

Draft Response 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

DRAFT RESPONSE 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 is 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" (LMA's), 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, DSC 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 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. ¹ [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	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 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

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		<p>occurring for the previous two or three years, that were re-approved each year as “temporary.”² Likewise, most transfers in 2009 and before were described as “temporary” and thus occurred without environmental review.³ 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-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.</p>		transfers would not have a significant impact on the coequal goals.
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	<p>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</p>	Co	<p>This comment did not address any changes to the original text.</p> <p>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</p>

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		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.		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.
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 § 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 § 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	Co, O	Delta Plan Appendix B, pages 5-9, Appendix G, 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 §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,

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		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 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.		CEQA does require the EIR to consider its direct, project-level impacts.
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, 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. 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 §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.

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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.
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	Comment noted.
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.

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29. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	<p>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</p> <p>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.</p>	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	<p>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."</p> <p>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 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.</p> <p>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).</p>	A, Co	<p>This comment does not address the change to the original text.</p> <p>Please see MR1 for a discussion of the Council's authority to include a regulatory component in the Delta Plan.</p> <p>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.</p>

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31. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	<p>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).</p> <p>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:</p> <p>(1) remove from the Proposed Regulations section 5003 because it exceeds the Legislature's express grant of statutory authority to the Council;</p> <p>(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</p> <p>(3) exempt from covered activities (without any sunset provision) all water transfers of up to one year in duration; and</p> <p>(4) recirculate the Proposed Regulations, as further modified, for full 45-day comment.</p> <p>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.</p> <p>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.</p> <p>3. Public Water Agencies' comment letter dated January 14, 2013 at pp. 4-7.</p>	A, Ct, Co, Du, Nr	See the Council's responses to comments (1), (2) and (3) in Sections 5003, 5001 and 5004, respectively.
32. Yolo County	4/22/2013	<p>[M]any of the County's original comments do not appear to have resulted in changes to the draft regulations. 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.</p>	O	Comment noted. Please see our responses to the previous comments submitted by these agencies.
33. California Water Research	4/23/2013	<p>1. Sufficiency of the regulations ensure consistency with the Delta Reform Act and other state laws</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>The courts have held that</p> <p>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.)</p> <p>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.</p> <p>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</p>	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.

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		<p>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.</p> <p>1 See comments of attorneys Stephan C. Volker and Michael Jackson on the Fifth Staff Draft Delta Plan. salmon populations.</p>		
34. California Water Research	4/23/2013	<p>2. The requirements of the Delta Reform Act, with respect to the Delta Plan, are not adequately addressed in the draft regulations.</p> <p>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 the intent of the legislature.</p> <p>A. Ecosystem Restoration Measures</p> <p>With respect to ecosystem restoration, section 85302(c) of the Delta Reform Act states that:</p> <p>The Delta Plan shall include measures that promote all of the following characteristics of a healthy Delta ecosystem:</p> <p>(1) Viable populations of native resident and migratory species.</p> <p>(2) Functional corridors for migratory species.</p> <p>(3) Diverse and biologically appropriate habitats and ecosystem processes.</p> <p>(4) Reduced threats and stresses on the Delta ecosystem.</p> <p>(5) Conditions conducive to meeting or exceeding the goals in existing species recovery plans and state and federal goals with respect to doubling</p> <p>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.</p> <p>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.</p> <p>B. Performance Measurements</p> <p>The Delta Plan is also required to include performance measurements in meeting goals and objectives:</p> <p>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</p> <p>(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.</p> <p>(b) The reliability of California water supply imported from the Sacramento River or the San Joaquin River watershed.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>C. Water Quality</p> <p>Section 85032(d) of the Delta Reform Act requires the following:</p> <p>(d) The Delta Plan shall include measures to promote a more reliable water supply that address all of the following:</p> <p>(1) Meeting the needs for reasonable and beneficial uses of water.</p> <p>(2) Sustaining the economic vitality of the state.</p> <p>(3) Improving water quality to protect human health and the environment.</p> <p>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</p>	Co	<p>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.</p> <p>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.</p> <p>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.</p>

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		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 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.	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.
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 § 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 § 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	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 § 85320(e).) The Department's determination may be appealed to the Council (Water Code § 85320(e)), pursuant to the Council's adopted appellate procedures. The Council will review any appeal to determine

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		<p>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 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.</p>		<p>whether BDCP meets the requirements of Section 85320. For additional information relating the Council’s authority as it relates to BDCP, see Appendix G to the Delta Plan.</p>
38. California Water Research	4/23/2013	<p>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.</p>	Co	<p>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.</p> <p>Department of Fish & Wildlife is tasked with determining whether BDCP meets the statutory Section called out by the comment, Water Code § 85320. If the Department so determines, the Council must incorporate BDCP into the Delta Plan. (Water Code § 85320(e).) The Department’s determination may be appealed to the Council (Water Code § 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 to the Delta Plan.</p>

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39. California Water Research	4/23/2013	<p>7. BDCP and review with respect to climate change and water quality</p> <p>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</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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</p>	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 § 85320(e).) The Department's determination may be appealed to the Council (Water Code § 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 to the Delta Plan.
40. California Water Research	4/23/2013	<p>8. Adaptive Management and BDCP</p> <p>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 decisionmaking about water system operations.</p> <p>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.</p> <p>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.</p>	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	<p>9. Summary</p> <p>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.</p> <p>The sum of these omissions is to allow incorporation of the Bay Delta Conservation Plan and other projects 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.</p> <p>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.</p>	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).)
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.

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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	<p>This comment does not refer to, or is based on, any change in language from the previous regulatory package.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>
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.

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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.
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)(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.	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.
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)(1) 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 85031(b)(1) 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	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 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 Sec 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 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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		<p>with many invaluable and unique resources and that these resources are of major statewide significance.</p> <p>(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 as•sets, 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.</p> <p>(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 pumose 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.)"</p> <p>The regulation is also inconsistent with Water Code section 12201 which provides: "\$12201. Necessity of maintenance of water supply</p> <p>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.)"</p> <p>Section 5001(h(3) should be changed to read:</p> <p>"(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:</p> <p>(A) Designate the Delta as a special place worthy of national and state attention;</p> <p>(B) Plan to preserve the hundreds of miles of meandering waterways and the many islands in essentially their present form;</p> <p>(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;</p> <p>(D) Encourage recreation and tourism that allow visitors to enjoy and appreciate the Delta and that contribute to its economy;</p> <p>(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,</p> <p>(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.</p> <p>(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 Project and federal Central Valley Project."</p>		
7. Central Delta Water Agency	4/22/2013	<p>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</p>	Co	<p>This is a comment on <u>5001(h)(1)(B)</u>.</p> <ol style="list-style-type: none"> 1. This comment does not address the change to the original text. 2. Also see MR8.

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		<p>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."</p>		
8. Central Delta Water Agency	4/22/2013	<p>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 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</p>	Co	5001(v) is derived from the definition of non-native invasive species used by DFW to describe non-native 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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		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.		
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 5001(h)(1)(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 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, 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.
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 <u>activity</u> 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 § 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	<p>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.</p> <p>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.</p>	Ct, Co	<p>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.</p> <p>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 § 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 impact" on the coequal goals for purposes of the Act and these regulations.</p> <p>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. (§ 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], § 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. (§ 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. (§ 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.</p> <p>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. (§ 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 adverse impact" on the coequal goals or government sponsored flood control. (§ 85225.10(a).) The Legislature is presumed to have used the different phrases to have a different meaning. (See <i>Kleffman v. Vonage Holdings Corp.</i> (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</p>

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				<p>broader meaning—i.e., that positive as well as adverse impacts be 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.</p>
<p>13. East Bay Municipal Utility District</p>	<p>4/22/2013</p>	<p>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 11/1/2017, 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.</p> <p>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.</p>	<p>Ct, Co</p>	<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>With respect to the comments assertion the language in 5001(dd)(3) is unnecessary, the Council disagrees. This language clarifies the regulation.</p>

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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	<p>This comment did not address any changes to the original text.</p> <p>The Council has the authority to define terms in the Delta Reform Act including when an action is a covered action (see MR1).</p> <p>The Council intended the definition of "achievement" of the coequal goals of water supply reliability and ecosystem in Section 5001(h)(l)-(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).</p>
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	<p>This comment did not address any changes to the original language of Section 5001(j)(3).</p> <p>Consistent with the Act (§ 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.</p> <p>The determination that a proposed action is a covered action is not a legislative decision, but rather is an adjudicative one. (See <i>Strumsky v. San Diego County Employees Retirement Assn.</i> (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 <i>Madera Oversight Coalition, Inc. v. County of Madera</i> (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].)</p>
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	<p>There was an error in the text of Section 5001(y). The text has been revised to read:</p> <p>(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)..."</p> <p>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. DSC staff considered using the term "potential covered actions" but chose instead to call them "proposed actions".</p>
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.

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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 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 § 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 § 85320(e).) The Department's determination may be appealed to the Council (Water Code § 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 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.

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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 the 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.
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 § 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 ih revisions (page 7) now defines "small scale" relying on CEQA Guidelines section 15333.	O	Comment noted, no response required.
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

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				<p>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.</p> <p>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.</p>
31. Sacramento County	4/22/2013	<p>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.</p> <p>Current comment: Definitions of "urban area" and urbanizing area" are now found in Sections 5001(ee) and 5001(fj) 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.</p>	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	<p>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?</p> <p>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".</p>	Ct	<p>The Council has the authority to define terms in the Delta Reform Act including when an action is a covered action (see MR1).</p> <p>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</p> <p>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".</p>
33. Sacramento County	4/22/2013	<p>Previous comment: In Section 5001(g), the statutory citation should be to the Section 12220 of the Water Code, not the Public Resources Code.</p> <p>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 of the regulations, but not carried over to the April 4th revisions.</p>	Co	The Council agrees. The reference will be corrected.
34. Sacramento County	4/22/2013	<p>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.</p> <p>Current Comment: The April 4th revisions are absent changes to Section 5001 (n) (page 4) that specifically address our finding.</p>	Ct	Comment Noted.
35. Sacramento County	4/22/2013	<p>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.</p> <p>Current comment: Floodway is still defined/referenced in Section 5001 (t) of the April 4th revisions (page 5).</p>	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	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

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		good common sense.		<p>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.</p> <p>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.</p> <p>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 impact" on the coequal goals for purposes of the Act and these regulations</p>
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	<p>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.</p> <p>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.</p> <p>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.</p>

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				<p>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.</p> <p>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.</p>
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.
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	<p>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.</p> <p>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.)</p> <p>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</p>	Co	<p>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.</p> <p>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.</p> <p>As a result, the Council recognizes that further evaluation is needed of the potential impact that</p>

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		section 475. (Gov. Code, § 11349.1(a)(4).)		<p>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.</p> <p>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.</p> <p>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.</p> <p>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).</p>
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 non-native invasive species used by DFW to describe non-native 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-	4/22/2013	Section 5001(dd) – “Significant Impact” is still defined as a substantial negative or positive impact on the achievement	A, Ne, Ct, Co	The Act adds a layer of regulation, separate from CEQA’s requirements, to actions that qualify as

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Mendota Water Authority, and State Water Contractors		<p>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.</p> <p>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.</p> <p>7. Public Water Agencies' comment letter dated January 14, 2013 at pp. 16-17, 19.</p>		<p>"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.</p> <p>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 and its Guidelines, such as "significant effect on the environment," does not mean the phrases have the same meaning in their distinct contexts.</p> <p>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 impact" on the coequal goals for purposes of the Act and these regulations.</p> <p>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. (§ 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], § 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. (§ 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. (§ 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</p>

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				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. (Gov. Code § 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 Council disagrees that the language in this paragraph exceeds its statutory authority. See MR1.
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	<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>

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				<p>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.</p> <p>With respect to the portion of the comment pertaining to the Council’s authority for application of the consistency certification, please refer to Master Response 1 (MR1).</p>
49. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	<p>[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.</p> <p>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.</p> <p>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.</p>	Co	<p>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.</p>

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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	Subsection (c) does not exempt conservation measures proposed to be implemented pursuant to a natural community conservation plan or a habitat conservation plan from the covered action process. If the local government in the Delta proposing to undertake such a conservation measure, and deems the action to be a covered action, Water Code Section 85225 and Section 5002(b) of these regulations, then the local government agency must prepare a written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan. Subsection (c) details how the agency filing the certification of consistency can demonstrate the covered action's consistency with Sections 5005 through 5009 of these regulations.
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	Subsection (c) does not exempt conservation measures proposed to be implemented pursuant to a natural community conservation plan or a habitat conservation plan from the covered action process. If the local government in the Delta proposing to undertake such a conservation measure, and deems the action to be a covered action, Water Code Section 85225 and Section 5002(b) of these regulations, then the local government agency must prepare a written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan. Subsection (c) details how the agency filing the certification of consistency can demonstrate the covered action's consistency with Sections 5005 through 5009 of these regulations.
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

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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 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	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 . 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.
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 (§ 85308(e)) and to include formal, science-based adaptive management for certain decisions (ongoing ecosystem restoration and water management decisions) (§ 85308(d)). Furthermore, several provisions in the Act declare or indicate the importance of science to decision-making in the Delta (see §§ 85308 [especially § 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

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				definition of best available science is appropriate and within Council authority.

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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 actual 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 §85031(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: 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 sur.plus 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,	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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		<p>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.)</p> <p>§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.)</p> <p>§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.)</p> <p>§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.)</p> <p>§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.)</p> <p>§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.)</p> <p>§ 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</p>		

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		<p>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 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:</p>		

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		<p>"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."</p> <p>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.)"</p> <p>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.</p>		
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

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				<p>5001(b), (c) (1) and (2), (hh)(1) and (2) and (ii)).</p> <p>Under California Law, these water suppliers are currently required, to prepare, adopt and implement Urban Water Management Plans or Agricultural Water Management Plans (see CWC 10610 et. Seq. and 10820 et. Seq.) DWR is required by existing law to review these plans for consistency with applicable laws (see CWC Division 6, Parts 2.55, 2.6 and 2.8).</p> <p>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)).</p>
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 CWC 10610 et. Seq. and 10820 et. Seq.) . The language in Section 5003 is appropriate.
7. Sacramento County	4/22/2013	<p>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(1975) 13 Cal.3d 721.</p> <p>Current comment: With the deletion of 5003, the "act reasonably or in good faith" language is no longer part of the proposed regulations.</p>	O	<p>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).</p> <p>The Council has already responded to the previous comment on this subject as follows:</p> <p>Consistent with the Act (§ 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.</p> <p>The determination that a proposed action is a covered action is not a legislative decision, but rather is an adjudicative one. (See <i>Strumsky v. San Diego County Employees Retirement Assn.</i> (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 <i>Madera Oversight Coalition, Inc. v. County of Madera</i> (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].)</p> <p>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 §</p>

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				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].)
8. Sacramento, City of	4/22/2013	<p>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.</p> <p>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.</p> <p>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: ...</p> <p>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."</p>	DP	<p>The Council believes that this Regulation does not infringe on existing water rights. Please see MR8 for a discussion of this subject.</p> <p>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.</p>
9. Sacramento, City of	4/22/2013	<p>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 ...</p>	DP	<p>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.</p>
10. Sacramento, City of	4/22/2013	<p>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 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.</p>	DP	<p>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 measurable outcomes of actions a water supplier is taking to reduce reliance on the Delta.</p>
11. San Joaquin Tributaries Authority	4/22/2013	<p>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).)</p>	Co	<p>The comment misconstrues Section 5003 in the adopted regulation regarding how the expected outcome for measurable 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</p>

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				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	<p>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.</p> <p>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.</p> <p>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.</p>
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).) 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.	Co	<p>The Council disagrees with the comment as regards water rights impacts. See MR8 for a discussion of this matter.</p> <p>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).</p>
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. DSC 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	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	A	The Council disagrees with the commenter’s assertion that it lacks authority to adopt a regulation such as Section 5003 This regulation is authorized, as explained in MR4.

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State Water Contractors		<p>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 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</p>		<p>In addition to overlooking the statutory basis for 5003 discussed in MR4, this comment ignores the fact that Section 5003 is grounded on the Council’s authority to protect and restore the Delta ecosystem. The Council is required to adopt a “legally enforceable Delta Plan” that will, among other things, “provide for the sustainable management of the Sacramento-San Joaquin Delta ecosystem.” (See Wat. 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.) Section 5003 applies only to a project that “would have a significant adverse environmental impact in the Delta.” (See 5003(3).)</p> <p>Moreover, the comment’s assertion that the Council has no authority “to constrain the operations of the State Water Project or Central Valley Project” ignores the fact that the legislature’s broad delegation of authority to the Council over “covered actions” in Water Code Section 85057.5 only has a limited exclusion concerning those projects. The Council lacks authority over their “[r]outine maintenance and operation.” But any actions concerning those projects that go beyond routine maintenance and operation can be regulated if part of the action occurs in the Delta and it would have a significant impact on the Delta. (See Wat. Code, § 85057.5.)</p> <p>The Council thus has the authority and discretion to regulate Delta projects, including non-routine actions concerning the State Water Project or Central Valley Project, if they threaten the Delta ecosystem. The Council does not, therefore, merely have the “implied” authority required by Government Code Section 11342.2; it has the express authority to protect the Delta through provisions such as Section 5003.</p> <p>The Council disagrees with the commenter’s claim that staff stated in a public meeting 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 <u>unless</u> 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.</p> <p>An account of the meeting follows.</p> <p>First, we note that comment refers to “the March <u>25 and 26</u> public meeting,” and no year is provided. Since there is no record of a Council meeting on these dates in any year since the Council was created, we assume the comment actually refers to the March 28/29, 2013 Council meeting.</p> <p>The comment made at the March 28/29, 2013 meeting occurred during an exchange with an attendee, in which staff explained that Section 5003 only applies to “water suppliers” as defined in Section 5001. The attendee stated that he knew of no agricultural operations in the Delta that fall within the definition of an agricultural water supplier. Staff’s comment was intended to validate that Section 5003 would only potentially apply to in-Delta water users that met the definition of water suppliers consistent with Section 5001.</p> <p>End account.</p>

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		<p>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.</p> <p>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).)</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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 Legislature did not provide the Council with, nor does our governmental structure allow for, such unbridled authority.</p> <p>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</p>		<p>The Council disagrees that section 5003 imposes mandates on water suppliers without considering financial limitations. The Council heard and considered substantial information and testimony regarding this policy as it was developing the Delta Plan. The Cost Analysis for Proposed Delta Plan Regulations evaluated the potential additional cost to water suppliers that this policy could mandate, to the extent that the mandate was not already a matter of state law. The Cost Analysis also acknowledges that there may be cases in which a covered action is modified, delayed or abandoned because it would otherwise be inconsistent. Costs associated with that, if they occurred, would be project specific, and cannot be quantified in advance. Please see the response to this commenter’s specific comment on the Cost Analysis for more detail.</p>

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		<p>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.</p> <p>11 Public Water Agencies’ comment letter dated January 14, 2013 at pp. 8-11, 20.</p> <p>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.</p>		
<p>17. San Luis & Delta-Mendota Water Authority, and State Water Contractors</p>	<p>4/22/2013</p>	<p>The Council was provided only limited authority by the Legislature.</p> <p>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.</p> <p>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.</p> <p>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.</p> <p>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 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.</p> <p>¹³ Chapter 3 of the Act is entirely dedicated to establishing this specific scheme. (Water Code, § 85225 et.</p>	<p>A</p>	<p>The Council disagrees with the commenter’s assertion that it lacks authority to adopt a regulation such as Section 5003 This regulation is authorized, as explained in MR4.</p> <p>In addition to overlooking the statutory basis for 5003 discussed in MR4, this comment ignores the fact that section 5003 is grounded on the Council’s authority to protect and restore the Delta ecosystem. The Council is required to adopt a “legally enforceable Delta Plan” that will, among other things, “provide for the sustainable management of the Sacramento-San Joaquin Delta ecosystem.” (See Wat. 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.) Section 5003 applies only to a project that “would have a significant adverse environmental impact in the Delta.” (See 5003(3).)</p> <p>Moreover, the comment’s assertion that the Council has no authority “to constrain the operations of the State Water Project or Central Valley Project” ignores the fact that the legislature’s broad delegation of authority to the Council over “covered actions” in Water Code section 85057.5 only has a limited exclusion concerning those projects. The Council lacks authority over their “[r]outine maintenance and operation.” But any actions concerning those projects that go beyond routine maintenance and operation can be regulated if part of the action occurs in the Delta and it would have a significant impact on the Delta. (See Wat. Code, § 85057.5.)</p> <p>The Council thus has the authority and discretion to regulate Delta projects, including non-routine actions concerning the State Water Project or Central Valley Project, if they threaten the Delta ecosystem. The Council does not, therefore, merely have the “implied” authority required by Government Code section 11342.2; it has the express authority to protect the Delta through provisions such as section 5003.</p>
<p>18. San Luis & Delta-Mendota Water Authority, and State Water Contractors</p>	<p>4/22/2013</p>	<p>The Legislature’s definition of “covered actions” cannot be expanded by fiat.</p> <p>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.</p> <p>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</p>	<p>A</p>	<p>The Council disagrees with the commenter’s assertion that it lacks authority to adopt a regulation such as Section 5003 This regulation is authorized, as explained in MR4.</p> <p>In addition to overlooking the statutory basis for 5003 discussed in MR4, this comment ignores the fact that section 5003 is grounded on the Council’s authority to protect and restore the Delta ecosystem. The Council is required to adopt a “legally enforceable Delta Plan” that will, among other things, “provide for the sustainable management of the Sacramento-San Joaquin Delta ecosystem.” (See Wat. 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.) Section 5003 applies only to a project that “would have a significant adverse environmental impact in the Delta.” (See 5003(3).)</p>

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PROPOSED REGULATION SECTION 5003

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
		<p>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.</p>		<p>Moreover, the comment’s assertion that the Council has no authority “to constrain the operations of the State Water Project or Central Valley Project” ignores the fact that the legislature’s broad delegation of authority to the Council over “covered actions” in Water Code section 85057.5 only has a limited exclusion concerning those projects. The Council lacks authority over their “[r]outine maintenance and operation.” But any actions concerning those projects that go beyond routine maintenance and operation can be regulated if part of the action occurs in the Delta and it would have a significant impact on the Delta. (See Wat. Code, § 85057.5.)</p> <p>The Council thus has the authority and discretion to regulate Delta projects, including non-routine actions concerning the State Water Project or Central Valley Project, if they threaten the Delta ecosystem. The Council does not, therefore, merely have the “implied” authority required by Government Code section 11342.2; it has the express authority to protect the Delta through provisions such as section 5003.</p>
<p>19. San Luis & Delta-Mendota Water Authority, and State Water Contractors</p>	<p>4/22/2013</p>	<p>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.</p>	<p>Ne</p>	<p>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 goals. Section 5003 is appropriate and necessary to achieve the coequal goals of providing a more water supply for California and protecting, restoring and enhancing the Delta ecosystem.</p> <p>See MR1 and MR4 for more information on the Council’s regulatory authority to consider out-of-Delta actions when regulating in-Delta actions.</p>

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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	<p>This comment does not refer to, or is based on, any change in language from the previous regulatory package.</p> <p>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.</p>
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	<p>This comment does not refer to, or is based on, any change in language from the previous regulatory package.</p> <p>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.</p> <p>The Council disagrees with the comment's assertion that Section 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 5001(j) of these regulations. It is likely that not all water contracting activities will meet the criteria. The Council has consistency review authority 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.</p>

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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 DSC's authority to require that the Water Board subject their decisions to "water right and statutory priorities." (§ 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.

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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	<p>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.</p> <p>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.</p> <p>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.</p> <p>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."</p>	Co	<p>This comment does not address any changes to Section 5006.</p> <p>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 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.</p> <p>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. § 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. § 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.)</p> <p>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.</p> <p>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.</p>

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PROPOSED REGULATION SECTION 5006

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
4. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>	Ct, Co, Du	<p>This comment does not address any changes to Section 5006.</p> <p>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.</p> <p>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 § 85320.) It does not demand the Council to await approval of BDCP before adopting the Delta Plan and implementing regulations. (See Water Code § 85300(a) [setting time frame for Delta Plan adoption]; § 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.</p>
5. San Luis & Delta-Mendota Water Authority, and State Water Contractors	4/22/2013	<p>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.</p>	Co	<p>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, which provides that conservation measures (1) Developed by a local government in the Delta and (2) approved and permitted by DFW prior to the Delta Plan's effective date are consistent with the Delta Plan's ecosystem restoration policies.</p>
6. Yolo County	4/22/2013	<p>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.</p>	Ct	<p>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."</p> <p>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.</p>

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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: <u>"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."</u> 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)."

**DRAFT RESPONSE 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	<p>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.</p> <p>(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.</p> <p>(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.</p> <p>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.</p>	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 non-native 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	<p>Subject: Response to questions concerning opportunities to minimize habitat improvements that increase habitat suitability for nonnative invasive species, striped bass or bass.</p> <p>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).</p> <p>Please recognize that the bullets below do not represent an exhaustive list and are not organized in any particular order of priority.</p> <ul style="list-style-type: none"> • 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. • 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). 	DP	Thank you for the letter. Comment duly noted.
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

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PROPOSED REGULATION SECTION 5009

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
				<p>an inquiry from the DSC, has identified a wide variety of measures than can void 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 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.</p>

DRAFT RESPONSE 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	<p>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.</p> <p>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.</p> <p>(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.</p>	Co	<p>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 city and 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.</p> <p>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 <i>Village of Euclid, Ohio v. Ambler Realty Co.</i> (1926) 272 U.S. 365, 386, explaining same in upholding city's land use designations.</p> <p>Regarding the assertion of conflict with the authority of the Delta Protection Commission, see MR7.</p>
2. Sacramento County	4/22/2013	<p>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?</p> <p>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 "Criteriafor Compatible and Sustainable Land Use Development".</p>	Ct	<p>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.</p>

DRAFT RESPONSE 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 § 85225.) The Council has authority to review covered actions on appeal for consistency with the Delta Plan. (Water Code § 85225.10.) “Covered actions” are defined by Water Code § 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 § 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 § 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 § 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	Comment noted. Regarding the Council’s regulatory authority, see MR1. Regarding the Council’s land use authority, see MR3.
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	Comment noted.
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. Staff believes that the commenter was referring to Section 5012(a) and not 5011(a). Staff 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.

DRAFT RESPONSE 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
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 is currently reviewing the status of its policy with respect to the Delta and is working with DWR and CalEMA to revise its policy.

DRAFT RESPONSE 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 DSC. Directing limited State funding towards areas that can provide the greatest flood control benefit is the goal of DSC 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, as the commenter noted, however they were included as a new recommendation in the Delta Plan. 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. It was decided that this wasn't necessary content for regulatory language, as it was descriptive of the categories of items to be studied, and thus was moved to a recommendation. The Delta Reform Act (85306) directs the Council to develop the priorities, and the Council will determine a deadline it sees appropriate given the scope of the project.

DRAFT RESPONSE 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	<p>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.</p> <p>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: (1) 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.</p>	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.

DRAFT RESPONSE 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.

DRAFT RESPONSE TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013

APPENDIX 1A

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
<p>1. San Luis & Delta-Mendota Water Authority, and State Water Contractors</p>	<p>4/22/2013</p>	<p>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.</p> <p>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.</p> <p>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.</p> <p>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.</p>	<p>A, Ne</p>	<p>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.</p> <p>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 (§ 85308(e)) and to include formal, science-based adaptive management for certain decisions (ongoing ecosystem restoration and water management decisions) (§ 85308(d)). Additionally, the Act declares the importance of science to decision-making in the Delta (see §§ 85308 [especially § 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.</p> <p>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.</p>

DRAFT RESPONSE TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013

APPENDIX 1B

ASSOCIATION	DATE	COMMENT	CODES	RESPONSE
<p>1. San Luis & Delta-Mendota Water Authority, and State Water Contractors</p>	<p>4/22/2013</p>	<p>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.</p> <p>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.</p>	<p>A, Ct</p>	<p>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) (§ 85308(d)) and to recommend integration of science and monitoring results into ongoing Delta water management (§ 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 §§ 85308 [especially § 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 § 85211, 85308(b).) Finally, the Council is instructed to base the Delta Plan on the advice of the Delta Independent Science Board (§ 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).</p> <p>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.</p>

DRAFT RESPONSE 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 Gov. Code, § 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 decisionmaking 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.

**DRAFT RESPONSE 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	<p>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.</p> <p>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.</p>
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	<p>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 Gov. Code, § 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.</p>
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	<p>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.</p> <p>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.</p>
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	<p>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 Sections 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.</p> <p>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."</p>

**DRAFT RESPONSE TO COMMENTS RECEIVED DURING THE 15-DAY NOTICE PERIOD APRIL 8, 2013 THROUGH APRIL 22, 2013
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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	<p>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.</p> <p>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.</p>
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	<p>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 DSC 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.</p>
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	<p>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. 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).</p> <p>In reference to costs associated with water rights hearings, see master legal response MR8.</p>
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	<p>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.</p>
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	<p>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.</p>

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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	<p>Section 5003 of the proposed regulation does not require a water supplier to reduce its quantity of water exported from the Delta. 5003(c)(1) provides that reduced reliance is demonstrated by 1) completion of a water management plan, 2) implementation of feasible and cost-effective water management practices, and 3) a description in the plan of the expected outcome of those practices. The first two of these are already a matter of state law, and the Cost Analysis provides a cost estimate for the third.</p> <p>Private businesses and individuals are not directly affected by costs of Delta Plan policies or administrative requirements. However, the revised cost analysis does state that they could also be affected indirectly through costs or benefits that accrue to them as a result of the changes in water supply reliability, ecosystem restoration, flood risk, or land use policies attributed in whole or in part to the Delta Plan. While the indirect impacts are real economic costs and benefits, without details of specific future covered actions they are not quantifiable at this time for purposes of the STD. 399.</p> <p>Also, the revised cost analysis states that a covered action might be delayed or abandoned by the applicant or lead public agency because it 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. On the other hand, other businesses and individuals may consider a particular covered action as detrimental or costly to their interests, and therefore abandonment or delay of that project would be viewed as a benefit. While indirect impacts are real economic effects, they would depend on the details of a future covered action, and are not quantifiable at this time for purposes of the STD. 399..</p> <p>With respect to specific requirements in the Government code:</p> <p>1) The revised costs analysis is evidence on which the Council staff relies to support an initial determination that the proposed regulation will not have a significant adverse impact on business (Government Code Section 11346.2(b)(6)).</p> <p>2) 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, 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 staff 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).</p>