



**Delta
Stewardship
Council**

A CALIFORNIA STATE AGENCY

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August 13, 2021

Jeanine Townsend, Clerk to the Board
State Water Resources Control Board
1001 I Street, 15th floor, Sacramento, CA 95814

Delivered via email: commentletters@waterboards.ca.gov

RE: Comments – Restoration Projects Statewide Order

Dear Chair Esquivel and Members of the Board:

The Delta Stewardship Council (Council) appreciates the opportunity to comment on the proposed Order for Clean Water Act Section 401 Water Quality Certification and Waste Discharge Requirements for Restoration Projects Statewide (proposed General Order). According to the Notice of Opportunity and draft Environmental Impact Report (EIR), the purpose of the statewide proposed General Order is to “establish a permit authorization process for specific types of restoration activities [and] provide Waste Discharge Requirements as well as Clean Water Act Section 401 Water Quality Certification.” For project proponents to use the Order, their proposed restoration projects would need to comply with the California Environmental Quality Act (CEQA).

The Council is an independent State of California agency established by the Sacramento-San Joaquin Delta Reform Act of 2009, codified in Division 35 of the California Water Code, sections 85000-85350 (Delta Reform Act). The Delta Reform Act charges the Council with furthering the State’s coequal goals for the Sacramento-San Joaquin Delta (the Delta) of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem, to 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. (Wat. Code § 85054.)

Pursuant to the Reform Act, the Council has adopted the Delta Plan, a legally enforceable management framework for the Delta and Suisun Marsh for achieving the coequal goals. The Delta Reform Act grants the Council specific regulatory and appellate authority over certain actions that take place in whole or in part in the Delta and Suisun Marsh, referred to as “covered actions.” (Wat. Code, §§ 85022(a) and 85057.5.) The Council exercises that authority through regulatory policies set forth in Title 23 of the California Code of Regulations, Sections 5001 through 5016 and recommendations incorporated into the Delta Plan. Water Code section 85057.5(b) provides that a regulatory action of a state agency is *not* a covered action under the Delta Plan.

While the proposed General Order is not a covered action, the Council appreciates the opportunity to acknowledge the significant permitting improvements the General Order would provide and outline how projects complying with the proposed General Order in the Council’s jurisdiction may be covered actions.

Improving Permitting Efficiency Will Accelerate Implementation Of Restoration Projects

As described in the Council’s proposed amendment to the ‘ecosystems’ chapter of the Delta Plan ([draft Delta Plan Chapter 4: Protect, Restore, and Enhance the Delta Ecosystem](#)), improving permitting efficiency is one of the key actions that should be undertaken by government agencies to support implementation of ecosystem restoration. Permitting for ecosystem protection, restoration, and enhancement actions in the Delta can be complex, time-consuming, and costly, requiring coordination among multiple local, state, and federal agencies.

In partnership with other State agencies under the California Natural Resources Agency, the Council contributed funds to Sustainable Conservation’s Accelerating Restoration program to assist in development of the proposed General Order. Implementation of the General Order will accelerate restoration projects by saving time, money, and avoiding the complexities of individual permitting, especially for smaller proponents that may be unfamiliar with navigating the permitting process.

It is currently estimated that it will take approximately 60,000-80,000 acres of net new functional, diverse, and interconnected habitat to achieve the fully restored Delta landscape envisioned in the Delta Reform Act, or roughly 7 to 10 percent of the combined land area of the Delta and Suisun Marsh. A proposed amendment to Delta Plan Chapter 4 envisions restoration of these acres by 2050, and this proposed General Order would help achieve that goal.

Covered Actions

State and local agencies are required to demonstrate consistency with the Delta Plan when carrying out, approving, or funding a covered action. ('certification of consistency', Wat. Code, §§ 85057.5 and 85225.) The proposed General Order is not a covered action, but projects that comply with the proposed General Order may be covered actions if they meet the criteria identified in Water Code section 85057.5(a). A covered action is a plan, program, or project as defined pursuant to CEQA that would: 1) occur in whole or in part within the boundaries of the Legal Delta (Wat. Code, § 12220) or Suisun Marsh (Pub. Res. Code, § 29101) (Wat. Code, § 85057.5(a)(1)); 2) be carried out, approved, or funded by the State or a local public agency (Wat. Code, §85057.5(a)(2)); 3) have a significant impact on the achievement of one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people, property, and State interests in the Delta (Wat. Code, § 85057.5(a)(4)); and 4) be covered by one or more of the regulatory policies contained in the Delta Plan (Cal. Code Regs., tit. 23, §§ 5003-5015).

An existing mechanism for coordination among the agencies responsible for implementation of ecosystem protection, restoration, and enhancement actions and the Council is the early consultation process for covered action certification. State and local agencies may consult with the Council early in the planning process regarding the consistency of proposed projects with applicable regulatory policies in the Delta Plan. For ecosystem restoration projects, it is critically important that early consultation occur in the earliest possible stages of the CEQA review process to ensure that Delta Plan requirements are incorporated as features of proposed projects or as mitigation measures in CEQA documents for such projects.

Delta Plan Policies and Mitigation Measures

Future projects utilizing the proposed General Order that meet the definition of a covered action are required to demonstrate consistency with the Delta Plan and its mitigation measures. Delta Plan Policies most relevant to future restoration projects complying with the proposed general order include¹:

General Policy **G P1(b)(2)**: Covered actions not exempt from CEQA must include all applicable feasible mitigation measures adopted and incorporated

¹ Descriptions of Delta Plan policies presented in this letter have been abridged to address requirements specific to ecosystem restoration projects. The full text of the Delta Plan's regulatory policies is available at <https://www.deltacouncil.ca.gov/pdf/delta-plan/regulations/2020-05-08-delta-plan-policies-handout.pdf>. The full text should be used in any future certification of consistency resulting from implementation of the General Order.

into the Delta Plan or substitute mitigation measures that the agency that files the certification of consistency finds are equally or more effective ([Cal. Code Regs., tit. 23, § 5002](#) and [Delta Plan Appendix O, Mitigation Monitoring and Reporting Program](#)).

General Policy **G P1(b)(3)**: Requires that all covered actions must document use of best available science, as relevant to the purpose and nature of the project ([Cal. Code Regs., tit. 23, § 5002](#) and [Delta Plan Appendix 1A, Best Available Science](#)).

General Policy **G P1(b)(4)**: Requires that ecosystem restoration covered actions must include adequate provisions, appropriate to the scope of the covered action, to assure continued implementation of adaptive management ([Cal. Code Regs., tit. 23, § 5002](#) and [Delta Plan Appendix 1B, Adaptive Management](#)).

Ecosystem Policy **ER P1**: Provides that the State Water Board's Bay Delta Water Quality Control Plan flow objectives shall be used to determine consistency with the Delta Plan ([Cal. Code Regs., tit. 23, § 5005](#)).

Ecosystem Policy **ER P2**: Provides that habitat restoration actions must be appropriate for the site's elevation, and deviations must be justified by best available science ([Cal. Code Regs., tit. 23, § 5006](#), [Delta Plan Appendix 3, Habitat Restoration](#), and [Delta Plan Appendix 4, Elevation Map](#)).

Ecosystem Policy **ER P3**: Provides that significant adverse impacts to the opportunity to restore habitat within priority habitat restoration areas must be avoided or mitigated ([Cal. Code Regs., tit. 23, § 5007](#) and [Appendix 5 Recommended Areas for Prioritization and Implementation of Habitat Restoration Projects](#)).

Ecosystem Policy **ER P4**: Provides that levee projects must evaluate and where feasible incorporate alternatives, including the use of setback levees in certain locations, to increase floodplains and riparian habitats ([Cal. Code Regs., tit. 23, § 5008](#) and [Appendix 8 Setback Levee Evaluation Areas](#)).

Ecosystem Policy **ER P5**: Provides that the potential for new introductions of, or improved habitat conditions for, nonnative invasive species, striped bass, or bass must be fully considered and avoided or mitigated in a way that appropriately protects the ecosystem ([Cal. Code Regs., tit. 23, § 5009](#)).

Delta as Place Policy **DP P2**: Provides that certain projects, including ecosystem restoration, must be sited to avoid or reduce conflicts with existing uses or those described or depicted in city and county general plans,

when feasible, considering comments from local agencies and the Delta Protection Commission. Plans for ecosystem restoration must consider sites on existing public lands, when feasible and consistent with a project's purpose, before privately owned sites are purchased ([Cal. Code Regs., tit. 23, § 5011](#)).

Revisions to Draft EIR

The Council recommends that the Final EIR for the proposed General Order reference the Delta Plan policies above and the mitigation measures required under **G P1(b)(2)** in the following EIR sections or chapters:

- Resource Impact sections: The Delta Reform Act and the Delta Plan are referenced in the Hydrology impact section, but should be similarly included in other impact sections, including but not limited to the Biological resource sections.
- EIR Appendix C: The Delta Stewardship Council and the Delta Plan should be added to the list of Permits and Authorizations for Restoration Activities, with a focus on Consistency Certification and incorporation of Delta Plan Mitigation Measures.

While the EIR Appendix E acknowledges that other agencies may require additional protection or mitigation measures committed to as part of the CEQA review process, the Council recommends the Final EIR include the following Delta Plan mitigation measures, or include substitute measures that the lead agency finds are equally or more effective:

- Agriculture and Forestry Resources: "Manage project operations to minimize the introduction of invasive species or weeds that may affect agricultural production on adjacent agricultural land."
- Biological Resources: "An invasive species management plan shall be developed and implemented for any project whose construction or operation could lead to introduction or facilitation of invasive species establishment. The invasive species management plan will include the following elements:
 - Nonnative species eradication methods (if eradication is feasible)
 - Nonnative species management methods
 - Early detection methods
 - Notification requirements
 - Best management practices for preconstruction, construction, and post construction periods
 - Monitoring, remedial actions and reporting requirements

Regarding Restoration Order, Chair Esquivel and Boardmembers, August 13, 2021

- Provisions for updating the target species list over the lifetime of the project as new invasive species become potential threats to the integrity of the local ecosystems
- Recreation: "If the substantial impairment, degradation, or elimination of recreational facilities occurs, replacement facilities of equal capacity and quality shall be developed and installed, with ongoing funding provided for maintenance of these facilities."

Thank you for the opportunity to provide comment. Should you have any questions, please contact Daniel Constable at Daniel.Constable@deltacouncil.ca.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Henderson", with a long horizontal flourish extending to the right.

Jeff Henderson, AICP
Deputy Executive Officer
Delta Stewardship Council