

**State of California  
Delta Stewardship Council  
715 P Street  
Sacramento, CA 95814**

**Title 23, California Code of Regulations  
Ecosystem Regulations: Amendment of Sections 5001, 5002,  
5003, 5004, 5005, 5006, 5007, 5008, 5009, 5010, 5011, 5012, 5013,  
5014, and 5015; Addition of Section 5005.1 and Appendix 3A,  
Appendix 4A, and Appendix 8A**

**Final Statement of Reasons**

**Update of Initial Statement of Reasons**

On March 29, 2024, the Delta Stewardship Council (Council) initiated the formal rulemaking process by issuing a Notice of Proposed Action to provide notice and receive public comments on the proposed regulation (OAL File No. Z2024-0318-02). The text of the proposed regulation, an Initial Statement of Reasons (ISOR), and an Economic and Fiscal Analysis (EFIA) of the proposed regulation were made available for public review and comment starting March 29, 2024. The Notice of the Proposed Action initiated a public comment period that was scheduled to close on May 14, 2024, and noticed a public hearing on the proposed rulemaking scheduled for May 14, 2024. An interested party requested the Council extend the public comment period to Friday, May 17, 2024, and the Council granted the request and extended the public comment period to 5 p.m., May 17, 2024.

The ISOR describes the rationale for the proposed regulation, and there have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Action.

The Council held a duly noticed public hearing to hear public comments on May 14, 2024, at the California Natural Resources Building at 715 P Street, Sacramento, California, and also held virtually in accordance with the requirements set forth in Government Code section 11346.8.

As authorized by Government Code section 11346.9(d), the Council hereby incorporates the ISOR and EFIA prepared in this matter. Unless specifically discussed otherwise below, the ISOR's stated bases for the necessity of the proposed regulations continue to apply to the regulations as adopted.

The proposed amendments to sections 5001, 5002, 5003, 5004, 5005, 5006, 5007, 5008, 5009, 5010, 5011, 5012, 5013, 5014 and 5015 and additions of section 5005.1, Appendix 3A, 4A and 8A are provided on the Council's website.<sup>1</sup> All references to

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<sup>1</sup> <https://www.deltacouncil.ca.gov/delta-plan/regulations>

regulations are to California Code of Regulations, title 23. In the final proposed text the proposed amendments are shown in underline to indicate additions and shown in strikeout to indicate deletions relative to the existing regulations, including technical, conforming changes.

The text noticed to the public referenced 5001(j), however this subsection was modified without regulatory effect with filing 2024-0131-01. As such, the final regulatory text has been modified to align with text currently printed in the California Code of Regulations (CCR).

No substantive modifications from the initial proposed text of the regulations were made after the initial comment period ending May 17, 2024. Non-substantial changes are summarized below. A “non-substantial change” is one that clarifies without materially altering the requirements, rights, responsibilities, conditions or prescriptions contained in the original text. (Cal. Code Regs., tit. 1, § 40.)

## **Statement of Specific Purpose and Necessity**

### **Renumbered Section 5001(ee) as Section 5001(mm)**

#### ***Purpose***

The purpose is to correct a cross-reference in the existing language of section 5001(ee).

#### ***Necessity***

The necessity is to correct a cross-reference in the existing language of section 5001(ee) to have it correctly refer to 5001(o)(1)(E).

### **Appendix 4A**

#### ***Purpose***

The purpose is to remove a cross-reference included in error under Table 1-1.

#### ***Necessity***

The necessity is to remove a cross-reference included in error under Table 1-1.

## **Local Mandate Determination**

The proposed regulations do not impose a mandate on local agencies.

## **Summary and Responses to Oral and Written Comments Received During the Public Comment Period**

The Council solicited public comments on the proposed regulation package OAL File No. Z2024-0318-02. A total of three written comments and eight oral comments were received.

The comments received were divided into individual sub-comments, which are each summarized and numbered in the matrix in Attachment 1 to this Final Statement of Reasons (FSOR). The sub-comments were then grouped into categories based on similar topics or concerns. A summary of the comments by area of concern and the responses to the comments by area of concern are provided below, and the corresponding sub-comments are identified at the end of each summary by the corresponding number in the matrix summary (Attachment 1 to the FSOR). Copies of the submitted written comments and the comment portion of the transcript of the May 14, 2024, public hearing are contained in the rulemaking record and are marked with

brackets that identify the corresponding comment number in the comment summary matrix.

The tables below list those who provided written or oral comments on the proposed regulations during the comment period. The number associated with a specific commenter in the comment summaries and responses sections that follow correspond to the numbers assigned to the commenter in the tables below.

**Table 1: Commenters Who Provided Written Comments During the Comment Period from March 29, 2024, through May 17, 2024**

<b>Number</b>	<b>Name</b>	<b>Affiliation</b>
01	Thomas J. Slater	California Central Valley Flood Control Association & Reclamation District 999
02	Jennifer Pierre	State Water Contractors
03	Emily Pappalardo	DCC Engineering Co., Inc.

**Table 2: Commenters Who Provided Oral Comments at the May 14, 2024, Public Hearing**

<b>Number</b>	<b>Name</b>	<b>Affiliation</b>
04	Thomas J. Slater	California Central Valley Flood Control Association & Reclamation District 999
05	Michael Moncrief	MBK Engineers
06	Bryan Barnhart	Department of Water Resources
07	Gilbert Cosio	River Delta Consulting
08	Kirsten Pringle	MBK Engineers
09	Emily Pappalardo	DCC Engineering Co., Inc.
10	Chandra Sekhar Chilmakuri	State Water Contractors
11	Teji Sandhu	Department of Water Resources

## Responses to Oral and Written Comments

### Response 1: Coordination with Interested Parties

#### *Summary of Comments Received*

The Council received comments requesting additional stakeholder engagement, including a request for a “stay” on the rulemaking process to allow additional engagement not required by the Administrative Procedure Act (Gov. Code, § 11340 et seq.).

A commenter had questions about the rulemaking process, including questions about opportunities for comment and the process for addressing those comments. The commenter also had questions regarding the involvement of interested parties in the Delta in the process, with it being unclear if the commenter was inquiring about the process to develop the Delta Plan Ecosystem Amendment or the associated rulemaking process.

Commenters also noted the evidence and existence of Tribal areas in the Delta, identifying that potential ecosystem restoration actions might occur in these areas.

Additionally, the Council received a comment expressing opposition to the proposed amendment to existing regulations in section 5001 to section 5015, inclusive.

[Comments 01.03, 03.01, 04.06, 07.01, 07.02, 7.03, 07.05 and 07.07]

#### ***Response to Comments Received***

##### Response 1.0: Opportunities for Public Input and Comment on the Delta Plan Ecosystem Amendment

No action taken, and the Council disagrees, in part.

On June 23, 2022, the Council adopted Resolution 2022-05, making effective an amendment to Chapter 4 of the Delta Plan, *Protect, Restore, and Enhance the Delta Ecosystem* (Ecosystem Amendment), and directing Council staff to initiate a rulemaking process to incorporate in the Council’s regulations the new and updated policies adopted in the Ecosystem Amendment. The Council conducted extensive outreach and coordination with interested parties during the development of the Ecosystem Amendment and associated rulemaking process, providing many opportunities for public input, as described below.

The Ecosystem Amendment and accompanying proposed regulations are the product of iterative public and state and local agency comments and coordination. The “Problem Statement” section in the ISOR describes the need for the development of the Ecosystem Amendment in response to the May 2015 state and federal agencies’ shift from the Bay Delta Conservation Plan (BDCP) to a portfolio of mitigation projects known as the EcoRestore initiative. In response,

“[t]he Council began considering the need for an amendment to Chapter 4 of the Delta Plan in 2015 and 2016 [...]. Throughout 2017 and 2018, Council staff conducted listening sessions with stakeholders, local agencies, and Delta residents, in addition to public meetings with the Council and Delta Independent Science Board (Delta ISB) members. Based on these listening sessions and

additional research, Council staff proposed the Ecosystem Amendment to the Council to include a portfolio of actions that protect existing ecosystems, restore ecosystems, and enhance working or urban landscapes that provide habitat resources to species. These approaches can establish ecological processes in natural communities to make them more resilient to land conversion and climate change.”

In addition, Council staff conducted background research and developed three draft papers to synthesize ecosystem science relevant to Chapter 4 of the Delta Plan. These papers were made available for public review. Based in part on these listening sessions and Council research, Council staff developed a portfolio of potential revisions to Chapter 4 of the Delta Plan. These potential revisions were presented to the Council for discussion at the April 2019 and June 2019 Council meetings. Following Council input, staff prepared a Preliminary Public Review Draft of the proposed Ecosystem Amendment in November 2019 and solicited comments from state and local agencies, the general public, and the Delta ISB. Comments were incorporated into a May 2020 draft of the proposed Ecosystem Amendment, which the Council authorized as the proposed project for environmental review under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.; CEQA) at its May 2020 meeting.

As part of the CEQA process, the Council issued a Notice of Preparation (NOP) of a Draft Program Environmental Impact Report (PEIR) in May 2020. The Council held a public scoping meeting during the 60-day NOP review period and solicited additional comments. The Ecosystem Amendment Draft PEIR was developed following the May 2020 NOP, and the September 2021 Ecosystem Amendment Draft PEIR was released for a 64-day public review period between September 27, 2021, and November 30, 2021. A workshop to receive public comments was held at the November 18, 2021, Council meeting. Subsequently, the June 2022 Ecosystem Amendment Final PEIR was prepared to respond to comments on the Draft PEIR and described revisions made to the Draft PEIR and proposed Ecosystem Amendment to address public comments. At the June 23, 2022, Council meeting, the Council certified the Ecosystem Amendment Final PEIR, adopted the Ecosystem Amendment, and authorized staff to initiate this rulemaking process to make effective the new and updated policies adopted in the Ecosystem Amendment.

As part of the rulemaking process, the Council provided public engagement on the proposed rulemaking as required by the Administrative Procedure Act in the form of a public comment period on the initial proposed regulation from March 29, 2024, through May 17, 2024, which is inclusive of a time extension requested by an interested party, and a public hearing on May 14, 2024.

As required pursuant to the Administrative Procedure Act, the Council is responding to comments in writing. Written comments and oral comments provided at the public hearing are part of the rulemaking file, and responses are included in the FSOR. The Council will consider the FSOR and staff recommendation for authorization for Council staff to finalize the rulemaking process with the Office of Administrative Law.

No rebuttal or supplementation period is required by the Administrative Procedure Act, although opportunity for public comment is provided pursuant to the Bagley-Keene

Open Meeting Act (Gov. Code, § 11120 et seq.) at Council meetings. A member of the public may make oral comments at Council meetings through the general public comment agenda item that is provided at each monthly Council meeting. However, the Council will not be responding to public comments that are received after the May 17, 2024, public comment deadline, consistent with the Administrative Procedure Act.

[Comments 01.03, 03.01, 07.01, 07.02, 07.03 and 07.05]

### Response 1.1: California Native American Tribes and Tribal Cultural Resources

In addition to the public outreach described in Response 1.0, the Council notified California Native American Tribes about Ecosystem Amendment activities as part of the previous CEQA and Assembly Bill 52 (Stats. 2014, ch. 535; AB 52) processes. Furthermore, the Ecosystem Amendment Draft PEIR considered the cultural and Tribal cultural resources within the Delta and potential impacts associated with the implementation of the Ecosystem Amendment.

AB 52 requires CEQA lead agencies to provide notification to and the opportunity to request consultation with California Native American Tribes that are traditionally and culturally affiliated with the geographic area of a proposed project, if a Tribe has requested notice of projects proposed within that area. As part of the CEQA process, the Council sent notices in May 2020 for the Ecosystem Amendment to seven Tribes that requested notification of all Council activities subject to AB 52. Additionally, to provide non-AB 52 notification of the proposed Ecosystem Amendment in the event that Tribes would like to provide comments, the Council sent non-AB 52 notification letters by email in May 2020 to 187 California Native American Tribal contacts within the Ecosystem Amendment PEIR Planning Area (as provided by the Native American Heritage Commission [NAHC]).

Comment letters regarding cultural resources that were received in response to the NOP included requests for AB 52 consultation from two Tribes, comments from the NAHC describing the AB 52 procedures for Tribal consultation and letters requesting consideration of the Tribes' social benefit from general restoration projects. The Council consulted with the two Tribes requesting consultation on the Ecosystem Amendment Draft PEIR, namely Sections 5.7 *Cultural Resources* and 5.17 *Tribal Cultural Resources*, and incorporated changes as appropriate into the Final PEIR and the Mitigation Monitoring and Reporting Program. One California Native American Tribe provided comment on the Ecosystem Amendment Draft PEIR, and the responses to these comments are provided in the Ecosystem Amendment Final PEIR. The other comments received via letter did not raise any specific concern related to the Ecosystem Amendment.

Ecosystem Amendment PEIR<sup>2</sup> Sections 5.7 *Cultural Resources* and 5.17 *Tribal Cultural Resources* describe cultural and Tribal cultural resources, respectively, and the potential impacts that could occur as a result of implementing the Ecosystem Amendment based on the thresholds of significance included in Appendix G of the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.).

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<sup>2</sup> <https://www.deltacouncil.ca.gov/pdf/delta-plan/2021-09-27-draft-peir-eco-amendment.pdf>

[Comments 04.06 and 07.07]

Response 1.2: Project Opposition

No changes made. The Council acknowledges the comment of opposition for the proposed regulation.

[Comment 03.01]

No changes to the ISOR or EFIA are proposed in response to these comments. No further changes to the proposed regulations are proposed.

**Response 2: Requests for Exemption or Variance**

***Summary of Comments Received***

Two comments were received asking the Council to consider exemptions or variances for Delta reclamation districts from certain requirements in the proposed regulations.

One comment was received requesting the Council create an exemption to the requirement to complete Appendix 3A and Appendix 4A for reclamation district flood control works.

One comment was received requesting language in the proposed regulation that would create a variance for some reclamation district projects from the requirement in section 5008 to evaluate and, where feasible, incorporate alternatives that would increase floodplains and riparian habitats, which could include a setback levee.

[Comments 03.04 and 04.03]

***Response to Comments Received***

Response 2.0: Request for Exemption

The regulatory requirement of proposed section 5005.1 is for a certifying agency to complete the appendices to the extent possible based on available project records drawn from the design, CEQA, and permitting processes. This section does not require that a project contain all of the specific components detailed in the appendices. Each section in the appendices includes a “no” box that can be selected at the time of certification if a detailed component does not apply to a particular project. If a certifying agency finds that this regulatory policy does not apply to its project, this may be indicated within the certification of consistency at the time of filing using a brief explanation. No change needed.

[Comment 03.04]

Response 2.1: Request for Variance

Section 5008, which became effective in 2013, currently reads: “Levee projects must evaluate and where feasible incorporate alternatives, including the use of setback levees, to increase floodplains and riparian habitats.” That existing regulatory language remains in the proposed version of the amended regulation. The proposed amendment to this section principally affects the existing version of Appendix 8. As levee modifications have been completed in some areas and new, higher accuracy land elevation and sea level data has been collected, adjustments to the geographical boundary within which alternatives evaluations are required are needed. Proposed

Appendix 8A uses a new geographical boundary reflecting the changes that have occurred since the existing section 5008 and Appendix 8 became effective in 2013. This updated boundary is more reflective of areas where alternatives to traditional levees are currently possible. In addition, Section 5008 does not require a state or local agency to build those alternatives when not feasible. These proposed amendments contained in Appendix 8A include a map showing changes to the locations where alternatives that would physically expand the channel width would be required to be evaluated. There is no need for a variance.

[Comment 04.03]

No changes to the ISOR or EFIA are proposed in response to these comments. No further changes to the proposed regulations are proposed.

### **Response 3: Request for Additional Guidance from the Council**

#### ***Summary of Comments Received***

Some commenters asked if the Council would provide guidance on how to fill out the new forms Appendix 3A and 4A. There were several additional questions about the record that will be required to be submitted with the certification of consistency. One commenter asked if filling out one Appendix 3A and Appendix 4A per project was enough or if one was needed for each component of a project, particularly for multi-benefit projects.

[Comments 05.05, 06.01, 10.01, 11.01 and 11.03]

#### ***Response to Comments Received***

##### **Response 3.0: Guidance from the Council**

No changes made. This comment is out of scope for this rulemaking as it does not address the proposed regulatory text or ISOR. The Council provides early consultation to certifying agencies to address questions that may arise during the certification of consistency process.

[Comments 05.05, 06.01 and 11.01]

##### **Response 3.1: Record for Certification of Consistency**

No changes made. Appendix 3A and Appendix 4A were designed with the intent that a certifying agency could use the project documentation already gathered during the design, CEQA, and permitting processes for the covered action. The Council provides early consultation to certifying agencies to address questions that may arise during the certification of consistency process.

[Comments 06.01 and 11.03]

##### **Response 3.2: Exclusion of Mitigation Projects**

No changes made. As stated in the PEIR released in September 2021, this proposed regulation applies to any covered action that includes protection, enhancement or restoration of the ecosystem, including restoration actions that are mitigation.<sup>3</sup> If a

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<sup>3</sup> Delta Plan Ecosystem Amendment Draft Program Environmental Impact Report SCH#202050219, Pg. 3-9.



certifying agency determines that proposed section 5005.1 or 5006 applies to a proposed covered action, the level of documentation to support the statements in proposed Appendix 3A and Appendix 4A should be consistent with the scope and scale of the project. The Council provides early consultation to certifying agencies to address questions that may arise during the certification of consistency process.

[Comment 10.01]

No changes to the ISOR or EFIA are proposed in response to these comments. No further changes to the proposed regulations are proposed.

## **Response 4: Ambiguous Policy Language**

### ***Summary of Comments Received***

Several comments were made regarding the proposed regulatory additions or other additions commenters would like to see. One commenter requested that the words "includes," "feasible," "best available science" and "evaluate" be clarified or replaced. Other commenters expressed concern regarding the lack of regulatory definitions for the intertidal, subtidal and deep subtidal elevation bands and the sea level rise accommodation band referenced in Appendix 4A and section 5006. Other requests for additional details regarding the definition of BDCP and CVP were also received.

Comments were also received seeking clarification about the "legacy clause." One commenter asked if a certifying agency that had already completed the certification of consistency process needed to recertify consistency with the proposed regulations after they take effect. Another commenter asked for clarification about what changes sections 5006(b)(2) and 5007(b)(2) reference. A question about what the "publication date" referred to was also raised.

Commenters claimed the map in Appendix 4A depicted too many areas in tidal elevation bands available for restoration, rather than recognizing that these areas are currently being used for agriculture and are not currently available for tidal wetland restoration.

Comments also alleged there was vague language in section 5006(4)(A) and suggested either removing the phrase "safeguard against levee failure" or editing the phrase to make clear it is not intended to make a certifying agency responsible for any or all levee failures in the Delta.

[Comments 02.01, 02.02, 02.03, 02.04, 02.05, 02.06, 02.07, 02.08, 05.02, 06.01, 07.04, 07.06, 08.01, 09.01, 10.02, 10.03, 10.04, 11.01, 11.02 and 11.03.]

### ***Response to Comments Received***

#### **Response 4.0: Meaning of "Includes"**

No changes made. The PEIR,<sup>4</sup> states that section 5005.1 applies to any covered action that includes protection, enhancement or restoration of the ecosystem, including restoration actions required as mitigation. Restoration is defined in Water Code section 85066, enhancement is defined in existing law in section 5001 and protection is defined

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<sup>4</sup> Delta Plan Ecosystem Amendment Draft Program Environmental Impact Report SCH#202050219, Pg. 3-9.

in existing law in section 5001. Thus, a certifying agency can locate definitions for activities considered to be protection, enhancement and restoration in current law. The Council provides early consultation to certifying agencies to address questions that may arise during the certification of consistency process.

[Comment 02.01]

#### Response 4.1: Clarification of Terms

No changes made. The terms “feasible” and “best available science” are defined in existing law in section 5001 since being adopted and becoming effective in 2013 when the Council first codified regulations. Similarly, the definition of “evaluation” in proposed section 5008 remains the same as in the existing regulation, and the documentation needed to support a certification of consistency for section 5008 has not changed from the existing regulation. No new type of analysis will be required that is not already required. However, the proposed regulation encourages the consideration of a broader range of alternatives to increase floodplains than simply setback levees.

[Comments 06.01, 09.01 and 11.01.]

#### Response 4.2: “Legacy Clause” Language

No changes made. Sections 5006(b)(2), 5007(b)(2) as well as 5008(b)(2) would only apply to covered actions that have not submitted a certification of consistency to the Council but are already engaged in the CEQA process when the proposed regulation becomes effective. For a covered action that had a NOP, Mitigated Negative Declaration or Negative Declaration published by the State Clearinghouse prior to the effective date of amended sections 5006, 5007 and 5008, those sections would not become operative until two years after the effective date of the amended Council regulations. In other words, a covered action that has already begun the CEQA process has two years from the effective date of the proposed regulations to finish the CEQA process and submit a certification of consistency to the Council before the proposed regulatory revisions would apply to that covered action. For the new proposed regulation section 5005.1, there is no delayed operative date because existing CEQA documentation can be used to complete Appendix 3A and Appendix 4A.

[Comments 02.08, 05.02, 08.01, 11.02 and 11.03]

#### Response 4.3: Definitions of BDCP and CVP

No changes made. The definitions of BDCP and CVP in section 5001 provide definitions of the acronyms and do not establish new regulatory definitions of either the Bay Delta Conservation Plan or Central Valley Project.

[Comments 02.02 and 02.03]

#### Response 4.4: Elevation and Accommodation Bands

No changes made. The sea level accommodation band baseline is the Mean Higher High Water (MHHW), which is established by an average of the National Tidal Datum Epoch and continues up to 10 feet. This is not a sea level rise inundation zone or prediction of sea level rise. With subsidence expected to continue in the Delta, this gives certifying agencies flexibility between all the conservation actions, such as from

wetland actions to oak woodland restoration, to select from up to 10 feet above the MHHW. The commenter cited specific sea level rise ranges (Intermediate-Low to Intermediate) as best available science from the 2024 update to the Ocean Protection Council report, but other ranges were also published in that same report.

The proposed regulation is not inconsistent with the 2024 update as the same report also states,

“The most precautionary approach, when feasible, is to evaluate Intermediate, Intermediate-High and High Scenarios to assess a spectrum of potential impacts, consequences, and responses” (pg. 58).

The proposed language in section 5006 and Appendix 4A directs a certifying agency to complete Appendix 4A and support entries with analysis. The language does not prescribe a level of expected sea level rise to use in the analysis.

For the remaining tidal elevation bands, “intertidal” and “subtidal,” no further definitions are necessary as the terms are defined both in Merriam-Webster and the Oxford English dictionaries and are commonly used in the ecosystem restoration community. Each project, in the planning and design phase, should rely on best available science (Wat. Code, § 5001.) to determine at what elevation the intertidal range lies. A certifying agency would analyze this as part of the design phase of a project in the subtidal zone.

In general, the Council wants to avoid regulations that are overly prescriptive and, thus, provide the most flexibility possible for a certifying agency to make a determination for its project, supported by a best available science analysis.

[Comments 02.04, 02.05, 02.06, 10.02 and 10.03]

#### Response 4.5: Elevation Map

No changes made. The map depicting the elevation bands referred to in Appendix 3A and Appendix 4A are contour lines offered as a guide. The map depicts higher water associated with outer-coast sea level rise and neither reflects physical transmission of sea level at the Golden Gate into the Delta nor the effects of possible future sea level rise adaptation efforts, such as salinity barriers, wetland restoration, levee setbacks and sea walls. Sea levels are rising faster in the Delta than most places in California due to vertical land movement, such as subsidence and tectonics, and the precise degree of subsidence and sea level rise within the Suisun Marsh and Delta is difficult to forecast due to interactions with river flows, tidal restoration efforts and future sea level rise adaptation efforts. The Council does not assume that levee removals or breaches would occur in this map or within the proposed regulation. The map and guidance provide certifying agencies future flexibility and were developed to leave migration space for rising waters to the year 2100 and beyond.

[Comment 07.04 and 07.06]

#### Response 4.6: Safeguarding Against Levee Failure

No changes made. Only covered actions are subject to the proposed regulations, and a certifying agency is only responsible for the planning, design and construction of its proposed action. The addition of the language “designed to safeguard against levee failure over the life of the covered action” to section 5006 was proposed to ensure long-

term consideration of levee integrity when a covered action is planning, designing and constructing new tidal restoration. This addition was made in response to concerns that the reconfiguration of levees at restoration projects could compromise the integrity of the remaining levees at the site.

[Comments 02.07 and 10.04]

No changes to the ISOR or EFIA are proposed in response to these comments. No further changes to the proposed regulations are proposed.

## **Response 5: Economic and Fiscal Impact of the Amended Regulations**

### ***Summary of Comments Received***

No changes made. Several comments were made regarding the costs associated with the proposed regulations and the potential cost burden this could place on certifying agencies, particularly smaller reclamation districts with limited revenue. One comment expressed concerns that if a larger reclamation district, such as one with over 20,000 acres, has trouble taking on the additional costs, then a smaller district, such as one with a few thousand acres or less, will have even more fiscal trouble. Another comment pointed out that the number of miles of levees maintained and operated by different reclamation districts could vary substantially, which would result in varying costs placed on them. Another comment expressed concerns that the requirement to use the best available science as part of the proposed regulations would increase costs further. As expressed in multiple comments, the ultimate concern is that the increased costs could result in reclamation districts electing not to pursue beneficial covered actions.

One comment specifically expressed concern about potential total planning costs potentially exceeding project costs in some cases, due to both other regulatory costs and those introduced by the proposed regulations.

Other comments sought general clarity regarding the calculations and values reported of economic and fiscal impacts, including the prospective change in spending on professional services, annual impacts and the total direct impacts.

[Comments 01.01, 03.02, 03.03, 04.01, 04.02, 04.04, 05.01, 05.03, 06.02, 09.02 and 11.02]

### ***Response to Comments Received***

#### **Response 5.0: Cost Burden to Certifying Agencies**

No changes made. The benefits of Appendix 3A and Appendix 4A are described in Section 3.5.2 of the EFIA and in the ISOR. The information needed to complete Appendix 3A and Appendix 4A is information that already would be disclosed as part of a project's design, CEQA, and permitting processes (see also Response 3.1). The requirement to use the best available science in establishing consistency with the Delta Plan is part of existing law, both in statute and regulations, and, thus, the proposed regulations would not change that. Therefore, the process for review of these documents, and any associated questions and comments, are unlikely to change to the extent that they would delay permitting and construction. Also, as described in Section 3.4.1 of the EFIA, the estimated additional costs applied are a very small share of the average total costs of covered actions. Lower-cost covered actions would likely see

lower additional regulatory costs to certifying agencies relative to the values applied in the EFIA. As also described in Section 3.4.1 of the EFIA, the potential additional costs associated with levee evaluations could be as much as \$200,000 but would likely be substantially less if, for example, the additional alternatives would clearly be rejected as financially infeasible. Therefore, while the EFIA reports a potential cost of \$200,000 per covered action to assess levee alternatives, this value seeks to avoid underestimating potential economic and fiscal impacts. The impact to smaller certifying agencies with lower budgets for projects would likely be substantially less than \$200,000. This could be the case regardless of the number of miles of levees overseen by the agency. It should not follow that the additional costs would be expected to cause a certifying agency to choose not to pursue a project that is a covered action.

[Comments 01.01, 03.02, 04.02, 04.04, 05.03, 09.02 and 11.02]

#### Response 5.1: Cost Burden as it Relates to Scope of Project

No changes made. As described in Section 2.2.3 of the EFIA, the estimated costs for planning associated with levee project evaluations under the proposed regulations are estimated as a share of typical total project costs. Conservative, or high, estimates were applied to avoid underestimating potential economic and fiscal impacts. Other planning and permitting costs referenced in the comment are not affected by the proposed regulations. See also Response 5.0.

[Comment 03.03]

#### Response 5.2: Clarifying Calculation of Changes in Spending on Professional Services

No changes made. As summarized in Table 6 in Section 3.3.1 of the EFIA, \$400,000 represents the total potential increase in spending on professional services for engineering and environmental consulting for covered actions that would require additional evaluations. Based on a separate calculation, \$400,000 also represents the total potential decrease in spending on these services for other covered actions that would no longer require additional evaluations due to the map changes described further in Response 2.1. These are reported separately because they would affect different covered actions, and most likely, different state and local agencies. Also, to estimate the full economic and fiscal impacts, cost increases and cost decreases are not considered to be offsetting. As explained in Section 3.1.3 of the EFIA, conservative, or high, estimates were applied to avoid underestimating potential economic and fiscal impacts.

[Comment 04.01]

#### Response 5.3: Clarifying Calculation of Total Annual Direct Impact

No changes made. The total potential increase in spending for state and local agencies submitting covered actions is \$500,000 across all certifying agencies each year. This is based on the potential for 10 covered actions per year, which is the most observed in any one year since consistency determinations became required under the Sacramento-San Joaquin Delta Reform Act of 2009 (Wat. Code, § 85000 et seq.; Delta Reform Act). This was applied, rather than the average number of covered actions per year, to avoid underestimating economic and fiscal impacts over the first 12 months following the effective date of the proposed regulations.

[Comments 05.01 and 06.02]

No changes to the ISOR or EFIA are proposed in response to these comments. No further changes to the proposed regulations are proposed.

## **Response 6: Feasibility of Setback Levees**

### ***Summary of Comments Received***

The Council received comments expressing concern that setback levees at the locations depicted in Appendix 8A would be economically infeasible, provide limited flood management benefits and have negative effects on the Delta's economy and Delta as Place considerations. Concerns were also raised about requiring the removal of mature vegetation and impacts to Tribal and cultural resources.

Concerns were raised that the increased conveyance capacity that may result from setback levees would negatively impact downstream channels that may not have the conveyance capacity to handle additional water coming downstream and that all the impacts of setback levees and pressures to install setback levees will be put on the levees located to the west of the Sacramento River.

Concerns were raised regarding poorly designed setback levees that may cause significant seepage and erosion of riparian benches created in the past due to lack of sufficient revetment protection, and ultimately changing the original configuration and eroding the setback levee.

[Comments 01.02, 03.05, 04.05, 05.04, 07.08 and 9.01]

### ***Response to Comments Received***

#### **Response 6.0: Feasibility of Setback Levees**

No changes made. Most comments regarding the proposed regulation centered around the infeasible nature of setting levees back. Reasons offered included impacts to individual landowners or communities, agriculture and downstream levee stability. Additional factors that may make setback levees infeasible were stated as costs, permitting requirements and impacts to habitat through vegetation removal.

The Council agrees that many of the potential issues cited in the comments could make a setback levee infeasible at a given location. Documentation of that infeasibility would need to be included in the certifying agency's certification of consistency for the covered action. An evaluation only needs to go as far as to show that a setback levee is feasible or not, such as not cost prohibitive, not taking prime agricultural land or not doing anything unlawful. The proposed regulatory amendment in this rulemaking did not amend the existing documentation requirement in current law. The current definition of feasible in existing section 5001 is identical to the definition of feasible in CEQA, codified at Public Resources Code section 21061.1.

[Comments 01.02, 04.05, 05.04, 07.08 and 09.01]

#### **Response 6.1 Increased Conveyance Capacity**

No changes made. Any potential impacts to conveyance capacity, downstream impacts and/or poor design of proposed levee projects would be evaluated and, if required,

mitigated in the CEQA process for a project before the submittal of a certification of consistency for the covered action.

[Comment 03.05]

No changes to the ISOR or EFIA are proposed in response to these comments. No further changes to the proposed regulations are proposed.

### **Alternatives that Would Lessen Adverse Economic Impact on Businesses**

The Council has not identified any reasonable alternatives to the proposed regulations that would lessen any adverse impact on small businesses or that would be less burdensome and equally effective in achieving the purposes of the regulation in a manner that achieves the purposes of the statute being implemented. The Council has determined that the proposed regulations are not expected to be substantial enough to result in the creation or elimination of businesses.

The Council concluded that: (1) the proposal will add 0.6 full-time equivalent jobs within California, (2) it is unlikely that the proposal will eliminate jobs within California, (3) it is unlikely the proposal will create new businesses in California, (4) it is unlikely the proposal will eliminate existing businesses within California, (5) the proposal could result in some expansion of businesses currently doing business within the state and (6) the proposal will benefit the health and welfare of California residents, worker safety or the state's environment.

### **Alternatives Determination for the Proposed Action**

The Council determined that no alternatives to the proposed regulation considered by the Council would be more effective in carrying out the purpose for which the regulation is proposed, would be as effective and less burdensome to affected private persons than the adopted regulation, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

### **Update of Materials Relied Upon**

No additional materials beyond those identified in the ISOR were relied upon.

### **Attachments**

Attachment 1: Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024.

Attachment 2: Comment Letters and Transcript from Public Hearing

### **Technical and Empirical Studies, Reports or Documents**

The studies, reports and documents the Council relied upon are the same as in the ISOR, which is incorporated by reference in accordance with Government Code section 11346.9.

# **FINAL STATEMENT OF REASONS**

## **Attachment 1**

Summary of Comments Received  
during Public Comment Period from  
March 29, 2024 – May 17, 2024.



## Summary of Comments Received During 49-Day Public Comment Period from March 29, 2024, Through May 17, 2024

Note: The responses to the comments below are contained in the Final Statement of Reasons. The applicable response for each comment in this matrix is denoted by the applicable response number. A copy of the submitted written comments and the transcript of the May 14, 2024, public hearing are part of the rulemaking record; the letters and transcript of the public hearing are bracketed to identify the individual comments by the corresponding comment number identified below.

Commenter Organization	Comment Number	Comments	Response Number
California Central Valley Flood Control Association & Reclamation District 999	01.01	<p>Increased Cost to Prepare a certification of consistency</p> <p>The amendments will significantly increase the cost for ecosystem enhancement and restoration projects. I don't think it is the intention of the Stewardship Council to have costs interfere with an RD [reclamation district] that is trying to improve the ecosystem and conduct restoration projects only to have them halted because it is causing an undue financial burden on their landowners. The necessary costs associated with normal OMM&amp;R [operation, maintenance, repair, replacement and rehabilitation] of existing levees is an ongoing burden and multi-benefit projects will become less attractive to the RD's [sic] because they cannot afford the new regulatory costs associated with the certification of consistency. This seems inherently wrong and something we hope [Council] Staff will consider modifying. If a multi-benefit project costs an extra \$50,000 because of costs associated with certification of consistency, that cost will be divided by the total acreage of the RD. The costs associated with certification will probably be nearly the same regardless of which RD it is associated with. Therefore, it will be less affordable to a small RD with only 1,000 acres or similar districts with small acres. A district like RD 999 has nearly 26,000 acres and it will be difficult for us to engage in a project with those additional costs. Meaning smaller districts will be more impacted and less likely to take on a multi-benefit project for those reasons. This shouldn't be the determining factor for moving forward with a multi-benefit project, and yet I promise it will be.</p>	Response 5.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
California Central Valley Flood Control Association & Reclamation District 999	01.02	<p>Feasibility of Constructing Setback Levees in Priority Locations Identified in Appendix SA [sic].</p> <p>The proposed amendment to section 5008 would require a certification of consistency for a project located in the setback levee evaluation areas identified in the Appendix 8A to evaluate, and where feasible incorporate, alternatives that would increase floodplains and riparian habitats. Compared to alternative projects, setback levees at these locations would be economically infeasible and provide limited flood management benefits. If setback levees were incorporated, prime agricultural land would be taken out of production impacting the Delta's economy and Delta as-a-place. It would also require the removal of mature vegetation and raise concerns about potential impacts to Tribal and cultural resources, particularly where the current flood control system is built on the natural levees.</p>	Response 6.
California Central Valley Flood Control Association & Reclamation District 999	01.03	<p>Given the magnitude of impacts the proposed changes will have on the economic sustainability of RD's [sic] In [sic] the Delta and lack of clarity in the proposed amendments, the CCVFCA [Central Valley Flood Control Association] and RD 999 request the Delta Stewardship Council put a stay on their rule making [sic] proceedings and allow for more collaboration to refine the implementation of amendments to Title 23, division 6, sections 5001 to 5015. These amendments, as currently written, put in jeopardy Delta as a Place, the very rule that the Delta Stewardship Council is responsible to protect.</p>	Response 1.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

<p>State Water Contractors</p>	<p>02.01</p>	<p>1. The meaning of “includes” should be clarified or replaced in the regulatory text that triggers the application of the new or amended regulations.</p> <p>Section 5005.1(b) provides: “For purposes of Water Code section 85057.5(a)(3) and section 5001(o)(1)(E) of this chapter, this policy applies to a covered action that includes protection, enhancement, or restoration of the ecosystem.” Section 5007(b)(1) provides: “(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(o)(1)(E) of this chapter, this policy applies to a covered action that includes protection, enhancement, or restoration of the ecosystem.” And section 5008(c)(1) provides: “For purposes of Water Code section 85057.5(a)(3) and section 5001(o)(1)(E) of this chapter, this policy covers a proposed action that includes any of the following: . . . .”</p> <p>SWC suggests the Council replace “includes” with “constitutes a project for the” in sections 5005.1(b) and 5007(b)(1) and “constitutes a project for” in section 5008(c)(1).</p> <p>Numerous projects that may be covered actions may “include” some protection, enhancement, or restoration of the ecosystem but should not be subject to section 5005.1 or section 5007. For instance, many projects may include the dedication of a conservation easement as mitigation to preserve habitat in perpetuity with no modification of the land or waters under the easement. Others may include small amounts of habitat restoration in the range of a fraction of an acre for impacts to waters of the United States to obtain a dredge-and-fill permit or a Fish and Game Code section 1602 lake or streambed alteration agreement. It would be meaningless and burdensome to require the extensive documentation required under the new or amended regulations where the covered action is not a habitat restoration or levee-focused project but “includes” some preservation, enhancement, or restoration as mitigation or alteration of a levee to accommodate a covered action that is not itself a levee project.</p> <p>In addition, using “includes” in this manner could make what otherwise would not be a covered action into one, thus requiring certification and possible appeals to the Council, which can delay projects a minimum of six months, solely because the action “includes” a small amount of ecosystem protection, enhancement or restoration or a levee modification to accommodate a covered action that is not itself a levee improvement project. (23 Cal. Code Regs., §5001(k)(1)(E) [a covered action must be covered by one or more of the substantive policies codified in Article 3 of Chapter 2 of Division 6 of Title 23].)</p>	<p>Response 4.</p>
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Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
State Water Contractors	02.02	<p>2. The proposed definitions in sections 5001(f) and 5001(p) would benefit from clarification.</p> <p>Section 5001(f) would benefit from the following clarification:                      (f) “BDCP” means the Bay Delta Conservation Plan, which was a habitat conservation plan under section 10 of the federal Endangered Species Act and a Natural Community Conservation Plan under the Natural Community Conservation Planning Act proposed by the Department of Water Resources, U.S. Fish &amp; Wildlife Service, National Marine Fisheries Service, and Bureau of Reclamation.</p> <p>The Council’s proposed definition is not inaccurate, but it is incomplete in important respects that have led opponents of the new Delta conveyance to argue in multiple forums, including litigation, that any proposed new conveyance is just the BDCP by another name, even when they are not part of an HCP/NCCP [habitat conservation plan/natural community conservation planning] like the conveyance proposed as one of twenty-two conservation measures in the BDCP. SWC’s proposed clarifying text would avoid such arguments that may be raised in future appeals for a certification of consistency.</p>	Response 4.
State Water Contractors	02.03	<p>Section 5001(p)’s definition of the CVP is inaccurate and requires more precision. It defines CVP to mean “the federal Central Valley Project described in Water Code section 11100 et seq.” While those sections of the Water Code are titled the Central Valley Project Act (CVP Act), the CVP Act authorized both facilities that became units of the federal CVP and facilities that became part of the SWP. (Wat. Code § 11260 [authorizing the Feather River Project unit, which includes Oroville Reservoir and what is now the California Aqueduct, among other things]; <i>United States v. State Water Resources Control Bd.</i> (1986) 182 Cal.App.3d 82, 99-100.) SWC recommends consulting with the Bureau of Reclamation or reviewing its publicly available information on the CVP to craft a definition.</p>	Response 4.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
State Water Contractors	02.04	<p>3. The Council should include definitions of the terms Intertidal Elevation Band and Sea Level Rise Accommodation Band as they are used in section 5006 as proposed for amendment.</p> <p>The terms Intertidal Elevation Band and Sea Level Rise Accommodation Band are used in section 5006(a)(3)(A) but are not among the amended definitions in section 5001. Council staff informed us that those terms are defined in an appendix to the Delta Plan that is not included in the regulatory amendments. This creates unnecessary uncertainty and opens the door to changes to the definitions without amending the regulation, where such changes would amend the regulation without complying with the Administrative Procedure Act.</p>	Response 4.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
State Water Contractors	02.05	<p>4. The Council should adopt a regulatory definition of Sea Level Rise Accommodation Band that is based on the best available science.</p> <p>The definition of Sea Level Rise Accommodation Band in the Delta Plan appendix appears to be based on the H++ scenario for the year 2100 in the Ocean Protection Council’s State of California Sea-Level Rise Guidance 2018 Update. The H++ scenario has no probability assigned because it is not based on probabilistic modeling but a single “scenario” under which the West Antarctic Ice Sheet is lost. Recently, the Ocean Protection Council released its DRAFT: State of California Sea Level Rise Guidance: 2024 Science and Policy Update, Jan. 2024 (Draft 2024 Update), in which it determined that “The extreme sea level rise scenario (i.e. H++) from Rising Seas 2017 is much higher than best available science suggests and has not been included in the 2024 update.” (<i>Id.</i> at p. 8, bold original.) It goes on to explain that “new scientific consensus represented in the IPCC AR6 is that the H++ scenario, in Rising Seas 2017, is not physically plausible as it incorporates too much sea level rise in the near-term and a consequent ongoing high rate of sea level rise throughout the rest of the 21st century. (<i>Id.</i> at pp. 22-23; see also <i>id.</i> at p. 28, fig. 2.3 [“illustrating that [the H++] scenario is above scientifically plausible sea level rise for all dates”].)</p> <p>The Draft Update goes on to explain that the Intermediate-Low Scenario is “a reasonable estimate of the lower bound of most likely sea level rise in 2100 . . . .” (<i>Id.</i> at p. 37). It also provides that the Intermediate Scenario is a reasonable estimate of the upper bound of the most likely sea level rise in 2100. (<i>Id.</i> at p. 38.) At 2100, those scenarios project median values of sea level rise of between 1.6 and 3.3 feet. (<i>Id.</i> at p. 27, table 2.1).</p> <p>Thus, the Council should adopt a regulatory definition of the Sea Level Rise Accommodation Zone that is significantly lower than the H++ scenario for the year 2100. A definition based on the median value at 2100 of 3.3 feet under the Intermediate Scenario makes the most sense as it is the reasonable estimate of the upper bound of most likely sea level rise based on the best available science.</p>	Response 4.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
State Water Contractors	02.06	5. The Council should adopt regulatory definitions of Subtidal Elevation Band and Deep Subtidal Elevation Band. These terms are used in the proposed amendments to section 5008(a)(4)(A). Leaving them undefined in the regulations creates uncertainty and opens the door to the Council changing the definitions in the Delta Plan, which would amend section 5008 without complying with the Administrative Procedure Act.	Response 4.
State Water Contractors	02.07	6. Section 5006(a)(4)(A) should be edited to avoid the unlawfully vague phrase “safeguard against levee failure.” “Safeguard against levee failure” in proposed section 5006(a)(4)(A) is unlawfully vague. (Gov. Code, sec. 11349.1(a)(3).) This phrase could be interpreted to mean the covered action must prevent levee failure or that it must protect the covered action from the consequences of a levee failure. If it is the former, not all covered actions subject to this policy can do so because the public agency undertaking the project may not own or operate the relevant levee(s). The latter is the more reasonable policy, but if that is the intent, the regulation should expressly state it, not leave the language ambiguous and subject to high uncertainty as to how the Council will interpret the ambiguous policy in an administrative appeal of certification of consistency. The latter could be clarified by inserting the phrase “the covered action” after “safeguard” to read “An explanation based on the best available science, for a covered action that takes place in whole or in part in the shallow Subtidal Elevation Band or the Deep Subtidal Elevation Band, of how the action is designed to safeguard the covered action against levee failure over the design life of the covered action.”	Response 4.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
State Water Contractors	02.08	<p>7. The Council should clarify sections 5006(b)(2) and 5007(b)(2) to avoid ambiguity and any suggestion that covered actions already past the certification of consistency stage may be required to prepare a second certification once the amended policies do apply.</p> <p>The references to “the changes” and “those changes” in proposed sections 5006(b)(2) and 5007(b)(2) are ambiguous. If they refer to the amendments to sections 5006 and 5007, then it means amended section 5006 is not operative with respect to any covered action that had a notice of preparation (NOP), mitigated negative declaration (MND) or negative declaration (ND) published prior to the effective date of the amendments until 2 years after the effective date of the amendments. If that is the intent, (b)(2) should substitute “amendments” for “changes” for clarity. The draft amendments also refer to the date of “publication” of an MND or ND, but it is not clear whether that means the date an MND or ND is circulated for public and responsible agency comment or the date they are adopted. It appears to mean the former, in which case it should expressly say that. In addition, if a state or local agency has already certified consistency for a covered action before the amendments become effective with respect to the covered action, is this provision intended to require a new certification of consistency at the point these sections do apply? That should not be the case because the Delta Reform Act does not authorize the Council to require two certifications of consistency for a project, one prior to implementation and one after implementation has begun or is completed. (Wat. Code, § 85225.)</p>	Response 4.
DCC Engineering Co., Inc.	03.01	On behalf of our Reclamation District 554, 556, 1002, and Brannan-Andrus Levee Maintenance District [sic] are opposed to the amendment to existing regulations in CCR Title 23, Div. 6, Article 1, Section 5001 to Section 5015, inclusive.	Response 1.



Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
DCC Engineering Co., Inc.	03.02	<p>These proposed amendments will cause an additional burden on permitting and facilitating necessary projects that benefit flood control, water supply, agriculture, communities, and the ecosystem.</p> <p>Section 5005.1 [sic] Appendix 3A and Appendix 4A – These requirements are required for the certification of consistency with the Delta Stewardship Council (DSC). This consistency process is relatively new in the permitting realm of the Delta and seeks to ensure projects are consistent with the Delta Plan created through legislation in 2009. Any project that repairs, rehabilitates, and/or enhances the levee system and provides additional ecosystem benefits is inherently consistent with the Delta Plan. There is no added benefit to the determination of consistency to the Delta Plan with the inclusion of these appendices. The permitting process as it is, is sufficient to make a determination that a project is consistent with the Delta Plan. All the information required in Appendices 3A and 4A provides a multitude of opportunities for the permit reviewer to question and comment on the project which can add considerable time to an already lengthy permitting process. Additionally, within these sections are requirements to use the best available science, which could be contested and further elongate the permit process. With additional time and research comes additional cost.</p>	Response 5.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
DCC Engineering Co., Inc.	03.03	Reclamation Districts (RD's) [sic] and landowners who pay assessments are limited in their ability to raise money for necessary flood-control projects. Thus, RDs are reliant on the Delta Levees Subventions and Special Projects programs to perform larger levee works. Recent releases of Project Solicitation Proposals with Special Projects must be multi-benefit. Additionally, the lack of programmatic mitigation banks and credits to purchase, RDs also must make their levee projects self-mitigating and multi-benefit. This may push projects that could be considered maintenance into covered actions and subject RDs to this permitting process. RDs are responsible for flood control but overtime [sic] the ability to perform flood control projects has become constricted due to an increased regulatory climate reducing allowable work windows and requiring a significant amount of upfront biological and cultural analysis. To the greatest extent possible, RDs must be efficient with their use of funds to ensure that most of the money they spend is spent on their flood control system and not on the planning and permitting. The costs of planning and permitting a levee project are beginning to match the cost of constructing a levee project. This further limits their ability to protect the values that the Delta Plan was set in place to uphold.	Response 5.
DCC Engineering Co., Inc.	03.04	We suggest including language within the rule making [sic] that creates an exemption for Reclamation District flood control works on the requirement to fill out Appendix 3A and 4A.	Response 2.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
DCC Engineering Co., Inc.	03.05	<p>Section 5008 – This section aims to improve the conveyance capacity of these priority channels. The potential for increased conveyance capacity may negatively impact downstream channels that may not have the conveyance capacity to handle this additional water coming downstream. This could then raise flood elevations and increase pressures on downstream levees.</p> <p>While this section does not specifically include any of the RD levees that are represented in this letter, the requirement to evaluate any proposed project for the potential of a setback levee is a concern if the priority areas are redefined in the future. Often, legacy homes and high value agriculture are immediately adjacent to the levee. These would be eliminated with setback levees. Who is allowed to make the determination on sufficiency of a determination that a set back [sic] levee is not feasible. Often, it will not be due to extreme costs to set back a levee. These costs can only be borne by urban areas, not rural ones. Additionally, these priority areas include urban areas where houses back up to the levees themselves. There is limited opportunity to set back levees in the northern section of the Sacramento River. All these impacts of setback levees and pressures to setback levees will be put on the levees to the west of the river.</p> <p>Lastly, setback levees, while having many benefits can also be detrimental if they are not designed properly. Many areas along Georgiana Slough were set back by the US Army Corps of Engineers in the 1940s to 1960s. Many of these areas experience significant seepage problems because of the materials that were used on these levees. Additionally, all the riparian benches that were created are eroding away because they don't have sufficient revetment protection to keep them in their original configuration eventually eroding back to the set back [sic] levee. As part of these requirements, setback levees should protect the original levee to improve flood protection and maintain ecosystem benefits into the future.</p>	Response 6.
California Central Valley Flood Control Association & Reclamation District 999	04.01	<p>Can you elaborate a little bit on how you got a net gain of 400 – I see the math, but it says decrease in spending on professional services for engineering for fewer levees alternative solutions but what does that encompass?</p>	Response 5.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
California Central Valley Flood Control Association & Reclamation District 999	04.02	If I can expand on the burden, or the potential burden of cost for these specific RDs [reclamation districts]. I think it's tantamount that - we are the largest RD in the Delta I think, within a few acres one way or another, and we're nearly 26,000 acres. So, in one sense we're very fortunate to divide our bill by that many acres, so to speak, our assessment goes out on a per acre basis, and we are managed by board members as most RDs are in the Delta. So, to make the case if we're the largest - and I don't think we can fund it economically – what is the 2 and 3,000 acre RDs that have to maintain similar number of levees or miles of levees, we have 33 miles of levee...someone next to us may have six miles of levee. The issue is funding and the grants that are provided us have term limits and time constraints on them to do these major projects and come up with consistency plans is extremely expensive for a RD that has an annual budget of \$110,000 and all of that goes to maintaining the levees to the best we can for the state plan of flood control working with our partners at DWR [Department of Water Resources] and the [Central Valley] flood [Protection] board and so forth. So I think it's cost prohibitive, or it looks like it will be for me, I don't know how anyone else could do it.	Response 5.
California Central Valley Flood Control Association & Reclamation District 999	04.03	That doesn't diminish the relevance of doing it or the importance of doing it, or any other reason I'm not questioning that right now - in my comments it may come but that's a different issue. I think it needs to be considered, we hope that the Council will consider some of our concerns and maybe variances for something that's not going to lead to a successful consistency anyway, maybe you don't have to do it. We just can't be impacted anymore completing these multi-benefit projects that we're all agreeing we need to do.	Response 2.
California Central Valley Flood Control Association & Reclamation District 999	04.04	We've shifted, I'm old enough to know how this has all shifted for the good, and we're comfortable doing it, now tag on another huge cost for something that's not pertinent to a specific district and it may prevent them from doing some very, very good operations and maintenance and repair work on existing levees. So I hope the Council gets the point that there's concern here monetarily and that's tantamount to it.	Response 5.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Commenter Organization	Comment Number	Comments	Response Number
California Central Valley Flood Control Association & Reclamation District 999	04.05	The fact that we just recently completed an Elk Slough feasibility study, we got a \$1,000,000 grant from the [Sacramento-San Joaquin Delta] Conservancy and it was just a beautifully done feasibility study on Elk Slough, which is 9.4 miles and is listed in your perspectives here, if you will that's the only tributary that has never been part of the state bank protection deal. It is pristine, beautiful and we're working diligently to try to keep that enhanced, keep it the way it is as well as provide flood control. A setback levee wipes out hundreds of years of beautiful pristine old wooded...it's like cutting your nose off to spite your face. So, that's a concern when we see setback levees in here, and as I understand, they're full setback levees so you'd be required to remove the old existing 200-year levees...	Response 6.
California Central Valley Flood Control Association & Reclamation District 999	04.06	And you know, and everyone on the Council knows, the evidence and existence of Tribal areas in the Delta is incredible. This cannot be, to me, done respectfully with those entities. And it's a big concern for us, we're trying to preserve all that whether there's room in here or not it has come up. So that's another concern going forward with these consistency hearings.	Response 1.
MBK Engineers	05.01	This is an estimate of the annual anticipated?...That have been received?	Response 5.
MBK Engineers	05.02	I think there was a potential misunderstanding that if your CEQA analysis or your findings did not meet to add to it, the concern was whether or not the Stewardship Council's consistency determination would require additional CEQA evaluations, and so the two year stop gap going back on the legacy language is appropriate, but then moving forward, there could be additional requirements of the Council and their analysis of the project if we don't meet the consistency determination.	Response 3.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
MBK Engineers	05.03	<p>One of our big concerns obviously - you have the table up still – is our financial concerns with our agencies as we submit our consistency determination findings moving into the future with the current financial uncertainties that we have at the state, our local agencies are always trying to evaluate and budget for whatever our future and anticipated costs may be to develop any number of projects let alone our responsibilities and obligations to operate and maintain our system. When there is funding for improvement and enhancements in the Delta in the future it will likely always be tied to multi-benefit projects. And for local agencies, our primary focus is always flood control, but finding those limited opportunities for multi-benefit within our respective systems will trigger our consistency determination requirements, and these additional forms that will need to be evaluated, along with in several areas the section 5008 requirements...primarily for the association we want to express our concerns about those additional costs for local agencies where our focus is primarily from the flood control requirement to stabilize the system of levees. I think your plans have shown the need for long term investment. Our local funds that typically are required for any state cost share do not go that far these days with increased cost, with utilities, construction, environmental engineering costs ever increasing, even though these costs do appear to be somewhat minor, I would stress that any cost is significant moving forward and any continued expansion of regulation and requirements for reporting are going to be felt locally and that does impact a lot of our smaller agencies, some larger agencies may have the ability to afford these costs but most of the public agencies within the Delta may not be able to afford these costs let alone the difficulty in competing for these grant funds in the future.</p>	Response 5.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
MBK Engineers	05.04	<p>The next point that I wanted to express is the evaluation of setback alternatives within the regions that have been reduced, focusing primarily on the North Delta, South Delta and then the east side streams connected to the North Delta region. I just want to make a clarifying statement that North and South Delta are primarily state plan of flood control systems and there is a significant authorization burden for doing any modifications or decertifications or setbacks of federal levee systems requiring an act of Congress these are significant undertakings requiring multiple years of [section] 408 reviews, system evaluations, geotechnical hydrologic analysis, if these districts receive grant funding to perform multi-benefit projects – enhancement projects – it’s more than likely that even on face value setbacks in these regions are not viable. Not to question the validity of requiring the analysis but these costs to setback these major federal systems are going to be extremely expensive, notwithstanding these project levees have mature habitat types, riparian habitat types. These are natural high ground areas, the natural riverbanks of the flood control system prior to development of the project system. And so, setting these levees back seems like an unreasonable expectation. Can be evaluated, but we question the expense and the cost and the value of going through that process. If anything, an opportunity to stabilize and enhance these areas would probably be more preferred by most reclamation districts. There are opportunities but there are not significant opportunities from our understanding.</p>	Response 6.
MBK Engineers	05.05	<p>I just wanted to provide additional comment and say that with previous consistency determination filings, the greatest asset that the Council provided is their staff time and the resources of staff available to work in collaboration with these agencies for submittal of these projects for Council review if similar resources and capabilities are available moving forward even with these new requirements, our hope is that Council staff and appropriate resources will be available to help support and guide some of the decision making that’s going to have to be performed by these applicants to address these comments appropriately. It’s always difficult when we evaluate some of these appendices and requirements how far we need to go to truly advance the language required. In the past we’ve had good guidance and support from Council staff and hopefully there is similar guidance going forward and some scalability that can be applied.</p>	Response 3.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
Department of Water Resources	06.01	<p>When you include the appendices, we're talking about dozens and dozens of questions here, that are going to need to be answered for habitat restorations projects and then also for levee repair projects, restoration projects. Do these regulations require a full record to be put together to support every answer to every question in these appendices? And just to be clear, because the appellate procedures require you to provide a list of all the documents in your record at the time of certification this would be, if this record is required, everybody would need to put it together before they submit their certification. Are we talking about a full record for every question?</p> <p>If there is an appeal, then does the regulation require a full administrative record to support all the answers in the checklist or is it that you need to have something in the record that shows whether the policy is applicable or not. And then, you've got all of these questions you need to answer if you know the answer. So, 'I don't know', might be an adequate answer for some of them. Am I understanding you saying that correctly?</p> <p>Does the certifying agency need to go find information to answer the questions? For the levee one...it's 5008. Would a certifying agency in order to evaluate the alternatives, be required to go out and do new studies or new modeling in order to get the information and do the evaluation that they do it, or can they just rely on the information they already have from say, going through the CEQA process?</p> <p>Is the Council going to give formal written guidance? Saying for example that you don't need to create a full administrative record for every question, you just answer it to the best of your ability if the policy applies? Or is this it?</p>	Response 3.
Department of Water Resources	06.02	<p>The final question is just on the last slide that we saw, the direct summary of impacts or the summary of direct impacts. The \$500,000, that's cumulative? You're saying that's how much you think it's going to be on average for all covered actions filed within in a particular year?</p>	Response 5.
River Delta Consulting	07.01	<p>Were these ever vetted to Delta stakeholders to find out their feedback on how these things might be implemented and their concerns? And if not, why not?</p>	Response 1.



Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Commenter Organization	Comment Number	Comments	Response Number
River Delta Consulting	07.02	And then as far as the process, you're having a hearing today, you're going to get some questions like we're discussing now, then you'll get some comments, the comments will not be addressed except in the statement of reasons that would then go to the final report to the Stewardship Council that they would vote on, what's going to happen?	Response 1.
River Delta Consulting	07.03	It was not clear that some of these regulations would be handled – or would be dealt with in this way.	Response 1.
River Delta Consulting	07.04	And then, and also during the process I remember making comments about the elevation map, that it's kind of misleading because some of those elevations you can't get to without flooding out a bunch of islands so I'm a little bit concerned that people might think that there are some intertidal or sea level rise accommodation bands that could be real but they're not because I don't think anybody would want to flood about two-thirds of an island to get to a small strip of habitat.	Response 3.
River Delta Consulting	07.05	When it gets to the Council with your statement of reasons of final report, that will be another hearing that we'd have a chance to comment at?	Response 1.
River Delta Consulting	07.06	The first comment has to do with some of these elevation bands and being able to reach them with water to be intertidal or exposed to sea level rise. There are a lot of levees that will have to come down to do that and getting the water to those elevation bands will flood out – deep flood a lot of agricultural ground. This came up in the mid-90s at the beginning of CalFed when an NGO wrote to the state saying 'the state should just buy all the islands and breach the levees and flood it' and we got a hold of that letter and actually sat down and had an ad-hoc committee with that NGO and some others and came to some pretty good conclusions, but the bottom line was they realized that kind of attitude was not going to work because all you're going to have is a big ocean, open water in deeply subsided areas. So just be aware that some of these areas are not as available as the maps may show for the type of ecosystem improvements that the plan is looking at.	Response 4.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
River Delta Consulting	07.07	And the same thing with – especially in the North Delta as Tom Slater and others have mentioned, these levees that are now project levees were built upon the natural levee which before California became a state was the only high ground in the Delta so that’s where Native Americans had their villages, and ceremonial grounds and burial grounds and so we know when we do our cultural resources survey, those old maps that come up from the 1850s and 1860s, it shows them pretty clearly, and the Tribes will comment on that. The likelihood of setting back any of those levees in the North Delta or anywhere else that had been an original natural levee are pretty much slim to none because of the issues that will be brought up by the Native Americans.	Response 1.
River Delta Consulting	07.08	The reclamation districts and the land owners within the Delta are pretty much owners of all the land you see that is slated to be habitat. There are some, what they call ‘public agencies’ but in those areas, a lot of the major habitat development is not slated and so you will have to deal with the reclamation districts and Delta land owners and it’s going to be very difficult to get them on board because setback levees take up so much ground. In fact, some of these setback levees were setback levees that were shown in BDCP, and that’s what really caused a lot of problems besides the Delta Conveyance that went along with BDCP that when you look at the setback levees it would take out Clarksburg and any other small towns in the Delta because they’re built right against the levee that’s not going to be an easy thing to pass through the Delta stakeholders.	Response 6.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
MBK Engineers	08.01	<p>Could you please provide clarifications there are three subsections within each of the sections that touch on the CEQA requirements about when certain changes within the regulations would go into effect? Could you just clarify how that would impact CEQA documents, the covered actions that have CEQA documents that are currently being developed or maybe are already developed but they haven't gone through the certification of consistency process?</p> <p>I guess it's still clear, the relationship between the CEQA documents and the regulations themselves – I understand the checklist and I understand the section 5008 about alternatives for new setback levee zones, but what's the clear connection between the CEQA documents for covered action and the proposed changes in the regulations.</p> <p>Having that language in there makes it a little confusing, that's why I'm just trying to better understand that portion.</p>	Response 3.
DCC Engineering Co., Inc.	09.01	<p>In the section 5008 when you talk about looking at feasibility of setback levee or increasing the channel width, do we have to submit a feasibility study or what's the requirement expected there?</p>	Response 3.
DCC Engineering Co., Inc.	09.02	<p>I don't want to belabor the point, I just want to concur with what Mike and Tom said about the financial burden on the reclamation districts and how onerous I think this process that we're adding on here to the consistency finding will be. And also when you look at increasing channel width or setback levees especially on the northern part of Sacramento River, there's only one direction you can go, and that's west. Because you can't go in the Pocket and increase the widths there. But I think ultimately it's time and money to get these – I'm currently working on a multi-benefit project and it's a lot of lift to even get that going and it's going to benefit everyone, it's just there's a lot of regulation we already have to endure, so to add more makes it harder to actually do the work I think we're all trying to do in the Delta.</p>	Response 5.
State Water Contractors	10.01	<p>The first is that we would like [Council] staff to clarify that the new regulations would only apply to covered actions that constitute ecosystem restoration projects and not every covered action that includes any ecosystem restoration are subject to these new regulations. Many covered actions may include small amounts of ecosystem preservation or restoration as mitigation but should not be subjected to the new regulations that are given to a standalone ecosystem restoration projects.</p>	Response 3.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
State Water Contractors	10.02	The second point I'd like to raise is the Council should include definitions of the terms intertidal elevation band, sea level rise accommodation band, subtidal elevation band and deep subtidal elevation band in the regulations. Those terms are currently defined in an appendix to the Delta Plan but because they are used in the regulations they should be defined in the regulations. That way if the Council proposes to amend the definitions in the future, the public will receive notice and an opportunity to comment.	Response 4.
State Water Contractors	10.03	The Council should adopt a regulatory definition of sea level rise accommodation band that is based on the best available science which does not project 10 feet of sea level rise by 2100. The new projections that are reported in the Ocean Protection Council's 2024 draft update of sea level rise guidance reports a reasonable range of 1.6 feet to 3.3 feet by 2100. The new guidance rejects the extreme high sea level rise scenario that the current definition is based on as much higher than what best available science suggests.	Response 4.
State Water Contractors	10.04	The requirement of covered actions subject to section 5006, safeguard against levee failure, should be clarified whether it means that the – whether this section would require the action to include feasible measures to protect it from levee failure or, sorry protect it from levee failure not incorporate levee increments or levee failure. It is vague, we just want to make sure that the covered action should include measures to safeguard against levee failure then I think we would propose some changes to the text clarifying that and we have that in our written comments. The point is, we want to make sure that this is not suggesting that the agency undertaking the covered action would have to prevent levee failure. The agency that's taking the covered action may not own or operate the nearby levees and they may not be able to do it.	Response 4.

Attachment 1 to FINAL STATEMENT OF REASONS

Summary of Comments Received during Public Comment Period from March 29, 2024 – May 17, 2024

OAL FILE NUMBER Z2024-0318-02

Committer Organization	Comment Number	Comments	Response Number
Department of Water Resources	11.01	Thank you for clarifying the administrative record on what is a required portion of documents required to support some of those responses on the checklist. I think what would be helpful is a supplemental guidance document would be super helpful in being able to clarify some of the terms that have been used or that others have asked for more clarification on. I think for DWR, some of the terms such as 'evaluate' or 'where feasible' some more guidance on that would be helpful. Potentially more guidance on what 'best available science' what is meant by that would be helpful.	Response 3.
Department of Water Resources	11.02	I think we share some of the same CEQA concerns as others do as well as the additional costs specifically for smaller projects. We are hoping the regulation doesn't make some of those infeasible.	Response 6.
Department of Water Resources	11.03	DWR does a lot of multi-benefit projects and so filling out some of those forms could be onerous. And making sure where we have multiple portions of a project that we're not filling those out – clarification on if we need to be filling those out for each component of a project or if the overall project is good enough.	Response 3.

# **FINAL STATEMENT OF REASONS**

## **Attachment 2**

Comment Letters Received  
March 29, 2024 – May 17, 2024

Public Hearing Transcript  
May 14, 2024



*ARCHITECTURE  
CIVIL ENGINEERING  
LAND USE PLANNING  
ENVIRONMENTAL / PERMITTING  
PROJECT CONSTRUCTION MANAGEMENT*

May 17, 2024

Delta Stewardship Council  
Attn: Eva Bush  
715 P Street, 15-300  
Sacramento, CA 95814

**Subject:** Comments to Proposed Regulatory Action to amend CCR Title 23, Division 6, Sections 5001 to 5015, inclusive, and of appendices.

Dear Council Members and Staff:

On behalf of our Reclamation District 554, 556, 1002, and Brannan-Andrus Levee Maintenance District are opposed to the amendment to existing regulations in CCR Title 23, Div. 6, Article 1, Section 5001 to Section 5015, inclusive. These proposed amendments will cause an additional burden on permitting and facilitating necessary projects that benefit flood control, water supply, agriculture, communities, and the ecosystem. Please find specific comments to individual sections below.

**Section 5005.1 Appendix 3A and Appendix 4A** – These requirements are required for the certification of consistency with the Delta Stewardship Council (DSC). This consistency process is relatively new in the permitting realm of the Delta and seeks to ensure projects are consistent with the Delta Plan created through legislation in 2009. Any project that repairs, rehabilitates, and/or enhances the levee system and provides additional ecosystem benefits is inherently consistent with the Delta Plan. There is no added benefit to the determination of consistency to the Delta Plan with the inclusion of these appendices. The permitting process as it is, is sufficient to make a determination that a project is consistent with the Delta Plan.

All the information required in Appendices 3A and 4A provides a multitude of opportunities for the permit reviewer to question and comment on the project which can add considerable time to an already lengthy permitting process. Additionally, within these sections are requirements to use the best available science, which could be contested and further elongate the permit process. With additional time and research comes additional cost.

Reclamation Districts (RD's) and landowners who pay assessments are limited in their ability to raise money for necessary flood-control projects. Thus, RDs are reliant on the Delta Levees Subventions and Special Projects programs to perform larger levee works. Recent releases of Project Solicitation Proposals with Special Projects must be multi-benefit. Additionally, the lack of programmatic mitigation banks and credits to purchase, RDs also must make their levee projects self-mitigating and multi-benefit. This may push projects that could be considered maintenance into covered actions and subject RDs to this permitting process. RDs are responsible for flood

control but overtime the ability to perform flood control projects has become constricted due to an increased regulatory climate reducing allowable work windows and requiring a significant amount of upfront biological and cultural analysis. To the greatest extent possible, RDs must be efficient with their use of funds to ensure that most of the money they spend is spent on their flood control system and not on the planning and permitting. The costs of planning and permitting a levee project are beginning to match the cost of constructing a levee project. This further limits their ability to protect the values that the Delta Plan was set in place to uphold.

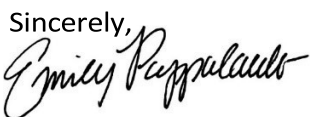
We suggest including language within the rule making that creates an exemption for Reclamation District flood control works on the requirement to fill out Appendix 3A and 4A.

**Section 5008** – This section aims to improve the conveyance capacity of these priority channels. The potential for increased conveyance capacity may negatively impact downstream channels that may not have the conveyance capacity to handle this additional water coming downstream. This could then raise flood elevations and increase pressures on downstream levees.

While this section does not specifically include any of the RD levees that are represented in this letter, the requirement to evaluate any proposed project for the potential of a setback levee is a concern if the priority areas are redefined in the future. Often, legacy homes and high value agriculture are immediately adjacent to the levee. These would be eliminated with setback levees. Who is allowed to make the determination on sufficiency of a determination that a set back levee is not feasible. Often, it will not be due to extreme costs to set back a levee. These costs can only be borne by urban areas, not rural ones. Additionally, these priority areas include urban areas where houses back up to the levees themselves. There is limited opportunity to set back levees in the northern section of the Sacramento River. All these impacts of setback levees and pressures to setback levees will be put on the levees to the west of the river.

Lastly, setback levees, while having many benefits can also be detrimental if they are not designed properly. Many areas along Georgiana Slough were set back by the US Army Corps of Engineers in the 1940s to 1960s. Many of these areas experience significant seepage problems because of the materials that were used on these levees. Additionally, all the riparian benches that were created are eroding away because they don't have sufficient revetment protection to keep them in their original configuration eventually eroding back to the set back levee. As part of these requirements, setback levees should protect the original levee to improve flood protection and maintain ecosystem benefits into the future.

Thank you for your consideration of these comments. We are available to coordinate on the proposed regulations so that it mutually benefits the charge of the Delta Stewardship Council and the Delta Reclamation Districts.

Sincerely,  


Emily Pappalardo, P.E.  
DCC Engineering, Co. Inc.





CALIFORNIA CENTRAL VALLEY  
**FLOOD CONTROL**  
ASSOCIATION

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<i>President</i>	<b>THOMAS SLATER</b>
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<i>Treasurer</i>	<b>MICHAEL BESSETTE</b>
<i>Secretary</i>	<b>CHRISTOPHER NEUDECK</b>

Eva Bush  
Delta Stewardship Council 715 P Street, 15-300  
Sacramento, Ca. 95814

**Subject: Comments on the Proposed Rulemaking to Implement Delta Plan Amendment Regarding Ecosystem Protection and Management**

Dear Ms. Bush:

Thank you for the opportunity to comment on the Delta Stewardship Council's proposed changes to the California Code of Regulation title 23 division 6, section 5001 to 50015 related to ecosystem protection and management.

**Increased Cost to Prepare a Certification of Consistency**

The amendments will significantly increase the cost for ecosystem enhancement and restoration projects. I don't think it is the intention of the Stewardship Council to have costs interfere with an RD that is trying to improve the ecosystem and conduct restoration projects only to have them halted because it is causing an undue financial burden on their landowners. The necessary costs associated with normal OMM&R of existing levees is an ongoing burden and multi-benefit projects will become less attractive to the RD's because they cannot afford the new regulatory costs associated with the Certification of Consistency. This seems inherently wrong and something we hope Staff will consider modifying. If a multi-benefit project costs an extra \$50,000 because of costs associated with Certification of Consistency, that cost will be divided by the total acreage of the RD. The costs associated with Certification will probably be nearly the same regardless of which RD it is associated with. Therefore, it will be less affordable to a small RD with only 1,000 acres or similar districts with small acres. A district like RD 999 has nearly 26,000 acres and it will be difficult for us to engage in a project with those additional costs. Meaning smaller districts will be more impacted and less likely to take on a multi-benefit project for those reasons. This shouldn't be the determining factor for moving forward with a multi-benefit project, and yet I promise it will be.

**Feasibility of Constructing Setback Levees in Priority Locations Identified in Appendix SA.**

The proposed amendment to section 5008 would require a certification of consistency for a project located in the setback levee evaluation areas identified in the Appendix 8A to evaluate, and where feasible incorporate, alternatives that would increase floodplains and riparian

habitats. Compared to alternative projects, setback levees at these locations would be economically infeasible and provide limited flood management benefits. If setback levees were incorporated, prime agricultural land would be taken out of production impacting the Delta's economy and Delta as-a-place. It would also require the removal of mature vegetation and raise concerns about potential impacts to tribal and cultural resources, particularly where the current flood control system is built on the natural levees.

Given the magnitude of impacts the proposed changes will have on the economic sustainability of RD's in the Delta and lack of clarity in the proposed amendments, the CCVFCA and RD 999 request the Delta Stewardship Council put a stay on their rule making proceedings and allow for more collaboration to refine the implementation of amendments to Title 23, division 6, sections 5001 to 5015. These amendments, as currently written, put in jeopardy Delta as a Place, the very rule that the Delta Stewardship Council is responsible to protect.

Sincerely,

Thomas J. Slater  
President RD 999  
President CCVFCA

May 17, 2024

[deltacouncil.ecosystemrulemaking@deltacouncil.ca.gov](mailto:deltacouncil.ecosystemrulemaking@deltacouncil.ca.gov)



Delta Stewardship Council

Attn: Eva Bush  
715 P Street, 15-300  
Sacramento, CA 95814

Subject: Ecosystem Amendments

Dear Ms. Bush:

The State Water Contractors (SWC) appreciates the opportunity to provide comments on the proposed regulations codifying the Delta Plan Ecosystem policies added to Chapter 4 of the Delta Plan in 2022 and adding definitions to the California Code of Regulations. The regulations have implications for how habitat restoration, enhancement, and conservation is being planned and implemented in the Delta.

SWC appreciates your meeting with us over the years to discuss the Delta Stewardship Council's (Council's) approach to amending Chapter 4. SWC also appreciates the Council's role in bringing together a strategic vision for ecosystem restoration outside of just mitigation actions.

The SWC is an organization representing 27 of the 29 public water entities that hold contracts with the California Department of Water Resources (DWR) for participation in the State Water Project (SWP).<sup>1</sup> Collectively, SWC's members provide a portion of the water supply delivered to approximately 27 million Californians, roughly two-thirds of the State's population, and to over 750,000 acres of irrigated agriculture. Water supply delivered to the Bay Area, San Joaquin Valley, central coast, and southern California from the SWP is diverted from the Sacramento-San Joaquin River Delta.

<sup>1</sup> Alameda County Flood Control District Zone 7, Alameda County Water District, Antelope Valley – East Kern Water Agency, Casitas Municipal Water District, Central Coast Water Authority, City of Yuba City, Coachella Valley Water District, Crestline – Lake Arrowhead Water Agency, Desert Water Agency, Dudley Ridge Water District, Empire West Side Irrigation District, Kern County Water Agency, Kings County, Littlerock Creek Irrigation District, Metropolitan Water District of Southern California, Mojave Water Agency, Napa County Flood Control and Water Conservation District, Oak Flat Water District, Palmdale Water District, San Bernardino Valley Municipal Water District, San Gabriel Valley Municipal Water District, San Geronio Pass Water Agency, San Luis Obispo County Flood Control and Water Conservation District, Santa Clara Valley Water District, Santa Clarita Valley Water Agency, Solano County Water Agency, and Tulare Lake Basin Water Storage District.

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Antelope Valley-East Kern  
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Kern County Water Agency

**General Manager**  
Jennifer Pierre

Through charges for participation in the SWP, SWC's members have funded and continue to fund extensive ecosystem restoration required as mitigation in SWP permits. SWC and some of its largest member agencies also have a long history of supporting and funding improved monitoring and scientific research to inform both water management and ecosystem restoration in the Delta. As the Council is undoubtedly aware, the State Water Resources Control Board is in the process of updating the Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan), and one of the alternatives being considered (and which SWC supports) is the Agreements to Support Healthy Rivers and Landscapes (Voluntary Agreements), which includes significant habitat restoration, some of which may occur in the Delta. Should the Voluntary Agreements be adopted, time will be of the essence when implementing habitat restoration. Thus, SWC and its members have a substantial interest and expertise that can inform any Delta activities, regulations, and policies, including those that affect Delta ecosystem restoration.

We acknowledge the challenges of bringing together diverse stakeholders in a dynamic ecosystem with complex problems created over decades and factoring in changing demands. The SWC appreciates the opportunity to engage with the Council and offer the following comments.

We agree that the state needs a long-term, feasible plan to achieve landscape-scale habitat restoration in the Delta and that flows or ecosystem restoration alone will not work. A combination of ecosystem restoration and functional flows is necessary to activate floodplains, generate turbidity and/or food web production, send signals to migratory species, etc. That strategy is consistent with the Voluntary Agreement approach we have supported for the update to the Bay-Delta Plan.

**1. The meaning of “includes” should be clarified or replaced in the regulatory text that triggers the application of the new or amended regulations.**

Section 5005.1(b) provides: “For purposes of Water Code section 85057.5(a)(3) and section 5001(o)(1)(E) of this chapter, this policy applies to a covered action that includes protection, enhancement, or restoration of the ecosystem.” Section 5007(b)(1) provides: “(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(o)(1)(E) of this chapter, this policy applies to a covered action that includes protection, enhancement, or restoration of the ecosystem.” And section 5008(c)(1) provides: “For purposes of Water Code section 85057.5(a)(3) and section 5001(o)(1)(E) of this chapter, this policy covers a proposed action that includes any of the following: . . . .”

SWC suggests the Council replace “includes” with “constitutes a project for the” in sections 5005.1(b) and 5007(b)(1) and “constitutes a project for” in section 5008(c)(1).

Numerous projects that may be covered actions may “include” some protection, enhancement, or restoration of the ecosystem but should not be subject to section 5005.1 or section 5007. For instance, many projects may include the dedication of a conservation easement as mitigation to preserve habitat in perpetuity with no modification of the land or waters under the easement. Others may include small amounts of habitat restoration in the range of a fraction of an acre for impacts to waters of the United States to obtain a dredge-and-fill permit or a Fish and Game Code section 1602 lake or streambed alteration agreement. It would be meaningless and burdensome to require

the extensive documentation required under the new or amended regulations where the covered action is not a habitat restoration or levee-focused project but “includes” some preservation, enhancement, or restoration as mitigation or alteration of a levee to accommodate a covered action that is not itself a levee project.

In addition, using “includes” in this manner could make what otherwise would not be a covered action into one, thus requiring certification and possible appeals to the Council, which can delay projects a minimum of six months, solely because the action “includes” a small amount of ecosystem protection, enhancement or restoration or a levee modification to accommodate a covered action that is not itself a levee improvement project. (23 Cal. Code Regs., § 5001(k)(1)(E) [a covered action must be covered by one or more of the substantive policies codified in Article 3 of Chapter 2 of Division 6 of Title 23].)

**2. The proposed definitions in sections 5001(f) and 5001(p) would benefit from clarification.**

Section 5001(f) would benefit from the following clarification:

(f) “BDCP” means the Bay Delta Conservation Plan, which was a habitat conservation plan under section 10 of the federal Endangered Species Act and a Natural Community Conservation Plan under the Natural Community Conservation Planning Act proposed by the Department of Water Resources, U.S. Fish & Wildlife Service, National Marine Fisheries Service, and Bureau of Reclamation.

The Council’s proposed definition is not inaccurate, but it is incomplete in important respects that have led opponents of the new Delta conveyance to argue in multiple forums, including litigation, that any proposed new conveyance is just the BDCP by another name, even when they are not part of an HCP/NCCP like the conveyance proposed as one of twenty-two conservation measures in the BDCP. SWC’s proposed clarifying text would avoid such arguments that may be raised in future appeals for a certification of consistency.

Section 5001(p)’s definition of the CVP is inaccurate and requires more precision. It defines CVP to mean “the federal Central Valley Project described in Water Code section 11100 et seq.” While those sections of the Water Code are titled the Central Valley Project Act (CVP Act), the CVP Act authorized both facilities that became units of the federal CVP and facilities that became part of the SWP. (Wat. Code § 11260 [authorizing the Feather River Project unit, which includes Oroville Reservoir and what is now the California Aqueduct, among other things]; *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 99-100.) SWC recommends consulting with the Bureau of Reclamation or reviewing its publicly available information on the CVP to craft a definition.

**3. The Council should include definitions of the terms Intertidal Elevation Band and Sea Level Rise Accommodation Band as they are used in section 5006 as proposed for amendment.**

The terms Intertidal Elevation Band and Sea Level Rise Accommodation Band are used in section 5006(a)(3)(A) but are not among the amended definitions in section 5001. Council staff informed us that those terms are defined in an appendix to the Delta Plan that is not included in the regulatory amendments. This creates unnecessary uncertainty and opens the door to changes to the definitions without amending the regulation, where such changes would amend the regulation without complying with the Administrative Procedure Act.

**4. The Council should adopt a regulatory definition of Sea Level Rise Accommodation Band that is based on the best available science.**

The definition of Sea Level Rise Accommodation Band in the Delta Plan appendix appears to be based on the H++ scenario for the year 2100 in the Ocean Protection Council's State of California Sea-Level Rise Guidance 2018 Update. The H++ scenario has no probability assigned because it is not based on probabilistic modeling but a single "scenario" under which the West Antarctic Ice Sheet is lost.

Recently, the Ocean Protection Council released its DRAFT: State of California Sea Level Rise Guidance: 2024 Science and Policy Update, Jan. 2024 (Draft 2024 Update), in which it determined that "**The extreme sea level rise scenario (i.e. H++) from Rising Seas 2017 is much higher than best available science suggests** and has not been included in the 2024 update." (*Id.* at p. 8, bold original.) It goes on to explain that "new scientific consensus represented in the IPCC AR6 is that the H++ scenario, in Rising Seas 2017, is not physically plausible as it incorporates too much sea level rise in the near-term and a consequent ongoing high rate of sea level rise throughout the rest of the 21st century. (*Id.* at pp. 22-23; see also *id.* at p. 28, fig. 2.3 ["illustrating that [the H++] scenario is above scientifically plausible sea level rise for all dates"].)

The Draft Update goes on to explain that the Intermediate-Low Scenario is "a reasonable estimate of the lower bound of most likely sea level rise in 2100 . . ." (*Id.* at p. 37). It also provides that the Intermediate Scenario is a reasonable estimate of the upper bound of the most likely sea level rise in 2100. (*Id.* at p. 38.) At 2100, those scenarios project median values of sea level rise of between 1.6 and 3.3 feet. (*Id.* at p. 27, table 2.1).

Thus, the Council should adopt a regulatory definition of the Sea Level Rise Accommodation Zone that is significantly lower than the H++ scenario for the year 2100. A definition based on the median value at 2100 of 3.3 feet under the Intermediate Scenario makes the most sense as it is the reasonable estimate of the upper bound of most likely sea level rise based on the best available science.

**5. The Council should adopt regulatory definitions of Subtidal Elevation Band and Deep Subtidal Elevation Band.**

These terms are used in the proposed amendments to section 5008(a)(4)(A). Leaving them undefined in the regulations creates uncertainty and opens the door to the Council changing the definitions in the Delta Plan, which would amend section 5008 without complying with the Administrative Procedure Act.

**6. Section 5006(a)(4)(A) should be edited to avoid the unlawfully vague phrase “safeguard against levee failure.”**

“Safeguard against levee failure” in proposed section 5006(a)(4)(A) is unlawfully vague. (Gov. Code, sec. 11349.1(a)(3).) This phrase could be interpreted to mean the covered action must prevent levee failure or that it must protect the covered action from the consequences of a levee failure. If it is the former, not all covered actions subject to this policy can do so because the public agency undertaking the project may not own or operate the relevant levee(s). The latter is the more reasonable policy, but if that is the intent, the regulation should expressly state it, not leave the language ambiguous and subject to high uncertainty as to how the Council will interpret the ambiguous policy in an administrative appeal of certification of consistency. The latter could be clarified by inserting the phrase “the covered action” after “safeguard” to read “An explanation based on the best available science, for a covered action that takes place in whole or in part in the shallow Subtidal Elevation Band or the Deep Subtidal Elevation Band, of how the action is designed to safeguard the covered action against levee failure over the design life of the covered action.”

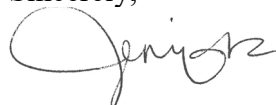
**7. The Council should clarify sections 5006(b)(2) and 5007(b)(2) to avoid ambiguity and any suggestion that covered actions already past the certification of consistency stage may be required to prepare a second certification once the amended policies do apply.**

The references to “the changes” and “those changes” in proposed sections 5006(b)(2) and 5007(b)(2) are ambiguous. If they refer to the amendments to sections 5006 and 5007, then it means amended section 5006 is not operative with respect to any covered action that had a notice of preparation (NOP), mitigated negative declaration (MND) or negative declaration (ND) published prior to the effective date of the amendments until 2 years after the effective date of the amendments. If that is the intent, (b)(2) should substitute “amendments” for “changes” for clarity. The draft amendments also refer to the date of “publication” of an MND or ND, but it is not clear whether that means the date an MND or ND is circulated for public and responsible agency comment or the date they are adopted. It appears to mean the former, in which case it should expressly say that.

In addition, if a state or local agency has already certified consistency for a covered action before the amendments become effective with respect to the covered action, is this provision intended to require a new certification of consistency at the point these sections do apply? That should not be the case because the Delta Reform Act does not authorize the Council to require two certifications of consistency for a project, one prior to implementation and one after implementation has begun or is completed. (Wat. Code, § 85225.)

Again, we appreciate the amount of effort that the Council and its staff have put into the Ecosystem Amendments, including meeting with diverse stakeholders and interests. We hope that the Council will take this opportunity to continue to make improvements as this important process proceeds. We are interested in continuing to work with the Council and staff as the process moves forward. If you have any questions about our comments or would like to discuss ways we can help support the process, please call me at (916) 447-7357 ext. 203.

Sincerely,



Jennifer Pierre  
General Manager

## Ecosystem Amendment Public Hearing Full Transcript

Jeff Henderson: Thank you. Good afternoon everyone. Thank you for joining us for our public hearing concerning the ecosystem regulations. We have folks participating here in the room as well as a number assembled online on zoom and looking forward to a good public hearing on our ecosystem regulations. By way of introductions, I'm Jeff Henderson Deputy Executive Officer for planning at the Delta Stewardship Council. I'm joined by Eva Bush who is our program manager for our regulatory unit within the planning division, and a number of other staff who will be assisting us throughout the afternoon. For those of you participating on Zoom - in order to comment please raise your hand using the zoom function, email [engage@deltacouncil.ca.gov](mailto:engage@deltacouncil.ca.gov) or call 916-275-6824. When we get to that portion of the meeting the clerk will call your name when it's your turn to speak and we ask that you state your name and affiliation for the record before beginning your comments. So what we have on tap for this afternoon is a brief presentation on the scope and function of the proposed regulations and the process that we're engaged in. And then a period of time sort of structured as a period of time for clarifying questions which we can and will address to the best of our ability, and then comments which are offered from the participants but won't be responded to today by staff. Those comments will be responded to in the final statement of reasons that we will be releasing later this summer.

All right so let's go ahead and advance to the first slide. What the proposed regulations would do technically, is that the Council's proposing to make a number of changes to California Code of Regulations Title 23, Division 6 to make technical conforming amendments to sections 5001 through 5015 inclusive, to make substantive amendments to sections 5001, 5006, 5007, and 5008 and to add a new section 5005.1 as well as three appendices: Appendix 3A, Appendix 4A and Appendix 8A.

I'm going to go over a bit what some of the proposed regulations would do beginning with section 5005.1, which is a new section that would require state and local public agencies to disclose contribution for ecosystem function restoration and the social benefits provided in the Delta from those contributions. It would also require disclosure of cultural, recreational, agricultural, and natural resources benefits anticipated from the completion of a covered action project. Essentially these are disclosure requirements at the core. Section 5006 would be amended. This is our regulatory policy that we refer to as ER P2 in the Delta plan. It would require that state and local public agencies that are proposing a project and what's known as the intertidal elevation ban and sea level rise accommodation ban to explain how the project would accommodate future marsh migration, anticipated sea level rise, and title inundation. If that accommodation is not possible it would also require an explanation for the exception provided. The regulation would require state and local public agencies based on best available science, to explain how the project is designed to safeguard against levy failure, should the project take place in the shallow subtidal elevation band or the deep subtidal elevation band focusing on accounting for future impacts and an added safeguard to reduce flood risk in the delta. And these elevation bands are defined in a map that is included as part of the regulation. Section 5008 would be amended to redefine the range - and this is policy



ER P4 in the Delta plan - this would refine the range of levies that are included in the policy and would incorporate the Stanislaus River, the Consumnes River, the Middle River, the Old River and Elk Slough while updating and clarifying language for new flood control works that includes permanent structural changes or improvements in flood control functions while allowing for future adaptations depending on Delta needs and climate changes. Additionally, the proposed Rulemaking would include new defined terms from some of the regulatory policies, would make technical conforming changes throughout the regulations, and would incorporate appendices 3A, 4A, and 8A.

The anticipated benefits associated with the project would be that it would benefit the health and welfare of California residents and protect the environment. It would protect existing ecosystems restore ecosystems and enhance working or urban landscapes that provide habitat resources to species, the approaches can reestablish ecological processes and natural communities to make them more resilient to land conversion and climate change, and the proposed regulations are based on decades of research lessons learned in recovery planning and increased coordination among agencies and partners working toward a common vision for a restored Delta ecosystem.

The project does also have potential costs, and the economic and fiscal impact assessment that's associated with the proposed regulations estimates that the proposal would add about 6 FTE jobs within California, that it's unlikely the proposal would eliminate jobs within California, that it's unlikely the proposal would create new businesses in California, that it's unlikely the proposal would eliminate existing businesses within California, that the proposal could result in some expansion of businesses currently doing business within the state, and that the proposal would benefit the health and welfare of California residents worker safety and the state's environment.

The economic and fiscal impact assessment also includes a summary of direct impact, and the direct financial impacts that are observed in the EFIA are an increase in spending on professional services for environmental consulting to complete Appendix 3A which is a part of section 5005.01 – that's the disclosure of ecological and social benefits required. And that would have a direct impact on average, \$60,000 a year. Increase in spending on professional services for environmental consulting to complete appendix 4A which applies to section 5006, which would be a direct impact of \$40,000 on average per year and an increase in spending on professional services for engineering for additional evaluations that would be required under Section 5008 of approximately \$400,000 on average per year. That particular direct cost is also offset by a decrease in spending on professional services for engineering for a fewer number of levy alternative evaluations. So on the on the on the plus side it's an additional 400k for evaluation of additional alternatives for each project considered. On the savings side it's a minus 400k for evaluation of alternatives across a lower number of levy projects because there have been modifications to the areas in which those are required.

That concludes the presentation and happy to entertain questions. Again what we'd like to do is take questions first from the room and then I'll ask Eric to forward in some

questions from the zoom. We are in a position to answer clarifying questions this afternoon but again not to respond to comments. So what I'd like to do is split the time into a period for questions and then transition to the period for comments and for comments the responses again will be provided as part of the final statement of reasons. Okay, are there questions from anyone in the room for clarification?

JH: We are in a position to answer clarifying questions this afternoon, but again not to respond to comments. So what I'd like to do is split the time into a period for questions, and then transition to the period for comments. And for comments, the responses again will be provided as part of the final statement of reasons. Okay. Are there questions from anyone in the room for clarification?

Tom Slater: This Tom Slater with the Central Valley Flood Control Association. Can you elaborate a little bit on how you got a net gain of four hundred – I mean I see the math, but it says decrease in spending on professional services for engineering for fewer levees alternative solutions but what does that encompass?

JH: So section 5008 requires evaluation of alternatives, if when you're proposing a levee project requires evaluation of alternatives to that project that would enhance floodplain values. One alternative that could be evaluated is a setback levee. The four hundred thousand dollar increase in spending on professional services is associated with additional alternatives being considered on each project, so compared to the existing regulation, this regulation would require evaluation of a number of additional alternatives that would be essentially equivalent to the labor time associated with consultants that would be on the order of four hundred thousand dollars. The decrease in spending on professional services is associated with a fewer number of projects that need to do those evaluations because the map that outlines the areas where those evaluations are required has been changed, largely to remove the central Delta from consideration in those alternatives. Does that answer your question?

Mike Moncrief: Mike Moncrief MBK Engineers, also representing the Central Valley Flood Control Association. This is an estimate of the annual anticipated?

JH: Average annual based on the number of covered actions considered in a year.

Mike Moncrief: That have been received?

JH: On an annual basis.

Mike Moncrief: Okay.

JH: So it takes an annual number – it takes an average – it looks back across the totality of covered actions that we've received, takes a year, and applies knowledge.

Mike Moncrief: Thank you.

JH: Okay, Erik, what have we got on Zoom?

Beck Barger: We have Shandra. Shandra you should be able to speak now.

Chandra Chilmakuri: Hi thank you. Can I provide a comment now, or is this Q and A time?

JH: I prefer to separate the clarifying questions from comments, we will come back around for comments. But if you have a clarifying question we're happy to respond.

Chandra Chilmakuri: I think I can wait and just provide the comments later. Thank you.

JH: Thank you.

Beck Barger: Okay. Brian Barnhart you should be able to unmute, do you have a question or comment?

Brian Barnhart: I have a number of questions and please cut me off when I have used up my time. So when you include the appendices, we're talking about dozens and dozens of questions here, that are going to need to be answered for habitat restorations projects and then also for levee repair projects, restoration projects. Do these regulations require a full record to be put together to support every answer to every question in these appendices? And just to be clear, because the appellate procedures require you to provide a list of all the documents in your record at the time of certification this would be, if this record is required, everybody would need to put it together before they – like when they submit their certification. So, are talking about a full record for every question?

JH: No. No. The questions - essentially the way to interpret that policy, is that the key is to evaluate and document the applicability of the policy to your project and if the policy applies to your project, to the best of your ability to fill out the checklist. There is no expectation of the gathering of the record at the time of certification other than an assessment as you note, the appeals the procedures require a listing of the materials in the record to the best of your ability, anything that you relied on to fill out that checklist.

Brian Barnhart: So I guess the next question becomes if there is an appeal, then does the regulation require a full administrative record to support all the answers in the checklist or – I think what I just heard you say - is that you need to have something in the record that shows whether the policy is applicable or not. And then, you've got all of these questions you need to answer if you know the answer. So, 'I don't know', might be an adequate answer for some of them. Am I understanding you saying that correctly?

JH: The obligation would be to fill out the checklist using the information that the department relies upon - in this instance the department would rely upon - to answer those questions to the degree that you have information to support those answers...that's the extent of the expectation.

Brian Barnhart: Okay, we're getting closer. So, does the certifying agency need to go find information to answer the questions.

JH: No.

Brian Barnhart: Okay. And then, the same basic question for the levee one, it's 5008 I think? Would a certifying agency in order to evaluate the alternatives, be required to go out and do new studies or new modeling in order to get the information and do the evaluation that they do it, or can they just rely on the information they already have from say, going through the CEQA process?

Eva Bush: Hi, Brian, this is Eva.

Brian Barnhart: Hi Eva.

Eva Bush: The regulation as far as evaluation and feasibility has not changed from before, so whatever approach the department took before should be used for the policy as it's written now, as well.

JH: Right the 5008 evaluation is not a new requirement.

Brian Barnhart: And the final question on the last slide that we saw, the direct summary of impacts or the summary of direct impacts. The five hundred thousand dollars, that's cumulative? You're saying that's how much you think it's going to be on average for all covered actions filed within in a particular year?

JH: It's an average annual based on the average number of certifications received by the Council in a given year. Across the history of the covered actions.

Brian Barnhart: Okay.

JH: So think of that as an average annual.

Brian Barnhart: Okay. And then, is the Council going to give formal written guidance? Saying for example that you don't need to create a full administrative record for every question, you just answer it to the best of your ability if the policy applies? Or is this it?

JH: No, I can't at this point speak for the Council in that regard.

Brian Barnhart: Okay. That's fair. Okay I'm done, thank you very much. I appreciate your patience. And your answers. But especially your patience.

Beck Barger: Okay. Before we get to that I have Teji with DWR. You should be able to speak now.

JH: Good afternoon Teji.

Beck Barger: Teji can you unmute yourself?

Teji Sandhu: I only had my hand raised when that first question went up, um, from maybe a board member, it was hard to hear the folks in the room. I will just save my comment for comment period time. Thank you.

JH: Okay. Thank you for letting us know about that, Teji.

Beck Barger: Gilbert Cosio? Did you have a question?

JH: Good afternoon, Gil.

Gilbert Cosio: Hi. Can you hear me now?

JH: Yes.

Gilbert Cosio: Were these ever vetted to Delta stakeholders to find out their feedback on how these things might be implemented, and their concerns? And if not, why not? And then as far as the process, so as I understand it you're having a hearing today, you're going to get some questions like we're discussing now, then you'll get some comments. The comments will not be addressed except in the statement of reasons that would then go to the final report to the Stewardship Council that they would vote on, is that what's going to happen?

JH: Let me answer the second question first. The responses to the comments that we receive today will be a part of the final statement of reasons which will be made publicly available ahead of the Council's consideration of that final statement of reasons and our staff recommendation to the Council to authorize us to push that material to the Office of Administrative Law for completion of the process. So, yes those comments will be responded to, it'll be in the final statement of reasons and yes that is presented to the Council. To the first part of the question about engaging with folks regarding these proposed regulations...the proposed regulations are in essence the regulatory policies that were considered in 2022 by the Council when it adopted the Ecosystem Amendment for the Delta plan. And that process itself was a four year engagement that did include extensive outreach both within the communities in the Delta, as well as with the agencies that conduct a lot of the restoration activity. So, there was a considerable amount of outreach associated with these, albeit it was a number of years ago. Does that answer your questions, Gil?

Gilbert Cosio: Yeah, I don't think it was clear that some of these regulations that were, you know, would be handled – or would be dealt with in this way. And also during the process I remember making comments about that, the map – the elevation map, that it's kind of misleading because some of those elevations you can't get to without flooding out a bunch of islands so I'm a little bit concerned that that people might think that there are some intertidal or sea level rise accommodation bands that could be real but they're not because I don't think anybody would want to flood an island, about two thirds of an island to get to a small strip of habitat, so I'm a little –

JH: Gil, I would encourage you to capture that portion in a comment either orally today or in a comment letter that you submit.

Gilbert Cosio: Okay and then the final question, when it gets to the Council with your statement of reasons of final report, that will be another hearing that we'd have a chance to comment at?

JH: That would be a normal Council meeting where the Bagley-Keene public comment rules would be in place. So that would be an opportunity for public comment, but those comments would not be reflected in the final regulations, unless directed by the Council.

Gilbert Cosio: Okay, thanks.

Beck Barger: Anybody that we have in the room with a question?

JH: Any other questions?

Kirsten Pringle: Kirsten Pringle, with MBK Engineers. Could you please provide clarifications there are three subsections within each of the sections that touch on the CEQA requirements about when certain changes within the regulations would go into effect? Could you just clarify how that would impact CEQA documents, the covered actions that have CEQA documents that are currently being developed or maybe are already developed but they haven't gone through the certification of consistency process?

JH: So the way that that is set up, is in essence to say upon the date upon which these regulations are adopted by the Council, there would be a two year period of time following that date, that for the subject regulations the expectation would be that the certifying agency would use the existing ecosystem regulations for a project, for which an NO - if it's an EIR – an NOP was released prior to the effective date of the regulation. So let's say you have a project that issued its NOP a year ago, and let's say the, the effective regulations go into place in January of 2025, there would a period from January 2025 to January 2027 where that project could certify against the existing regulations.

Kirsten Pringle: Okay. I guess it's still unclear the relationship between the CEQA documents and the regulations themselves – like I understand the checklist and I understand the section 5008 about alternatives for new setback levee zones, um but what's the clear connection between the CEQA documents for covered action and the proposed changes in the regulations.

JH: There is no connection there.

Kirsten Pringle: Okay. I guess that language having in there makes it a little confusing, that's why I'm just trying to better understand that portion.

JH: Yeah, the reference to CEQA in that instance is really to just identify that that filing of the notice of preparation – again in the case of an EIR – that filing of a notice of preparation is the operative piece that enables a project to take advantage of the legacy clause.

Kirsten Pringle: Okay. Mike did you have a clarifying question?

Mike Moncrief: I think that there was a potential misunderstanding that if your CEQA analysis or your findings did not meet – sorry, Mike Moncrief MBK Engineers – to add to

it, the concern was whether or not the Stewardship Council consistency determination would require additional CEQA evaluations, and so the two year stop gap going back on the legacy language is appropriate but then moving forward, there could be additional requirements of the Council and their analysis of the project if we don't meet the consistency determination.

JH: That is not the case.

Mike Moncrief: That is not the case. Okay. Thank you.

JH: Okay. You're welcome. Any other questions before we move to comments? Yes, Emily.

Emily Pappalardo: This is Emily Pappalardo with DCC Engineering. In the section 5008 when you talk about looking at feasibility of setback levee or increasing the channel width, do we have to submit a feasibility study or what's the requirement expected there?

JH: The requirement there – and this is a point I think Eva addressed earlier – the requirement there is no different than it is today.

Emily Pappalardo: Okay.

JH: There is no increased burden in terms of like, a specific type of analysis that's required that's not already required. What we are doing is just encouraging a broader range of alternatives, not just exclusively setback levees.

Emily Pappalardo: Okay.

JH: Does that answer your question?

Emily Pappalardo: Yes, thanks.

JH: Alright, last call for any questions for folks who are currently participating? Do we see anything on Zoom?

JH: Okay, let's move to comments then. And just, we can start with folks in the room. Erik will bring the magic microphone around. Would anybody like to go first? Mike.

Mike Moncrief: Very appreciative of the opportunity to provide comments, so as I said earlier, my name is Michael Moncrief, MBK Engineers, on behalf of the Central Valley Flood Control Association today. Primarily the association does represent approximately thirty reclamation districts in the Delta so the perspective we're coming from is just making sure that with our advocacy and fact-finding we want to provide best available information to our associate members but also convey to the Council our interest in participating and engaging in rulemaking and appreciate this opportunity for comments. One of our big concerns obviously, is our financial concerns with our agencies as we submit our consistency determination findings moving into the future, with the current financial uncertainties that we have at the state, our local agencies are always trying to

evaluate and budget for whatever our future and anticipated costs may be to develop any number of projects let alone our responsibilities and obligations to operate and maintain our system. When there is funding for improvement and enhancements in the Delta in the future it will likely always be tied to multi-benefit projects. And for local agencies, our primary focus is always flood control, but finding those limited opportunities for multi-benefit within our respective systems will trigger our consistency determination requirements and these additional forms that will need to be evaluated, along with in several areas the section 5008 requirements, primarily for the association, we want to express our concerns about those additional costs for local agencies where our focus is primarily from the flood control requirement to stabilize the system of levees. I think your plans have shown the need for long term investment. Our local funds that typically are required for any state cost share do not go that far these days with increased cost, with utilities, construction, environmental engineering costs ever increasing, even though these costs do appear to be somewhat minor, I would stress that any cost is significant moving forward and any continued expansion of regulation and requirements for reporting are going to be felt locally and that does impact a lot of our smaller agencies, some larger agencies may have the ability to afford these costs but most of the public agencies within the Delta may not be able to afford these costs let alone uh, the difficulty in uh, competing for these grant funds in the future. The next point, I only wanted to make two - we are going to provide written comments, so thank you – the other point that I wanted to express is the evaluation of setback alternatives within the regions that have been reduced, focusing primarily on the North Delta, South Delta, and then the east side streams connected to the North Delta region. I just want to make a clarifying statement that North and South Delta are primarily state plan of flood control systems and there is a significant authorization burden for doing any modifications or decertifications or setbacks of federal levee systems, requiring an act of Congress, these are significant undertakings requiring multiple years of 408 reviews, system evaluations, geotechnical hydrologic analysis, if these districts receive grant funding to perform multi-benefit projects – enhancement projects – it's more than likely that even on face value setbacks in these regions are not viable. Not to question the validity of requiring the analysis but these costs to setback these major federal systems are going to be extremely expensive, notwithstanding, these project levees have mature habitat types, riparian habitat types. These are natural high ground areas, the natural riverbanks of the flood control system prior to development of the project system. And so, setting these levees back seems like an unreasonable expectation. Can be evaluated, but we question the expense and the cost and the value of going through that process. If anything an opportunity to stabilize and enhance these areas would probably be more preferred by most reclamation districts. There are opportunities but there are not significant opportunities from our understanding. I'll stop there, we will be providing written comments on all the elements of the rulemaking and thank you very much and always appreciate the ability to engage and be part of the process. Thank you.



JH: Thank you Mike. Anyone else in the room wish to offer comments? Tom? Can we pass the mic over there?

Tom Slater: Tom Slater with RD 999 as well as chairman for the board of the flood association so I speak on both behalf's today. Mike alluded to the fact that there's over thirty RD's in the - just members of the association – and far many more RD's in the Delta. If I can expand on the burden, or the potential burden of cost for these specific RD's. I think it's tantamount that - we are the largest RD in the Delta I think, within a few acres one way or another, and we're nearly twenty-six thousand acres. So, in one sense we're very fortunate to divide our bill by that many acres, so to speak, our assessment goes out on a per acre basis and we are managed by board members as most RD's are in the Delta. So, to make the case if we're the largest -and I don't think we can fund it economically – what is the two- and three-thousand-acre RD's that have to maintain similar number of levees or miles of levees, we have 33 miles of levee...someone next to us may have 6 miles of levee. The issue is funding and the grants that are provided us have term limits and time constraints on them to do these major projects and come up with consistency plans is extremely expensive for a RD that has an annual budget of one hundred and ten thousand dollars and all of that goes to maintaining the levees to the best we can for the state plan of flood control working with our partners at DWR and the flood board and so forth. So I think it's cost prohibitive or it looks like it will be for me, I don't know how anyone else could do it. That doesn't diminish the relevance of doing it or the importance of doing it, or any other reason I'm not questioning that right now - in my comments it may come but that's a different issue. I think it needs to be considered, we hope that the Council will consider some of our concerns and maybe variances for something that's not going to lead to a successful consistency anyway, maybe you don't have to do it. We just can't be impacted anymore completing these multi-benefit projects that we're all agreeing we need to do. We've shifted, I'm old enough to know how this has all shifted for the good, and we're comfortable doing it, now tag on a another huge cost for something that's not pertinent to a specific district and it may prevent them from doing some very very good operations and maintenance and repair work on existing levees. So, I'm rambling a bit Jeff, and I think you get the point, or I hope the Council gets the point that there's concern here monetarily and that's tantamount to it. The fact that we just recently completed an Elk Slough feasibility study, we got a million-dollar grant from the Conservancy and it was just a beautifully done feasibility study on Elk Slough which is 9.4 miles and is listed in your perspectives here, if you will, that's the only tributary that has never been part of the state bank protection deal. It is pristine, beautiful and we're working diligently to try to keep that enhanced, keep it the way it is as well as provide flood control. A setback levee wipes out hundreds of years of beautiful pristine old wooded...it's like cutting your nose off to spite your face. So, that's a concern when we see setback levees in here and as I understand they're full setback levees so you'd be required to remove the old existing 200 year levees...more concerns that I can put in writing a little bit later on or later this week but other than that I would just be duplicative if I continued. And you should know, and in fact you do know and everyone on the Council knows, the evidence and existence of tribal areas in the Delta

is incredible. This cannot be, to me, done respectfully with those entities. And it's a big concern for us, we're trying to preserve all that whether there's room in here or not it has come up. So that's another concern going forward with these consistency hearings. With that I'll leave it and we will be making some comments too, on paper.

JH: Okay. Thank you Tom.

Emily Pappalardo: Emily Pappalardo with DCC Engineering, I don't want to belabor the point, I just want to concur with what Mike and Tom said about the financial burden on the reclamation districts and how onerous I think this process that we're adding on here to the consistency finding will be. And also you know, when you look at increasing channel width or setback levees especially on the northern part of Sacramento River, there's only one direction you can go, and that's west. Because you can't go in the Pocket and increase the widths there. But I think ultimately it's time and money to get these – I'm currently working on a multi-benefit project and it's a lot of lift to even get that going and it's going to benefit everyone, it's just there's a lot of regulation we already have to endure, so to add more makes it harder to actually do the work I think we're all trying to do in the Delta.

JH: Thank you Emily. Okay, shall we move online?

Chandra Chilmakuri: Thank you. My name is Chandra Chilmakuri with State Water Contractors. We appreciate the work that the Council has been putting into these policies and all the past engagement with us on this effort. The State Water Contractors have long supported the system restoration in the Delta to further the coequal goals and we understand ecosystem restoration is not only required for compliance with environmental permits but it is essential to protect our state water supply reliability. We will be submitting written comments before the deadline but generally our comments are aimed at clarifying the proposed regulations. Today, verbally I just want to highlight a few of those recommendations that you will find in our comment letter. The first is that we would like staff to clarify that the new regulations would only apply to covered actions that constitute ecosystem restoration projects and not every covered action that includes any ecosystem restoration are subject to these new regulations. Many covered actions may include small amounts of ecosystem preservation or restoration as mitigation but should not be subjected to the new regulations that are given to a standalone ecosystem restoration projects. The second point I'd like to raise is the Council should include definitions of the terms intertidal elevation band, sea level rise accommodation band, subtidal elevation band and deep subtidal elevation band in the regulations. Those terms are currently defined in an appendix to the Delta Plan but because they are used in the regulations they should be defined in the regulations. That way if the Council proposes to amend the definitions in the future, the public will receive notice and an opportunity to comment. The third point is that, the Council should adopt a regulatory definition of sea level rise accommodation band that is based on the best available science which does not project 10 feet of sea level rise by 2100. The new projections that are reported in the Ocean Protection Council's 2024 draft update of sea

level rise guidance reports a reasonable range of 1.6 feet to 3.3 feet by 2100. The new guidance rejects the extreme high sea level rise scenario that the current definition is based on as much higher than what best available science suggests. Lastly, the requirement of covered actions subject to section 5006, safeguard against levee failure, should be clarified whether it means that the – whether this section would require the action to include feasible measures to protect it from levee failure or, sorry protect it from levee failure not incorporate levee increments or levee failure. It is vague, we just want to make sure that the covered action should include measures to safeguard against levee failure then I think we would propose some changes to the text clarifying that and we have that in our written comments. The point is, we want to make sure that this is not suggesting that the agency undertaking the covered action would have to prevent levee failure. The agency that's taking the covered action may not own or operate the nearby levees and they may not be able to do it. With that I really appreciate the opportunity to comment and welcome the continued engagement with the Council staff and the Council and we will submit our written comments shortly. Thank you.

JH: Thank you Chandra.

Beck Barger: Next we have Gilbert Cosio.

Gilbert Cosio: Thanks again. Gilbert Cosio, River Delta Consulting. I just want to for the record add some of the comments I was kind of phrasing as a question earlier. Just to clarify. So the first comment has to do with some of these elevation bands and being able to reach them with water to be intertidal or exposed to sea level rise. There are a lot of levees that will have to come down to do that and getting the water to those elevation bands will flood out – deep flood a lot of agricultural ground. This came up in the mid nineties at the beginning of CalFed when an NGO wrote to the state saying ‘the state should just buy all the islands and breach the levees and flood it’ and we got a hold of that letter and actually sat down and had an ad-hoc committee with that NGO and some others and came to some pretty good conclusions, but the bottom line was they realized that kind of attitude was not going to work because all you're going to have is a big ocean, open water in deeply subsided areas. So just be aware that some of these areas are not as available as the maps may show for the type of ecosystem improvements that the plan is looking at. And the same thing with – especially in the North Delta as Tom Slater and others have mentioned, these levees that are now project levees were built upon the natural levee which before California became a state was the only high ground in the Delta so that's where Native Americans had their villages, and ceremonial grounds and burial grounds and so we know when we do our cultural resources survey, those old maps that come up from the 1850's and 1860's, it shows them pretty clearly, and the tribes will comment on that. The likelihood of setting back any of those levees in the North Delta or anywhere else that had been an original natural levee are pretty much slim to none because of the issues that will be brought up by the Native Americans. Finally, as others have spelled out, the Reclamation Districts

and the landowners within the Delta are pretty much owners of all the land you see that is slated to be habitat. There are some, what they call 'public agencies' but in those areas, a lot of the major habitat development is not slated and so you will have to deal with the Reclamation Districts and Delta landowners and it's going to be very difficult to get them on board because setback levees take up so much ground. In fact, some of these setback levees were setback levees that were shown in BDCP, and that's what really caused a lot of problems besides the Delta Conveyance that went along with BDCP that when you look at the setback levees it would take out Clarksberg and any other small towns in the Delta because they're built right against the levee that's not going to be an easy thing to pass through the Delta stakeholders. That's all I have for now, we'll be preparing some written comments.

JH: Last call for comments. We will remain online until 6 o'clock as advertised.

Teji Sandhu: From DWR, I just wanted to say thank you for the opportunity to provide comments. I think from DWR's viewpoint it seems that everybody today has captured our comments or overarching comments and I just wanted to mention. Thank you for clarifying the administrative record on what is a required portion of documents required to support some of those responses on the checklist. I think what would be helpful - and I think it has been mentioned earlier - is a supplemental guidance document would be super helpful in being able to clarify some of the terms that have been used or that others have asked for more clarification on. I think for DWR, some of the terms such as 'evaluate' or 'where feasible' some more guidance on that would be helpful. Potentially more guidance on what 'best available science' what is meant by that would be helpful. I think we share some of the same CEQA concerns as others do as well as the additional costs specifically for smaller projects. We are hoping the regulation doesn't make some of those infeasible. DWR does a lot of multi-benefit projects and so filling out some of those forms could be onerous. And making sure where we have multiple portions of a project that we're not filling those out - clarification on if we need to be filling those out for each component of a project or if the overall project is good enough. So some of those things, and we will be providing a more formal comment letter by the due date, May 17<sup>th</sup>, so you will see some of that. Just wanted to thank you for the opportunity to comment and providing some of that Q and A earlier was helpful. Thank you.

JH: Thank you Teji.

Mike Moncrief: If I could provide additional comment...Mike Moncrief again with MBK Engineers. I just wanted to provide additional comment and say that with previous consistency determination filings, the greatest asset that the Council provided is their staff time and the resources of staff available to work in collaboration with these agencies for submittal of these projects for Council review if similar resources and capabilities are available moving forward even with these new requirements, our hope is that Council staff and appropriate resources will be available to help support and guide some of the decision making that's going to have to be performed by these applicants to address these comments appropriately. It's always difficult when we evaluate some of

these appendices and requirements how far we need to go to truly advance the language required. In the past we've had good guidance and support from Council staff and hopefully there is similar guidance going forward and some scalability that can be applied. Thank you.

JH: Okay. And I know I'm not supposed to respond to comments but on this one I would say there's no reason to expect any different. We would continue to offer early consultation on all covered actions.

JH: We will remain until 6 o'clock as advertised. That gives us another hour or so, but there is no other formal part of the presentation. Thank you.

JH: Good Afternoon everybody. It is 6 just checking in one last time to see if there are any comments that people would like to offer on the ecosystem regulations proposed by the Delta Stewardship Council. There is no one present in the room other than staff. Would anyone online like to offer a comment before we close today? Seeing no hands, we'll go ahead and close the public hearing. Let the record show it's six o'clock. Thank you very much for joining us today.