DIRECTORS
George Biagi, Jr.
Rudy Mussi
Edward Zuckerman

COUNSEL
Dante John Nomellini
Dante John Nomellini, Jr.

CENTRAL DELTA WATER AGENCY
235 East Weber Avenue • P.O. Box 1461 • Stockton, CA 95201
Phone 209/465-5883 • Fax 209/465-3956

January 14, 2013

Via Email to
RulemakingProcessComment@deltacouncil.ca.gov

Delta Stewardship Council

Re: Proposed Regulations 11/16/2012
CCR Title 23 Division 6
Chapter 2. Consistency with Regulatory
Policies Contained in the Delta Plan

The Central Delta Water Agency submits the following comments:

Section 5001.(d) "Best Available Science"

The proposed definition lacks substance and clarity and should include a requirement that the science is based on historic or other verifiable data showing cause and effect. A glaring example of this shortcoming is the reliance on the development of tidal and floodplain habitat in the Delta as a solution to the decline of fish populations. As tidal and floodplain habitat has been increasing in the Delta since the 1980s, fish populations have been decreasing with the most dramatic declines occurring in the last decade.

The following should be added:

> "(4) It is based on historic or other verifiable data showing cause and effect."

Section 5001.(e)(1) "Achieving the coequal goal of providing a more reliable water supply for California"

(A) This section ignores the need to limit the development of arid lands which require water from sources which will directly or indirectly increase demand for water exported

by the SWP and CVP from the Delta watershed. There is already a huge imbalance caused in major part by the SWP failure to develop projects in the North Coast Watersheds sufficient to supplement inflow to the Delta by 5 million acre feet per year. Without such a restoration it is likely that new demand could increase the imbalance between supply and demand and a more reliable supply for all of California will not be achievable.

The following should be added to the listing in the second sentence in (A): "limiting the development of arid lands which require water from sources which will directly or indirectly increase demand for water exported by the SWP and CVP from the Delta watershed."

Section 5001.(e)(1)(A)(B)&(C) The importance of improving Delta levees to maintain ocean salinity repulsion and reduce the risk of interruption of local Delta water urban and agricultural diversions, as well as diversions for export, is overlooked in (A), (B), and (C). The levee systems are necessary to protect the various islands and tracts which provide irreplaceable habitat for numerous species, including the hundreds of thousands of waterfowl of the Pacific Flying which winter on the Delta croplands. The levees provide and protect hundreds of miles of meandering sheltered waterways and shoreline habitat critical to the protection and enhancement of the unique cultural, recreational, natural resource, and agricultural values of the Delta. Protection of Delta lands from flooding is necessary to avoid the huge loss of freshwater due to the increased evaporation from the resulting waterbody in comparison to that from the farming of crops. The difference is estimated to be about 2 acre feet per acre per year which if extended over thousands of acres, which could be as high as 400,000 acres, would greatly aggravate the effort to provide a reliable water supply for California.

"improve Delta levees" should be inserted in (A) line 5 after "expand storage".

"Delta levees and" should be inserted in (C) line 3 after "improving" and before "conveyance".

The proposed regulation is inconsistent with Water Code section 85004(b) which specifically references new and improved infrastructure in addition to water storage and Delta conveyance facilities. Infrastructure certainly includes levees. The regulation at the very least must include those elements required by statute.

The failure to include the improvement of levees presents a direct conflict with Water Code 12981 which provides:

"§ 12981. Unique resources with statewide significance; preservation

(a) The Legislature finds and declares that the delta is endowed with many invaluable and unique resources and that these resources are of major statewide significance.

(b) The Legislature further finds and declares that the delta's uniqueness is particularly characterized by its hundreds of miles of meandering waterways and the many islands adjacent thereto; that, in order to preserve the delta's invaluable resources, which include highly productive agriculture, recreational assets, fisheries, and wildlife environment, the physical characteristics of the delta should be preserved essentially in their present form; and that the key to preserving the delta's physical characteristics is the system of levees defining the waterways and producing the adjacent islands. However, the Legislature recognizes that it may not be economically justifiable to maintain all delta islands.

(c) The Legislature further finds and declares that funds necessary to maintain and improve the delta's levees to protect the delta's physical characteristics should be used to fund levee work that would promote agricultural and habitat uses in the delta consistent with the purpose of preserving the delta's invaluable resources."

Section 5001.(e)(1)(B) The regulation on lines 3 and 4 which provides "consistent with existing water rights and the State's area of origin statutes and Reasonable Use and Public Trust Doctrines" omits reference to Water Code section 12200 to 12220 inclusive which includes Water Code sections 12200 thru 12205 which has been commonly referred to as the Delta Protection Act or Delta Protection Statute rather than an area of origin statute.

This omission places the proposed regulation in direct conflict with the provisions in Water Code section 85031 which specifically limits the authority of the Delta Stewardship Council.

The language should be changed to read "consistent with the limitations in Water Code section 85031 and Reasonable Use and Public Trust Doctrines."

Water Code sections 12200 thru 12205 are particularly important in that such sections were adopted in 1959 as foundational to the operation of the State Water Resources Development System. The Act was contemporaneously interpreted by the Department of Water Resources in its December 1960 Bulletin 76 Report to the Legislative titled Delta Water Facilities. At page 12 it was stated:

"Further increase in water use in areas tributary to the Delta will worsen the salinity incursion problem and complicate the already complex water rights situation. To maintain and expand the economy of the Delta, it will be necessary to provide an adequate supply of good quality water and protect the lands from the effects of salinity incursion. In 1959 the State Legislature directed that water shall not be diverted from the Delta for use elsewhere unless adequate supplies for the Delta are first provided." (emphasis added.)

The affirmative obligations of providing protection against the effects of salinity incursion, and providing an adequate supply of good quality water to maintain and expand the economy of the Delta limits the export of water from the Delta to a far greater extent than "consistent with existing water rights and the State's area of origin statutes".

The provisions of the Delta Protection Act are as follows:

"§12200. Legislative findings and declaration

The Legislature hereby finds that the water problems of the Sacramento-San Joaquin Delta are unique within the State; the Sacramento and San Joaquin Rivers join at the Sacramento-San Joaquin Delta to discharge their fresh water flows into Suisun, San Pablo and San Francisco bays and thence into the Pacific Ocean; the merging of fresh water with saline bay waters and drainage waters and the withdrawal of fresh water for beneficial uses creates an acute problem of salinity intrusion into the vast network of channels and sloughs of the Delta; the State Water Resources Development system has as <u>one of its objectives the transfer of waters from water-surplus areas in the Sacramento Valley and the north coastal area to water-deficient areas to the south and west of the Sacramento-San Joaquin Delta via the Delta; water surplus to the needs of the areas in which it originates is gathered in the Delta and thereby provides a common source of fresh water supply for water-deficient areas</u>. It is, therefore, hereby declared that a general law cannot be made applicable to said Delta and that the enactment of this law is necessary for the protection, conservation, development, control and use of the waters in the Delta for the public good. *(Added by Stats. 1959, c. 1766, p. 4247, §1.)*

§12201. Necessity of maintenance of water supply

<u>The Legislature finds that the maintenance of an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban, and recreational development in the Delta</u> area as set forth in section 12220, Chapter 2, of this part, and to provide a common source of fresh water for export to areas of water deficiency is <u>necessary to the peace, health, safety and welfare of the people of the State</u>, except that delivery of such water shall be subject to the provisions of section 10505 and sections 11460 to 11463, inclusive, of this code. *(Added by Stats. 1959, c. 1766, p 4247, §1.)*

§12202. Salinity control and adequate water supply; substitute water supply; delivery

<u>Among the functions</u> to be provided by the State Water Resources Development System, in coordination with the activities of the United States in providing

salinity control for the Delta through operation of the Federal Central Valley Project, shall be the provision of salinity control and an adequate water supply for the users of water in the Sacramento-San Joaquin Delta. If it is determined to be in the public interest to provide a substitute water supply to the users in said Delta in lieu of that which would be provided as a result of salinity control no added financial burden shall be placed upon said Delta water users solely by virtue of such substitution. Delivery of said substitute water supply shall be subject to the provisions of section 10505 and sections 11460 to 11463, inclusive, of this code. *(Added by Stats. 1959, c. 1766, p 4247, §1.)*

§12203. Diversion of waters from channels of delta

It is hereby declared to be the policy of the State that no person, corporation or public or private agency or the State or the United States should divert water from the channels of the Sacramento-San Joaquin Delta to which the users within said Delta are entitled. *(Added by Stats. 1959, c. 1766, p 4249, §1.)*

§12204. Exportation of water from delta

In determining the availability of water for export from the Sacramento-San Joaquin Delta no water shall be exported which is necessary to meet the requirements of sections 12202 and 12203 of this chapter. *(Added by Stats. 1959, c. 1766, p 4249, §1.)*

§12205. Storage of water; integration of operation and management of release of water

It is the policy of the State that the operation and management of releases from storage into the Sacramento-San Joaquin Delta of water for use outside the area in which such water originates shall be integrated to the maximum extent possible in order to permit the fulfillment of the objectives of this part. *(Added by Stats. 1959, c. 1766, p 4249, §1.)*"

Of particular note is the intent:

1) that the interior Delta be a common source of fresh water supply or common pool for both local and export use;

2) that the maintenance of an adequate supply of good quality water is to be sufficient for maintenance and expansion of agriculture, industry, urban, and recreational development in the Delta;

3) that the Delta is to have priority over exports; and

4) that release of water from storage for export shall be integrated to the maximum extent possible to fulfill the objectives of the act. i.e. common pool, salinity control and adequate supply of good quality water to maintain and expand agriculture, industry, urban and recreational development in the Delta.

The proposed regulation is inconsistent with and conflicts with both Water Code section 12200 et seq. and Water Code section 85031.

Section 5001.(e)(2) and (3) "Achieving the coequal goal of protecting, restoring, and enhancing the Delta ecosystem"

The proposed regulation inappropriately elevates and separates a goal of establishing a terrestrial landscape supporting viable populations of native resident and migrating species from the goal of protecting the unique cultural, recreational, natural resource, and agricultural values of the California Delta as an evolving place. Populations of native resident and migratory species are of course part of the natural resource value of the delta. The cultural, recreational, natural resource, and agricultural values are all part of the Delta ecosystem. The reference to evolving place should not be interpreted as a negative evolution, but merely as a recognition of change over time.

Water Code section 85054 Coequal Goals provides:

"'Coequal goals' means the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place."

Natural resource values along with cultural, recreational and agricultural values achieve in a manner that protects and enhances values as an evolving place. No preference is indicated in said section.

Water Code section 85020 provides:

"(b) Protect and enhance the unique cultural, recreational and agricultural values of the California Delta as an evolving place."

In contrast to Water Code section 85054 "Natural Resource" values are not included in the requirement to protect and enhance.

Water Code section 85020(c) provides:

> "(c) Restore the Delta ecosystem, including its fisheries and wildlife, as the heart of a healthy estuary and wetland ecosystem."

Protect and enhance indicates the intent to improve. Restore would presumably indicate a goal of some historic level. Water Code section 11912 which was adopted in 1961 required as a reimbursable cost to State Water Project contractors the cost for preservation of fish and wildlife. While restoration to the 1961 levels would be an improvement for fish over present conditions, there is no suggestion that agriculture in contravention of the mandate to protect and enhance is to be displaced or harmed to provide habitat.

As stated above, Water Code section 85031 does not authorize, and in fact precludes, the Delta Stewardship Council from limiting or otherwise affecting the application of Water Code sections 12200-12205 to provide salinity control and an adequate water supply sufficient to maintain and expand agriculture, industry, urban and recreational development.

Displacement of agricultural land for habitat is inconsistent with the objective of maintenance and expansion of agriculture.

Section 5001(e)(2) elevates a limited portion of "Natural Resource Values" to a priority over the other values mandated to be protected and enhanced. The regulation is inconsistent with statutes and law.

Much of the Delta is Swamp and Overflowed land.

Construction of levees along and surrounding the Swamp and Overflowed lands was pursuant to the efforts of the State of California to reclaim the Swamp and Overflowed Lands granted to it by the United States. Such lands were acquired by the State of California from the Federal Government by virtue of the Act of Congress of September 28, 1850 (9 U.S. Stats. at Large, p. 519), generally known as the Arkansas Act. In accepting the grant from the Federal Government the State is bound to carry out in good faith the objects for which the grant was made and thereby assumed an obligation to reclaim the lands.

> "The object of the Federal Government in making this munificent donation to the general States was to promote the speedy reclamation of the lands and thus invite to them population and settlement, thereby opening new fields for industry and increasing the general prosperity." See Kimball v. Reclamation Fund Commissioners (1873) 45 Cal. 344, 360.

The State patented such lands into private ownership conditioned on efforts towards reclamation. Swampland Districts (Reclamation Districts) organized pursuant to State law were typically the mechanism whereby such reclamation efforts were accomplished.

The local governmental entities and interests built the levees for the primary purpose of

draining the Delta lands and tracts so that they could be put to productive use which in many cases was farming. Other productive uses include commercial, industrial and residential uses. The original non-project levees were in a number of cases later improved as a part of a federal project and are now "project levees".

Conversion of Swamp and Overflowed land to wetlands and particularly the breaching or removal of levees for such purpose would appear to be in violation of the State obligations to reclaim. If the levees are project levees the entire purpose of the federal project and expenditure would be destroyed.

The regulation limits the goal to supporting viable populations of native species. Much of the recreational value in the Delta is fishing for striped bass, black bass and other non-native fish. There is also a significant amount of recreation involving hunting of non-native species such as pheasants and Eurasian doves. Non-native species are also a significant part of the natural resource values of the Delta. Water Code section 85020(c) does not limit the restoration requirement to native species. The statutory requirement to protect and enhance or restore is not furthered by limiting the goal to supporting viable populations of native fish.

The use of the term "viable" does not incorporate the requirement to protect, enhance or restore.

Black's Law Dictionary defines "viable" as "Liveable, having the appearance of being able to live". Supporting viable populations falls far short of restoration and/or protection and enhancement.

Section 5001(e)(3) further erodes the statutory requirements to protect and enhance the unique cultural, recreational and agricultural values of the California Delta as an evolving place (Water Code section 85020(b)) and to restore the Delta ecosystem, including its fisheries and wildlife (Water Code section 85020(c)). The regulation provides "including change associated with achieving the coequal goals". Including this language renders the goal of protecting, restoring and enhancing the Delta ecosystem as secondary to the goal of providing a more reliable water supply. This is contrary to law, including Water Code sections, 85054, 85020, 85022, 85031, 12200 thru 12205, 12981 and 11910 thru 11915.5.

Section 5001(e)(3)(B) is ambiguous as to the nature of the plan or its intent.

Section 5001(e)(3)(C) is contrary to the statutes in that it limits the actions to "maintaining" Delta agriculture rather than "protecting and enhancing" agricultural values. The regulation ignores the Economic Sustainability Plan provided by the Delta Protection Commission contrary to Water Code section 85301 which requires consideration and incorporation into the Delta Plan. This provision also ignores the importance of Delta agriculture as providing critical habitat for numerous terrestrial and aquatic species, including migratory waterfowl of the Pacific Flyway.

Section 5001.(i) Encroachment

The regulation includes "removal of vegetation" as an encroachment. Such inclusion is inconsistent with Water Code sections 85020 and 85054 in that maintenance and enhancement of levees and floodways is critical to the protection and enhancement of the unique cultural, recreation, natural resource, and agricultural values of the Delta.

Removal of vegetation is part of "Routine maintenance and operation" of levees, flood channels, and drainage canals.

Requirements for removal of vegetation are contained in the operation and maintenance manuals for project levees and in the regulations of the Central Valley Flood Protection Board. By way of example, California Code of Regulations Title 23 section 131(d) provides:

> "With the exception of naturally occurring vegetation which the owner of the underlying land has no responsibility to maintain, any vegetation which interferes with the successful execution, functioning, maintenance or operation of the adopted plan of flood control, must be removed by the owner. If the owner does not remove such vegetation upon request, the board reserves the right to have the vegetation removed at the owner's expense."

Title 23 section 131(g)(2) provides:

> "Invasive or difficult-to-control vegetation, whether naturally occurring or planted, that impedes or misdirects floodflows is not permitted to remain on a berm or within the floodway or bypass."

Contracts between the State and United States and between local maintaining agencies and the State require removal of vegetation from levees and floodways. Such contracts are written to comply with State and Federal Statutes and regulations. The proposed regulation constitutes an unlawful interference with contracts as well as a serious conflict with statutes and regulations.

The definition should be revised to delete "or removal of vegetation".

Water Code section 85057.5(5) specifically excludes from covered actions "Routine maintenance and operation of any facility located, in whole or in part, in the Delta, that is owned or operated by a local public agency."

Section 5001.(j) "Enhancement" or "Enhancing"

The regulation example of "flooding the Yolo Bypass more often" ignores the possible detrimental impact to other values such as cultural, recreational and agricultural, and therefor is

inconsistent with Water Code sections 85020 and 85054. The regulation should be changed to require consistency with protection and enhancement of recreational and agricultural values. The regulation should include as an example the enhancement to fish and wildlife which may result from protection and enhancement of recreational and agricultural values.

Section 5001.(p) "Protection" or "Protecting"

Preventing an irretrievable conversion of lands suitable for restoration which is not causing harm to the ecosystem is not "protection", but rather an unlawful take of property rights in contravention of the State and United States Constitutions and the statutes relating thereto. This regulation is also inconsistent with Water Code sections 85020 and 85054 which require protection and enhancement of cultural, recreational and agricultural values as well as the unrelated natural resource value of habitat.

Section 5003. "Covered Action" and 5004 "Contents of Certifications of Consistency"

To the extent covered actions include those actions referenced as being inconsistent with statutes and other provisions of law elsewhere in our comments to the regulations, these sections are also inconsistent with such statutes and law.

5003 A section should be added to clarify that actions in an area south of the Delta served with water exported through the SWP or CVP pumping facilities may be covered actions since such pumping facilities are located in the Delta.

Section 5005. Reduce Reliance on the Delta through Improved Regional Water Self Reliance

The regulation ignores water right and statutory priorities afforded to the Delta and other areas of origin and is therefore inconsistent with Water Code section 85031 which is an overriding limitation on Division 33 of the Water Code.

The regulations and Delta Plan must require that the exports from the Delta by the State Water Project (SWP) and Central Valley Project (CVP) be curtailed first before any reduction in reliance on the Delta is imposed on diverters in the Delta and other areas of origin within the Delta Watershed.

The priorities of senior water right holders and those in the protected areas subject to Water Code section 1215 et seq. must also be recognized and protected.

Water Code §85031(a) provides as follows:

"§85031. Effect on existing water rights; diversion and conveyance of water not to

deem area immediately adjacent or capable of being conveniently supplied; applicability of other water Code provisions; effect on existing legal protections

(a) This division does not diminish, impair, or otherwise affect in any manner whatsoever any area of origin, watershed of origin, county of origin, or any other water rights protections, including, but not limited to, rights to water appropriated prior to December 19, 1914, provided under the law. This division does not limit or otherwise affect the application of Article 1.7 (commencing with Section 1215) of Chapter 1 of Part 2 of Division 2, Sections 10505, 10505.5, 11128, 11460, 11461, 11462, and 11463, and Sections 12200 to 12220, inclusive." (Emphasis added)

Water Code §§12200 through 12205 are particularly specific as to the requirements to provide salinity control for the Delta and provide an "adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban and recreational development."

For ease of reference, the following Water Code sections are quoted with emphasis added:

"§12200. Legislative findings and declaration

The Legislature hereby finds that the water problems of the Sacramento-San Joaquin Delta are unique within the State; the Sacramento and San Joaquin Rivers join at the Sacramento-San Joaquin Delta to discharge their fresh water flows into Suisun, San Pablo and San Francisco bays and thence into the Pacific Ocean; the merging of fresh water with saline bay waters and drainage waters and the withdrawal of fresh water for beneficial uses creates an acute problem of salinity intrusion into the vast network of channels and sloughs of the Delta; the State Water Resources Development system has as one of its objectives the transfer of waters from water-surplus areas in the Sacramento Valley and the north coastal area to water-deficient areas to the south and west of the Sacramento-San Joaquin Delta via the Delta; water surplus to the needs of the areas in which it originates is gathered in the Delta and thereby provides a common source of fresh water supply for water-deficient areas. It is, therefore, hereby declared that a general law cannot be made applicable to said Delta and that the enactment of this law is necessary for the protection, conservation, development, control and use of the waters in the Delta for the public good. *(Added by Stats. 1959, c. 1766, p. 4247, §1.)*

§12201. Necessity of maintenance of water supply

The Legislature finds that the maintenance of an adequate water supply in the Delta sufficient to maintain and expand agriculture, industry, urban, and recreational development in the Delta area as set forth in Section 12220, Chapter

2, of this part, and to provide a common source of fresh water for export to areas of water deficiency is necessary to the peace, health, safety and welfare of the people of the State, except that delivery of such water shall be subject to the provisions of Section 10505 and Sections 11460 to 11463, inclusive, of this code. *(Added by Stats. 1959, c. 1766, p 4247, §1.)*

§12202. Salinity control and adequate water supply; substitute water supply; delivery

Among the functions to be provided by the State Water Resources Development System, in coordination with the activities of the United States in providing salinity control for the Delta through operation of the Federal Central Valley Project, shall be the provision of salinity control and an adequate water supply for the users of water in the Sacramento-San Joaquin Delta. If it is determined to be in the public interest to provide a substitute water supply to the users in said Delta in lieu of that which would be provided as a result of salinity control no added financial burden shall be placed upon said Delta water users solely by virtue of such substitution. Delivery of said substitute water supply shall be subject to the provisions of Section 10505 and Sections 11460 to 11463, inclusive, of this code. *(Added by Stats. 1959, c. 1766, p 4247, §1.)*

§12203. Diversion of waters from channels of delta

It is hereby declared to be the policy of the State that no person, corporation or public or private agency or the State or the United States should divert water from the channels of the Sacramento-San Joaquin Delta to which the users within said Delta are entitled. *(Added by Stats. 1959, c. 1766, p 4249, §1.)*

§12204. Exportation of water from delta

In determining the availability of water for export from the Sacramento-San Joaquin Delta no water shall be exported which is necessary to meet the requirements of Sections 12202 and 12203 of this chapter. *(Added by Stats. 1959, c. 1766, p 4249, §1.)*

§12205. Storage of water; integration of operation and management of release of water

It is the policy of the State that the operation and management of releases from storage into the Sacramento-San Joaquin Delta of water for use outside the area in which such water originates shall be integrated to the maximum extent possible in order to permit the fulfillment of the objectives of this part. *(Added by Stats. 1959, c. 1766, p 4249, §1.)*"

§ 11460 provides:

"§ 11460. Prior right to watershed water

In the construction and operation by the department of any project under the provisions of this part a watershed or area wherein water originates, or an area immediately adjacent thereto which can conveniently be supplied with water therefrom, shall not be deprived by the department directly or indirectly of the prior right to all of the water reasonably required to adequately supply the beneficial needs of the watershed, area, or any of the inhabitants or property owners therein. *(Added by Stats. 1943, c. 370, p. 1896. Amended by Stats. 1957, c. 1932, p. 3410, § 296.)*"

The December 1960 Bulletin 76 (Attachment A) which is a contemporaneous interpretation by DWR of Water code Section 12200 through 12205 provides at page 12:

"In 1959 the State Legislature directed that water shall not be diverted from the Delta for use elsewhere unless adequate supplies for the Delta <u>are first</u> provided." (emphasis added.)

A summary of the promises made on behalf of the United States to those in the areas of origin is contained in the 84th Congress, 2D Session House Document No. 416, Part One Authorizing Documents 1956 at Pages 797-799 as follows:

"My Dear Mr. Engle: In response to your request to Mr. Carr, we have assembled excerpts from various statements by Bureau and Department officials relating to the subject of diversion of water from the Sacramento Valley to the San Joaquin Valley through the operation of the Central Valley Project.

A factual review of available water supplies over a period of more than 40 years of record and the estimates of future water requirements made by State and Federal agencies makes it clear that there is no reason for concern about the problem at this time.

For your convenience, I have summarized policy statements that have been made by Bureau of Reclamation and Department of the Interior officials. These excerpts are in the following paragraphs:

On February 20, 1942, in announcing the capacity for the Delta-Mendota Canal, Commissioner John C. Page said, as a part of his Washington D.C., press release:

"The capacity of 4,600 cubic feet per second was approved, with the understanding that the quantity in excess of basic requirements mainly for replacement at Mendota Pool, will not be used to serve new lands in the San Joaquin Valley if the water is necessary for development in the Sacramento Valley below Shasta Dam and in the counties of origin of such waters."

On July 18, 1944, Regional Director Charles E. Carey wrote a letter to Mr. Harry Barnes, chairman of a committee of the Irrigation Districts Association of California. In that letter, speaking on the Bureau's recognition and respect for State laws, he said:
"They [Bureau officials] are proud of the historic fact that the reclamation program includes as one of its basic tenets that the irrigation development in the West by the Federal Government under the Federal reclamation laws is carried forward in conformity with State water laws."

On February 17, 1945, a more direct answer was made to the question of diversion of water in a letter by Acting Regional Director R. C. Calland, of the Bureau, to the Joint Committee on Rivers and Flood Control of the California State Legislature. The committee had asked the question, "What is your policy in connection with the amount of water that can be diverted from one watershed to another in proposed diversions?" In stating the Bureau's policy, Mr. Calland quoted section 11460 of the State water code, which is sometimes referred to as the county of origin act, and then he said:
"As viewed by the Bureau, it is the intent of the statute that no water shall be diverted from any watershed which is or will be needed for beneficial uses within that watershed. The Bureau of Reclamation, in its studies for water resources development in the Central Valley, consistently has given full recognition to the policy expressed in this statute by the legislature and the people. The Bureau has attempted to estimate in these studies, and will continue to do so in future studies, what the present and future needs of each watershed will be. The Bureau will not divert from any watershed any water which is needed to satisfy the existing or potential needs within that watershed. For example, no water will be diverted which will be needed for the full development of all of the irrigable lands within the watershed, nor would there be water needed for municipal and industrial purposes or future maintenance of fish and wildlife resources."

On February 12, 1948, Acting Commissioner Wesley R. Nelson sent a letter to Representative Clarence F. Lea, in which he said:
"You asked whether section 10505 of the California Water Code, also sometimes referred to as the county of origin law, would be applicable to

the Department of the Interior, Bureau of Reclamation. The answer to this question is: No, except insofar as the Bureau of Reclamation has taken or may take assignments of applications which have been filed for the appropriation of water under the California Statutes of 1927, chapter 286, in which assignments reservations have been made in favor of the county of origin.

The policy of the Department of the Interior, Bureau of Reclamation, is evidenced in its proposed report on a Comprehensive Plan for Water Resources Development–Central Valley Basin, Calif., wherein the Department of the Interior takes the position that "In addition to respecting all existing water rights, the Bureau has complied with California's 'county of origin' legislation, which requires that water shall be reserved for the presently unirrigated lands of the areas in which the water originates, to the end that only surplus water will be exported elsewhere."

On March 1, 1948, Regional Director Richard L. Boke wrote to Mr. A. L. Burkholder, secretary of the Live Oak Subordinate Grange No. 494, Live Oak, Calif., on the same subject, and said:

"I can agree fully with the statement in your letter that it would be grossly unjust to 'take water from the watersheds of one region to supply another region until all present and all possible future needs of the first region have been fully determined and completely and adequately provided for.' That is established Bureau of Reclamation policy and, I believe, it is consistent with the water laws of the State of California under which we must operate."

On May 17, 1948, Assistant Secretary of the Interior William E. Warne wrote a letter to Representative Lea on the same subject, in which he said: "The excess water made available by Shasta Reservoir would go first to such Sacramento Valley lands as now have no rights to water."

Assistant Secretary Warne goes on to say, in the same letter:
"As you know, the Sacramento Valley water rights are protected by: (1) Reclamation law which recognizes State water law and rights thereunder; (2) the State's counties of origin act, which is recognized by the Bureau in principle; and (3) the fact that Bureau filings on water are subject to State approval. I can assure you that the Bureau will determine the amounts of water required in the Sacramento Valley drainage basin to the best of its ability so that only surplus waters would be exported to the San Joaquin. We are proceeding toward a determination and settlement of Sacramento Valley waters which will fully protect the rights of present users; we are

determining the water needs of the Sacramento Valley; and it will be the Bureau's policy to export from that valley only such waters as are in excess of its needs."

On October 12, 1948, Secretary of the Interior Krug substantiated former statements of policy in a speech given at Oroville, Calif. Secretary Krug said, with respect to diversion of water:
"Let me state, clearly and finally, the Interior Department is fully and completely committed to the policy that no water which is needed in the Sacramento Valley will be sent out of it."
He added:
"There is no intent on the part of the Bureau of Reclamation ever to divert from the Sacramento Valley a single acre-foot of water which might be used in the valley now or later."

Water Code section 1216 provides as follows:

"**§ 1216. Depriving protected area of adequate supplies of water prohibited**

A protected area shall not be deprived directly or indirectly of the prior right to all the water reasonably required to adequately supply the beneficial needs of the protected area, or any of the inhabitants or property owners therein, by a water supplier exporting or intending to export water for use outside a protected area pursuant to applications to appropriate surface water filed, or groundwater appropriations initiated, after January 1, 1985, that are not subject to Section 11460. (*Added by Stats.1984, c. 1655, § 2.*)"

The failure to honor the water right and statutory priorities as required by Water Code section 85031 is simply a taking of the property of those with seniority and a gift to the contractors of the SWP and CVP receiving waters exported at the SWP and CVP pumps near Tracy.

The resulting injustice from the proposed regulation is highlighted by the fact that the SWP was to develop sufficient projects in North Coast watersheds to supplement flows into the Delta of 5 million acre feet per year by the year 2000. These supplemental flows were needed to meet the approximately 4.25 million acre feet of SWP contract entitlement as well as other project responsibilities such as salinity control for the Delta. The North Coast development did not take place yet the SWP continues to export water from the Delta. The failure of the Secretary of Interior to comply with the condition that the San Luis Unit of the CVP not go forward unless a Valley Drain with an outlet to the Bay or Ocean was assured also highlights the injustice resulting from the Delta Stewardship Council effort.

The regulations must be rewritten to require curtailment of SWP and CVP exports from the Delta to areas south of the Delta before imposition of any burden on other water users, and then in accordance with the water right and statutory priorities.

To be effective, the restraint on such SWP and CVP exports should limit the service or transport of water to new development of arid lands which will directly or indirectly increase demand for SWP or CVP export pumping from the Delta.

In addition to and consistent with the above, 5005.(c) must be revised to delete "or used in the Delta' and insert "or" before "transferred".

5005.(c)(1) insert "or" before "transfer" and delete "or use".

5005.(c)(2) insert "or" before "transfer" and delete "or use".

5005.(c)(3) insert "or" before "transfer" and delete "or use".

5005.(d) insert "or" before "transfer" and delete "or use water in".

Section 5007. Update Delta Flow Objectives

In compliance with the limitations contained in Water Code section 85031, the regulation must be revised to include the requirement that imposition of flow requirements must adhere to the water right and statutory priorities. Flow necessary for mitigation of harm caused by the SWP and CVP, and to meet salinity control in the Delta, and to meet the affirmative obligations of the Projects such as the SWP obligation to preserve fish and wildlife, and the CVP obligation to double the natural production of anadromous fish must be provided by the SWP and CVP.

Section 5008. Restore Habitats at Appropriate Elevations

The regulation as written is in conflict with Water Code section 85020(b) which requires the protection and enhancement of the unique cultural, recreational and agricultural values of the California Delta as an evolving place, and Water Code section 85054 both as to protecting, restoring and enhancing the Delta ecosystem of which the levee protected lands are a part, and the requirement to protect and enhance the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place. As explained above, interference with the reclamation of the Swamp and Overflowed lands would violate the obligation of the State resulting from the grant of said lands from the United States. The mandate of such regulation also appears to illegally conflict with local agency efforts and plans to protect agricultural lands.

The regulation should be revised to require that the restoration of habitat be accomplished in a manner consistent with the statutory requirements. Improvement of water quality in the Delta and provision of inflow and outflow would constitute consistent restoration of habitat.

Similarly, improvement of in-channel habitat such as on already flooded islands and areas, and on the channel islands or berms would be consistent. Improvement of levees to provide a larger structural section to accommodate waterside planting is also an opportunity for habitat restoration that could be consistent with legal requirements.

Section 5009. Protect Opportunities to Restore Habitat

This regulation coupled with the regulation pertaining to covered actions constitutes a regulatory taking in contravention of the State and Federal Constitution and related statutes. Identification of such areas for extraordinary regulation and future acquisition will diminish land values without just compensation. Additionally, the areas designated include agricultural lands the conversion of which to habitat would violate Water Code sections 85020(b), 85054 and other provisions of law.

Inhibiting use or development for the purpose of limiting the cost or otherwise facilitating a future acquisition for a public purpose constitutes an unlawful taking.

Section 5010. Expand Floodplains and Riparian Habitats in Levee Projects

Recommendation Number 7 of Chapter 7 of the Delta Plan excludes local levee maintaining agencies from the development of the criteria. The lack of local input invites liability in that many deficiencies in levees, which are to be addressed with levee programs, are the result of state and federal actions. Project levees which were not constructed to appropriate engineering standards are a major part of the need for levee improvement projects. The regulation is inconsistent with Water code sections 85020(b) and 85054. The regulation should be revised to require that each designation be accompanied by a finding that the action protects and enhances agricultural values. The requirement of concurrence by the local levee maintaining agency should also be added.

Section 5011. Avoid Introductions of and Habitat Improvements for Nonnative Species

Nonnative Species

There are a number of nonnative species such as striped bass, black bass and pheasants that are an important part of the recreational values in the Delta which are required to be protected and enhanced.

Water Code section 85304(c)(5) provides that the Delta Plan shall include measures that promote:

> "Conditions conducive to meeting or exceeding the goals in existing species recovery plans and state and federal goals with respect to doubling salmon populations."

Water Code section 85304(e)(3) provides as a subgoal and strategy for restoring a healthy ecosystem:

> "Promote self-sustaining, diverse populations of native and valued species by reducing risk of take and harm from invasive species."

The CVPIA (3406(b)(1)) requires the Secretary of Interior to develop a program to ensure by the year 2002 natural production of anadromous fish on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991. Anadromous fish include: salmon, steelhead, striped bass, sturgeon and American shad.

Much, if not all, of the tidal habitat targeted for development in the Delta Plan will improve habitat for striped bass and black bass.

The regulation lacks clarity as to whether it is directed at nonnative species or nonnative invasive species which are not defined. The tidal habitat will likely improve habitat for nonnative species, including plant species which are commonly referred to as invasive.

The regulation as currently written is ambiguous and in conflict with the very statutes cited as authority for its adoption.

Section 5012. Locate New Development Wisely

The regulation unduly interferes with local land use authority in that its limitations are an absolute limitation and go well beyond a reasonable nexus to the coequal goals. Flood proofing or protecting development to meet all requirements in areas not listed in 5012(a) is possible, and the targeting of areas rather than establishing standards for development, which can be uniformly and equitably applied, is in conflict with the authority provided by law to local and regional land use agencies.

The statement of no alteration of concurrent authority with the Delta Protection Commission (DPC) does not resolve the DSC application of requirements beyond the jurisdiction of the DPC or the prohibition by the DSC of development allowed by the DPC.

Section 5014. Prioritization of State Investments in Delta Levees and Risk Reduction

5014(d)(2) the provision "Except on islands planned for ecosystem restoration, improvement of non-project Delta levees to the Hazard Mitigation Plan (HMP) may be funded without justification of the benefits." should be modified to delete "Except on islands planned for ecosystem restoration".

As explained above, such targeting harms land values in advance of acquisition for public purposes and is contrary to law.

To the extent such islands contain recreational or agricultural values, the conversions to tidal or wetland habitat and the deprivation of funding would violate the statutory requirements to protect and enhance such values in Water Code sections 85020 and 85054, as well as other statutes and law cited above. A substantial period of time may pass before a decision is made to acquire the so-called restoration land and such areas may never be acquired. The levees on the targeted islands, in some cases, protect larger areas than the area targeted and flood consequences could extend well beyond the targeted areas.

Section 5016. Floodway Protection

As explained above the definitions of encroachment should be changed to delete "removal of vegetation". Without such change the regulation is in conflict with law.

Section 5017. Floodplain Protection

The definition of encroachment should be changed to delete "removal of vegetation". Without such change the regulation is in conflict with the law.

Article 4. General Provisions

Sections 5018, 5019, and 5020 are inappropriate and clearly beyond the authority of the DSC. Water Code section 85210 does not give the DSC authority to violate statutes and other law and then absolve itself of wrongdoing. As set forth above, the regulations of the DSC are in violation of law and must be revised.

Overall Objections

Laws passed by the California Legislature and signed by the Governor do not override constitutional provisions of the State or United States. In addition to the regulations being contrary to the law as set forth above the statutory authority upon which the DSC relies, constitutes an overly broad and unlawful delegation of authority by the Legislature to the Delta Stewardship Council.

The Central Delta Water Agency February 2, 2012 comments on the Delta Plan Draft Environmental Impact Report are incorporated herein by this reference as if stated in full herein.

Yours very truly,

Dante John Nomellini
Manager and co-counsel