



County of Sacramento

January 14, 2013

Cindy Messer
Delta Plan Program Manager
Delta Stewardship Council (DSC)
980 Ninth Street, Suite 1500
Sacramento, California 95814

RE: Comments on the Delta Plan's Proposed Regulations

Dear Ms. Messer:

Pursuant to Government Code section 11340 *et seq.*, (Administrative Procedures Act), Sacramento County respectfully comments on the Delta Plan regulations, proposed to be incorporated in Title 23, Division 6 of the California Code of Regulations (CCR)

1. Many of the "regulations" are characterized as policies, rather than regulations. While the provisions arguably provide policy direction for interpreting the Delta Reform Act (Act), they do not provide the type of clarity or objective parameters that readily permit implementation of either the Act or the Delta Plan. The provisions merely reiterate the policies contained in the November 2012 Final Draft Delta Plan. They do not elaborate upon, define, clarify or otherwise explain or set standards. To the contrary, the "regulations" will likely necessitate further clarification and regulation.

2. The regulations substantially focus on only one of the coequal goals, the provision of a more reliable water supply, with little to no recognition of the other coequal goal of protection, restoration, and enhancement of the Delta ecosystem. Such emphasis on the one goal to the exclusion of the other renders the proposed regulations inconsistent with the Act.

3. The definition of "coequal goals" in Section 50001(e) is not actually a definition of those goals. It does no more than reiterate and duplicate Public Resources Code section 85054. The so-called definition relates exclusively to the conceptual manner of achieving the co-equal goals. However, there is no linkage to actual implementation of the coequal goals. Furthermore, the strategies identified as protecting and enhancing the values of the Delta are conceptual and undefined. For example, in Section 5001(e) (3), what is meant by "encourage recreation and tourism?" What performance measure, standard or criteria is being adopted?

4. In Section 5001(g), the statutory citation should be to the Section 12220 of the Water Code, not the Public Resources Code.

5. The definition of "encroachment" in Section 5001(i) (and related provisions of the draft regulations) is overly broad, duplicative and unnecessary. It is unnecessary because State law already vests the Central Valley Flood Protection Board (and local governments, under the Cobey-Alquist Act) with comprehensive regulatory authority to address encroachments in floodplains. The definition is also overbroad because it includes literally every activity that could occur in a floodplain. Conceivably even routine agricultural practices such as planting crops, removing invasive weeds and installing wells would constitute encroachments under this definition.

6. The definition of "floodway" in Section 5001(l) is duplicative of other provisions of state law and, therefore, unnecessary. For example, regulations adopted by the Central Valley Flood Protection Board define both "designated floodway" and "floodway." See 23 Cal.Code Regs. §4. A parallel definition of this term is unnecessary, as is a duplicative regulatory process relating to encroachments and other activities in floodways.

7. To the extent that the draft regulations are utilizing CEQA standards and definitions, those regulatory provisions should be cross-referenced. For example, Section 5001(k) defines the term "feasible." A definition of that term already exists in the CEQA Guidelines (14 CCR § 15364). As such, the definition is duplicative.

8. In Section 5001(t) and (u), the definitions of "urban area" and "urbanizing area" are consistent with Government Code 65507(j) and the terminology used in the 2012 Central Valley Protection Plan (CVFPP), it conflicts with the definition of "urban" set forth in the Delta Protection Commission's Land Use Resource Management Plan (LURMP). This inconsistency needs to be resolved in order avoid implementation issues when applying the new development and flood protection regulations to the unincorporated (legacy) Delta communities.

9. With respect to Section 5003, the term "covered action" is already defined in state law. The draft regulatory definition is duplicative of Water Code section 85057.5.

10. Section 5003(c) requires that covered action determinations must be "reasonable, made in good faith and consistent with the Delta Reform Act and this chapter." However, it is not appropriate to require that the local legislative body act reasonably or in good faith in making its determination. The sole issue is the correctness of the legislative body's determination that an activity constitutes a covered action and is consistent with the Act. Subjective inquiries into the "good faith" or "reasonableness" of public agency decision makers is barred. See e.g. *Board of Supervisors v. Los Angeles Co.* (1995) 32 Cal.App.4th 1616; *Co. of Los Angeles v. Superior Court* (1975) 13 Cal.3d 721.

11. Section 5003(b)(2)(D)(ii) needs to define the term "small-scale habitat restoration Projects."

12. Section 5004(b)(2) provides that covered actions not exempt from CEQA must include feasible mitigation measures identified in the Delta Plan's Program EIR or substitute measures. However, under CEQA, mitigation is only required for significant impacts. Absent clarification, this provision legislates an additional CEQA mandate. In addition, mitigation measures should be dictated by CEQA, not by a separate mitigation requirement imposed by the Act.

13. Section 5004 is titled contents of certifications of consistency, but neither it nor any of the other draft regulations provide any guidance or criteria for determining whether and to what extent a project that is only partially consistent with one of the coequal goals is "on whole" consistent for purposes of Section 5004. Nor does Section 5004 provide any guidance, standard or regulation relating to the time of the certificate of consistency.

14. Section 5012 limits "new urban development" to certain locations that are already developed or designated for development in local general plans. The intended meaning of the term "urban development" is far from clear. The draft regulations already define the term "urban area" in such a manner that the unincorporated Delta towns of Clarksburg, Courtland, Hood, Locke, Ryde and Walnut Grove are excluded. However, the term "new urban development" is using the term "urban" as a classification of a particular type of land use (residential, commercial, industrial) without regard to population or density. A broad interpretation of the term "new urban development" would encompass even the construction of a single residence or commercial facility. However, other draft regulations (Section 5015 regulating residential subdivisions of five or more lots) would be unnecessary in such case. What then is the level of "urban development" that is within the scope of Section 5012?

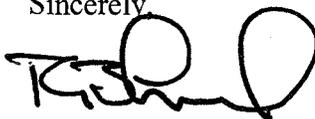
15. Section 5015 requires 200 year flood protection for certain residential developments of five or more parcels. This requirement is inconsistent with existing statutory provisions regarding only 100 year flood protection. It conflicts with existing Government Code section 65865.5 wherein the State clearly established that development in non-urban areas (under 10,000 residents) must meet the FEMA 100-year standard and that the 200-year standard is applied to urban areas. Under the current Sacramento County General Plan, neither these towns nor the entirety of the rural Delta could ever reach a population greater than 10,000. Currently, the State has not established 200-year floodplain elevations and according to the Central Valley Flood Protection Plan, has no intention of doing so for non-urban areas. Further FEMA does not utilize and has not established 200-year floodplain maps or elevations. Therefore, it is unclear what 200-year standard is intended in the draft regulations, how and when it is to be established and how the proposed regulation could be applied, lacking any such definition of the standard.

Sacramento County appreciates the opportunity to share our comments on the proposed regulations and strongly urges the DSC to address each comment and make the appropriate text changes prior to filing the proposed regulations with the Office of Administrative Law (OAL). As provided for in Government Code section 11349 *et seq*, the County and will remain engaged with both the DSC and the OAL during the final rulemaking review and adoption process.

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Should you require additional information, please contact Michael Peterson, Director of Water Resources (916) 874-8913, or Don Thomas, Senior Planner (916) 874-5140.

Sincerely,

A handwritten signature in black ink, appearing to read 'R. Leonard', with a large loop at the end.

Robert B. Leonard
Chief Deputy County Executive

RL:dt

cc: Michael Peterson, Director of Department of Water Resources, Sacramento County
Michele Bach, Office of the County Counsel, Sacramento County
Cathy Hack, Environmental Coordinator, Department of Community Development,
County of Sacramento