Conservation Plan**) of the Delta Plan and therefore the Council has not made these specific changes to the regulation. In any event, the Council, based on comments unrelated to this has chosen to revise the regulation as follows:

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		to development of or creation of momentum for a project or projects that will or may further degrade Delta water quality prior to comprehensive CEQA analysis, and prior to development of new and updated flow objectives for the Delta and high-priority tributaries including public trust doctrine analysis by the Board. This subsection and subsection (c) of this Section control over any provision or provisions in these Regulations, Delta Plan, Draft EIR and/or RPDEIR in actual or arguable conflict with this subsection and/or subsection (c) of this Section.		Sections (a) and (b) were deleted from the adopted regulations. They are now only in the Delta Plan as a recommendation. Proposed Section 5005 ~~5007~~ has been changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan. (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and Section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (a~~c~~) covers a proposed action that could significantly affect flow in the Delta.
4.1 Friends of the River	1/24/2013	Support for Proposed Amendments Our previous comment letters and the Environmental Water Caucus comment letter referenced at the beginning of this comment letter establish the numerous violations of CEQA that will take place if the Council proceeds to adopt the Delta Plan and Regulations including calls for improved, meaning new, upstream conveyance. Our Proposed Amendments to Section 5007 are intended to allow you to comply with, as opposed to violate, CEQA if you proceed to adopt the Regulations and Delta Plan at this time. The Council's own Initial Statement of Reasons (SOR) furnishes additional support for the need to either not adopt the Regulations and Delta Plan at this time, or include our Proposed Amendments if the Regulations and Delta Plan are adopted. The SOR includes statements that "The best available science suggests that the currently required flow objectives within and out of the Delta are insufficient to protect the Delta ecosystem. Additionally, uncertainty regarding future flow objectives for the Delta impairs the reliability of water supplies that depend on the Delta or its watershed. The predictability of water exports cannot be improved and the Bay Delta Conservation Plan cannot be implemented without timely State Water Resources Control Board (SWRCB) action to update flow objectives. Section 5007 is intended to achieve the legislative intent for the SWRCB to establish an accelerated process to determine instream flow needs of the Delta for the purposes of facilitating the planning decisions that are required to achieve the objectives of the Delta Plan (Water Code section 85086)." (SOR pp. 5-6). Those statements appear to be both clear and indisputable. That being the case, it would be directly contrary to those statements to proceed now to make planning decisions calling for or facilitating new, upstream conveyance for the exporters. No such planning decisions can be considered rationally, let alone made, until after the Board makes the determinations which the Council's own Statement of Reasons declares are essential to the making of such planning decisions. To do otherwise "would put the cart before the horse."	DP, S	We disagree. The policy is not inconsistent with the Statement of Reasons, which merely references the need to expeditiously update flow objectives in relation to planning for improved conveyance. Again, the Council's approach to BDCP and conveyance is described in Appendix G (The Delta Stewardship Council's Role Regarding Conveyance). Also, we have included recommendation WR R12 (**Complete Bay Delta Conservation Plan)** in the Delta Plan which does not advocate a particular result, but calls for expedited completion of the BDCP consistent with the Delta Reform Act (which itself, addresses the relationship of flow criteria and BDCP; see Water Code Section 85086(c)).
5.1 Individual (Public Hearing Transcript 1/11/13: pg 63 line 23 to pg. 64 line 6) RCRC: Kathy Mannion	1/11/2013	Our last example is in 5007, update Delta flow objectives. Section 5007 A and B are recommendations contained in the Delta Plan. We therefore feel that they're inappropriately included in the regulations and we're proposing that they should be deleted. And we've also provided revised language to section 5007 C. And that, again, provides some clarity as to the authority of the Water Board and what point in time the Stewardship Council would utilize the flow objectives.	A, Ct	The commenter asserts that portions of Section 5005 ~~5007~~ are permissive and not directory, and are essentially recommendations for action by another agency that are not appropriate to include as a regulation. Sections (a) and (b) were deleted from the adopted regulations. They are now only in the Delta Plan as a recommendation. Proposed Section 5005 ~~5007~~ has been changed to: (a~~c~~) ~~Prior to the establishment of revised flow objectives as described in subsections (a) and (b), the~~ 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~~After the flow objectives are revised~~, the revised flow objectives shall be used to determine consistency with the Delta Plan. (b~~d~~) For purposes of Water Code section 85057.5(a)(3) and Section 5001 ~~5003~~(j~~a~~)(1~~5~~)(E) of this Chapter, the policy set forth in subsection (a~~c~~) covers a proposed action that could significantly affect flow in the Delta.

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ADOPTED REGULATION: SECTION 5006 ~~5008~~

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1. California Department of Fish and Wildlife; Ecosystem Conservation Division/Water Branch	1/10/2013	Section 5008: Section 5008 of the proposed regulations stipulates that "[h]abitat restoration must be carried out consistent with 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 [Conservation Strategy] (Department of Fish and Game 2011), with minor alterations." CDFW, in collaboration with its federal Ecosystem Restoration Program implementation partners (National Marine Fisheries Service and U.S. Fish and Wildlife Service), is currently revising the Conservation Strategy in response to comments received during the public review period. We have concerns about the Draft Conservation Strategy creating mandatory standards through these regulations. Therefore, we recommend the use of a statement similar to that found in the 5th Staff Draft Delta Plan, which noted "The Delta Stewardship Council may amend the Delta Plan to incorporate updated figures and text from the Ecosystem Restoration Program's Conservation Strategy as the strategy is revised."	A, Ct, O	The commenter has suggested including the following statement: "The Delta Stewardship Council may amend the Delta Plan to incorporate updated figures and text from the Ecosystem Restoration Program's Conservation Strategy as the strategy is revised." While the Council is likely to amend its regulations over time as various plans and strategies are updated, it would not be appropriate to include this type of language in a regulation. Instead, the Council has modified the regulation to state, "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 (Department of Fish and Wildlife 2011)." In this manner, the Council will create a fixed reference point for this regulation, and any future amendments will go through the appropriate public and administrative review processes.
2. California Department of Fish and Wildlife; Ecosystem Conservation Division/Water Branch	1/10/2013	Section 5008(a): We recommend that section 5008(a) of the proposed regulations, as well as ER P2 in the Delta Plan, provide that if a proposed habitat restoration action is not consistent with Section II of the Conservation Strategy (Appendix 3 to the proposed regulations, Appendix H of the Delta Plan) or the elevation map (Appendix 4 to the proposed regulations, Figure 4-5 of the Delta Plan), "proposals shall provide sufficient scientific rationale for such deviations."	Ct, Co	The regulation has been revised to include the proposed language: "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." The Council recognizes that there may be valid reasons for deviating from restoring the habitat types associated with elevations shown in Appendix 4, and agrees that a scientific rationale should be provided. The Council intends to require habitat restoration projects that are covered actions to be consistent with other aspects of DFW's guidance in Appendix 3. However, it should be noted that section 5002 states that in cases where full consistency with all relevant regulatory policies may not be feasible, "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." Thus, section 5002 provides a way to address deviations from Appendix 3, while the revisions to this section provide a way to address deviations from Appendix 4.
3. California Farm Bureau Federation	1/14/2013	Proposed sections 5008 and 5009 reference the specific elevations depicted in certain CALFED Draft Conservation Strategy "elevation maps," as criteria having potential relevance to the Council's determination on "consistency," "significant impacts," and related "mitigation" requirements for proposed habitat restoration projects in the Delta. With respect to these elevation maps, some future restoration activities and locations could conceivably involve alteration or modification of existing elevations, thus the elevation maps referenced in the propose rule should not be a rigid requirement for a potential consistency determination, under appropriate circumstances, where the objective might be precisely to restore desired habitat at some different elevation than the current elevation.	O	Restoration consistent with the elevation map is not a "rigid requirement," as suggested by the commenter. The regulation states that the map "should be used as a guide." The revised regulation further states, ""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."
4. Central Delta Water Agency	1/14/2013	Section 5008. Restore Habitats at Appropriate Elevations The regulation as written is in conflict with Water Code section 85020(b) which requires the protection and enhancement of the unique cultural, recreational and agricultural values of the California Delta as an evolving place, and Water Code section 85054 both as to protecting, restoring and enhancing the Delta ecosystem of which the levee protected lands are a part, and the requirement to protect and enhance the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place. As explained above, interference with the reclamation of the Swamp and Overflowed lands would violate the obligation of the State	Co	The protection of the unique cultural, recreational, and agricultural values of the Delta as an evolving place, as required by Water Code section 85020(b) and 85054, can be accomplished at the regional scale in a manner that is compatible with habitat restoration, and these sections do not imply a restriction on aquatic habitat restoration at the project scale. Water Code section 85020 states that one of the objectives inherent in the coequal goals for management of the Delta is to "restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a health estuary and wetland ecosystem." Water Code section 85022(d)(5) states that one of the "fundamental goals for managing land use in the Delta" is to "develop new or improved aquatic and terrestrial habitat and protect existing habitats to advance the goal of restoring

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		resulting from the grant of said lands from the United States. The mandate of such regulation also appears to illegally conflict with local agency efforts and plans to protect agricultural lands. The regulation should be revised to require that the restoration of habitat be accomplished in a manner consistent with the statutory requirements. Improvement of water quality in the Delta and provision of inflow and outflow would constitute consistent restoration of habitat. Similarly, improvement of in-channel habitat such as on already flooded islands and areas, and on the channel islands or berms would be consistent. Improvement of levees to provide a larger structural section to accommodate waterside planting is also an opportunity for habitat restoration that could be consistent with legal requirements.		and enhancing the Delta ecosystem." The use of the word "new" clearly allows for the conversion of one habitat type to another, including the conversion of diked land to aquatic habitat. In addition, habitat restoration can enhance recreational opportunities, and some types of habitat restoration, such as floodplain and riparian habitat restoration, can be compatible with agriculture. The commenter asserted that interference with reclamation of the Swamp and Overflowed Land would violate the obligation of the state resulting from the grant of said lands from the United States. The comment misunderstands the State's obligations under the land grant of Swamp and Overflowed Lands in the Arkansas Act. In the Arkansas Act, Congress granted California Swamp and Overflowed Lands "to enable" the state to reclaim the land. (43 U.S.C.A. section 982.) Accordingly, Congress required the proceeds from sales of those lands be applied exclusively to the reclaiming of those lands. (43 U.S.C.A. section 983.) Thus that Act did not require the State to reclaim all the land granted it by Congress, but rather obligated it to use all proceeds received from the sale of the land to reclaim the land. Only the United States may question the State's disposition of the lands or the proceeds from their sales. (Kings County v. Tulare County (1898) 119 Cal. 509.) The regulation does not illegally conflict with local agency efforts and plans to protect agricultural lands. See MR3 regarding the Council's land use authority. The commenter offers several examples of ways to improve habitat that would also benefit agriculture in the Delta. The Council agrees that improvement of water quality in the Delta is consistent with ecosystem restoration, including habitat restoration, as discussed in Chapters 4 and 6 of the Delta Plan. The Council also agrees that restoring adequate flows is an essential element of restoration of habitat, as discussed in Chapter 4 of the Delta Plan. Improvement of in-channel habitat is consistent with this section. Expansion of riparian and floodplain habitat as part of levee projects is consistent with this section and section 5008, Expand Floodplains and Riparian Habitats in Levee Projects.
5. San Joaquin County Board of Supervisors	1/14/2013	Policy ER P2 "Restore Habitats at Appropriate Elevations"; Proposed Regulation Article 3, Section 5008. This proposed Regulation is inconsistent with, and contradictory to, local land use authority as set forth in California Law. This proposed Regulation, specifically sub-Section (b)(1), is not "clearly understandable", as required by rulemaking review standards. As to Section 5008, San Joaquin County concurs in the submitted objections and comments of Solano County and Yolo County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.	Ct, Co, DP	Regarding the Council's land use authority, see MR3. The regulation has been revised to improve clarity. Regarding concurrence with comments submitted by Solano County and Yolo County, please see responses to comments by those agencies.
6. Solano County Department of Resource Management	1/14/2013	Habitat restoration must be accomplished in a way that minimally impacts existing in-Delta uses and provides for full mitigation, including economic mitigation, for any direct or indirect effects. Further, any such restoration should focus on public lands and on lands provided from willing sellers. Such guiding principles should be stated here (and elsewhere).	DP	The regulations do not call for economic mitigation for any direct or indirect effects of habitat restoration. Instead, the issue of minimizing impacts on existing in-Delta uses is addressed by section 5013, which states that "Water management facilities, ecosystem restoration, and flood management infrastructure must be sited to avoid or reduce conflicts with existing or planned uses, when feasible, considering comments from local agencies and the Delta Protection Commission." The issue of use of existing public land is addressed by section 5013, which states, "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."

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				The issue of willing sellers is addressed by DP R4 of the Delta Plan which states, "Agencies acquiring land for water management facilities, ecosystem restoration, and flood management infrastructure should purchase from willing sellers, when feasible, including consideration of whether lands suitable for proposed projects are available at fair prices."
7. Yolo County, Office of the County Counsel	1/14/2013	This section relates to the restoration of habitat at "appropriate elevations." The County objected to earlier versions of this policy in the Delta Plan. We note, however, that this policy has significantly evolved (even from the final Staff Draft released on May 14, 2012) and that it no longer automatically precludes any habitat restoration activity that may be inconsistent with the elevation map shown in Appendix 4 of the regulations. Rather, Section 5008 designates the map as a "guide" and it establishes the Draft Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions (DFG 2011) as the key reference in determining the suitability of individual restoration projects. The County generally believes this approach is far more appropriate than those discussed in earlier drafts of the Delta Plan. Nonetheless, the need for any regulatory oversight of this particular issue is questionable. In the absence of substantial evidence that this policy will discourage projects that would otherwise cumulatively threaten the achievement of the coequal goals, it is doubtful that the Delta Reform Act can be read to vest the Council with authority to adopt such a regulation. The County encourages the Council to reconsider whether regulatory oversight of this subject is presently necessary or appropriate.	Ne	The comment regarding the evolution of the policy is noted. Regarding the Council's use of a regulatory approach to achieve the coequal goals, see MR1.
8. Yolo County, Office of the County Counsel	1/14/2013	Additionally, as set forth in San Joaquin County's comments on Section 5008, the County does not believe that subsection (a) of the proposed regulation meets the clarity standard set forth in Section 11349(c) of the Government Code. In particular, it is not clear what it means to designate the referenced map as a "guide" to habitat restoration, nor is it clear how consistency should be measured.	Ct	The regulation has been revised to include the proposed language: "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." This revision addresses the need for clarity in how the referenced map will be used as a guide.

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
ADOPTED REGULATION: SECTION 5007 ~~5009~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. California Central Valley Flood Control Association	1/14/2013	Section 5009 – Protect Opportunities to Restore Habitat. This section limits behavior based upon what opportunities there might be to potentially restore habitat. By mandating through this regulatory provision that impacts to the "opportunity" to restore habitat must be avoided or mitigated, this is a regulatory "taking" as it limits the future use of private property on any area of certain elevation in the Delta where an "opportunity" to restore habitat exists. It does not make sense to ask that mitigation occur for an event which itself has not yet, and may never, occur. Who determines if there is an "opportunity" on any individual parcel of land in the Delta for habitat restoration? What is the citation of the statute giving the Council in consultation with California Fish and Wildlife the authority to determine mitigation for a landowner to use his property simply because it "may be" an "opportunity" for future habitat?	A, Ct	Regarding the assertion of a regulatory taking, see MR6. The commenter asserts that one cannot mitigate for an event which has not yet, and may never, occur. The regulation has been revised to clarify that mitigation can be achieve by "designing and implementing a project so that it will not preclude or otherwise interfere with the ability to restore habitat as described in section 5006." This may be achieved in a variety of ways, such as by requiring the removal of structures following temporary uses, such as special events requiring tents and booths; elevating any structures or infrastructure to avoid impeding the flow of water if the site is appropriate for aquatic habitat restoration; clustering any structures at the edge of a site to reduce barriers to future habitat connectivity, etc. Regarding the question of who determines if an opportunity to restore habitat exists, that determination would be made by the state or local lead agency for the covered action, based on the designation of priority habitat restoration areas in Appendix 5. Regarding the Council's authority to regulate land use, see MR3.
2. East Bay Municipal Utility District	1/14/2013	Section 5009. Protect Opportunities to Restore Habitat — As noted earlier, Section 5009(a) uses the term "significant impacts" which is defined in 5001(s) as either a positive or negative impact. If this definition is used, Section 5009(a) requires that a project having either a positive or negative impact on the opportunity to restore habitat in select areas must be avoided or mitigated. As discussed in our comments for Section 5001(s), the definition of "significant impact" should be changed to make it consistent with all other state and federal regulations that use the term "significant impact" in an environmental context. To our knowledge, the term is always used to identify "adverse" significant impacts, and there is nothing in the Delta Reform Act provisions that supports the use of a different definition. By adding the concept of "positive" impacts to the definition, the definition becomes confusing to the regulated community and inconsistent with other regulations and policies.	Co	Section 5001(dd) defines a significant impact to be either positive or negative. To address the potential confusion related to applying this definition in section 5007(a), the section has been revised as follows, "… significant <u>adverse</u> impacts to the opportunity to restore habitat…must be avoided or mitigated."
3. San Joaquin County Board of Supervisors	1/14/2013	Policy ER P3 "Protect Opportunities to Restore Habitat"; Proposed Regulation Article 3, Section 5009. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.	A, Co	See MR3.
4. San Joaquin County Board of Supervisors	1/14/2013	In San Joaquin County's portion of the Delta, the priority habitat restoration areas are the Lower San Joaquin River Floodplain and a portion of the Cosumnes and Mokelumne Rivers confluence. Presently, the land use in these areas is predominately agriculture encompassing thousands of acres of agricultural land. This proposed Regulation could substantially affect the ability of growers to change their farming operations to sufficiently meet changing market, environmental, or regulatory demands in perpetuity. Additionally, designating these lands as priority habitat restoration areas has a potential to devalue the land and could result in less flexibility regarding land use. Farmers may not be able to plant higher value crops or build needed structures to support their farming operations. The designation may also adversely impact values and flexibility on adjacent lands. Neither the recirculated PEIR nor the Delta Plan adequately addresses the potential impacts to agriculture on lands designated as priority habitat restoration areas.	DP, E	The regulation has been revised to clarify that mitigation can be achieve by "designing and implementing a project so that it will not preclude or otherwise interfere with the ability to restore habitat as described in section 5006." This regulation would not affect the ability of growers to change their farming operations or build needed structures to support their farming operations unless those actions met the screening criteria of being a covered action under the Delta Plan, i.e., involved some type of state or local government funding or approval, among other criteria. Potential impacts on adjacent land are addressed in section 5011, which states, "Measures to mitigate conflicts with adjacent uses may include, but are not limited to, buffers to prevent adverse effects on adjacent farmland." The Cost Analysis describes potential costs imposed by policies, and indicates that much of the priority areas are already designated for restriction on land uses. It states "Parts of the Cosumnes-Mokelumne Confluence are within the North Delta Flood Control and Ecosystem Restoration Project area. Pockets of the Lower San Joaquin River Floodplain are designated as Significant Natural Resource Areas or Resource Conservation areas in the San Joaquin County General Plan and subject to development restrictions." The Cost Analysis acknowledges that

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				lands outside the already-designated areas could require some modification or bear some mitigation cost if a project is determined to be a covered action.
5. San Joaquin County Board of Supervisors	1/14/2013	As to Section 5009, San Joaquin County concurs in the submitted objections and comments of Solano and Yolo County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.	Ct, E	See responses to comments submitted by Solano County and Yolo County.
6. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Section 5009: The Proposed Regulation states that "[s]ignificant impacts to the opportunity to restore habitat at the elevations shown in Appendix 4 must be avoided or mitigated." It is unclear what constitutes an "opportunity to restore habitat," and how such an "opportunity" might be the subject of a potentially significant impact (which much be an adverse physical impact under controlling law). (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, §§15358, 15382.) These ubiquitous uncertainties violate OAL requirements. Thus, Section 5009 must be removed or revised.	Ct	The regulation has been revised to clarify that mitigation can be achieved by "designing and implementing a project so that it will not preclude or otherwise interfere with the ability to restore habitat as described in section 5006." The comment asserts that the use of the phrases "opportunity to restore habitat" is unclear. The phrase opportunity to restore habitat is clear. An opportunity to restore habitat will be determined by the state or local lead agency for the covered action, based on the designation of priority habitat restoration areas in Appendix 5. The comment also suggests the use of the phrase "significant impact" is unclear. The regulation was revised to clarify that only significant adverse impacts to the opportunity to restore habitat must be avoided or mitigated. The comment appears to assert that "significant impact" is defined by the California Environmental Quality Act (CEQA)'s definition of "significant effect on the environment." However, the regulation's significant adverse impact requirement is not implementing CEQA. It is implementing the Delta Reform Act. The term is therefore not defined by CEQA in this context.
7. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	Section 5009: The Proposed Regulation states that "[s]ignificant impacts to the opportunity to restore habitat at the elevations shown in Appendix 4 must be avoided or mitigated." It is unclear what constitutes an "opportunity to restore habitat," and how such an "opportunity" might be the subject of a potentially significant impact (which much be a physical impact under controlling law). (Pub. Resources Code, §§ 21065, 21068; Cal. Code Regs., tit. 14, §§15358, 15382.) Further, it is unclear how the proposed mandatory language requiring that "opportunity" impacts "must be avoided or mitigated" is to be satisfied.	Ct	The regulation has been revised to clarify that, for purposes of this section, a potentially significant adverse impact would "preclude or otherwise interfere with the ability to restore habitat as described in section 5006." The comment asserts that the use of the phrases "opportunity to restore habitat" is unclear. The phrase opportunity to restore habitat is clear. An opportunity to restore habitat will be determined by the state or local lead agency for the covered action, based on the designation of priority habitat restoration areas in Appendix 5. The comment also suggests the use of the phrase "significant impact" is unclear. The regulation was revised to clarify that only significant <u>adverse</u> impacts to the opportunity to restore habitat must be avoided or mitigated. The comment appears to assert that "significant impact" is defined by the California Environmental Quality Act (CEQA)'s definition of "significant effect on the environment." However, the regulation's significant adverse impact requirement is not implementing CEQA. It is implementing the Delta Reform Act. The term is therefore not defined by CEQA in this context. The concept of avoiding or mitigating impacts is well known and established. See, for example, the California Environmental Quality Act, where Public Resources Code section 21002.1(a) explains that the purpose of an environmental impact report is to "indicate the manner in which . . . significant effects can be mitigated or avoided." See also Public Resources Code section 21100(b)(3) and 14 Cal. Code Regs. sections 15126.4 and 15370.
8. Solano County Department of Resource Management	1/14/2013	This section is problematic, for two reasons. First, it is not clear. Subsection 5009(a) refers to "the opportunity to restore habitat at the elevations shown in Appendix 4," but Appendix 4 does not contain a demarcation of restoration opportunity areas. Second, it raises the specter of inverse condemnation/taking for those areas deemed restoration opportunity areas due to depressed property values.	Ct, E	Subsection 5007(a) has been revised to clarify that the regulation only applies "Within the priority habitat restoration areas depicted in Appendix 5" and the reference to Appendix 4 has been deleted from this subsection. Subsection 5007(d) continues to state that the regulation applies in the priority habitat restoration areas shown in Appendix 5. Regarding the assertion of a regulatory taking, see MR6.

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ADOPTED REGULATION: SECTION 5007 ~~5009~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
9. Westlands Water District	1/14/2013	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 must be an adverse physical impact under controlling law). (Pub. Resources Code, §§ 21065, 21068; CEQA Guidelines, §§15358, 15382; see also In re Bay-Delta, supra, 43 Cal.4th at p. 1168 [emphasizing the importance of distinguishing "between preexisting environmental problems . . ., on the one hand, and adverse environmental effects" on the other, and rejecting argument that potential environmental impacts of proposed actions can be measured and compared in relation to their ability to achieve environmental goals or to improve existing conditions].)	Ct	See response to identical comment above by San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.
10. Westlands Water District	1/14/2013	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.	Ct	See response to identical comment above by San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.
11. Yolo County, Office of the County Counsel	1/14/2013	The County concurs with and incorporates by reference the comments of San Joaquin County on Section 5009 of the proposed regulations, as applicable to priority habitat restoration areas designated within Yolo County. In addition, the County offers the following comments on proposed Section 5009.	O	See response to the comments of the San Joaquin County Board of Supervisors.
12. Yolo County, Office of the County Counsel	1/14/2013	This section requires "significant impacts to the opportunity to restore habitat at the elevations shown in Appendix 4" to be avoided or mitigated. Importantly, Section 5009 includes language from the final Staff Draft of the Delta Plan that tempers the effect of this policy by requiring consideration of the <u>probability</u> of future restoration in determining the need for mitigation. This language reduced the County's principal concern with prior versions of this policy, as expressed in various comment letters on the fifth and earlier staff drafts of the Delta Plan. Despite this, as with Section 5008, above, the County questions both the necessity and authority for Council oversight of this issue and encourages the Council to reconsider these issues. Section 5009 is also vague as to how the probability of future restoration should be weighed in determining the need for mitigation. It thus appears to present some serious interpretive issues for the Department of Fish and Game and other state and local agencies to confront in the years to come. Much of this could be avoided by simply revising Section 5009 to state that it applies only when a restoration project is "reasonably foreseeable," as the County suggested in commenting on the Fifth Draft of the Delta Plan in a letter dated September 30, 2011. We respectfully encourage the Council to consider this clarification.	A, Ne, Ct	The comment regarding the evolution of the policy is noted. Regarding the Council's land use authority, see MR3. The suggested addition of the phrase "reasonably foreseeable" has not been added because the regulation is intended to protect opportunities to restore habitat within the areas designated in Appendix 5 over a longer timeframe than that of foreseeable projects.

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
ADOPTED REGULATION: SECTION 5008 ~~5010~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. California Central Valley Flood Control Association	1/14/2013	Section 5010 – Expand Floodplains. This section seeks to impose on the flood protection community the requirement to consider and implement setback levees unless not feasible. This provision suffers from many infirmities. First, how is feasible defined? Second, who defines it? Third, who polices it? Fourth, what is the method for appealing that policing? Fifth, would this apply to a private individual making levee repairs but needing a State permit? If so, what is the Council's jurisdiction over the individual? Sixth, what is the Council's jurisdiction to impose these requirements?	A, Ct	The geographic scope of the areas of the Delta for consideration of setback levees has been substantially revised to limit the areas for consideration. "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 (Sec. 5001). This definition is one established and applied elsewhere in the law (e.g., Public Resources Code section 21061.1). Thus, if the project proponent/lead agency of a major levee project determines that setback levees are infeasible for their project, no further action is necessary. The Council does not police these projects, and does not have permitting or approval; authority over these types of projects. If such a project rises to the level of a covered action, then it is the lead agency's responsibility to file a certification of consistency. These regulations apply only to "covered actions" under the Delta Reform Act. A project is not a "covered action" unless it is "carried out, approved, or funded by the state or a local public agency." (section 85057.5(a)(3).) It is the state or local public agency proposing to undertake the covered action that certifies the action's consistency with this regulation, and not an individual. (section 85225.) This regulation requires covered actions proposing new levees or substantially rehabilitating or reconstructing existing levees in specified areas to consider and where feasible incorporate alternatives that increase floodplain and riparian habitat, such as setback levees. The Council is authorized to adopt this policy, which furthers the creation of floodplain and riparian habitat, because it must adopt a Delta Plan that furthers the coequal goals, including the coequal goal of restoring the Delta ecosystem. (sections 85300(a), 85054.) The Plan must promote characteristics of a healthy Delta ecosystem by, for example, promoting biologically appropriate habitats (section 85302(c)(3)) and establishing migratory corridors for wildlife along Delta river channels (section 85302(e)(2)). Furthermore, the Council must adopt a Plan that reduces risks to important interests in the Delta by, among other things, promoting strategic levee investments. (sections 85305(a), 85306.) This regulation will promote creation of riparian habitat necessary to meet the Act's requirements, as well as encourage the creation of additional floodplain which will help to reduce the risk of flooding.
2. California Farm Bureau Federation	1/14/2013	As currently proposed, section 5010 would require that "[l]evee projects [...] evaluate and where feasible incorporate alternatives, including the use of setback levees, to increase floodplains and riparian habitats." As clarified in section 5010(b), the section would apply to "a proposed action to construct new levees or substantially rehabilitate or reconstruct existing levees." By extension, consistent with Water Code section 85057.5(b)(5), the section would not apply to "[r]outine maintenance and operation of any facility located, in whole or in part, in the Delta, that is owned or operated by a local public agency." Section 5001(r) clarifies the meaning of "setback levee," defining a "setback levee" as "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," and further clarifies that "in the Delta, a 'setback levee' may not necessarily result in removal of the existing levee." Section 5010 further provides that "criteria" used to "determine appropriate locations for setback levees for purposes of [the state policy]" would be developed by the Department of Water Resources, in conjunction with the Central Valley Flood Protection Board, the Department of Fish and Game, and the Sacramento-San Joaquin Delta Conservancy. Comment: For small rural and agricultural reclamation districts in the Delta that now would be	Co, O	The action of routine maintenance of a levee is well established, with DWR's Subventions Program having funded such maintenance for decades. It is the responsibility of the lead agency to determine whether their proposed project is considered significant and will rise to the level of consistency with the Delta Plan. With respect to the level of evaluation, "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. As stated therein, financial feasibility is a factor, and those projects that are infeasible are not subject to the applicable policy.

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		required to comply with policy proposed in section 5010 (local public agencies within the meaning of 85057.5(b)(5)), it will be important to further define and clarify the distinction between "routine maintenance and operation" and a "proposed action to [...] substantially rehabilitate or reconstruct [an existing levee]." Secondly, it would be very important to clearly establish what level of "evaluation," and what showing of "feasibility" or "infeasibility" will be required to comply with the new policy, and avoid a potential appeal. First and foremost, it would seem that financial feasibility should be the primary constraint on "incorporation" of "alternatives, including the use of setback levees, to increase floodplains and riparian habitats" in a local levee project. Moreover, it would seem appropriate that the financial feasibility of the proposed local project control over any future "criteria" developed by the Department of Water Resources, the Central Valley Flood Protection Board, the Department of Fish and Game, and the Sacramento-San Joaquin Delta Conservancy. With respect to proposed section 5010, it is also important that the regulation avoid unintended consequences, such as a situation in which local levee districts are prevented from undertaking necessary work to "rehabilitate or reconstruct" levees beyond "routine maintenance operation," due to potential prohibitive costs of such action, as result of the policy proposed in section 5010. A regulation that fails to address such concerns could be found inconsistent with the Delta Reform Act—and with other portions of the Council's regulations—as such a regulation could potentially increase flood risks to life and property in the Delta, and might furthermore conflict with statutory objectives to protect Delta agriculture, the Delta economy, etc. (See, e.g., proposed sections 5001(e)(3)(B), (C), and (E).)		
3. Central Delta Water Agency	1/14/2013	Section 5010. Expand Floodplains and Riparian Habitats in Levee Projects Recommendation Number 7 of Chapter 7 of the Delta Plan excludes local levee maintaining agencies from the development of the criteria. The lack of local input invites liability in that many deficiencies in levees, which are to be addressed with levee programs, are the result of state and federal actions. Project levees which were not constructed to appropriate engineering standards are a major part of the need for levee improvement projects. The regulation is inconsistent with Water code sections 85020(b) and 85054. The regulation should be revised to require that each designation be accompanied by a finding that the action protects and enhances agricultural values. The requirement of concurrence by the local levee maintaining agency should also be added.	Co	Recommendation RR R8 concerning the development of setback levee criteria by DWR does not specifically exclude local agencies. It will be the responsibility of DWR to ensure that appropriate public input is incorporated per their requirements. The local expertise and knowledge of the local levee maintaining agencies will be important in allowing for effective criteria development.
4. City of Stockton	1/14/2013	Section 5010 provides for alternatives to levee projects to increase floodplains and riparian habitat. It appears to incorporate materials not yet developed, namely "criteria developed by the Department of Water Resources, in conjunction with the Central Valley Flood Protection Board, the Department of Fish and Game, and the Sacramento-San Joaquin Delta Conservancy." It is unclear what these future criteria, when ultimately developed, would do and whether they would be clear in the context of Section 5010. This regulation is therefore unclear.	Ct	The policy was revised to limit its geographical scope. The criteria proposed in Recommendation 8, when developed, will have to be assessed for its use and inclusion into Council considerations, but as of this point, does not exist and thus its impact on this regulation is unknown. The criteria, as of this point, will not be binding unless future actions to incorporate them into the Delta Plan are taken, which would be a public proceeding.
5. City of West Sacramento	1/14/2013	Expand Floodplains. This section seeks to impose on the flood protection community the requirement to consider and implement setback levees unless not feasible. This provision goes beyond the authority of the Council.	A	The Council has the authority to implement the Delta Reform Act, in which achievement of the coequal goals and their inherent policy objectives is clearly stated, including restoring the Delta ecosystem, and reducing flood risks. This regulation requires covered actions proposing new levees or substantially rehabilitating or reconstructing existing levees in specified areas to consider and where feasible incorporate alternatives that increase floodplain and riparian habitat, such as setback levees. The Council is authorized to adopt this policy, which furthers

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				the creation of floodplain and riparian habitat, because it must adopt a Delta Plan that furthers the coequal goals, including the coequal goal of restoring the Delta ecosystem. (sections 85300(a), 85054.) The Plan must promote characteristics of a healthy Delta ecosystem by, for example, promoting biologically appropriate habitats (section 85302(c)(3)) and establishing migratory corridors for wildlife along Delta river channels (section 85302(e)(2)). Furthermore, the Council must adopt a Plan that reduces risks to important interests in the Delta by, among other things, promoting strategic levee investments. (sections 85305(a), 85306.) This regulation will promote creation of riparian habitat necessary to meet the Act's requirements, as well as encourage the creation of additional floodplain which will help to reduce the risk of flooding.
6. East Bay Municipal Utility District	1/14/2013	Section 5010. Expand Floodplains and Riparian Habitats in Levee Projects - Section 5010(a) is unclear in that it directs the regulated community to do something that hasn't yet been identified. The second sentence states "When available and incorporated into this policy" various criteria must be used to make a determination, however the criteria are not available at this time so they should not be incorporated into the regulation. The regulatory criteria should be adopted into regulatory language after they have been developed — not before. The regulated community must have an opportunity to provide comment on the criteria, and this approach does not allow for that opportunity.	Ct	The criteria, when developed, will be considered by the Council for incorporation. Until that point, no criterion exists, and is not part of the regulation. The Council has revised the policy to delete reference to the future criteria it recommends be developed in the Delta Plan. This reference is deleted to clarify that the Council may consider adopting the criteria once developed in a future rulemaking, but those currently undeveloped criteria have no regulatory effect through this regulation at this time. The public will have full opportunity to review and comment on those criteria, if and when they are proposed to be adopted by the Council pursuant to the rulemaking procedures provided for under Government Code section 11340 et seq.
7. Sacramento County	11/20/2012	In March of 2012, Sacramento County provided the DSC with maps of the unincorporated communities of Freeport, Courtland, Hood, Locke, Ryde, and Walnut Grove. As you recall, the County vigorously cautioned the DSC that these maps were not reflective of finite or legal geographic boundaries, but rather illustrated General Plan land use designations, as adopted by our Board of Supervisors in November 2011. Nevertheless these maps are now included in Appendix "K" of the draft Delta Plan.		The Council notes Sacramento County's comment that the maps of unincorporated Delta communities do not reflect legal geographic boundaries. The Council intends to use the maps in Appendix 7 of the rulemaking package to designate areas that are exempt from specific regulations (sections 5010 and 5013, corresponding to DP P1 and RR P2 in the Delta Plan) under the Delta Reform Act.
8. Sacramento County	11/20/2012	More recently the Delta Protection Commission (DPC) submitted a similar request for Delta community maps for inclusion into their Land Use and Resource Management Plan (LURMP). Staff from both the County's Community Development and Water Resources departments worked collaboratively with DPC staff to accommodate this mapping request. For this mapping exercise, County staff considered not only existing General Plan land use designations, but also existing urban/non-agricultural zoning in and immediately adjacent to the defined Delta communities. This closer look revealed a combination of very minor mapping errors on our zoning maps, along with the discovery of a few scattered parcels that are appropriately zoned to accommodate urban densities and land uses.		The Council notes that Sacramento County prepared similar maps to those provided to the Council in response to a request from the Delta Protection Commission.
9. Sacramento County	11/20/2012	An example of mapping errors includes the exclusion of approximately 7.0 acres of RD-5, RD- 10, and RD-10 (MHP) zoned land in the northwest corner of the community of Hood. Most of this acreage is home to the Robin Hood Mobilehome Park. An example of urban zoned sites not included on the first set of maps submitted to the DSC is the 31.0 acre site located adjacent to the community of Locke, just north of the Delta Cross Channel. This site is designated as "Recreation" on the General Plan and zoned C-0 (Commercial Recreational). The C-0 zone is very restrictive allowing few land uses by-right. For example, most recreation-related uses (e.g., marinas, restaurants, travel trailer parks, and resorts) are subject the approval of a Conditional Use Permit (CUP). A description of the applicable County's zoning designations is attached.		The Council agrees to revise the maps in Appendix 7 of the Rulemaking Package ~~(and Appendix K of the Delta Plan)~~ to correct mapping errors. Specifically, the map of the Town of Hood, has been revised to include approximately 7.0 acres of RD-5, RD-10 and RD-10 (MHP) zoned land in northwest corner of Hood, most of which consists of the Robin Hood Mobilehome Park. The Freeport map also has been revised to correct errors. The Council does not agree with the suggestion to add the two parcels zoned CO (Commercial Recreation) to the map of Locke and Walnut Grove, or to add the parcel zoned CO to the Ryde map. Section 5010 does not cover commercial recreational visitor-serving uses, and therefore it is not necessary to include these parcels within the boundaries of the unincorporated Delta towns in order to exempt them regulation. The Council does not agree with the suggestion to add the parcels zoned RD-5 (Single Family) and M-1 (Light Industrial), located across from the Paintersville Bridge, to the Courtland map.

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				These parcels are located approximately half a mile from Courtland and do not appear to be part of the community.
10. Sacramento County	11/20/2012	During their November 15, 2012 hearing, the DPC took formal action to accept and incorporate Sacramento County's (and Yolo County's) Delta community maps into their LURMP. Therefore, in order to achieve the stated objective of consistency we are submitting a set of "revised" Delta community maps that mirror those accepted by the DPC and request that they replace those contained in Appendix "K" of draft Delta Plan. These maps more accurately reflect both current General Plan designations and existing urban and/or non-agricultural zoning. Again, the mapping changes are minor in nature and do not impede or circumvent the Council's primary statutory objective to "achieve the coequal goals" through the implementation of key land use, watermanagement, and flood protection policies and strategies outlined in the draft Delta Plan, specifically DP P1 and RR P3.		The Council does not believe it is necessary for the maps in the Council's regulations (and the Delta Plan) and the Delta Protection Commission's *Land Use and Resource Management Plan* to be identical because they will be used by the agencies under their distinct legislative authorities in different ways.
11. Sacramento County	11/20/2012	Furthermore, consistent with our past messaging, the attached maps merely reflect adopted land use designations and zoning, but should not be construed or interpreted as illustrating a finite boundary line identified by Sacramento County for these communities. As stated in prior written comments and in one-on-one meetings with you and your staff, absent significant public engagement and input the establishment of boundaries around the Delta communities is problematic. As a result, this effort to "map" the Delta communities for the purposes of the Delta Plan should be considered just the first step first of several steps to establish legally defensible boundaries. Sacramento County staff are also preparing mapping that identifies other existing and approved urban uses and areas throughout the Delta that are not depicted on these maps. We will share these new maps with both the DSC and DPC when they are available.		The Council's maps do not create legal boundaries for use by other agencies in the implementation other laws.
12. San Joaquin County Board of Supervisors	1/14/2013	Policy ER P4 "Expand Floodplains and Riparian Habitats in Levee Projects"; Proposed Regulation Article 3, Section 5010. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.	A, Co	The Council has the authority to implement the Delta Reform Act, in which achievement of the coequal goals and their inherent policy objectives is clearly stated, including restoring the Delta ecosystem, and reducing flood risks.
13. San Joaquin County Board of Supervisors	1/14/2013	Levee projects must evaluate and, where feasible, incorporate alternatives, including use of setback levees, to increase floodplains and riparian habitats. When available, the criteria developed under the Delta Plan's RR R7 must be used to determine appropriate locations for setback levees. This proposed Regulation covers a proposed action to construct new levees or substantially rehabilitate or reconstruct existing levees. It is unclear from the Delta Plan how the new wetlands and floodplains created by the setback levees will be managed. Who is responsible for managing the wetlands and floodplains and who will pay the cost of management? Requiring already financially challenged Reclamation Districts to build and maintain setback levees and the wetlands they create could make levee maintenance cost prohibitive for many Districts. Additionally, poorly managed wetlands caused by insufficient funds and/or expertise could adversely affect neighboring agricultural lands by serving as a reservoir for harmful insects, noxious weeds, disease, and rodents. If the Delta Plan requires setback levees to increase wetlands and floodplains, then it should also identify responsible parties and funding sources for managing them into perpetuity.	DP, E	The regulation states that levee projects must evaluate, and where feasible, incorporate alternatives, including setback levees. It does not mandate setback levees. If the lead agency of a large levee project determines that setback levee incorporation is feasible and warranted within their project design, they are responsible for any aspects of the projects life cycle that would typically be expected from a lead agency.

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14. Solano County Department of Resource Management	1/14/2013	What is the reason to mandate the evaluation of alternatives, and who pays for that? Furthermore, it's not clear the Delta Stewardship Council has the authority to mandate this.	A	The purpose for mandating the evaluation of setback levees, where feasible, is to possibly expand floodplains and riparian habitats in the Delta, consistent with the Council's authority to implement the Delta Reform Act, in which achievement of the coequal goals and their inherent policy objectives is clearly stated, including restoring the Delta ecosystem, and reducing flood risks.
15. Yolo County, Office of the County Counsel	1/14/2013	Regs 5010, 5011: The County concurs with and incorporates by reference the comments of San Joaquin County on Section 5010 of the proposed regulations. The County concurs with and incorporates by reference the comments of San Joaquin County on Section 5011 of the proposed regulations.	O	We direct the commenter to the responses provided to the referenced agencies.

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ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1.1 California Central Valley Flood Control Association	1/24/2013	**Cost Clarification** - Table 3 on page 25 states that this section will cost state and local agencies from $3 million to $7.5 million, however, it does not indicate whether these are annual or total costs for complying with this section. **We request that the Cost Analysis**: 1) clarify whether these additional costs to state and local agencies is annual or total; and 2) analyze the capacity of reclamation districts to bear the burden of these additional costs based on their annual budgets as we mentioned previously.	E	The Council understands the limitations on financial capacity of some Reclamation Districts. Economic factors including financial capacity are considerations that would be used to determine whether the setback levee (or other habitat improvement) is feasible (see definition of "feasible," 5001(p)). The Council also recognizes that costs would be incurred in such determination and the costs for an agency to determine feasibility are likely to vary widely depending on the circumstance. However, the revised cost analysis recognizes that some determinations may be very straightforward and inexpensive, such as in cases where construction of a setback levee would be well outside the economic capacity of the local agency and no state or federal funding was available. The reference in subdivision (a) to reliance on future criteria has been deleted from the adopted regulations.
2.1 Local Agencies of the North Delta	1/24/2013	§ 5010 Expand Floodplains and Riparian Habitats in Levee Projects – The showing of infeasibility for setback levees appears to be a major financial and administrative burden on local reclamation and levee districts. (See above regarding lack of clarity on what that showing will entail.) Moreover, there does not seem to be a clear or meaningful distinction between what constitutes routine maintenance and operation and substantial rehabilitation and reconstruction. As explained in prior comments, setback levees are not appropriate in many circumstances within the Delta. They are also vastly more expensive to build, and often lead to destruction of existing structures and conversion of productive farmland. Last, the reference in subdivision (a) to reliance on future criteria to be developed by other agencies, departments, boards, etc. is impermissible in that it does not apprise the public of what standard is being proposed now for adoption.	Ct	The extent of levee setback evaluation has been significantly narrowed in the adopted regulation. The costs shown in appendix A of the Cost Analysis are only illustrative of the range of costs for constructing a setback levee, if such is found to be feasible. A range of costs per mile is shown based on some recent projects, and it is unclear what further cost breakdown would be useful. The only required cost is for the evaluation of feasibility.
3.1 Local Agencies of the North Delta	1/24/2013	The text of section 5010: Expand Floodplains and Riparian Habitat in Levee Projects, misleads reader into assuming that approximately half of the Delta levees would already need analysis for setback levees. (Cost Analysis, p. 16.) However, the text of the Central Valley Flood Protection Plan ("CVFPP") does not support this assumption. Instead, the CVFPP instead explains that "At selected levee setback locations in Sacramento and San Joaquin river basins," setback levees should be "consider[ed]," "may be used...where economically feasible," and "where setback levees for multiple benefits prove feasible." The CVFPP also proposes a "greater cost-share" for setback levees. (See 2012 CVFPP, June, 2012, pp. 2–15, 3-4, 3-7, 3-11, 3-44, 4-20, available at: http://www.water.ca.gov/cvfmp/docs/2012%20CVFPP%20FINAL%20lowres.pdf.) Finally, there is no cost breakdown provided in the illustration that provides the detail required for Form 399.	E	The Council understands the limitations on financial capacity of some Reclamation Districts. Economic factors including financial capacity are considerations that would be used to determine whether the setback levee (or other habitat improvement) is feasible (see definition of "feasible," 5001(p)). The Council also recognizes that costs would be incurred in such determination and the costs for an agency to determine feasibility are likely to vary widely depending on the circumstance. However, the revised cost analysis recognizes that some determinations may be very straightforward and inexpensive, such as in cases where construction of a setback levee would be well outside the economic capacity of the local agency and no state or federal funding was available.

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		Form 399 should disclose the sum total cost per mile of new setback levees that could be required as a result of this plan as compared to existing requirements.		The reference in subdivision (a) to reliance on future criteria has been deleted from the adopted regulations.

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ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Central Delta Water Agency	1/14/2013	Section 5011. Avoid Introductions of and Habitat Improvements for Nonnative Species Nonnative Species There are a number of nonnative species such as striped bass, black bass and pheasants that are an important part of the recreational values in the Delta which are required to be protected and enhanced. Water Code section 85304(c)(5) provides that the Delta Plan shall include measures that promote: "Conditions conducive to meeting or exceeding the goals in <u>existing species recovery plans</u> and state and federal goals with respect to doubling salmon populations." Water Code section 85304(e)(3) provides as a subgoal and strategy for restoring a healthy ecosystem: "Promote self-sustaining, diverse populations of native <u>and valued species</u> by reducing risk of take and harm from invasive species." The CVPIA (3406(b)(1)) requires the Secretary of Interior to develop a program to ensure by the year 2002 natural production of anadromous fish on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991. Anadromous fish include: salmon, steelhead, striped bass, sturgeon and American shad. Much, if not all, of the tidal habitat targeted for development in the Delta Plan will improve habitat for striped bass and black bass. The regulation lacks clarity as to whether it is directed at nonnative species or nonnative invasive species which are not defined. The tidal habitat will likely improve habitat for nonnative species, including plant species which are commonly referred to as invasive. The regulation as currently written is ambiguous and in conflict with the very statutes cited as authority for its adoption.	Ct, Co	A definition of non-native invasive species is provided and the application of the policy to invasive nonnative species is emphasized. The reference in Water Code 85304(c)(5) to recovery plans does not require protection of valuable non-native species, as these plans are developed for federally-designated endangered native species, not introduced species. Also, although the Central Valley Project Improvement Act (CVPIA) does establish a federal program to rebuild anadromous fish populations in the Central Valley, Water Code 85304(c)(5) references only the goal of doubling salmon populations, rather than CVPIA goals for other anadromous fish. Efforts to manage and recover striped bass became controversial with the listing of Chinook salmon and delta smelt under the state and federal Endangered Species Acts and have remained controversial since, with the Department of Fish and Wildlife agreeing in 2011 to develop, a proposal to modify the striped bass sport fishing regulation (i.e., section 5.75) to reduce striped bass predation on Sacramento River Winter-run Chinook salmon, Central Valley Spring-run Chinook salmon, Central Valley steelhead, and delta smelt. Substantial habitats for striped bass and bass will remain outside areas proposed for ecosystem restoration, providing significant areas where these valued species are protected from harm by invasive plants and animals or other stressors. 5009(a) provides that measures to avoid new introductions or improved habitat conditions for affected species must be implemented in a way 'that appropriately protects the ecosystem" affords protection at the ecosystem level for both native and introduced but valuable species.
2. San Joaquin County Board of Supervisors	1/14/2013	Policy ER P5 "Avoid Introductions and Habitat Improvements that Enhance Survival and Abundance of Nonnative Invasive Species"; Proposed Regulation Article 3, Section 5011. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.	A, Co	Regarding the Council's land use authority, see MR3.

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ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. California Central Valley Flood Control Association	1/14/2013	Section 5012 – New Urban Development. This section prohibits new urban development except in specific designated areas. This provision raises many questions. First, what is urban development, as the term is not defined here. Is it a single home? Is it measured by the 10,000 residents definition of an urban areas? Is it something in between? Second, what is the Council's jurisdiction to decide which areas are properly designated? Third, what consideration has been given to potential taking claims? This section also appears to conflict with the responsibilities of the Delta Protection Commission (DPC) to review, approve, and serve as a appeal body for development in the Delta, and as such is wholly duplicative of the statutory authority vested in the DPC. Finally, this section also appears to conflict with: (1) Water Code Section 85022(c)(4) which states that future developments that are carefully planned and consistent with the policies of that division are "essential" to the economic and social well-being, particularly to persons living and working in the Delta, (2) Section 85212 which states what the Council's input is required to include, but it does not concede or transfer any powers to regulate land use development from the local government to the Council, (3) Section 85300(a) which states that the Delta Plan shall include subgoals and strategies "to assist in guiding state and local agency actions" [emphasis added] related to the Delta., and (4) Section 85305(a) which states that the Delta Plan shall reduce risks to people, property, and state interests in the delta by "promoting" "appropriate land uses," but not granting any authority to the Council or the Delta Plan to "regulate" development or land uses. See sections 85057.5(c), 85022(c)(4), 85212, 85300, 85305(a), the CVFPP, and the ULDC.	A, Ct, Co	Section 5010 has been clarified by removing the term "urban development." In addition, the regulation has been revised to allow new development outside urban areas and towns if it is consistent with land use designations in county general plans as of the date of the Delta Plan's adoption, such as farm labor housing in areas designated for agriculture. The Council's jurisdiction to decide which areas are properly designated is part of the Council's land use authority. Regarding the Council's land use authority, see MR3. Regarding the assertion of a potential regulatory taking, see MR6. Regarding the assertion of conflict with and duplication of the authority of the Delta Protection Commission, see MR7. The adopted regulation is consistent with Water Code section 85022(c)(4) because it allows future development within the designated areas, thus enhancing the economic and social well-being of Delta residents by reducing their exposure to flood risk. The adopted regulation is consistent with Water Code section 85212, which requires the Council to provide advice to local and regional planning agencies regarding the consistency of local and regional planning documents with the Delta Plan. The adopted regulation is consistent with Water Code section 85300(a), which states that the "Delta Plan may also identify specific actions that state or local agencies may take to implement the subgoals and strategies." Regarding the Council's land use authority, see MR3. The adopted regulation is consistent with Water Code section 85305(a), which calls for promoting appropriate land uses. The term "promote" includes the notion of prodding. However, it also includes promoting by regulating. Thus, the term is defined as "support or actively encourage (a cause, venture, etc.); further the progress of: [for example] *some regulation is still required to promote competition*. (See Oxford Dictionaries' definition at http://oxforddictionaries.com/definition/english/promote [emphasis in original].) Consistent with this definition, both the Legislature and the California Supreme Court have expressly used the term "promote" to mean "require." (See for example, Health & Safety Code section 1276.3(b)(1) agency can "promote" by "requiring" certain actions.) Penal Code section 1016.5 [declares Legislature's intent to "promote fairness . . . by requiring" a specified warning]; *Bank of Italy v. Johnson* (1926) 200 Cal. 1, 22 [rule that used the word "require" was "in harmony" with statute that used the word "promoted."] In the Delta Reform Act, the Legislature neither limited the term to non-regulatory actions nor required regulatory actions. Rather, it left that determination to the Council's discretion. Regarding the Council's authority to regulate, see MR1.
2. Central Delta Water Agency	1/14/2013	Section 5012. Locate New Development Wisely The regulation unduly interferes with local land use authority in that its limitations are an absolute limitation and go well beyond a reasonable nexus to the coequal goals. Flood proofing or protecting development to meet all requirements in areas not listed in 5012(a) is possible, and the targeting of areas rather than establishing standards for development, which can be uniformly and equitably applied, is in conflict with the authority provided by law to local and regional land use agencies. The statement of no alteration of concurrent authority with the Delta Protection Commission (DPC) does not resolve the DSC application of requirements beyond the jurisdiction of the DPC or the prohibition by the DSC of development allowed by the DPC.	A, Co	Regarding the Council's land use authority, see MR3. Moreover, the limitation on new development is not an absolute limitation. The regulation has been revised to allow new development outside urban areas and towns if it is consistent with land use designations in county general plans as of the date of the Delta Plan's adoption, such as farm labor housing in areas designated for agriculture. New residential development of five or more parcels in these areas must also be consistent with section 5013 with respect to floodproofing. Designating areas for different types of uses is a well-established land use planning and regulatory practice. It has been used since approximately 1900 (see *Village of Euclid, Ohio v. Ambler Realty Co.* (1926) 272 U.S. 365, 386, explaining same in upholding city's land use designations. Regarding the assertion of conflict with the authority of the Delta Protection Commission, see MR7.

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3. City of Stockton	1/14/2013	Section 5012 proscribes "new urban development" in the Plan area in all but limited geographical areas. The reach and scope of Section 5012 has been, and continue to be, of great concern to the City of Stockton, as the City's core area is located within the Secondary Zone of the Delta. In its June 8, 2012 comment letter to the DSC on the 6th Draft Delta Plan (which is incorporated by this reference), the City noted that the language in the Delta Plan's proposed policy DP P1 (Locate New Development Wisely) was unclear and suggested revised language to provide better clarity. Similarly, On July 17, 2012, the City of Stockton transmitted a letter to DSC Chairman Phil Isenberg requesting confirmation that planned development, consistent with an adopted General Plan within an urban and urbanizing area in the Secondary Zone of the Delta and in a sphere of influence or urban limit line, is geographically exempt from the certification of consistency requirements of the Delta Plan (see Attachment 1: City of Stockton Letter to Delta Stewardship Council on Exemption of Urban/Urbanizing Areas, Dated July 17, 2012). We have continued to get clarity on the application of Section 5012 specifically to various existing and potential future projects in the City. Absolute clarity on this issue is critical to the City as a literal reading of Section 5012 could prohibit certain development - and even redevelopment in the City's core downtown area and other areas. Even the Council's most recent letter to the City, dated November 8, 2012 (and attached hereto as Attachment 2) recognizes that the application of Section 5012 to certain projects is unclear. In that letter, the Council explained that "routine urban development in areas already planned for urban uses in cities, their spheres of influence, or other urban areas will rarely if ever cross the threshold to require certifications of consistency with the Delta Plan." (November 8, 2012 letter, page 3.) As it relates to projects already in the pipeline, the Council recommended "that the project proponents should obtain written determinations that they fall within these exemptions from the applicable State or local agencies that approved and/or funded the projects." (November 8, 2012 letter, page 2.) However, it is the Council itself that should be able to say whether these projects are or are not subject to the requirements for certifications of consistency. The inability to opine on whether or not these project are subject to the Delta Plan's consistency determinations is further evidence that the proposed regulations are unclear.	Ct, Du	Section 5012 has been renumbered as section 5010. Section 5010 would not regulate new residential, commercial or industrial development in areas currently designated for development in cities, their spheres of influence, and other unincorporated urban areas or towns listed in the regulation, cited below. Specifically, section 5010 applies only to "new residential, commercial, and industrial development that is *not* located within the areas described in subsection (a)." (Emphasis added.) Section 5010 does not, therefore, apply to the following areas: "(1) Areas that city or county general plans as of the date of the Delta Plan's adoption [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 urban residential, commercial, and industrial development may occur on Bethel Island unless it is consistent with the Contra Costa County general plan effective as of the date of the Delta Plan's adoption; (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.". In addition, the Council has further clarified section 5010 by adding subsection (b), which states, "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 the date of the Delta Plan's adoption, and is otherwise consistent with this chapter." This means that a development of this type in the outskirts of the City of Stockton, outside the City's boundaries AND its sphere of influence (and outside the other areas described in subsection (a)) would be covered by this policy, and only allowed if consistent with relevant land uses designated in the San Joaquin County general plan as of the date of the Delta Plan's adoption (and otherwise consistent with any other relevant Delta Plan regulations).
4. Sacramento County	1/14/2013	14. Section 5012 limits "new urban development" to certain locations that are already developed or designated for development in local general plans. The intended meaning of the term "urban development" is far from clear. The draft regulations already define the term "urban area" in such a manner that the unincorporated Delta towns of Clarksburg, Courtland, Hood, Locke, Ryde and Walnut Grove are excluded. However, the term "new urban development" is using the term "urban" as a classification of a particular type of land use (residential, commercial, industrial) without regard to population or density. A broad interpretation of the term "new urban development" would encompass even the construction of a single residence or commercial facility. However, other draft regulations (Section 5015 regulating residential subdivisions of five or more lots) would be unnecessary in such case. What then is the level of "urban development" that is within the scope of Section 5012?	Ct	Section 5010 has been clarified by removing the term "urban development." The regulation also has been revised to add subsection (b), which allows new development outside the specified urban areas and towns "if it is consistent with the land uses designated in county general plans as of the date of the Delta Plan's adoption, and is otherwise consistent with this chapter", such as farm labor housing in areas designated for agriculture. In addition, subsection (c) states that the regulation "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." With respect to the compatibility of section 5010 and section 5013, the addition of the language in 5010(b) now allows appropriate development outside the urban areas and towns, while 5013 requires floodproofing for any new residential development of five or more parcels in these rural areas, should the proposed development be demonstrated to be compatible with the designated land uses, as required by 5010.

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
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ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
5. San Joaquin County Board of Supervisors	1/14/2013	Policy DP P1 "Locate New Development Wisely"; Proposed Regulation Article 3, Section 5012. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.	A, Co	Regarding the Council's land use authority, see MR3.
6. San Joaquin County Board of Supervisors	1/14/2013	Sub-Section 5012(a) states that new urban development including residential, commercial and industrial uses, must be limited to certain areas. These include areas within the City of Stockton's or County's General Plans as of the date of the Delta Plan adoption which areas are designated for development in Cities or are shown in their adopted spheres of influence. This requirement is confusing and may lead to implementation problems because the proposed Regulation appears to use the term "uses" synonymously with the term "General Plan designation." How land is actually used may be somewhat different than the specific General Plan designation language. For instance, land may be designated in the General Plan as General Agriculture, but the use of the land may be for a residence with the rest of the parcel used for agricultural production. There are also a number of uses that can be considered as commercial or industrial types of agricultural uses, such as wineries or large agriculture processing facilities, but they may be permitted on land designated as General Agriculture in the General Plan.	Ct	Section 5010 has been clarified by removing the term "residential, commercial, and industrial uses." The regulation also has been revised to add subsection (b), which allows new development outside the specified urban areas and towns "if it is consistent with the land uses designated in county general plans as of the date of the Delta Plan's adoption, and is otherwise consistent with this chapter", such as farm labor housing in areas designated for agriculture. This revision was made to acknowledge that some types of residential or commercial uses are appropriate in areas designated for agriculture or recreation. The concern regarding potential limitations on wineries or large agricultural processing facilities is further addressed by section 5010(c) which states that the policy "does not cover recreational or 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."
7. San Joaquin County Board of Supervisors	1/14/2013	As of the adoption of the Delta Plan, this proposed Regulation subsection would also prohibit the County from changing the General Plan designation to permit urban development on any land within the Primary and Secondary zones of the Delta outside of a City's sphere of influence. As the County is in the process of updating its General Plan, this will place limits on the County's ability to plan where growth and development may occur in the future. The fundamental issue at hand is the loss of local land use authority, which is inconsistent with State law. Section 65100 of California Planning and Zoning Law states that there is in each City and County a planning agency with the powers necessary to carry out the purposes of this title. Section 65103 states that each planning agency is responsible for, among other things, the preparation and implementation of the General Plan. Section 5012 of Article 3 will tie the hands of the County when preparing and implementing its General Plan.	A, Co	Regarding the Council's land use authority, see MR3.
8. San Joaquin County Board of Supervisors	1/14/2013	As to Section 5012, San Joaquin County concurs in the submitted objections and comments of Solano County and Yolo County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.	A, Ct, Co	Comment noted. See responses to comments made by Solano and Yolo County.
9. Solano County Department of Resource Management	1/14/2013	• This limitation on new development is well beyond the scope of the Delta Reform Act and state law. The Legislature has not called for the cessation of new development as provided in this regulation.	A	The adopted regulation would not cause the cessation of new development but would limit most new development to areas designated in the Delta Plan. The regulation also has been revised to add subsection (b), which allows new development outside the specified urban areas and towns "if it is consistent with the land uses designated in county general plans as of the date of the Delta Plan's adoption, and is otherwise consistent with this chapter", such as farm labor housing in areas designated for agriculture.
10. Solano County Department of Resource Management	1/14/2013	• Section 5015 appears to contemplate new residential development, in conflict with this section.	Ct	With respect to the compatibility of section 5010 and section 5013, the addition of the language in 5010(b) will allow residential development in some cases outside the urban areas and towns, while 5013 requires floodproofing for any new residential development of five or more parcels in these rural areas, should the proposed development be demonstrated to be compatible with the designated land uses, as required by 5010.

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ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
11. Solano County Department of Resource Management	1/14/2013	• Lastly, this section would appear to conflict with the responsibilities of the Delta Protection Commission regarding development in the Delta, and as such is wholly "duplicative," counter to the requirement at Government Code section 11349(f).	Du	Regarding the assertion of conflict with and duplication of the authority of the Delta Protection Commission, see MR7.
12. Yolo County, Office of the County Counsel	1/14/2013	This section limits "new urban development, including residential, commercial, and industrial uses," to certain locations that are already developed (including the legacy towns) or designated for development in local general plans. The intended meaning of the term "urban development" is far from clear. A broad interpretation of this term would encompass even the construction of a single residence or commercial facility. However, other proposed regulations (e.g., Section 5015, regulating residential subdivisions of five or more lots) would be unnecessary if such an interpretation were intended. This leaves the County perplexed as to what level (i.e., density and intensity) of "urban development," exactly, is within the scope of Section 5012. One potential approach to resolving this clarity issue is to simply modify Section 5012 to refer to "<u>significant levels of</u> new urban development." While certainly not as clear as a quantitative standard, this language would provide considerable guidance to affected agencies while also eliminating the current inconsistency with Section 5015 and other provisions of the draft regulations. Such an approach would be in keeping with the apparent objective of Section 5012 (i.e., to allow only very limited new urban development in the Delta) and elements of the statutory definition of "covered action" in Water Code Section 85057.5, including its limitation to actions that "[w]ill have a significant impact on achievement of one or both of the coequal goals . . . ."	Ct	Section 5010 has been clarified by removing the term “urban development.” The regulation also has been revised to add subsection (b), which allows new development outside the specified urban areas and towns “if it is consistent with the land uses designated in county general plans as of the date of the Delta Plan’s adoption, and is otherwise consistent with this chapter”, such as farm labor housing in areas designated for agriculture. With respect to the compatibility of section 5010 and section 5013, the addition of the language in 5010(b) now allows appropriate development outside the urban areas and towns, while 5013 requires floodproofing for any new residential development of five or more parcels in these rural areas, should the proposed development be demonstrated to be compatible with the designated land uses, as required by 5010.
13. Yolo County, Office of the County Counsel	1/14/2013	Finally, aside from the foregoing issues, the County recognizes that unlike earlier versions of the Delta Plan policy on which this regulation is based, Section 5012 does not apply to "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." This change, by itself, resolves the County's main concern with earlier versions of the policy underlying this proposed regulation. The County greatly appreciates the Council's inclusion of this language and its understanding of the need to accommodate some development of this nature in rural portions of the Delta.	O	Comment noted.

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ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. California Department of Fish and Wildlife; Ecosystem Conservation Division/Water Branch	1/10/2013	Section 5013: Section 5013 of the proposed regulations requires ecosystem restoration to be sited to avoid or reduce conflicts with existing or planned uses when feasible. We recommend that the first sentence be restated as a recommendation, rather than a mandatory requirement. For example, we suggest the following: "When siting water management facilities, ecosystem restoration, and flood management infrastructure, project agencies should seek to avoid or reduce conflicts with existing or planned uses and should consider comments from local agencies and the Delta Protection Commission." We also recommend clearly defining what constitutes "planned uses."	Ct, O	The Council has determined that the first sentence should be retained as part of the adopted regulation, not revised to become a recommendation. Section 5011 has been revised to clarify the meaning of "planned uses." The regulation now refers to "those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence."
2. San Joaquin County Board of Supervisors	1/14/2013	Policy DP P2 "Respect Local Land Use when Siting Water or Flood Facilities or Restoring Habitats"; Proposed Regulation Article 3, Section 5013. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.	A, Co	Regarding the Council's land use authority, see MR3.
3. San Joaquin County Board of Supervisors	1/14/2013	This proposed Regulation, specifically sub-Section (a), is not "clearly understandable", as required by rulemaking review standards. The use of the words "considering" and "consider" leaves those covered by, or implementing, the proposed Regulation to guess whether the proposed regulation requires action or simply requires review of possible action.	Ct	The use of the words "considering" and "consider" mean that the adopted regulation only requires review of possible action.
4. Solano County Department of Resource Management	1/14/2013	• However, some clarification is necessary regarding the term by "planned uses." Whose plan? And what level of planning is required to meet that definition?	Ct	Section 5011 has been revised to clarify the meaning of "planned uses." The regulation now refers to "those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence."
5. Solano County Department of Resource Management	1/14/2013	• Privately-owned sites do not have to be "purchased," necessarily. The language should be changed to "utilized" or the like.	DP	The Delta Stewardship Council intends for part of the regulation that refers to privately owned sites to apply specifically to sites that are purchased by public agencies and removed from the tax base, rather than sites that are simply "utilized."
6. Solano County Department of Resource Management	1/14/2013	• The only thing stated about mitigation for existing uses is the following: "Measures to mitigate conflicts with adjacent uses may include, but are not limited to, buffers to prevent adverse effects on adjacent farmland." This is insufficient, if only because it is concerned with "adjacent uses." Full mitigation, including economic mitigation, should be required for any disruption to existing uses as well as adjacent uses. (See comments on section 5008.)	DP	The first sentence of section 5011 calls for proposed actions to "avoid or reduce conflicts with existing…uses…when feasible." However, the Council has made a policy choice not to require full mitigation of the direct and indirect impacts of habitat restoration.
7. Solano County Department of Resource Management	1/14/2013	• We agree that the siting of water or flood facilities or habitat restoration must be accomplished in a manner that avoids conflicts with existing or planned uses. This regulation permits such conflicts when it is not "feasible" to avoid them. What is "feasible" should be strictly interpreted so as to not weaken what is a fundamental principle for Delta communities, including our own.	DP	Comment noted.
8. Yolo County, Office of the County Counsel	1/14/2013	The County concurs with and incorporates by reference the comments of San Joaquin County on Section 5013 of the proposed regulations. The County concurs with and incorporates by reference the comments of San Joaquin County on Section 5014 of the proposed regulations.	O	Comment noted. See responses to comments made by San Joaquin County.

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ASSOCIATION		DATE	COMMENT	CODES	RESPONSE
1.1	Individual (Conover)	1/24/2013	Sec. 5013(a). Restoring Habitats This provision is to avoid conflicts with existing or planned uses when feasible, considering comments from agencies and the Delta Protection Plans, so that the proposer must consider sites on existing public lands when feasible and consistent with a project's purpose, before privately owned sites are purchased. We agree with this policy and support it. We also support the last sentence of that paragraph, "Measures to mitigate conflicts with adjacent uses may include, but are not limited to, buffers to prevent adverse impacts on adjacent farmland." We would add to that the need for new levees to protect existing structures where marsh and tidelands are created for wildlife, to prevent flood impacts when floodwaters are released into restored natural floodplains and waterways. 200-year flood protection should be provided to existing rural farms as well. Our farm has been there for almost one hundred years, and our orchards are mature, productive, well-established economically within the global food distribution network, employ many people, and touch five generations of owners' families. Adjacent farms are the same. They deserve the protection afforded people in towns.	O	The first sentence of Section 5011 ~~5013~~ calls for proposed actions to "avoid or reduce conflicts with existing…uses…when feasible". However, the Council has made a policy choice not to require full mitigation of the direct and indirect impacts of habitat restoration.

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ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. California Central Valley Flood Control Association	1/14/2013	Section 5014 – Prioritization of State Investment. This provision offers criteria for prioritizing future State investments. Subsection (d)(1) is unclear on who is to "implement" the emergency preparedness, response, and recovery strategies and it should be clarified to state it is the local government agencies who will "implement" these strategies pursuant to their existing authorities. The Council's role according to Water Code Section 85305(a) is to "promote" effective emergency preparedness, but does not give any authority to "implement." In addition, the provision should be clarified that it is also the local agency that determines what is "appropriate."	Ct	The purpose of this clause was to encourage State funding to be directed towards implementing the SB 27 Task Force recommendations, which were developed, in part, by local emergency response agencies. This proposed regulation is not directing the Council to fill this role, rather it is highlighting this arena for priority receipt of State funds. It is silent on which level of government should fill this role. RR R2 recommends the establishment of a local agency with fee authority to fund and implement various emergency preparedness, response, and recovery activities. Regarding who must "implement" the emergency preparedness strategies referenced in section 5014(d)(1), the Delta Reform Act requires the state or local public agency proposing the covered action to certify its consistency with the Delta Plan, subject to review by the Council in the event that determination is appealed. (See sections 85057.5; 85225; 85225.25.) Thus, the state or local public agency certifying consistency with the Delta Plan must ensure its covered action is consistent with the requirement in 5014(d)(1) that emergency preparedness strategies are implemented.
2. California Department of Water Resources	1/14/2013	5014. Prioritization of State investments in Delta Levees and Risk Reduction. This Section states that the DSC will take the lead, working with DWR and the Central Valley Flood Protection Board to prioritize state investments in Delta levees. As you know DWR and the Board have been looking at this issue for a number of years and look forward to working with you on this activity. We recognize that the prioritization will change over time to meet society's needs.	O	Comment noted.
3. California Department of Water Resources	1/14/2013	Regs 5014, 5015, 5016, 5017: Central Valley Flood Protection Board. Many of these policies relate to responsibilities of the Central Valley Flood Protection Board. It is our understanding that the Board is in the process of reviewing these policies with regard to whether they conflict with the Board's authorities. DWR will consult with the Board following its review and may submit additional comments at that time.	O	Council staff met with CVFPB staff twice in January 2013 to address their questions regarding the proposed rulemaking, to ensure that concerns regarding potential overlap and roles and responsibilities are addressed. Agency responsibilities, however, often overlap. See, for example, *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal.App.4th 861, 866 ("One who would construct and operate a California power plant must first obtain an interconnected set of federal, state and regional agency approvals."); *Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 935 [timber harvest permit approvals are subject to a "regulatory scheme that encourages interagency teamwork" but does not strip "state agencies of their respective authority to protect resources"].) The Act grants the Council independent authority to include measures in the Delta Plan that reduce in-Delta risks. (Water Code section 85305(a).) The Legislature also expressed its intent that the Council would have an independent regulatory role concerning flood control issues 1) by authorizing the Council to include local plans of flood protection in the Delta Plan (Water Code section 85307(b)) and 2) by defining covered actions as including actions that will have a significant impact on flood control programs. (Water Code section 85305(a).)
4. Central Delta Water Agency	1/14/2013	Section 5014. Prioritization of State Investments in Delta Levees and Risk Reduction 5014(d)(2) the provision "Except on islands planned for ecosystem restoration, improvement of non-project Delta levees to the Hazard Mitigation Plan (HMP) may be funded without justification of the benefits." should be modified to delete "Except on islands planned for ecosystem restoration". As explained above, such targeting harms land values in advance of acquisition for public purposes and is contrary to law. To the extent such islands contain recreational or agricultural values, the conversions to tidal or wetland habitat and the deprivation of funding would violate the statutory requirements to protect and enhance such values in Water Code sections 85020 and 85054, as well as other statutes and law cited above. A substantial period of time may pass before a decision is made to	Co, DP	It is the intent that State funding to achieve the HMP guidance not be directed towards islands where intentional breaching, etc. may occur. The commenter's expressed concern regarding land values seems outside the scope of reasonable consideration on the part of the Council. Directing limited State funding towards areas that can provide the greatest flood control benefit is the goal of Council policy.

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		acquire the so-called restoration land and such areas may never be acquired. The levees on the targeted islands, in some cases, protect larger areas than the area targeted and flood consequences could extend well beyond the targeted areas.		
5. East Bay Municipal Utility District	1/14/2013	Section 5014. Prioritization of State Investments in Delta Levees - Section 5014(a) is applicable by its terms to the DSC, and is essentially a proposal by the DSC to adopt regulations requiring itself to develop funding priorities for State investments in Delta levees by January 1, 2015. This is an unnecessary regulation, and is more appropriate for internal DSC guidance and/or Delta Plan language. To the extent the DSC determines that additional Delta Plan language is warranted, in developing the language, it would be helpful to specify which "local agencies" the DSC intends to consult. Several state agencies are named, but at the local level no specificity is provided other than "local agencies." Local agencies involved in funding levee maintenance and local agencies with infrastructure dependent on levee maintenance should be among the agencies consulted.	Ne, DP	The Council understands and accepts the assertions of the commenter. Regulation 5012 ~~5014~~ has been substantially revised, with section 5012 ~~5014~~(a) and (b) removed from the final version. The bulk of this material has been moved into a new recommendation in Chapter 7 to provide guidance to the Council as it conducts its levee assessment activities.
6. East Bay Municipal Utility District	1/14/2013	Subsections 5014(b) and (c) are also not necessary and arc directed at actions to be conducted by DWR, although the regulations are not worded to require DWR to take action. Subsection 5014(d)(2) is also directed at DWR but is worded only as guidance or an expectation. This unnecessary language should be deleted.	Ne	The language referenced by the commenter has been removed from the revised regulation.
7. San Joaquin County Board of Supervisors	1/14/2013	Policy RR P1 "Prioritization of State Investments in the Delta Levees and Risk Reduction"; Proposed Regulation Article 3, Section 5014. There is no authority for this proposed Regulation. The Delta Stewardship Council is authorized only to make recommendations with respect to priorities for State levee investments. (Water Code Section 85306)	A	This regulation sets interim priorities to guide state investments in Delta flood risk management, to the extent permitted by law, including emergency preparedness and Delta levee funding. The Council is tasked with recommending priorities for state investments in the Delta (section 85306), as this policy does. The Council must also through its Delta Plan reduce risks to people, property, and state interests in the Delta by promoting effective emergency preparedness, appropriate land uses, and strategic levee investments. (Section 85305(a).) This regulation is authorized pursuant to these provisions of the Act. Further, note this regulation applies only to actions that meet the definition of a covered action in section 85057.5 involving state investments in Delta flood risk management. It applies only to the extent permitted by law (section 5014(d)) and does not change existing levee standards (section 5014(e)). As explained in response to comments on section 5001(e), the use of the term “promote” is not limited to non-mandatory recommendations. As the Oxford Dictionary defines the term, it means to “support or actively encourage (a cause, venture, etc.); further the progress of: [for example] *some regulation is required to promote competition* [emphasis in original]. Setting forth standards to guide investments in levees and requiring development and implementation of emergency preparedness measures “furthers the progress” of strategic levee investments and emergency preparedness in the Delta, respectively.
8. San Joaquin County Board of Supervisors	1/14/2013	This proposed Regulation would result in conducting an island by-island economics-based risk analysis. Additionally, the analysis would be required to consider the impact related to protecting the value of Delta islands' economic output, including agriculture. However, the Delta Plan does not state how to determine the value of the agriculture that is protected by a levee. If the required economic analysis is done properly, the value of agriculture protected by a levee should be determined over the life of the Plan and not on an annual basis.	DP, E	Comment noted. The specific economic details of the proposed study have not been developed, but it is presumed that an in-depth analysis of all relevant economic values associated with each Delta island and tract shall be addressed in a manner conforming to accepted economic analysis. Criteria and standards for the assessment for levee prioritization will be agreed upon by Council staff, DWR, and CVFPB.

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9. San Joaquin County Board of Supervisors	1/14/2013	As to Section 5014, San Joaquin County concurs in the submitted objections and comments of Yolo County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.	DP	Comment noted.
10. Save the California Delta Alliance	1/14/2013	§ 5014: Change § 5014(b)(2)(G) to read" Existing ecosystem values and ecosystem restoration opportunities including the use of vegetated levees."	DP	The purpose of this listing was to highlight the existing values to be considered when assessing each Delta island, including ecosystem values. It is not intended to provide recommendations on future levee design or configurations. This issue is being considered by the US Army Corps of Engineers and the Department of Water Resources, in conjunction with the Central Valley Flood Protection Board.
11. Solano County Department of Resource Management	1/14/2013	Water Code section 85306 requires the Delta Stewardship Council to consult with the Central Valley Flood Protection Board regarding the prioritization of state investments in Delta levees. However, subsection (a) enlarges that conversation to a number of other parties, including the Department of Water Resources. This will only complicate the discussion.	DP	Comment noted. The purpose of consulting the various agencies noted is to develop an effective prioritization that addresses the appropriate technical and agency-related issues. Such consultations shall allow the Council to produce a better product that meets its statutory mandate.
12. Yolo County, Office of the County Counsel	1/14/2013	In addition, the County offers the following comments. First, this section calls for the development of "funding priorities" for the investment of state funds in Delta levees by January 1, 2015, based in part on a number of actions set forth in subsection (b). Those actions include various references to "Delta islands" without any reference to other lands in the Delta. Presumably, the limited focus of this draft regulation is in error, as it conflicts with related language in the Delta Plan itself (e.g., p. 277, referring to Delta tracts and islands rather than islands alone). This should be addressed in a revised version of Section 5014.	Ct, DP	Will update to reflect this comment.
13. Yolo County, Office of the County Counsel	1/14/2013	Second, as the Council is aware, the Department of Water Resources is currently leading a regional flood management planning effort in various throughout the Delta as part of its implementation of the Central Valley Flood Protection Plan and the Delta Reform Act. This effort will result in a number of region-specific plans for flood protection improvements and related matters. This effort appears to implement the same provisions of the Delta Reform Act that the Council is attempting to implement through this regulation. It is not clear, however, that this proposed regulation is entirely in harmony with the DWR effort. The County encourages the Council to review this carefully with DWR to avoid conflicts between projects proposed (and presumably, prioritized) in local plans developed through the DWR effort and the funding priorities established under Section 5014.	Co	Council staff will monitor and, where feasible, participate in the regional planning efforts sponsored by the Department of Water Resources to determine the aspects of the region-specific plans that are applicable to the prioritization efforts of the Council. We look forward to working with local agencies to ensure that regional flood risk reduction can be achieved in a manner that reflects the State's requirement to prioritize its spending on Delta levees.

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ADOPTED REGULATION: SECTION 5012 ~~5014~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1.1 Central Valley Flood Protection Board	1/24/2013	(a) The Delta Stewardship Council, in consultation with the Department of Water Resources, the Central Valley Flood Protection Board, the Delta Protection Commission, local agencies, and the California Water Commission, shall develop funding priorities for State investments in Delta levees by by ~~January 1, 2015~~July 1, 2017. These priorities shall be consistent with the provisions of the Delta Reform Act in promoting effective, prioritized strategic State investments in levee operations, maintenance, and improvements in the Delta for both levees that are a part of the State Plan of Flood Control, as described in the Central Valley Flood Protection Plan, and non-project levees. Upon completion, these priorities shall be considered for incorporation into the Delta Plan and these regulations.	DP	Comment noted. The purpose of consulting the various agencies noted is to develop an effective prioritization that addresses the appropriate technical and agency-related issues. Such consultations shall allow the DSC to produce a better product that meets its statutory mandate.

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
ADOPTED REGULATION: SECTION 5013 ~~5015~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. California Central Valley Flood Control Association	1/14/2013	Section 5015 – Flood Protection for Rural Areas. This provisions states that new residential development of five or more parcels shall provide a minimum of 200-year protection when not in certain defined areas. This provision is confusing and appears preempted by State law. First, does this apply to a single proposal for residences on five or more parcels? Does it apply cumulatively over a Delta island? Does it apply cumulatively over the entire Delta? What about five residences on a single parcel? Is that precluded? What is the basis of five parcels as the threshold? What studies or analyses have been performed to justify that number? Second, SB5 very clearly stated the requirement of 200-year protection for urban and urbanizing communities and incorporated the FEMA requirement of 100-year protection for rural and small community protection. Thus, the State Legislature has occupied the field on this issue and the Council is preempted from imposing a more stringent standard.	Ct, Co	This proposed policy, 5013 ~~5015~~(RR P2) has been substantially revised. This proposed policy no longer requires 200 year flood protection for developments of five or more parcels outside of the noted zones. Commenter's correctly noted that 200 year base flood elevations were not readily available, thus the revised proposed policy is based upon the 100 year base flood elevation, and further requires that anticipated sea level rise be accommodated into planning and design for rural residential development as noted in policy 5013~~5015.~~
2. Sacramento County	1/14/2013	15. Section 5015 requires 200 year flood protection for certain residential developments of five or more parcels. This requirement is inconsistent with existing statutory provisions regarding only 100 year flood protection. It conflicts with existing Government Code section 65865.5 wherein the State clearly established that development in non-urban areas (under 10,000 residents) must meet the FEMA 100-year standard and that the 200-year standard is applied to urban areas. Under the current Sacramento County General Plan, neither these towns nor the entirety of the rural Delta could ever reach a population greater than 10,000. Currently, the State has not established 200-year floodplain elevations and according to the Central Valley Flood Protection Plan, has no intention of doing so for non-urban areas. Further FEMA does not utilize and has not established 200-year floodplain maps or elevations. Therefore, it is unclear what 200-year standard is intended in the draft regulations, how and when it is to be established and how the proposed regulation could be applied, lacking any such definition of the standard.	Ct, Co	This proposed policy, 5013 ~~5015~~ (RR P2) has been substantially revised. This proposed policy no longer requires 200 year flood protection for developments of five or more parcels outside of the noted zones. Commenter's correctly noted that 200 year base flood elevations were not readily available, thus the revised proposed policy is based upon the 100 year base flood elevation, and further requires that anticipated sea level rise be accommodated into planning and design for rural residential development as noted in policy 5013~~5015~~.
3. San Joaquin County Board of Supervisors	1/14/2013	Policy RR P2 "Require Flood Protection for Residential Development in Rural Areas"; Proposed Regulation Article 3, 5015. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.	A, Co	This proposed policy, 5013 ~~5015~~ (RR P2) has been substantially revised. This proposed policy no longer requires 200 year flood protection for developments of five or more parcels outside of the noted zones. Commenter's correctly noted that 200 year base flood elevations were not readily available, thus the revised proposed policy is based upon the 100 year base flood elevation, and further requires that anticipated sea level rise be accommodated into planning and design for rural residential development as noted in policy 5013~~5015~~.
4. San Joaquin County Board of Supervisors	1/14/2013	Sub-Section 5015(a) requires residential development in the Delta, outside of several specifically identified areas, to provide 200-year flood protection. Current state statutes (SB 5, SB 1278) require 200-year flood protection only in "urban or urbanizing" areas, and most of the Delta does not fall within such areas. The Delta Reform Act does not mandate this increased flood protection requirement. Neither the Delta Plan nor the proposed Regulations provide any rationale for this increased flood protection requirement.	A, Ne	This proposed policy, 5013 ~~5015~~ (RR P2) has been substantially revised.. This proposed policy no longer requires 200 year flood protection for developments of five or more parcels outside of the noted zones. Commenter's correctly noted that 200 year base flood elevations were not readily available, thus the revised proposed policy is based upon the 100 year base flood elevation, and further requires that anticipated sea level rise be accommodated into planning and design for rural residential development as noted in policy 5013~~5015~~.
5. San Joaquin County Board of Supervisors	1/14/2013	As to Section 5015, San Joaquin County concurs in the submitted objections and comments of Solano County and Yolo County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.	A, Co	This proposed policy, 5013 ~~5015~~ (RR P2) has been substantially revised. This proposed policy no longer requires 200 year flood protection for developments of five or more parcels outside of the noted zones. Commenter's correctly noted that 200 year base flood elevations were not readily available, thus the revised proposed policy is based upon the 100 year base flood elevation, and further requires that anticipated sea level rise be accommodated into planning and design for rural residential development as noted in policy 5013~~5015~~.

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ADOPTED REGULATION: SECTION 5013 ~~5015~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
6. Solano County Department of Resource Management	1/14/2013	This section would appear to be inconsistent with existing state law (namely, SB 5), and, as a result, would appear, on its face, to be a virtual prohibition of new residential development, at or above the 5 unit development threshold, in the Delta outside of the exempted areas. It was not the intention of the Legislature with the Delta Reform Act to overturn the existing state law in this area. (See also comments on section 5012.)	Co	This proposed policy, 5013 ~~5015(~~RR P2) has been substantially revised. This proposed policy no longer requires 200 year flood protection for developments of five or more parcels outside of the noted zones. Commenter's correctly noted that 200 year base flood elevations were not readily available, thus the revised proposed policy is based upon the 100 year base flood elevation, and further requires that anticipated sea level rise be accommodated into planning and design for rural residential development as noted in policy 5013~~5015~~.
7. Yolo County, Office of the County Counsel	1/14/2013	This section requires 200-year flood protection for certain residential developments of five or more parcels, primarily including those projects located outside of developed areas or areas designated for development in local general plans. The County reiterates its prior comments regarding this requirement's inconsistency with existing (and relatively recent) statutory provisions requiring only 100-year flood protection. (E.g., Yolo County Comments on Fifth Draft, p. 7 of enclosure (September 30, 2011).) The appropriate level of flood protection for such residential development projects is already the subject of state law, and the Legislature alone has authority to change this requirement.	Co	This proposed policy, 5013 (RR P2) has been substantially revised. This proposed policy no longer requires 200 year flood protection for developments of five or more parcels outside of the noted zones. Commenter's correctly noted that 200 year base flood elevations were not readily available, thus the revised proposed policy is based upon the 100 year base flood elevation, and further requires that anticipated sea level rise be accommodated into planning and design for rural residential development as noted in policy 5013~~5015~~.

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ADOPTED REGULATION: SECTION 5013 ~~5015~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1.1 California Central Valley Flood Control Association	1/24/2013	**Cost Clarification** – Table 3 on page 26 says there are minor state and local costs. However page A-3 indicates costs of levee improvements to provide 200-year flood protection above what is required under current law for non-urban areas to range from $5.4 to $25 million per levee mile, the cost of a new floodwall to be approximately $9.4 million per levee mile, with the incremental cost incurred by a local or state agency required to provide 200-year levee protection rather than 100-year to be about $6 million per levee mile. Table 3 should be amended to reflect the significant costs identified on page A-3.	E	The costs shown in appendix A of the Cost Analysis are only illustrative of the range of costs for constructing a setback levee, if such is found to be feasible. The only required cost imposed by the proposed regulation is for the evaluation of feasibility, which is shown in Table 3. Also, the Cost Analysis has been revised in response to comments and to reflect revisions to the originally proposed regulatory text.
2.1 California Central Valley Flood Control Association	1/24/2013	**Cost Capacity -** A five mile long floodwall ($9.4 million x 5 = $47 million) could exceed the total value of land in a non-urban reclamation district's jurisdiction and be beyond the funding capacity of the RD based on their annual budget for levees. The Cost Analysis should identify the land value for lands within all non-urban reclamation districts in the Delta and evaluate the costs to provide 200-year flood protection against the total land value and against the RDs annual budget for levees.	E	Section 5013 (originally Section 5015) has been significantly revised in response to comments. Neither the original nor the revised version of this provision requires the construction of a floodwall. The floodproofing is only required for new residential developments of five or more units, not for entire reclamation districts as implied by the comment. In most cases it is expected that floodproofing of individual structures may be lower cost than a flood wall, and the cost would be borne by the developer and/or residents of the new development.
3.1 Central Valley Flood Protection Board	1/24/2013	The Board makes the following observation: Proposed Council regulation section 5015 prohibits new residential development of five or more parcels in certain rural areas unless 200-year flood protection is provided. Section 5015 appears to be inconsistent with one of the policy goals in the CVFPP, which focuses 200-year flood protection in urban, rather than rural, areas.	Co	The provision is not inconsistent with the CVFPP, but rather extends the policy of protecting residential developments of five units or more to areas outside existing defined urban areas. The provision has also been significantly revised in response to comments.

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ADOPTED REGULATION: SECTION 5014 ~~5016~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. California Central Valley Flood Control Association	1/14/2013	Section 5016 – Floodway Protection. This section precludes encroachments in a floodway unless it can be demonstrated that the encroachment will not meet certain standards. To whom must this be demonstrated? The Council? If so, in what process? To someone else? And by whom is it to be demonstrated? The private property owner constructing the encroachment or the government agency granting a permit for the encroachment? What does unduly impede the free flow mean? Is this measured by a reasonableness standard? A percentage? A minimum flow standard? How is jeopardy to public safety to be measured? This provision also appears to conflict with aspects of the Central Valley Flood Protection Board's authority.	Ct, Co	The agency filing the certification of consistency would have to make the determinations that the proposed action does not rise to the level of an encroachment. This language was developed with Central Valley Flood Protection Board's input. Under the Delta Reform Act, the state or local public agency that proposes to carry out, approve or fund a covered action makes the initial determination. (See, for example, Water Code sections 85057.5(a)(2) and (3), and 85225.) If a person appeals a public agency's certification of consistency to the Council, the Council reviews that determination pursuant to Water Code section 85225.25. The reference to "unduly impede the free flow of water" derives from the Central valley Flood Protection Board's regulation governing encroachments into designated floodways (23 CCR Article 5 Sec. 107), and presumably the project proponent would provide the same level of analysis to demonstrate that the proposed project meets this intent. It is the project proponent's responsibility to demonstrate this to the lead agency's satisfaction, as that agency would file a consistency certification.
2. California Farm Bureau Federation	1/14/2013	Proposed section 5016(a) specifies that "[n]o encroachment shall be permitted 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." Comment: See related comment on proposed section 5001(i) above.	O	Comment noted, and addressed in response to 5001.
3. Central Delta Water Agency	1/14/2013	Section 5016. Floodway Protection As explained above the definitions of encroachment should be changed to delete "removal of vegetation". Without such change the regulation is in conflict with law.	Co, DP	The definition of encroachment used herein is derived from the regulations of the Central Valley Flood Protection Board, Title 23, Division 1, Waters, Article 2, section 4(m) in which the removal of vegetation is referenced as a potential encroachment. This is interpreted by the CVFPB to refer to the <u>activity</u> of removing vegetation as a being a potential encroachment, by the use of machinery, large equipment, etc.
4. San Joaquin County Board of Supervisors	1/14/2013	Policy RR P3 "Protect Floodways"; Proposed Regulation Article 3, Section 5016. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.	A, Co	Commenter's letter provided no further background information as to why this proposed policy is inconsistent with local land use authority.
5. San Joaquin County Board of Supervisors	1/14/2013	As to Section 5016, San Joaquin County concurs in the submitted objections and comments of Solano County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.	A, Ct	Comment noted.
6. Solano County Department of Resource Management	1/14/2013	• This section is vague and ambiguous. What does "appropriate analysis" mean? How is "unduly impede" to be interpreted? • Considering the broad definition of "encroachment" in section 5001, this section would appear overly broad and beyond the scope of the Delta Reform Act. Furthermore, it would appear to intrude on the authority of the Central Valley Flood Protection Board, including with federal flood control projects.	A, Ct	The agency filing the certification of consistency would have to make the determinations that the proposed action does not rise to the level of an encroachment. This language was developed with Central Valley Flood Protection Board's input. The reference to "unduly impede the free flow of water" derives from the Central valley Flood Protection Board's regulation governing encroachments into designated floodways (23 CCR Article 5 Sec. 107), and presumably the project proponent would provide the same level of analysis to demonstrate that the proposed project meets this intent. It is the project proponent's responsibility to demonstrate this to the lead agency's satisfaction, as that agency would file a consistency certification.

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ADOPTED REGULATION: SECTION 5014 ~~5016~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1.1 Central Valley	1/24/2013	The Board recommends the following modifications:	DP	Comment noted, and addressed in response to 5001.

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ADOPTED REGULATION: SECTION 5014 ~~5016~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
Flood Protection Board		(a) No encroachment shall be ~~permitted~~ 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 5003(a)(5) of this Chapter, this policy covers a proposed action that would encroach in a floodway. (c) This policy is not intended to exempt any proposed encroachment in a designated floodway or regulated stream from compliance with applicable regulations and requirements of the Board. Written certification of compliance from the Board may be included as part of the detailed findings required by section 5004(b)(1), to show consistency of proposed encroachments in a designated floodway or regulated stream with this policy.		
2.1 Local Agencies of the North Delta	1/24/2013	§§ 5016, 5017Floodway and Floodplain Protection – It does not appear that these provisions have been coordinated with existing requirements of the Central Valley Flood Protection Board. Moreover, the regulations should make clear that continued agriculture in floodways and floodplains does not conflict with these provisions. Vegetation removal in such areas should also be specifically permitted.	Co	The definition of encroachment used herein is derived from the regulations of the Central Valley Flood Protection Board, Title 23, Division 1, Waters, Article 2, Section 4(m) in which the removal of vegetation is referenced as a potential encroachment. This is interpreted by the CVFPB to refer to the activity of removing vegetation as a being a potential encroachment, by the use of machinery, large equipment, etc.

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ADOPTED REGULATION: SECTION 5015 ~~5017~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. California Central Valley Flood Control Association	1/14/2013	Section 5017 – Floodplain Protection. This section precludes encroachments in defined areas unless it can be demonstrated that the encroachment will not have a significant impact on floodplain values and functions. As noted above, encroachment is defined so broadly as to include vegetation removal. Beyond that, to whom must this standard of no significant impact be demonstrated? The Council? If so, in what process? To someone else? And by whom is it to be demonstrated? The private property owner constructing the encroachment or the government agency granting a permit for the encroachment? What does it mean to impact floodplain values and functions? The section also provides an exemption where an appropriate analysis is provided. To whom is it to be provided? And who decides if it is appropriate? This provision also appears to conflict with aspects of the Central Valley Flood Protection Board's authority.	Ct, Co	Same issue as presented to 5014 ~~5016~~ by the same agency. Also, please note that the definition of encroachment used herein is derived from the regulations of the Central Valley Flood Protection Board, Title 23, Division 1, Waters, Article 2, section 4(m) in which the removal of vegetation is referenced as a potential encroachment. This is interpreted by the CVFPB to refer to the activity of removing vegetation as a being a potential encroachment, by the use of machinery, large equipment, etc. Regarding conflicting with the Board's authority, this proposed regulation is limited to areas not regulated by the Board as designated floodways or regulated streams per 23 CCR.
2. California Farm Bureau Federation	1/14/2013	Proposed section 5017(a) specifies that "[n]o encroachment shall be permitted in any of the following floodplains unless it can be demonstrated by appropriate analysis that the encroachment will not have a significant impact on floodplain values and functions [in certain areas of the Delta designated as floodplains]." Comment: See related comment on proposed section 5001(i) above.	O	Comment noted. Similar to previous comments.
3. California Farm Bureau Federation	1/14/2013	Section 5017(c) clarifies that the policy in section 5017(a) ("Floodplain Protection") that no "encroachment" be permitted in certain designated floodplain areas is "not intended to exempt any activities in [certain designated floodplain areas] from applicable regulations and requirements of the Central Valley Flood Protection Board." In addition to avoiding any exemption from applicable regulations of the Central Valley Flood Protection Board, to avoid duplication and inconsistency, the Council's proposed regulations must ensure that the Council's definitions of "encroachment," "floodway," and "floodplain," and its consistency, review, and potential appeal processes, do not advance substantially different or unworkable standards, or otherwise work at cross-purposes to the Central Valley Flood Protection Board's existing regulations on "encroachments" in floodways and floodplains. Moreover, since the Flood Board is the agency with the greatest technical competence and expertise in this area, the Council's regulations should perhaps incorporate that agency's regulations, otherwise defer to the Flood Board in this area, or potentially incorporate any existing Flood Board permitting requirements as a functional equivalent of any separate Council process, with an initial presumption of validity and overall adequacy as to compatibility of routine agricultural activities as permissible uses in designated floodways and floodplains.	O	The Council has worked with the CFVPB to ensure that the definitions for these terms are consistent. Additionally, staff has worked with CVFPB staff to ensure that CVFPB applicable regulations are noted and referenced, where appropriate.
4. Central Delta Water Agency	1/14/2013	Section 5017. Floodplain Protection The definition of encroachment should be changed to delete "removal of vegetation". Without such change the regulation is in conflict with the law.	Co, DP	Same issue as presented to 5016 by the same agency. Also, please note that the definition of encroachment used herein is derived from the regulations of the Central Valley Flood Protection Board, Title 23, Division 1, Waters, Article 2, section 4(m) in which the removal of vegetation is referenced as a potential encroachment. This is interpreted by the CVFPB to refer to the activity of removing vegetation as a being a potential encroachment, by the use of machinery, large equipment, etc.
5. East Bay Municipal Utility District	1/14/2013	Section 5017. Floodplain Protection - Subsection 5017(a) also highlights the problems with the definition of "significant impact" Using the definition in 5001(s), the reader must conclude that no encroachment can take place even if the encroachment will actually result in a benefit to the floodplain values and functions. To resolve this issue the definition of "significant impact," as presented in 5001(s), should be revised to include only adverse impacts, not beneficial impacts.	Ct	Comment noted. The policy has been revised to refer to "significant adverse impacts."
6. San Joaquin County Board of Supervisors	1/14/2013	Policy RR P4 "Protect Floodplains"; Proposed Regulation Article 3, Section 5017. This proposed Regulation is inconsistent with, and contradictory to, local agency land use authority as set forth in California law.	A, Co	Commenter's letter provided no further background information as to why this proposed policy is inconsistent with local land use authority.

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ADOPTED REGULATION: SECTION 5015 ~~5017~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
7. San Joaquin County Board of Supervisors	1/14/2013	As to Section 5017, San Joaquin County concurs in the submitted objections and comments of Solano County regarding this proposed Regulation and, as extrapolated to apply to San Joaquin County and the lands, policies and activities herein, adopts those objections and comments by reference as though fully set forth herein.	A, Ct	Comment noted.
8. Solano County Department of Resource Management	1/14/2013	• This section is vague and ambiguous. Again, what does "appropriate analysis" mean? What does "significant impact on floodplain values and functions" mean? • In its application to geographical areas outside of the legal Delta (e.g., the entire Yolo Bypass), this section would appear to be beyond the authority of the Delta Stewardship Council. (See Water Code § 85058.)	A, Ct	The agency filing the certification of consistency would have to make the determinations that the proposed action does not rise to the level of an encroachment. This language was developed with Central Valley Flood Protection Board's input. Project proponents typically have to adhere to county floodplain ordinances which require that they demonstrate that the proposed project will not violate the local agency's floodway and floodplain requirements. The policy has been revised to ensure it only refers to areas within the Legal Delta.
9. Solano County Department of Resource Management	1/14/2013	• There is an errant "\" in subsection (a)(1).	O	Comment noted.
10. Solano County Department of Resource Management	1/14/2013	• Regarding subsection (a)(1), where, specifically, is the confluence of Putah Creek into the Yolo Bypass? There is no clear definition or line of demarcation identifying this boundary.	Ct	This proposed policy is under revision to reflect the Council's geographical authority
11. Solano County Department of Resource Management	1/14/2013	• Considering the broad definition of "encroachment" in section 5001, this section would appear overly broad and beyond the scope of the Delta Reform Act. • Lastly, as with section 5016, this section would appear to establish a form of concurrent regulatory authority with the Central Valley Flood Protection Board.	A	Comment noted. The authority of the Central Valley Flood Protection Board only extends to "Designated Floodways" per Title 23, Division 1. Floodways within the Delta not designated as "Designated Floodways" per Title 23, Division 1 are those captured by proposed policy 5016, thus the authorities are not overlapping or duplicative.
12. Yolo County, Office of the County Counsel	1/14/2013	This section prohibits encroachments in various floodplains, including the entirety of the Yolo Bypass, "unless it can be demonstrated by appropriate analysis that the encroachment will not have a significant impact on floodplain values and functions." The County has two objections to this section. First, the Council's authority ends at the boundaries of the legal Delta. Portions of the Yolo Bypass lying north of Interstate 80 are outside the legal Delta, and thus beyond the regulatory reach of the Council. This section should be modified to acknowledge this limitation.	A	This proposed policy is under revision to reflect the Council's geographical authority.
13. Yolo County, Office of the County Counsel	1/14/2013	Second, as noted above, encroachments within the Yolo Bypass are already separately and comprehensively regulated by the Central Valley Flood Protection Board. The County thus reiterates its earlier comments on this issue in the context of Section 5001(i), relating to the necessity of separate regulation by the Council and consistency with the nonduplication standard in Government Code Section 11349(f).	Co, Du	Agency responsibilities, however, often overlap. See, for example, City of Morgan Hill v. Bay Area Air Quality Management Dist. (2004) 118 Cal.App.4th 861, 866 ("One who would construct and operate a California power plant must first obtain an interconnected set of federal, state and regional agency approvals."); Pacific Lumber Co. v. State Water Resources Control Bd. (2006) 37 Cal.4th 921, 935 [timber harvest permit approvals are subject to a "regulatory scheme that encourages interagency teamwork" but does not strip "state agencies of their respective authority to protect resources"].) The Act grants the Council independent authority to include measures in the Delta Plan that reduce in-Delta risks. (Water Code section 85305(a).) The Legislature also expressed its intent that the Council would have an independent regulatory role concerning flood control issues 1) by authorizing the Council to include local plans of flood protection in the Delta Plan (Water Code section 85307(b)) and 2) by defining covered actions as including actions that will have a significant impact on flood control programs. (Water Code section 85305(a).)

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ADOPTED REGULATION: SECTION 5015 ~~5017~~

ASSOCIATION		DATE	COMMENT	CODES	RESPONSE
1.1	Central Valley Flood Protection Board	1/24/2013	(a) No encroachment shall be ~~permitted~~ 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 impact on floodplain values and functions	DP	The Council will make the suggested modifications.
2.1	Central Valley Flood Protection Board	1/24/2013	(c) This policy is not intended to exempt any proposed encroachment in a designated floodway or regulated stream that also includes any of the areas listed in subsection (a) from compliance with applicable regulations and requirements of the Board. Written certification of compliance from the Board may be included as part of the detailed findings required by section 5004(b)(1), to show consistency of proposed encroachments in a designated floodway or regulated stream that also includes any of the areas listed in subsection (a) with this policy.	DP	Thank you for the comment. The Council, in its discretion, has chosen not to change the definition or to use the definition you have suggested.
3.1	Individual (Conover)	1/24/2013	Section 5017. Flood Protection. (a) No encroachment permitted in floodplains without finding of no significant impact on floodplain values and functions, specifies in Subsection (2) the Cosumnes-Mokelumne River Confluence, (McCormack-Willimson Tract), "or as modified in the future by DWR or the US Army Corps of Engineers. This plan appears by its proposed Habitat Restoration Evaluation Zone, to be headed in that direction. Our Glannvale ranches are directly North of that Tract, and could be affected by potentially imminent studies and proposals for restoration.	O	Comment noted.

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ADOPTED REGULATION: SECTION 5016 ~~5018, 5019, 5020~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. California Central Valley Flood Control Association	1/14/2013	Sections 5018, 5019, and 5020 – General Provisions. Are these three provisions enforceable regulations or are they just policy statements of intent? The regulations should specify which provisions in this regulatory package Section 5018 will apply to because there are many provisions on land use, flood protection, and habitat restoration that prohibit or limit certain activities that constitute a regulatory "taking" of private property and requiring just compensation be paid.	Ct	See response MR6 related to regulatory taking.
2. Central Delta Water Agency	1/14/2013	Regs 5018, 5019, 5020: Article 4. General Provisions Sections 5018, 5019, and 5020 are inappropriate and clearly beyond the authority of the DSC. Water Code section 85210 does not give the DSC authority to violate statutes and other law and then absolve itself of wrongdoing. As set forth above, the regulations of the DSC are in violation of law and must be revised.	Co	Regarding the Council's authority to regulate, see MR1.
3. City of West Sacramento	1/14/2013	Regs 5018, 5019, 5020: General Provisions. The regulations should specify which provisions in this regulatory package Section 5018 will apply to because there are many provisions on land use, flood protection, and habitat restoration that prohibit or limit certain activities that constitute a regulatory "taking" of private property.	O	See response MR6 related to regulatory taking.
4. Solano County Department of Resource Management	1/14/2013	This section should be extended to public property, in addition to private property. After all, public property is also subject to condemnation (see Code of Civil Procedure §§ 1240.510, 1240.610), with the public entity-owner entitled to just compensation.	O	Regarding the Council's authority to regulate, see MR1.
5. Solano County Department of Resource Management	1/14/2013	Our reading of this section is that this section applies to both public and private property owners and encompasses water rights (including area of origin, watershed of origin, county of origin, or any other water rights protections), consistent with the Delta Reform Act and other provisions of law. (See, e.g., Water Code §§ 85031(a), 85032(i).) Providing such clarification in the regulation would reduce any potential confusion on these points.	O	The provision is intended to avoid the applications of policies in a manner that would violate the constitutional rights of property owners. Its application in particular factual situations will depend upon applicable statutes and case law. In the event that a policy would violate a public entity's constitutional rights, section 5019 would apply.

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
ADOPTED REGULATION: SECTION 5016 ~~5018, 5019, 5020~~

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1.1 Individual (Conover)	1/24/2013	If the habitat studies find our lands to be high land suitability, and other federal lands are not sufficient, and after better projection of inland extent of sea level rise up the Cosumnes toward Elk Grove and the Mokelumne toward Galt, and some agency insists on breaking the levee, and flooding lands for swamp, just compensation should be determined according to a methodology that recognizes our longstanding productivity and the removal of profitable lands contributing to the 7th largest economy in the world. The Income Method or another should be specified to be applicable, to reflect productivity and potential, in determining market value. Lands that have been started into production, with infrastructure investment, whether or not already planted, should be recognized as projected income. That data can be developed based on adjacent parcels and historical and projected market prices for pears, grapes and wines. It therefore should be required under these rules to be used in any potential condemnation proceedings by any agency involved in this process.	O	The Council has not received authority from the legislature to mandate how compensation should be determined in cases of eminent domain. A state or local agency implementing a covered action or a court must make that determination.
2.1 Individual (Conover)	1/24/2013	At a larger scale the proposed Final Delta Plan REIR is missing some important information about economic impacts. Known economic impacts, such as the loss of /,700 jobs projected by the input-output study reported at the Delta Science Conference in October, is a known impact that we did not see in the Executive Summary. It might be in a back chapter, but we did not have time in	E	This is a comment on the Recirculated Draft PEIR. Comments on the RDPEIR are addressed separately. The Cost Analysis and the Economic and Fiscal Impact Statement address potential economic effects of the proposed regulation. The economic analysis referred to in the comment appears to be related to some specific potential project, not to the proposed

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
		between taking care of our own businesses and incomes. We do not have paid staff to read these documents, and any time away for that purpose potentially threatens key stages in crop life cycles that will affect health and growth in the following season.		regulation or the Delta Plan itself.
3.1 Individual (Conover)	1/24/2013	The back-up documents were not sent to us, and no Notice was sent to us as "interested land owners." "Interested landowners" should be defined as not only those who contact you to express interest in receiving more documents or mere website postings. Any landowner in the region has an economic interest in the outcome of this Plan and its Rules. They should all receive paper notices in the mail, and reminders that these documents, so hard to read in downloaded files from the internet, are available for mailing out. Broadband internet is not available far off the main roads.	Nr	The Council complied with the notification and document availability requirements of California Government Code and the California Code of Regulations. In addition, the Council made substantial effort to provide information and notification regarding its activities, through its public meetings and website postings.

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
STATEMENT OF REASONS

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Calaveras County Water District	1/4/2013	Page 1, paragraph 1, change as follows so as to be consistent with CWC §85020(d): "...include promoting statewide water conservation and water use efficiency, and sustainable water use, improving water quality..."	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
2. Calaveras County Water District	1/4/2013	Page 2, Definitions: Please change to be consistent with our earlier recommendations (regarding definitions) as provided on the Text of the Proposed Regulation. This would include elimination of the term proposed action and a definition of a "covered action" consistent with CWC §85057.5(a).	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
3. Calaveras County Water District	1/4/2013	Page 4, paragraph beginning with, "The intent of Section 5005..." "efficiency and conservation and diversify local water supply portfolios. This will be done by improving, investing in, and implementing local and regional water supply projects[7], local 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. For the purposes of improving regional self-reliance water conservation is considered a new source of water supply, consistent with CWC §1011(a). Water so saved through these counts as a new source of supply as this water would have been needed to meet future demand. Thus, even if water use is increasing as a result of economic or population growth, a water supplier can demonstrate that its water use is more efficient and is contributing to reduced reliance on the Delta and improved regional self-reliance."[8] [7] Taken directly from CWC §85021 [8] Delta Stewardship Council Final Draft Plan, Appendix P, page P-2, lines 30-35.	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
4. Calaveras County Water District	1/4/2013	Page 5 paragraph beginning with, "Achieving the Delta ecosystem restoration goal..." "...and migratory species with diverse and biologically diverse appropriate habitats, functional corridors and ecosystem processes. The ultimate restoration of the Delta ecosystem will also be dependent upon achieving a more natural flow regime from upstream. That natural flow regime will be due in part to the return to more historic Sierra Nevada Forest canopy and composition conditions and improved watershed conditions. The long-term sustainability of the Delta ecosystem is dependent upon a resilient, functioning Sierra Nevada ecosystem."	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
5. Calaveras County Water District	1/4/2013	Page 5 paragraph beginning with, "Altered flows in the Sacramento and San Joaquin Rivers and their tributaries change flows within and out of the Delta and affect salinity and sediment in the Delta. Not all altered flows are due to water diversion projects or stream channel modifications. The condition of upstream Sierra Nevada forests in canopy and composition as well as the	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
		condition of meadows and watersheds influences what the current flows in Delta tributary rivers and streams are. Therefore, to achieve a more natural flow regime to benefit fish and other aquatic species, a return to more historic Sierra Nevada forest densities will be necessary."		Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
6. California Department of Water Resources	1/14/2013	Page 2, line 27: this does not seem correct. Suggest changing language as follows: "Section 5003 also enumerates a list of statutory and administrative exemptions. Water Code section 85075.5 lists certain actions from the definition of covered actions. The Delta Stewardship Council has also identified other actions as not being covered actions because they will not have a significant impact on the coequal goals or government-sponsored flood control programs. ~~as required by Water Code section85057.5."~~	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
7. California Department of Water Resources	1/14/2013	Page 2, line 33: See discussion in Comment 5 above regarding this sentence. We strongly recommend deleting the clause. Note that as written it is inconsistent with the Proposed Regulation which includes consistency with the chapter. "The agency's determination is subject to judicial review and must be reasonable, made in good faith, and consistent with the Delta Reform Act."	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
8. California Department of Water Resources	1/14/2013	Page 4, line 30: See discussion in Comment 10. The sentence below does not accurately reflect the language of the regulation which reads "Success in achieving the statewide policy of reduced reliance on the Delta and improving regional self-reliance will be demonstrated through a significant reduction in the amount of water used, or in the percentage of water used, from the Delta watershed". The regulation does not require a significant reduction in the amount of water used, or in the percentage of water used, from the Delta watershed. Rather is requires implementation of specific measures which, if complied with, constitute compliance with this section. The expected outcome and the measure of success is reduction in the amount of water used, or in the percentage of water used from the Delta watershed. The sentence should be changed: "Section 5005 is aimed at achieving this policy of reduced reliance on the Delta and improving regional self reliance. Success will be demonstrated through ~~by requiring~~ significant reduction in the amount of water used, or in the percentage of water used, from the Delta watershed."	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
9. California Department of Water Resources	1/14/2013	Page 5, line 16: See Comment 13 above. DWR does not agree with the statement below. The first sentence should be deleted because it does not relate to the recommendation. It is possible that "the lack of accurate there is no evidence in the Delta Plan that supports the statement. Section 5006 does not remedy the purported problems. The third sentence implies that DWR and the USBR are not complying with their existing policies. There is no evidence in the Delta Plan that supports this implication. The last sentence is too broad. DWR's policies do not apply to all SWP contracts; but only to the long-term water supply contracts. Although we cannot speak to the CVP contracts, we think that their policies also only apply to their long term water supply contracts. The paragraph should be changed: "The lack of accurate, timely, consistent, and transparent information on the management of	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.

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		California's water supplies and beneficial uses is a significant impediment to the achievement of the coequal goals. Section 5006 is intended to help remedy this problem through ~~improved~~ continued public involvement and transparency in decision making processes ~~by enforcing~~, with regard to certain types of covered actions, existing contracting policies within the Department of Water Resources (DWR) and the Bureau of Reclamation. The Council considered a transparency requirement for all Delta water users and agencies. However, in order to reduce costs and time, Section 5006 reduces the regulatory burden by imposing this regulation only on SWP and CVP long-term water supply contracts."		
10. California Department of Water Resources	1/14/2013	Page 5, Paragraph 5, Section 5007. Update Delta Flow Objectives. See Comment 14 above. DWR believes that the issue of adequate flows for fishery purposes needs to be considered in the context of all Bay Delta Water Quality Plan objectives.	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
11. California Department of Water Resources	1/14/2013	Page 8, line 4. This sentence is missing the word "feasible" which is an important qualifier, especially with regard to state action which may find that the avoidance or reduction of conflicts is infeasible: "Section 5013 requires the avoidance or reduction of conflicts with existing or planned land uses, when feasible, in locating water management, ecosystem restoration, or flood management infrastructure in the Delta."	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
12. California Department of Water Resources	1/14/2013	Page 8, Paragraph 3, Reduce Risk. Many of these policies relate to responsibilities of the Central Valley Flood Protection Board. It is our understanding that the Board is in the process of reviewing these policies with regard to whether they conflict with the Board's authorities.	S	Comment noted. The Central Valley Flood Protection Board provided written comments and testified at the Council's 1/11/2013 and 1/24/2013 public hearings.
13. California Department of Water Resources	1/14/2013	Page 10, Cost Analysis. DWR has not had a chance to look at the Cost Analysis and the Economic and Fiscal Statement in any great detail. Based on a very cursory look, the cost estimates seem to be in the general range that one would expect. The costs of several of the policies relating to habitat restoration and flood control may be underestimated. For example, with regard to Section 5014. Prioritization of State Investments in Delta Levees and Risk Reduction, the costs identified are the costs of hiring a consultant. DWR expects that there will be costs, potentially significant, involved with DWR and Central Valley Flood Protection Board involvement and review. As examples, DWR expects that some of the review of set-back levees and implementation of mitigation measures may also add additional costs.	S, E	Thank you for the comment. It is acknowledged that the Council and DWR are in general agreement over cost estimates. The Council does not believe the habitat restoration and flood control costs to be underestimated. As noted in the Cost Analysis, communication with DWR staff indicated that DWR already intends to conduct prioritization of State investments in Delta levees. Therefore, no additional cost to DWR as a result of the proposed regulatory policy is accounted for. [1][] Personal Communication. June 18, 2012. Mike Mirmazaheri. Department of Water Resources. Division of Flood Management. FloodSAFE Environmental Stewardship and Statewide Resources Office.

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14. El Dorado County Water Agency	1/14/2013	Page 1, paragraph 1, change as follows so as to be consistent with CWC §85020(d): "...include promoting statewide water conservation and water use efficiency, and sustainable water use, improving water quality..."	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
15. El Dorado County Water Agency	1/14/2013	Page 2, Definitions: Please change to be consistent with our earlier recommendations (regarding definitions) as provided on the Text of the Proposed Regulation. This would include elimination of the term proposed action and a definition of a "covered action" consistent with CWC §85057.5(a).	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
16. El Dorado County Water Agency	1/14/2013	Page 4, paragraph beginning with, "The intent of Section 5005..." "efficiency and conservation and diversify local water supply portfolios. This will be done by improving, investing in, and implementing local and regional water supply projects[7], local 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. For the purposes of improving regional self-reliance water conservation is considered a new source of water supply, consistent with CWC §1011(a). Water so saved through these counts as a new source of supply as this water would have been needed to meet future demand. Thus, even if water use is increasing as a result of economic or population growth, a water supplier can demonstrate that its water use is more efficient and is contributing to reduced reliance on the Delta and improved regional self-reliance."[8] [7] Taken directly from CWC §85021 [8] Delta Stewardship Council Final Draft Plan, Appendix P, page P-2, lines 30-35.	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
17. El Dorado County Water Agency	1/14/2013	Page 5 paragraph beginning with, "Achieving the Delta ecosystem restoration goal..." "...and migratory species with diverse and biologically diverse appropriate habitats, functional corridors and ecosystem processes. The ultimate restoration of the Delta ecosystem will also be dependent upon achieving a more natural flow regime from upstream. That natural flow regime will be due in part to the return to more historic Sierra Nevada Forest canopy and composition conditions and improved watershed conditions. The long-term sustainability of the Delta ecosystem is dependent upon a resilient, functioning Sierra Nevada ecosystem."	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.

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18. El Dorado County Water Agency	1/14/2013	Page 5 paragraph beginning with, "Altered flows in the Sacramento and San Joaquin Rivers and their tributaries change flows within and out of the Delta and affect salinity and sediment in the Delta. Not all altered flows are due to water diversion projects or stream channel modifications. The condition of upstream Sierra Nevada forests in canopy and composition as well as the condition of meadows and watersheds influences what the current flows in Delta tributary rivers and streams are. Therefore, to achieve a more natural flow regime to benefit fish and other aquatic species, a return to more historic Sierra Nevada forest densities will be necessary."	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
19. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	In the Initial Statement of Reasons, the Council asserts that "implementation of the proposed regulatory policies is necessary in order to achieve the coequal goals as enumerated in the 2009 Delta Reform Act." The Council further states that "[t]he authority vested in the Council to make consistency determinations ensures that Delta-related activities will be coordinated and legally enforceable under the oversight of the Council." (Initial Statement of Reasons at p. 14.) Thus, the Council conceives of its role as that of a "super-regulatory" agency with approval authority over all "Delta-related actions."(3) In a similar vein, the Council states that "Section 5005 is aimed at achieving [the] policy of reduced reliance on the Delta and improving regional self-reliance by requiring a significant reduction in the amount of water used, or in the percentage of the water used, from the Delta watershed." (Initial Statement of Reasons at p. 4, emphasis added.) It is striking that the Council asserts this outcome as an apparent central responsibility of the Council to achieve, through its appellate review of Delta Plan consistency certifications, notwithstanding the clear absence of such authority in the Delta Reform Act. (3) "Delta-related actions" is not a term defined in the Act or in the Proposed Regulations. By statute, the Council has no authority to adjudicate appeals over consistency certifications for all "Delta-related actions," but only for statutorily defined "covered actions."	A	This comment addresses whether the Council has appropriate authority to regulate as described in section 5005 ~~5003~~. The commenter has made the same comments on the adopted regulation itself – see responses to comments on section 5005 ~~5003~~. In addition, the commenter objects to use of the phrase "Delta-related actions." Staff notes that this term is not used in the regulation and its use in the ISOR has no regulatory effect. The phrase is not used in the Final Statement of Reasons.
20. Tuolumne Utilities District	1/3/2013	Page 1, paragraph 1, change as follows so as to be consistent with CWC §85020(d): "...include promoting statewide water conservation and water use efficiency, and sustainable water use, improving water quality..."	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
21. Tuolumne Utilities District	1/3/2013	Page 2, Definitions: Please change to be consistent with our earlier recommendations (regarding definitions) as provided on the Text of the Proposed Regulation. This would include elimination of the term proposed action and a definition of a "covered action" consistent with CWC §85057.5(a).	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.

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STATEMENT OF REASONS

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22. Tuolumne Utilities District	1/3/2013	Page 4, paragraph beginning with, "The intent of Section 5005..." "efficiency and conservation and diversify local water supply portfolios. This will be done by improving, investing in, and implementing local and regional water supply projects[7], local 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. For the purposes of improving regional self-reliance water conservation is considered a new source of water supply, consistent with CWC §1011(a). Water so saved through these counts as a new source of supply as this water would have been needed to meet future demand. Thus, even if water use is increasing as a result of economic or population growth, a water supplier can demonstrate that its water use is more efficient and is contributing to reduced reliance on the Delta and improved regional self-reliance."[8] [7] Taken directly from CWC §85021 [8] Delta Stewardship Council Final Draft Plan, Appendix P, page P-2, lines 30-35.	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
23. Tuolumne Utilities District	1/3/2013	Page 5 paragraph beginning with, "Achieving the Delta ecosystem restoration goal..." "...and migratory species with diverse and biologically diverse appropriate habitats, functional corridors and ecosystem processes. The ultimate restoration of the Delta ecosystem will also be dependent upon achieving a more natural flow regime from upstream. That natural flow regime will be due in part to the return to more historic Sierra Nevada Forest canopy and composition conditions and improved watershed conditions. The long-term sustainability of the Delta ecosystem is dependent upon a resilient, functioning Sierra Nevada ecosystem."	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.
24. Tuolumne Utilities District	1/3/2013	Page 5 paragraph beginning with, "Altered flows in the Sacramento and San Joaquin Rivers and their tributaries change flows within and out of the Delta and affect salinity and sediment in the Delta. Not all altered flows are due to water diversion projects or stream channel modifications. The condition of upstream Sierra Nevada forests in canopy and composition as well as the condition of meadows and watersheds influences what the current flows in Delta tributary rivers and streams are. Therefore, to achieve a more natural flow regime to benefit fish and other aquatic species, a return to more historic Sierra Nevada forest densities will be necessary."	S	Narrative in the Initial Statement of Reasons (ISOR) summaries the rationale for the adopted regulation based on policy recommendations in the final draft of the Delta Plan. The ISOR does not repeat verbatim the narrative of the Delta Plan, the adopted regulation (including definitions), or the Sacramento –San Joaquin Delta Reform Act of 2009. However, the Delta Stewardship Council does believe the ISOR provides sufficient reason for the adopted regulation. Modification to the adopted regulation as a result of comments directed at definitions and individual polices is reflected in the Final Statement of Reasons and Final Regulatory Order. Comments that improve clarity or make the justification more consistent with the adopted regulation or authorizing statute are addressed in the FSOR.

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
STATEMENT OF REASONS

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1.1 California Central Valley Flood Control Association	1/24/2013	The California Central Valley Flood Control Association (CCVFCA) respectfully submits these additional comments on the "Cost Analysis for Proposed Delta Plan Regulations in Support of Economic and Fiscal Impact Statement" proposed as part of your Rulemaking Package for the Delta Plan. We are very concerned about the impact the additional costs estimated for implementing these regulations will have on the ability of Delta Reclamation Districts to pursue levee construction projects to reduce the risk of flood and consequent loss of life and property, but we have limited these comments to Sections 5010 and 5015.	E	This is a general summary comment. See the responses to other more specific comments, including the next comment below and those for Sections 5008 (originally 5010) and 5013 (originally 5015).

ASSOCIATION		DATE	COMMENT	CODES	RESPONSE
2.1	California Central Valley Flood Control Association	1/24/2013	Our first major concern is that the Cost Analysis fails to mention what the annual budgets for Reclamation Districts in the Delta are, or even provide a typical annual budget in order to evaluate the ability of districts to comply with Sections 5010 and 5015, or other sections. We have not polled our members but a rough estimate of the average annual budget RDs have for levees is probably about $50,000/year out of a total of annual district budget of $120,000 which covers other costs such as cleaning ditches as part of maintenance and paying electricity bills for keeping the lands drained/reclaimed (pumping water off of the island/lands) so that they can be put to productive use which in most cases is farming. The average subventions claim by a district is about $200,000, which is roughly a cost of $50,000 to the district (their 25% cost-share with the state). A 20% increase in the project planning costs would be an increase of $40,000 to evaluate the feasibility of alternatives to provide expanded floodplains and riparian habitats, which would be split 25/75 with the state. Additional costs of $1.5 million per mile to improve an existing levee to a setback identified on page A-1 of Appendix A and the total cost estimate of $31 to $68 million per mile to build a setback levee clearly exceeds the capacity of the annual budgets of RDs in the Delta and in some cases the total value of the land. Concerns regarding the capacity of Delta RDs to bear the additional costs for complying with Sections 5015 are similar and should also be considered by the Council before adopting these costly regulations. We strongly urge the Council to collect and review the annual budgets for the Reclamation Districts of the Delta to determine: 1) the level of impact these additional costs would have on their limited funds; 2) whether these additional costs will result in levee improvement projects (substantial rehabilitation or reconstruction) being delayed; 3) whether the delay in levee improvements would increase the risk of flooding and loss of life and property; and 4) re-evaluate the feasibility of this regulation based on this new fiscal information.	E	The Council understands the limitations on financial capacity of some Reclamation Districts. Economic factors including financial capacity are considerations that would be used to determine whether the setback levee (or other habitat improvement) is feasible (see definition of "feasible," 5001(p)). The Council also recognizes that costs would be incurred in such determination and the costs for an agency to determine feasibility are likely to vary widely depending on the circumstance. However, the revised cost analysis recognizes that some determinations may be very straightforward and inexpensive, such as in cases where construction of a setback levee would be well outside the economic capacity of the local agency and no state or federal funding was available. The regulation does not require that setback levees be built at the local district's expense when that is not feasible financially. Also, the revised regulation narrowed the extent of levees subject to the setback evaluation.
3.1	California Central Valley Flood Control Association	1/24/2013	**General Public Benefit -** Page 15 of the Cost Analysis says the additional planning costs are for the evaluation of the feasibility of alternatives to provide expanded floodplains and riparian habitats through setback levees. We would argue that the "incorporation of alternatives, including the use of setback levees" to expand floodplains and riparian habitats "where feasible" are broad benefits to the public and therefore the costs associated with providing them should not be borne by property owners who pay assessments for the maintenance and improvements of these levees. If a RD had to increase its assessment to pay for building such setbacks they would be required to receive voter approval pursuant to Prop. 218 which only allows the assessment to be based on the special benefit each parcel receives. The public benefits that accrue to others outside the assessment area such as the expanded floodplains and riparian habitats called for in this section are beyond the scope of Prop. 218. It is also inappropriate for property owners to be assessed to increase riparian habitat that other entities such as the State Water Project, Central Valley Project, or water contractors that export water from the Delta could claim as credits to be applied towards the habitat acres they are required to produce to maintain their ESA/CESA take permits for the South Delta Pumps or as habitat credits under the HCP they are pursuing (BDCP). Therefore, we would request the Council to: 1) evaluate who bears responsibility for expanding floodplain and riparian habitat; and 2) amend this regulatory provision to apply the cost burden more broadly instead of only on the property owners assessed for levees that require substantial rehabilitation or reconstruction.	E	The state has a long history of providing financial assistance to local reclamation districts and other agencies to maintain and improve levees. This assistance includes grants to improve habitat for fish and wildlife, protect open space, or provide opportunities for outdoor recreation. The Council expects that will continue. The regulation does not require that an agency construct setback levees if that is technically or economically (including financially) infeasible. It anticipates, however, that in some circumstances setting back a levee to add fish and wildlife or outdoor recreation benefits or improve flood management benefits may enhance a project's financial feasibility, in part by attracting funding from additional sources. The Council agrees that economic factors including financial capacity are considerations that would be used to determine whether the setback levee (or other habitat improvement) is feasible (see definition of "feasible," 5001(p)). A local agency's inability to pay for benefits to others outside its assessment base, as described in the comment, may make a levee setback project financially infeasible for it to carry out without outside funding. The Council also recognizes that costs would be incurred in such determination and the costs for an agency to determine feasibility are likely to vary widely depending on the circumstance. However, the revised cost analysis recognizes that some determinations may be very straightforward and inexpensive, such as in cases where construction of a setback levee would be well outside the economic capacity of the local agency and no state or federal funding was available.
4.1	California Central Valley Flood Control Association	1/24/2013	**Cost Capacity** – We would point out that in most cases the total cost estimate to build the setback levee of $31 to $68 million (page A-1) exceeds the total value of land on many Delta islands/reclamation districts. So, we question why the Council would impose a 20% increase in levee project costs to evaluate feasibility in RDs where the cost to build the setback levee	E	The Council understands the limitations on financial capacity of some Reclamation Districts. Economic factors including financial capacity are considerations that would be used to determine whether the setback levee (or other habitat improvement) is feasible (see definition of "feasible," 5001(p)). The Council also recognizes that costs would be incurred in such

ASSOCIATION		DATE	COMMENT	CODES	RESPONSE
			exceeds the total value of the land? Multiplying the cost per levee mile identified for this regulation would also result in amounts greater than the total value of land in the RD. We request: the Cost Analysis to compare the cost of implementing this regulation with the total assessable value of the area that will bear the burden of paying to comply with this regulation.		determination and the costs for an agency to determine feasibility are likely to vary widely depending on the circumstance. However, the revised cost analysis recognizes that some determinations may be very straightforward and inexpensive, such as in cases where construction of a setback levee would be well outside the economic capacity of the local agency and no state or federal funding was available. The regulation does not require that setback levees be built at the local district's expense when that is not feasible financially. Also, the revised regulation narrowed the extent of levees subject to the setback evaluation.
5.1	Local Agencies of the North Delta	1/24/2013	LAND's prior comments illustrated some of the problems with Form 399 and the accompanying Cost Analysis. We would like to make the following additional points to assist in the correction of the deficiencies with the Council's economic analysis: In general, Form 399 lacks clarity, which must be corrected. While some costs are shown, it is not clear over what time period the estimated costs would be incurred. Moreover, Attachment 1 (referenced repeatedly in Form 399) also does not provide this information.	E	Costs are estimated as annual values. Std. Form 399 and its attachment are based on analysis and description in the Cost Analysis, which provides more detail about assumptions and calculations. All of these documents have been provided to the public and to the Department of Finance for its review.
6.1	Local Agencies of the North Delta	1/24/2013	Additionally, the proposed regulatory requirements are unreasonable, exceptionally complex and expensive, and lead to no new benefits associated with the co-equal goals. The new definitions, redefinitions, and sweeping scope of the proposed language takes previously exempted activities, due to their size and lack of impact, and reclassifies them, without any analysis of their impacts or the relative benefits that could occur. The justification of the costs is absent, the cost analysis is incomplete, and fails to accurately identify even the impacts that are described, let alone the significant number of undisclosed impacts. The crux of the Cost Analysis appears to be that the most expensive levees, setback levees, would not be needed in every covered levee action, therefore it is not consequential. While the analysis is required for each levee project that is a covered action, useable criteria is not provided for that evaluation, and there is inadequate guidance for what constitutes the sole criterion, "feasible". The Council's own analysis of the Plan shows the potential for tens to hundreds of millions of dollars of additional costs per year, yet assumes that these costs will somehow be borne by small rural communities and will have no impacts on employment or service provisions. These exorbitant costs will likely lead to severe economic and social hardships within the Delta, with the obvious direct and indirect result of the loss of agricultural jobs, productivity, ultimately risking the long-term viability of agriculture and increasing risk in the Delta.	E	While the annual number of covered actions undertaken in the Delta is uncertain, Council Staff believes the cost estimates for individual covered actions are reasonable and representative. The Economic and Fiscal impact requires direct costs of the proposed regulation be included in the Cost Analysis where available. Indirect costs are acknowledged but because of the large uncertainty are not quantified. Benefits of the regulatory policies are discussed, although not quantified. Spending on Delta Plan policies will not necessarily lead to job losses. Existing agricultural and recreation activity and local repair and maintenance activities are specifically exempt. Spending on levee evaluation and adaptive management may redirect some of the agencies' spending, but it is uncertain if this would result in net job loss. If some of the funding for these costs is provided by the state or federal government or other sources outside the Delta, that could provide a net increase in jobs. Again, due to the uncertainty about the kind, location, and magnitude of potential covered actions, these potential effects are not quantified.
7.1	Local Agencies of the North Delta	1/24/2013	The Cost Analysis provides a circular argument that additional costs for a covered action will not be incurred if the agency has already modified its project to be consistent with the Plan. (Cost Analysis, p. A-1.) The cost analysis also assumes that an agency can simply avoid completing any covered actions, such as levee upgrades, to meet current standards, without any resultant costs. The costs associated with compliance with the regulations are not only poorly identified but fail to identify the obvious direct and indirect costs from impacts associated with projects that cannot or are not be completed because of the additional requirements and their costs. In particular, the Cost Analysis does not address the likely costs of not completing levee improvements as a result of the additional burdens imposed by the new regulations.	E	The Cost Analysis only describes costs that could be incurred in order to comply with the proposed regulation. Costs incurred to comply pre-existing laws, regulations, including local land use requirements, are not considered costs imposed by the proposed Delta Plan regulation. The comment refers to a statement in the Cost Analysis that makes this point. It is not a circular argument to say that if existing laws and regulations already require a project to have characteristics consistent with the Delta Plan, then no new costs are imposed on it by the proposed regulation. Delta Plan policies are written to conform to existing laws, regulations, and policies. In many cases they do not add new requirements or costs on state or local agencies; nevertheless, such policies serve two purposes. First, they add another consequence to state or local agencies that fail to conform to existing requirements – namely, that covered actions may not be consistent with the Delta Plan. Second, the Council believes that the Delta Plan policies work together to provide a comprehensive approach to Delta planning. The Delta Plan provides that comprehensive approach, and the proposed regulation incorporates the policies into one consolidated, enforceable regulation. The Council recognizes that some kinds of projects may not happen because they cannot be done in a way consistent with the Delta Plan. The Cost Analysis acknowledges this, but does

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
				not attempt to speculate on what those projects might be and what the indirect cost might be. The final sentence in the comment is not specific as to what burden might prevent needed levee improvements. Other comments have specifically addressed the cost of evaluating setback levees – see for example the response to comments 2 and 4 above.

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
NOTICE OF RULEMAKING

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. East Bay Municipal Utility District	1/14/2013	Appendix 1A — Best Available Science. It appears as if the Appendix, as provided to the public via the DSC's website, is incomplete. The last paragraph on page 1 A-2 ends abruptly with an incomplete sentence, as illustrated below. "It is recognized that differences exist between the accepted standards of peer review for various fields of study and professional communities. When applying the criteria for best available science in Table 1A-1, the Council recognizes that the level of peer review for supporting material and technical information " There is no continuation of Appendix 1A. This typographical error should be corrected.	Nr	Comment noted. Appendix 1A has been corrected.
2. East Bay Municipal Utility District	1/14/2013	General comment regarding forms — during the development of the Delta Plan, DSC staff created a draft covered action checklist form and a certification form. These forms are still on the DSC's website and have not been updated since 2011. The forms in their current draft arc not consistent with the proposed regulatory language. It should be noted that the contents of the forms must consist only of existing, specific, legal requirements, and that the forms cannot add any regulatory language or requirements that are not included in the adopted regulation.	Nr	Comment noted. Updated forms are posted on the Council's website.
3. San Joaquin Tributaries Authorities	1/14/2013	California Government Code section 11346.5 sets the requirements for the DSC Notice of Proposed Rulemaking ("Notice"). The Notice fails to meet all of those requirements. The Notice's "Informative Digest" must evaluate consistency and compatibility with existing State laws. (Gov. Code, §11346.5(a)(3)(D).) While the Notice identifies several sections of the Water Code and Public Resources Code, it does not evaluate consistency with Water Code section 10608.8. As explained below and specific to proposed section 5007, Water Code section 10608.8 (part of SB X7 7) directly contradicts the proposed section 5007. Not addressing this contradiction violates the Notice requirements. The SJTA requests the DSC revise the Notice to conform to Government Code section 11346.5.	Nr	It is unclear from the context of section 5007 what subsection of 10608.8 the comment is referring. If the comment intended to refer to section 5005 (not 5007), Council staff disagrees that that 5005 is inconsistent with 10608.8. For example, 5005 does not require an urban supplier to meet its conservation targets sooner than 2020 (10608.8(a)), nor does it mandate an absolute reduction in water use (10608.8(c)). See the more detailed response to similar comments on section 5005.
4. Save the California Delta Alliance	1/14/2013	The Council's Decision Not to Adopt Regulatory Policies Governing Conveyance Is Contrary to the Mandate of The Delta Reform Act and Makes the Regulations Inadequate as a Matter of Law. A. The Council's Authority Over Conveyance, Including The BDCP, Is Not Contingent. Water Code section 85320 provides that the BDCP "shall be considered for inclusion in the Delta Plan in accordance with this chapter" [Cal. Water Code Division 35, Part 4, Chapter 2]. Thus, the criteria for inclusion are those set forth in Chapter 2. Water Code section 85320(a) then provides that "The BDCP shall not be incorporated into the Delta Plan unless the BDCP does all of the following." Sub-paragraphs (1) and (2)(A)-(G) then set forth the list of requirements. Thus, in addition to considering all the criteria set forth in Chapter 2, the Council is prohibited from incorporating the BDCP unless it meets the requirements set forth in subparagraphs (1) and (2)(A)-(G). Subparagraph (e) then provides the process by which the Council will review DFG's determinations with regard to the BDCP: (e) If the Department of Fish and Game approves the BDCP as a natural community conservation plan pursuant to Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code and determines that the BDCP meets the requirements of this section, and the BDCP has been approved as a habitat conservation plan pursuant to the federal Endangered Species Act (16 U.S.C. Section 1531 et seq.), the council shall incorporate the BDCP into the Delta Plan. The Department of Fish and Game's determination that the BDCP has met the requirements of this section may be appealed to the council. The structure of the Delta Reform Act sets up the Council as an appellate body. That is how it exercises almost all of its regulatory authority. The legislature wanted to be sure that the Council	A, DP, Nr	The adopted regulation does not authorize or approve conveyance associated with BDCP. The proposed BDCP is a reasonably foreseeable future project that is not part of the Delta Plan. It is being evaluated by the Department of Water Resources as the CEQA lead agency. The cumulative impacts of the proposed Delta Plan, in combination with the impacts of the proposed BDCP, are described in EIR Sections 22 and 23.

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
		would exercise that regulatory authority over the BDCP so it reiterated that DFG's determination could be appealed to the Council. Sub-paragraph (e) is aimed at foreclosing exactly the construction that the Council has put on the Delta Reform Act: that it does not have regulatory authority over BDCP conveyance. To say that the Council's regulatory authority over the BDCP is "contingent" because it only arises on appeal proves too much: in that case almost all of the Council's regulatory authority is contingent. Some of the criteria to be considered in evaluating the BDCP are expressed in specific terms. However other crucial criteria are expressed in broad and general terms: "other operational requirements and flows necessary for recovering the Delta;" "a reasonable range of alternatives;" "in a timely manner;" "a reasonable range of flow criteria [and] rates of diversion;" "a reasonable range of Delta conveyance alternatives;" etc. Water Code section 85210(i) provides that the Council has a responsibility to "adopt regulations or guidelines as needed to carry out the powers and duties identified in this division [Div. 35].Ó Government Code section 11342.600 provides in pertinent part that a regulation is designed to "implement, interpret, or make specific the law enforced or administered." No doubt the Council enforces and administers section 85320, as its purpose is for the BDCP to "be considered for inclusion in the Delta Plan." Cal. Water Code ¤ 85320. However the notice of proposed rulemaking pointedly omits section 85320 (and 85321) from the list of code sections that the regulations "implement, interpret, and make specific." Notice of Proposed Rulemaking at 1. These sections are not exempted from the Council's regulatory authority and any assessment of the BDCP in fact requires that these general terms be made specific so the Council has an intelligible framework and adequate information against which the BDCP can be judged. The legislature's intent that the Council make these terms specific is confirmed by the fact that the Delta Reform Act contains definitions sections, but none of these terms are included therein. Does a "reasonable range of Delta Conveyance alternatives" mean that only one point of diversion need be considered but that alternatives for capacity and design of the canal and or tunnel(s) need to be considered? Or does it mean that more than one point of diversion must be considered? This is an important question discussed in more detail below. The BDCP has interpreted it to mean the former. Our reading of Cal. Water Code ¤ 85320(b)(2)(B) convinces us that the latter is the case. The Council needs to address this question through a conveyance regulatory framework that make this general statement specific. And it needs a lot of information that it doesn't have to promulgate conveyance regulations. The Council has acknowledged that "the 2012 Delta Plan does not include any regulatory policies regarding conveyance." Delta Plan, Appendix G at G-2. It has further acknowledged that it can include these policies only after it conducts "extensive analysis of the conveyance options and associated detailed environmental review." Since the Council has acknowledged that it has not yet conducted the required analysis and has therefore not included the necessary regulatory policies, its informed consideration of the BDCP's proposed conveyance is not possible. The Delta Plan should guide the BDCP not the other way around. Once the appropriate analysis is conducted and required policies adopted, the Council can of course exercise discretion in determining if the proposed conveyance complies with the adopted regulatory policies.		

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
5. Trinity County Board of Supervisors	1/2/2013	Under the section "Whether the Proposed Regulation is Inconsistent or Incompatible with Existing State Regulations", the statement is made that "None of the proposed regulations are inconsistent or incompatible with existing state regulations." This is clearly false. AB32, California's Global Warming Solutions Act was signed by Arnold Schwarzenegger in 2006 and mandates the reduction of state greenhouse gas emissions to the emissions levels of 1990 by the year 2020. AB32 requires the California Air Resources Board to adopt rules and regulations "...to achieve the maximum technologically feasible and cost-effective greenhouse gas emission reductions..." The proposed Delta Reform Act regulations are clearly at odds with the requirements of AB32 since these new regulations will result in a major increase in greenhouse gas emissions as existing hydroelectric generation is reduced and replaced with fossil generation. Delta Reform Act proposed flow changes could result in a 30% reduction in carbon-free hydroelectric generation from the central valley project. This lost power generation will inevitably be replaced with gas-fired power generation.	Co, Nr	The adopted regulation is not inconsistent with AB32. The adopted regulation encourages the SWRCB to complete the updated Bay-Delta Water Quality Control Plan flow objectives. Implementation of these updated flow objectives will not lead to a significant increase in greenhouse gas emissions for several reasons. First, the reservoir releases needed for hydroelectric generation are made pursuant to water rights, water service contracts, and/or Federal Energy Regulatory Commission licenses with accompanying SWRCB certifications pursuant to section 401 of the Clean Water Act. They are therefore safeguarded at least by the state statutory and procedural protections described in section 5.3.1 above and, in the case of FERC licensure, by the pre-emptive authority of federal law. Second, if, as the EIR appropriately assumes, the Delta Plan's recommendations and policies are implemented, current users of Delta water will reduce their reliance on that water, thus reducing the need for electricity to convey Delta water to users outside the Delta. The reduced demand will limit the impact of any reduction in hydroelectric generation. Third, under a natural flow regime, water will still be released from these reservoirs. Although these releases may be at different times of the year than under present conditions, and more of them may be for instream flow and Delta outflow, rather than for diversion or export, they will still be available for hydroelectric generation. In light of the uncertainty of the specific actions required to implement the future flow objectives, and the EIR's programmatic approach, quantitative analysis of greenhouse gas emissions related to changes in hydropower supply is neither possible nor required. Regarding potential increased GHG emissions that could result from various projects encouraged by the Delta Plan, including recycled waste water and stormwater facilities and water transfers (which could require additional electricity for conveyance if the receiving agencies use water from the CVP or SWP), the EIR acknowledges the potential for such emissions in Section 21, and determines that the impact could be significant and unavoidable.

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
ECONOMIC AND FISCAL IMPACT STATEMENT

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Butte County Board of Supervisors	1/8/2013	Section 22 (PEIR) fails to assess the cumulative socioeconomic impacts to the depletion of groundwater resources, stream flow and recreation to the north of Delta watershed.	E	Council staff does not believe that the adopted regulation will result in cost or economic impacts to groundwater resources, stream flow and recreation to the north of Delta watershed. The adopted regulation does not authorize or approve conveyance associated with BDCP. Please refer to comment response [xxx] for a description of the regulation's role related to the BDCP.
2. Butte County Board of Supervisors	1/8/2013	The Delta Plan presents the opportunity for actions that could impact the north of Delta watershed through decreased diversions and/or reoperation of Lake Oroville to meet Delta flow criteria. Changes in Lake Oroville operation to meet Delta flow criteria or from Bay Delta Conservation Plan (BDCP) actions will result in economic and social impacts to Butte County. For example, analysis of BDCP implementation has shown that Lake Oroville would remain in a "dead pool" condition in most years. This situation would render Lake Oroville inoperable as a recreation venue, damage the ecosystem and become a visual blight on the region. Lake Oroville is located entirely within Butte County and is integral to recreation, economy and ecosystem for those in its Area of Origin. While the Delta Plan seeks to enhance recreational opportunities in the Delta and to protect Delta legacy towns, the Delta Plan will result in redirected adverse recreational impacts at Lake Oroville and, consequently, to Butte County and to north of Delta legacy towns. The PEIR (Section 18 Recreation) fails to assess the recreational and economic impacts to Butte County from the Revised Project.	E	The Council staff does not believe that the adopted regulation will result in cost or economic impacts to the north of Delta watershed through decreased diversions and/or reoperation of Lake Oroville. The SWRCB will update the flow objectives independent of the adopted regulation. The adopted regulation does not mandate the update of flow objectives for the Delta and for high-priority tributaries in the Delta watershed. The adopted regulation does not authorize or approve conveyance associated with BDCP. Please refer to comment response [xxx] for a description of the regulation's role related to the BDCP.
3. Butte County Board of Supervisors	1/8/2013	The description of impacts and mitigation measures (PEIR) fails to recognize the economic and recreational impacts to Butte County from the drawdown of Lake Oroville.	E	The Council staff does not believe that the adopted regulation will result in cost or economic impacts to the north of Delta watershed through decreased diversions and/or reoperation of Lake Oroville. See previous response.
4. Central Delta Water Agency	1/14/2013	Section 5009. Protect Opportunities to Restore Habitat This regulation coupled with the regulation pertaining to covered actions constitutes a regulatory taking in contravention of the State and Federal Constitution and related statutes. Identification of such areas for extraordinary regulation and future acquisition will diminish land values without just compensation. Additionally, the areas designated include agricultural lands the conversion of which to habitat would violate Water Code sections 85020(b), 85054 and other provisions of law. Inhibiting use or development for the purpose of limiting the cost or otherwise facilitating a future acquisition for a public purpose constitutes an unlawful taking.	DP, E	See response MR6 related to regulatory taking.
5. Central Valley Clean Water Association	1/14/2013	Information About the Financing of Delta Plan Projects Is Necessary to Understand the Feasibility of the Revised Project in Relation to RDPEIR Alternatives The RDPEIR and DPEIR fails to address the Finance Plan within the Final Draft Delta Plan, noting only that "[t]he Finance Plan Framework relies upon other agencies to authorize or to establish mechanisms for the development of funding and/or collection of funds, steps which would not result in changes in physical conditions in the environment in addition to those that are already discussed and analyzed in this EIR." (DPEIR, p. 2-56.) While the Finance Plan itself may not directly impact the physical environment, information regarding the Finance Plan is critical to understanding the feasibility of the Final Draft Delta Plan, particularly as it relates to the alternatives in the RDPEIR. The assumption built into the Finance Plan and only superficially referenced in the DPEIR is that entities identified as "stressors" will be successful in procuring funding for Plan projects. Given the realities of Proposition 218 and the existing scarcity of local, state or federal funds for such projects, such an assumption is highly questionable. The RDPEIR should disclose the important elements of the Finance Plan, discuss the likelihood that funding will be available for such projects, and address the timing of any such funding. Without this information, the public cannot understand the relative feasibility, and thus merits, of the Revised Project and its alternatives.	E	This comment addresses Chapter 8 of the final Delta Plan and how financial considerations could affect feasibility and implementation of the Delta Plan. The adopted regulation's supporting fiscal and economic impact analysis discusses potential implementation costs.

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
6. City of Sacramento	1/14/2013	Moreover, the Cost Analysis assumes that most of the regulatory components of the Delta Plan will have no costs associated with implementation. This is somewhat surprising given the Cost Analysis recognizes that "the Delta Plan policies will become regulations that all State and local agencies, as they are identified within each policy, must observe." (Cost Analysis, p.12.) Yet, the Cost Analysis argues that Section 5005 "does not mandate substantial new costs on water suppliers" because those water suppliers are already subject to the water management planning and implementation of existing laws set forth in Section 5005. For Section 5006, the Cost Analysis states that this provision simply provides that contracting "will follow [already] established procedures" and therefore "imposes no new costs to state or local agencies or on private entities." (Cost Analysis, p.14.) For Section 5007, the Cost Analysis states that "no mandates are made" through the proposed regulation and, therefore, there are no additional costs on any state or local agencies or on private entities. (Cost Analysis, p.14.) The discussion of Section 5008 is similar, explaining that Section 5008 "does not mandate any additional habitat restoration actions nor is it likely to significantly alter future restoration plans" and therefore "imposes no new costs." (Cost Analysis, Page 14.) The same is true for Section 5010 (policy only requires consideration of alternatives and therefore is not anticipated to impose additional costs); Section 5011 (policy would already be covered by required CEQA mitigation and therefore imposes no new costs); Section 5012 (policy imposes no direct costs); Section 5013 ("[t]his policy does not differ significantly from existing conditions"); and Section 5014 (recognizes existing efforts underway and claims no additional costs).	E	Delta Plan policies are written to conform to existing laws, regulations, and policies. In many cases they do not add new requirements or costs on state or local agencies; nevertheless, such policies serve two purposes. First, they add another consequence to state or local agencies that fail to conform to existing requirements – namely, that covered actions may not be consistent with the Delta Plan. Second, the Council believes that the Delta Plan policies work together to provide a comprehensive approach to Delta planning. The Delta Plan provides that comprehensive approach, and the adopted regulation incorporates the policies into one consolidated, enforceable regulation.
7. City of Sacramento	1/14/2013	The analysis used in the Cost Analysis appears to contradict the Delta Plan, the Proposed Regulations, and the Initial Statement of Reasons supporting the regulations. The Initial Statement of Reasons argues that "[t]he adoption of these regulatory policies is necessary to carry out the legislative requirement that the Council adopt a legally enforceable long-term management plan for the Delta" and "are necessary to carry out the legislative intent of achieving the coequal goals and objections specified" in the Water Code. (Initial Statement of Reasons, p.1) The Cost Analysis, however, argues that the Regulations impose no additional costs on anyone, in part, because existing law already imposes the same mandates contained in the Regulations. Either the proposed regulations are indeed necessary to effectuate the legislation — and the associated costs are attributable to the regulations — or, as argued in the Cost Analysis, they are not necessary.	Ne, E	Delta Plan policies are written to conform to existing laws, regulations, and policies. In many cases they do not add new requirements or costs on state or local agencies; nevertheless, such policies serve two purposes. First, they add another consequence to state or local agencies that fail to conform to existing requirements – namely, that covered actions may not be consistent with the Delta Plan. Second, the Council believes that the Delta Plan policies work together to provide a comprehensive approach to Delta planning. The Delta Plan provides that comprehensive approach, and the adopted regulation incorporates the policies into one consolidated, enforceable regulation.
8. City of Sacramento	1/14/2013	The Council has prepared a Cost Analysis as required by Government Code sections 11346.3 and 11346.5. The Cost Analysis, however, appears to suffer from substantial deficiencies. First, the discussion regarding the ability of local agencies to "recover costs" associated with the implementation of the Delta Plan is wrong and out of date. In this regard, the Cost Analysis relies on the case of California Farm Bureau Federation v. State Water Resources Control Board (2011) 51 Cal.4th 421, to suggest that "regulatory fees" can simply be imposed to recover costs. This case, however, is based on the law prior to the passage of Proposition 26 — a proposition that further restricted the ability of state and local agencies to raise revenue and recover certain costs. The Cost Analysis, to be accurate and informative, should consider the ability to local agencies to recover costs in light of Proposition 26.	E	The Cost Analysis acknowledges that local districts would need to recover costs using mechanisms that are within their authority and which, depending on the circumstance, may require a vote. Proposition 26 specifically exempted from its restrictions any charges imposed by state or local governments for specific services provided, including exempting any “charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.”
9. City of Stockton	1/14/2013	Moreover, the Cost Analysis assumes that most of the regulatory components of the Delta Plan will have no costs associated with implementation. This is somewhat surprising, given the Cost Analysis recognizes that "the Delta Plan policies will become regulations that all State and local agencies, as they are identified within each policy, must observe." (Cost Analysis, p.12.) Yet, the Cost Analysis argues that Section 5005 "does not mandate substantial new costs on water suppliers" because those water suppliers are already subject to the water management planning	E	Delta Plan policies are written to conform to existing laws, regulations, and policies. In many cases they do not add new requirements or costs on state or local agencies; nevertheless, such policies serve two purposes. First, they add another consequence to state or local agencies that fail to conform to existing requirements – namely, that covered actions may not be consistent with the Delta Plan. Second, the Council believes that the Delta Plan policies work together to provide a comprehensive approach to Delta planning. The Delta Plan provides that

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		and implementation of existing laws set forth in Section 5005. For Section 5006, the Cost Analysis states that this provision simply provides that contracting "will follow [already] established procedures" and therefore "imposes no new costs to state or local agencies or on private entities." (Cost Analysis, p.14.) For Section 5007, the Cost Analysis states that "no mandates are made" through the proposed regulation and, therefore, there are no additional costs on any state or local agencies or on private entities. (Cost Analysis, p.14.) The discussion of Section 5008 is remarkably similar, explaining that Section 5008 "does not mandate any additional habitat restoration actions nor is it likely to significantly alter future restoration plans" and therefore "imposes no new costs." (Cost Analysis, Page 14.) The same is true for Section 5010 (policy only requires consideration of alternatives and therefore is not anticipated to impose additional costs); Section 5011 (policy would already be covered by required CEQA mitigation and therefore imposes no new costs); Section 5012 (policy imposes no direct costs); Section 5013 ("[t]his policy does not differ significantly from existing conditions"); and Section 5014 (recognizes existing efforts underway and claims no additional costs).		comprehensive approach, and the adopted regulation incorporates the policies into one consolidated, enforceable regulation.
10. City of Stockton	1/14/2013	The analysis used in the Cost Analysis appears to contradict the Delta Plan, the Proposed Regulations, and the Initial Statement of Reasons supporting the regulations. The Initial Statement of Reasons argues that "[t]he adoption of these regulatory policies is necessary to carry out the legislative requirement that the Council adopt a legally enforceable long-term management plan for the Delta" and "are necessary to carry out the legislative intent of achieving the coequal goals and objections specified" in the Water Code. (Initial Statement of Reasons, p.1) The Cost Analysis, however, argues that the Regulations impose no additional costs on anyone, in part, because existing law already imposes the same mandates contained in the Regulations. The Council cannot have it both ways. Either the proposed regulations are indeed necessary to effectuate the legislation - and the associated costs are attributable to the regulations -or, as argued in the Cost Analysis, they are not necessary.	E	Delta Plan policies are written to conform to existing laws, regulations, and policies. In many cases they do not add new requirements or costs on state or local agencies; nevertheless, such policies serve two purposes. First, they add another consequence to state or local agencies that fail to conform to existing requirements – namely, that covered actions may not be consistent with the Delta Plan. Second, the Council believes that the Delta Plan policies work together to provide a comprehensive approach to Delta planning. The Delta Plan provides that comprehensive approach, and the adopted regulation incorporates the policies into one consolidated, enforceable regulation.
11. City of Stockton	1/14/2013	The Council has prepared a Cost Analysis as required by Government Code sections 11346.3 and 11346.5. The Cost Analysis, however, appears to suffer from substantial deficiencies. First, the discussion regarding the ability of local agencies to "recover costs" associated with the implementation of the Delta Plan is wrong and out of date. In this regard, the Cost Analysis relies on the case of California Farm Bureau Federation v. State Water Resources Control Board (2011) 51 Ca1.4th 421, to suggest that "regulatory fees" can simply be imposed to recover costs. This case, however, is based on the law prior to the passage of Proposition 26 - a proposition that further restricted the ability of state and local agencies to raise revenue and recover certain costs. (See California Farm Bureau Federation v. State Water Resources Control Board (2011) 51 Ca1.4th 421, 428 (fn.2) ["[o]n November 2, 2010, the voters approved Proposition 26, which requires a two-thirds supermajority vote of the Legislature to pass certain fees. None of the parties have asserted that the law enacted by Proposition 26 applies to this case"].) The Cost Analysis, to be accurate and informative, should consider the ability of local agencies to recover costs in light of Proposition 26.	E	The Cost Analysis acknowledges that local districts would need to recover costs using mechanisms that are within their authority and which, depending on the circumstance, may require a vote. Proposition 26 specifically exempted from its restrictions any charges imposed by state or local governments for specific services provided, including exempting any “charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.”
12. City of Stockton	1/14/2013	The Proposed Regulations fail to meet the standards set forth in the APA for clarity, nonduplication, and necessity and must therefore be revised. The cost analysis must be redone to reflect the actual costs that will flow from the implementation of the Delta Plan.	E	Comment noted. The Council believes that the analysis reasonably describes, and where possible quantifies, costs and economic impacts of the adopted regulation’s implementation.
13. Local Agencies of the North Delta	1/14/2013	Economic Analysis of Rulemaking Does not Disclose the Total Number and Types of Businesses Impacted and the Number or Percentage of Total Businesses Impacted that are Small Businesses. The Cost Analysis for Proposed Delta Plan Regulations in Support of Economic and Fiscal Impact	E	The Economic and Fiscal Impact Statement and the supporting Cost Analysis provide a discussion of the kinds of costs incurred. The directly regulated entities are state and local agencies, not businesses. The analysis acknowledges that businesses will be affected indirectly

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		Statement Prepared for Delta Stewardship Council ("Cost Analysis") is incomplete and incorrect. Standard Form 399, Economic and Fiscal Impact Statement ("Form 399") identifies only a cursory analysis that fails to identify the number of potential businesses or even industries negatively affected by the proposed regulations implementing the Plan. The economic cost and the resulting potential for direct and indirect injury to in-Delta communities, industries and individual interests is not disclosed. As explained below, there will be significant costs to local communities of this rulemaking, which is inconsistent with the mandate of the Delta Reform Act. (See Wat. Code, § 85020, subd. (b) ("Protect and enhance the unique cultural, recreational, and agricultural values of the California Delta as an evolving place.").) The basic premise presented in Form 399 appears to be that "improved water reliability" and other Plan actions with "unknown benefits" somehow provided by the Plan outweigh any job losses and economic impact on in-Delta communities. But at the same time, the analysis in Form 399 describes an economic burden of $11.9-16.8 million dollars of new costs per year on in-Delta communities. (Section D2, p. 2.) Yet, the analysis concludes that these costs will not lead to job losses or economic failures. The Delta Plan and its implementing regulations require an exceptionally costly, complex and uncertain analyses for consistency with the Delta Plan. This burden will likely be borne entirely by family farming operations, individual rural residents and others who comprise the funding base for Delta Reclamation Districts and levee maintenance districts. The cost of this newly required analysis will be dedicated to paperwork, not to critical infrastructure repair and maintenance, such as levees. As LAND and other local interests have repeatedly explained, onerous and contradictory levee standards will impair Delta agriculture and the local ability to meet residential needs for farming and recreation services. These additional costs are moreover not identified in the Cost Analysis. According to Form 399: "Plan policies and administrative requirements apply to State and local agencies. Private businesses and individuals are not directly affected by costs of Delta Plan policies or administrative requirements. However, private businesses and individuals could be affected indirectly in two ways. First, private businesses or individuals directly involved in the proposed action may incur costs to make the action consistent with the Delta Plan. Second, costs to the State or local agency proposing a covered action could be passed on to specific private businesses and individuals through assessments, rates, fees, or other charges. Even without a specific proposed action, local agencies may incur additional costs to be consistent with Delta Plan policies in anticipation of future proposed actions." (Section A.2.) "The number of businesses and jobs created or eliminated is uncertain. Delta Plan policies are expected to provide long-term benefits in protecting agriculture, restoring the Delta ecosystem, improving water supply reliability, maintaining and enhancing settings for outdoor recreation and tourism in the Delta, and improving flood protection." (Section A.3-5.) "While the estimated reduction in business costs to produce goods and services is unknown, it is anticipated that this benefit could outweigh the indirect cost of assessments, rates, fees, or other charges used to recover the cost of certification of a proposed covered action and the steps necessary for a covered action to comply with Delta Plan policies." (Section A.6.)		in two ways: 1) through fees, assessments, rates, etc. that agencies may use to recover costs; and 2) by potential modifications to covered projects to make them consistent. The distribution of such indirect effects will depend on specific proposed actions, and cannot be known at this time except in general terms. The Council understands the concerns of local agencies and residents in the Delta, and has defined the consistency process to avoid burdens on existing uses and activities where possible. Existing agricultural, recreational, or other activities that do not meet all five conditions for a covered action need not file for consistency, and local repair and maintenance activities are specifically exempt. Cost estimates are included in the Cost Analysis for filing a Certification of Consistency and for other policy-related costs. The regulation incorporates the policy statement of section 85020, subd. (b) quoted by the commenter, and further incorporates two policies that specifically protect the Delta as Place; therefore the Council disagrees that the regulation is inconsistent with section 85020, subd. (b). Spending on Delta Plan policies will not necessarily lead to job losses. Spending on levee evaluation and adaptive management may redirect some of the agencies' spending, but it is uncertain if this would result in net job loss. If costs of setback levees or adaptive management were funded by state, federal, or other sources outside the Delta, the spending would be likely to increase jobs locally.

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14. Local Agencies of the North Delta	1/14/2013	In addition the Example Cost Analysis fails to accurately compare future costs under the new regulations to current costs. In Table A-3, the ratio of costs for 200 year protection levees with and without setbacks is actually 970 percent, not the 800 percent increase described ($58 million and $7 million per mile). As a result, the Plan places Delta communities in direct risk of flooding because of the unreasonable economic burden imposed by implementation of the Plan. This is a double injury, because the Plan also has required new levee standards that increase costs above the Department of Water Resources PL 84-99 standards. So, not only are planning costs to assess the Plan's requirements excessive, the implementation cost is monumental. This result conflicts with Goals and Policies in the Delta Plan that are ostensibly designed to reduce flooding risk.	E	Only actions that the local agency determines to meet all five of the criteria in 5003(a) would be potential covered actions. Further, local agency activities to operate or maintain levees or other facilities are exempt under section 85057.5(b)(5) of the Delta Reform Act. The cost estimates of setback levees in Table A-3 are identified as example costs, incurred only if such a levee is found to be feasible. Economic factors including financial capacity are considerations the local agency would use to self-determine whether the setback levee (or other habitat improvement) is feasible (see definition of “feasible”, 5001(l)).
15. Local Agencies of the North Delta	1/14/2013	In addition, the Example Cost Analysis identifies a new set of project costs for levee projects as a result of this Plan that are not disclosed in Form 399: "...$1.5 million per mile of levee. Assuming that planning costs are 20 percent of the combined cost of planning, engineering, and design, the additional planning costs would be $300,000 per mile of levee." (Cost Analysis, Appendix A, p. A-1.) "The total project cost of setback levees ranges from $31 to $68 million per mile, depending on local site conditions and costs of land acquisition. In contrast, the cost of levee rehabilitation in-place ranges from $4 to $15 million per mile. The cost of setback levees could therefore be two to eight times the cost to improve an existing levee in-place." (Cost Analysis, Appendix A, p. A-2.) "Addition of water-side berms in setback levees to provide habitat would increase the cost by another 50 to 100 percent. The Administrative Draft Bay Delta Conservation Plan estimates the addition of setback levees, including riparian habitat provision, would increase costs by 93 to 150 percent." (Cost Analysis, Appendix A, p. A-3.) Thus, by the Plan's own analysis, the cost per mile of levee would go from as low as $4 million per mile to as much as $68 million per mile, with additional habitat measures raising the cost to $136 million per mile, an increased cost of 3,400 percent!	E	Only actions that the local agency determines to meet all five of the criteria in 5003(a) would be potential covered actions. Further, local agency activities to operate or maintain levees or other facilities are exempt under section 85057.5(b)(5) of the Delta Reform Act. The cost estimates of setback levees in Table A-3 are identified as example costs, incurred only if such a levee is found to be feasible. Economic factors including financial capacity are considerations the local agency would use to self-determine whether the setback levee (or other habitat improvement) is feasible (see definition of “feasible”, 5001(l)).
16. Local Agencies of the North Delta	1/14/2013	The Plan proposes massive new expenses on levee and other projects without any consideration for the impacts on the ability of local districts to pay. If levee repair funding remained constant, a 200 to 800 percent increase in levee costs would result in a reduction in miles of levee repairs to one quarter to 1/16 of the current rate. This cost increase is unacceptable by any standard and isn't disclosed in Form 399 as required.	E	Only actions that the local agency determines to meet all five of the criteria in 5003(a) would be potential covered actions. Further, local agency activities to operate or maintain levees or other facilities are exempt under section 85057.5(b)(5) of the Delta Reform Act. The cost estimates of setback levees in Table A-3 are identified as example costs, incurred only if such a levee is found to be feasible. Economic factors including financial capacity are considerations the local agency would use to self-determine whether the setback levee (or other habitat improvement) is feasible (see definition of “feasible,” 5001(l)).
17. Local Agencies of the North Delta	1/14/2013	While some costs are included in the Example Cost Analysis, they are not adequately estimated. (Cost Analysis, Appendix A, Example Cost Analysis, Table A-3.) There are approximately 177 special districts identified in this analysis (Cost Analysis, Appendix B), with the proposal in this Plan that special districts will simply pass the $11.9-16.8 million in new annual costs on to their members. What is likelier to happen, however, is that districts that can't afford the increased costs will not be able to continue to provide the services for which they were formed, and the service burden will be placed on the State.	E	The Cost Analysis acknowledges that local districts would need to recover costs using mechanisms that are within their authority and which, depending on the circumstance, may require a vote. Proposition 26 specifically exempted from its restrictions any charges imposed by state or local governments for specific services provided, including exempting any “charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof.”
18. Sacramento Regional County Sanitation District	1/14/2013	Moreover, the Cost Analysis assumes that most of the regulatory components of the Delta Plan will have no costs associated with implementation. This is somewhat surprising, given the Cost Analysis recognizes that “the Delta Plan policies will become regulations that all State and local agencies, as they are identified within each policy, must observe.” (Cost Analysis, p.12.) Yet, the	E	Delta Plan policies are written to conform to existing laws, regulations, and policies. In many cases they do not add new requirements or costs on state or local agencies; nevertheless, such policies serve two purposes. First, they add another consequence to state or local agencies that fail to conform to existing requirements – namely, that covered actions may not be

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19. Sacramento Regional County Sanitation District	1/14/2013	The analysis used in the Cost Analysis appears to contradict the Delta Plan, the Proposed Regulations, and the Initial Statement of Reasons supporting the regulations. The Initial Statement of Reasons argues that "[t]he adoption of these regulatory policies is necessary to carry out the legislative requirement that the Council adopt a legally enforceable long-term management plan for the Delta" and "are necessary to carry out the legislative intent of achieving the coequal goals and objections specified" in the Water Code. (Initial Statement of Reasons, p.1) The Cost Analysis, however, argues that the Regulations impose no additional costs on anyone, in part, because existing law already imposes the same mandates contained in the Regulations. The Council cannot have it both ways. Either the proposed regulations are indeed necessary to effectuate the legislation – and the associated costs are attributable to the regulations – or, as argued in the Cost Analysis, they are not necessary.	Ne, E	Delta Plan policies are written to conform to existing laws, regulations, and policies. In many cases they do not add new requirements or costs on state or local agencies; nevertheless, such policies serve two purposes. First, they add another consequence to state or local agencies that fail to conform to existing requirements – namely, that covered actions may not be consistent with the Delta Plan. Second, the Council believes that the Delta Plan policies work together to provide a comprehensive approach to Delta planning. The Delta Plan provides that comprehensive approach, and the adopted regulation incorporates the policies into one consolidated, enforceable regulation.
20. Sacramento Regional County Sanitation District	1/14/2013	The Council has prepared a Cost Analysis as required by Government Code sections 11346.3 and 11346.5. The Cost Analysis, however, appears to suffer from substantial deficiencies. First, the discussion regarding the ability of local agencies to "recover costs" associated with the implementation of the Delta Plan is wrong and out of date. In this regard, the Cost Analysis relies on the case of California Farm Bureau Federation v. State Water Resources Control Board (2011) 51 Cal.4th 421, to suggest that "regulatory fees" can simply be imposed to recover costs. This case, however, is based on the law prior to the passage of Proposition 26 – a proposition that further restricted the ability of state and local agencies to raise revenue and recover certain costs. (See California Farm Bureau Federation v. State Water Resources Control Board (2011) 51 Cal.4th 421, 428 (fn.2) ["[o]n November 2, 2010, the voters approved Proposition 26, which requires a two-thirds supermajority vote of the Legislature to pass certain fees. None of the parties have asserted that the law enacted by Proposition 26 applies to this case"].) The Cost Analysis, to be accurate and informative, should consider the ability to local agencies to recover costs in light of Proposition 26.	E	The Cost Analysis acknowledges that local districts would need to recover costs using mechanisms that are within their authority and which, depending on the circumstance, may require a vote. Proposition 26 specifically exempted from its restrictions any charges imposed by state or local governments for specific services provided, including exempting any "charge imposed for the reasonable regulatory costs to a local government for issuing licenses and permits, performing investigations, inspections, and audits, enforcing agricultural marketing orders, and the administrative enforcement and adjudication thereof."
21. San Luis & Delta-Mendota Water Authority; State Water	1/14/2013	Also, the cost analysis ignores the costs associated with the mandatory reductions in the quantity of water conveyed through the Delta, and in reductions in water used from within the Delta watershed set forth in Section 5005 of the Proposed Regulations. The economic and social costs of those reductions are severe. The Public Water Agencies' prior letter regarding the Delta	E	Section 5003 will be an important step toward encouraging water conservation and the development of local and regional water supplies, where feasible, thereby improving self-reliance as required by the Delta Reform Act. Self-reliance, in turn, would reduce reliance on the Delta and improve water supply reliability. Its direct impact on the availability of Delta

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Contractors, Inc.		Plan Draft Program Environmental Impact Report, dated February 2, 2012, discusses the work of economists from U.C. Davis and the University of the Pacific, which concluded that in 2009, as a result of a relatively dry hydrology and water supply restrictions imposed on the State Water Project and Central Valley Project, the San Joaquin Valley population lost as many as 7,434 jobs, more than $278 million in income, and more than $368 million in overall economic output. (Michael J., et al. 2009. A Retrospective Estimate of the Economic Impacts of Reduced Water Supplies to the San Joaquin Valley in 2009 (Sep. 28, 2010).) Additional support can be found in several court decisions. (Delta Smelt Consol. Cases (E.D. Cal. 2010) 717 F.Supp.2d 1021, 1052; Consol. Salmonid Cases (E.D. Cal. 2010) 713 F.Supp.2d 1116, 1148; San Luis & Delta-Mendota Water Authority v. Salazar (Delta Smelt Consol. Cases) (E.D. Cal. 2009) 2009 WL 1575169 at *5-6.)		water, however, will likely be limited. Under 5003(a), a covered action exporting water from, transferring water through or using water in the Delta would be inconsistent with the Delta Plan, and therefore barred, if and only if it has each of the following three attributes: 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; (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. Policy WR P1 would limit the overall availability of Delta water only if a significant number of covered actions were likely to be inconsistent with all three of its factors. In fact, the policy will prevent very few, if any, proposed actions. Instead it will, as the EIR finds, benefit water availability by encouraging local and regional self-reliance. This is primarily because water suppliers can avoid inconsistency by "adequately contribut[ing] to reduced reliance on the Delta and improved regional self reliance." To do so, per 5003(C)(1), each water supplier must have taken three actions: "(A) Completed a current urban or agricultural water management plan (Plan)which has been reviewed by DWR 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 management Plan, of all programs and projects included in the Plan that are locally cost effective and technically feasible that 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)." These requirements do not impose substantial new burdens on agencies proposing or otherwise receiving water from covered actions. Urban and agricultural water management plans are required by law and will include the identification and evaluation of potential local and regional water supplies. The only requirements added by section 5003 are that the proposing agency must begin implementation of "locally cost effective and technically feasible" projects to reduce reliance on the Delta and that, from 2015 onward, water management plans "include[]…the expected outcome for measurable reduction in Delta reliance and improvement in regional self- reliance." These requirements will not create any gap between water supply and demand. If projects to reduce Delta reliance are technically feasible and locally cost-effective, then consistency with section 5003 would simply require the agency to begin those projects. Once the water suppliers that will receive water from the covered action have commenced such implementation, then the covered action would be consistent with section 5003 and could go forward. Alternately, if no technically feasible and locally cost-effective local projects are available to the proposing agency, then its proposed covered action

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				will not be inconsistent with section 5003 and may go forward. section 5003 would not prevent a covered action in the absence of a feasible replacement, and would not force any agency to undertake projects that are not feasible and locally cost-effective. Moreover, even if an agency had failed to prepare a water management plan and/or implement locally cost-effective and feasible actions, the proposed covered action would only be inconsistent with section 5003 if the failure to do so significantly caused the need for the action and the proposed action would have a significant adverse impact on the Delta. In short, it is likely that section 5003 would prevent very few, if any, covered actions. Instead, it will encourage agencies to move forward with local and regional water supplies projects, thus benefitting the water supply availability and reliability for all users of Delta water. Private businesses and individuals are not directly affected by costs of Delta Plan policies or administrative requirements. However, public agencies that do bear such costs would recover those costs in various ways from their constituents. For the same reasons that agencies would not bear substantial new costs to comply with section 5003, the costs passed through to constituents (individuals and private businesses) would also not be substantial. The revised cost analysis acknowledges that a covered action might be delayed or abandoned by the applicant or lead public agency if the action cannot be made consistent with one or more Delta Plan policies. This could result in foregone benefits to the applicant and, indirectly, businesses or individuals. Examples of foregone benefits may include more expensive water treatment or water supply alternatives to the proposed action, or the foregone economic benefit of real-estate development in the Delta. However, without details of specific future covered actions, they are not quantifiable at this time for purposes of the STD. 399. Moreover and as explained at length above, it is unlikely that section 5003 would be the cause of inconsistency. In addition, section 5003 only addresses and encourages the implementation of locally cost-effective and technically feasible actions. Locally cost-effective is defined in statute to mean "that the present value of the local benefits of implementing an agricultural efficiency water management practice is greater than or equal to the present value of the local cost of implementing that measure" (Water Code 10608.12(k); for the equivalent definition for urban demand management measures, see Water Code 10631.5 (a)(4)(B)). Such actions would not lead to the dire local economic impacts that the comment suggests, because local benefits would exceed local costs. To the contrary, the Legislature has already determined that "[d]iverse regional water supply portfolios will increase water supply reliability and reduce dependence on the Delta (Water Code section 10608(c)), and that requiring diverse portfolios, including conservation and efficiency, will "not limit the economic productivity of California's agricultural, commercial, or industrial sectors." (Water Code section 10608.8(c).) With respect to specific requirements in the Government code: the revised cost analysis is evidence on which the Council relied to support a determination that the proposed regulation will not have a significant adverse impact on business (Government Code section 11346.2(b)(6)). The conclusion is reinforced by Water Code sections 10608(c) and 10608.8(c), as noted above.) The modified STD 399, which was provided to Department of Finance and included in its final form in the final rulemaking record submitted to the Office of Administrative Law, summarizes the analysis required by Government Code section 11346.3. It is based on and includes all relevant information from the proposed regulation, the revised Cost Analysis, the Delta Plan, and the evidence and testimony supporting the Council's development of the Delta Plan and the RDPEIR. The Notice of Proposed Rulemaking (11/30/2012) and the Initial Statement of Reasons (11/30/2012) provide the initial

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				determinations and description of alternatives considered, as required by Government Code sections cited in the comment. The Council believes that these components of the rulemaking file have adequately addressed the required components listed in Government Code section 11346.3 and 11346.5(a)(7)-(a)(12).
22. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	For all the reasons stated above, the Proposed Regulations including the Cost Analysis are fundamentally flawed and should be revised and recirculated for public comment.	E	Comment noted. See responses to other, more specific comments
23. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	The Cost Analysis Does Not Adequately Explain the Assumption of No Cost to Comply with Existing Regulations The proposed regulations are based on an apparent assumption that the Proposed Regulations merely duplicate, and do not add to the substantive requirements of existing law, so the costs of the proposed regulations would occur in any case. That assumption is not explicitly stated or supported by citations to law. Thus, the assumption that particular results of the regulations are already defined in law, and thus generate no costs, is unsupported. To the extent that the Proposed Regulations add substantive mandates, as demonstrated above, the assumption is inaccurate.	E	The rationale for why each policy either does or does not impose any new requirement relative to existing laws and policies is explained in the Cost Analysis. The evaluation of impacts as a change from an existing or a no-project condition is a well accepted method. In instances where Delta Plan policies are written to conform to existing laws, regulations, and policies, no new direct requirements or costs are added on state or local agencies. However, indirect costs may occur, and are discussed in the Cost Analysis.
24. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	The Cost Analysis Erroneously Interprets Habitat Restoration as No Cost The cost analysis assumes that all habitat restoration will result from the operation of CEQA. There is no basis for this assumption, as nowhere in the Proposed Regulations are habitat restoration goals tied to those required to fulfill CEQA obligations to implement feasible alternatives or mitigation measures to address significant environmental impacts. As a result, the cost analysis improperly assumes no cost for habitat restoration that may be required as a result of the Proposed Regulations. Further, the related requirement to protect opportunities to restore habitat imposes additional opportunity and direct costs, as use of private property may be affected by restoration effort mandates. The discussion in the cost analysis focuses on areas that are currently regulated to justify its finding of no additional costs, but fails to examine the costs associated with those areas which are not currently regulated.	E	Council staff does not believe that the adopted regulation will result in cost or economic impacts due to habitat restoration requirements. The comment appears to be in regard to policies of sections 5008 and 5009. Neither policy requires that a local or state agency must restore habitat. Section 5008 states that, if a project is restoring habitat, it must be consistent with a strategy developed by the California Department of Fish and Game (now Wildlife). Or, if a project must provide mitigation restoration under CEQA, that mitigation must be consistent. Again, the policy does not mandate new restoration, just consistency. Council staff has determined that this would impose little if any direct costs, as detailed in the Cost Analysis. Indirect costs may occur and are also discussed in the Cost Analysis. Staff believes that the Cost Analysis sufficiently described the rationale for no significant cost imposed by policy 5009.
25. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	The Cost Analysis Greatly Underestimates the Cost of Complying with the Proposed Regulations Most simply put, the cost analysis is limited to administrative costs of compliance with the Proposed Regulations; thus, it fails to address the larger direct and indirect economic and social costs associated with application of the regulations as written. The Proposed Regulations fail to consider: -Costs (both opportunity and direct costs) due to delays in private projects for consistency determinations; -Costs due to delays that result in the abandonment of projects; -Costs due to appeals regarding consistency certifications, and the lack of clear definition of many of the terms of the regulation lend themselves to interminable, hyper-technical legal challenges based on differing interpretations of vague and ambiguous provisions.	E	While the annual number of covered actions undertaken in the Delta is uncertain, the DSC staff believe the cost estimates for individual covered actions are accurate. The Economic and Fiscal impact requires direct costs of the adopted regulation be included in the Cost Analysis where available. The Economic and Fiscal Impact Statement and its Attachment were revised to provide better explanation of opportunity costs (called indirect costs). These costs, if they occurred, would be project specific, and cannot be quantified in advance. Staff believes that preparations for consistency filing should be concurrent with other permitting, planning, and CEQA compliance, so delays should be minimal. The Cost Analysis included an estimate of the cost of an appeal to a consistency determination.

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
ECONOMIC AND FISCAL IMPACT STATEMENT

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
26. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	The Cost Analysis Ignores Potential Costs Associated with Implementing the Requirements to Reduce Reliance on Delta Watershed Water to Meet Future Water Supply Needs While existing law may require regions to improve water conservation, groundwater management, and multiple other water use changes (see Wat. Code, § 10608 et seq.), Section 5005 of the Proposed Regulations threatens loss of water supply for failing to meet certain reductions in water used from the Delta watershed. The Proposed Regulations state, if a region fails to '"adequately contribute," to water use reductions (10), those within that region may not receive water from within the Delta, or conveyed through the Delta. If restrictions on water supply are imposed pursuant to Section 5005, such draconian consequences will drive significant expenditures beyond what is currently underway. Conversely, those regions which have already significantly complied with the requirements may have limited ability to further reduce their demand. Those regions may lose opportunities to have sufficient water to meet demands or be forced to spend large sums of money on projects that are not otherwise cost-effective. Thus, the Council has yet to analyze the economic costs associated with the implementation of Section 5005. (10) "Adequately contribute" is undefined. Thus, the cost of compliance may be unknowable. However, the Council cannot promulgate an unlawfully vague and ambiguous regulation, then use the vagueness and ambiguity as an excuse not to conduct the required economic analysis of the impact of implementing the Proposed Regulations.	Ct, E	Comment noted. See responses to comment 21 in the Economic and Fiscal Impact section.
27. San Luis & Delta-Mendota Water Authority; State Water Contractors, Inc.	1/14/2013	To the extent the proposed regulations assume the reductions in the quantity of water conveyed through the Delta would be "offset" by localized actions, the cost analysis does not identify costs associated with those other actions. For example, if the offset is to occur with increased production of groundwater, the cost analysis does not consider the cost of overdrafting groundwater basins.	E	Comment noted. See responses to comment 21 in the Economic and Fiscal Impact section. As to overdraft of groundwater, it is unlikely that groundwater overdraft would be an urban demand management measure or agricultural efficient water management practice to offset the quantity of water conveyed through the Delta. If costs are incurred through the implementation of local actions to offset the quantity of water conveyed through the Delta, these are indirect costs to the regulation and are discussed in the Cost Analysis. However, without knowing the specific actions each agency would undertake to comply with section 5005 no costs can be estimated.
28. Trinity County Board of Supervisors	1/2/2013	EFIS and Notice of Rulemaking: Under the section "Cost Impacts on Representative Person or Business", it states, "The total indirect cost of Delta Plan policies to private business or individuals is uncertain." Proposed flow changes contemplated by the Delta Plan could result in more than a 50% increase in the cost of power to Trinity Public Utilities District (TPUD). This could cost the 7500 customers of TPUD more than $2 million per year. While $2 million may seem like a rounding error in Sacramento, it is a very large amount of money to remove from an economy the size of Trinity County.	E, Nr	Council staff does not believe that the adopted regulation will result in cost or economic impacts to the Trinity River watershed. The SWRCB will update the flow objectives independent of the adopted regulation. The adopted regulation does not mandate the update of flow objectives for the Delta and for high-priority tributaries in the Delta watershed. The adopted regulation does not authorize or approve conveyance associated with BDCP. Appendix ~~G~~A of the Delta Plan provides a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
APPEAL

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Regional Council of Rural Counties	12/27/2012	Pane 59. Lines 13-17. Covered Actions Consistency Appeals. Chapter 2. The Delta Plan The Delta Plan states that "Any person, including any member of the Council or its Executive Officer, who claims that a covered action is inconsistent with the Delta Plan……, may file an appeal with regard to a certification of consistency submitted to Council." The Council serves as an appellate body to determine if a covered action is consistent with the Delta Plan if an appeal is filed. Given that the Council is charged with making the determination of consistency, allowing a member of the Council or its Executive Officer to file an appeal raises a variety of questions. RCRC recommends that in order to maintain objectivity that the Delta Plan should instead specifically state that members of the Council and the Executive Officer may <u>not</u> file an appeal with regard to a certification of consistency submitted to the Council.	O	The appeal procedures discussed in the Delta Plan are not part of the instant adopted regulation. Rather, the Council previously adopted the appeal procedures (on September 23, 2010). Moreover, they are not subject to the Administrative Procedures Act (APA). The Delta Reform Act provides that "[t]he council shall adopt administrative procedures governing appeals, which shall be exempt from" the APA. (Water Code section 85225.30, citing Government Code section 11340 et seq.) Finally, although the appeal procedures are not subject to the APA, we note that the questioned provision concerning who may file an appeal is permissible. See, for example, *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205 (city council member can both appeal a planning commission action and vote on the appeal, consistent with due process requirements).

RESPONSE TO COMMENTS RECEIVED DURING THE 45-DAY NOTICE PERIOD NOVEMBER 30, 2012 THROUGH JANUARY 14, 2013 AND DURING THE PUBLIC HEARING JANUARY 24, 2013
EXTENSION

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Regional Council of Rural Counties	12/27/2012	RCRC agrees with the various organizations who have requested an extension of the comment period that the 45 day comment period for these three documents, which includes the holiday season, is inadequate.	Nr	The Council considered the requests for extension. However, extensive opportunity for input was provided during development of the Delta Plan, and the Council now feels some urgency to begin implementing the policies. Therefore, the Council decided not to extend the comment period.
2. Regional Council of Rural Counties	12/27/2012	Given the short 45 day timeframe to review and comment on the Final Draft Delta Plan, the Recirculated Draft Delta Plan PEIR, and the proposed draft regulations, RCRC's comments will be limited to select issues of interest with recommended changes. RCRC agrees with the various organizations who have requested an extension of the comment period that the 45 day comment period, which includes the holiday season, is inadequate.	Nr	The Council considered the requests for extension. However, extensive opportunity for input was provided during development of the Delta Plan, and the Council now feels some urgency to begin implementing the policies. Therefore, the Council decided not to extend the comment period.

Draft Responses to Comments Received during the 15-day Notice Period
April 24, 2013, through May 9, 2013
Written Comments and Responses on Modified Economic and Fiscal Impact Statement: STD 399 plus Attachment 1 ("Modified STD 399")

CODES USED

A	Authority of Proposed Regulations
Ne	Necessity of Proposed Regulations
Ct	Clarity of Proposed Regulations
Co	Consistency of Proposed Regulations with existing law/regulation
Du	Proposed Regulations' duplication of existing law/regulation
DP	Proposed Regulation comment dealing with changes in content to the corresponding Delta Plan policy/procedure
O	Proposed Regulation comment suggesting changes in wording of definitions or other language not verbatim from Delta Plan; other general responses
S	Statement of Reasons
E	Economic and Fiscal Analysis or Cost Report
Nr	Notice of Rulemaking or general rulemaking process

WRITTEN COMMENTS AND RESPONSES ON A MODIFIED ECONOMIC AND FISCAL IMPACT STATEMENT: STD 399 PLUS ATTACHMENT 1 ("MODIFIED STD 399") COMMENTS SUBMITTED BETWEEN APRIL 24, 2013 AND ENDING MAY 9, 2013

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Bert Wilson	5/2/2013	[T]he most grievous error is in omitting charges for the BDCP tunnels which will be incorporated into the Delta Plan. The document says: "…costs to the State or local agency proposing a covered action could be passed on to specific private businesses and individuals through assessments, rates, fees or other charges." The Private Sector Cost Impacts you list are mostly unknown whereas you should be able to estimate the impact ("Beneficiaries Pay") that the Delta Plan (including the construction of the twin tunnels) will have on all water rate-payers. This is necessary because of the private funding of the tunnels by the Association of State and Federal Water Contractors, the authorized funding authority that will provide the revenue stream to the Dept. of Water Resources to construct the tunnels. I am concerned that because this is not a state agency they can set rates of return on their investment that could be so high as to be considered usury! These rates should be known before any ground is broken. These rates should be part of the Delta Plan.	E	This comment does not address any change to the document under review, the Economic and Fiscal Impact Statement. The Council disagrees with this comment. The Delta Plan does not address or analyze the current BDCP proposal because it has not yet been adopted. When this occurs, Water Code section 85320 sets forth a process whereby the BDCP shall be considered for inclusion in the Delta Plan. The Department of Fish & Wildlife is tasked with determining whether BDCP meets the statutory section called out by section 85320. If the Department so determines, the Council must incorporate BDCP into the Delta Plan. (Water Code section 85320(e)). The Department's determination may be appealed to the Council (Water Code section 85320(e)), pursuant to the Council's adopted appellate procedures. The Council will review any appeal to determine whether BDCP meets the requirements of section 85320. For additional information relating the Council's authority as it relates to BDCP, see Appendix C~~G~~ to the Delta Plan.
2. California Water Research	5/9/2013	Please put this into the administrative record. [The attached file appears to be a PowerPoint presentation by the Army Corps of Engineers on an Extended-Delta Hydrodynamic Model regarding sea level rise.]	E	This comment does not address any change to the document under review, the Economic and Fiscal Impact Statement. While we appreciate on-going modeling work in the Delta regarding sea level rise, there are no new issues raised. As requested, this submission will be made part of the administrative record.
3. LA County Sanitation Districts	5/9/2013	[T]he Sanitation Districts support implementation of the Delta Conveyance Facilities because the resulting significant improvements in the salinity of State Water Project (SWP) water would in turn reduce the salinity of recycled water. This would improve the Sanitation Districts' ability to comply with Waste Discharge and Water Recycling Requirements issued by the Los Angeles and Lahontan Regional Water Quality Control Boards for recycling and surface water discharges from its water reclamation plants. Many potential users of recycled water express concern that irrigating with water with a higher salt content than other sources will adversely impact their plantings. Lower salinity recycled water will also greatly improve the feasibility and cost of implementation measures local agencies must take in accordance the State Water Resources Control Board's Recycled Water Policy requirements associated with development of Salinity and Nutrient Management Plans. Reducing the regulatory burden on recycled water use and improving its quality will increase its use. One example of local salinity limits affecting two of the Sanitation Districts' water reclamation plants, the Upper Santa Clara River Chloride Total Maximum Daily Load (USCR Chloride TMDL), is the result, in part, of the high chloride levels in SWP deliveries. The Sanitation Districts' member agency, the Santa Clarita Valley Sanitation District, faces the expensive burden of providing advanced treatment to remove chloride from wastewater to comply with the TMDL for its recycled water discharges. The cost to comply with the USCR Chloride TMDL is expected to exceed $100 million for a community of 200,000 and would increase the annual cost for wastewater treatment by over 40 percent despite the fact that the SWP water used by the community contains chloride levels that approach and sometimes have exceeded the chloride limit. We understand that implementation of the Delta Conveyance Facility would greatly reduce chloride levels to southern California including Santa Clarita. Such improvement might eliminate the need for advanced treatment facilities in Santa Clarita.	E	This comment does not address any change to the document under review, the Economic and Fiscal Impact Statement. This comment focuses on the expected benefits of reduced salinity in supply water as a result of implementation of BDCP, particularly for water treatment, recycling and reuse. The Delta Plan does not address or analyze the current BDCP proposal because it has not yet been adopted. When this occurs, Water Code section 85320 sets forth a process whereby the BDCP shall be considered for inclusion in the Delta Plan. The Department of Fish & Wildlife is tasked with determining whether BDCP meets the statutory section called out by section 85320. If the Department so determines, the Council must incorporate BDCP into the Delta Plan. (Water Code section 85320(e).) The Department's determination may be appealed to the Council (Water Code section 85320(e)), pursuant to the Council's adopted appellate procedures. The Council will review any appeal to determine whether BDCP meets the requirements of section 85320. For additional information relating the Council's authority as it relates to BDCP, see Appendix C~~G~~ to the Delta Plan.
4. San Luis & Delta-Mendota Water Authority, and State Water Contractors	5/9/2013	The State Water Contractors and San Luis & Delta-Mendota Water Authority[1], collectively referred to herein as the "Public Water Agencies" submit this comment letter regarding the Modified Economic & Fiscal Impact Statement. The Public Water Agencies have previously commented on the cost analysis but to date these comments have not been addressed. The Public Water Agencies refer you to their join comment letters submitted on January 14, 2013 and April 22, 2013 and incorporate those comments in this letter. (See Exhibit "2.") For the reasons stated in the Public Water Agencies previous comment letters, and because the comments remain to be addressed in the Modified Economic & Fiscal Impact Statement, the cost analysis still fails to comply with the law. To remedy this, the Modified Economic & Fiscal Impact Statement should be revised and re-circulated for public comment. We appreciate this opportunity to comment and stand ready to provide you with assistance if necessary.	E	This comment does not address any change to the document under review, the Economic and Fiscal Impact Statement. This comment does not raise new issues, but re-submits previous comments. Please see the Council's responses to this commenter's previous comments.

WRITTEN COMMENTS AND RESPONSES ON A MODIFIED ECONOMIC AND FISCAL IMPACT STATEMENT: STD 399 PLUS ATTACHMENT 1 ("MODIFIED STD 399") COMMENTS SUBMITTED BETWEEN APRIL 24, 2013 AND ENDING MAY 9, 2013

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
5. Local Agencies of the North Delta	5/9/2013	Local Agencies of the North Delta ("LAND") 1 previously submitted comments on the Rulemaking Package and Economic Analysis dated January 14, 2013 and April 22, 2013. While there have been some improvements, the Rulemaking Package is still not the least burdensome, effective alternative. For these and other reasons explained in previous correspondence, LAND continues to object to the adoption of the Rulemaking Package and the Delta Plan, as well as certification of the Delta Plan Program EIR by the Delta Stewardship Council ("Council").	E	For the reasons set forth in the Initial Statement of Reasons (11/30/2012) and in Council's response to comments received during the 45 and 15 day comment periods, Council believes that none of the alternatives considered or that have otherwise been identified and brought to the attention of the Council would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective and less burdensome to affected private persons than the action taken by the Council. Please see the Council's responses to this commenter's previous comments.
6. Local Agencies of the North Delta	5/9/2013	A. Estimated Private Sector Cost Impacts Item 1. The section fails to disclose that the Rulemaking Package will impact small businesses and California competitiveness, require new reporting requirements, and imposes prescriptive rather than performance based requirements. Each of these boxes (b., d., e. and f.) should therefore be checked and discussed.	E	Explanations for the exclusion of checked boxes in A.1. of the Economic and Fiscal Impact Statement are provided in Attachment 1 to the Economic and Fiscal Impact Statement and are discussed further by addressing comments 7 through 10.
7. Local Agencies of the North Delta	5/9/2013	b. Small Business Impacts The new regulations restrict all development to the growth areas of the legacy communities, and impose severe limitations on non-agricultural development, and housing development greater than 4 units. The Rulemaking will also increase direct and indirect costs on small businesses through increased reclamation district costs that must be paid by landowners and/or water users within a district to meet new flood standards and new analysis and reporting requirements for setback levees established by this rulemaking. Impacted small businesses include family farms, farm suppliers, farm labor and other service industries.	E	First, the regulation applies to State and local agencies. Private businesses and individuals are not directly affected by costs of the regulation. However, the Economic and Fiscal Impact Statement does recognize that small business may indirectly incur costs to make a project consistent with a covered action or through assessments, rates, fees, or other charges. The costs of actions taken to comply with Delta Plan polices will be unique to the details of a covered action and cannot be known in advance. Therefore, while recognized, the total cost of the regulation to private business or individuals is unknown, and the total number and type of businesses impacted, including small business, is also unknown. Second, several policies either explicitly exclude cities, their area of influence, and unincorporated towns or incorporated alternative approaches to avoid or minimize impacts on small businesses in the Delta. For example, limitations on construction or development in the Delta (section 5010) specifically exempt "commercial recreational visitor-serving uses or facilities for processing of local crops or that provide essential services to local farms." Also, section 5011 directs covered actions to avoid conflicts with existing land uses, including farming. Finally, the Council disagrees with the comment regarding costs incurred by reclamation district and local agency associated with new flood standards being passed along to local growers. The regulation does not include any new standards pertaining to levee design or maintenance activities that might be undertaken by reclamation districts. The regulation does require an assessment for the feasibility of setback levees, but this requirement is limited to specific areas identified in the regulation where such levees are most likely to provide significant habitat restoration benefits. In addition, it is up to the filing agency to determine if setbacks within the levee project are feasible, which includes financial feasibility. If setback levees are not deemed feasible, then no further action is required.
8. Local Agencies of the North Delta	5/9/2013	d. California Competitiveness Increasing costs of producing specialty local agricultural products (e.g., tree crops, certain grape crops, dichondra, endive, and specialty organic crops) will affect California competitiveness. Increased reclamation district and local agency costs to comply with new flood standards and reporting requirements established by this rulemaking must be funded by these growers, making California less competitive.	E	The regulation is not expected to impair overall California competiveness. It does not follow that any cost imposed on a business will reduce California's competitiveness with other states. Benefits from a regulation must also be considered to the extent they are related to the cost. Council believes that Regulations would provide long-term benefits in protecting agriculture, restoring the Delta ecosystem, improving water supply reliability, maintaining and enhancing settings for outdoor recreation and tourism in the Delta, and improving flood protection. The benefits would improve the ability of California businesses to compete, reducing costs to produce goods and services by reducing the potential cost to business from water supply shortages. While the estimated reduction in business costs to produce goods and services is unknown, Council believes that anticipated benefit could outweigh the indirect cost of certification of a proposed covered action and the steps necessary for a covered action to comply with the regulation. Normal agricultural operations within the Delta, including those mentioned in the comment, would generally not be covered actions. It is true that consistency-related costs to a largely agricultural reclamation district would if possible be passed to growers. The Delta Reform Act and the proposed regulation exempt from covered action status the operations and maintenance activities of such districts, but levee construction or improvement projects, for example, would not be exempt, and

WRITTEN COMMENTS AND RESPONSES ON A MODIFIED ECONOMIC AND FISCAL IMPACT STATEMENT: STD 399 PLUS ATTACHMENT 1 ("MODIFIED STD 399") COMMENTS SUBMITTED BETWEEN APRIL 24, 2013 AND ENDING MAY 9, 2013

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				the district would pass consistency costs to growers (or apply for reimbursement to the Commission on State Mandates, as provided in the Delta Reform Act). However, as previously mentioned, it does not follow that any cost imposed on a business will reduce California's competitiveness with other states. Benefits from a regulation must also be considered to the extent they are related to the cost and Council believes that anticipated benefit could outweigh the indirect cost of the regulation. Finally, the Council disagrees with the comment regarding costs incurred by reclamation district and local agency associated with new flood standards being passed along to local growers. The regulation does not include any new standards pertaining to levee design or maintenance activities that might be undertaken by reclamation districts.
9. Local Agencies of the North Delta	5/9/2013	e. Reporting Requirements The rulemaking increases reporting requirements by forcing reclamation districts to demonstrate that specific new flood standards are met and to analyze the feasibility of setback levees along the Sacramento River and elsewhere in the Delta.	E	No reporting requirements are imposed on the private sector. The regulation applies to State and local agencies only. Furthermore, the regulation does not "force reclamation districts to demonstrate that specific new flood standards are met." In fact, the regulation does not include any new standards pertaining to levee design or maintenance activities that might be undertaken by reclamation districts. The regulation does require an assessment for the feasibility of setback levees, but this requirement is limited to specific areas identified in the regulation where such levees are most likely to provide significant habitat restoration benefits. In addition, it is up to the CEQA lead agency to determine if the setback levee project is feasible, which includes financial feasibility. If setback levees are not deemed feasible, then no further action is required.
10. Local Agencies of the North Delta	5/9/2013	f. Prescriptive Instead of Performance Requirements The majority of the standards imposed by this rulemaking are specifically prescriptive, such as the prescriptive levee standards, requirements for maximum number of dwellings, specific habitat elevations and locations, and set back levee locations, each without regard for consideration performance based criteria	E	All of the Delta Plan policies were developed through an extensive public process during which many alternatives were suggested and discussed. Alternatives included some that were more prescriptive and potentially burdensome and some that were less so. The range was embodied in a set of formal alternatives that were analyzed in the Draft PEIR. The Council considered all of these and selected the policies that it believes achieve flexibility and cost-effectiveness, implementing performance instead of prescriptive standards when possible, while meeting the goals and mandates of the Act.
11. Local Agencies of the North Delta	5/9/2013	Item 2. The section fails to identify specific impacts that will result from the Rulemaking on businesses. At the very least, specific classes of impacted businesses should be identified. The answer provided – "Businesses directly involved in covered actions and businesses indirectly affected by local agency's cost recovery" – are essentially every business located in the Delta and any business that would locate in the Delta in the future that would engage in a covered action. The argument that local agency costs as a result of the implementation of the Plan are "indirect" is also unsupported. Direct costs will be placed on local agencies for determination of consistency and compliance with the Plan. These costs are then are passed on to the ratepayers, many of whom are businesses.	E	STD 399 acknowledges that costs will occur to businesses, but it does not identify specific impacts or costs because those will depend on future, unknown covered actions. STD 399 does not state that costs to local agencies are "indirect." The costs of actions taken to comply with Delta Plan polices will be unique to the details of a covered action and cannot be known in advance. The potential range of agency costs for consistency compliance is estimated in the Economic and Fiscal Impact Statement, based on what the Council believes are reasonable assumptions. The portion of agency costs that is passed onto private business or individuals through assessments, rates, fees, or other charges, and the way such costs are spread among agency constituents and ratepayers, will vary by agency and is unknown. Therefore, the total cost of the regulation to private business or individuals is unknown, and the total number and type of businesses impacted, including small business, is also unknown.
12. Local Agencies of the North Delta	5/9/2013	Item 3. The section fails to identify specific impacts as a result of this Rulemaking as required, including the number businesses that will be created, which should be "none." The significant restrictions on projects deemed covered actions would impair businesses and lead to losses that must be disclosed.	E	The number of businesses and jobs created or eliminated is uncertain. However, the impacts to business are discussed qualitatively. See previous response to comment 11. As explained in the Cost Analysis, Council believes that the regulation would provide long-term benefits in protecting agriculture, restoring the Delta ecosystem, improving water supply reliability, maintaining and enhancing settings for outdoor recreation and tourism in the Delta, and improving flood protection. These benefits will be spread through much of the state and will improve the state's long-term outlook for business and jobs, improving its ability to maintain and attract business and a skilled workforce.

WRITTEN COMMENTS AND RESPONSES ON A MODIFIED ECONOMIC AND FISCAL IMPACT STATEMENT: STD 399 PLUS ATTACHMENT 1 ("MODIFIED STD 399") COMMENTS SUBMITTED BETWEEN APRIL 24, 2013 AND ENDING MAY 9, 2013

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
13. Local Agencies of the North Delta	5/9/2013	Item 5. The section fails to identify specific impacts as a result of this Rulemaking as required, including identification of the number businesses that will be created, which should be "none." The statement that the Plan "could induce net job creation" is not substantiated. If the Council intends to refer to jobs created by construction of the BDCP tunnels, this assumption should be disclosed. Local job losses due to implementation of the Plan and construction of the BDCP tunnels should also be disclosed. The idea that some temporary "construction and restoration jobs" would be sufficient to replace or somehow offset local sustainable agriculture over the long term is unsupported.	E	The number of businesses and jobs created or eliminated is uncertain. However, Council believes that on balance the net effects to the State, while uncertain, could be positive. Further discussion of potential effects on jobs is provided in the "Cost Analysis for Proposed Delta Plan Regulations" (Delta Stewardship Council, 2013). The potential for net job creation would result from The regulation providing long-term benefits in protecting agriculture, restoring the Delta ecosystem, improving water supply reliability, maintaining and enhancing settings for outdoor recreation and tourism in the Delta, and improving flood protection. BDCP was not used to estimate net job creation.
14. Local Agencies of the North Delta	5/9/2013	Item 6. The section misidentifies the specific impacts as a result of this Rulemaking as required. Specifically, the claim that the impacts would be "outweighed" from statewide perspective is meaningless. The impacts to the Delta are severe and the statewide benefits are uncertain. This statement should not be made if it cannot be substantiated.	E	The regulation is not expected to impair overall California competiveness. Council believes that the regulation would provide long-term benefits. The benefits would improve the ability of California businesses to compete, reducing costs to produce goods and services by reducing the potential cost to business from water supply shortages. While the estimated reduction in business costs to produce goods and services is unknown, it is anticipated that this benefit could potentially outweigh the indirect cost of certification of a proposed covered action and the steps necessary for a covered action to comply with the regulation. The analysis did not assert that benefits would outweigh costs. The "Cost Analysis for Proposed Delta Plan Regulations" (Delta Stewardship Council, 2013) contains the data and assumptions used to estimate the potential range of costs.
15. Local Agencies of the North Delta	5/9/2013	B. Estimated Costs Item 1. This section (items a.-c.) fails to identify any specific costs as a result of this Rulemaking, however somehow is able to derive a total range of costs in item d. As commented previously, the analysis behind the range provided in item d. must be disclosed.	E	The costs of actions taken to comply with Delta Plan polices will be unique to the details of a covered action and cannot be known in advance. However, in general the estimated total annual statewide dollar costs that businesses and individuals may incur to comply with this regulation range from $5.8 to $8.4 million. This range is based on what Council believes are reasonable assumptions about future covered actions; the "Cost Analysis for Proposed Delta Plan Regulations" (Delta Stewardship Council, 2013) contains the data and assumptions used to make this estimate.
16. Local Agencies of the North Delta	5/9/2013	Item 2. This section now identifies possible impacts on the construction industry, but specific impacts, as well as impacts on "all industries," are not explained.	E	Neither the magnitude nor the share of such costs can be estimated by industry with any precision for the same reasons the number of businesses impacted cannot be estimated. Direct costs are to state and local agencies. The way that those costs are spread among businesses and individuals will depend on the specific future covered action and on the cost recovery mechanisms of the agency. See response the comment 11.
17. Local Agencies of the North Delta	5/9/2013	Item 4. This section states that there will not be any new housing costs. But the section in item 2 states that the construction industry will be impacted. This lacks internal consistency and calls the veracity of the submission into question. If the construction industry is impacted, housing costs will also be affected. This impact must be disclosed.	E	It is indicated in the Economic and Fiscal impact Statement that no significant direct impacts on housing costs are likely to occur from implementation of the regulation. The Cost Analysis explained the rationale for this conclusion. The construction industry could be affected in both positive and negative ways. Construction includes much more than housing construction. The analysis acknowledges that local agency costs recovered through permit fees would fall more on businesses that pay those fees, such as land development businesses. That is a different issue than the net effect on housing costs from a statewide perspective – the two conclusions are not inconsistent.
18. Local Agencies of the North Delta	5/9/2013	Form STD 399 and the entire Cost Analysis continues to be inadequate and does not comply with Government Code section 11346.5, among other requirements. Major costs are ignored entirely and other costs are misstated. In addition, the Rulemaking file provided for public review does not include "copies of the calculations and assumptions leading to dollar estimates" in compliance with instructions adopted by the Department of Finance.	E	Council disagrees, and believes that the cost analysis and STD 399 provide a reasonable assessment of the costs of implementing the proposed regulation. For the reasons given in those documents, some costs are quantified, some are described but not quantified, and some are expressed as a range or by use of examples. The text quoted in the comment expresses what the Department of Finance requests for its own review; it is not a requirement for public review under the Administrative Procedures Act. Nevertheless, the "Cost Analysis for Proposed Delta Plan Regulations" (Delta Stewardship Council, 2013) contains the data and assumptions used to make the quantified estimate of cost. The modified Cost analysis and STD 399 were provided to Department of Finance and will be included in final form in the final rulemaking record submitted to the Office of Administrative Law.
19. San Joaquin County Board of Supervisors	5/9/2013	As a response to the Delta Stewardship Council's Modified Proposed Rulemaking Documents referenced above, San Joaquin County comments that those documents are vague, confusing and internally inconsistent. Moreover, they are not clearly understandable as required in the rulemaking process. While much boilerplate and background language is used, and the documents are replete with conclusionary	E	Council disagrees, and believes that the STD 399 is clear and accurately describes the fiscal and economic information required. The "Cost Analysis for Proposed Delta Plan Regulations" (Delta Stewardship Council, 2013) contains the data and assumptions used to make the quantified estimate of cost in the STD 399 and were made available for review during the 45-day and initial 15-day public comment periods. The modified "Cost Analysis for Proposed Delta Plan Regulations"

WRITTEN COMMENTS AND RESPONSES ON A MODIFIED ECONOMIC AND FISCAL IMPACT STATEMENT: STD 399 PLUS ATTACHMENT 1 ("MODIFIED STD 399") COMMENTS SUBMITTED BETWEEN APRIL 24, 2013 AND ENDING MAY 9, 2013

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
		statements, there is little in the way of clearly articulated calculations which would enable the ordinary reader to discern how the economic, fiscal and mathematical conclusions were derived. This prevents the ordinary reader from analyzing the validity of the conclusions and comparing these documents with earlier versions of the same documents. Substantial changes were made between the two versions of the documents but there are no detailed economic or fiscal assumptions, facts, and calculations which lead to or justify the conclusions. Accordingly, San Joaquin County objects to the documents referred to above and requests that appropriate steps be taken to ensure those documents are revised to meet the requirements of the rulemaking process.		and STD 399 were provided to Department of Finance for review and approval and will be included in final form in the final rulemaking record submitted to the Office of Administrative Law. (*This letter was post marked 5/10/13)

Responses to Comments
Received during the 15-day Notice Period April 8, 2013, through April 22, 2013

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CODES USED

A	Authority of Proposed Regulations
Ne	Necessity of Proposed Regulations
Ct	Clarity of Proposed Regulations
Co	Consistency of Proposed Regulations with existing law/regulation
Du	Proposed Regulations' duplication of existing law/regulation
DP	Proposed Regulation comment dealing with changes in content to the corresponding Delta Plan policy/procedure
O	Proposed Regulation comment suggesting changes in wording of definitions or other language not verbatim from Delta Plan; other general responses
S	Statement of Reasons
E	Economic and Fiscal Analysis or Cost Report
Nr	Notice of Rulemaking or general rulemaking process

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: GENERAL COMMENTS

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Individual (Armstrong)	4/11/2013	It in my contention that LMA's should be an integral part of the plan, and any implementation of actions required by the plan, that impacts LMA's.	O	This comment does not address any change to the text of this section. Assuming that the commenter is referring to "Levee Maintaining Agencies" (LMAs), they are an integral part of the flood risk management structure of the Delta, and are certainly addressed in the Delta Plan. They form an important part of the structure which not only maintain and improve Delta levees, but also form the first line of defense for flood fighting and emergency response. We refer the commenter to Chapter 7 of the Delta Plan for further discussion regarding flood risk reduction.
2. BSK Engineers & Associates	4/15/2013	If [the revised Form Std. 399] has not been posted, I formally request an extension on the 15 day notice period for public review of that document once it is posted.	O	The form was posted and 15 day public review period commenced on April 24, 2013 – May 8, 2013.
3. Antioch, City of	4/22/2013	The DSC should set forth rules providing the following: 1. Provide a Safe-Harbor format/form for Consistency Certification. The DSC likely has in mind what it would like to see in the format and contents of a Consistency Certification. Providing a Safe-Harbor form/format would be extremely helpful for municipalities that may have multiple projects falling within the scope of a Covered Action.	O	The Council will not provide a Safe-Harbor format/form for Consistency Certification. Refer to section 5002 for what should be addressed in a certification of consistency. A Certification of Consistency form is not part of the regulations; however, the Council will provide a web-based application to facilitate compliance.
4. Antioch, City of	4/22/2013	2. Implement rules providing for and implementing broader Administrative Exemptions (in addition to those set forth by the current Delta Plan.) The DSC should conduct hearings to determine further Administrative Exemptions that would not have an impact on the dual goals. This would be extremely helpful for municipalities and would allow for proper planning and project development. For example, certain subdivision and commercial development projects that meet certain criteria would likely not have any impact on the dual goals - e.g. in the secondary zone, subject to an EIR, meeting certain waste discharge treatment requirements, etc.	O	The Council does not have the authority to create administrative exemptions. Section 5010, Locate New Urban Development Wisely, details which actions are covered by the Regulation and which actions are exempt.
5. California Department of Fish and Wildlife	4/22/2013	Finally, CDFW suggests that the title page for Appendix 3 be revised to read "Excerpt from the Ecosystem Restoration Program's Draft Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone (CDFW 2011): Section II. Habitats." Such an approach would more explicitly describe the content of the appendix and would be consistent with the reference used in section 5006 of the modified text and Appendix H of the Final Draft Delta Plan.	O	The Council has amended the title page for Appendix 3 to clarify document is part of the regulation and not a draft product of CDFW.
6. California Department of Fish and Wildlife	4/22/2013	The California Department of Fish and Wildlife (CDFW) appreciates the opportunity to review and comment on the Modified Text of Proposed Regulation, dated April 4, 2013, through which the policies of the Delta Plan will become enforceable state regulations. CDFW recognizes the profound challenges associated with managing the Delta to achieve the co-equal goals of protecting, restoring, and enhancing the ecosystem and providing a more reliable water supply for California , as mandated by the Sacramento San Joaquin Delta Reform Act of 2009. As a Trustee Agency, a potentially Responsible Agency, and the State implementing agency for the Ecosystem Restoration Program, CDFW is committed to playing an active role in the effort to achieve the coequal goals. We are providing specific comments concerning the modified text of the proposed regulations.	O	Comment noted, no response required.
7. Center for Biological Diversity	4/22/2013	I am writing specifically to oppose the continuing exclusion of temporary water transfers from the Delta Plan regulation. These comments build upon those submitted by the Environmental Water Caucus in response to the draft Delta Plan regulation and rulemaking package; please reference the earlier comments on the proposed regulation contained therein. Water transfers constitute a major impact to Delta water supply and quality, facilitating water transfers out of and through the Delta either by shifting water out of South-of-Delta reservoirs (allowing more Delta water to be exported and stored) or by transferring water through the Delta to either State Water Project (SWP) or Central Valley Project (CVP) contractors. Unfortunately, the environmental impacts of these transfers are often obscured by classifying such transfers as "temporary," as most transfers thus classified	DP	We disagree with the comment regarding the Council's determination that single-year water transfers will not have a significant impact on the coequal goals through December 2016. The Council recognizes in the Delta Plan the contribution that water transfers can make to improve water supply reliability for the State. In addition, under California law, transfers that occur within the period of one year do not require environmental review under CEQA. This suggests a legislative determination that single-year transfers are unlikely to significantly harm the environment. Nevertheless, the Council is aware of the concern that these one-year water transfers may have significant impacts on the environment, including on the delta's ecosystem. Of particular

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		do not require environmental review under the California Environmental Quality Act. The use of "temporary transfers" hide impacts in two respects: first, through being used for one-year renewals of what are essentially serial, repeated transfers, and second, through cumulative effects of single, very large "temporary" transfers and multiple "temporary" transfers occurring simultaneously. Because "temporary" transfers are frequently both serial in effect and cumulative in impact, they should be included as "covered actions" under the Delta Plan. In fact, the State Water Resources Control Board (SWRCB) records demonstrate that most recent water transfers are classified as "temporary." For example, in 2010 alone, 100% of the proposed water transfers were temporary, totaling over 250,000 acre-feet of water; the orders for the following are included as attachments. [Table 1] Under the proposed rulemaking, zero transfers would have been considered, despite totaling over 250,000 acre-feet. This is particularly troubling because many of these transfers, including the Tule transfer, were actually serial transfers occurring for the previous two or three years, that were re-approved each year as "temporary." Likewise, most transfers in 2009 and before were described as "temporary" and thus occurred without environmental review. After the above-referenced USBR transfer in 2010, the single largest temporary transfer occurred in 2012, for 100,000 acre-feet: [Table 2] There are also a number of specific "temporary" transfers which have been repeated over multiple years and therefore represent a serial transfer in nature. DWR has repeatedly authorized temporary transfers to Westlands Water District which transfer water on a temporary basis from other SWP users to Westlands. These transfers include the following examples, the official records of which have been included with this letter as attachments. [Table 3] In addition, WRO 2005-09 was an order denying an application by DWR and the Bureau of Reclamation to "temporarily" change the permitted water quality criteria for electrical conductivity (EC); as a "temporary" change this attempt could also be excluded from "covered actions" under the Plan regulation, even though it would have direct and serious consequences for Delta water quality and therefore belongs under covered actions. As can be seen from the above tables, DWR and Westlands engaged in a serial transfer program of increasing volumes for nearly a decade, yet evaded environmental review by classifying these transfers as "temporary." It may be argued that some of the above temporary transfers did not have an impact on the Delta, and thus deserve exclusion. But the degree of impact—that is, the consistency determination—is precisely the threshold issue which must be addressed by the Delta Stewardship Council when considering covered actions. In contrast, DSC has provided scant evidence that such transfers do not, in fact, impact the Delta—or that they are so benign that they could not affect the Delta. Along the same lines, the cumulative impacts of adding such "temporary" transfers together, both yearly and year-on-year, is also clearly significant, and should be evaluated as part of a consistency determination by the Council. In sum, temporary water transfers do qualify as covered actions under the Delta Plan, and the exclusionary language should be deleted from the regulation. There is no justifiable reason to exclude these transfers from the Delta Plan's covered actions. Further, the regulation's proposal to "sunset" or limit the applicability of this section does not render this provision legal, as the regulation will still exclude such transfers for the time being and anticipates continuing to exclude such transfers under an as-yet-to-be-		concern are single year transfers that are repeated over consecutive years, which is a process that may end up circumventing the CEQA review that is required for environmental assessment of multi-year transfers. As a result, the Council recognizes that further evaluation is needed of the potential impact that temporary transfers, either individually or when repeated over consecutive years, may have on the coequal goals and the Council is committed to undertaking this work through the Delta Plan. For the purposes of the immediate regulation, the Council has determined that temporary transfers would not have a significant impact on the coequal goals.

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		determined future program. To be legal, this measure should be the reverse: until such a future program has been enacted which conclusively demonstrates that such transfers will have no impact, the transfers must be included in the regulation as "Covered Actions." Otherwise the Regulation essentially admits that this action should be covered, and that some future activity will justify its exclusion—an argument which does not bear legal weight. The exclusion of temporary transfers from the regulation plainly exceeds the scope of authority provided to the Council under the Delta Reform Act for what should be included as "covered actions," and should be removed accordingly.		
8. Central Delta Water Agency	4/22/2013	These comments are supplementary to our previous comments on your proposed regulations. In the interest of avoiding complete repetition such are incorporated herein by this reference. The section numbers have changed due to your revisions, but the substantive deficiencies remain	O	Comment noted, no response required.
9. East Bay Municipal Utility District	4/22/2013	We appreciate that DSC staff made changes to address many of our previous comments as submitted on January 14, 2013. Unfortunately, there are several sections of the regulatory language that are still inconsistent with the standards in the APA, including the "necessity," "nonduplication," and "consistency" standards set forth in Government Code Sections 11349(a) and 11349(f).	Co	Comment noted, no response required.
10. Environmental Water Caucus, et al	4/22/2013	[the Environmental Water Caucus, Friends of the River, California Sportfishing Protection Alliance, California Water Impact Network, AquAlliance, and Restore the Delta] adopt and incorporate by this reference the Environmental Water Caucus (EWC) comment letter of January 14, 2013, Friends of the River's prior comment letters of January 11, 14, and 24, 2013, and the CSPA, C-WIN, and AquAlliance Comment letter of January 14, 2013.	O	Comment noted, no response required.
11. Environmental Water Caucus, et al	4/22/2013	VIOLATIONS OF DELTA REFORM ACT AND FAILURE TO USE CRITICAL INFORMATION ESSENTIAL FOR CEQA COMPLIANCE [...] California Water Code § 85086(c)(1)(emphasis added). The SWRCB did what is required by the Delta Reform Act by filing with the Delta Stewardship council its 2010 flow report. Inexplicably, the DSC did not use this information required by state law to inform the planning decisions for the Delta Plan. This failure to follow the process established in the Delta Reform Act for formulating the Delta Plan, and in fashioning and evaluating the alternatives considered in the CEQA analysis for the Plan, make the CEQA impact analysis invalid and make the proposed Regulations unlawful. The Council's own Initial Statement of Reasons (SOR, filed in January, 2013) furnishes additional support for the need for the Council to either not adopt the Regulations and Delta Plan until the SWRCB "flow criteria for the Delta ecosystem necessary to protect public trust processes" are used to analyze the new conveyance proposed in BDCP, which has not been done, or drop the Plan's call for improved, meaning new, conveyance before the Regulations and Delta Plan are adopted. [...] The DSC has therefore failed to use the "best available scientific information" in formulating the Delta Plan.	Co	This comment did not address any changes to the original text. Per Water Code section 85086, the Council received the SWRCB's report on the Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem at the August 2010 Council meeting. The Council was informed by the flow criteria when developing the Delta Plan, which makes several references to the report in, for example Chapter 4. The Council also used the report in preparing the Delta Plan EIR. See, e.g., Master Response 5 of the Delta Plan EIR. For discussion of the range of alternatives considered in the Delta Plan EIR, please see Master Response 3 in the Delta Plan Final EIR.
12. Environmental Water Caucus, et al	4/22/2013	In addition to constituting a violation of the Delta Reform Act, this rush to adopt the Delta Plan and Regulations before the DSC considers flow criteria for the Delta pursuant to its public trust obligations also constitutes a violation of CEQA's command to all public agencies to find out and disclose all that they reasonably can about the proposed project and its environmental impacts. Adoption of the Delta Plan and Regulations prior to the required action by the DSC will constitute failure to proceed in the manner required by law required by both the Delta Reform Act and CEQA.	Co	This comment did not address any changes to the original text. Per Water Code section 85086, the Council received the SWRCB's report on the Development of Flow Criteria for the Sacramento-San Joaquin Delta Ecosystem at the August 2010 Council meeting. The Council was informed by the flow criteria when developing the Delta Plan, which makes several references to the report in, for example Chapter 4. The Council also used the report in preparing the Delta Plan EIR. See, e.g., Delta Plan EIR Master Response 5. Regarding the EIR's programmatic approach to the analysis of environmental impacts, please see Delta Plan Final EIR Master Response 2. As discussed further in the response to comment 13 below, the BDCP is not a part of the project under review in the Delta Plan PEIR.

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13. Environmental Water Caucus, et al	4/22/2013	VIOLATION OF CEQA'S COMMANDS TO PROVIDE AN "ACCURATE, STABLE AND FINITE PROJECT DESCRIPTION" AND TO NOT POSTPONE OR SEGMENT ENVIRONMENTAL REVIEW FROM PROJECT APPROVAL The EWC comment letter pointed out in detail how the Delta Plan, Regulations and CEQA process have violated that straightforward CEQA command. (EWC comment letter pp. 43- 46). As set forth there, the true project ever since the announcements by the Governor and Resource Agency in the summer of 2012 has been the Delta Water Tunnels project. As pointed out, the Recirculated Draft Program EIR (RPDEIR) failed to disclose, let alone evaluate the environmental effects of the Delta Water Tunnels project. [...] [...] unless the Council drops the call for improved meaning new conveyance upstream from the Delta, it will be necessary for the Council to require preparation and recirculation of a new Draft EIR. That is required because "The draft EIR [and RDPEIR] was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." Guideline § 15088.5(a)(4).	Co	As described in Delta Plan Final EIR Master Response 1, Delta Reform Act requires the Delta Plan to promote options for new and improved infrastructure relating to, among other things, the water conveyance in the Delta. Water Code section 85304. It does this by encouraging successful completion of the BDCP by a date-certain. See Proposed Final Draft Delta Plan, p. 114 (Recommendation WR R12). Regarding development of BDCP, the Delta Reform Act states that DWR "shall consult with the [C]ouncil…during the development of the BDCP [and] [t]he [C]ouncil shall be a responsible agency in the development of the [BDCP] environmental impact report." Water Code section 85320(c); Draft EIR, p. 23-1. In other words, the Council is not the lead agency for BDCP, and the BDCP is not a part of the project under CEQA review here. Rather, the proposed BDCP is a reasonably foreseeable future project that is being evaluated by the Department of Water Resources as the CEQA lead agency. The cumulative impacts of the proposed Delta Plan, in combination with the impact of the proposed BDCP, are described in Delta Plan EIR Sections 22 and 23. The Environmental Water Caucus's comments regarding the sufficiency of the EIR's project description with regard to BDCP are further addressed to the responses to its comment letter, number OR007, particularly comment OR007-11.
14. Friends of the River	4/22/2013	We adopt and incorporate by this reference our prior comment letters of January 11, 14, and 24, 2013, the Environmental Water Caucus comment letters of January 14, and April 22, 2013, and the CSPA, C-WIN, and AquAlliance Comment letter of January 14, 2013.	O	Comment noted. Please see our responses to the previous comments submitted by these groups.
15. Friends of the River	4/22/2013	The CEQA violations are so numerous and so extreme that they cannot be cured or evaded by responses to comments on the draft environmental documents. Unless our proposed or equivalent amendments are adopted, it will be necessary for the Council to require preparation and recirculation of a new Draft EIR. That is because: "The draft EIR [and RPDEIR] was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." CEQA Regulations § 15088. 5(a)(4).	Co, S	Regarding the EIR's approach to the BDCP project, and that project's relationship to the Delta Plan, please see Delta Plan Final EIR Master Response 1 and the response to comment 13 above. Section 2 in Volume 4 of the Final EIR explains why CEQA does not require recirculation of the document.
16. Friends of the River	4/22/2013	Add new Section where the Council thinks best: § Delta Plan and Regulations do not Call for New Conveyance (a) In the absence of "comprehensive review and analysis" including "a reasonable range of Delta conveyance alternatives, including through-Delta", "the potential effects of climate change, possible sea level rise up to 55 inches,", "the potential effects on migratory fish and aquatic resources", and the "potential effects of each Delta conveyance alternative on Delta water quality" (Draft EIR 23-3, 4) supposedly to be provided in the future by the BDCP CEQA process; and in the absence of water supply availability analysis, quantification, and analysis of the environmental impacts of supplying specific quantities of water required by CEQA as determined by the California Supreme Court's decision in Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412; it is not possible at this time for the Council to lawfully call for, plan for, encourage, recommend, or require development of new conveyance upstream from the Delta for the exporters. (b) These Regulations and the Delta Plan do not call for, plan for, encourage, recommend, or require development of new conveyance, intakes, tunnels, canals and/or diversions upstream from the Delta for the exporters, improved Delta conveyance and operations, or optimizing diversions in wet years when more water is available. Nothing in these Regulations and the Delta Plan, or the draft EIR or RPDEIR establishes support for any future decision including but not limited to the BDCP process to favor selection of an alternative of development of new conveyance and diversions upstream from the Delta including the Delta Water Tunnels as opposed to other alternatives such as reducing exports and/or maintaining through-Delta conveyance. This provision is necessary to ensure that the Delta Plan and these Regulations do not violate CEQA and/or lead to development of or creation of momentum for a project or projects such as the Delta Water Tunnels prior to comprehensive CEQA analysis of the true project. This subsection	Co, O	Delta Plan Appendix ~~B~~D, pages 5-9, Appendix ~~G~~A, Section 23 of the EIR, and Delta Plan Final EIR Master Response 1 all provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan. The proposed BDCP is a reasonably foreseeable future project that is being evaluated by the Department of Water Resources as the CEQA lead agency. As the Delta Reform Act requires, the Council will be a CEQA responsible agency for the BDCP. (Water Code section 85320(c).) The cumulative impacts of the proposed Delta Plan, in combination with the impact of the proposed BDCP, are described in EIR Sections 22 and 23. Because the BDCP is not a part of the Delta Plan, CEQA does require the EIR to consider its direct, project-level impacts.

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		and subsection (a) of this Section control over any provision or provisions in these Regulations, Delta Plan, Draft EIR and/or RPDEIR in actual or arguable conflict with this subsection and/or subsection (a) of this Section.		
17. Friends of the River	4/22/2013	Instead of doing what CEQA requires, the Delta Plan and Regulations unlawfully make the most fundamental planning decision ever to be made in the history of the Delta— calling for improved, meaning new, upstream conveyance— without any CEQA analysis of the impacts of that new, upstream conveyance in all phases of the project including operation. "CEQA's informational purpose 'is not satisfied by simply stating information will be provided in the future.'" Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 441. Accord, Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection (2008) 44 Cal.4th 459, 502-504 (not proper to defer portion of environmental analysis to approve a plan by a statutory deadline).	Co, S	Delta Plan Appendix ~~B~~D, pages 5-9 and Appendix ~~G~~A provide a discussion of the Council's role in California's water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan. The proposed BDCP is a reasonably foreseeable future project that is being evaluated by the Department of Water Resources as the CEQA lead agency. As the Delta Reform Act requires, the Council will be a CEQA responsible agency for the BDCP. (Water Code section 85320(c).) The cumulative impacts of the proposed Delta Plan, in combination with the impact of the proposed BDCP, are described in EIR Sections 22 and 23. Because the BDCP is not a part of the Delta Plan, CEQA does require the EIR to consider its direct, project-level impacts.
18. Sacramento County	4/22/2013	In cases where the proposed regulatory language remains unchanged or amended, we respectfully reaffirm our prior comments.	x	Comment noted. Please see our responses to the previous comments submitted by this commenter.
19. Sacramento County	4/22/2013	Previous comment: Many of the "regulations" are characterized as policies, rather than regulations. While the provisions arguably provide policy direction for interpreting the Delta Reform Act (Act), they do not provide the type of clarity or objective parameters that readily permit implementation of either the Act or the Delta Plan. The provisions merely reiterate the policies contained in the November 2012 Final Draft Delta Plan. They do not elaborate upon, define, clarify or otherwise explain or set standards. To the contrary, the "regulations" will likely necessitate further clarification and regulation. New comment: Sacramento County notes that the April 4, 2013 revisions to the proposed regulations include a host on of language changes, but nothing so substantial to ''provide the type of clarity or objective parameters that readily permit implementation of either the Act or the Delta Plan"	Ct	This comment did not address any changes to the original text. However, these adopted regulations intentionally reiterate all Delta Plan policies. That is because those policies are intended to have regulatory effect. As such, they are subject to this Administrative Procedures Act process and must be adopted as regulations. Otherwise, those policies would be underground regulations.
20. Sacramento County	4/22/2013	Previous comment: The regulations substantially focus on only one of the coequal goals, the provision of a more reliable water supply, with little to no recognition of the other coequal goal of protection, restoration, and enhancement of the Delta ecosystem. Such emphasis on the one goal to the exclusion of the other renders the proposed regulations inconsistent with the Act. Current comment: The April 4th revisions are absent changes that specifically address our finding.	Co	We disagree. The adopted regulation appropriately furthers the coequal goals as required by the Delta Reform Act (e.g. see sections 5005–5009 ~~5007-5011~~, inclusive).
21. Sacramento, City of	4/22/2013	We at the City of Sacramento Department of Utilities (Sacramento) appreciated the opportunity to meet with you, Keith Coolidge, and Carl Lischesky today. It was an informative and productive meeting, for which we thank you. One of the topics of discussion at our meeting was the modified proposed Delta Stewardship Council regulations dated 4/4/2013. This has informed our understanding of the draft regulations' intent and contributed to the comments we now provide on the draft regulations, as set forth below. As set forth in our comments on the first draft of these regulations , Sacramento provides a domestic water supply , wastewater collection and treatment services, and stormwater collection, management and discharge, for the residents and businesses of Sacramento. Sacramento also provides water supply on a wholesale basis to neighboring areas, many of whom are otherwise reliant on groundwater only, in furtherance of conjunctive use and mitigation of groundwater contamination. The draft regulations have been improved since the initial draft, which is appreciated . There remain, however, several areas that merit comment, as noted below.	O	Introductory comment noted.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: GENERAL COMMENTS

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22. Sacramento, City of	4/22/2013	In our meeting today we discussed the implementation schedule for some of the recommendations. Sacramento offers the following thoughts on schedule: Sacramento recommends that the DSC update the due date for the evaluation recommended in WQ R10, Evaluate Wastewater Recycling, Reuse, or Treatment from January 1, 2014 to January 1, 2017 or 3 years from when the Delta Plan goes into effect, whichever is sooner. More time is necessary to perform a meaningful evaluation and to allow a regional collaborative approach. Interagency discussion is a key component to assessing feasibility. More time should be allotted for the WQ RS recommendations for a study plan and completion of the studies for Delta nutrient objectives. The Delta Plan currently recommends a due date of January 1, 2014 for the study plan, and January 1, 2016 for completion of the studies. We suggest that these dates be increased by at least one year. Issues related to nutrient management are complex in the Delta, and a scientifically sound and meaningful evaluation should include stakeholders and experts in the field. Adequate staffing and resources for the Regional Board evaluation are also needed. These suggestions may not impact the overall schedule on this topic, but Regional Board staff should be given flexibility if the studies indicate that more time is necessary to develop effective objectives.	O	This is not a comment on the Regulation. The Council concurs that later dates for WQ R10 and WR R5 are appropriate, and will make these changes in the Delta Plan.
23. San Joaquin Council of Governments	4/22/2013	Upon further reading, discussions with DSC staff and review of the Delta Plan, the proposed modified regulations are in conflict with the Delta Plan draft and do not provide the 'grandfather' aspect which DSC staff has been stating. The modified regulations actually insert more requirements on existing habitat plans. We respectfully ask you include our comments into the public record	DP	The Council disagrees with the comment. The Council added language to section 5002(c) detailing how conservation measures proposed to be implemented pursuant to a natural community conservation plan or a habitat conservation plan approved and permitted by the Department of Fish and Wildlife prior to the date of the Delta Plan's adoption can be deemed consistent with sections 5005 through 5009.
24. San Joaquin County	4/22/2013	Accordingly, San Joaquin County's January 14, 2013, letter (with attachments) is again submitted as though fully set forth herein, including those submittals of Yolo and Solano Counties which were incorporated into San Joaquin County's letter by reference, regardless of any further changes in those Counties' submittals that may be made in response to the Modified Proposed Rulemaking Documents. As well, San Joaquin County concurs in the submitted objections and comments of Yolo County, set forth in its April 22, 2013, letter regarding the Modified Proposed Rulemaking Documents, and adopts those objections and comments by reference as though full set forth herein.	O	Comment Noted. See similar previously addressed and current responses.
25. San Joaquin Tributaries Authority	4/22/2013	As drafted, the Regulations modified Article 2, Certifications of Consistency, as section "50024." This is likely a clerical error and must be corrected.	Ct	This apparent error was checked, and the modified regulation is actually correct. The section number has been changed from 5004 to 5002, and is shown in the modified version with the "4" in strikeout font. This is difficult to see in the modified version.
26. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	The State Water Contractors and the San Luis & Delta-Mendota Water Authority, on behalf of themselves and their member agencies, collectively referred to herein as the "Public Water Agencies,"1 submit the following comments in response to the Notice of Modifications to Proposed Regulatory Text the Delta Stewardship Council ("Council") submitted to the Office of Administrative Law ("OAL") on April 4, 2013 (hereafter, "Proposed Regulations" or "modified Proposed Regulations"). The comments presented herein are relevant to the draft Delta Plan and the draft Programmatic Environmental Impact Report for the Delta Plan. As a result, the Public Water Agencies respectfully submit this letter to the Council, for consideration and inclusion in the administrative record for those other, related efforts as well. 1 For the entire list of the Public Water Agencies, see Attachment 1 to the Public Water Agencies' prior comment letter on the draft proposed regulations and economic impact analysis dated January 14, 2013 (attached).	DP	Introductory comment noted.

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27. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	In addition, it is encouraging that the modified Proposed Regulations extend the exclusion of water transfers of less than one year in duration from the definition of "covered action" to January 1, 2017, although it is not satisfactory to limit the exclusion to that date.	O	The commenter expands on this introductory statement in subsequent comments on specific sections. The Council's responses to those subsequent comments respond to this introductory statement.
28. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	In spite of those improvements, the Public Water Agencies remain very concerned with the draft Delta Plan, its supporting draft environmental impact report and the Proposed Regulations. The Public Water Agencies supported and value the integral though circumscribed role the Legislature established for the Council in the Sacramento San Joaquin Delta Reform Act of 2009 (Water Code, § 85000 et seq., "Delta Reform Act" or "Act"). In addition to its limited "covered action" review role, the Legislature has directed the Council to: (1) help facilitate the coordination of often disparate State agency actions in the Delta to further the achievement of the coequal goals; (2) prioritize levee investments in the Delta to protect "state interests"; and, (3) take the lead in developing a robust and more effective and efficient Delta Science Plan and Program. Regrettably, instead of providing the value added the Legislature intended, thus far the Council is poised to become yet another regulatory hurdle in the Delta hampering achievement of the coequal goals, notwithstanding its lack of statutory authorities to undertake such a role.	A, Co, DP	The commenter expands on this introductory statement in subsequent comments on specific sections. The Council's responses to those subsequent comments respond to this introductory statement.
29. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	The numerous fundamental and fatal deficiencies identified in the Public Water Agencies' comment letter of January 14, 2013, particularly relating to exceeding limited authorities granted to the Council in the Delta Reform Act, have not been cured. 2 2 The Public Water Agencies hereby incorporate by reference the prior comments presented in their January 14, 2013 letter. In addition, because the modified Proposed Regulations will be central to the implementation of the Delta Plan, which itself is the subject of a legally deficient Programmatic Environmental Impact Report ("PEIR"), the Public Water Agencies incorporate by reference their prior comments on the Final Draft Delta Plan and the Final Draft PEIR. In addition, because the Council staff did not propose changes to all of the previously published draft Proposed Regulations, those prior comments remain applicable. The Public Water Agencies' prior comments are attached as Exhibits 1, 2 and 3.	A	Comment noted. See the Council's responses to the previous comments submitted by these agencies.
30. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	As the Public Water Agencies previously demonstrated, the Council's Proposed Regulations are based on a fundamental misreading of the Delta Reform Act. The Council asserts the authority to adopt the Proposed Regulations, regardless of whether they are expressly authorized by the Act. The Council largely bases its claim of authority on a single phrase in Water Code section 85001, subdivision (c). That section expresses a legislative intent to "establish a governance structure that will direct efforts across state agencies to develop a legally enforceable Delta Plan." But it is a long and unsupported leap from that statement of intent to the Council's interpretation – that it has the duty and power to make the entirety of the Delta Plan legally enforceable through the adoption of regulations. Under established principles of law, the Delta Reform Act undoubtedly affords the Council power to adopt regulations, but that power is limited to those regulations necessary to carry out the specific "powers and duties identified" for it by the Legislature in the Delta Reform Act. (Water Code, § 85210(i).) That is a much narrower scope than making all of the various provisions of the Delta Plan "legally enforceable." The Legislature defined the manner and extent to which the Delta Plan will be legally enforceable. In particular, for covered actions, it requires agencies to provide written certification of consistency with the Delta Plan. That certification must be supported by detailed findings, and may be appealed to the Council. (Water Code, § 85225.) If the Council concludes that an agency's conclusions regarding consistency are not supported by substantial evidence, it may remand for further explanations and findings. (Water Code, § 85225.25.) In addition, the Delta Reform Act contemplates that the Delta Plan will rely on the existing authorities of federal and state agencies that regulate and carry out activities in the Delta. For example, the Bay Delta Conservation Plan will be incorporated into the Delta Plan if it meets the permitting	A, Co	This comment does not address modifications to the original regulatory text. Please see MR1 for a discussion of the Council's authority to include a regulatory component in the Delta Plan. Moreover, the Council disagrees with the commenter's statement that the Council asserts that it "has the duty and power to make the entirety of the Delta Plan legally enforceable…" Only what is in the regulation package has regulatory effect. The vast majority of the content of the Delta Plan does not.

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		requirements of the Natural Communities Conservation Planning Act and the federal Endangered Species Act. (Water Code § 85320.) The Bay Delta Conservation Plan will be legally enforceable. Thus, the Delta Plan will be legally enforceable, as and to the extent specified by the Legislature in the Delta Reform Act. Not only is the Council's claim of broad authority unnecessary to fulfill the intent expressed in section 85001(c), its proposed regulations would conflict with the Delta Reform Act, by altering the legally enforceable effect of the Delta Plan. The Council is overstepping its authority. If the Legislature had intended for the Council to have such broad powers through the term "legally enforceable," it would have expressly stated that in the chapter of the Delta Reform Act regarding the "Mission, Duties, And Responsibilities Of The Council," Water Codes sections 85210 through 85214. It did not. In the alternative, the Legislature could have included such broad authority in Water Code section 85300, which requires the Council to develop and adopt the Delta Plan. It did not. Or, it could have included "legally enforceable" in the list of requirements for the Delta Plan in Water Code section 85308. Again, it did not. Given the absence of the broad duty and power claimed by the Council from the most pertinent sections of the Delta Reform Act, it is unreasonable and unlawful to find that expansive power and duty nonetheless implied in the expression of legislative intent in Water Code section 85001(c).		
31. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Many of the modified Proposed Regulations (like the proposed regulations of November 16, 2012) also fail to satisfy other basic standards set forth in the Government Code to which any proposed regulations must conform (necessity, clarity, consistency, reference, and non duplication). In light of the Council's carefully defined and delegated authority, and based on the arguments presented in our prior comments and in Attachment 1 hereto, the Public Water Agencies respectfully urge the Council to direct staff to: (1) remove from the Proposed Regulations section 5003 because it exceeds the Legislature's express grant of statutory authority to the Council; (2) remove from the Proposed Regulations, draft Delta Plan, and existing regulations governing the administrative appeal process any claim of authority to stop covered actions from being implemented; such an assertion of authority is inconsistent with the plain language in, and legislative intent supporting the Act;3 (3) exempt from covered activities (without any sunset provision) all water transfers of up to one year in duration; and (4) recirculate the Proposed Regulations, as further modified, for full 45-day comment. Unless and until the Council eliminates from the Proposed Regulations provisions that exceed the Council's authority, provisions that are not necessary, provisions that are not clear, provisions that are not consistent, and provisions that are duplicative, as identified above, in Attachment 1 hereto, and in our prior comments, the Proposed Regulations will remain fundamentally and legally flawed. The requested revisions of the Proposed Regulations would also help the Council re-focus, allowing it to devote more resources toward progress on the tasks the Legislature was most interested in having the Council perform. The Public Water Agencies have worked faithfully with the Council and its staff to help guide the development of a Delta Plan, and its regulations, that will further the coequal goals while not exceeding the Council's powers delegated to it by the Legislature. We look forward to continuing this constructive relationship into the future as the Plan continues to evolve. 3. Public Water Agencies' comment letter dated January 14, 2013 at pp. 4-7.	A, Ct, Co, Du, Nr	The Council disagrees that the proposed regulations are unnecessary, unclear, or duplicative. For detailed response to comment (1), see the Council's response to commenter's comments on section 5003. For detailed response to comment (2), see MR 2. For detailed response to comment (3), see MR 11.
32. Yolo County	4/22/2013	[M]any of the County's original comments do not appear to have resulted in changes to the draft regulations.	O	Comment noted. Please see our responses to the previous comments submitted by these agencies.

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		On this basis, the County reiterates the comments, observations, suggestions and objections in its January 14, 2013 letter, a copy of which is enclosed and incorporated herein by this reference. The County also offers two minor additional comments.		
33. California Water Research	4/23/2013	1. Sufficiency of the regulations ensure consistency with the Delta Reform Act and other state laws There is a fundamental issue with the structure of the Delta Reform Act, in that it delegates to an administrative process, primarily overseen by the Delta Stewardship Council, acts that would normally be reserved for the legislature, most notably, review and approval for public funding of a plan by the Department of Water Resources to create a multi-billion dollar extension of the State Water Project, to fundamentally change operations of the State Water Project and Central Valley Project, and to fundamentally change land uses in the legal Delta. To provide bounds on this process, the Delta Reform Act created the Delta Stewardship Council, and delegated the act of creating a legally enforceable Delta Plan to the Council. The Delta Reform Act specified statutory requirements for the Delta Plan, and for the Bay Delta Conservation Plan, in order to be incorporated into the Delta Plan. But the Delta Reform Act did not fully specify administrative processes for ensuring consistency of the results of the DSC's administrative process with the authorizing statute, or with other applicable laws. It also exempted the Delta Stewardship Council's administrative procedures for review of appeals of determinations of consistency with the Delta Plan from the California Government Code. The California Government Code would ordinarily provide for administrative review of the appeal procedure by the Office of Administrative Law, ensuring conformance of the appeals process with state laws and the state constitution. The courts have held that So long as the scope of an agency's powers are properly defined and limited by the Legislature and the exercise of those powers is subject to appropriate judicial review, the exercise of limited legislative and judicial powers by an administrative agency does not offend the Constitution. (Ray v. Parker, supra, 15 Cal.2d at pp. 291-292, 101 P.2d 665.) (California Radioactive Materials Management Forum, v. Department Of Health Services, 15 Cal.App. 4th 841, May 7, 1993.) It is not clear that the Delta Reform Act has sufficient specificity to properly define and delineate the administrative process overseen by the Delta Stewardship Council. This places a burden on the Delta Stewardship Council to demonstrate that regulations adopted as part of the Delta Plan are sufficient to ensure that future actions by the Council with respect to the Delta Plan will be in full accordance with the authorizing statute and with all applicable state laws. Many problems have been noted with the vagueness and lack of specification in the Delta Plan, and its lack of adequacy with respect to provisions in the Delta Reform Act. 1 This lack of adequacy can allow the actions of the Council to deviate in many ways, large and small, from the language and intent of the Delta Reform Act, and to act in ways that are inconsistent with other state laws. 1 See comments of attorneys Stephan C. Volker and Michael Jackson on the Fifth Staff Draft Delta Plan.	Co	Please see MR1 for an explanation of the Council's statutory authority to adopt these regulations. To the extent this comment implicates later, more specific comments relating to BDCP, please see responses to those later comments.
34. California Water Research	4/23/2013	2. The requirements of the Delta Reform Act, with respect to the Delta Plan, are not adequately addressed in the draft regulations. The Delta Reform Act contained clear and explicit directions about the contents of the Delta Plan, which were not followed by the Delta Stewardship Council. As a result, the Delta Plan deviates significantly from	Co	Regarding the adequacy of the Council's ecosystem regulations, Article 3 contains a number of regulations that would require covered actions address ecosystem restoration. Specifically, sections 5006 through 5009 are focused on habitat protection and improvement. In addition, the Council has determined, within its discretion, to satisfy its mandate to address ecosystem restoration issues in the Delta through recommendations in the Delta Plan.

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		the intent of the legislature. A. Ecosystem Restoration Measures With respect to ecosystem restoration, section 85302(c) of the Delta Reform Act states that: The Delta Plan shall include measures that promote all of the following characteristics of a healthy Delta ecosystem: (1) Viable populations of native resident and migratory species. (2) Functional corridors for migratory species. (3) Diverse and biologically appropriate habitats and ecosystem processes. (4) Reduced threats and stresses on the Delta ecosystem. (5) Conditions conducive to meeting or exceeding the goals in existing species recovery plans and state and federal goals with respect to doubling Article 3 is silent on many of these measures. As such, the regulations severely restrict the applicability of this section to the Delta Plan and to future actions of the Council with respect to the Delta Plan. These measures inherently specify many aspects of these public trust duties of the Delta Stewardship Council with respect to the Delta. The measures are also essential to any future determinations of consistency with the Delta Plan. Therefore the OAL should require that the Delta Stewardship Council expand Article 3 to include substantive language on each of these required measures. B. Performance Measurements The Delta Plan is also required to include performance measurements in meeting goals and objectives: 85211. The Delta Plan shall include performance measurements that will enable the council to track progress in meeting the objectives of the Delta Plan. The performance measurements shall include, but need not be limited to, quantitative or otherwise measurable assessments of the status of (a) The health of the Delta's estuary and wetland ecosystem for supporting viable populations of aquatic and terrestrial species, habitats, and processes, including viable populations of Delta fisheries and other aquatic organisms. (b) The reliability of California water supply imported from the Sacramento River or the San Joaquin River watershed. While there are some measures for the reliability of the water supply in the draft regulations, there are no quantitative measures to track the health of the Delta's estuary and wetland ecosystem for supporting viable populations of aquatic and terrestrial species. It seems clear that the legislature intended that the Delta Plan not only include goals for viable populations of aquatic and terrestrial species in the Delta, but that the Delta Stewardship Council should track progress towards achieving these goals. In addition, the draft regulations do not address the need to assess the status of the Sacramento River and San Joaquin River watershed with respect to water supply reliability. Since climate change could greatly impact runoff in these watersheds, this requirement is essential. The Office of Administrative Law should require that the draft regulations be expanded to ensure that the Delta Plan, and future actions of the Delta Stewardship Council, comply fully with this section of the Delta Reform Act.		Regarding performance measures, the Council has included all relevant performance measures required by the Delta Reform Act in the Delta Plan. These performance measures are not part of these regulations because they are not provisions with which a covered action must be consistent. Regarding water quality, section 5005 of the regulations would require that covered actions are consistent with flow objective adopted by the State Water Resources Control Board. In addition, the Council has determined, within its discretion, to satisfy its mandate to address water quality issues in the Delta through recommendations in the Delta Plan.

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		C. Water Quality Section 85032(d) of the Delta Reform Act requires the following: (d) The Delta Plan shall include measures to promote a more reliable water supply that address all of the following: (1) Meeting the needs for reasonable and beneficial uses of water. (2) Sustaining the economic vitality of the state. (3) Improving water quality to protect human health and the environment. The draft regulations do not have policies which sufficiently address item (d)(3). While the State Water Resource Control Board's Bay Delta Water Quality Control Plan addresses the need to protect waters in the Delta from certain kinds of degradation, they do not address the need to improve water quality in the Delta to protect human health and the environment. 2 The Office of Administrative Law should require that the draft regulations, and future actions of the Delta Stewardship Council, including review for consistency with the Delta Plan, comply fully with this section of the Delta Reform Act. 2 The Environmental Water Caucus made extensive recommendations to the Delta Stewardship Council on measures to improve water quality in the Delta, including a recommendation that the Delta Stewardship Council condition approval of covered actions on inclusion of enforceable implementation plans in TMDLS. See EWC comments.		
35. California Water Research	4/23/2013	3. Consistency of covered actions with the Delta Plan In addition to the vagueness of the Delta Plan, Policy GP1 -- Detailed findings to establish consistency with the Delta Plan – fails to adequately specify substantive standards for consistency of covered actions with the Delta Reform Act. The proposed regulations, and GP 1, through omission, severely narrow the applicability of the Delta Reform Act to covered actions. The omission is particularly egregious with respect to the Bay-Delta Conservation Plan, and section 85320 of the Delta Reform Act. The original proposed rule for GP 1 had the following provision: (5) If the agency that files the certification of consistency will carry out the covered action, the certification of consistency must also include a certification from that agency that the covered action complies with all applicable laws pertaining to water resources, biological resources, flood risk, and land use and planning. If the agency that files the certification of consistency will not carry out the covered action (but will approve or fund the action), the certification of consistency must include a certification from that agency that the covered action complies with all applicable laws of the type listed above over which that agency has enforcement authority or with which that agency can require compliance. It had been narrowed from the 5th Draft Delta Plan, which had the following provision: All covered action proponents shall certify that the covered action shall comply at all times with existing applicable law. 3 The entire rule has now been stricken from GP 1. The vagueness of the Delta Plan, and the two revisions to GP1, severely restrict review by the Delta Stewardship Council of conformance of covered actions with the Delta Reform Act and with other state laws. In doing so, the draft regulations create an administrative process that can spiral out of control. It seems clear that the legislature cannot create a new agency of the state and delegate to it an	Co	Agencies proposing covered actions must certify that their covered actions are consistent with these regulations, which implement the Delta Reform Act. The previous regulatory provision requiring certification of consistency to address applicable laws other than the Delta Reform Act was removed because it was unnecessary. Other agencies will review actions for compliance with laws within their jurisdiction.

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		administrative process that could result, over time, in violations of the authorizing statute and other state laws. Thus either the Delta Stewardship Council's interpretation of the Delta Reform Act is unconstitutional, or the Act itself is unconstitutional. The Office of Administrative Law, as part of the review of the draft regulations, should require that the regulations have sufficient breadth and specificity to ensure that the Delta Plan and actions certified as consistent with the Delta Plan fully comply with the Delta Reform Act and all applicable state laws, both now and in the future. 3 Fifth Staff Draft Delta Plan, p. 61.		
36. California Water Research	4/23/2013	4. Requirements in Delta Reform Act for oversight of science, monitoring, and assessment programs that support adaptive management by the Independent Science Board The Delta Reform Act also explicitly mandated the role of the Independent Science Board in oversight of scientific research, monitoring, and assessment programs that support adaptive management of the Delta (Section 803504(a)): (3) The Delta Independent Science Board shall provide oversight of the scientific research, monitoring, and assessment programs that support adaptive management of the Delta through periodic reviews of each of those programs that shall be scheduled to ensure that all Delta scientific research, monitoring, and assessment programs are reviewed at least once every four years. (4) The Delta Independent Science Board shall submit to the council a report on the results of each review, including recommendations for any changes in the programs reviewed by the board. Through omission, the proposed regulations fail to implement these essential oversight duties of the Independent Science Board. The Office of Administrative law should require specific regulations to implement these requirements. The OAL should also require the Delta Stewardship Council to revise the requirements for adaptive management in the certifications of consistency with the Delta Plan in section 5002 to ensure that they are consistent with the statutory requirements for oversight by the Independent Science Board.	Co	The Independent Science Board (ISB) provides independent science advice to the Council relating to the best available science and the Delta Plan. (Water Code section 85308(a).) These regulations are based on advice provided by the ISB and the Delta Science Program. As the comment notes, the Independent Science Board is also tasked with overseeing scientific research that supports adaptive management in the Delta and providing the Council with a report on this subject every four years. (Water Code section 85280(a).) The requirement is explicit in statute and no regulations are needed to implement it.
37. California Water Research	4/23/2013	5. Delegation and section 85320(2)(b) of the Delta Reform Act The Delta Reform Act delegates the determination of consistency with the Delta Reform Act sections 85320 to the California Department of Fish and Game (now the Department of Fish and Wildlife), as does the appeals procedure of the Delta Stewardship Council. 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. 4 However, this delegation should not be interpreted as altering the essential agency duties of the Delta Stewardship Council in assuring compliance of the Delta Plan with the provisions of the Delta Reform Act, including section 85320 (b) (2). Section 85320 states that (b) The BDCP shall not be incorporated into the Delta Plan and the public benefits associated with the BDCP shall not be eligible for state funding, unless the BDCP does all of the following: (2) Complies with Division 13 (commencing with Section 21000) of the Public Resources Code, including a comprehensive review and analysis of all of the following: (A) A reasonable range of flow criteria, rates of diversion, and other operational criteria required to satisfy	Co	As the comment notes, Department of Fish & Wildlife is tasked with determining whether BDCP meets the statutory section called out by the comment. If the Department so determines, the Council must incorporate BDCP into the Delta Plan. (Water Code section 85320(e).) The Department's determination may be appealed to the Council (Water Code section 85320(e)), pursuant to the Council's adopted appellate procedures. The Council will review any appeal to determine whether BDCP meets the requirements of section 85320. For additional information relating the Council's authority as it relates to BDCP, see Appendix ~~G~~A to the Delta Plan.

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		the criteria for approval of a natural community conservation plan as provided in subdivision (a) of Section 2820 of the Fish and Game Code, and other operational requirements and flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions, which will identify the remaining water available for export and other beneficial uses. (B) A reasonable range of Delta conveyance alternatives, including through-Delta, dual conveyance, and isolated conveyance alternatives and including further capacity and design options of a lined canal, an unlined canal, and pipelines. (C) The potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the environmental impact report. (D) The potential effects on migratory fish and aquatic resources. (E) The potential effects on Sacramento River and San Joaquin River flood management. (F) The resilience and recovery of Delta conveyance alternatives in the event of catastrophic loss caused by earthquake or flood or other natural disaster. (G) The potential effects of each Delta conveyance alternative on Delta water quality. The Office of Administrative Law, as part of its review of the proposed regulations, should require that GP1 be revised to substantively ensure compliance of the Bay Delta Conservation Act with section 85320(b)(2). 4 Final Staff Draft Delta Plan, Appendix B.		
38. California Water Research	4/23/2013	6. Importance of adequate review of the Bay Delta Conservation Plan with respect to 85320(b)(2)(A) In regard to this provision of section 85320(b)(2)(A) , many environmental groups have argued that the requirement for a water availability analysis is fundamental to the public trust and must be done formally and with reference to the Public Trust review conducted by the State Water Resources Control Board according to section 85086 of the Delta Reform Act. "(c) (1) For the purpose of informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan, the board shall, pursuant to its public trust obligations, develop new flow criteria for the Delta ecosystem necessary to protect public trust resources." The SWRCB flow criteria proceedings have been completed and submitted to the Delta Stewardship Council, yet there are no plans to use them in any formal assessment of whether the Bay Delta Conservation Plan meets the criteria in section 85302 (A) for a comprehensive review and analysis of "flows necessary for recovering the Delta ecosystem and restoring fisheries under a reasonable range of hydrologic conditions." The need for a formal assessment is clear from the actions of US Fish and Wildlife Service and the National Marine Fisheries Services in attempting to review the Bay Delta Conservation Plan for conformance with the requirements of the Endangered Species Act. The agencies had to request their own modeling runs to develop operating criteria necessary for the protection of fish in the Delta. The resulting operating models were not part of the BDCP review and analysis, but they should be. The agencies have recently requested to convene a five agency team that will develop operating criteria for upstream reservoirs to protect migrating winter and spring run Chinook salmon. 5 For this reason, the lack of specification of any substantive criteria with respect to section 85302(A) and (D) is a serious omission in policy GP1 and Article 3 of the proposed regulations. The Office of Administrative Law should require the Delta Stewardship Council to include such criteria. 5 NMFS and USFWS, red flag comments on March BDCP administrative draft.	Co	The flow criteria developed by SWRCB informed the Council's planning decisions made in the Delta Plan and these regulations, as provided by Water Code section 85086. Department of Fish & Wildlife is tasked with determining whether BDCP meets the statutory section called out by the comment, Water Code section 85320. If the Department so determines, the Council must incorporate BDCP into the Delta Plan. (Water Code section 85320(e).) The Department's determination may be appealed to the Council (Water Code section 85320(e)), pursuant to the Council's adopted appellate procedures. The Council will review any appeal to determine whether BDCP meets the requirements of section 85320, including section 85320(b)(2)(A)[requiring a comprehensive review of a reasonable range of flow criteria]. For additional information relating the Council's authority as it relates to BDCP, see Appendix ~~G~~A to the Delta Plan.

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39. California Water Research	4/23/2013	7. BDCP and review with respect to climate change and water quality With regard to subsections (C) and (G) of section 85302(b)(2) on climate change and water quality, the Delta Reform Act has attempted to delegate responsibility for review of conformance of the Bay-Delta Conservation Plan with these subsections to DFW, but it is not clear that DFW has sufficient statutory authority and resources in these other areas for adequate review. Thus this section of the Delta Reform Act may be fundamentally flawed and unconstitutional. It is critically important that the Bay Delta Conservation Plan be adequately reviewed for consistency with 85320(b)(2) (C), which requires a comprehensive review and analysis of the "... potential effects of climate change, possible sea level rise up to 55 inches, and possible changes in total precipitation and runoff patterns on the conveyance alternatives and habitat restoration activities considered in the environmental impact report." since the drier climate change scenarios could greatly reduce runoff in the Sacramento and San Joaquin River watersheds. 6 To ensure full conformance of the Delta Plan with section 85302(b)(2)(C) , the Office of Administrative Law should require the Delta Stewardship Council to include specific, substantive criteria in Article 3 with respect to BDCP and climate change. The Bay Delta Conservation Plan also does not currently include a comprehensive review of the impacts of the proposed conveyance plans on water quality in the Delta, instead focusing only on the impacts of the conveyance on covered species. It seems clear that the intent of the legislature, in requiring a comprehensive review and analysis of (G) The potential effects of each Delta conveyance alternative on Delta water quality. in order for BDCP to be incorporated in the Delta Plan, did not intend that such review be restricted only to impacts on endangered aquatic species. The lack of specification of any standards for water quality in the current regulations may thus have the effect of restricting the applicability of this statute. The Office of Administrative Law should require the Delta Stewardship Council to include specific, substantive criteria for determination of consistency of BDCP with respect to subsection (G). 6 California Water Research, Incorporation of Drought Risk from Climate Change into California Water Planning	O	Department of Fish & Wildlife is tasked with determining whether BDCP meets the statutory section called out by the comment. If the Department so determines, the Council must incorporate BDCP into the Delta Plan. (Water Code section 85320(e).) The Department's determination may be appealed to the Council (Water Code section 85320(e)), pursuant to the Council's adopted appellate procedures. The Council will review any appeal to determine whether BDCP meets the requirements of section 85320, including section 85320(b)(2)(C) [requiring a comprehensive analysis of the potential effects of climate change on conveyance alternatives]. For additional information relating the Council's authority as it relates to BDCP, see Appendix ~~G~~A to the Delta Plan.
40. California Water Research	4/23/2013	8. Adaptive Management and BDCP In the section of the draft regulations on adaptive management, there is no mention of the requirement in Section 85321 of the Delta Reform Act, which requires the Bay Delta Conservation Plan to include fishery agencies in real-time decision making about water system operations. 85321. The BDCP shall include a transparent, real-time operational decision making process in which fishery agencies ensure that applicable biological performance measures are achieved in a timely manner with respect to water system operations. This omission could restrict application of this section of the statute to the Bay-Delta Conservation Plan. Again, the OAL should require language in the draft regulations to adequately incorporate this language.	O	Department of Fish & Wildlife is tasked with determining whether BDCP meets the statutory section called out by the comment, section 85321.
41. California Water Research	4/23/2013	9. Summary There is a significant pattern in these omissions, in that each involves statutory language which provides checks and balances on the Delta Plan and the Bay Delta Conservation Plan to ensure protections for the Delta ecosystem, water quality, and migratory fish and aquatic species. The sum of these omissions is to allow incorporation of the Bay Delta Conservation Plan and other projects	O	As noted in response to more specific comments, the Delta Reform Act requires the incorporation of BDCP into the Delta Plan if Department of Fish and Wildlife determines it is consistent with Water Code section 85320. That determination may be reviewed by the Council on appeal. (Water Code section 85320(e).)

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		into the Delta Plan, without meeting any of the basic statutory requirements for protection of the Delta. This is clearly contrary to the intent of the legislature in the Delta Reform Act. There have been extensive prior comments on the Delta Plan, and on the need to meet the requirements of the Delta Reform Act. However, the Delta Stewardship Council has chosen not to act on these comments. It is now up to the Office of Administrative Law to ensure that the draft regulations include these essential checks and balances.		
42. South Delta Water Agency	4/23/2013	South Delta Water Agency joins in the comment of Central Delta Water Agency regarding the proposed regulations 4/4/13.		Comment noted. Please see our responses to comment submitted by this agency.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5001

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Contra Costa Water District	4/17/2013	5001(dd)(3) - The declaration that temporary water transfers will not have a significant impact for purposes of determining whether a project meets the definition of a covered action is consistent with existing state law that exempts such transfers under CEQA. Putting a sunset on this exemption, however, would be inconsistent with state law and could result in project proponents having to conduct environmental analysis for consistency with the Delta Plan when not required under CEQA. The time required to go through the DSC consistency process may make one-year transfers ineffective, reducing the tools available for agencies to reliably provide water to their customers. The stated purpose for the sunset clause is to encourage DWR and SWRCB to implement transfer measures recommended in the Delta Plan. However, holding the beneficiaries of temporary transfers hostage is not an appropriate tactic.	O	This comment does not refer to, or is based on, any change in language from the previous regulatory package. With respect to the Council's determination that single-year transfers will not have a significant impact on the coequal goals through December 31, 2016, the Council recognizes in the Delta Plan the contribution that water transfers can make to improve water supply reliability for the State. In addition, under California law, transfers that occur within the period of one year do not require environmental review under CEQA. This suggests a legislative determination that single-year transfers are unlikely to significantly harm the environment. Nevertheless, the Council is aware of the concern that these one-year water transfers may have significant impacts on the environment, including on the delta's ecosystem. Of particular concern are single year transfers that are repeated over consecutive years, which is a process that may end up circumventing the CEQA review that is required for environmental assessment of multi-year transfers. As a result, the Council recognizes that further evaluation is needed of the potential impact that temporary transfers, either individually or when repeated over consecutive years, may have on the coequal goals and the Council is committed to undertaking this work through the Delta Plan. For the purposes of the immediate regulation, the Council has determined that temporary transfers would not have a significant impact on the coequal goals. With respect to the comment's assertion that the regulation is inconsistent with state law, the Council disagrees. CEQA and the Act are distinct statutory schemes, operating for different purposes and imposing differing requirements on regulated entities. The Act is narrower to the extent it focuses on the Delta rather than CEQA's statewide approach, but broader to the extent it focuses on policy objectives beyond CEQA's objective to eliminate adverse environmental impacts. Thus, in addition to complying with CEQA and all other applicable laws, public agencies proposing covered actions must also comply with the Act and these implementing regulations. Nevertheless, the legislature acknowledges and directs some overlap between the two statutes by cross-referencing CEQA concepts as part of the definition of "covered actions" over which the Council has jurisdiction. Thus, under section 85057.5(a)(1), a plan, program, or project must be a "project" under CEQA, Public Resources Code section 21065, to be a "covered action" under the Act. While the intent and effect of the Act governing "covered actions" are distinct from CEQA's, the Council draws from existing CEQA statute and Guidelines where the statutory schemes overlap. Thus, where the Council finds that a project exempt from CEQA would similarly not have a significant impact on the coequal goals, it makes that finding in this regulation.
2. Contra Costa Water District	4/17/2013	Section 5001(h) - The definition of "coequal goals "remains lengthy, repetitive, confusing, and contains regulatory elements not appropriate in the definitions section of the regulation. The "coequal goals" are defined by statute; the additional definition of what it means to achieve the coequal goals does not facilitate understanding of or compliance with the regulation s and should be deleted. The stated reason for including the definition of achievement of the coequal goals is to aid in determining whether a plan, program or project meets the definition of a "covered action". However, many of the actions listed (e.g., expanding groundwater and surface storage both north and south of the Delta) have little to do with such a determination, and subsections (3) (A)-(F) are strategies to protect the unique values of the Delta and do not aid in determining whether a proposed action meets the criteria of a covered action. If the DSC determines to keep the definition of "achievement" of the coequal goals in the regulation, CCWD suggests that subsections (1) and (3) be rewritten to be more succinct and descriptive similar to subsection (2).	Ct	Section 5001(e)(3) provides specificity to Water Code section 85054's requirement that the coequal goals 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.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5001

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3. Contra Costa Water District	4/17/2013	Section 5001(j)(3) - This section of the definition of a "covered action "is prescriptive in nature and should be deleted or reworded to simply describe who makes the determination that a proposed action is a covered action.	Ct	This provision requires a public agency to determine whether its proposed plan, program, or project is a "covered action." The provision further requires this determination to be reasonable and made in good faith. The determination that a proposed action is a covered action is not a legislative decision, but rather is an adjudicative one. (See Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 34, n.2 ["[L]egislative action is formulation of a rule to be applied in all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts."]) The cases cited by the comments discussing the judicial standards of review over legislative decisions are therefore inapplicable. Furthermore, requiring that this determination be reasonable and made in good faith is an objective standard, not a subjective standard. (See Madera Oversight Coalition, Inc. v. County of Madera (2011) 199 Cal.App.4th 48, 103 n.32 [where "good faith" standard is associated with "reasoned analysis" or "reasonableness," it is an objective standard].) Finally, it is appropriate for the Council to require agencies to make reasonable decisions in good faith, as other agencies frequently require. (E.g., CEQA Guidelines § 15151 [standard for adequacy of EIR is "good faith effort" at full disclosure]; Cal. Code Regs. tit. 14, § 18839 [requiring "good faith effort" and "reasonable effort" in implementing recycling program]; 36 C.F.R. 800.4(b)(1) [requiring federal agencies make "reasonable and good faith effort" in identifying historic properties].
4. Contra Costa Water District	4/17/2013	Section 5001(y) - "Proposed action" as defined overlaps with and is apparently used interchangeably with "covered action". Having two terms that mean the same thing is confusing. The two terms should remain distinct. All plans, programs or projects proposed within the jurisdictional boundary of the DSC are "proposed actions "which are reviewed against the screening criteria to determine whether they are "covered actions". If a project meets the criteria for a "covered action", it should thenceforth be called a "covered action". A proposed action that does not meet the criteria would not be subject to these regulations.	Ct	There was an error in the text of section 5001(y). The text has been revised to read: (y) "Proposed Action" means a plan, program, or project that meets the covered action screening criteria listed in section 5001(j)(1)(A) through ~~(E)~~(D)…"
5. Central Delta Water Agency	4/22/2013	5001(h)(2) - This section is inconsistent with Water Code section 85020(c) in that the objective inherent in the co-equal goals is to "restore the Delta fisheries and wildlife." While supporting "viable populations of native resident and migratory species" is a step in the right direction and a required goal, it falls far short of the statutory objective. Restoration is far greater than simply "supporting" viable populations. Additionally there are numerous non-native species of major recreational importance in the Delta, including species such as Striped Bass, Black Bass and Pheasants. The words "capable of supporting viable populations of native resident and migratory species" should be replaced by "that will restore the Delta fisheries and wildlife consistent with the current objectives provided in state and federal law." The proposed regulation is also inconsistent with other provisions of law. Water Code section 85302(c)(5) provides that the Delta Plan shall include measures that promote: "Conditions conducive to meeting or exceeding the goals in existing species recovery plans and state and federal goals with respect to doubling salmon populations." Water Code section 85302(e)(3) provides that the Delta Plan include as a subgoal and strategy for restoring a healthy ecosystem: "Promote self-sustaining, diverse populations of native and valued species by reducing risk of take and harm from invasive species." The CVPIA (3406(b)(l)) requires the Secretary of Interior to develop a program to ensure by the year 2002	Co	This comment does not address any change to the original text as no changes were made to section 5001(h)(2). Water Code Sec 85020(c) is inherent in the goal of protecting, restoring, and enhancing the Delta ecosystem. 5001(h)(1)(2) defines what it means to achieve that goal. With too many native Delta species endangered, threatened, or scarce, and their native habitats degraded by numerous stressors, restoration of a resilient functioning estuary and terrestrial landscape with the attributes noted in the regulation is essential to the restoration of Delta fish and wildlife. A resilient estuary capable of supporting viable populations of native resident and migratory species will also support introduced species, such as striped bass, bass, and pheasants noted in the comment, but in locations and at population levels compatible with other important ecosystem attributes. The remainder of the comment is not about the adequacy of the definition of achieving the goal of protecting, restoring and enhancing the Delta ecosystem, but is rather an allegation about perceived shortcomings in the contents of the Delta Plan.

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		natural production of anadromous fish on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991. Anadromous fish include: salmon, steelhead, striped bass, sturgeon and American shad.		
6. Central Delta Water Agency	4/22/2013	The regulation is in conflict with Water Code section 85020(b) and 85054. 1) It fails to require that agricultural values of the Delta be protected and enhanced and instead substitutes "Maintain Delta agriculture as a primary land use, a food source, a key economic sector and a way of life" in subsection (c). 2) It fails to require that the cultural and recreational values be protected and enhanced and instead substitutes "encourage recreation and tourism that allow visitors to appreciate the Delta and that contribute to its economy. 3) It fails to require that cultural, recreational and agricultural values of the Delta be protected and enhanced and instead substitutes "sustain a vital Delta economy that includes a mix of agricultural, tourism, recreation, related industries and business, and vital components of state and regional infrastructures. 4) It applies the word ''unique" as a limitation on protection and enhancement rather than a recognition of the uniqueness of the Delta as requiring protection and enhancement of all its resources. The regulation's use of uniqueness is also inconsistent with the following: 1) Water Code section 85022(c)(l) which provides: "The Delta is a distinct and valuable natural resource of vital and enduring interest to all the people and exists in a delicately balanced estuary and wetland ecosystem of hemispheric importance." 2) Water Code section 8503l(b)(l) which mandates that the Delta Protection Commission (DPC) develop a proposal which must include a plan "to establish state and federal designation of the Delta as a place of special significance, which may include application for a Federal designation of the Delta as a Natural Heritage Area. 3) Water Code section 85301(b)(2) which mandates that the DPC proposal include "a regional economic plan to support increased investment in agriculture, recreation, tourism and offer resilient land uses in the Delta." 4) Water Code section 85301(c)(2) which mandates that ''the Department of Food and Agriculture shall prepare a proposal, for submission to the commission, to establish market incentives and infrastructure to protect and enhance the economic and public values of Delta Agriculture. 5) Water Code section 12981 which provides: "§12981. Unique resources with statewide significance; preservation (a) The Legislature finds and declares that the delta is endowed with many invaluable and unique	Co	The only substantive change to this provision was to replace "~~commercial and other~~" with "related" industries "and businesses." This comment does not address that change. A primary purpose of the definition provided in section 5001(h)(1)(2) is to explain the term "an evolving place" used in describing the protection of the unique values of the Delta as a place in Water Code 85020(b)and Water Code 85054. As noted in response to earlier comments from the CDWA, that defining of 'an evolving place' is derived from reports of the Delta Vision Task Force, consistent with the guidance of Water Code section 85300 (a). The strategies listed for achieving that goal are means to attain that goal, rather than subgoals or objectives that limit the aim of protecting and enhancing the unique cultural, recreational, natural resource and agricultural of the Delta as an evolving place. These strategies are derived from the Delta protection Commission economic plan prepared pursuant to Water Code section 85031(b), including its proposal to designate the Delta as a national heritage area, which the Council reviewed and partly incorporated into the Delta Plan.

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		resources and that these resources are of major statewide significance. (b) The Legislature further finds and declares that the delta's uniqueness is particularly characterized by its hundreds of miles of meandering waterways and the many islands adjacent thereto; that, in order to preserve the delta's invaluable resources, which include highly productive agriculture, recreational assets, fisheries, and wildlife environment, the physical characteristics of the delta should be preserved essentially in their present form; and that the key to preserving the delta's physical characteristics is the system of levees defining the waterways and producing the adjacent islands. However, the Legislature recognizes that it may not be economically justifiable to maintain all delta islands. (c) The Legislature further finds and declares that funds necessary to maintain and improve the delta's levees to protect the delta's physical characteristics should be used to fund levee work that would promote agricultural and habitat uses in the delta consistent with the purpose of preserving the delta's invaluable resources. (Added by Stats. 1973, c. 717,p. 1293, § 1, eff. Sept. 24, 1973. Amended by Stats. 1985, c. 1271, § 3; Stats. 1996, c. 601 (A.B. 360), § 11.)" The regulation is also inconsistent with Water Code section 12201 which provides: "§12201. Necessity of maintenance of water supply The Legislature finds that the maintenance of an adequate water supply in the Delta sufficient to maintain and expand agriculture. industry, urban, and recreational development in the Delta area as set forth in section 12220, Chapter 2, of this part, and to provide a common source of fresh water for export to areas of water deficiency is necessary to the peace, health, Safety, and welfare of the people of the State, except that delivery of such water shall be subject to the provisions of section 10505 and sections 11460 to 11463, inclusive, of this code. (Added by Stats. 1959, c. 1766, p 4247, §1.)" Section 5001(h(3) should be changed to read: "(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 that the fundamental characteristics and values that comprise the Delta's special qualities can be preserved and enhanced while accommodating natural 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 preserve the hundreds of miles of meandering waterways and the many islands in essentially their present form; (C) Protect and enhance Delta agriculture as a primary land use. a food source, a key economic sector, a way of life and as an essential habitat for terrestrial species including waterfowl of the Pacific Flyway; (D) Encourage recreation and tourism that allow visitors to enjoy and appreciate the Delta and that contribute to its economy; (E) Protect and enhance 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 communities, people, property, and other interests in the Delta by improving the system of levees which define the waterways and produce adjacent islands while recognizing that it may not be economically justifiable to maintain all delta islands against all natural risks. (G) Assure that the Delta will be provided with salinity control and an adequate water supply sufficient to maintain and expand agriculture, Industry, urban and recreational development in the Delta and that provision of the same shall be a pre-condition to the export of water from the Delta by the State Water		

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		Project and federal Central Valley Project."		
7. Central Delta Water Agency	4/22/2013	This section is inconsistent with Water Code Section 85031. What is commonly referred to as the "Delta Protection Act" (Water Code Section 12200 et seq) adopted in 1959 (DPA) is not included in the required consistency condition for reduced reliance on water from the Delta. These Water Code sections are not commonly included in the general reference to "State's area of origin statutes." The common reference to the State's area of origin statutes are to the Watershed of Origin Statutes (Water Code Sections 11460 et seq and 11128) and to the County of Origin Statutes (Water Code Section 10505 et seq). The Delta Protection Act (1959) (DPA) is particularly important in that 1) it requires the SWP and CVP to provide salinity control and an adequate water supply for the Delta (Water Code Sections 12201 & 12202); 2) it prohibits the export of water from the Delta to which in-Delta users are entitled through water rights and water which is necessary for salinity control and an adequate supply "to maintain and expand agriculture, industry, urban and recreational development in the Delta." (Water Code Section 12204); and 3) it requires maintenance of a common pool of water in the interior of the Delta and requires the operation and management of releases from storage for export to be integrated to the "maximum extent possible" in order to fulfill the objectives of the Act. The objectives of the DPA are to protect Delta water rights, provide salinity control and additionally provide an adequate supply to "maintain and expand agriculture, industry, urban, and recreational development in the Delta." The DPA was contemporaneously interpreted by the Department of Water Resources in the Preliminary Bulletin 76, December 1960 Report to the Legislature as providing "In 1959 the State Legislature directed that water shall not be diverted from the Delta for use elsewhere unless adequate supplies for the Delta are first provided." Your regulations here and in other sections fail to embrace and are in conflict with the statutes which give a clear priority for Delta water uses over exports. A specific reference to the "Delta Protection Act" (1959) must be included along with the reference to "State's area of origin statutes." It would be better to include the specific statutory references from Water Code Section 85031. The first sentence of Section 5001(h)(l)(B) should be changed to read: "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 the priorities of water rights and statutory rights to water including without limitation Water Code Sections 1215 et seq., 10505 et seq., 11128, 11460 et seq., and 12200 et seq."	Co	This is a comment on section 5001(h)(1)(B). 1. This comment does not address the change to the original text. 2. Also see MR8.
8. Central Delta Water Agency	4/22/2013	The definition is too broad and can include introduced species many of which have been a part of the ecosystem for over 100 years, and are an important part of the Bay-Delta ecosystem. By way of example, Striped Bass which are native to the Atlantic Coast and cohabit with Atlantic Salmon were introduced into the Bay-Delta Estuary in 1879. The importance of Striped Bass as a sport fish and as an indicator of ecosystem health led to many studies of its life history and population dynamics. (See California Fish and Game 85(1):31-36 1999 Status of Striped Bass in the Sacramento-San Joaquin Estuary) The Striped Bass index was used as an indicator of health of the estuary until it dropped below the minimum health level, then it was ignored and now Striped Bass are being disfavored to further degrade conditions in the Delta in order to facilitate greater exports from the Delta. Following are graphs (Graph 1 and Graph 2) showing natural fall run Salmon production for the Sacramento River, Striped Bass abundance, exports from the Delta, natural production for fall-run San Joaquin system Salmon, Delta Smelt Index and spawning Steelhead numbers upstream of RBDD. There is no apparent correlation between Salmon production declines and Striped Bass abundance and both species existed at relatively healthy	Co	5001(v) is derived from the definition of nonnative invasive species used by DFW to describe nonnative invasive species and provides so consistency with many widely used descriptions of these animal and vegetative pests, improving the clarity of the regulation.

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		population levels until the early 1970s when Striped Bass declined in apparent correlation with increased exports of water from the Delta. Most native and non-native fish species and many mammals are predators. Many are predators even on their own species. Invasive is a term that has been applied to unintended or even unlawful introduction of non-native species such as those introduced from the discharge of ballast water from ships. The definition in 5001(v) and Section 5009 together seek to prevent the increase in numbers of Striped Bass and bass. These sections provide a clear conflict with 1) Water Code section 85302(c)(5) which requires that the Delta Plan include measures that promote: "Conditions conducive to meeting or exceeding the goals in existing species recovery plans and state and federal goals with respect to doubling salmon populations." (emphasis added) and 2) Water Code section 85302(e)(3) which requires that the Delta Plan include as a subgoal and strategy: "Promote self-sustaining, diverse populations of native and valued species by reducing the risk of take and harm from invasive species." (emphasis added) Striped Bass are clearly a valued species for sport fishing and are also the subject of goals "in existing recovery plans." The CVPIA section 3406(b)(2) requires the Secretary of Interior to develop a program to ensure by the year 2002 natural production of anadromous fish on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991. Anadromous fish are defined in the Act to include salmon, steelhead, striped bass, sturgeon and American shad. The subject regulations are also inconsistent with Fish and Game Code section 1741 which provides: "The Legislature finds and declares that it is the policy of the state to preserve and enhance black bass resources and to manage black bass populations to provide satisfactory recreational opportunities to the public." and California Fish and Game Fishery Policies for Striped Bass and Black Bass, copies of which are attached hereto as Attachment A There are numerous native fish, birds and mammals that are predators of salmon at various life stages. Physical conditions which are conducive to predation by non-native fish species are also conducive to predation by native species of fish. Elimination of one fish predator species can be expected to result in replacement by another. There is no apparent correlation between the decline of desired fish species and wetland habitat in the Delta (as legally defined in Water Code section 12220). The objective should be improvement of habitat to achieve the desired goal within the constraints provided in law. Salmon, Striped Bass and "Bass" co-existed with satisfactory populations when exports from the Delta were substantially lower and outflows higher than the levels desired by the SWP, CVP and their contractors. The required amounts, timing and quality of flow into and out of the Delta and the times when diversions can be allowed have not yet been determined. The Section 5001(v) definition of "non-native invasive species" should be changed by adding after "species" in the first line ''which were unlawfully introduced or historically not recognized as valuable to the public or ecosystem." The Section 5009 proposed addition of "Striped bass or bass" should be rejected.		

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9. Central Delta Water Agency	4/22/2013	This section is inconsistent with Water Code Section 85031 and the references therein, in that it does not mandate that water exported from the Delta be limited to water supplies legally available for export from the Delta. Exports by the SWP and CVP must be limited to water which is truly surplus to the present and future needs of the Delta and other areas of origin. The words "will more closely match water supplies available to be exported" must be replaced with "shall be limited to water supplies legally available to be exported." A better change would be "shall be limited to water supplies which are surplus to the present and future needs of the Delta and other areas of origin." Additionally, this section refers to "improving conveyance." Water Code Section 85020(t) uses the words "Improve the water conveyance system." In order for the regulation to be consistent with the statute "improving the water conveyance system" should be substituted for "improving water conveyance." Less conveyance for export rather than more is likely required and improving conveyance could be interpreted as suggesting increased conveyance. Levee and channel improvements, improved fish screening at the export intakes and improvements of the existing Delta cross-channel could all be conveyance system improvements consistent with law which do not necessarily result in increased conveyance. The first sentence of Section 500l(h)(l)(C) should be changed to read: "Water exported from the Delta shall be limited to water supplies which are surplus to the present and future needs of the Delta and other areas of origin." The first part of the second sentence should be changed to read: "This will be done by improving the water conveyance system in the Delta and ..."	Co	This is a comment on section 5001(h)(1)(C). 1. This comment does not address any change to the original text as no changes were made to section 5001(h)(1)(C), aside from renumbering. 2. We also disagree with the specific points. First, the phrase “available to be exported” assumes that the item can be legally exported. Second, the regulation’s use of the phrase “improving conveyance in the Delta” is consistent with the various statutory references to water conveyance. Third, the Delta Plan does not advocate specific proposals for making physical modifications to water conveyance facilities in the Delta. Appendix ~~B~~D, pages 5-9 and Appendix ~~C~~A provide a discussion of the Council’s role in California’s water supply conveyance facilities, and the rationale for its decision to defer consideration of this matter for a later update of the Delta Plan.
10. Central Delta Water Agency	4/22/2013	The regulation includes "removal of vegetation" as an encroachment. Such inclusion is inconsistent with Water Code sections 85020 and 85054 in that maintenance and enhancement of levees and floodways is critical to the protection and enhancement of the unique cultural, recreation, natural resource, and agricultural values of the Delta. Removal of vegetation is part of "Routine maintenance and operation" of levees, flood channels, and drainage canals. Requirements for removal of vegetation are contained in the operation and maintenance manuals for project levees and in the regulations of the Central Valley Flood Protection Board. By way of example, California Code of Regulations Title 23 section 131 (d) provides: "With the exception of naturally occurring vegetation which the owner of the underlying land has no responsibility to maintain, any vegetation which interferes with the successful execution, functioning, maintenance or operation of the adopted plan of flood control, must be removed by the owner. If the owner does not remove such vegetation upon request, the board reserves the right to have the vegetation removed at the owner's expense." Title 23 section 131 (g)(2) provides: "Invasive or difficult-to-control vegetation, whether naturally occurring or planted, that impedes or misdirects flood flows is not permitted to remain on a berm or within the floodway or bypass." Contracts between the State and United States and between local maintaining agencies and the State require removal of vegetation from levees and floodways. Such contracts are written to comply with State and Federal Statutes and regulations. The proposed regulation constitutes an unlawful interference with contracts as well as a serious conflict with statutes and regulations. The definition should be revised to delete "or removal of vegetation". Water Code section 85057.5(5) specifically excludes from covered actions "Routine maintenance and operation of any facility located, in whole or in part, in the Delta, that is owned or operated by a local public agency."		This is a comment on section 5001(n). The definition of encroachment used herein is derived from the regulations of the Central Valley Flood Protection Board, Title 23, Division 1, Waters, Article 2, section 4(m) in which the removal of vegetation is referenced as a potential encroachment. This is interpreted by the CVFPB to refer to the activity of removing vegetation as a being a potential encroachment, by the use of machinery, large equipment, etc.
11. East Bay Municipal Utility District	4/22/2013	Section 5001(bb) - The definition of "restoration" or "restoring" merely references the statutory definition set forth in Water Code Section 85066 in order to define a term set forth in the lengthy and confusing enhanced definition of "coequal goals." This separate definition does little to interpret or carry out the statutory provisions and should be removed.	O	This comment did not address any changes to the original text. In addition to being consistent with the statutory definition provided by section 85066, this definition adds examples of what it may include, thereby offering additional clarification to the statutory definition and its use in these regulations.

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12. East Bay Municipal Utility District	4/22/2013	Section 5001(dd) - The definition of "significant impact" improperly includes both changes that positively impact the achievement of one or both of the coequal goals and changes that are directly or indirectly caused by a project "when the project's incremental effect is considered together with the impacts of other closely-related past, present, or reasonably foreseeable future projects." Rather than remedying the problems in the original text with regard to the inclusion of impacts that, when considered cumulatively in connection with the effects of past projects, other current projects, and probable future projects, would have a substantial impact on the achievement of one or both of the coequal goals, the change to the definition has made the language less clear. There is no support in the Delta Reform Act language for including projects result in minor or negligible impacts within the definition of "covered actions." The Delta Reform Act defines "covered actions" to be actions that will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs. It is improper to expand this definition to include projects with minor or de minimis impacts. There is no support for including a project within the definition of a "covered action" solely because the project will have a minor impact that may be greater when it is considered together with other past projects, particularly if the past project is undertaken by a different state or local agency. It is also not clear what projects would be deemed to be "closely-related past, present, or reasonably foreseeable future projects." The text does not explain whether these are projects that are closely-related geographically, or closely-related in time, and thus it will be difficult for state and local agencies to understand the scope of this provision. If the Council determines that it is necessary to define "significant impact" in these regulations, we urge the adoption of a definition consistent with Section 15382 of the CEQA Guidelines. "Significant impact" should be defined as "a substantial adverse change in baseline conditions." This is consistent with the intent of Water Code Sections 85031 and 85032, which state that the Delta Reform Act does not alter CEQA or supercede or modify certain other provisions.	Ct, Co	CEQA and the Act are distinct statutory schemes, operating for different purposes and imposing differing requirements on regulated entities. The Act is narrower to the extent it focuses on the Delta rather than CEQA's statewide approach, but broader to the extent it focuses on policy objectives beyond CEQA's objective to eliminate adverse environmental impacts. Nevertheless, the legislature acknowledges and directs some overlap between the two statutes by cross-referencing CEQA concepts as part of the definition of "covered actions" over which the Council has jurisdiction. Thus, under section 85057.5(a)(1), a plan, program, or project must be a "project" under CEQA, Public Resources Code section 21065, to be a "covered action" under the Act. While the intent and effect of the Act governing "covered actions" are distinct from CEQA's, the Council draws from existing CEQA statute and Guidelines where the statutory schemes overlap. Using terminology from other statutes and regulations has the advantage of being readily understood by the regulated community because the terms and their meaning are well-established. Here, the Council uses concepts from CEQA and the CEQA guidelines, specifically defining "significant impact" to mean "substantial" impact (similar to Public Resources Code section 21068) and to include cumulative impacts of closely-related past, present, and reasonably foreseeable future projects (as in Public Resources Code section 21083(b)(2) and CEQA Guideline 15355), to define "significant impact" on the coequal goals for purposes of the Act and these regulations. Beneficial impacts are included in the definition because the Legislature intended projects having significant beneficial impacts be required to be consistent with the Delta Plan. The Legislature intended the Delta Plan to be the unified plan for resources management in the Delta, governing proposed projects related to the Delta that have significant impacts, beneficial, adverse, or both. (section 85001(c) [stating intent of the Delta Reform Act to establish an enforceable governance structure, i.e., the Council and its Delta Plan, that will provide for sustainable management of Delta resources], section 85020(h) [same].) To implement this intent, the Delta Reform Act requires the Delta Plan to promote specific characteristics of a healthy, functional Delta, for example, by promoting viable populations of native species and conditions conducive to meeting species recovery plan targets. (section 85302.) The Act also specifically calls out ongoing ecosystem projects, which often would have beneficial impacts on the coequal goal of ecosystem restoration, requiring that they include adaptive management. (section 85308(f).) These provisions of the Act would be unenforceable if the definition of significant impact did not include projects with generally beneficial impacts (such as an ecosystem restoration project increasing habitat or a water management project designed to improve both water supply reliability and ecosystem restoration) because those projects would not be required to be consistent with the Delta Plan and these regulations. Moreover, the Delta Reform Act reinforces this intent by using two phrases in different contexts. A proposed action is a covered action, requiring consistency with the Delta Plan, if, among other things, it has "a significant impact" on the coequal goals or government sponsored flood control. (section 85057.5(a)(4).) On the other hand, a covered action's consistency determination may only be appealed to the Council if the appellant alleges a "significant <u>adverse</u> impact" on the coequal goals or government sponsored flood control. (section 85225.10(a).) The Legislature is presumed to have used the different phrases to have a different meaning. (See Kleffman v. Vonage Holdings Corp. (2010) 49 Cal.4th 334, 341 [rule of statutory construction that every word in a statute must be given meaning to avoid making any word "surplusage" or meaningless].) Thus, in section 85057.5, where the Legislature omitted the limiting term "adverse," the Legislature intended a broader meaning—i.e., that positive as well as adverse impacts be

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				considered when determining whether a proposed action is a “covered action.” The Legislature’s decision to require projects with significant impacts of any kind to file detailed consistency findings, while limiting the Council’s appellate review authority to allegations of significant adverse impacts, makes sense. If consistency findings were required only when the project proponent believed that its project would adversely impact a coequal goal, the public would be denied the ability to review the consistency findings to draw their own conclusion and to file an appeal with the Council.
13. East Bay Municipal Utility District	4/22/2013	Section 5001(dd)(3) indicates that one-year transfers will not have a "significant impact" and are therefore not considered a covered action, which is consistent with Section 1729 of the Water Code. However, Section 5001(dd)(3) sunsets the exemption on 111/2017, a limitation that is not consistent with Section 1729 of the Water Code. This creates a potentially confusing regulatory requirement that could result in an agency undertaking an environmental review of a one-year transfer to satisfy the requirements for certifying consistency with the Delta Plan, even though the legislature has exempted these from the requirements for CEQA review. The last sentence of Section 5001(dd)(3), starting with "The Council contemplates ..." is simply a narrative expression of the Council's intent and is unnecessary. It does not provide clarity for the regulated community and does not meet the standard of necessity for regulatory language.	Ct, Co	With respect to the Council’s determination that single-year transfers will not have a significant impact on the coequal goals through December 31, 2016, the Council recognizes in the Delta Plan the contribution that water transfers can make to improve water supply reliability for the State. In addition, under California law, transfers that occur within the period of one year do not require environmental review under CEQA. This suggests a legislative determination that single-year transfers are unlikely to significantly harm the environment. Nevertheless, the Council is aware of the concern that these one-year water transfers may have significant impacts on the environment, including on the delta’s ecosystem. Of particular concern are single year transfers that are repeated over consecutive years, which is a process that may end up circumventing the CEQA review that is required for environmental assessment of multi-year transfers. As a result, the Council recognizes that further evaluation is needed of the potential impact that temporary transfers, either individually or when repeated over consecutive years, may have on the coequal goals and the Council is committed to undertaking this work through the Delta Plan. For the purposes of the immediate regulation, the Council has determined that temporary transfers would not have a significant impact on the coequal goals. With respect to the comment’s assertion that the regulation is inconsistent with state law, the Council disagrees. CEQA and the Act are distinct statutory schemes, operating for different purposes and imposing differing requirements on regulated entities. The Act is narrower to the extent it focuses on the Delta rather than CEQA’s statewide approach, but broader to the extent it focuses on policy objectives beyond CEQA’s objective to eliminate adverse environmental impacts. Thus, in addition to complying with CEQA and all other applicable laws, public agencies proposing covered actions must also comply with the Act and these implementing regulations. Nevertheless, the legislature acknowledges and directs some overlap between the two statutes by cross-referencing CEQA concepts as part of the definition of “covered actions” over which the Council has jurisdiction. Thus, under section 85057.5(a)(1), a plan, program, or project must be a “project” under CEQA, Public Resources Code section 21065, to be a “covered action” under the Act. While the intent and effect of the Act governing “covered actions” are distinct from CEQA’s, the Council draws from existing CEQA statute and Guidelines where the statutory schemes overlap. Thus, where the Council finds that a project exempt from CEQA would similarly not have a significant impact on the coequal goals, it makes that finding in this regulation. With respect to the comments assertion the language in 5001(dd)(3) is unnecessary, the Council disagrees. This language clarifies the regulation.

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14. East Bay Municipal Utility District	4/22/2013	5001(h)(l)-(3) - Because "coequal goals" is already defined by statute, there is no necessity to define "achieving the coequal goals." Subparagraphs (h)(l)-(3) appear to be expressing DSC's aspirations or statements of intent regarding what it hopes to promote through implementation of the Delta Plan, rather than adding any necessary clarity to the definition of "coequal goals" already set forth in the statute. This language is narrative and descriptive in nature, and as such should be confined to the Delta Plan.	O	This comment did not address any changes to the original text. The Council has the authority to define terms in the Delta Reform Act including when an action is a covered action (see MR1). The Council intended the definition of "achievement" of the coequal goals of water supply reliability and ecosystem in section 5001(h)(1)-(3) to assist project proponents in determining whether a project meets the definition of "covered action" as defined in section 5001(j)(1) of the regulations and section 85057.5 of the Act. Thus, the definition is offered to clarify whether a project has a significant impact on achieving the coequal goals pursuant to sections 5001(j)(1) and 85057.5(a)(4).
15. East Bay Municipal Utility District	4/22/2013	Section 5001(j)(3) includes prescriptive requirements applicable to state and local public agencies that should not be included within a "definition". We question the necessity for including the statement that a determination is subject to judicial review, or that the determination must be reasonable, made in good faith, and consistent with the Delta Reform Act because these are simply reiterations of the requirements of Water Code Section 85225 or processes set forth in statute.	Ne	This comment did not address any changes to the original language of section 5001(j)(3). The Council disagrees that the language is prescriptive. The language is intended to clarify an objective standard of how the determination that a plan, program or project is a "covered action" is made by a public agency.
16. East Bay Municipal Utility District	4/22/2013	Section 5001(j)(4) is "not readily understandable", as required by the OAL standards. The section is simply not comprehensible and should be deleted or clarified	Ct	This language is part of the statutory definition of a covered action, Water Code section 85057.5 (c), as passed by the Legislature as part of the 2009 Delta Reform Act.
17. East Bay Municipal Utility District	4/22/2013	5001(y) - Proposed Action Defined. It is not clear that there is any need for a separate definition of "proposed action" in Section 5001, particularly if this term is defined as meaning all plans, programs, or projects meeting the covered action screening criteria.	Ct	There was an error in the text of section 5001(y). The text has been revised to read: (y) "Proposed Action" means a plan, program, or project that meets the covered action screening criteria listed in section 5001(j)(1)(A) through ~~(E)(~~(D)…" The adopted regulation provides criteria to identify covered actions. In order to describe the process within the regulation, there is a need to describe things that might be covered actions but have not yet been determined to be covered by a Delta Plan policy. Council staff considered using the term "potential covered actions" but chose instead to call them "proposed actions".
18. East Bay Municipal Utility District	4/22/2013	Section 5001(dd)(4) creates a confusing, circular, and illogical definition. Section 5001(dd) defines a "significant impact" and includes subsections (1)-(4) that are defined NOT to have a significant impact. However, subsection (4) then refers back to (dd) for "unusual circumstance indicating a reasonable possibility that the project will have a significant impact... as further defined by Section 5001(dd) of this Chapter." In simple terms, the definition says the following items (1)-(4) are exempt, unless they aren't. Furthermore, the terms "unusual circumstance" and "reasonable possibility" are vague. This is unacceptable regulatory language and does not meet the standards of necessity or clarity.	Ne, Ct	Section 5001(dd)(4) is not circular. The Council determined as a general matter that projects that are exempt from CEQA are not likely to have a significant impact on the coequal goals. Thus, this regulation presumes those CEQA-exempt projects will not have a significant impact on the coequal goals for purposes of 85057.5(a)(4) and 5001(j)(1), unless there are unusual circumstances indicating otherwise. This approach replicates the unusual circumstances exception to categorical exemptions in CEQA Guideline 15300.2(c), which is likewise not circular.
19. East Bay Municipal Utility District	4/22/2013	The enhanced definition of "coequal goals," which is defined in Water Code Section 85054, includes prescriptive mandates and continues for more than a page, with three "further defined" phrases which have their own separate definitions in Section 5001(h). The second sentence of the definition uses prescriptive regulatory language to express how the goal "shall be achieved" and then the definition goes on to define "achievement," including language establishing prescriptive requirements applicable to "regions that use water from the Delta watershed" and to undefined entities. While the revisions have sought to clear up some of the ambiguity by stating that "achievement" is defined for purposes of determining whether a plan, program, or project meets the definition of a "covered action," this structure of mixing definitions and regulatory language is confusing to the potentially regulated community, and in so doing does not meet a reasonable standard of clarity	Ct	This comment did not address any changes to the original text. Council intended the definition of "achievement" of the coequal goals of water supply reliability and ecosystem in section 5001(h) to assist project proponents in determining whether a project meets the definition of "covered action" as defined in section 5001 of the regulations and section 85057.5 of the Act. Thus, the definition is offered to clarify whether a project has a significant impact on achieving the coequal goals pursuant to sections 5001(h) and 85057.5(a)(4). The definitions are not prescriptive because they are not tied to any substantive provision of the regulations. They do not mandate any person or entity undertake particular action, nor is a covered action required to be consistent with them. Rather, they simply define what "achieving" the coequal goals means for the purpose of determining whether a project has a significant impact on achieving those goals and, therefore, whether a project is a "covered action" and

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				must be consistent with the regulatory policies in this chapter.
20. East Bay Municipal Utility District	4/22/2013	Section 5001(j) - Covered action defined. Similar to the enhanced definition of "coequal goals," this enhancement of the definition of "covered action," which is already defined in Water Code Section 85057.5, sets forth substantive regulatory requirements that are unclear.	Ct	The Council is not changing the definition of a covered action. The Council is clarifying the definition by including additional language that requires the determination whether a proposed plan, program, or project is a covered action be reasonable and made in good faith
21. Friends of the River	4/22/2013	The following deletions and new Regulations Section are proposed to allow the Council to adopt a Delta Plan and Regulations without violating CEQA by calling for new conveyance— the Delta Water Tunnels. Our suggested language is as follows: Delete from § 5001(h)(1)(A) the phrase "and improve Delta conveyance and operations."	O	As described above, the Delta Reform Act requires the Delta Plan to promote options for new and improved infrastructure relating to, among other things, the water conveyance in the Delta. Water Code section 85304. Therefore, it is appropriate for the definition of the coequal goals to include the statements that providing a more reliable water supply for California will include "promoting, improving, investing in, and implementing projects and programs that . . . improve Delta conveyance and operations" and that Water exported from the Delta will more closely match water supplies available to be exported . . . by improving Delta conveyance." Regulation s 5001(h)(1)(A). Regarding the Council's approach to the CEQA analysis of the proposed, BDCP, please see the response to General Comments No. 13.
22. Friends of the River	4/22/2013	Section 5001(h)(1)(A) and (C) - The Delta Water Tunnels-- the proposed project set forth in the Bay Delta Conservation Plan (BDCP)—are the understood way of carrying out these activities according to the California Department of Water Resources. Moreover, these terms are used in the Regulations' definitions of the achieving of the co-coequal goals established by the Delta Reform Act. That is an unlawful effort to make the new upstream conveyance—the Delta Water Tunnels—the only BDCP alternative that would be consistent with the Delta Reform Act, the Delta Plan, and the Delta Plan Regulations.	O, S	The regulations regarding new conveyance are not equivalent to calling for or requiring the construction of the current draft BDCP proposal, nor are such regulations inappropriate. Firstly, section 5001(h), to which the comment refers, defines "coequal goals" for the purpose of the Regulation. A definition does not require or direct any action, but rather is used to clarify the term for other sections of the Regulation. Secondly, the language of section 5001(h) is consistent with the Delta Reform Act, which requires that the Delta Plan address improved conveyance (see Water Code sections 85020(f), 85004(b) and 85304). Finally, the current draft BDCP proposal has not been adopted, but is currently under review by State and Federal agencies and other interested parties. The Department of Fish & Wildlife is tasked with determining whether BDCP meets the statutory section called out by the comment. If the Department so determines, the Council must incorporate BDCP into the Delta Plan. (Water Code section 85320(e).) The Department's determination may be appealed to the Council (Water Code section 85320(e)), pursuant to the Council's adopted appellate procedures. The Council will review any appeal to determine whether BDCP meets the requirements of section 85320. For additional information relating the Council's authority as it relates to BDCP, see Appendix ~~G~~A to the Delta Plan. In conclusion, BDCP is not currently part of the Delta Plan. Should the BDCP be approved and become part of the Delta Plan, the Council will consider revising the regulations as appropriate.
23. Friends of the River	4/22/2013	Delete § 5001(h)(1)(C) in its entirety including "improving conveyance in the Delta" and "to optimize diversions in wet years when more water is available."	O	Regarding the inclusion of improved conveyance in the definition of "coequal goals," please refer to comment 21 above. Regarding the EIR's approach to the BDCP and its relationship to the Delta Plan, Please refer to response to comment 13 in General Comments.
24. Friends of the River	4/22/2013	The recommended modifications to the text of the Regulations have done absolutely nothing to cure any of the many extremely serious CEQA violations that were brought to the Council's attention in the above referenced comment letters. In a nutshell, the Delta Plan and Regulations are running interference for—serving as a blocking back for—the massive Delta Water Tunnels by calling for improved, meaning new upstream conveyance. That violates CEQA because he environmental documents prepared in the Delta Plan and Regulations process have failed to even disclose that the Delta Water Tunnels are the true project, let alone evaluate the environmental impacts of developing and operating the Tunnels.	Co, S	Please refer to response to comment 13 in General Comments.

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25. Friends of the River	4/22/2013	Recent "Red Flag" issues raised by the National Marine Fisheries Service ((NMFS) and the U.S. Fish and Wildlife Service concerning the Delta Water Tunnels are many, and include as just one example "potential extirpation of mainstream Sacramento River populations of winter- run and spring-run Chinook salmon over the term of the permit. . . ." (NMFS Progress Assessment and Remaining Issues Regarding the Administrative Draft BDCP Document, p. 12, April 4, 2013). Those species of salmon are listed endangered species under the Endangered Species Act, 16 U.S.C. § 1531 et seq. The potential impact of a project on endangered species is per se significant under CEQA. 14 Cal. Code Regs (CEQA Regulations) § 15065(a)(1). Recirculation of environmental documents is required when new information is provided showing substantial impacts on the environment including impacts on endangered species of salmon as a result of taking significant quantities of the water they live in. Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 447-449; CEQA Regulations § 15088.5(a). A copy of the NMFS document setting forth these impacts is attached to the original of this comment letter personally delivered to the Council for consideration by the Council and inclusion in the Record. "Potential extirpation" of the salmon as a result of the Delta Water Tunnels is one of many significant environmental impacts that the Delta Plan Regulations CEQA process has failed to disclose let alone evaluate. Preparation and recirculation of a new Draft EIR are required here.	Co, S	Section 4 of the EIR analyzes the Delta Plan's impacts on biological resources, including special status species like Sacramento River winter run and spring run Chinook salmon, and determines that such impacts would be significant Recirculated Draft PEIR at p. ES-18. Regarding the EIR's approach to the BDCP and its relationship to the Delta Plan, Please refer to response to comment 13 in General Comments.
26. Friends of the River	4/22/2013	The entire Delta Plan and Regulations CEQA process has failed to provide and disclose the CEQA required "accurate, stable and finite description" of the true project. (For details see EWC January 14, 2013 comment letter pp. 43- 46). The true project has been and is the massive Delta Water Tunnels project as announced by the Resources Agency in June 2012 and the Governor in July 2012. The true project has become even more abundantly clear now that the State is releasing the BDCP Plan chapters including Chapter 4 describing the Delta Water Tunnels. A copy of Chapter 4 released March 14. 2013 is attached to the original of these comments personally delivered to the Council for the information of the Council and for the Record. [...] The failure to provide an accurate project description and evaluate the environmental impacts of the true project—the Delta Water Tunnels--also violates CEQA by unlawfully segmenting and postponing environmental review from the adoption of the Delta Plan and Regulations calling for improved, meaning new upstream conveyance. (For details see FOR comment letter, January 14, 2013).	Co, S	Regarding the EIR's approach to the BDCP and its relationship to the Delta Plan, Please refer to response to comment 13 in General Comments.
27. Friends of the River	4/22/2013	There has also been complete failure to identify and properly consider a reasonable range of alternatives to the Delta Water Tunnels, including the EWC alternative (alternative 2) calling for reduced exports, no new upstream conveyance, and emphasis on water conservation and recycling to efficiently and effectively meet water supply needs. (For details see EWC January 14, 2013 comment letter pp. 39-67). No other alternative, including the EWC alternative has been compared to the true project— the Delta Water Tunnels. The RPDEIR concluded that alternative 2 is slightly environmentally inferior to the proposed project. The NMFS, however, finds that the proposed project involves the "potential extirpation" of two populations of Chinook salmon. Consequently, the EWC alternative is environmentally superior to the proposed project. The failure to disclose and evaluate this and other significant adverse impacts of the proposed project and the failure to conduct reasoned, unbiased analysis of alternatives constitutes failure to proceed in a manner required by law under CEQA.	Co, S	Regarding the EIR's approach to the BDCP and its relationship to the Delta Plan, please refer to response to comment 13 in General Comments. Regarding the selection and consideration of the EIR's range of alternatives and the determination of the environmentally superior alternative, please refer to Delta Plan Final PEIR Master Response 3. Because BDCP is not a part of the Delta Plan, as described in response to comment 13 in General Comments, the EIR's range of alternatives does not include alternatives to the proposed BDCP. Moreover, because the Delta Reform Act requires the Delta Plan to "promote options for new and improved infrastructure relating to the water conveyance in the Delta" (Water Code section 85304), any alternative that did not include such promotion would be inherently legally infeasible.
28. Sacramento County	4/22/2013	Previous comment: Section 5003(b)(2)(D)(ii) needs to define the term "small-scale habitat restoration projects." Current comment: Section 5001, subdivision (dd), paragraph (4), subparagraph (BJ of the April 4th revisions (page 7) now defines "small scale" relying on CEQA Guidelines section 15333.	O	Comment noted, no response required.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5001

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
29. Sacramento County	4/22/2013	Previous comment: With respect to Section 5003, the term "covered action" is already defined in state law. The draft regulatory definition is duplicative of Water Code section 85057.5. Current comment: Section 5003 was deleted from the April 4th revisions. A shorter version of the covered action definition is now included in Section 5001(j) (pages 3 and 4), consistent with Water Code section 85057.5.	O	Comment noted, no response required.
30. Sacramento County	4/22/2013	Previous comment: To the extent that the draft regulations are utilizing CEQA standards and definitions, those regulatory provisions should be cross-referenced. For example, Section 5001(k) defines the term "feasible." A definition of that term already exists in the CEQA Guidelines (14 CCR§ 15364). As such, the definition is duplicative. Current comment: The April 4th revisions (page 4) are absent changes to Section 5001(p) that specifically address our finding.	Du	This comment did not address any changes to the original text. CEQA and the Act are distinct statutory schemes, operating for different purposes and imposing differing requirements on regulated entities. The Act is narrower to the extent it focuses on the Delta rather than CEQA's statewide approach, but broader to the extent it focuses on policy objectives beyond CEQA's objective to eliminate adverse environmental impacts. While the intent and effect of the Act governing "covered actions" are distinct from CEQA's, the Council draws from existing law such as CEQA to the extent those established standards fit with the Council's implementation of the Delta Reform Act's objectives. Thus, as the comment notes, the Council defines "feasible" to have the same meaning for purposes of its regulations as defined by the CEQA Guidelines. Nevertheless, the definition is necessary and not duplicative because without it, the term's meaning with respect to its use in these regulations would not be clear. That a term or phrase appears elsewhere in statute or regulation does not determine the meaning of the same term or phrase used in a different context for the Council's regulations.
31. Sacramento County	4/22/2013	Previous comment: In Section 5001(t) and (u), the definitions of "urban area" and "urbanizing area" are consistent with Government Code 65507G) and the terminology used in the 2012 Central Valley Protection Plan (CVFPP), it conflicts with the definition of "urban" set forth in the Delta Protection Commission's Land Use Resource Management Plan (LURMP). This inconsistency needs to be resolved in order avoid implementation issues when applying the new development and flood protection regulations to the unincorporated (legacy) Delta communities. Current comment: Definitions of "urban area" and urbanizing area" are now found in Sections 5001(ee) and 5001(ff) of the April 4th revisions (page 7). Given that the term "urban" was deleted from Sections 5010 and 5013, the Delta Plan's regulations no longer need to define "urban area" or "urbanizing area", and therefore should be deleted.	Co	The terms "urban area" and "urbanizing area" are utilized in section 5012 and therefore the definitions for these terms are needed in section 5001.
32. Sacramento County	4/22/2013	Previous comment: The definition of "coequal goals" in Section 5001(e) is not actually a definition of those goals. It does no more than reiterate and duplicate Public Resources Code section 85054. The so-called definition relates exclusively to the conceptual manner of achieving the co-equal goals. However, there is no linkage to actual implementation of the coequal goals. Furthermore, the strategies identified as protecting and enhancing the values of the Delta are conceptual and undefined. For example, in Section 5001(e) (3), what is meant by "encourage recreation and tourism?" What performance measure, standard or criteria is being adopted? Current comment: The coequal goals definition is now cited in Section 5001 (h) of the April 4th revisions (page 2). However, the revised language does not address our finding regarding expanding the coequal goals definition, and further this regulation is absent a much needed performance standard or clarification of the term "encourage"	Ct	The Council has the authority to define terms in the Delta Reform Act including when an action is a covered action (see MR1). The Delta Reform Act (Water Code section 85054) requires coequal goals "...be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of then Delta as an evolving place." 5001(h) provides specificity to this statutory requirement The definitions provided in section 5001(h) do not establish prescriptive requirements, but rather define what actions will qualify as a covered action because they have a "significant impact" on "achieving the coequal goal of providing a more reliable water supply for California."
33. Sacramento County	4/22/2013	Previous comment: In Section 5001(g), the statutory citation should be to the Section 12220 of the Water Code, not the Public Resources Code. Current comment Revised Section 5001 (k) (page 4 of the April 4th revisions) still cites Public Resources Code, not Water Code. Interestingly, the correct cite was included in the March 18, 20013 redline version	Co	The Council agrees. The reference will be corrected.

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
		of the regulations, but not carried over to the April 4th revisions.		
34. Sacramento County	4/22/2013	Previous comment: The definition of "encroachment" in Section 5001(i) (and related provisions of the draft regulations) is overly broad, duplicative and unnecessary. It is unnecessary because State law already vests the Central Valley Flood Protection Board (and local governments, under the Cobey-Alquist Act) with comprehensive regulatory authority to address encroachments in floodplains. The definition is also overbroad because it includes literally every activity that could occur in a floodplain. Conceivably even routine agricultural practices such as planting crops, removing invasive weeds and installing wells would constitute encroachments under this definition. Current Comment: The April 4th revisions are absent changes to Section 5001 (n) (page 4) that specifically address our finding.	Ct	Comment Noted.
35. Sacramento County	4/22/2013	Previous comment: The definition of "floodway" in Section 5001(1) is duplicative of other provisions of state law and, therefore, unnecessary. For example, regulations adopted by the Central Valley Flood Protection Board define both "designated floodway" and "floodway." See 23 Cal.Code Regs. §4. A parallel definition of this term is unnecessary, as is a duplicative regulatory process relating to encroachments and other activities in floodways. Current comment: Floodway is still defined/referenced in Section 5001 (t) of the April 4th revisions (page 5).	Du	Comment Noted.
36. Sacramento, City of	4/22/2013	The definition of "significant impact" in Section 5001(dd) should be brought into consistency with the definition found in CEQA Guidelines Section 15382. This is called for under Water Code Sections 85031 and 85032, as well as making good common sense.	Co	The Act adds a layer of regulation, separate from CEQA's requirements, to actions that qualify as "covered actions." The two statutes provide for different review for different purposes—one requiring review of projects proposed throughout the state for significant adverse environmental impacts and mitigation of those impacts, the other requiring consistency of projects proposed in the Delta with the coequal goals. Thus, in addition to complying with CEQA and all other applicable laws, public agencies proposing covered actions must also comply with the Act and implementing regulations, which have requirements separate from CEQA. The definition of "significant impact" defines the use of the phrase with respect to the Act and its implementing regulations, and it does not alter or affect the environmental review framework under CEQA or a project proponent's obligations under that statute in any way. Accordingly, the regulation is consistent with sections 85031 and 85032. For the same reasons, the regulation's definition of substantial impact need not be the same as CEQA's definition and using the exact same definition does not make sense in light of the differing contexts (see response discussing the inclusion of beneficial impacts). That a term or phrase appears elsewhere in another statute or regulation does not determine the meaning of the same term or phrase used in a different context. The Act's use of phrases, such as "significant impact on the coequal goals," that have some similarities to phrases used in CEQA and its Guidelines, such as "significant effect on the environment," does not mean the phrases have the same meaning in their distinct contexts. Nevertheless, to the extent the similar phrases' intent and context overlaps, it is appropriate and reasonable for the Council to draw from concepts used in other statutes and regulations when defining phrases used in the Act and its own regulations. Using terminology from other statutes and regulations has the advantage of being readily understood by the regulated community because the terms and their meaning are well-established. The Council uses concepts and definitions from existing law to the extent such definitions are appropriate in the context of its regulations. Here, the Council uses concepts from CEQA and the CEQA guidelines, specifically defining "significant impact" to mean "substantial" impact (similar to Public Resources Code

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
				section 21068) and to include cumulative impacts of closely-related past, present, and reasonably foreseeable future projects (as in Public Resources Code section 21083(b)(2) and CEQA Guideline 15355), to define "significant impact" on the coequal goals for purposes of the Act and these regulations.
37. Sacramento, City of	4/22/2013	Section 5001(dd)(3) initially removes one year transfers from the definition of "covered action", then sunsets that removal arbitrarily on January 1, 2017. This conflicts with Water Code Section 1729, and the statement that one year transfers will not have a significant impact. The Legislature's exemption of such transfers from CEQA should be honored.	Co	With respect to the Council's determination that single-year transfers will not have a significant impact on the coequal goals through December 31, 2016, the Council recognizes in the Delta Plan the contribution that water transfers can make to improve water supply reliability for the State. In addition, under California law, transfers that occur within the period of one year do not require environmental review under CEQA. This suggests a legislative determination that single-year transfers are unlikely to significantly harm the environment. Nevertheless, the Council is aware of the concern that these one-year water transfers may have significant impacts on the environment, including on the delta's ecosystem. Of particular concern are single year transfers that are repeated over consecutive years, which is a process that may end up circumventing the CEQA review that is required for environmental assessment of multi-year transfers. As a result, the Council recognizes that further evaluation is needed of the potential impact that temporary transfers, either individually or when repeated over consecutive years, may have on the coequal goals and the Council is committed to undertaking this work through the Delta Plan. For the purposes of the immediate regulation, the Council has determined that temporary transfers would not have a significant impact on the coequal goals. With respect to the comment's assertion that the regulation is inconsistent with state law, the Council disagrees. CEQA and the Act are distinct statutory schemes, operating for different purposes and imposing differing requirements on regulated entities. The Act is narrower to the extent it focuses on the Delta rather than CEQA's statewide approach, but broader to the extent it focuses on policy objectives beyond CEQA's objective to eliminate adverse environmental impacts. Thus, in addition to complying with CEQA and all other applicable laws, public agencies proposing covered actions must also comply with the Act and these implementing regulations. Nevertheless, the legislature acknowledges and directs some overlap between the two statutes by cross-referencing CEQA concepts as part of the definition of "covered actions" over which the Council has jurisdiction. Thus, under section 85057.5(a)(1), a plan, program, or project must be a "project" under CEQA, Public Resources Code section 21065, to be a "covered action" under the Act. While the intent and effect of the Act governing "covered actions" are distinct from CEQA's, the Council draws from existing CEQA statute and Guidelines where the statutory schemes overlap. Thus, where the Council finds that a project exempt from CEQA would similarly not have a significant impact on the coequal goals, it makes that finding in this regulation.
38. Sacramento, City of	4/22/2013	Some provisions continue to suffer from inconsistency with the APA standards regarding necessity, nonduplication, and consistency (see, e.g., Government Code Sections 11349(a) and 11349(f).) One example of this is the statement in Section 5001(dd)(3) of what the "Council contemplates" will happen. A narrative description of what the Council anticipates may be appropriate in the Plan, but does not belong in APA regulations.	Ne	The Council disagrees with this comment, and believes the referenced language provides clarification.
39. Sacramento, City of	4/22/2013	5001(dd)(3) - As another example, some definitions continue to exhibit a mixture of definitional language and lengthy regulatory provisions that makes it difficult to interpret where the definition ends and the regulatory requirements begin, as noted in prior comments.	Ct	The Council disagrees with this comment, and believes the referenced language provides clarification.

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
40. San Joaquin Tributaries Authority	4/22/2013	Section 5001(bb) states that restoration actions may include "restoring more natural Delta flows." This conflicts with language in the Delta Plan. The Delta Plan defines natural flow as that which occurred before 1849 in a pattern shaped by the natural topography of creeks, rivers, natural levees, and valley floodplains. The Delta Plan further states that because these topographical landscape patterns "will largely not be returned to their former state," restoring natural flows is impossible. (Delta Plan (Nov. 2012), at 141.) Instead, the Delta Plan correctly references the concept of functional flow throughout the Plan. The language in the regulatory definition of Section 5001(bb) conflicts with the Delta Plan and therefore violates the APA clarity standard because the regulation is not easily understood by the persons it directly affects. (Gov. Code, § 11349(c).) The DSC should change the language to "functional flow" to remain consistent with the Delta Plan.	Ct	The term "restoring more natural Delta flows" in 5001(bb) is one of several used to illustrate the definition of restoration. The discussion of "more natural functional flows" in the Delta Plan does not present a conflict with this regulatory definition. The Delta Plan acknowledges that Delta flows cannot and will not be returned to their pre-1849 state. See, e.g., Proposed Final Delta Plan at p. 145. Therefore, the Delta Plan and the regulations do not call for the establishment of "natural flows, but rather encourage "more natural flows" and "more natural functional flows." See, e.g., Delta Plan Recommendation CEG Delta Plan ER R2. Proposed Final Delta Plan at 144, Regulation section 5001(bb) (emphasis added). This indicates that the Delta Plan encourages actions that will provide flows that are more similar to pre-1849 flows than are current flows, but does not set the unrealistic goal of emulating pre-1849 flows precisely.
41. San Joaquin Tributaries Authority	4/22/2013	The Regulations exempt certain categories of projects from a determination of "significant impact" for the purpose of meeting the definition of a covered action. Included in those exemptions are temporary water transfers of up to one year. (Regulations, § 5001(dd)(3).) However, this exemption is scheduled to terminate as of January 1, 2017, unless the DSC extends the exemption prior to that date. The exemption should not be allowed to sunset. The proposed sunset provision creates uncertainty for transferors who have an immediate need to undertake temporary transfers. Also, the sunset provision is inconsistent with the Legislature's determination that such transfers should be exempt from CEQA since the Water Code provides the State Water Board with the opportunity to protect against injury to the environment and other legal water users. (Water Code, § 1725, 1729.) Allowing the sunset provision would create uncertainty and contradict other Regulations. (Gov. Code, § 11349(c) and (d).) The exemption that follows the temporary transfer exemption states that "other projects exempted from CEQA" would also be exempt from DSC regulation. (Regulations, § 5001(dd)(4).) Short-term transfers are projects exempt from CEQA. (See, e.g., 14 CCR §§ 15061(b)(3), 15269, and 15300, et seq.) Therefore, the repeal of the exemption under section 5001(dd)(3) would directly contradict section 5001(dd)(4). (Gov. Code, § 11349(c).) In addition, the repeal of the exemption under section 5001(dd)(3) is contrary to public policy, as declared by Water Code section 475. (Gov. Code, § 11349.1(a)(4).)	Co	With respect to the Council's determination that single-year transfers will not have a significant impact on the coequal goals through December 31, 2016, the Council recognizes in the Delta Plan the contribution that water transfers can make to improve water supply reliability for the State. In addition, under California law, transfers that occur within the period of one year do not require environmental review under CEQA. This suggests a legislative determination that single-year transfers are unlikely to significantly harm the environment. Nevertheless, the Council is aware of the concern that these one-year water transfers may have significant impacts on the environment, including on the delta's ecosystem. Of particular concern are single year transfers that are repeated over consecutive years, which is a process that may end up circumventing the CEQA review that is required for environmental assessment of multi-year transfers. As a result, the Council recognizes that further evaluation is needed of the potential impact that temporary transfers, either individually or when repeated over consecutive years, may have on the coequal goals and the Council is committed to undertaking this work through the Delta Plan. For the purposes of the immediate regulation, the Council has determined that temporary transfers would not have a significant impact on the coequal goals. With respect to the comment's assertion that the regulation is inconsistent with state law, the Council disagrees. CEQA and the Act are distinct statutory schemes, operating for different purposes and imposing differing requirements on regulated entities. The Act is narrower to the extent it focuses on the Delta rather than CEQA's statewide approach, but broader to the extent it focuses on policy objectives beyond CEQA's objective to eliminate adverse environmental impacts. Thus, in addition to complying with CEQA and all other applicable laws, public agencies proposing covered actions must also comply with the Act and these implementing regulations. Nevertheless, the legislature acknowledges and directs some overlap between the two statutes by cross-referencing CEQA concepts as part of the definition of "covered actions" over which the Council has jurisdiction. Thus, under section 85057.5(a)(1), a plan, program, or project must be a "project" under CEQA, Public Resources Code section 21065, to be a "covered action" under the Act. While the intent and effect of the Act governing "covered actions" are distinct from CEQA's, the Council draws from existing CEQA statute and Guidelines where the statutory schemes overlap. Thus, where the Council finds that a project exempt from CEQA would similarly not have a significant impact on the coequal goals, it makes that finding in this regulation. The Council disagrees that its determination that single-year transfers will not have a significant impact on the coequal goals through December 31, 2016, contradicts section 5001(dd)(4).

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5001

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
42. San Joaquin Tributaries Authority	4/22/2013	Section 5001(k) - Article 1, section 5001 defines many terms which do not comply with the clarity standard; the DSC must therefore clarify these definitions before adopting the Regulations. The Regulations define Delta as that which is "defined in Section 12220 of the Public Resources Code." Section 12220 of the Public Resources Code includes definitions for the California Forest Legacy Program Act of 2007; nowhere does it define "Delta." Therefore, section 5001(k) of the Regulations does not meet the APA clarity standard because it uses incorrect language and is not easily understood by directly affected persons. (Gov. Code, § 11349(c), 1 CCR § 16(a)(2) and (5).)	Ct	Section 5001(k) incorrectly references the Public Resources Code. The correct reference should be section 12220 of the Water Code. This has been corrected.
43. San Joaquin Tributaries Authority	4/22/2013	Section 5001(v) includes several requirements for non-native invasive species that are unnecessary, such as "rapid" reproduction and "threatening" to native species. The definition should be much more straightforward and include all species not native to the Delta estuary and introduced into the system by human placement and other non-natural means.	Ct	5001(v) is derived from the definition of nonnative invasive species used by DFW to describe nonnative invasive species and provides so consistency with many widely used descriptions of these animal and vegetative pests, improving the clarity of the regulation.
44. San Joaquin Tributaries Authority	4/22/2013	The Regulations are not necessary, unclear and duplicative, thereby violating the APA regulatory standards. (Gov. Code, § 11349.1(a)(1), (3) and (6).) The record does not contain substantial evidence which reflects a need for "proposed action" to have its own regulatory definition. (Gov. Code, § 11349(a).) Therefore, a separate definition for a "proposed action" is not necessary under the APA. Further, this regulation is duplicative because it serves the same purpose as another regulation. (Gov. Code, § 11349(f).) The definition of a proposed action has the same "screening criteria" as a covered action and both actions are subject to compliance with the Regulations. The Regulations offer no distinction between the definitions of a proposed action and a covered action, defined in section 5001(j). Therefore, separately providing proposed action with its own regulatory definition violates the APA requirement that regulations are non-duplicative. (Gov. Code, § 11349.1(a)(6).) Additionally, duplicating the covered action definition also renders the definition of a proposed action unclear and in violation of the APA clarity standard. This clarity issue did not exist in the original regulatory package the DSC released. There, a proposed action was defined as an action that met only the first four of the covered action screening criteria, but not the fifth. This was non-duplicative and offered more clarity as required by the APA standards.	Ct, Du	There was an error in the text of section 5001(y). The text has been revised to read: (y) "Proposed Action" means a plan, program, or project that meets the covered action screening criteria listed in section 5001(j)(1)(A) through ~~(E)~~(D)…"
45. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Section 5001(dd) – "Significant Impact" is still defined as a substantial negative or positive impact on the achievement of one or both of the coequal goals. As demonstrated in our prior comments, the inclusion of projects that will have a significant positive impact on the achievement of the coequal goals is unnecessary, but more importantly, it exceeds the Council's statutory authority. 7 State policy is to further the coequal goals by avoiding the carrying out of actions that are inconsistent with, i.e., adverse to their achievement, not by adding another regulatory obstacle to projects that significantly advance them. The proposed definition also lacks clarity and lacks consistency. Specifically, for purposes of the California Environmental Quality Act ("CEQA"), "significant impact" and "significant effect" are defined as "substantial, or potentially substantial adverse change in any of the physical conditions within the area . . .." (14 Cal. Code Regs., § 15382, underline added; see also, id, § 15358 ["effects" and "impacts" synonymous].) The conflict with CEQA's definition will likely lead to confusion in the regulated community, especially given the explicit references to CEQA in Section 5001(dd). The Council must exclude from the definition of significant impacts positive impacts. 7. Public Water Agencies' comment letter dated January 14, 2013 at pp. 16-17, 19.	A, Ne, Ct, Co	The Council has the authority to adopt its definition of "significant impact" on the coequal goals and this definition is necessary, clear, and consistent with CEQA. The Act adds a layer of regulation, separate from CEQA's requirements, to actions that qualify as "covered actions." The two statutes provide for different review for different purposes—one requiring review of projects proposed throughout the state for significant adverse environmental impacts and mitigation of those impacts, the other requiring consistency of projects proposed in the Delta with the coequal goals. Thus, in addition to complying with CEQA and all other applicable laws, public agencies proposing covered actions must also comply with the Act and implementing regulations, which have requirements separate from CEQA. The definition of "significant impact" defines the use of the phrase with respect to the Act and its implementing regulations, and it does not alter or affect the environmental review framework under CEQA or a project proponent's obligations under that statute in any way. For the same reasons, the regulation's definition of significant impact need not be the same as CEQA's definition and using the exact same definition does not make sense in light of the differing contexts (for example, see discussion below regarding beneficial impacts). That a term or phrase appears elsewhere in another statute or regulation does not determine the meaning of the same term or phrase used in a different context. The Act's use of phrases, such as "significant impact on the coequal goals," that have some similarities to phrases used in CEQA

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				and its Guidelines, such as "significant effect on the environment," does not mean the phrases have the same meaning in their distinct contexts. Nevertheless, to the extent the similar phrases' intent and context overlaps, it is appropriate and reasonable for the Council to draw from concepts used in other statutes and regulations when defining phrases used in the Act and its own regulations. Using terminology from other statutes and regulations has the advantage of being readily understood by the regulated community because the terms and their meaning are well-established. The Council uses concepts and definitions from existing law to the extent such definitions are appropriate in the context of its regulations. Here, the Council uses concepts from CEQA and the CEQA guidelines, specifically defining "significant impact" to mean "substantial" impact (similar to Public Resources Code section 21068) and to include cumulative impacts of closely-related past, present, and reasonably foreseeable future projects (as in Public Resources Code section 21083(b)(2) and CEQA Guideline 15355), to define "significant impact" on the coequal goals for purposes of the Act and these regulations. Beneficial impacts on the coequal goals are included in the definition because the Legislature intended projects having significant beneficial impacts be required to be consistent with the Delta Plan. The Legislature intended the Delta Plan to be the unified plan for resources management in the Delta, governing proposed projects related to the Delta that have significant impacts, beneficial, adverse, or both. (section 85001(c) [stating intent of the Delta Reform Act to establish an enforceable governance structure, i.e., the Council and its Delta Plan, that will provide for sustainable management of Delta resources], section 85020(h) [same].) To implement this intent, the Delta Reform Act requires the Delta Plan to promote specific characteristics of a healthy, functional Delta, for example, by promoting viable populations of native species and conditions conducive to meeting species recovery plan targets. (section 85302.) The Act also specifically calls out ongoing ecosystem projects, which often would have beneficial impacts on the coequal goal of ecosystem restoration, requiring that they include adaptive management. (section 85308(f).) These provisions of the Act would be unenforceable if the definition of significant impact did not include projects with generally beneficial impacts (such as an ecosystem restoration project increasing habitat or a water management project designed to improve both water supply reliability and ecosystem restoration) because those projects would not be required to be consistent with the Delta Plan and these regulations.
46. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Section 5001(f) – The definition of "best available science" has undergone a major revision. As revised, the definition now mandates that "[b]est available science shall be consistent with the guidelines and criteria found in Appendix 1A." By doing so, it has elevated the "guidelines" into a regulatory definition. 4 Such a major revision to a draft regulation requires a minimum of 45-day notice and comment. (Govt. Code, §§ 11346.4(a), 11346.8(c).) The Council should remove the guidelines and criteria as an appendix to the Proposed Regulations. 4. In addition, as demonstrated in our detailed comments on Appendix 1A below, the criteria themselves include unlawful mandates and misrepresent key aspects of what may constitute best available science.	A, Nr	The information provided in the previous definition was drawn from Appendix 1A, the previous definition explicitly referenced Appendix 1A, and Appendix 1A was part of the previously proposed regulation. Therefore the change to the definition of best available science was "sufficiently related" to the previous language and a 15-day comment period was appropriate. (Government Code section 11346.8(c).)
47. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Section 5001(h) – This subdivision continues to incorporate substantive mandates regarding the achievement of the coequal goals into a regulatory definition. In addition, as explained in our prior comments, 5 these mandates exceed the Council's specific statutory authority. 6 The unlawful provisions must be removed. 5 Public Water Agencies' comment letter dated January 14, 2013 at p. 15. 6 Ibid.	A	The comment does not explain how section 5001(h) exceeds the Council's authority, and the Council disagrees that the language in this paragraph exceeds its authority. The definition in 5001(h) is included to define what actions will qualify as covered actions because they will have a significant impact on the coequal goals. The Council has authority to define terms and phrases used by the Delta Reform Act and its regulations. For responses to previous comments, see the comment matrix responding to those comments.

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
48. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Section 5001(dd)(3) – The Proposed Regulations should except from covered actions water transfers, particularly those of duration of up to one year. Water transfers occur regularly in connection with the operations of the State Water Project ("SWP") and Central Valley Project ("CVP"), and are therefore "routine operations" of the SWP and CVP that are expressly excluded from the statutory definition of "covered action" in Water Code section 85057. 5, subdivision (b)(2). Temporary water transfers are exempted from CEQA, (Water Code, § 1729; 14 Cal. Code Regs. § 15282, subd. (u)), and should likewise be excluded from the definition of "covered action" to ensure clarity and consistency among laws. 8 Exclusion of water transfers from covered actions is important to further the co-equal goals. Transfers are an important means to meet water needs for both consumptive and in-stream beneficial uses. However, given the purpose of the transfer and their duration, time is often, if not always, of the essence. If not exempted from the definition of "covered actions," delays caused by challenges to either determinations that given transfers will not have significant impacts on the achievement of the coequal goals, or consistency certifications for such transfers, would likely impair, if not preclude, such transfers (a result intended to be avoided by exempting temporary transfers from CEQA). The Proposed Regulation would have a chilling effect on the use of this important water management tool, and should be rejected because it is antithetical to the coequal goal of improved water supply reliability. 8 See also, Public Water Agencies' comment letter dated January 14, 2013 at pp. 17. Notably, none of the code section references with regard to the entirety of section 5001 provides authority for application of the consistency certification regulatory scheme to CEQA exempted activities.	Ct, Co	See MR 11 for a response to the comments relating to the propriety of the Council's finding that single year water transfers will not have a significant impact on the coequal goals and the sunset provision. It is the responsibility of the public agency proposing a project, plan, or program to determine whether its action is a "covered action" under Water Code section 85057.5. Water Code section 85057.5(b)(2) exempts "routine maintenance and operation of the State Water Project or the federal Central Valley Project." However, it is the agency proposing the action's responsibility to determine whether an action is a covered action pursuant to section 85057.5 and these regulations, subject to judicial review. Nevertheless, the Council disagrees that one-year temporary transfers are excluded from the definition of a covered action because they are "routine operations" of the SWP and CVP. By their very nature, one-year transfers cannot be routine because the participating water suppliers, the amount of the transfer, when the transfer will occur, or even the need for a transfer cannot anticipated in advance with any certainty.
49. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	[The] modified Proposed Regulations now create an inconsistency between the Proposed Regulations and CEQA that may result in the Proposed Regulations requiring environmental review where the Legislature has provided a statutory exemption under CEQA. In the modified Section 5001(dd)(4), projects other than temporary water transfers that are exempted from CEQA are excluded from the definition of "covered actions" unless an unusual circumstance applies. However, because the modified Proposed Regulations attempt to redefine CEQA terms, it is unclear whether the dozens of other statutory exemptions can be exempt from the definition of "covered action," since statutory exemptions do not have an unusual circumstances exception under CEQA. Categorical exemptions were created based on the fact that they are recognized to be actions that, under normal circumstances, do not have significant environmental effects. On this basis, categorical exemptions have an unusual circumstances exception that prevents application of the exemption if there is something about the action that makes it unlike other, similar actions such that it is likely to have significant impacts. In contrast, statutory exemptions were not created based on their general lack of environmental impacts but for other reasons the legislature found compelling, thus, there are no "usual" or "unusual" circumstances that relate to statutory exemptions. The proposed extension of an inapplicable "unusual circumstances" exception to statutory exemptions may create a requirement that virtually all actions statutorily exempt from CEQA may require some level of environmental review in order to determine whether they are a covered actions, and if so, it would require more environmental review to demonstrate that they are consistent with the coequal goal of restoring the Delta ecosystem. Thus, the Proposed Regulation would override the statutory exemptions provided in CEQA.	Co	The comment misconstrues the distinct requirements under the Delta Reform Act and CEQA. The Delta Reform Act adds a layer of regulation, separate from CEQA's requirements, to actions that qualify as "covered actions." The two statutes provide for different review for different purposes—one requiring review of projects proposed throughout the state for significant adverse environmental impacts and mitigation of those impacts, the other requiring consistency of projects proposed in the Delta with the coequal goals. Thus, in addition to complying with CEQA and all other applicable laws, public agencies proposing covered actions must also comply with the Act and implementing regulations, which have requirements separate from CEQA. The definition of "significant impact" defines the use of the phrase with respect to the Act and its implementing regulations, and it does not alter or affect the environmental review framework under CEQA or a project proponent's obligations under that statute in any way. Furthermore, the Council determined as a general matter that projects that are exempt from CEQA are not likely to have a significant impact on the coequal goals. Thus the regulation presumes those CEQA-exempt projects will not have a significant impact on the coequal goals for purposes of Water Code section 85057.5(a)(4), unless there are unusual circumstances indicating otherwise.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5002

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Solano County Water Agency	4/15/2013	Subsection (c) is inconsistent with the last version of the Delta Plan. Delta Plan (November 2012, Chapter 4, page 156) does not require a confirming statement from the Department of Fish and Wildlife for consistency.	DP	The Council disagrees that the subsection is inconsistent with the Delta Plan. A conforming statement from the Department of Fish and Wildlife is merely one method for how an agency, completing the certification of consistency for a covered action that includes a conservation measure under an existing natural community conservation plan or a habitat conservation plan, can provide detailed findings as to how the covered action consistent with sections 5005 through 5009 of these regulations. If the agency chooses not to provide the conforming statement, then the certification of consistency must include other detailed findings as to how the covered action is consistent with sections 5005 through 5009.
2. San Joaquin Council of Governments	4/16/2013	Subsection (c) is inconsistent with the last version of the Delta Plan. Delta Plan (November 2012, Chapter 4, page 156) does not require a confirming statement from the Department of Fish and Wildlife for consistency.	DP	The Council disagrees that the subsection is inconsistent with the Delta Plan. A conforming statement from the Department of Fish and Wildlife is merely one method for how an agency, completing the certification of consistency for a covered action that includes a conservation measure under an existing natural community conservation plan or a habitat conservation plan, can provide detailed findings as to how the covered action consistent with sections 5005 through 5009 of these regulations. If the agency chooses not to provide the conforming statement, then the certification of consistency must include other detailed findings as to how the covered action is consistent with sections 5005 through 5009.
3. Contra Costa Water District	4/17/2013	Both of these subsections include requirements that are duplicative of other state and federal regulatory programs. Projects not exempt from CEQA already have to provide mitigation for all environmental impacts. The relationship between the mitigation requirements in 5002(b)(2) and under CEQA needs to be clearly described, with a goal that this requirement should not result in additional mitigation beyond what is necessary to satisfy CEQA. Ecosystem restoration and water management projects that might involve adaptive management would likely require permits from state and federal wildlife agencies. Those permits usually require adaptive management and financial assurances. Again in an attempt to avoid duplication and additional work, subsection (b)(4) should include language that wildlife agency approved adaptive management plans and financial assurance programs are deemed consistent with this policy.	Ct, Co	Regarding mitigation requirements under the Delta Plan and under CEQA, please refer to Delta Plan Final PEIR master Response 4. The portion of this comment pertaining to the requirement that projects not exempt from CEQA must include feasible mitigation measures identified in the Delta Plan's EIR or substitute measures is similar to other comments. The response to this comment and the other similar comments is labeled MR12. Please refer to MR12. The Council disagrees that this regulation is unnecessary and/or duplicative. Covered actions will have a significant impact on the coequal goals and the council is within its authority to ensure appropriate components like adaptive management as defined by these regulations are integrated into the project. This requirement under section 5002 ensures that adaptive management plans developed by agencies for ecosystem and water management covered actions are consistent with the adaptive management framework included in the Delta Plan. Adaptive management plans and financial assurance programs developed for permitting purposes with other state and federal wildlife agencies can be used as part of the consistency determination process for covered actions as long as the approach to adaptive management is consistent with Appendix 1B (Adaptive Management) and the financial assurance program include information to address section 5002 subsection (b)(4)(b).
4. East Bay Municipal Utility District	4/22/2013	Subsection 5002(a) specifies a "policy" that "applies" after a "proposed action" (a term that is defined as the equivalent of a "covered action") has been determined to be a "covered action" because it is controlled by one or more of the "regulatory policies" set forth in the article that follows this section. This language is narrative and unnecessary.	O	There was an error in the text of section 5001(y). The text will be revised to read: (y) "Proposed Action" means a plan, program, or project that meets the covered action screening criteria listed in section 5001(j)(1)(A) through ~~(E)~~(D)…" Subdivision (a) is necessary as it differentiates between the other regulatory policies that are used in determining if an action is a covered action and this policy which is not used in the determination. Actions determined by the state or local public agency to meet the definition of a covered action must be consistent with all regulatory policies, including section 5002.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
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ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
5. East Bay Municipal Utility District	4/22/2013	The statutory basis for the requirements in Section 5002(b)(2) should also be more clearly explained. It is not clear whether this provision is intended to require a certificate of consistency to include mitigation measures beyond those required by CEQA. If this is the case, then the basis for the requirement should be further explained. Otherwise, it should be made clear that applicable mitigation measures are only those feasible mitigation measures or substitute measures necessary to reduce the impacts to a level that no longer results in a significant impact to the coequal goals or the implementation of flood control measures.	Ct	This comment did not address any changes to the original language of section 5002(b)(2). This comment pertaining to the requirement that projects not exempt from CEQA must include feasible mitigation measures identified in the Delta Plan's EIR or substitute measures is similar to other comments. The response to this comment and the other similar comments is labeled **MR12**. Please refer to **MR12.**
6. Sacramento County	4/22/2013	Previous comment: Section 5004 is titled contents of certifications of consistency, but neither it nor any of the other draft regulations provide any guidance or criteria for determining whether and to what extent a project that is only partially consistent with one of the coequal goals is "on whole" consistent for purposes of Section 5004. Nor does Section 5004 provide any guidance, standard or regulation relating to the time of the certificate of consistency. Current comment: Again, Section 5004, now cited in Section 5002 was re-titled to "Detailed Findings to Establish Consistency with the Delta Plan". However, the April 4th revisions do not specifically address our finding. For example, no additional "guidance" or "standard" is provided.	Ct	This comment did not address any changes to the original language of section 5002(b)(2). However, the language of section 5002(b)(1) has been modified, clarify that covered actions need to be consistent with the Delta Plan and do so by being consistent with each of the regulatory policies contained in Article 3. The Delta Reform Act did not specify when a certification of consistency should be filed with the Council. The Council envisions that a certification of consistency should be filed with the Council concurrently with the filing of a Notice of Determination after the approval of a project. At this time, the project has been identified and the environmental analyses have been completed. It should be noted that, similar to the CEQA process, if a project changes substantially after the submission of the certification of consistency, than a new certification of consistency will have to be filed with the Council before the project can be implemented.
7. Sacramento County	4/22/2013	Previous comment: Section 5004(b)(2) provides that covered actions not exempt from CEQA must include feasible mitigation measures identified in the Delta Plan's Program EIR or substitute measures. However, under CEQA, mitigation is only required for significant impacts. Absent clarification, this provision legislates an additional CEQA mandate. In addition, mitigation measures should be dictated by CEQA, not by a separate mitigation requirement imposed by the Act. Current comment: Section 5004(b)(2), is now cited in Section 5002(b)(2) (page 9). However, the regulatory language remains unchanged and does not specifically address our finding.	O	This comment did not address any changes to the original language of section 5002(b)(2). This comment pertaining to the requirement that projects not exempt from CEQA must include feasible mitigation measures identified in the Delta Plan's EIR or substitute measures is similar to other comments. The response to this comment and the other similar comments is labeled **MR12**. Please refer to **MR12**.
8. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Section 5002(b)(2) – The proposed consistency findings continue to require lead agencies that are undertaking or approving a covered action that is not exempt from CEQA to include feasible mitigation measures identified in the Delta Plan's PEIR. First, as drafted, this regulation would improperly require lead agencies to adopt mitigation measures even where the underlying project would qualify for a Negative Declaration because it would have no significant impact on the environment. Thus, the requirement is contrary to the requirements of CEQA and should be deleted. Second, this requirement would trump a lead agency's discretion to adopt feasible mitigation measures that it determines are appropriate to the specific project at hand. Even where lead agencies produce project-level environmental documents that tier off of program EIRs, under CEQA there is no mandate that the lead agency adopt the same mitigation measures, or mitigation measures that are deemed to be at least as effective, as those adopted in connection with a program EIR. Third, the regulation must be revised to ensure clarity, consistency and avoid duplication of measures (including mitigation) adopted through the BDCP and those adopted by the Council. Given the limited authority for the Council to adopt mitigation requirements, as previously addressed in the Public Water Agencies' comments, and the statutory construct, which among other provisions, mandates the Council incorporate the BDCP into the Delta Plan if specific conditions are satisfied, the regulations should make plain that the mitigation measures adopted through the BDCP will supersede any measures adopted by the Council, and those Council adopted measures will not apply to or otherwise affect the BDCP.	A, Ct, Co, Du	Please see **MR12** for a response to the requirement that projects not exempt from CEQA must include feasible mitigation measures identified in the Delta Plan's EIR or substitute measures. With respect to potential future BDCP mitigation measures, BDCP is not currently part of the Delta Plan. Should the BDCP be approved and become part of the Delta Plan, the Council will consider revising the regulations as appropriate.

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PROPOSED REGULATION: SECTION 5002

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
9. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Section 5002(b)(3) – The modified Proposed Regulations continue to unlawfully impose on all lead agencies a requirement to use and document the use of best available science. As detailed in our prior comments, the Council lacks the authority to impose this requirement on lead agencies undertaking or approving covered actions, and this requirement suffers numerous defects, in large part because it concerns the standard of information needed to support agency decision-making. 9 It also conflicts with the substantial evidence standard in CEQA, and it overlaps with similar, but not identical requirements to use the best available scientific and commercial data to support permits and consultations under the California Endangered Species Act, and federal Endangered Species Act. The Public Water Agencies urge the Council to recast this into a recommendation in the Delta Plan instead of elevating it to a regulatory mandate. 10 9 Public Water Agencies' comment letter dated January 14, 2013 at pp. 7-8. 10 Public Water Agencies' comment letter dated January 14, 2013 at pp. 7-8.	A	The Council disagrees with this comment. The Delta Reform Act requires the use of best available science, and the regulation reflects this directive. In addition to requiring the Delta Plan be based on best available science, the Act requires the Plan to recommend integration of science and monitoring results into ongoing Delta water management (section 85308(e)) and to include formal, science-based adaptive management for certain decisions (ongoing ecosystem restoration and water management decisions) (section 85308(d)). Furthermore, several provisions in the Act declare or indicate the importance of science to decision-making in the Delta (see sections 85308 [especially section 85308(c), requiring the Delta Plan to, "where appropriate, utilize monitoring, data collection, and analysis of actions sufficient to determine progress toward meeting [] quantified targets"], 85302(g), 85280) and thus it is within the Council's authority to mandate its use with respect to covered actions. Accordingly, a definition of best available science is appropriate and within Council authority.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5003

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Contra Costa Water District	4/17/2013	Section 5003(b) - The new language in (b) seems to exempt DWR and Reclamation since they are explicitly excluded from the definition of "agricultural supplier" and do not meet the definition of "urban suppliers", and would not apply to agricultural water users serving less than 10,000 acres. What is the basis for exempting these suppliers from the requirements of this section?	Ct	As the commenter notes, DWR and the U.S. Bureau of Reclamation (USBR) are excluded from the definition of "agricultural supplier" and do not meet the definition of "urban suppliers." These agencies are not subject to section 5003 because this section applies to "water suppliers." This term is defined in 5001(hh) as including agricultural and urban water suppliers. The definitions for "Agricultural Water Supplier" and "Urban Water Supplier" are provided in sections 5001(c) and 5001 (gg), respectively, and are based upon existing statutory language. (See Water Code sections 10608.12, 10617 and 10583). These Water Code sections specifically exclude DWR from consideration as an Agricultural Water Supplier. The USBR is not included 1) because it is a federal agency and not subject to the Regulation, and 2) because its functions in supplying water to water suppliers are very similar to those of the DWR.
2. Contra Costa Water District	4/17/2013	Urban Water Management Plans (UWMP) are long-range planning documents that change over time in response to changing conditions and technologies. Requiring agencies to implement all programs and projects in their UWMP that are cost effective and technically feasible which reduce reliance on the Delta in order to be consistent with this policy is unrealistic and unnecessary. An agency is required to update the UWMP every five years, yet an UWMP scope extends for decades to the future. In CCWD's case, future water supply planning extends out fifty years and includes scenarios involving potential growth, climate change, water supply reliability and other factors that are possible, yet unknown. Requirements to implement all cost effective and technically feasible programs is not possible nor necessary, given the long lead time in determining the actually necessity of the actions. The requirement in 5003(c)(l)(C) to begin documenting measurable progress in reducing reliance on the Delta is sufficient to show whether or not agencies are contributing to implementation of this policy. CCWD recommends deleting references to implementation in 5003(c)(1)(B).	Ne, O	We disagree with the comment. As the commenter points out, existing law requires water suppliers to update their Urban and Agricultural Water Management Plans every five years, including the implementation schedule set forth in the Plan. This will provide a water supplier sufficient flexibility to make appropriate adjustments to long-term projections. The language in section 5003 of the adopted regulation is appropriate.
3. Central Delta Water Agency	4/22/2013	The regulation ignores water right and statutory priorities afforded to the Delta and other areas of origin and is therefore inconsistent with Water Code section 85031 which is an overriding limitation on Division 33 of the Water Code. The regulations and Delta Plan must require that the exports from the Delta by the State Water Project (SWP) and Central Valley Project (CVP) be curtailed first before any reduction in reliance on the Delta is imposed on diverters in the Delta and other areas of origin within the Delta Watershed. The priorities of senior water right holders and those in the protected areas subject to Water Code section 1215 et seq. must also be recognized and protected. Water Code §8503l(a) provides as follows: 0§85031. Effect on existing water rights; diversion and conveyance of water not to deem area immediately adjacent or capable of being conveniently supplied; applicability of other water Code provisions; effect on existing legal protections (a) This division does not diminish, Impair, or otherwise affect in any manner whatsoever any area of origin, watershed of origin, county of origin, or any other water rights protections, including, but not limited to, rights to water appropriated prior to December 19, 1914, provided under the law. This division does not limit or otherwise affect the application of Article 1.7 (commencing with Section 1215) of Chapter 1 of Part 2 of Division 2, Sections 10505, 10505.5, 11128, 11460, 11461, 11462, and 11463, and Sections 12200 to 12220, inclusive." (Emphasis added.) Water Code §§12200 through 12205 are particularly specific as to the requirements to provide salinity control for the Delta and provide an "adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban and recreational development." added:	Co	This comment purports to address all of section 5003 1. Except for the comment objecting to the regulation's use of the phrase "percentage of water used," this comment does not address changes to this section. 2. The Council disagrees with the comment that the term, "or in the percentage of water used" (from the Delta) should be removed from section 5003(c)(1). Water Code section 85021 establishes reduced reliance on the Delta as a policy of the State of California, and directs each region that relies on water from the Delta watershed to improve its regional self-reliance for water. Section 5003 provides that success in achieving the statewide policy of reduced reliance on the Delta and improving regional self-reliance will be demonstrated through a significant reduction in the amount of water used, or in the percentage of water used, from the Delta watershed. This flexibility allows a region that may not be able to reduce the amount of water used from the Delta (e.g. due to a large increase in population) to demonstrate achievement of the statewide policy by water conservation or the development of other water sources.

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		For ease of reference, the following Water Code sections are quoted with emphasis 11§12200. Legislative findings and declaration The Legislature hereby finds that the water problems of the Sacramento-San Joaquin Delta are unique within the State; the Sacramento and San Joaquin Rivers join at the Sacramento-San Joaquin Delta to discharge their fresh water flows into Suisun, San Pablo and San Francisco bays and thence into the Pacific Ocean; the merging of fresh water with saline bay waters and drainage waters and the withdrawal of fresh water for beneficial uses creates an acute problem of salinity intrusion into the vast network of channels and sloughs of the Delta; the State Water Resources Development system has as one of its objectives the transfer of waters from water-surplus areas in the Sacramento Valley and the north coastal area to water-deficient areas to the south and west of the Sacramento-San Joaquin Delta via the Delta; water surplus to the needs of the areas in which it originates is gathered in the Delta and thereby provides a common source of fresh water supply for water deficient areas. It is, therefore, hereby declared that a general law cannot be made applicable to said Delta and that the enactment of this law is necessary for the protection, conservation, development, control and use of the waters in the Delta for the public good. (Added by Stats. 1959, c. 1766, p. 4247, §1.) §12201. Necessity of maintenance of water supply The Legislature finds that the maintenance of an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban and recreational development in the Delta area as set forth in Section 12220, Chapter 2, of this part, and to provide a common source of fresh water for export to areas of water deficiency is necessary to the peace, health, safety and welfare of the people of the State, except that delivery of such water shall be subject to the provisions of Section 10505 and Sections 11460 to 11463, inclusive, of this code. (Added by Stats. 1959, c. 1766, p 4247, §1.) §12202. Salinity control and adequate water supply; substitute water supply; delivery Among the functions to be provided by the State Water Resources Development System, in coordination with the activities of the United States in providing salinity control for the Delta through operation of the Federal Central Valley Project, shall be the provision of salinity control and an adequate water supply for the users of water in the Sacramento-San Joaquin Delta. If it is determined to be in the public interest to provide a substitute water supply to the users in said Delta in lieu of that which would be provided as a result of salinity control no added financial burden shall be placed upon said Delta water users solely by virtue of such substitution. Delivery of said substitute water supply shall be subject to the provisions of Section 10505 and Sections 11460 to 11463, inclusive, of this code. (Added by Stats. 1959, c. 1766, p 4247, §1.) §12203. Diversion of waters from channels of delta It is hereby declared to be the policy of the State that no person, corporation or public or private agency or the State or the United States should divert water from the channels of the Sacramento-San Joaquin Delta to which the users within said Delta are entitled. (Added by Stats. 1959, c. 1766, p 4249, §1.) §12204. Exportation of water from delta In determining the availability of water for export from the Sacramento-San Joaquin Delta no water shall be exported which is necessary to meet the requirements of Sections 12202 and 12203 of this chapter. (Added by Stats. 1959, c. 1766, p 4249, §1.) §12205. Storage of water; integration of operation and management of release of water It is the policy of the State that the operation and management of releases from storage into the Sacramento-San Joaquin Delta of water for use outside the area in which such water originates shall be integrated to the maximum extent possible in order to permit the fulfillment of the objectives of this		

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		part. (Added by Stats. 1959, c. 1766, p 4249, §1.) § 11460 provides: "§ 11460. Prior right to watershed water In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein. (Added by Stats. 1943, c. 3 70,p. 1896. Amended by Stats. 1957, c. 1932, p. 3410, §296.) The December 1960 Bulletin 76 (Attachment A to prior comments) which is a contemporaneous interpretation by DWR of Water code Section 12200 through 12205 provides at page 12: "In 1959 the State Legislature directed that water shall not be diverted from the Delta for use elsewhere unless adequate supplies for the Delta are first provided." (emphasis added.) A summary of the promises made on behalf of the United States to those in the areas of origin is contained in the 84th Congress, 2d Session House Document No. 416, Part One Authorizing Documents 1956 at Pages 797-799 as follows: "My Dear Mr. Engle: In response to your request to Mr. Carr, we have assembled excerpts from various statements by Bureau and Department officials relating to the subject of diversion of water from the Sacramento Valley to the San Joaquin Valley through the operation of the Central Valley Project. A factual review of available water supplies over a period of more than 40 years of record and the estimates of future water requirements made by State and Federal agencies makes it clear that there is no reason for concern about the problem at this time. For your convenience, I have summarized policy statements that have been made by Bureau of Reclamation and Department of the Interior officials. These excerpts are in the following paragraphs: On February 20, 1942, in announcing the capacity for the Delta Mendota Canal, Commissioner John C. Page said, as a part of his Washington D.C., press release: "The capacity of 4,600 cubic feet per second was approved, with the understanding that the quantity in excess of basic requirements mainly for replacement at Mendota Pool, will not be used to serve new lands in the San Joaquin Valley if the water is necessary for development in the Sacramento Valley below Shasta Dam and in the counties of origin of such waters." On July 18, 1944, Regional Director Charles E. Carey wrote a letter to Mr. Harry Barnes, chairman of a committee of the Irrigation Districts Association of California. In that letter, speaking on the Bureau's recognition and respect for State laws, he said: "They [Bureau officials] are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigation development in the West by the Federal Government under the Federal reclamation laws is carried forward in conformity with State water laws." On February 17, 1945, a more direct answer was made to the question of diversion of water in a letter by Acting Regional Director R. C. Calland, of the Bureau, to the Joint Committee on Rivers and Flood Control of the California State Legislature. The committee had asked the question, "What is your policy in connection with the amount of water that can be diverted from one watershed to another in proposed diversions?" In stating the Bureau's policy, Mr. Calland quoted section 11460 of the State water code, which is sometimes referred to as the county of origin act, and then he said: "As viewed by the Bureau, it is the intent of the statute that no water shall be diverted from any		

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		watershed which is or will be needed for beneficial uses within that watershed. The Bureau of Reclamation, in its studies for water resources development in the Central Valley, consistently has given full recognition to the policy expressed in this statute by the legislature and the people. The Bureau has attempted to estimate in these studies, and will continue to do so in future studies, what the present and future needs of each watershed will be. The Bureau will not divert from any watershed any water which is needed to satisfy the existing or potential needs within that watershed. For example, no water will be diverted which will be needed for the full development of all of the irrigable lands within the watershed, nor would there be water needed for municipal and industrial purposes or future maintenance of fish and wildlife resources." On February 12, 1948, Acting Commissioner Wesley R. Nelson sent a letter to Representative Clarence F. Lea, in which he said: You asked whether section 10505 of the California Water Code, also sometimes referred to as the county of origin law, would be applicable to the Department of the Interior, Bureau of Reclamation. The answer to this question is: No, except insofar as the Bureau of Reclamation has taken or may take assignments of applications which have been filed for the appropriation of water under the California Statutes of 1927, chapter 286, in which assignments reservations have been made in favor of the county of origin. The policy of the Department of the Interior, Bureau of Reclamation, is evidenced in its proposed report on a Comprehensive Plan for Water Resources Development-Central Valley Basin, Calif., wherein the Department of the Interior takes the position that "In addition to respecting all existing water rights, the Bureau has complied with California's 'county of origin' legislation, which requires that water shall be reserved for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus water will be exported elsewhere ." On March 1, 1948, Regional Director Richard L. Boke wrote to Mr. A. L. Burkholder, secretary of the Live Oak Subordinate Grange No. 494, Live Oak, Calif., on the same subject, and said: "I can agree fully with the statement in your letter that it would be grossly unjust to 'take water from the watersheds of one region to supply another region until all present and all possible future needs of the first region have been fully determined and completely and adequately provided for.' That is established Bureau of Reclamation policy and, I believe, it is consistent with the water laws of the State of California under which we must operate." On May 17, 1948, Assistant Secretary of the Interior William E. Warne wrote a letter to Representative Lea on the same subject, in which he said: "The excess water made available by Shasta Reservoir would go first to such Sacramento Valley lands as now have no rights to water." Assistant Secretary Warne goes on to say, in the same letter: "As you know, the Sacramento Valley water rights are protected by: (1) Reclamation law which recognizes State water law and rights thereunder; (2) the State's counties of origin act, which is recognized by the Bureau in principle; and (3) the fact that Bureau filings on water are subject to State approval. I can assure you that the Bureau will determine the amounts of water required in the Sacramento Valley drainage basin to the best of its ability so that only surplus waters would be exported to the San Joaquin. We are proceeding toward a determination and settlement of Sacramento Valley waters which will fully protect the rights of present users; we are determining the water needs of the Sacramento Valley; and it will be the Bureau's policy to export from that valley only such waters as are in excess of its needs." On October 12, 1948, Secretary of the Interior Krug substantiated former statements of policy in a		

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		speech given at Oroville, Calif. Secretary Krug said, with respect to diversion of water: "Let me state, clearly and finally, the Interior Department is fully and completely committed to the policy that no water which is needed in the Sacramento Valley will be sent out of it." He added: "There is no intent on the part of the Bureau of Reclamation ever to divert from the Sacramento Valley a single acre-foot of water which might be used in the valley now or later." Water Code section 1216 provides as follows: § 1216. Depriving protected area of adequate supplies of water prohibited A protected area shall not be deprived directly or indirectly of the prior right to all the water reasonably required to adequately supply the beneficial needs of the protected area, or any of the inhabitants or property owners therein, by a water supplier exporting or intending to export water for use outside a protected area pursuant to applications to appropriate surface water filed, or groundwater appropriations initiated, after January 1, 1985, that are not subject to Section 11460. (Added by Stats.1984, c. 1655, § 2.)" The failure to honor the water right and statutory priorities as required by Water Code section 85031 is simply a taking of the property of those with seniority and a gift to the contractors of the SWP and CVP receiving waters exported at the SWP and CVP pumps near Tracy. The resulting injustice from the proposed regulation is highlighted by the fact that the SWP was to develop sufficient projects in North Coast watersheds to supplement flows into the Delta of 5 million acre feet per year by the year 2000. These supplemental flows were needed to meet the approximately 4.25 million acre feet of SWP contract entitlement as well as other project responsibilities such as salinity control for the Delta. The North Coast development did not take place yet the SWP continues to export water from the Delta. The failure of the Secretary of Interior to comply with the condition that the San Luis Unit of the CVP not go forward unless a Valley Drain with an outlet to the Bay or Ocean was assured also highlights the injustice resulting from the Delta Stewardship Council effort. The SWP and CVP have a duty to mitigate damages caused by the projects and to fulfill their affirmative obligations such as the provision of salinity control for the Delta, the preservation of fish and wildlife by the SWP and the obligation of the CVP to meet the restoration of anadromous fish requirements in CVPIA Section 3406(b)(2). The CVPIA requirement is to develop a program to ensure by the year 2002 natural production of anadromous fish on a long term basis, at levels not less than twice the average levels attained during the period of 1967-1991. Anadromous fish are defined in the Act to include salmon, steelhead, striped bass, sturgeon and American shad. The regulations must be rewritten to require curtailment of SWP and CVP exports from the Delta to areas south of the Delta before imposition of any burden on other water users, and then in accordance with the water right and statutory priorities. The first two lines of Section 5003(a) should be changed to read: "(a) Water shall not be exported from or transferred through the Delta for use outside the Delta and other areas of origin if all of the following apply:" In Section 5003(c)(l) the words "or in the percentage of water used" should be deleted. If a supplier increases water deliveries from sources other than the Delta the percentage of Delta water in that supplier's total water deliveries will go down, but the reliance on the Delta will not change in amount to be diverted. The language is at best ambiguous.		

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5003

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4. East Bay Municipal Utility District	4/22/2013	Section 5003(a) sets forth a general prescription applicable to exports from the Delta, transfers through it, or use from it. The language does not specify the entities to which it applies or how it will be enforced, and Section 5003(b) does little to add these necessary details or clarify the intent of the section.	Ne, Ct	We disagree with the comment. The modification made to section (5003)(b) clarifies the connection that must exist between a proposed action (to export water from, transfer water through, or use water in the Delta) and the water suppliers addressed in the policy (those that receive water as a results of the proposed action) for the regulation to apply. Section 5001 provides the definition of water suppliers that are subject to the provisions of 5003 (see section 5001(b), (c) (1) and (2), (hh)(1) and (2) and (ii)). Under California Law, these water suppliers are currently required, to prepare, adopt and implement Urban Water Management Plans or Agricultural Water Management Plans (see Water Code sections 10610 et seq. and 10820 et seq.) DWR is required by existing law to review these plans for consistency with applicable laws (see Water Code Division 6, Parts 2.55, 2.6 and 2.8). Section 5003 will be enforced through the adopted regulation. Applicants for a covered policy are required by the regulation to file a certificate of consistency with the Delta Stewardship Council. This certificate the applicant to make findings with respect to conformance with section 5003 including a finding that 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 serve reliance consistent with all of the requirements listed in paragraph(1) of subsection (e) (see section 5003 (a)(1), (2), and (3)).
5. East Bay Municipal Utility District	4/22/2013	Section 5003(c)(2) appears to be entirely a narrative list setting forth programs that could reduce reliance on the Delta and it provides no regulatory purpose. For the sake of clarity it should be deleted.	Ct, O	The Council has included this language in section 5003 to provide necessary clarity on how to comply with the regulation.
6. East Bay Municipal Utility District	4/22/2013	Section 5003(c)(l) misrepresents the established uses of urban and agricultural water management plans. These plans are long-range planning documents that change over time as conditions and technologies change, and, as noted in the language, DWR is charged with reviewing them and determining compliance with the statutory requirements. The implementation schedules set forth in the plans are goals established by the water suppliers and are intended to adapt to changing circumstances. In order to protect the integrity of the water management plan as a useful planning document, all references to implementation should be deleted. Subsection 5003(c)(l)(B) should be revised as follows: "Identified and evaluated all programs and projects in the Urban or Agricultural Water Management Plan that are locally cost effective, technically feasible, and which would reduce reliance on the Delta."	Ct, O	We disagree with the comment. Existing law requires water suppliers to update their Urban and Agricultural Water Management Plans every five years, including the implementation schedule set forth in the Plan Plans (see Water Code sections 10610 et. seq. and 10820 et. seq.). The language in section 5003 is appropriate.
7. Sacramento County	4/22/2013	Previous comment: Section 5003(c) requires that covered action determinations must be "reasonable, made in good faith and consistent with the Delta Reform Act and this chapter." However, it is not appropriate to require that the local legislative body act reasonably or in good faith in making its determination. The sole issue is the correctness of the legislative body's determination that an activity constitutes a covered action and is consistent with the Act. Subjective inquiries into the "good faith" or "reasonableness" of public agency decision makers is barred. See e.g. Board of Supervisors v. Los Angeles Co. (1995) 32 Cal.App.41 1616; Co. of Los Angeles v. Superior Court(l975) 13 Cal.3d 721. Current comment: With the deletion of 5003, the "act reasonably or in good faith" language is no longer part of the proposed regulations.	O	The current comment is incorrect, and appears to be based upon an incomplete reading of the regulation. The reference language regarding “reasonable, made in good faith, and consistent with the Delta Reform Act and this chapter” has been moved to section 5001(i). The Council has already responded to the previous comment on this subject as follows: Consistent with the Act (section 85225), this provision requires a public agency to determine whether its proposed plan, program, or project is a “covered action.” The provision further requires this determination to be reasonable and made in good faith. The determination that a proposed action is a covered action is not a legislative decision, but rather is an adjudicative one. (See *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 34, n.2 [“[L]egislative action is formulation of a rule to be applied in all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts.”]) The cases cited by the comments discussing the judicial standards of review over legislative decisions are therefore inapplicable. Furthermore, requiring that this determination be

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				reasonable and made in good faith is an objective standard, not a subjective standard. (See *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 103 n.32 [where "good faith" standard is associated with "reasoned analysis" or "reasonableness," it is an objective standard].) Finally, it is appropriate for the Council to require agencies to make reasonable decisions in good faith, as other agencies frequently require. (E.g., CEQA Guidelines section 15151 [standard for adequacy of EIR is "good faith effort" at full disclosure]; Cal. Code Regs. tit. 14, section 18839 [requiring "good faith effort" and "reasonable effort" in implementing recycling program]; 36 C.F.R. 800.4(b)(1) [requiring federal agencies make "reasonable and good faith effort" in identifying historic properties].)
8. Sacramento, City of	4/22/2013	Sacramento's primary concern with the modified regulations relates to the provisions that call for reduced reliance on water from the Delta watershed. For example, under Section 5003 reduced reliance is to be achieved by water efficiency measures such as conservation, recycling, and groundwater management. Sacramento endorses and is moving forward with water efficiency measures as contemplated in the statute and regulations. Sacramento supports the tenet that where feasible and cost effective, these types of measures should be integrated into every water delivery system. However, an important statutory directive that applies to both the statutory and regulatory scheme, including the reduced reliance provisions, is articulated in Water Code Section 85031. This statute makes it clear that these provisions, including the "expected outcome" provisions of Section 5003(c)(1)(C), are subject to California's area of origin and water right protections. This is essential for one of the dual goals of the Delta Plan -water supply reliability -- to have any meaning for water users in the watersheds tributary to the Delta. During our meeting, you explained that Section 5003 applies to diversions from within the Delta, and not to diversions that occur outside of the Delta (regardless of where the water is used.) In order to reflect that in the regulations, Section 5003 (a) should be edited to read as follows: Water shall not be exported from, transferred through, or HSeG-diverted at a location within, the Delta if all of the following apply: ... Similarly, in subsections (1) through (3) immediately following the above text, the word "use" should be replaced with "diversion." Finally, in subsection (b), the word "use" should be replaced with "divert."	DP	The Council believes that this Regulation does not infringe on existing water rights. Please see MR8 for a discussion of this subject. The Council disagrees with the proposed change to section 5003. Addressing the way in which water is used within the Delta, as well as the potential Delta impacts of the project's upstream components, are important to the achievement of the coequal goals and the State's policy of reduced reliance on the Delta. A proposed action specifically to transfer water to and to use that water in the Delta could be subject to section 5003. The language in this section is appropriate and needed to achieve the goals of the Delta Reform Act.
9. Sacramento, City of	4/22/2013	On a related note, to be consistent with the reference in Section 5003 (c)(1)(8) to programs and projects "that are locally cost effective and technically feasible," the beginning of the second sentence of Section 5001(h)(1)(8) should be revised to read as follows: This will be done by improving, investing in, and implementing locally cost effective and technically feasible local and regional projects and programs that increase ...	DP	The Council does not believe the recommended change is necessary. Section 5001(h)(1)(B) is part of a definition of coequal goals for the purposes of this Regulation. Section 5003(c)(1)(B) is part of a Section that regulates actions that export water from, transfer water through, or use water in the Delta, and is intended to articulate how water suppliers may be deemed consistent with the Section. It is unnecessary for the two paragraphs to be identical.
10. Sacramento, City of	4/22/2013	Although Sacramento does not divert within the Delta and is not subject to Section 5003, we believe that another important clarification of the regulations is needed. During our meeting, you provided us with an improved understanding of the intended meaning of Section 5003(c)(1)(C). You explained that Section 5003 allows for increased use of water from the Delta watershed, provided that the water efficiency measures described in subsections (c)(1)(B) and (c)(2) are being undertaken. This is important to concurrently improve water efficiency in the Delta watershed, and maintain a reliable water supply to support future economic development within that area, consistent with the area of origin and other water laws (see, e.g., Water Code Section 85031.) To reflect this, Section 5003(c)(1)(C) should be edited to read as follows: (C) Included in the Plan, commencing in 2015, the expected outcome for measurable reduction in Delta	DP	The Council does not believe the recommended change is necessary. Section 5003(c)(1)(B) provides that water suppliers that will receive water from a covered action subject to section 5003 are consistent with that regulation if they identify, evaluate and commence implementation of all programs and projects identified in their urban or agricultural water management plans that are locally cost effective and technically feasible which reduce reliance on the Delta, including water conservation, recycled water, capture of stormwater, etc. Section 5003(c)(1)(C) is a reporting requirement on the measureable outcomes of actions a water supplier is taking to reduce reliance on the Delta.

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		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 by comparison to the amount of water that would have been used absent the programs and projects referenced in subsection (B) above. For the purposes of reporting, water conservation and other water use efficiencies are considered a new source of water supply, consistent with Water Code Section 1011.		
11. San Joaquin Tributaries Authority	4/22/2013	Additionally, section 5003(c)(1)(C) is contrary to the statutory language of SB X7 7 regarding regional water supply reliability. SB X7 7 "does not require a reduction in the total water used in the agricultural or urban sectors." (Water Code, § 10608.8(c) [emphasis added].) In contrast, section 5003 specifically states that reduced reliance is achieved only when a water supplier demonstrates a "reduction in the amount [or percentage] of water used … from the Delta watershed." The compliance required by section 5003 is directly inapposite to SB X7 7, which expressly states that it "does not require a reduction in the total water used." Therefore, as currently drafted, section 5003 is contradictory to existing law and fails to meet the APA consistency standard. (Gov. Code, §§ 11349.1(a)(4) and 11349(d).)	Co	The comment misconstrues section 5003 in the adopted regulation regarding how the expected outcome for measureable reduction in Delta reliance and improvement in regional self-reliance will be reported in the Urban and Agricultural Water Plans. This outcome will be reported as either a reduction in the amount of water used, or a reduction in the percentage of water used, from the Delta watershed. Further, for the purposes of reporting, water efficiency is considered a new source of supply. This means that a water supplier experiencing growth in water demand can show how increased conservation and development of additional local supplies to meet those water needs is contributing to a reduction in the percentage of water used from the Delta watershed. The water conservation that is achieved through SB 7X X will contribute to reduced reliance on the Delta and improved regional self-reliance. Thus, we disagree with the comment that section 5003 is contrary to the language of SB X7 7 and to existing law.
12. San Joaquin Tributaries Authority	4/22/2013	Section 5003 goes beyond the authority of the DSC and Water Code section 85302, which limits the geographic scope for projects and programs identified in the Delta Plan to the legal Delta. (Gov. Code, § 11349.1(a)(2); Water Code, § 85302(b).) While section 85302(b) allows for recommendations outside of the Delta, it is unambiguous that the Delta Plan's regulatory focus must remain on the legal Delta. Section 5003 goes beyond the authority allowed by the legislature because it attempts to regulate water used throughout the entire Delta watershed, which extends beyond the statutory Delta and boundaries of the DSC authority. This over-regulatory action is unlawful and must be revised.	A	The Council disagrees with the comment that section 5003 of the adopted regulation goes beyond the scope of the Council's regulatory authority. The Delta Reform Act gives the Council the authority and discretion to adopt a regulation that takes into account water conservation and local water supply development actions, whether they occur in or out-of-Delta, where those actions have a direct causal relationship to the proposed covered action. See Master Response 4 for more information. Further, the comment misconstrues the provisions of section 5003. Water suppliers that do not receive water from the Delta, such as suppliers located in the Delta's upper watershed, are not subject to the provisions of section 5003. However the Delta Plan recommends that all water suppliers located within the Delta watershed, including areas upstream of the Delta, voluntarily implement the measures contained in section 5003 to reduce their reliance on water from the Delta watershed and to improve regional self-reliance. Please note that the Council has modified section 5003 of the adopted regulation to simplify and clarify this language. Subsections 5003(a) and 5003 (b) have been removed and a new subsection 5003 (c)(1)(C) has been added. The remaining language, as modified, describes the actions that individual water suppliers are expected to take to achieve reduced reliance and improved regional self-reliance. The removed language describes the performance measures by which the statewide effectiveness of the actions taken by achieve the policy of reducing reliance on the Delta and improving regional self-reliance will be evaluated by the Delta Plan over time. The added language clarifies how the expected outcome for measureable reduction in delta reliance and improvement in regional self-reliance shall be reported in the Urban and Agricultural Water Management Plans. We believe that this appropriately clarifies the language in this section.
13. San Joaquin Tributaries Authority	4/22/2013	Further, section 5003 threatens to violate the rules of water right priority by requiring senior upstream water users to curtail diversions for the benefit of junior downstream users. This is contrary to existing statutory and case law which governs water use and priority in the State of California. (Gov. Code, §§ 11349.1(a)(4) and 11349(d) ["'Consistency' means being in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law."].) To the extent section 5003 intends to implement SB X7 7, it fails to meet the "reference" standard because it does not cite to the statutes which arose from SB X7 7. (Gov. Code, §§ 11349, 11349.1(5).)	Co	The Council disagrees with the comment as regards water rights impacts. See MR8 for a discussion of this matter. The Council disagrees with the comment as regards the "reference" standard. Section 5003 properly references the relevant parts of SBX7 7, as described in Government Code section 11349).

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		The DSC approved the change that former proposed regulatory language be included as language in the narrative of the Delta Plan. That language states that the intent of this regulatory language is to "reduce reliance on the Delta by complying with the statutory requirements of SB X7 7." The regulation must cite the SB X7 7 statutes from which this regulatory language arose and intends to comply with.		
14. San Joaquin Tributaries Authority	4/22/2013	Section 5003(b) goes beyond the DSC authority because it states it applies to "proposed actions." (Gov. Code, § 11349.1(a)(2).) The DSC authority is limited to regulate covered actions; therefore the regulation of "proposed actions" goes beyond DSC authority. (Water Code, §§ 85022, 85210; see also Delta Plan (2012), at 5 and 50.) The Delta Plan must be amended to limit regulatory action to covered actions.	A	The adopted regulation provides criteria to identify covered actions. In order to describe the process within the regulation, there is a need to describe things that might be covered actions but have not yet been determined to be covered by a Delta Plan policy. Council staff considered using the term "potential covered actions" but chose instead to call them "proposed actions."
15. San Joaquin Tributaries Authority	4/22/2013	While too broad geographically, section 5003 is too narrow regarding water use within the Delta. Section 5003 only applies to "water suppliers." Regulation section 5001(ii) defines "water suppliers" as including agricultural water users that provide water to 10,000 or more irrigated acres. Thus, this regulation does not apply to most agricultural water users in the Delta who provide water to less than 10,000 acres of irrigated acres. This exemption means that most Delta water users are not required to reduce their reliance on Delta water and improve regional self-sufficiency – two foundational elements of the Delta Plan. This acreage threshold is too narrow and renders section 5003 virtually meaningless. Section 5003 must be amended to apply to all water users in the legal Delta.	Ct	The Council disagrees with this comment. The referenced definitions are based on existing statutory language (See Water Code sections 10608.12, 10617 and 10583), which the Council believes is appropriate for this Regulation.
16. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Section 5003 (Water Resources Policy 1 of the draft Delta Plan) – As demonstrated in detail in the Public Water Agencies' prior comments,11 neither the plain language of the Delta Reform Act nor its legislative history empowers the Council to adopt regulations purporting to prohibit water exports from, or transfers through the Delta if, in the Council's opinion, one or more agricultural or urban water suppliers "have failed to adequately contribute to reduced reliance on the Delta and improved regional self- reliance" consistent with the Council's proposed regulatory standards.12 The Act authorizes the Council to review appeals of consistency determinations for covered actions in the Delta and Suisun Marsh. But it does not authorize it to deny water transfers and exports based on the statewide policy of reduced regional reliance on the Delta to meet future water supply needs, either through the consistency appeal process, or through a direct prohibition, as Section 5003 purports to do. The modified Proposed Regulations cite as authority a host of code sections from the Delta Reform Act. However, as demonstrated below, none of the cited statutory references provide the Council with the authority it asserts. The Proposed Regulations should not include any language that would result in a ban of water exports from, or transfers through the Delta, or otherwise regulate actions of water suppliers outside the Delta and Suisun Marsh. Water Code Section 85210, subdivision (i) provides that the authority to "adopt regulations or guidelines as needed" is limited to adopting only those regulations necessary "to carry out the powers and duties identified" in the Delta Reform Act. In and of itself, this section does not authorize any specific regulations as only those "powers and duties identified in" the Act can provide justification for a proposed regulation. In other words, the Council has only those powers and duties expressly provided in the Act. The specific "references" cited as support for the Council's authority to adopt proposed Section 5003 fail to provide any legitimate basis for exercising the "authority" asserted under section 85210, subdivision (i) because none of them specifies "powers and duties identified in" the Delta Reform Act. Water Code Sections 10608, 10610.2, 10610.4, 10801, and 10802, are not part of the Delta Reform Act. Instead, they set forth the requirements for Agricultural and Urban Water Management Plans. Thus, they do not provide the Council with the claimed authority. Water Code Section 85001, subdivision (c) expresses the Legislature's finding and conclusion that the Council serve as a "governance structure that will direct efforts across state agencies to develop a legally enforceable Delta Plan." This is a general statement of legislative intent, not a grant of regulatory	A	While it will be the responsibility of the agency proposing an action to determine whether its action is a covered action that is required to be consistent with the Delta Plan and these regulations, the Delta Reform Act's definition of covered actions may include water management actions (section 85057.5(a).). Thus, pursuant to the statute, those water management covered actions must be consistent with the Delta Plan and will be subject to these regulations, and it is within the Council's authority to regulate those covered actions. Regarding the Council's authority to adopt section 5003, the Act requires the Council to adopt a "legally enforceable Delta Plan" that will, among other things, "provide for the sustainable management of the Sacramento-San Joaquin Delta ecosystem." (Water Code section 85001(c).) Many other statutory provisions reinforce this authority. (See MR5, reviewing the Council's authority to protect, restore and enhance the Delta ecosystem.) The regulation that imposes limitations on covered actions that export water from, transfer water through, or use water in the Delta, section 5003, applies only when the covered action will harm the Delta environment. It is authorized by the Act because it satisfies the mandate that the Council provide for sustainable management of the Delta ecosystem. It is further authorized as a measure that promotes a more reliable water supply. (Water Code section 85302(d).) Contrary to the comment's assertion, section 5003 is not a "ban" on exports from or transfers through the Delta. Rather it requires those covered actions that meet specified criteria to contribute to reduced reliance on the Delta, as described more specifically in the regulation. For more detailed explanation of the Council's authority to adopt and enforce regulations generally, see master response 1. For an explanation of the Council's authority to consider out-of-Delta actions when regulating in-Delta actions, see master response 4.

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		authority. It does not provide any authority to the Council to regulate the activities of local agencies throughout the state of California, or to constrain the operations of the State Water Project or Central Valley Project, including use of water transfers for the benefit of State Water Project or Central Valley Project water users. Water Code Section 85004, subdivision (b) expresses the Legislature's finding and declaration that various water management strategies, alternative water supply development, and new storage and conveyance facilities are "involved" in "providing a more reliable water supply for the state." It does not provide the Council with the "power and duty" to mandate reduced reliance. Water Code Section 85020, subdivision (a) provides a very general legislative assessment that "inherent in the coequal goals for management of the Delta" is to "Manage the Delta's water and environmental resources and the water resources of the state over the long term." The section begins by stating: "The policy of the State of California to achieve the following objectives" which is not a delegation of a "power and duty." The section expresses state policy. Water Code Section 85020, subdivision (d) specifies efforts to "Promote statewide water conservation, water use efficiency, and sustainable water use" are considered "inherent in the coequal goals for management of the Delta." Again, there is no "power and duty" identified or conferred upon the Council that may be a "reference" for the assertion of "authority" under section 85210, subdivision (i). Furthermore, the plain meaning of the word "promote" cannot justify the promulgation of a regulatory mandate. If the Legislature intended to "require" an action it would have written the statute to include mandatory language. Instead it chose the word "promote" which means to "support or encourage" something, not to mandate or regulate it. Water Code Section 85020, subdivision (h) explains that "the policy of the State of California" was to "establish a new governance structure with the authority, responsibility, accountability, scientific support, and adequate and secure funding to achieve" the objectives inherent in the coequal goals. The Legislature carried out this policy by forming the Council and creating and revising the "powers and duties" of other State agencies related to management of the Delta, i.e. the Delta Conservancy and the Delta Protection Commission. This provision provides no authority to regulate water suppliers. And it cannot reasonably be interpreted to constitute a general and sweeping delegation of "powers or duties" upon the Council in addition to and independent of the Council's powers and duties specifically identified in the Delta Reform Act. Water Code Section 85021 does not confer upon the Council a "power and duty." It establishes a policy separate and distinct from the policy, which must guide the Council, in Water Code section 85020. Water Code section 85020 establishes the objectives "inherent in the coequal goals for management of the Delta" which the Council is charged with furthering through the Delta Plan, whereas Water Code section 85021 expresses legislative intent that, through a "statewide strategy" of investment "in improved regional supplies", the policy "of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs." The Legislature itself acted to implement that policy (Water Code section 85021) by adopting SBX 7X – a comprehensive statutory scheme to achieve statewide water conservation goals -- as part of the extensive package of water legislation that included the Delta Reform Act. Water Code Section 85023 is a statement of basic principles governing water rights and water management in California ("reasonable and beneficial use" and "the public trust doctrine") and does not confer a "power and duty" upon the Council consistent with section 85210, subdivision (i). In fact, these principles are central to the purview of the State Water Resources Control Board, the authorities of which, as noted above, were expressly reserved solely to it in the Delta Reform Act. (Water Code, § 85031 (d).)		

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		Water Code Section 85054 sets forth the legislative definition of "coequal goals." This "definition" cannot be interpreted to be a "power and duty identified" in the division providing direction and authority for the Council to promulgate the "reduce reliance" policy of draft Section 5003. Water Code Section 85300, subdivision (a) states that the Council will "develop, adopt, and commence implementation" of a Delta Plan that "furthers" the coequal goals and does so through "subgoals and strategies to assist in guiding state and local agency actions" and further that "[t]he Delta Plan may also identify specific actions that state or local agencies may take to implement the subgoals and strategies." (Water Code, § 85300, subd. (a), underline added.) Unfortunately, proposed Section 5003 would mandate actions rather than "assist in guiding" them or identifying those that local agencies "may" take to further the policy. Simply put, the plain language of the Act does not authorize the Council to create the mandates in proposed Section 5003. Again, section 85210, subdivision (i), and bedrock principles of statutory construction do not allow such elasticity of interpretation. Water Code Section 85302, subdivision (d) repeats the legislative direction that "the Delta Plan shall include measures to promote [not regulate] a more reliable water supply" to meet the State's needs, ensure economic vitality and improve water quality. There is no "power and duty" included, only the direction that the Delta Plan "promote" measures that can contribute to improving water supply reliability and three criteria the Legislature identified as representing the targeted outcomes of doing so. The "reduce reliance" policy of proposed Section 5003 seeks to utilize section 85302, subdivision (d) as justification for its promulgation when, if adopted, the proposed policy would undermine water supply reliability by increasing the uncertainty of water supplies. For example, it would reduce the security of pursuing water transfers as a flexible means of preparing for and responding to drought. It also imposes mandates on local water agencies without considering financial and other limitations, as well as changing conditions and circumstances. Here again, there has been no "power and duty" identified in the statute that would provide a legal basis for the Council's regulation. Water Code Section 85303 echoes section 85020, subdivision (d), likewise using the word "promote." Thus, it does not provide a "power and duty" conferred upon the Council to include the mandates of proposed Section 5003 as an enforceable regulation or policy in the Delta Plan. Consequently, it too provides no justification for proposed Section 5003. Water Code Section 85304 directs that the Delta Plan shall "promote," not mandate, "options" relating to conveyance, storage and operation of both. This does not state that the Council shall determine and direct what is to be done based on an asserted authority to ban exports from or transfer water through the Delta. Instead, promoting options is a function of developing information and facilitating conversations among agencies and stakeholders and scientists. It would be error to read into the Legislature's careful choice of words a broad authority to mandate specific actions outside the Delta. As has been shown by the explication above, while the Council cites Water Code section 85210, subdivision (i), as the foundation of its "authority" to promulgate Section 5003, that authority is dependent upon the provision of specific "powers and duties identified" in the Delta Reform Act. Furthermore, the foregoing analysis of each of the sections relied upon by the Council to substantiate its proposed policy shows that none of them provide such a power and duty. Thus, proposed Section 5003 should be removed from the Proposed Regulations because the Council lacks the authority to adopt it. If the Council's specious rationale of grounding its asserted regulatory authority upon the general statements of policy and legislative declarations of intent in the Delta Reform Act is allowed to stand, then any state agency could infer that it, too, has an obligation and "duty" to mandate certain activities to "promote" the achievement of broad policy objectives legislatively declared in most statutes. The		

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		Legislature did not provide the Council with, nor does our governmental structure allow for, such unbridled authority. Proposed Section 5003 is particularly illustrative of the fatal flaw of phantom authority being cited as the basis for a regulation. Similar analyses can be done for other modified Proposed Regulations, but as applied to proposed Section 5003, this shortcoming is perhaps the most egregious, especially when one considers the negative effect this proposed policy would have on the achievement of the water supply reliability coequal goal – in direct opposition to the overall intent of the Delta Reform Act. 11 Public Water Agencies' comment letter dated January 14, 2013 at pp. 8-11, 20. 12 Notwithstanding the lack of authority to promulgate Section 5003, the way "water supplier" is defined for purposes of Section 5003 is both too broad and too narrow. Too narrow, because, as stated at the March 25 and 26 public meeting, both in-Delta and upstream water users are exempt, leaving the policy to apply to only water users who export water through the State Water Project or the Central Valley Project. In-Delta diversions can have an individually or cumulatively significant adverse impact on achieving the coequal goals, thus, they should not be exempted. It is also too broad, because, as explained below, the Council seeks to judge water management decisions of agencies outside of the Delta.		
17. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	The Council was provided only limited authority by the Legislature. In contrast to the code sections of the Delta Reform Act the Council uses as references for modified proposed Section 5003, there are sections in the Act, such as the following, which do explicitly identify authority and direction to the Council regarding its "power" and "duty" to review land use activities in the Delta, i.e. "covered actions," and explicit guidance for the Council's review of them. Within the Act's three section "Delta Policy" chapter, it is notable that unlike sections 85020 and 85021, which set forth general statewide policies, section 85022, subdivision (a) is the only section in the chapter that specifically refers to "covered actions." Moreover, that section limits the use of the "covered action" regulatory scheme to land use activities in the Delta and Suisun Marsh. If the Legislature had intended "covered actions" to be applicable to the enforcement of any and all general policies and objectives specified in sections 85020 and 85021 regarding statewide water management policies, it easily could have done so. It did not. Section 85022, subdivision (a) declares the Legislature's intent that state and local land use actions identified as "covered actions" pursuant to section 85057.5 be consistent with the Delta Plan. This section's findings, policies, and goals apply to Delta land use planning and development, not water management decisions far outside the Delta. Moreover, the provision of lengthy and specific direction to the Council regarding how it is to carry out its "power" and "duty" to review appeals of covered action certifications related to land use activities in the Delta and Suisun Marsh evidences the Legislature's intent to limit the Council's authority to appellate review of consistency certifications in the land use arena. 13 This stands in stark contrast to the sections referenced in ostensible support of any "power" and "duty" related to promulgating proposed Section 5003. A specific "power and duty" is "identified" in section 85022, subdivision (b), which directs that the Council shall be guided by the findings, policies, and goals expressed in this section when reviewing decisions of the Delta Protection Commission pursuant to Division 19.5 (commencing with section 29700) of the Public Resources Code. In section 85034, the Legislature also provided specific direction that the Council shall assume the powers and duties of the California Bay-Delta Authority. But the Bay-Delta Authority was not a regulatory body, and certainly had no authority to prohibit appropriation of water conveyed through	A	The Council disagrees with the comment's assertion that the Delta Reform Act limited the Council's authority to "land use" covered actions. The Delta Reform Act's definition of covered action is not limited to land use activities, rather it is broadly defined to include any "plan, program, or project" (defined by Public Resources Code § 21065) that, among other things, will have a significant impact on the coequal goals. (§ 85057.5(a).) Thus, it may include projects such as water management actions. Thus, pursuant to the statute, those water management covered actions must be consistent with the Delta Plan and will be subject to these regulations, and it is within the Council's authority to regulate those covered actions. Regarding the Council's authority to adopt section 5003, the Act requires the Council to adopt a "legally enforceable Delta Plan" that will, among other things, "provide for the sustainable management of the Sacramento-San Joaquin Delta ecosystem." (Water Code § 85001(c).) Many other statutory provisions reinforce this authority. (See MR5, reviewing the Council's authority to protect, restore and enhance the Delta ecosystem.) The regulation that imposes limitations on covered actions that export water from, transfer water through, or use water in the Delta, section 5003, applies only when the covered action will harm the Delta environment. It is authorized by the Act because it satisfies the mandate that the Council provide for sustainable management of the Delta ecosystem. It is further authorized as a measure that promotes a more reliable water supply. (E.g., Water Code § 85302(d).) For more detailed explanation of the Council's authority to adopt and enforce regulations generally, see master response 1. For an explanation of the Council's authority to consider out-of-Delta actions when regulating in-Delta actions, see master response 4.

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		the Delta. Again, this is consistent with the Legislature's care in seeking to avoid creating a new regulatory agency with broad jurisdiction to regulate actions outside the Delta, but instead was focused on a narrow application of "covered actions" review powers to land use actions in the Delta and Suisun Marsh. 13 Chapter 3 of the Act is entirely dedicated to establishing this specific scheme. (Water Code, § 85225 et. seq.)		
18. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	The Legislature's definition of "covered actions" cannot be expanded by fiat. Through its proposed Section 5003, the Council seeks to functionally, and unlawfully, expand the specific language of section 85057.5's definition of "covered action". Though the statute limits potential "covered actions" to those occurring in the Delta or Suisun Marsh, Section 5003 asserts authority to reach outside those specified areas to exercise jurisdiction over water suppliers outside the Delta, based on the legal fiction that it is only assessing the "consistency" of the actual "covered action" being proposed to occur within the Delta. By doing so, the Council inappropriately and without basis establishes the potential for a proposed "covered action" that is consistent with the Delta Plan and furthers the achievement of the coequal goals (more reliable water supply and restoration of the Delta's ecological health), but is proscribed by the Council because the proponent of the "covered action" has not "adequately" satisfied its unjustified regulatory scheme. The Legislature made it clear that the Council's geographic reach is limited to the Delta and the Suisun Marsh, with two limited exceptions. First, Water Code section 85302, subdivision (b) provides: "The geographic scope of the ecosystem restoration projects and programs identified in the Delta Plan shall be the Delta, except that the Delta Plan may include recommended ecosystem projects outside the Delta that will contribute to achievement of the coequal goals." (Underline added.) Second, Water Code section 85307 provides: "The Delta Plan may identify actions to be taken outside of the Delta, if those actions are determined to significantly reduce flood risks in the Delta." Thus, if the Legislature had intended the Council to have the authority to mandate "reduced reliance" on water conveyed through the Delta, it would have expressly provided it with that power. It did not. Because the Delta Reform Act does not authorize the Council to regulate actions outside the Delta by purporting to regulate "covered actions" within the Delta, the Council should direct staff to remove Section 5003 from the next draft of the proposed regulations.	A	Please see MR 4 for a response to the comment that section 5003 inappropriately reach water suppliers outside the Delta.
19. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Not only does the Council lack the authority to adopt Section 5003, it is unnecessary and redundant. In the last 20 years, both urban and agricultural water users that receive water from the Central Valley Project and State Water Project, which is conveyed through the Delta, have invested billions of dollars to implement water conservation programs, improve efficiency, create new storage both above and below ground, and develop local and alternative supplies. Because of this investment, water use in those areas looks much different than it did in the early 1990's and before. Per capita usage has decreased significantly in urban areas. Similarly in those areas, agricultural water use has been reduced considerably resulting in less water being applied to a crop while maintaining high levels of production. Regulatory uncertainty in recent years has made these investments a further necessity. In addition, other sections of the Water Code have increased incentives for urban and agricultural water suppliers to further improve reduced reliance. Section 5003 seeks to add further regulatory and reporting requirements on the communities reliant on exports, and only those communities. As stated by staff at the March 28 and 29 public meeting, neither in-Delta water users nor upstream water users are subject to the policy. Instead, the Council seeks to regulate water suppliers often hundreds of miles from the Delta who are already subject to numerous other federal, state, and local controls on water quantity and quality.	Ne	The Council disagrees that section 5003 is unnecessary and redundant. This section builds on current requirements for water suppliers to prepare Urban and Agricultural Water Management Plans to minimize the burden on water suppliers as they comply with a "legally enforceable Delta Plan" and contribute to both achieving the coequal goal of improving the reliability of the state's water supply and the state's policy of reducing reliance on the Delta and improving regional self-reliance. The comment's assertion that section 5003 is "redundant" ignores the fact that the regulation adds a new consequence. As a result, it encourages compliance, and thereby adds to existing law. Section 5003 does not alter existing regulations administered by DWR relating to water management plans. However, simply complying with DWR requirements would not satisfy the requirements of the policy because these do not require urban water suppliers to take any action. Rather, they require urban water suppliers to prepare a plan to manage their water supplies efficiently and effectively, and to submit reports to the DWR at five-year intervals. The Council, however, believes that both planning and implementation are necessary to reduce reliance on the Delta and improve regional self-reliance. Therefore, section 5003 provides that all water suppliers that have "completed a current Agricultural or Urban Water Management Plan (Plan)" and have "identified, evaluated and commenced implementation, consistent with the implementation schedule set forth in the Plan of all programs and projects included in the

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				Plan that are locally cost effective and technically feasible which reduce reliance on the Delta" are "contributing to reduced reliance on the Delta and improved regional self-reliance and are therefore consistent with this policy (i.e. section 5003)." Furthermore, section 5003 establishes an expected outcome for measureable reduction in Delta reliance and improvements in self-reliance (i.e. the reduction in the amount of water used, or in the percentage of water used, from the Delta watershed) that is applicable to both agricultural and urban water suppliers, and requires them to report this information in their Plans, beginning in 2015. Even where existing law and section 5003 are the same, section 5003 provides an additional consequence beyond existing law (existing law withholds grants if certain actions are not taken). Here, under certain conditions, noncompliance can mean that a proposed in-Delta action that would benefit the water supplier does not comply with the regulation and therefore may not be able to go forward. See MR1 and MR4 for more information on the Council's regulatory authority to consider out-of-Delta actions when regulating in-Delta actions. The Council disagrees with the commenter's claim that "neither in-Delta water users nor upstream water users are subject to this policy." In-Delta water users that fall under the definition of "water supplier" (see section 5001(hh)) are subject to the policy. Section 5003 covers a proposed action to export water from, transfer water through, or use water in the Delta. However, it does not apply unless one or more water suppliers, as defined in section 5001, would receive water as the result of the proposed action (see section 5003 (b)). Thus section 5003 would potentially apply to in-Delta water users that meet the State's definition of urban and agricultural water suppliers.
20. Sacramento, City of	5/23/2013	**This comment was received late after the comment period ended.** ...Based on this representation, our letter of April 22 suggested edits in Sections 5003(a) and 5003(b) to make this regulatory intent clearer. Our letter also suggested an edit to the "expected outcome for measurable reduction in Delta reliance" provision in Sect ion 5003(c) to better reflect the regulatory intent that you three described during the meeting. On May 6, 2013, Mr. Carl Lischeske and Mr. Kevan Samsam of the Delta Stewardship Council contacted Jim Peifer of the City's Department of Utilities and advised him that changes to the regulations that the City requested will not be made because it is too late in the process to make these changes, but t hat they could be made at a later date, such as the next update of the Delta Plan. In this conversation, Council staff reiterated its position that Section 5003 of the proposed regulations applies to diversions of surface water from within the Delta, but not to diversions that occur outside of the Delta - even if the water may be used in the Delta after being diverted - and also stated that the Council has never intended the language to be interpreted differently. Until the recommended edits to Section 5003 of the proposed regulations are made, we will rely on Council executive staff's consistent representations as to the intent and application of these provisions.	Ct, Co	WR P1 could apply to proposed activities that use water in the Delta, even if the water originates or is diverted outside the Delta, or if the water is pumped from groundwater. However, the activity must first meet the definition of a "Proposed Action" including having a significant impact on either of the coequal goals or a governments sponsored flood control program. Based on the information provided by the commentator, including the meetings and conversations that occurred which resulted in the comments, it is unlikely the projects and types of projects discussed will meet the definition of a proposed action and be subject to WR P1.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5004

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. East Bay Municipal Utility District	4/22/2013	The provisions in Section 5004(a)-(b) are duplicative, unnecessary, and unclear. The statement of reasons indicates that the "lack of accurate, timely, consistent, and transparent information on the management of California's water supplies and beneficial uses is a significant impediment to the achievement of the coequal goals." However, the solution proposed by the regulatory language is simply to reiterate existing state and federal policies and regulations that are enforced by other agencies. Furthermore, the regulatory package provides no documentation or evidence suggesting that the existing state and federal polices and regulations are not currently being enforced. As such, this entire section is inconsistent with both the standards of necessity and nonduplication. This section is not necessary, as there is no evidence that the existing policies and regulations are not currently being implemented and enforced, and it is also not clear that these policies and regulations, or the statutes pursuant to which they were adopted, can be enforced by the Council.	Ct, O	This comment does not refer to, or is based on, any change in language from the previous regulatory package. We disagree that this section is duplicative, unnecessary or unclear. In the past decade, both CVP and SWP have adopted new or modified policies relating to transparency and public participation in decisions on state and federal water contracts. The Council fully supports these measures as the Council has determined transparency of government decision making and an informed public is important in achieving the coequal goals. To be consistent with the Delta Plan, approval of new or modified contracts must have taken place through administrative decision-making processes that are consistent with these policies. The purpose of the regulation is to provide the Council with the ability to assure compliance with these policies, and to provide an additional consequence for those who fail to comply. The language in the Delta Plan has been modified to better reflect this.
2. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Section 5004 is redundant and unnecessary, as demonstrated in the Public Water Agencies' prior comments (formerly numbered Section 5006). The Department of Water Resources and United States Bureau of Reclamation have contracting processes for water from the State Water Project and Central Valley Project, respectively, that require transparency. There is no need for the Council to repeat those requirements in its regulations. Further, section 5004 would arguably provide the Council with authority to regulate the form of state and federal water contracting statewide, a power the Council does not and cannot have. For these and other reasons presented by the Public Water Agencies, section 5004 should be removed from the Proposed Regulations.	A, Ne	This comment does not refer to, or is based on, any change in language from the previous regulatory package. In the past decade, both CVP and SWP have adopted new or modified policies relating to transparency and public participation in decisions on state and federal water contracts. The Council fully supports these measures. To be consistent with the Delta Plan, approval of new or modified contracts must have taken place through administrative decision-making processes that are consistent with these policies. The purpose of the regulation is to provide the Council with the ability to assure compliance with these policies, and to provide an additional consequence for those who fail to comply. Given the additional consequence, the regulation is not redundant. The Council disagrees with the comment's assertion that section ~~5006~~ 5004 is an attempt to administratively declare that the administration of water contracts by DWR or the Bureau of Reclamation are covered actions. To be a covered action, the proposed activity must meet the definition of a covered action, as described in Water Code section 85057.5 and in section ~~5003~~ 5001(j) of these regulations. It is likely that not all water contracting activities will meet the criteria. Water Code section 85057.5(b)(2), for example, excludes the "[r]outine maintenance and operation of the State Water Project or the federal Central Valley Project." Therefore, those actions are not covered by the adopted regulations. In contrast, actions concerning one or both of those projects that are either not routine, or not maintenance and operation, are potentially covered actions if they meet other statutory criteria. The Council has consistency review authority, on appeal, over those water contracting activities that will have a significant impact on the coequal goals and meet the other criteria of a covered action. The Council is not asserting jurisdiction over the Bureau of Reclamation. However, some Bureau contracts may be with local agencies. Those local agencies must determine if the water contracting activity is a covered action and, if necessary, file a certification of consistency.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5005

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Central Delta Water Agency	4/22/2013	Section 5005(b). The reference to subsection (c) should be changed to relettered (a). Section 5005. Update Delta Flow Objectives In compliance with the limitations contained in Water Code section 85031, the regulation must be revised to include the requirement that imposition of flow requirements must adhere to the water right and statutory priorities. Flow necessary for mitigation of harm caused by the SWP and CVP, and to meet salinity control in the Delta, and to meet the affirmative obligations of the Projects such as the SWP obligation to preserve fish and wildlife, and the CVP obligation to double the natural production of anadromous fish must be provided by the SWP and CVP.	Co	The reference to subsection (c) should be changed to (a). The remaining comment does not address any changes to the regulation. It is outside the Council's authority to require that the Water Board subject their decisions to "water right and statutory priorities." (section 85057.5(B)(1).) Additionally, subsequent implementation of the proposed flow objectives in the BDWQCP may necessitate changes to existing water rights, not the other way around.
2. San Joaquin Tributaries Authority	4/22/2013	Section 5005 has been greatly improved; the SJTA supports the deletion of proposed deadlines for the State Water Resources Control Board flow objective review process. However, section 5005 states that, when adopted, the DSC will use the State Water Board's flow objectives to determine consistency with the Delta Plan. This determination is premature. If the State Water Board adopts objectives that do not comply with the Delta Plan or frustrate the achievement of the co-equal goals, such objectives should not be incorporated into the Delta Plan. Thus, the DSC must wait until the State Water Board adopts water quality objectives and review the adopted objectives before determining that the objectives shall be used to determine consistency with the Delta Plan.	Co	The proposed completion dates for the State Water Resources Control Board's adoption of flow objectives have been changed to a recommendation in the Delta Plan. The commenter asserts that State Water Board' revised flow objectives may not be consistent with the Delta Plan or the co-equal goals, and should not be used to determine consistency with the Delta Plan. The section on compliance with State Water Board flow objectives has not changed, so this comment does not pertain to the changes. Nevertheless, the regulation requires covered actions to be consistent with existing flow criteria provided for in the Bay Delta Water Quality Control Plan, and when that plan is updated, the update will be used. Through its adoption of new flow objectives, the Board is required to balance the protection of public trust resources, including the Delta ecosystem, economic interests, human health and welfare, and water supply needs. Thus, the coequal goals of ecosystem restoration and water supply reliability, as well as achieving those goals in a manner that protects the Delta as an evolving place, are quintessential to the Board's determination. Furthermore, the Delta Reform Act sets forth the policies relating to the Delta that state actions dealing with the Delta must apply (e.g., Water Code section 85020 [asserting the policy of the State for management of the Delta].)
3. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	There have been some modest improvements to the Council's original proposed regulations submitted to OAL on November 16, 2012. The Public Water Agencies are encouraged that former proposed Section 5007 "Update Delta Flow Objectives" has been removed from the modified Proposed Regulations package, and has become a recommendation.	O	Comment Noted.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5006

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Solano County Water Agency	4/15/2013	The Delta Stewardship Council lacks legal authority make a consistency determination or to require mitigation for a conservation measure to develop or restore habitat pursuant to an approved Habitat Conservation Plan and/or Natural Community Conservation Plan.	A	See MR1.
2. San Joaquin Council of Governments	4/16/2013	The Delta Stewardship Council lacks legal authority make a consistency determination or to require mitigation for a conservation measure to develop or restore habitat pursuant to an approved Habitat Conservation Plan and/or Natural Community Conservation Plan.	A	See MR1.
3. Central Delta Water Agency	4/22/2013	The regulation as written is in conflict with Water Code section 85020(b) which requires the protection and enhancement of the unique cultural, recreational and agricultural values of the California Delta as an evolving place, and Water Code section 85054 as to protecting, restoring and enhancing the Delta ecosystem of which the levee protected lands are a part, and the requirement to protect and enhance the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place. As explained above, interference with the reclamation of the Swamp and Overflowed lands would violate the obligation of the State resulting from the grant of said lands from the United States. The regulation is also in conflict with Water Code section 12981 in which the Legislature has declared that in order to preserve the Delta's invaluable resources, the physical characteristics of the Delta should be preserved essentially in their present form and that it is necessary to maintain and improve the Delta's levees to protect such physical characteristics. The levee systems at the "appropriate elevations" are in areas which are less vulnerable to subsidence related risks. The mandate of such regulation also appears to illegally conflict with local agency efforts and plans to protect agricultural lands. The regulation should be revised to require that the restoration of habitat be accomplished in a manner consistent with the statutory requirements. Improvement of water quality in the Delta and provision of inflow and outflow would constitute consistent restoration of habitat. Similarly, improvement of in-channel habitat such as on already flooded islands and areas, and on the channel islands or berms would be consistent. Improvement of levees to provide a larger structural section to accommodate waterside planting is also an opportunity for habitat restoration that could be consistent with legal requirements. The regulation should include: "(c) No habitat Restoration shall be allowed if it requires the breaching of or results in compromising the integrity of any existing levee system in the Delta."	Co	This comment does not address any changes to section 5006. The protection of the unique cultural, recreational, and agricultural values of the Delta as an evolving place, as required by Water Code section 850202(b) and 85054, can be accomplished at the regional scale in a manner that is compatible with habitat restoration, and these sections do not imply a restriction on aquatic habitat restoration at the project scale. Water Code section 85020 states that one of the objectives inherent in the coequal goals for management of the Delta is to “restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a health estuary and wetland ecosystem.” Water Code section 85022(d)(5) states that one of the “fundamental goals for managing land use in the Delta” is to “develop new or improved aquatic and terrestrial habitat and protect existing habitats to advance the goal of restoring and enhancing the Delta ecosystem.” The use of the word “new” clearly allows for the conversion of one habitat type to another, including the conversion of diked land to aquatic habitat. In addition, habitat restoration can enhance recreational opportunities, and some types of habitat restoration, such as floodplain and riparian habitat restoration, can be compatible with agriculture. The commenter asserted that interference with reclamation of the Swamp and Overflowed Land would violate the obligation of the state resulting from the grant of said lands from the United States. The comment misunderstands the State’s obligations under the land grant of Swamp and Overflowed Lands in the Arkansas Act. In the Arkansas Act, Congress granted California Swamp and Overflowed Lands “to enable” the state to reclaim the land. (43 U.S.C.A. section 982.) Accordingly, Congress required the proceeds from sales of those lands be applied exclusively to the reclaiming of those lands. (43 U.S.C.A. section 983.) Thus that Act did not require the State to reclaim all the land granted it by Congress, but rather obligated it to use all proceeds received from the sale of the land to reclaim the land. Only the United States may question the State’s disposition of the lands or the proceeds from their sales. (Kings County v. Tulare County (1898) 119 Cal. 509.) The regulation does not illegally conflict with local agency efforts and plans to protect agricultural lands. See MR3 regarding the Council’s land use authority. The commenter offers several examples of ways to improve habitat that would also benefit agriculture in the Delta. The Council agrees that improvement of water quality in the Delta is consistent with ecosystem restoration, including habitat restoration, as discussed in Chapters 4 and 6 of the Delta Plan. The Council also agrees that restoring adequate flows is an essential element of restoration of habitat, as discussed in Chapter 4 of the Delta Plan. Improvement of in-channel habitat is consistent with this section. Expansion of riparian and floodplain habitat as part of levee projects is consistent with this section and section 5008, Expand Floodplains and Riparian Habitats in Levee Projects.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5006

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
4. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Section 5006 requires all habitat restoration in the Delta to be consistent with a draft conservation strategy issued by the Department of Fish and Wildlife in 2011. Elevating another agency's draft strategy to the status of an enforceable mandate creates potential ambiguity, inconsistencies, and duplication. This approach highlights serious concerns that apply more broadly regarding the relationship of the Proposed Regulations (as well as the Delta Plan and the "mitigation measures" identified in the Delta Plan PEIR) to formulation and implementation of the BDCP. The BDCP presents an opportunity to further the coequal goals and achieve significant benefits for the Delta ecosystem as well as protects and restores water supplies, in a manner that is consistent with the carefully defined statutory authority of the Council. The Council's proposed actions could create inconsistencies with the BDCP, however, despite the BDCP's legislatively mandated incorporation into the Delta Plan. The Council's proposed actions purport to impose strategies and mitigation measures that are premature, potentially detrimental to achievement of the coequal goals, and the language could be interpreted as improperly pre-committing resources and constraining other agencies' discretion in evaluating alternatives and mitigation measures in the BDCP. This is not what the Legislature intended. The Delta Reform Act sought a detailed roadmap for water management that depends on the BDCP as well as dozens of plans and studies needed from other agencies. Without these plans and studies on issues such as how to improve the delivery of water, flood protection, and the regional economy, the Council lacks the technical information needed to make basic planning decisions and to realistically evaluate their environmental and economic costs and benefits. Not only has the Council failed to adequately assess the economic implications of the Proposed Regulations, but it also proposes a framework that is likely to prevent successful formulation and implementation of other crucial planning efforts.	Ct, Co, Du	This comment does not address any changes to section 5006 from the original regulation text. The Council has amended the title page for Appendix 3 to clarify document is part of the regulation and not a draft product of CDFW. BDCP has not yet been approved. The Delta Reform Act lays out a specific process for the approval and incorporation of BDCP into the Delta Plan. (Water Code section 85320.) It does not demand the Council to await approval of BDCP before adopting the Delta Plan and implementing regulations. (See Water Code section 85300(a) [setting time frame for Delta Plan adoption]; section 85320 [discussing process for incorporating BDCP into Delta Plan.) Should the BDCP be approved and become part of the Delta Plan, the Council will consider revising the regulations as appropriate at that time.
5. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	The provision in proposed Section 5006 is also inconsistent with the broad exemption from this requirement included in the modified Section 5002(c) for conservation measures proposed to be implemented pursuant to an NCCP or HCP that was developed by a local government in the Delta and approved and permitted by the Department of Fish and Wildlife before the Delta Plan is adopted. The language added to proposed Section 5002(c) provides that such conservation measures will be "deemed consistent" with the requirements of Sections 5005-5009 if the certification of consistency "includes a statement confirming the nature of the conservation measure from the Department of Fish and Wildlife." It is unclear what this means. If it is intended to prevent local agencies in the Delta from undertaking conservation measures that may be inconsistent with the Department of Fish and Wildlife's 2011 draft strategy, it does not fulfill that intent.	Co	Section 5002(c) was added to the regulation to make the regulation consistent with language previously in the Delta Plan relating to the requirements for conservation measure covered actions that are part of an approved and permitted NCCP or HCP. Those covered actions are deemed consistent with sections 5005 through 5009 of these regulations, provided the agency includes a statement from CDFW confirming the nature of the permitted conservation measure.
6. Yolo County	4/22/2013	First, the proposed changes to Section 5006 (formerly Section 5008) ("Restore Habitat at Appropriate Elevations") do not appear to fully address the comments of the California Department of Fish and Wildlife, as presented in Attachment 1 to Agenda Item 6b for the Council's March 28-29, 2013 meeting. It appears that DFW intended the "rationale for the deviation" concept to apply equally to Appendices 3 and 4, rather than Appendix 4 (the elevations map) alone. The County supports such an approach and therefore recommends that the Council consider adding a reference to Appendix 3 in the final sentence of subsection (a) of Section 5006.	Ct	The Council intends to require habitat restoration projects that are covered actions to be consistent with other aspects of DFW's guidance in Appendix 3. However, it should be noted that section 5002 states that in cases where full consistency with all relevant regulatory policies may not be feasible, "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." Thus, section 5002 provides a way to address deviations from Appendix 3, while the revisions to this section provide a way to address deviations from Appendix 4.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5007

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Central Delta Water Agency	4/22/2013	This regulation coupled with the regulation pertaining to covered actions constitutes a regulatory taking in contravention of the State and Federal Constitution and related statutes. Identification of such areas for extraordinary regulation and future acquisition will diminish land values without just compensation. Additionally, the areas designated include agricultural lands the conversion of which to habitat would violate Water Code sections 85020{b), 85054, 12981, 11461 and other provisions of law and the obligations to reclaim Swamp and Overflowed lands. Inhibiting use or development for the purpose of limiting the cost or otherwise facilitating a future acquisition for a public purpose constitutes an unlawful taking.	Co	See MR6.
2. Yolo County	4/22/2013	Second, the proposed changes to Section 5007 (formerly Section 2009) ("Protect Opportunities to Restore Habitat") appear to suffer from a minor internal inconsistency. Specifically, subsection (a) of Section 5007 states that "significant adverse impacts to the opportunity to restore habitat as described in Section 5006 must be avoided or mitigated." This emphasis on "significant" impacts appears again in subsection (c), which explains the level of mitigation required. However, subsection (b) appears to omit the concept of "significance" in discussing when such impacts will be deemed to have been "avoided or mitigated." Consistent with the notion that impacts must only be avoided or mitigated to the extent they are "significant," subsection (b) should be revised to read as follows: "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 significantly preclude or otherwise interfere with the opportunity to restore habitat as described in Section 5006." In the absence of this clarifying edit, subsection (b) could potentially be read to require the complete elimination of any potential impacts, irrespective of significance.	Ct	We disagree that there is an internal inconsistency. Subsection (a) requires the avoidance or mitigation of significant adverse impacts to the opportunity to restore habitat within certain priority habitat restoration areas. The concept of "significant adverse impacts" is already included in (b) by virtue of the language "impacts referenced in subdivision (a)."

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5009

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. California Department of Fish and Wildlife	4/22/2013	For reasons summarized below, CDFW recommends revising section 5009 of the proposed regulation as follows : § 5009. Avoid Introductions of and Minimize Habitat Improvements that Increase Habitat Suitability for Nonnative Invasive Species. (a) The potential for new introductions of, or habitat improvements that enhance survival and abundance of improved habitat conditions for, nonnative invasive species, striped bass, or bass must be fully considered and avoided or minimized mitigated in a way that appropriately protects the ecosystem. (b) For purposes of Water Code Section 85057.5(a)(3) and Section 5001U)(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. With respect to the title of section 5009, CDFW suggests moving "Invasive" to follow "Nonnative", in order to make the terminology (nonnative invasive species) consistent with the definition provided in the modified text(§ 5001(v)), as well as subsections (a) and (b) of this section (5009). In addition, CDFW suggests inserting "minimize" prior to "habitat improvements" in the title of section 5009 and following "avoided" in subsection (a), given that avoidance of habitat improvements which enhance survival and abundance of nonnative invasive species may not be practicable/feasible during implementation of restoration actions designed to benefit native species . We recommend deleting the reference to "mitigation" in the section title and text because it is unclear what might constitute successful mitigation, and it is also unclear what level of mitigation would be sufficient. We propose clarifying language in the section title and text of subsection (b) to indicate that the habitat improvements proposed should avoid enhancing habitat for invasive species. Careful consideration of design elements that minimize the potential establishment and proliferation of nonnative invasive species and promote habitat resiliency to changes in future Delta conditions is of critical importance to restoration planning.	DP	The revisions proposed do not improve the clarity of the regulation, but only substitute equivalent terms for those used in the rule. For example, the term mitigate as used in the rules title already implies avoiding or minimizing. Mitigation in this context need not always require compensatory mitigation, but rather actions to avoid or lessen effects. Improved habitat conditions encompass improvements that enhance survival and abundance. When improvements that enhance conditions favorable to invasive nonnative species can be avoided in habitat restoration projects, they can be mitigated through measures that lessen their effects, as noted in DFW's recent correspondence on the matter (see response to comment 2 in section 5009).
2. California Department of Fish and Wildlife	4/29/2013	Subject: Response to questions concerning opportunities to minimize habitat improvements that increase habitat suitability for nonnative invasive species, striped bass or bass. In response to your April 23, 2013 questions about whether it is feasible to improve the Delta's aquatic habitats for native species while still minimizing increases in habitat suitability for nonnative invasive species, striped bass or bass, the Department of Fish and Wildlife (Department) is providing the following preliminary information about measures that can contribute to that objective. Much of the following information was compiled during a scientific evaluation of Prospect Island restoration design alternatives (ERP 2013). Please recognize that the bullets below do not represent an exhaustive list and are not organized in any particular order of priority. • Minimize (when appropriate) restoration design that introduces human-made structures, as these are often areas where predators congregate. • Design habitat improvements that have hydraulic and depth diversity for feeding, resting and refuge from predators. • Avoid creating high velocity gradients (large changes between high and low velocity flows) associated with abrupt changes in structural features, such as at breaches, as these tend to provide feeding locations for 'mobile' predators. As breach size increases the hydrodynamic structure available for use by predators decreases. High velocity gradients at such features may reduce the ability of native fish to avoid predators.	DP	Thank you for the letter. Comment duly noted.

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
		• Minimize the establishment of dense vegetation structure associated with submerged/floating aquatic vegetation (SAV/FAV), as these are often utilized by 'lay-and-wait' predators. In addition, SAV/FAV beds may also act as 'biological filters' for sediment (Nobriga et al. 2008), influencing localized turbidity levels. • Create conditions that encourage turbidity. • Design for bi-directional tidal circulation to focus tidal energy, which helps maintain channel velocities and discourage the establishment of SAV/FAV. • Create floodplain habitat that is seasonally inundated during peak native fish spawning and rearing periods and is dry during other periods to prevent the spawning and rearing of nonnative fish (Sommer et al. 2001; Sommer et al. 2004) and the colonization of SAV/FAV and clams (Lucas and Thompson, 2012).		
3. Central Delta Water Agency	4/22/2013	As set forth above in joint comments on both 5001.(v) and 5009, the regulation is in conflict with Water Code sections 85302(c)(5), 85302(e)(3), CVPIA section 3405(b)(2), Fish and Game Code section 1741 and California Fish and Game Fishing Policies for Striped Bass and Black Bass.	Co	As noted in the response to CDWA's prior comments on these rules, efforts to manage and recover striped bass became controversial with the listing of Chinook salmon and delta smelt under the state and federal Endangered Species Acts and have remained controversial since, with the Department of Fish and Wildlife agreeing in 2011 to develop, a proposal to modify the striped bass sport fishing regulation (i.e., section 5.75) to reduce striped bass predation on Sacramento River Winter-run Chinook salmon, Central Valley Spring-run Chinook salmon, Central Valley steelhead, and delta smelt. The Department of Fish and Wildlife, in response to an inquiry from the Council, has identified a wide variety of measures than can avoid or reduce the adverse effects of bass or striped bass predation on endangered native fish within ecosystem restoration projects (see comment 2 in section 5009), without otherwise interfering with ecosystem restoration actions or adverse effects on striped bass populations. Substantial habitats for striped bass and bass will remain outside areas proposed for ecosystem restoration, providing significant areas where these valued species are protected from harm by invasive plants and animals or other stressors. 5009(a) provides that measures to avoid new introductions or improved habitat conditions for affected species must be implemented in a way 'that appropriately protects the ecosystem" affords protection at the ecosystem level for both native and introduced but valuable species. . The reference in Water Code 85304(c)(5) to recovery plans does not require protection of valuable nonnative species, as these plans are developed for federally-designated endangered native species, not introduced species. Also, although the Central Valley Project Improvement Act (CVPIA) does establish a federal program to rebuild anadromous fish populations in the Central Valley, Water Code 85304(c)(5) references only the goal of doubling salmon populations, rather than CVPIA goals for other anadromous fish.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5010

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Central Delta Water Agency	4/22/2013	The regulation unduly interferes with local land use authority in that its limitations are an absolute limitation and go well beyond a reasonable nexus to the coequal goals. Flood proofing or protecting development to meet all requirements in areas not listed in 5010(a) is possible, and the targeting of areas rather than establishing standards for development, which can be uniformly and equitably applied, is in conflict with the authority provided by law to local and regional land use agencies. The statement of no alteration of concurrent authority with the Delta Protection Commission (DPC) does not resolve the DSC application of requirements beyond the jurisdiction of the DPC or the prohibition by the DSC of development allowed by the DPC. (DPC) does not resolve the DSC application of requirements beyond the jurisdiction of the DPC or the prohibition by the DSC of development allowed by the DPC.	Co	Regarding the Council's land use authority, see MR3. Moreover, the limitation on new development is not an absolute limitation. The regulation allows new development outside urban areas and towns if it is consistent with land use designations in county general plans as of the date of the Delta Plan's adoption, such as farm labor housing in areas designated for agriculture. New residential development of five or more parcels in these areas must also be consistent with section 5013 with respect to floodproofing. Designating areas for different types of uses is a well-established land use planning and regulatory practice. It has been used since approximately 1900 (see *Village of Euclid, Ohio v. Ambler Realty Co.* (1926) 272 U.S. 365, 386, explaining same in upholding city's land use designations). Regarding the assertion of conflict with the authority of the Delta Protection Commission, see MR7.
2. Sacramento County	4/22/2013	Previous Comment: Section 5012 limits "new urban development" to certain locations that are already developed or designated for development in local general plans. The intended meaning of the term "urban development" is far from clear. The draft regulations already define the term "urban area" in such a manner that the unincorporated Delta towns of Clarksburg, Courtland, Hood, Locke, Ryde and Walnut Grove are excluded. However, the term "new urban development" is using the term "urban" as a classification of a particular type of land use (residential, commercial, industrial) without regard to population or density. A broad interpretation of the term "new urban development" would encompass even the construction of a single residence or commercial facility. However, other draft regulations (Section 5015 regulating residential subdivisions of five or more lots) would be unnecessary in such case. What then is the level of "urban development" that is within the scope of Section 5012? Current comment: We note the term "urban" was deleted from Section 5010 (pages 14 and 15) and replaced with "residential, commercial and industrial development". To better reflect the intent of Chapter 5 of the Delta Plan and remove all references to the term urban, we suggest the re-titling of Section 5010. We recommend replacing "Locate New Urban Development Wisely" with "Criteria for Compatible and Sustainable Land Use Development".	Ct	Commenter asserts that the title of this regulation be changed. This is not necessary, as section 5010(a) clarifies that "urban" in this case refers to residential, commercial and industrial development.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5011

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Section 5011 mandates that "[w]ater 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 . . . ." In addition, it mandates that "[p]lans 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." There is no basis in the Delta Reform Act for the asserted authority to regulate the siting of water management facilities, ecosystem restoration, and flood management infrastructure, regardless of whether the regulated action is a covered action. Nor does the Act authorize the Council to regulate all purchases of land that may be developed for ecosystem restoration. Proposed Section 5011 cites as authority Water Code section 85210, subdivision (i), and lists as references sections 85020, 85022, 85054, 85300, and 85305. Neither the authority cited, nor the sections referenced, authorize the Council to dictate what feasible alternative sites or mitigation measures must be considered by anyone proposing to site water or flood management facilities or ecosystem restoration projects or proposing to purchase land for ecosystem restoration purposes.	A	Regarding the Council's land use authority, see MR3. Covered action proponents must certify consistency with the Delta Plan. (Water Code section 85225.) The Council has authority to review covered actions on appeal for consistency with the Delta Plan. (Water Code section 85225.10.) "Covered actions" are defined by Water Code section 85057.5 and could include water management facility construction projects, ecosystem restoration projects, and flood management infrastructure projects. The Delta Plan must promote appropriate land uses. (Water Code section 85305(a).) The Council has determined in its discretion that requiring covered actions to respect local land use designations appropriately accomplishes this requirement. The rule is derived, in part, from the Council's consideration of the Delta Protection Commission's proposal to protect the unique values of the Delta, submitted pursuant to Water Code 85301, any provision of which the Council is authorized to include in the Delta Plan by Water Code Sec 85301(d).
2. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Proposed Section 5011 also conflicts with federal and state law. Absent a waiver of sovereign immunity, federal and state agencies are not subject to compliance with local general plans and zoning ordinances. In addition, under California law, cities and counties enjoy an intergovernmental immunity, and are exempt from each other's building and zoning regulations, including compliance with general plans. Although Government Code section 53091 requires a local agency to comply with cities' and counties' building and zoning ordinances, "local agencies" do not include cities or counties. (Gov. Code, § 53090.) Furthermore, the siting and construction of "facilities for the production, generation, storage, treatment, or transmission of water" by any agency is also expressly immune from city and county building and zoning ordinances. (Gov. Code, § 53090, subds. (c)-(d).) Yet modified Section 5011(a) attempts to render the siting of "water management facilities" subject to consistency with city and county general plans. Thus, proposed Section 5011(a) conflicts with federal and state law, and would be preempted if adopted.	Co	State and local agencies proposing to undertake covered actions must certify consistency with these regulations, which implement the Delta Plan. (Water Code section 85225.) Eventually, federal agencies may also have to certify consistency with these regulations, once the Delta Plan is approved under the federal Coastal Zone Management Act. (Water Code section 85300(d)(1)(A) & (d)(2); see MR1 for more information about the Coastal Zone Management Act requirements). Thus, agencies proposing covered actions are required by state, and eventually federal, law to certify consistency with this regulation. Those agencies will not be subject to the jurisdiction of any local agency. Local, state, and federal agencies are not immune from complying with this regulation and the regulation is not preempted.
3. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Many of the activities that would be subject to this new regulation would be exempt from CEQA, and thus should not be covered actions subject to the consistency certification requirements of the Delta Reform Act. For instance, the purchase of land for restoration of natural conditions, including plant or animal habitats, is exempt from CEQA. (14 Cal. Code Regs. § 15325, subd. (c).) Thus, absent "unusual circumstances," such actions should not be covered actions under the Council's modified proposed Section 5001(dd)(4). Thus, the proposed regulation of the purchase of land for ecosystem restoration exceeds the Council's statutory authority and should be removed for the Proposed Regulations and Delta Plan policies. 14 14. Furthermore, the modified Section 5011(a) is not limited in geographic scope to land purchased in the Delta and Suisun Marsh. Thus, the regulation also exceeds the Council's jurisdiction in this regard as well.	A	As an initial matter, the comment generally misconstrues the distinction between CEQA and the Delta Reform Act. The Act adds a layer of regulation, separate from CEQA's requirements, to actions that qualify as "covered actions." The two statutes provide for different review for different purposes—one requiring review of projects proposed throughout the state for significant adverse environmental impacts and mitigation of those impacts, the other requiring consistency of projects proposed in the Delta with the coequal goals. Thus, in addition to complying with CEQA and all other applicable laws, public agencies proposing covered actions must also comply with the Act and implementing regulations, which have requirements separate from CEQA. The Council's appellate review authority applies to covered actions as defined by Water Code section 85057.5, which in part defines covered actions using the definition of "plan, program, or project" provided by CEQA's Public Resources Code section 21065. The definition of covered action refers only to the definition in the Public Resources Code and not to the statutory or categorical exemptions from CEQA in the Public Resources Code and California Code of Regulations. Thus, projects that meet the definition of a "plan, program, or project" under CEQA but is exempted from the requirements of CEQA by a statutory or categorical exemption nevertheless may be a covered action, provided it meets the other statutory criteria in Water Code section 85057.5.

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
				Nevertheless, the Council determined as a general matter that projects that are exempt from CEQA are not likely to have a significant impact on the coequal goals. Thus the regulation presumes those CEQA-exempt projects will not have a significant impact on the coequal goals for purposes of Water Code section 85057.5(a)(4), unless there are unusual circumstances indicating otherwise.
4. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	In addition, the Proposed Regulation is unnecessary. Public agencies undertaking habitat restoration projects already have ample financial and regulatory incentives to ensure that their habitat restoration projects are consistent with local land use designations, and site restoration activities on publicly owned lands when feasible and consistent with the project's purpose. And for any ecosystem restoration projects that must undergo state or federal environmental review, lead agencies are already required to consider feasible mitigation measures and project alternatives that would substantially lessen any significant adverse impacts. Thus, even if the Council had the legal authority to regulate land acquisition for ecosystem restoration projects, which it does not, the modified Section 5011 would nevertheless be unnecessary. Modified Section 5011 is beyond the Council's statutory authority and unnecessary. Accordingly, it should be removed from the next draft of the Proposed Regulations and the Final Delta Plan policies.	A, Ne, DP	The Delta Reform Act (Water Code section 85054) requires that the coequal goals 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." This gives the Council the statutory authority to require that major projects needed to achieve the coequal goals and flood protection are consistent with local land use plans when feasible. See MR3 for additional discussion of the Council's land use authority. In Water Code section 85022(c)(4), the Legislature has found that "Existing developed uses, and future developments that are carefully planned and developed consistent with the policies of this division, are essential to the economic and social well-being of the people of this state and especially to persons living and working in the Delta." While it is true that public agencies already have incentives to ensure that their projects are consistent with local land use designations and to site projects on publicly owned land, the Council has determined that section 5011 is necessary to explicitly call for the balancing of multiple objectives that the Delta Reform Act requires.
5. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	In addition, we urge the Council to strike the sentence in modified draft Section 5011(a) that reads: "The goals for funding priorities are all important, and it is expected that over time, the Department of Water Resources must balance achievement of those goals." This provision leaves too much room for maintaining the status quo, which has not advanced the coequal goals.	O	This comment does not address any change to the text of this section. The Council believes that the commenter was referring to section 5012(a) and not 5011(a). The Council acknowledges the commenter's concern. Due to the complexity of allocating funding for Delta levee maintenance and improvements, it is felt that the ability to balance achievement of the stated goals by DWR is important to note.
6. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Finally, we urge that the improvement of all Delta levees to the Hazard Mitigation Plan (HMP) standard be deleted from modified draft Section 5006(a). FEMA has stated recently that it has no obligation to restore levees under the Hazard Mitigation Plan Memorandum of Understanding. 15 Such a requirement risks wasting limited public funds, and it may ultimately reduce the reliability of water supply. The FEMA policy is further justification to eliminate this requirement in proposed Section 5011(a). See Letter from Nancy Ward, Regional Administrator, FEMA Region IX, to Mark Ghilarducci, Governor's Authorized Representative, California Emergency Management Agency (Oct. 23, 2012), attached as Exhibit 4.	Ne	This comment does not address any change to the text of this section. The reference to HMP is contained within section 5012(a), not 5006(a). FEMA recently terminated the Hazard Mitigation Plan Memorandum of Understanding (MOU) due to problems the Agency identified in the DWR program for Delta levee maintenance and improvement. FEMA representatives have stated the agency plans to reinstate the MOU as soon as possible, and FEMA is currently working with DWR and CalEMA to revise the MOU; therefore, it is appropriately referenced in section 5012.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5012

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Central Delta Water Agency	4/22/2013	In Section 5012(a)(2) the provision "Except on islands planned for ecosystem restoration, improvement of non-project Delta levees to the Hazard Mitigation Plan (HMP) may be funded without justification of the benefits." should be modified to delete "Except on islands planned for ecosystem restoration". As explained above, such targeting harms land values in advance of acquisition for public purposes and is contrary to law.	DP	This comment does not address any change to the text of this section. The purpose of language in the regulation is to address funding priorities for State interests in Delta levees, and directing funding towards levees planned for ecosystem restoration activities would not be prudent. This does not preclude local levee districts from investing directly and fully any amount they deem necessary into their levee systems. It is the intent that State funding to achieve the HMP guidance not be directed towards islands where intentional breaching, etc. may occur. The commenter's expressed concern regarding land values seems outside the scope of reasonable consideration on the part of the Council. Directing limited State funding towards areas that can provide the greatest flood control benefit is the goal of Council policy.
2. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Section 5012 (formerly numbered Section 5014) - Renumbered Section 5012 strikes the priorities proposed for state investments in Delta levees previously included as subdivisions (a)-(c). While we agree that these old priorities needed to be improved, it would be a mistake to weaken or make more subjective these provisions, and the Public Water Agencies strongly urge that the Council comply with the intent of the Reform Act (Water Code, §§ 85306-85307), and set island-by-island priorities based upon calculated public benefits and costs which include the increasing risks from seismic, climate change, sea level rise and on-going subsidence. By striking subdivisions (a)-(c), the Council has abandoned any deadline for implementing levee funding prioritization, and has instead proposed very broad, non-specific interim priorities which leaves so much room for interpretation that it will do nothing to address the status quo, which has led to haphazard investment in levee repairs that may not serve the public's interest in levee maintenance or the coequal goals of improved ecosystem health and water supply reliability. Indeed, prior comments on the Delta Plan and proposed regulations have documented the ecological benefits of certain flooded islands, but to date, none of the drafts have acknowledged these comments. Hard deadlines should be introduced in the next draft of Section 5011.	Ct	The referenced sections (a)-(c) were removed from the regulations, as the commenter noted, however they were added as a new recommendation in the Delta Plan. This language was not regulatory but rather it was descriptive of the categories of items to be studied, and thus was moved to a recommendation. The content of the removed sections was primarily items for consideration during the analysis process for developing the prioritization for State investments in Delta levees. The Delta Reform Act (85306) directs the Council to develop the priorities, and the Council directed staff to complete this task by January 1, 2015.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5013

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Central Delta Water Agency	4/22/2013	The additional requirement for flood proofing to protect against a 55 inch rise in sea level at the Golden Gate should be deleted. The language is ambiguous as to the resulting flood elevation in the Delta and could be interpreted to require more than the 200 year level of protection required for urban areas. The requirement should be the same as that for the unincorporated Delta towns.	DP	The regulation is based upon the 100 year flood elevations in the Delta, which are defined by FEMA in many cases, and are well understood by developers and engineers working in the Delta. It is the Council's intention that sea level rise be accommodated into new rural residential developments in the Delta in order to reduce flood risk to those developments. Current standards for the referenced areas do not accommodate sea level rise, and simply using the same standards would not address the Council's mandate to reduce risks to people in the Delta.
2. Sacramento County	4/22/2013	Previous comment: Section 5015 requires 200 year flood protection for certain residential developments of five or more parcels. This requirement is inconsistent with existing statutory provisions regarding only 100 year flood protection. It conflicts with existing Government Code section 65865.5 wherein the State clearly established that development in non-urban areas (under 10,000 residents) must meet the FEMA 100-year standard and that the 200-year standard is applied to urban areas. Under the current Sacramento County General Plan, neither these towns nor the entirety of the rural Delta could ever reach a population greater than 10,000. Currently, the State has not established 200-year floodplain elevations and according to the Central Valley Flood Protection Plan, has no intention of doing so for non-urban areas. Further FEMA does not utilize and has not established 200-year floodplain maps or elevations. Therefore, it is unclear what 200-year standard is intended in the draft regulations, how and when it is to be established and how the proposed regulation could be applied, lacking any such definition of the standard. Current comment: We note that revisions to Section 5013 (page 18) resulted in the deletion of the 200-year provision. However, the County remains concerned that the revised regulatory language will still be problematic to implement and enforce as a local flood control/management standard. As an alternative we propose the following: § 5013. Require Flood Protection for Residential Development in Rural Areas. (a) New residential development of five or more parcels shall provide for a minimum of 200 year flood protection, such as through the use of adequate levees or floodproofing, if it be protected through floodproofing, as defined in Section 5001(s), to a level 12 inches above the 100 year base flood elevation, plus sufficient additional elevation to protect against the local impacts of a 55 inch rise in sea level rise, measured at the Golden Gate. unless the development is located within outside of: (I) Areas that city or county general plans, as of the date of the Delta Plan's adoption, 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. (5) The incorporated City of Isleton.	O	It appears that the proposed regulatory language for Sec. 5013 does not substantially differ from that developed by the Council and included within the rulemaking package. The commenter correctly notes that the intention is for rural residential development outside of the areas noted in Sec. 5013 to accommodate local impacts of sea level rise of 55 inches at the Golden Gate.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
PROPOSED REGULATION: SECTION 5015

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Sacramento County	4/22/2013	Revised Section 5015(a)(2) references the "The Cosumnes River-Mokelumne Confluence, as defined by the North Delta Flood Control and Ecosystem Project (McCormack-Williamson)". For a better understanding of this regulation, which will lead to more seamless adherence and implementation at the local level, Chapter 7 the Delta Plan should include a map that specifically identifies this area.	Ct	This area is identified in Figure 7-6 within chapter 7 of the Delta Plan.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
APPENDIX 1A

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Appendix 1A ("Best Available Science) – As demonstrated above and in previous comments, it is unlawful and unnecessary to require all covered actions to document the use of best available science. In addition, Appendix 1A, with which all documentation of best available science must be "consistent" under the Proposed Regulations, includes inappropriate criteria, some of which are expressed in mandatory terms. For instance, Appendix 1A states: "Best available science changes over time, and decisions may need to be revisited as new scientific information becomes available." While true that best available science changes over time, there is no universal requirement in law that decisions such as project approvals or permits must be "revisited" as new information becomes available. Statements like this should be removed. It is also incorrect to state that "best available science" "has undergone peer review conducted by active experts in the applicable field(s) of study." In many instances, the best available science may not have undergone peer review. Peer review may be an ideal, but it is not a pre-requisite to information constituting the best available scientific data at the time a proposed project is being evaluated. In addition, the peer review criteria in Table 1A-1 mandates that "Independent scientific peer review shall be applied formally to proposed projects and initial draft plans, in writing after official draft plans or policies are released to the public, and to final released plans." (Underline added.) The Delta Reform Act does not authorize the Council to impose this "criterion" on covered actions. Moreover, it would impose an unnecessary and impossibly heavy burden on a host of projects, increasing costs and delays to a point beyond which few, if any, projects would be undertaken or approved. In addition, while peer review may be appropriate for scientific studies and papers, it is unclear what "peer review" of a proposed project or initial draft plans means. The Council states that it "understands that varying levels of peer review may be commonly accepted in various fields of study and professional communities." However, the Council does not recognize that the best available data (e.g., field studies, phase 1 site assessments, and monitoring of background conditions) may not require any peer review to provide reliable, relevant, and legally adequate information for informed decision- making.	A, Ne	The statement in Appendix 1A that "[b]est available science changes over time" and "decisions may need to be revisited as new scientific information becomes available" acknowledges the evolving nature of best available science, but it does not require a covered action proponent to return to the Council and provide a revised certification of consistency. In addition to requiring the Delta Plan be based on best available science, the Act requires the Plan to recommend integration of science and monitoring results into ongoing Delta water management (section 85308(e)) and to include formal, science-based adaptive management for certain decisions (ongoing ecosystem restoration and water management decisions) (section 85308(d)). Additionally, the Act declares the importance of science to decision-making in the Delta (see sections 85308 [especially section 85308(c), requiring the Delta Plan to, "where appropriate, utilize monitoring, data collection, and analysis of actions sufficient to determine progress toward meeting [] quantified targets"], 85302(g), 85280) and thus it is within the Council's authority to mandate its use. Accordingly, a definition of best available science is appropriate and within Council authority. Criteria listed in Table 1A for Peer Review is based on the National Research Council's criteria for peer review and represents a "desirable peer review process." There is flexibility in the peer review process (and in the consistency certification process) based on the standards of review for various fields of study and professional communities. The Council recognizes that the level of peer review for supporting materials and technical information will vary and the depending on the covered action.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
APPENDIX 1B

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Appendix 1B (Adaptive Management) – The Council lacks the authority to require proponents of covered actions to implement adaptive management. Notwithstanding that fatal defect with the modified Proposed Regulations, Appendix 1B confuses minor adjustments to real-time operations of "water management" projects with formal adaptive management, stating: "For example, decisions might need to be made daily (e.g., Delta water operations), yearly (e.g., implementation of landscape-scale restoration), or decadal (adaptive management of landscape-scale restoration design)." This reflects a fundamental misunderstanding of the adaptive management framework, and must be corrected. These are just a few of the more egregious problems with the proposed "criteria" in Appendix 1A and 1B. Correcting these problems, and others, does not address the more fundamental issue that the Council has no authority to require proponents of covered actions to document the use of best available science.	A, Ct	The Delta Reform Act requires the Delta Plan to include a formal, science-based adaptive management strategy for certain decisions (ongoing ecosystem restoration and water management decisions) (section 85308(d)) and to recommend integration of science and monitoring results into ongoing Delta water management (section 85308(e)). The Council accomplishes these legislative directives by requiring adaptive management for ecosystem restoration and water management covered actions. Furthermore, several provisions in the Act indicate the importance of science to decision-making in the Delta (see sections 85308 [especially section 85308(c), requiring the Delta Plan to, "where appropriate, utilize monitoring, data collection, and analysis of actions sufficient to determine progress toward meeting [] quantified targets"], 85302(g), 85280) and thus it is within the Council's authority to mandate its use with respect to covered actions. Accordingly, a definition of best available science is appropriate and within Council authority. Requiring adaptive management for the specified actions furthers the collection of data and the measuring of progress toward achieving the objectives of the Delta Plan and the coequal goals pursuant to these provisions in the Act. (See sections 85211 and 85308(b).) Finally, the Council is instructed to base the Delta Plan on the advice of the Delta Independent Science Board (section 85308(a)), which recommended the incorporation of adaptive management for these actions (Memos to Phil Isenberg, Chair, Delta Stewardship Council from Richard Norgaard, Chair Delta Independent Science Board (DISB) dated 8 May 2011, 16 Sept 2011 and 12 June 2012). Appendix 1B states that covered actions "should include an adaptive management plan that considers all nine steps of [the adaptive management] framework; however, they need not be rigidly included and implemented in the order described here and should not be used as a means to prevent action, but rather as a tool in decision making." While each decision made on a daily basis to modify water operations may not be subject to the nine-step adaptive management process, the Water Operations Management Team does work within an adaptive management framework that includes the major elements of "plan," "do," and "evaluate and respond." Therefore, the statement does not need to be corrected.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
NOTICE OF RULEMAKING

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. Local Agencies of the North Delta	4/22/2013	We were also disappointed that the revised Economic Impact Statement ("Form 399") was not made available on the Council's website, and ultimately had to be physically retrieved from the Council's office. As a regulatory process with stakeholders throughout the state, the entire rulemaking file should have been available online, or at least provided via email upon request.	Nr	In keeping with its commitment to full transparency and open decision making, the Council provided notice on 4/24/2013 that an additional document, the modified Economic and Fiscal Impact Statement: STD 399 plus Attachment 1, was available for public inspection and comment for a period of 15 days commencing 4/24/2013, and up to and including 5/9/2013.
2. Local Agencies of the North Delta	4/22/2013	Here are LAND's comments on the modified package. I did not see any notice regarding an extension of the deadline on comments due to the unavailability of Form 399 on the Council's website. It also does not appear that the revised Form 399 is posted yet. Please advise if I am mistaken.	Nr	In keeping with its commitment to full transparency and open decision making, the Council provided notice on 4/24/2013 that an additional document, the modified Economic and Fiscal Impact Statement: STD 399 plus Attachment 1, was available for public inspection and comment for a period of 15 days commencing 4/24/2013, and up to and including 5/9/2013.
3. Local Agencies of the North Delta	4/22/2013	Local Agencies of the North Delta ("LAND")1 previously submitted comments on the Rulemaking Package and Economic Analysis. While there have been some improvements, the Rulemaking Package is still not the least burdensome, effective alternative. Furthermore, changes to several of the proposed regulations appear to be substantive in nature, necessitating further public review prior to adoption. (See Gov. Code, § 11346.8, subd. (c).) For these reasons, LAND requests that the Delta Stewardship Council ("Council") revise the Rulemaking Package to conform with applicable requirements prior to adoption and provide the public with an adequate opportunity to review and comment on those changes.	Nr	For the reasons set forth in the Initial Statement of Reasons (11/30/2012) and in staff's response to comments received during the 45 and 15 day comment periods, Council staff believes that none of the alternatives considered or that have otherwise been identified and brought to the attention of the Council would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective and less burdensome to affected private persons than the action taken by the Council. Due to changes of the proposed regulations that were substantive in nature, pursuant to Government Code section 11346.8, subd. (c), the Council issued a Notice of Public Availability of Modified Regulatory Text and Availability of Additional Documents on 4/4/2013, initiating a 15 day public comment period.
4. Local Agencies of the North Delta	4/22/2013	Generally, the Cost Analysis and Form 399 still do not provide a foundation for its conclusions regarding the costs of implementing the Rulemaking Package. This analysis should be corrected and made available on the Council's website prior to adoption of the Rulemaking Package. A thorough analysis and public disclosure of these costs is necessary to informed decision making as well as a valid set of regulations.	Nr	Council staff believes that the cost analysis and STD 399 provide a reasonable assessment of the costs of implementing the Rulemaking Package. The modified Cost analysis and STD 399 was provided to Department of Finance and will be included in its final form in the final rulemaking record submitted to the Office of Administrative Law. In keeping with its commitment to full transparency and open decision making, the Council provided notice on 4/24/2013 that an additional document, the modified Economic and Fiscal Impact Statement: STD 399 plus Attachment 1, was available for public inspection and comment for a period of 15 days commencing 4/24/2013, and up to and including 5/9/2013.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
ECONOMIC AND FISCAL ANALYSIS OR COST REPORT

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
1. BSK Engineers & Associates	4/15/2013	I requested [the Form Std. 399] to be re-written to more accurately reflect the factual basis described in the Cost Analysis, as well as for numerous other comments that Melinda and I had.	Ct, E	The Council has determined that the cost analysis and STD 399 provide a reasonable assessment of the costs of implementing the Rulemaking Package. The modified Cost analysis and STD 399, which was provided to Department of Finance and will be included in its final form in the final rulemaking record submitted to the Office of Administrative Law. In keeping with its commitment to full transparency and open decision making, the Council provided notice on 4/24/2013 that an additional document, the modified Economic and Fiscal Impact Statement: STD 399 plus Attachment 1, was available for public inspection and comment for a period of 15 days commencing 4/24/2013, and up to and including 5/9/2013.
2. Local Agencies of the North Delta	4/22/2013	The Cost Analysis now claims that the annual costs of implementing the Delta Plan will be less than $10 million. (Form 399, p. 1.) A clear explanation of how those costs were derived in the first place or how they were reduced from an estimated high of $12.1 million in the November 2012 draft Rulemaking Package is not provided. This contravenes basic requirements for a valid rulemaking.	E	Government Code section 11347.1 (a) states that any, "agency that adds any…document to the rulemaking file after publication of the notice of proposed action and relies on the document in proposing the action shall make the document available a required by this section." Pursuant to Government Code section 11346.8, subd. (c), the Council issued a Notice of Public Availability of Modified Regulatory Text and Availability of Additional Documents on 4/4/2013, including the revised cost analysis, initiating a 15 day public comment period. The modified STD 399, which was provided to Department of Finance and will be included in its final form in the final rulemaking record submitted to the Office of Administrative Law, is based on and includes all relevant information from the revised cost analysis. Therefore, explanation of the annual cost of implementing the Delta Plan is provided in the revised cost analysis and by comparison with the Modified Regulatory Text, the change from the November 2012 draft cost analysis in the Rulemaking Package is evident.
3. Local Agencies of the North Delta	4/22/2013	LAND remains concerned that the Cost Analysis still does not accurately reflect the likely costs of implementing the Rulemaking Package, which will place severe burdens on local districts in the Delta. (Gov. Code, §§ 11346.3, 11346.5.)	E	The Council has determined that the cost analysis and STD 399 provide a reasonable assessment of the costs of implementing the Rulemaking Package. The modified Cost analysis and STD 399, which was provided to Department of Finance and will be included in its final form in the final rulemaking record submitted to the Office of Administrative Law. In addition, for the reasons set forth in the Initial Statement of Reasons (11/30/2012) and in Council staff's response to comments received during the 45 and 15 day comment periods the Council has determined that none of the alternatives considered or that have otherwise been identified and brought to the attention of the Council would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective and less burdensome to affected private persons than the action taken by the Council.
4. Local Agencies of the North Delta	4/22/2013	The Cost Analysis and Form 399 also continue to ignore the restrictions on public agencies imposed by Proposition 218. (See, e.g., Cost Analysis, pp. 7-8 and Appendix B.) Specifically, Proposition 218 establishes limitations on the levy of assessments as follows: (a) assessments may only be imposed upon parcels which receive a special benefit beyond the general benefits conferred on property within a special district as a result of the public improvement or service; (b) the charge to each parcel may not exceed the reasonable cost of the proportional special benefit conferred on that parcel; and (c) the special district must allocate costs between special and general benefits, and cannot use assessments to recover the proportionate cost attributable to the general benefit. (Art. XIII D, § 4, subd. (a).) The inability of special districts to recover costs associated with the proposed Rulemaking Package should be recognized. Most critically, the inability to pass costs onto landowners within special districts for analysis and construction of setback levees should be disclosed for Policy § 5008: Expand Floodplains and Riparian Habitats in Levee Projects. This is because no benefits would be conferred to assessed parcels from setback levees. Instead, setback levees would likely remove from production the very farmland subject to assessment and diminish the number of acres within the district that can be assessed for fees.	E	Council staff believes that the proposed regulatory action could impose a mandate on local agencies and school districts proposing a covered action. However, the Council has also determined that many if not all local agencies and school districts have existing legal authority to recover costs of consistency certification and compliance with applicable policies through the use of fees, assessments, and charges, set forth in the Initial Statement of Reasons (11/30/2012). In this instance the local mandate is not reimbursable pursuant Government Code section 17556(d). In the event, however, that any agency does not have or is unable to exercise such authority, section 41 of the Delta Reform Act provides for the Commission on State Mandates to determine costs mandated by the state and for reimbursement to local agencies pursuant to Part 7 (commencing with section 17500) of Division 4 of Title 2 of the Government Code. This is recognized in the revised cost analysis. The revised cost analysis also recognizes financial feasibility with respect to section 5008, "Economic factors including financial capacity are considerations that would be used to determine whether the setback levee (or other habitat improvement) is feasible (see definition of "feasible," 5001(p)). The actual cost for an agency to determine feasibility is likely to vary widely depending on the circumstance."

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
ECONOMIC AND FISCAL ANALYSIS OR COST REPORT

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
5. Local Agencies of the North Delta	4/22/2013	Attachment 1 to Form 399 is also misleading in that it states that the "Delta Plan policies are expected to provide long-term benefits in protecting agriculture . . . ." (See p. 2.) As a coalition of special districts serving primarily family-operated farms in the Delta, it is clear that Delta Plan regulations do not protect agriculture in the Delta. To the contrary, the Delta Plan regulations make continuing agricultural activities more difficult in the Delta. This increased difficulty stems from Plan components that: (1) place additional restrictions and regulatory processes on continuing agricultural activities in the Delta; (2) promote conversion of agricultural lands to habitat, thereby reducing the economic viability of specialty crops grown in the Delta; and (3) promote completion of the Bay Delta "Conservation" Plan, which includes massive new diversion facilities in the north Delta that will convert nearly 5,000 acres of farmland and hinder availability of fresh water for agricultural use within the Delta. While we appreciate changes to the Plan over time making it somewhat less destructive and interfere less with existing agriculture in the Delta, the Delta Plan and the Rulemaking Package cannot fairly be interpreted to "protect agriculture" in the Delta. Attachment 1 should be revised to state that the Plan attempts to protect water supplies for agriculture that is reliant on water exported from the Delta (or something similar).	E	The Council understands the concerns of local agencies and residents in the Delta, and has designed the consistency process to reduce or avoid burdens on existing uses and activities where possible. Existing agricultural, recreational, or other activities that do not meet all five conditions for a covered action need not file for consistency, and local repair and maintenance activities are specifically exempt as covered actions under Water Code section 85057.5(b). Further, the proposed regulation incorporates a Delta Plan policy (section 5011) specifically designed to protect existing agricultural uses. Therefore the Council disagrees that the regulation is inconsistent with providing long-term benefits in protecting agriculture. In addition, for the reasons set forth in the Initial Statement of Reasons (11/30/2012) and in Council staff's response to comments received during the 45 and 15 day comment periods the Council has determined that none of the alternatives considered or that have otherwise been identified and brought to the attention of the Council would be more effective in carrying out the purpose for which the regulatory action was proposed or would be as effective and less burdensome to affected private persons, including agricultural production, than the action taken by the Council.
6. Local Agencies of the North Delta	4/22/2013	While it may be true that a special district could potentially show that a setback levee is ultimately infeasible because of the increased cost, providing that analysis is itself costly. Thus, if there is no mechanism to fund the setback levee, such a project is per se infeasible and no further analysis should be required.	E	The Council agrees that economic factors including financial capacity are considerations that would be used to determine whether the setback levee (or other habitat improvement) is feasible (see definition of "feasible," 5001(p)). The Council also recognizes that costs would be incurred in such determination and the costs for an agency to determine feasibility are likely to vary widely depending on the circumstance. However, the revised cost analysis does recognize that some determinations may be very straightforward and inexpensive, such as in cases where construction of a setback levee would be well outside the economic capacity of the local agency and no state or federal funding was available.
7. San Joaquin Tributaries Authority	4/22/2013	The Revised Cost Analysis underestimates the cost of implementing the Delta Plan policies. Specifically, section 5003(c)(1) would require significant implementation costs, such as planning for a measurable reduction in the amount or percentage of water used from the Delta watershed through Urban or Agricultural Water Management Plans. The Revised Cost Analysis estimates these planning measures would cost approximately $2,000. (Revised Cost Analysis, at 15.) This estimate drastically underestimates the costs of planning required to implement section 5003. For example, the analysis to determine which measures may result in reduction in reliance upon the Delta and which measures are economically feasible will include hydrologic modeling, economic modeling, and multiple planning efforts, which will cost much more than $2,000. Further, section 5003 may require significant costs associated with water rights hearings because the language of 5003(c)(1) may result in upstream senior water right holders litigating the reallocation of water rights to junior water users. The Revised Cost Analysis must be revised to appropriately estimate these costs.	E	Costs in section 5003 (c)(1)(A) and (B) only occur from water suppliers documenting compliance with existing water management requirements and describing the expected outcome of water management practices the water supplier has adopted. An estimated cost for water suppliers to document the expected outcome on Delta reliance, beginning with their 2015 water management plan is provided in the revised cost analysis. Existing water code sections cited in section 5003 (c)(1) define water management requirements, including conservation programs and projects, that suppliers must implement or evaluate to comply with existing state water management law. These include demand management measures (DMMs) for urban suppliers and efficient water management practices (EWMPs) for agricultural suppliers. Section 5003 of the proposed regulation does not mandate that water suppliers adopt any management practices they would not otherwise be obligated to adopt under existing state water management law. Section 5003 applies to water suppliers that are already subject to the water management planning and implementation of existing law, and so does not mandate substantial new costs on water suppliers. Even those completing and implementing water management plans are not required to implement many of the DMMs or EWMPs unless they are locally cost-effective (Water Code 10631(g) for urban suppliers and Water Code 10825(b) for agricultural suppliers). In reference to costs associated with water rights hearings, see master legal response MR8.

RESPONSES TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
ECONOMIC AND FISCAL ANALYSIS OR COST REPORT

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
8. San Joaquin Tributaries Authority	4/22/2013	The Revised Cost Analysis also states that proposed regulation 5005 "suggests deadlines for the [State Water Board] to update the Bay-Delta Water Quality Control Plan objectives." (Revised Cost Analysis, at 15.) This is incorrect. The revised language no longer sets forth deadlines for the State Water Board's revision of water quality objectives. Also, as noted above, because the State Water Board has not yet adopted new objectives, the DSC must wait until the State Water Board acts to review the action taken before it can determine whether it is appropriate to incorporate such action into the Delta Plan. The Revised Cost Analysis must be revised to make these corrections.	E	Comment noted. The description in the costs analysis of regulation 5005 is awkward. However, revision to text in the cost analysis would not have implications to the estimated cost of the proposed regulation to state and local agencies or private entities.
9. San Joaquin Tributaries Authority	4/22/2013	The Modified Notice states the DSC has already provided the Economic and Fiscal Impact Statement to the Department of Finance. This provision is premature. The DSC must provide the public with the opportunity to review and comment on the modified Economic and Fiscal Impact Statement before finalizing and sending it to the Department of Finance. (Gov. Code, § 11347.1(d).)	E	In keeping with its commitment to full transparency and open decision making, the Council provided notice on 4/24/2013 that an additional document, the modified Economic and Fiscal Impact Statement: STD 399 plus Attachment 1, was available for public inspection and comment for a period of 15 days commencing 4/24/2013, and up to and including 5/9/2013.
10. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	Finally, the Council has not adequately assessed the potential adverse economic impacts of the potential forced reduction in exports pursuant to proposed Section 5003. Under Government Code sections 11346.2(b)(5), 11346.3 and 11346.5(a)(7)-(a)(12), the Council must assess and make supported findings regarding the economic impacts of its proposed regulations on California business enterprises and individuals. The Cost Analysis For Proposed Delta Plan Regulations falls well short. It offers only a single sentence, on page 6, regarding the potential economic impact of lost export supplies. It says that private individuals and businesses may incur "costs" from changes in "water supply reliability." There is no analysis or estimate of the cost to users of developing alternatives supplies to replace lost exports, or of the economic impacts including lost jobs that will occur if existing farms and businesses cannot feasibly replace water supplies from the Delta, and hence must reduce or cease economic activity. An adverse economic impact from lost water supplies is an obvious but still unexamined potential result of a draconian halt to exports pursuant to Section 5003. Even putting aside the Council's lack of authority to adopt Section 5003, it cannot lawfully adopt Section 5003 until it has adequately assessed and disclosed the potential adverse economic impact on California businesses and individuals from Section 5003, as required by Government Code section 11346.3 and related sections.	A, E	Section 5003 will be an important step toward encouraging water conservation and the development of local and regional water supplies, where feasible, thereby improving self-reliance as required by the Delta Reform Act. Self-reliance, in turn, would reduce reliance on the Delta and improve water supply reliability. Its direct impact on the availability of Delta water, however, will likely be limited. Under 5003(a), a covered action exporting water from, transferring water through or using water in the Delta would be inconsistent with the Delta Plan, and therefore barred, if and only if it has each of the following three attributes: 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; (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. Policy WR P1 would limit the overall availability of Delta water only if a significant number of covered actions were likely to be inconsistent with all three of its factors. In fact, the policy will prevent very few, if any, proposed actions. Instead it will, as the EIR finds, benefit water availability by encouraging local and regional self-reliance. This is primarily because water suppliers can avoid inconsistency by "adequately contribut[ing] to reduced reliance on the Delta and improved regional self reliance." To do so, per 5003(C)(1), each water supplier must have taken three actions: "(A) Completed a current urban or agricultural water management plan (Plan)which has been reviewed by DWR 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 management Plan, of all programs and projects included in the Plan that are locally cost effective and technically feasible that 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)."

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				These requirements do not impose substantial new burdens on agencies proposing or otherwise receiving water from covered actions. Urban and agricultural water management plans are required by law and will include the identification and evaluation of potential local and regional water supplies. The only requirements added by section 5003 are that the proposing agency must begin implementation of "locally cost effective and technically feasible" projects to reduce reliance on the Delta and that, from 2015 onward, water management plans "include[]…the expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance." These requirements will not create any gap between water supply and demand. If projects to reduce Delta reliance are technically feasible and locally cost-effective, then consistency with section 5003 would simply require the agency to begin those projects. Once the water suppliers that will receive water from the covered action have commenced such implementation, then the covered action would be consistent with section 5003 and could go forward. Alternately, if no technically feasible and locally cost-effective local projects are available to the proposing agency, then its proposed covered action will not be inconsistent with section 5003 and may go forward. Section 5003 would not prevent a covered action in the absence of a feasible replacement, and would not force any agency to undertake projects that are not feasible and locally cost-effective. Moreover, even if an agency had failed to prepare a water management plan and/or implement locally cost-effective and feasible actions, the proposed covered action would only be inconsistent with section 5003 if the failure to do so significantly caused the need for the action and the proposed action would have a significant adverse impact on the Delta. In short, it is likely that section 5003 would prevent very few, if any, covered actions. Instead, it will encourage agencies to move forward with local and regional water supplies projects, thus benefitting the water supply availability and reliability for all users of Delta water. Private businesses and individuals are not directly affected by costs of Delta Plan policies or administrative requirements. However, public agencies that do bear such costs would recover those costs in various ways from their constituents. For the same reasons that agencies would not bear substantial new costs to comply with section 5003, the costs passed through to constituents (individuals and private businesses) would also not be substantial. The revised cost analysis acknowledges that a covered action might be delayed or abandoned by the applicant or lead public agency if the action cannot be made consistent with one or more Delta Plan policies. This could result in foregone benefits to the applicant and, indirectly, businesses or individuals. Examples of foregone benefits may include more expensive water treatment or water supply alternatives to the proposed action, or the foregone economic benefit of real-estate development in the Delta. However, without details of specific future covered actions, they are not quantifiable at this time for purposes of the STD. 399. Moreover and as explained at length above, it is unlikely that section 5003 would be the cause of inconsistency. In addition, section 5003 only addresses and encourages the implementation of locally cost-effective and technically feasible actions. Locally cost-effective is defined in statute to mean "that the present value of the local benefits of implementing an agricultural efficiency water management practice is greater than or equal to the present value of the local cost of implementing that measure" (Water Code 10608.12(k); for the equivalent definition for urban demand management measures, see Water Code 10631.5 (a)(4)(B)). Such actions would not lead to the dire local economic impacts that the comment suggests, because local benefits would exceed local costs. To the contrary, the Legislature has already determined that "[d]iverse regional water supply portfolios will increase water supply reliability and reduce dependence on

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				the Delta (Water Code section 10608(c)), and that requiring diverse portfolios, including conservation and efficiency, will "not limit the economic productivity of California's agricultural, commercial, or industrial sectors." (Water Code section 10608.8(c).) With respect to specific requirements in the Government code: the revised cost analysis is evidence on which the Council relied to support a determination that the proposed regulation will not have a significant adverse impact on business (Government Code section 11346.2(b)(6)). The conclusion is reinforced by Water Code sections 10608(c) and 10608.8(c), as noted above.) The modified STD 399, which was provided to Department of Finance and included in its final form in the final rulemaking record submitted to the Office of Administrative Law, summarizes the analysis required by Government Code section 11346.3. It is based on and includes all relevant information from the proposed regulation, the revised Cost Analysis, the Delta Plan, and the evidence and testimony supporting the Council's development of the Delta Plan and the RDPEIR. The Notice of Proposed Rulemaking (11/30/2012) and the Initial Statement of Reasons (11/30/2012) provide the initial determinations and description of alternatives considered, as required by Government Code sections cited in the comment. The Council believes that these components of the rulemaking file have adequately addressed the required components listed in Government Code section 11346.3 and 11346.5(a)(7)-(a)(12).