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August 3, 2010

VIA E-MAIL

Chris Stevens
Chief Counsel
Delta Stewardship Council
650 Capitol Mall, Fifth Floor
Sacramento, CA 95814

Re: *Administrative Procedures Governing Appeals*

Dear Mr. Stevens:

Thank you for the opportunity to comment on the draft Administrative Procedures Governing Appeals ("Procedures"). Although we appreciate the effort that has gone into drafting these Procedures, we have a number of concerns. We urge the Council to seriously consider them as it works toward finalizing the Procedures.

As a general matter, the Procedures are cumbersome, lacking in certain detail, and at times confusing. More specifically:

- **Rule 2** requires local agencies to consult with the Council no later than 30 days before submitting its certification to the Council pursuant to Water Code § 85225. Our reading of the law, however, is that such consultation on covered actions should not be mandatory. (*See* Water Code § 85255.5; *compare with* Water Code § 85212.) Certainly, while our county would make every effort to consult with the Council, we question the necessity of making this an actual requirement.
- In addition, **Rule 2** could require such consultation to be with a member of the Council itself. This is a bit awkward, as that same Council Member would presumably hear an appeal of the results of such consultation.
- In juxtaposition to the simplicity of Water Code § 85255, **Rule 3** renders the process significantly more cumbersome. First, it requires the local public agency to "post its draft certification on its website, post it conspicuously in its office, and mail it to all persons requesting notice" at least 30 days prior to its submission. It is difficult to think of other

agency actions requiring such exhaustive notice. Second, it requires an agency, and not the Council, to receive comments on the draft certification and include those in the administrative record. This is burdensome. Besides, such comments would likely already be contained elsewhere in the administrative record.

- In addition to being cumbersome, **Rule 3** is somewhat confusing. If an agency has to take action on the draft certification before submitting it to the Council, then the 30 days should be prior to the local public agency's action on the draft certification itself, and not 30 days prior to its submission.
- The provisions regarding augmentation of the administrative record are very problematic. **Rule 4** provides what is traditionally contemplated by an administrative record: an indexed set of documents that were "before the state or local agency at the time it made its certification." (*See, e.g.*, Pub. Res. Code § 21167.6 (requirements in CEQA litigation).) However, **Rule 9** provides that an appellant may augment the record with "additional information from a reliable source that is both directly pertinent to the issue of consistency, and was widely-known and available at the time of the agency's certification." Moreover, **Rule 10** allows the Council itself to augment the record with similar information. Lastly, **Rule 11** allows "any interested person" to augment the record. There are a number of problems with these provisions. First, there appears to be no provision for a local public agency to contest such augmentation. Second, with all this augmentation, the proceeding becomes less and less like an "appeal," or a review of the agency's decision, which is fundamentally what this process entails, and more like a *de novo* hearing. Third, what exactly do "directly pertinent" and "widely-known and available" mean? This could be very broad, as there are literally hundreds if not thousands of documents concerning the Delta, a healthy number of which might meet this requirement. Fourth, this raises the real possibility that new issues could be raised on appeal. These latter two problems are particularly raised by **Rule 11**.
- **Rule 4** requires the agency to convert hard copies to electronic form, which is burdensome.
- Has the "checklist" in **Rule 4** been drafted yet? We would be interested in seeing its content.
- **Rule 7** provides that an appeal is not considered "filed" until received and determined by Council staff to contain the requisite information. This is complicated by **Rule 9**, which permits the appellant to continue to augment the record after the appeal has been filed. The relationship between the two is a bit confusing.
- The notice requirements in **Rule 8** could be clearer. It is not clear that the notice has to provide the "when and where" of the appeal hearing.
- In **Rule 13(a)**, why would a mutually agreeable extension have to be approved by the Council's executive officer?

- **Rule 13(b)** should be fleshed out a bit. Would the Council hold a separate, initial hearing on such “dismissable” matters? Also, could the executive officer’s decision (if so delegated) be appealed to the Council? (If it cannot be, does this comport with the intent of the legislation to have the Council hear the appeals?)
- Will an agency be able to submit a response to the allegations made in the appeal? Without this ability, it is a fairly one-sided “briefing” process.
- What are the standards on appeal? For example, who has the burden of proof? What is that burden? **Rule 14** uses the term “substantial evidence.” What, exactly, does that mean? Also, what are the rules regarding presenting evidence? Is everything admissible?
- It is not clear to me whether or not the Council will, or even can, deliberate in closed session on the appeal.
- Assuming that an appeal is denied by the Council, will a local public agency have to start this entire process from scratch?

Thank you for considering the comments above as you draft these Procedures. We look forward to sharing these comments with you this Thursday. Should you have any questions about this letter, please feel free to contact me.

Sincerely,



Daniel M. Wolk
Deputy County Counsel

CC: Cliff Covey
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