

Central Valley Flood Protection Board Meeting  
October 24, 2014

INFORMATIONAL BRIEFING

**Covered Actions Regulatory Process**

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**BRIEFING SUMMARY**

**Background**

**The Delta Plan: Covered Actions Regulatory Process Overview**

The Delta Reform Act of 2009 established a certification process for compliance with the Delta Plan. This means that state and local agencies that propose to carry-out, approve or fund a qualifying action, called a “covered action” in the Delta Plan, must certify that this action is consistent with the Delta Plan and must file a certificate of consistency with the Delta Stewardship Council.

**A. What Is a Covered Action?**

A state or local agency that proposes to carry out, approve, or fund a plan, program, or project is the entity that must determine whether that plan, program, or project is a covered action. That determination must be reasonable, made in good faith, and consistent with the Delta Reform Act and relevant provisions of the Delta Plan. Both the Delta Reform Act and the Delta Stewardship Council’s own Administrative Procedures contain exemptions for such things as state agency regulatory actions, routine maintenance of certain facilities, projects located within specified regional planning areas, or specific ministerial actions.

Unless otherwise exempt, the Delta Reform Act is the starting point to determine whether proposed plans, programs, or projects are covered actions under the Delta Plan and therefore subject to the regulatory provisions in the plan. The Act defines a covered action as (Water Code Section 85057.5(a)):

*...a plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code that meets all of the following conditions:*

- 1. Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh;*
- 2. Will be carried out, approved, or funded by the state or a local public agency;*
- 3. Is covered by one or more provisions of the Delta Plan;*
- 4. Will have a significant impact on the achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta.*

If an agency determines that a proposed plan, program, or project is not a covered action that determination is not subject to Council regulatory review, but is subject to judicial review as to whether it was reasonable, made in good faith, and is consistent with the Delta Reform Act and relevant provisions of the Delta Plan.

## **B. Delta Plan Regulatory Policies**

The Delta Stewardship Council adopted the Delta Plan on May 16, 2013. Subsequently, California's Office of Administrative Law approved the Delta Plan's fourteen regulatory policies, allowing them to become legally-enforceable regulations, on September 1, 2013 (Attachment 1). Of the fourteen policies in the Delta Plan, thirteen are considered technical in nature and the remaining policy – G P1(23 CCR Section 5002) - applies once the proposed action is determined to be a covered action and includes requirements for detailed findings to establish consistency with the Delta Plan. Two of 14 the technical policies deal with water resources, five apply to ecosystem restoration, two deal with "Delta as a Place" land use policies, and the remaining four are related to flood risk reduction. As described above, the proposed activity would have to implicate one of these regulatory policies in order to be considered a Covered Action.

## **C. Early Consultation**

If requested, the Council staff will meet with the agency's staff during early consultation to review the consistency of the proposed action and to offer non-binding advice as to whether the proposed plan, program, or project appears to be a covered action, provided that the ultimate determination in this regard must be made by the agency.

## **C. Certification of Consistency**

A state or local agency that proposes to undertake a covered action, prior to initiating the implementation of that covered action, is required to submit a written certification to the Council, with detailed findings demonstrating that the covered action is consistent with the Delta Plan. Detailed findings must address consistency with each policy in the Delta Plan that is implicated by the covered action.

Certifications of Consistency are to be submitted on-line. The Council has developed an on-line process to assist state and local agencies in preparing the required certification. The certification process will demonstrate whether a covered action is consistent with the Delta Plan by being fully transparent, disclosing potential environmental impacts, and identifying how best available science will be used in decision-making and adaptive management.

## **D. Appeals**

The Council has appellate authority to review the consistency of covered actions with the Delta Plan if they are challenged. Any person who claims that a covered action is inconsistent with the Delta Plan and, as a result would have a significant adverse impact has 30 calendar days from the time of consistency certification to file an appeal with the Council.

As required by the Delta Reform Act (see Water Code Section 85225.30), the Council adopted on September 23, 2010 administrative procedures governing appeals. These procedures are included in the Delta Plan (Appendix D). The purpose of the procedures – which have the force of law - is to govern how the Council considers appeals (1) with regard to adequacy of certifications of consistency submitted to the Council and (2) determinations by DFW with regard to BDCP satisfaction of Delta Plan “incorporation” requirements (Water Code Section 85320(e), Water Code Sections 85225.10 and 85225.30).

The Council is required to apply the standard of substantial evidence when reviewing covered action appeals. State or local agencies are required to submit detailed findings upon filing their consistency determination. These findings and the administrative record of the approving agency will provide the basis for the Council’s decision making. Upon receiving an appeal, the Council has 60 days to hear the appeal and an additional 60 days to make its decision and issue specific written findings. This timeline will typically allow the Council to consider appeals as part of its regularly scheduled meetings. If the covered action is found to be inconsistent, the project may not proceed until it is revised so that it is consistent with the Delta Plan.

#### **E. On-line Forms System for Consistency Certification and Appeals**

To assist local and state agencies in filing certifications of consistency and for entities wishing to file appeals, Council staff has developed an on-line system to guide entities through these processes and to provide a means for submitting all required information and documentation in an organized, comprehensive and timely manner. This system encourages transparency by providing the public with information on all consistency certifications and appeals filed with the Council and timelines for each action of the process. This on-line system went “live” on September 1, 2013 and is located on the Council’s website at (<http://deltacouncil.a.gov/covered-actions>).

#### **Current Status**

Council staff continues to actively engage in early consultations as requested by local and state agencies. Staff also continues to provide training workshops local and state entities on the covered actions process and to assist with understanding the Delta Plan and its 14 regulatory policies. The first certification of consistency was filed in August 2014 by DWR on its Sherman Island Whale’s Mouth project (see <http://coveredactions.deltacouncil.ca.gov/> for details). No appeals were filed on this covered action.

#### **Attachments**

Attachment 1: Delta Plan Regulatory Policies

# Delta Plan Policies

The Delta Plan contains a set of regulatory policies that will be enforced by the Delta Stewardship Council’s appellate authority and oversight, described in Chapter 2.

POLICY NUMBER	SHORT TITLE	POLICY LANGUAGE
<b>Chapter 2</b>		
G P1 (23 CCR Section 5002)	Detailed Findings to Establish Consistency with the Delta Plan	<ul style="list-style-type: none"> <li data-bbox="735 756 1437 945">(a) This policy specifies what must be addressed in a certification of consistency filed by a State or local public agency with regard to a covered action. This policy only applies after a “proposed action” has been determined by a State or local public agency to be a covered action because it among other things is covered by one or more of the policies contained in Article 3. Inconsistency with this policy may be the basis for an appeal.</li> <li data-bbox="735 966 1437 1890">(b) Certifications of Consistency must include detailed findings that address each of the following requirements:               <ul style="list-style-type: none"> <li data-bbox="787 1039 1437 1459">1. Covered actions, in order to be consistent with the Delta Plan, must be consistent with this regulatory policy and with each of the policies contained in Article 3 implicated by the covered action. The Delta Stewardship Council acknowledges that in some cases, based upon the nature of the covered action, full consistency with all relevant regulatory policies may not be feasible. In those cases, the agency that files the certification of consistency may nevertheless determine that the covered action is consistent with the Delta Plan because on whole, that action is consistent with the coequal goals. That determination must include a clear identification of areas where consistency with relevant regulatory policies is not feasible, an explanation of the reasons why it is not feasible, and an explanation of how the covered action nevertheless, on whole, is consistent with the coequal goals. That determination is subject to review by the Delta Stewardship Council on appeal.</li> <li data-bbox="787 1470 1437 1627">2. Covered actions not exempt from CEQA must include applicable feasible mitigation measures identified in the Delta Plan’s Program EIR (unless the measure(s) are within the exclusive jurisdiction of an agency other than the proposing agency), or substitute mitigation measures that the proposing agency finds are equally or more effective.</li> <li data-bbox="787 1648 1437 1701">3. As relevant to the purpose and nature of the project, all covered actions must document use of best available science.</li> <li data-bbox="787 1711 1437 1890">4. Ecosystem restoration and water management covered actions must include adequate provisions, appropriate to the scope of the covered action, to assure continued implementation of adaptive management. This requirement shall be satisfied through both of the following:                   <ul style="list-style-type: none"> <li data-bbox="836 1858 1437 1890">A. An adaptive management plan that describes the approach to</li> </ul> </li> </ul> </li> </ul>

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		<p>be taken consistent with the adaptive management framework in Appendix 1B, and</p> <p>B. Documentation of access to adequate resources and delineated authority by the entity responsible for the implementation of the proposed adaptive management process.</p> <p>(c) A conservation measure proposed to be implemented pursuant to a natural community conservation plan or a habitat conservation plan that was:</p> <ol style="list-style-type: none"> <li>1. Developed by a local government in the Delta, and;</li> <li>2. Approved and permitted by the Department of Fish and Wildlife prior to the date of the Delta Plan's adoption</li> </ol> <p>Is deemed to be consistent with Sections 5005 through 5009 of this chapter if the certification of consistency filed with regard to the conservation measure includes a statement confirming the nature of the conservation measure from the Department of Fish and Wildlife.</p>

**Chapter 3**

WR P1 (23 CCR Section 5003)	Reduce Reliance on the Delta through Improved Regional Water Self Reliance	<p>(a) Water shall not be exported from, transferred through, or used in the Delta if all of the following apply:</p> <ol style="list-style-type: none"> <li>(1) One or more water suppliers that would receive water as a result of the export, transfer or use have failed to adequately contribute to reduced reliance on the Delta and improved regional self-reliance consistent with all of the requirements listed in paragraph (1) of subsection (c);</li> <li>(2) That failure has significantly caused the need for the export, transfer or use; and</li> <li>(3) The export, transfer, or use would have a significant adverse environmental impact in the Delta.</li> </ol> <p>(b) For purposes of Water Code Section 85057.5(a)(3) and Section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action to export water from, transfer water through, or use water in the Delta, but does not cover any such action unless one or more water suppliers would receive water as a result of the proposed action.</p> <p>(c) (1) Water suppliers that have done all of the following are contributing to reduced reliance on the Delta and improved regional self-reliance and are therefore consistent with this policy:</p> <ol style="list-style-type: none"> <li>(A) Completed a current Urban or Agricultural Water Management Plan (Plan) which has been reviewed by the Department of Water Resources for compliance with the applicable requirements of Water Code Division 6, Parts 2.55, 2.6, and 2.8;</li> <li>(B) Identified, evaluated and commenced implementation, consistent with the implementation schedule set forth in the management Plan, of all programs and projects included in the Plan that are locally cost effective and technically feasible which reduce reliance on the Delta; and,</li> <li>(C) Included in the Plan, commencing in 2015, the expected outcome for measurable reduction in Delta reliance and improvement in regional self-reliance. The expected outcome</li> </ol>
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for measurable reduction in Delta reliance and improvement in regional self-reliance shall be reported in the Plan as the reduction in the amount of water used, or in the percentage of water used, from the Delta watershed. For the purposes of reporting, water efficiency is considered a new source of water supply, consistent with Water Code Section 1011(a).

- (2) Programs and projects that reduce reliance could include, but are not limited to, improvements in water use efficiency, water recycling, storm water capture and use, advanced water technologies, conjunctive use projects, local and regional water supply and storage projects, and improved regional coordination of local and regional water supply efforts.

WR P2 (23 CCR Section 5004)	Transparency in Water Contracting	<ul style="list-style-type: none"> <li>(a) The contracting process for water from the State Water Project (SWP) and/or the Central Valley Project (CVP) must be done in a publicly transparent manner consistent with applicable policies of the Department of Water Resources and the Bureau of Reclamation referenced below.</li> <li>(b) For purposes of Water Code section 85057.5(a)(3) and Section 5001(j)(1)(E) of this Chapter, this policy covers the following:               <ul style="list-style-type: none"> <li>(1) With regard to water from the State Water Project, a proposed action to enter into or amend a water supply or water transfer contract subject to Department of Water Resources Guidelines 03-09 and/or 03-10 (each dated July 3, 2003), which are attached as Appendix 2A; and,</li> <li>(2) With regard to water from the Central Valley Project, a proposed action to enter into or amend a water supply or water transfer contract subject to Section 226 of P.L. 97-293, as amended or Section 3405(a)(2)(B) of the Central Valley Project Improvement Act, Title XXXIV of Public Law 102-575, as amended, which are attached as Appendix 2B, and Rules and Regulations promulgated by the Secretary of the Interior to implement these laws.</li> </ul> </li> </ul>
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**NOTE:** Authority cited: Section 85210(i), Water Code.

**Reference:** Sections 85020, 85021, 85300 and 85302, Water Code.

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**Chapter 4**

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ER P1 (23 CCR Section 5005)	Update Delta Flow Objectives	<ul style="list-style-type: none"> <li>(a) The State Water Resources Control Board’s Bay Delta Water Quality Control Plan flow objectives shall be used to determine consistency with the Delta Plan. If and when the flow objectives are revised by the State Water Resources Control Board, the revised flow objectives shall be used to determine consistency with the Delta Plan.</li> <li>(b) For purposes of Water Code section 85057.5(a)(3) and Section 50031(j)(1)(E) of this Chapter, the policy set forth in subsection (a) covers a proposed action that could significantly affect flow in the Delta.</li> </ul>
ER P2 (23 CCR Section 5006)	Restore Habitats at Appropriate Elevations	<ul style="list-style-type: none"> <li>(a) Habitat restoration must be carried out consistent with Appendix 3, which is Section II of the Draft Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions (Department of Fish and Wildlife 2011). The elevation map attached as Appendix 4 should be used as a guide for determining appropriate habitat restoration actions based on an area’s elevation. If a proposed habitat restoration action is not consistent with Appendix 4, the proposal shall provide rationale for the deviation based on best available science.</li> <li>(b) For purposes of Water Code Section 85057.5(a)(3) and Section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action that</li> </ul>

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ER P3 (23 CCR Section 5007)	Protect Opportunities to Restore Habitat	<p>includes habitat restoration.</p> <p>(a) Within the priority habitat restoration areas depicted in Appendix 5, significant adverse impacts to the opportunity to restore habitat as described in Section 5006, must be avoided or mitigated.</p> <p>(b) Significant impacts referenced in subsection (a) will be deemed to be avoided or mitigated if the project is designed and implemented so that it will not preclude or otherwise interfere with the ability to restore habitat as described in Section 5006.</p> <p>(c) Mitigation shall be determined, in consultation with the Department of Fish and Wildlife, considering the size of the area impacted by the covered action and the type and value of habitat that could be restored on that area, taking into account existing and proposed restoration plans, landscape attributes, the elevation map shown in Appendix 4 and other relevant information about habitat restoration opportunities of the area.</p> <p>(c) For purposes of Water Code Section 85057.5(a)(3) and Section 5001(j)(1)(E) of this Chapter, this policy covers proposed actions in the priority habitat restoration areas depicted in Appendix 5. It does not cover proposed actions outside those areas.</p>
ER P4 (23 CCR Section 5008)	Expand Floodplains and Riparian Habitats in Levee Projects	<p>(a) Levee projects must evaluate and where feasible incorporate alternatives, including the use of setback levees, to increase floodplains and riparian habitats. Evaluation of setback levees in the Delta shall be required only in the following areas (shown in Appendix 8): (1) The Sacramento River between Freeport and Walnut Grove, the San Joaquin River from the Delta boundary to Mossdale, Paradise Cut, Steamboat Slough, Sutter Slough; and the North and South Forks of the Mokelumne River, and (2) Urban levee improvement projects in the cities of West Sacramento and Sacramento.</p> <p>(b) For purposes of Water Code Section 85057.5(a)(3) and Section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action to construct new levees or substantially rehabilitate or reconstruct existing levees.</p>
ER P5 (23 CCR Section 5009)	Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species	<p>(a) 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.</p> <p>(b) For purposes of Water Code Section 85057.5(a)(3) and Section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action that has the reasonable probability of introducing, or improving habitat conditions for, nonnative invasive species.</p>
<b>Chapter 5</b>		
DP P1 (23 CCR Section 5010)	Locate New Urban Development Wisely	<p>(a) New residential, commercial, and industrial development must be limited to the following areas, as shown in Appendix 6 and Appendix 7:</p> <p>(1) Areas that city or county general plans as of the date of the Delta Plan's adoption, designate for residential, commercial, and industrial development in cities or their spheres of influence;</p> <p>(2) Areas within Contra Costa County's 2006 voter-approved urban limit line, except no new residential, commercial, and industrial development may occur on Bethel Island unless it is consistent with the Contra Costa County general plan effective as of the date of the Delta Plan's adoption;</p>

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- (3) Areas within the Mountain House General Plan Community Boundary in San Joaquin County; or,
- (4) The unincorporated Delta towns of Clarksburg, Courtland, Hood, Locke, Ryde, and Walnut Grove.
- (b) Notwithstanding subsection (a), new residential, commercial, and industrial development is permitted outside the areas described in subsection (a) if it is consistent with the land uses designated in county general plans as of the date of the Delta Plan's adoption, and is otherwise consistent with this Chapter.
- (c) For purposes of Water Code Section 85057.5(a)(3) and Section 5001(j)(1)(E) of this Chapter, this policy covers proposed actions that involve new residential, commercial, and industrial development that is not located within the areas described in subsection (a). In addition, this policy covers any such action on Bethel Island that is inconsistent with the Contra Costa County general plan effective as of the date of the Delta Plan's adoption. This policy does not cover commercial recreational visitor-serving uses or facilities for processing of local crops or that provide essential services to local farms, which are otherwise consistent with this chapter.
- (d) This policy is not intended in any way to alter the concurrent authority of the Delta Protection Commission to separately regulate development in the Delta's Primary Zone.

DP P2 (23 CCR Section 5011)    Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats

- (a) Water management facilities, ecosystem restoration, and flood management infrastructure must be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence 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. Measures to mitigate conflicts with adjacent uses may include, but are not limited to, buffers to prevent adverse effects on adjacent farmland.
- (b) For purposes of Water Code Section 85057.5(a)(3) and Section 5001(j)(1)(E) of this Chapter, this policy covers proposed actions that involve the siting of water management facilities, ecosystem restoration, and flood management infrastructure.

**Chapter 7**

RR P1 (23 CCR Section 5012)    Prioritization of State Investments in Delta Levees and Risk Reduction

- (a) Prior to the completion and adoption of the updated priorities developed pursuant to Water Code Section 85306, the interim priorities listed below shall, where applicable and to the extent permitted by law, guide discretionary State investments in Delta flood risk management. Key priorities for interim funding include emergency preparedness, response, and recovery as described in Paragraph (1), as well as Delta levees funding as described in Paragraph (2).
  - (1) Delta Emergency Preparedness, Response, and Recovery: Develop and implement appropriate emergency preparedness, response, and recovery strategies, including those developed by the Delta Multi-Hazard Task Force pursuant to Water Code Section 12994.5.
  - (2) Delta Levees Funding: The priorities shown in the following table are meant to guide budget and funding allocation strategies for levee improvements. The goals for funding priorities are all important, and it is expected that over time the Department of Water Resources



must balance achievement of those goals. Except on islands planned for ecosystem restoration, improvement of non-project Delta levees to the Hazard Mitigation Plan (HMP) standard may be funded without justification of the benefits. Improvements to a standard above HMP, such as that set by the U.S. Army Corps of Engineers under Public Law 84-99 (P.L. 84-99), may be funded as befits the benefits to be provided, consistent with the Department of Water Resource's current practices and any future adopted investment strategy.

**Priorities for State Investment in Delta Integrated Flood Management**  
*Categories of Benefit Analysis*

Goals	Localized Flood Protection	Levee Network	Ecosystem Conservation
1	Protect existing urban and adjacent urbanizing areas by providing 200-year flood protection.	Protect water quality and water supply conveyance in the Delta, especially levees that protect freshwater aqueducts and the primary channels that carry fresh water through the Delta.	Protect existing and provide for a net increase in channel-margin habitat.
2	Protect small communities and critical infrastructure of Statewide importance (located outside of urban areas).	Protect flood water conveyance in and through the Delta to a level consistent with the State Plan of Flood Control for project levees.	Protect existing and provide for net enhancement of floodplain habitat.
3	Protect agriculture and local working landscapes.	Protect cultural, historic, aesthetic, and recreational resources (Delta as Place).	Protect existing and provide for net enhancement of wetlands.

- (b) For purposes of Water Code Section 85057.5(a)(3) and Section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action that involves discretionary State investments in Delta flood risk management, including levee operations, maintenance, and improvements. Nothing in this policy establishes or otherwise changes existing levee standards.

RR P2 (23 CCR Section 5013) Require Flood Protection for Residential Development in Rural Areas

- (a) New residential development of five or more parcels shall be protected through floodproofing to a level 12 inches above the 100 year base flood elevation, plus sufficient additional elevation to protect against a 55-inch rise in sea level at the Golden Gate, unless the development is located within:
- (1) Areas that city or county general plans, as of the date of the Delta Plan's adoption, designate for development in cities or their spheres of influence;
  - (2) Areas within Contra Costa County's 2006 voter-approved urban limit line, except Bethel Island;
  - (3) Areas within the Mountain House General Plan Community

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		<p>Boundary in San Joaquin County; or</p> <p>(4) The unincorporated Delta towns of Clarksburg, Courtland, Hood, Locke, Ryde, and Walnut Grove, as shown in Appendix 7.</p> <p>(b) For purposes of Water Code Section 85057.5(a)(3) and Section 5003(j)(1)(E) of this Chapter, this policy covers a proposed action that involves new residential development of five or more parcels that is not located within the areas described in subsection (a).</p>
RR P3 (23 CCR Section 5014)	Protect Floodways	<p>(a) No encroachment shall be allowed or constructed in a floodway, unless it can be demonstrated by appropriate analysis that the encroachment will not unduly impede the free flow of water in the floodway or jeopardize public safety.</p> <p>(b) For purposes of Water Code Section 85057.5(a)(3) and Section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action that would encroach in a floodway that is not either a designated floodway or regulated stream.</p>
RR P4 (23 CCR Section 5015)	Floodplain Protection	<p>(a) No encroachment shall be allowed or constructed in any of the following floodplains unless it can be demonstrated by appropriate analysis that the encroachment will not have a significant adverse impact on floodplain values and functions:</p> <ol style="list-style-type: none"> <li>(1) The Yolo Bypass within the Delta;</li> <li>(2) The Cosumnes River-Mokelumne River Confluence, as defined by the North Delta Flood Control and Ecosystem Restoration Project (McCormack-Williamson), or as modified in the future by the Department of Water Resources or the U.S. Army Corps of Engineers (Department of Water Resources 2010a); and,</li> <li>(3) The Lower San Joaquin River Floodplain Bypass area, located on the Lower San Joaquin River upstream of Stockton immediately southwest of Paradise Cut on lands both upstream and downstream of the Interstate 5 crossing. This area is described in the Lower San Joaquin River Floodplain Bypass Proposal, submitted to the Department of Water Resources by the partnership of the South Delta Water Agency, the River Islands Development Company, Reclamation District 2062, San Joaquin Resource Conservation District, American Rivers, the American Lands Conservancy, and the Natural Resources Defense Council, March 2011. This area may be modified in the future through the completion of this project.</li> </ol> <p>(b) For purposes of Water Code Section 85057.5(a)(3) and Section 5001(j)(1)(E) of this Chapter, this policy covers a proposed action that would encroach in any of the floodplain areas described in subsection (a).</p> <p>(c) This policy is not intended to exempt any activities in any of the areas described in subsection (a) from applicable regulations and requirements of the Central Valley Flood Protection Board.</p>