



CITY OF STOCKTON

OFFICE OF THE CITY ATTORNEY
CITY HALL
425 NORTH EL DORADO STREET
STOCKTON, CA 95202-1997
TELEPHONE (209) 937-8333
FACSIMILE (209) 937-8898

January 14, 2013

Phil Isenberg, Chairman, and Council Members
Delta Stewardship Council
Attn: Cindy Messer, Delta Plan Program Manager
RulemakingProcessComment@deltacouncil.ca.gov
980 Ninth Street, Suite 1500
Sacramento, California 95814

CITY OF STOCKTON COMMENTS ON RULEMAKING PACKAGE FOR REGULATIONS CONTAINED IN DELTA PLAN

The City of Stockton (City) appreciates the opportunity to review and comment on the Delta Stewardship Council's (DSC's) Rulemaking Package submitted to the Office of Administrative Law on November 16, 2012. This letter provides the City's written comments on the Rulemaking Package in accordance with the DSC's Notice of Proposed Rulemaking.

The City has been an active participant in the public process associated with development of the Delta Plan. The City submitted detailed comments on the various Drafts of the Plan and the corresponding Draft Program EIR. The City's comprehensive comments on the DSC's Recirculated Draft Program Environmental Impact Report Final Draft Delta Plan are expressed in our separately transmitted comment letter, dated January 14, 2013, which is hereby incorporated by this reference.

The City will be substantially impacted by the Delta Plan and its accompanying Proposed Regulations. Specifically, over 50 percent (21,256 acres) of the City of Stockton's incorporated urban area and an additional 7,932 acres within the City's Sphere of Influence are located within the Secondary or Primary Zones of the Delta.

Background

California's Administrative Procedure Act (APA) provides, among other things, that the California Office Of Administrative Law (OAL) must review all regulations adopted and proposed for publication for compliance with the APA. (Gov. Code § 11349.1.) In doing so, the OAL is directed to use the following standards in its review: necessity, authority, clarity, consistency, reference, and nonduplication. (Gov. Code § 11349.1(a).) As

relevant to this comment letter, the APA and regulations implementing the APA proscribe the following meaning to certain of these standards:

- "Necessity" means the record of the rulemaking proceeding demonstrates by substantial evidence the need for a regulation to effectuate the purpose of the statute, court decision, or other provision of law that the regulation implements, interprets, or makes specific, taking into account the totality of the record. For purposes of this standard, evidence includes, but is not limited to, facts, studies, and expert opinion. (Gov. Code § 11349(a).) In order to meet the "Necessity" standard, the record of the rulemaking proceeding must include a statement of the *specific purpose* of each, along with information explaining *why each provision of the adopted regulation is required to carry out the described purpose of the provision*. (Cal Code Regs., tit 1, §10.)
- "Clarity" means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them. (Gov. Code § 11349(c).) A regulation is presumed to fail the "clarity" standard if, among other things:
 - the regulation can, on its face, be reasonably and logically interpreted to have more than one meaning
 - the regulation uses terms which do not have meanings generally familiar to those "directly affected"¹ by the regulation, and those terms are defined neither in the regulation nor in the governing statute
 - the regulation presents information in a format that is not readily understandable by persons "directly affected."(Cal. Code Regs., tit. 1, §16.)
- "Nonduplication" means that a regulation does not serve the same purpose as a state or federal statute or another regulation. This standard requires that an agency proposing to amend or adopt a regulation must identify any state or federal statute or regulation which is overlapped or duplicated by the proposed regulation and justify any overlap or duplication.² (Gov. Code § 11349(f).) A regulation serves the "same purpose" where it either "repeats or rephrases in whole or in part a state or federal statute or regulation." (Cal. Code Regs., tit. 1, §12.)

¹ A person or entity is presumed to be "directly affected" if they are legally required to comply with the regulation, are legally required to enforce the regulation, derive from the enforcement of the regulation a benefit that is not common to the public in general, or incur from the enforcement of the regulation a detriment that is not common to the public in general. (Cal. Code Regs., tit. 1, §16.)

² Government Code section 11349, subdivision (f) provides that the Nonduplication standard "is not intended to prohibit state agencies from printing relevant portions of enabling legislation in regulations when the duplication is necessary to satisfy the clarity standard in paragraph (3) of subdivision (a) of Section 11349.1". Instead, the Nonduplication standard is "intended to prevent the indiscriminate incorporation of statutory language in a regulation".

The Policies contained in the Delta Plan, that constitute the “regulations³” contained in the Regulatory Package being submitted to OAL for approval, fail to satisfy the standards set forth in the APA. As a general matter, the proposed regulations include a significant amount of unnecessary narrative language and statements of policy that make it difficult for the potentially regulated entities to discern precisely what is required of them.

Specific Comments On Proposed Regulations

Section 5003. Covered Action Defined

Covered Action is already specifically defined in Water Code section 85057.5. It is not clear why the proposed regulation repeats, verbatim, portions of Water Code section 85057.5 and changes and adds other language. In this regard, Section 5003 fails the Clarity, Nonduplication, and Necessity standards of the APA. Instead of attempting to redefine “Covered Action,” the regulations, if anything, should simply define terms contained within the statutory definition. Additional confusion arises from phrases and words like “unusual circumstances” contained in Section 5003(b)(2)(D), and the narrative examples provided in Section 5003(b)(2)(D)(i) and (ii).

In addition, Section 5003 conflicts with those provisions of the Public Resources Code governing projects that are exempt from CEQA (Pub. Res. Code §§21080 et seq.). Water Code section 85075.5 uses CEQA’s definition of “project,” yet the regulations purport to only incorporate *some* of the CEQA exemptions. The conflict it creates is that various projects are exempt from CEQA (require no environmental review) and, by making them subject to the Council’s “consistency” determinations, those projects that should be exempt from environmental (CEQA) review will nonetheless have to undergo significant environmental review in the context of consistency with the Delta Plan. This at least appears to be a consequence of using CEQA’s project definition but only including a limited number of CEQA’s exemptions. The regulations should more clearly delineate what will be subject to environmental review, and the Council should explain why not all CEQA exemptions are included.

Section 5004. Certifications of Consistency

Subdivision (a) is narrative and appears unnecessary. Subdivision (b) is unclear. It provides, among other things, that “[c]overed actions must be consistent with the coequal goals, as well as with each of the regulatory policies contained in Article 3 implicated by the covered action.” First, it is not clear how, if at all, the “regulatory policies” contained in the Delta Plan are different from the “coequal goals.” Presumably, the Delta Plan’s regulatory scheme is in furtherance of the coequal goals. Water Code section 85225 provides that a written certification of consistency must include detailed

³ All references to the regulations proposed in the regulatory package are to Chapter 2 of Division 6 of Title 23 of the California Code of Regulations, unless otherwise noted.

findings as to whether the covered action is consistent with the *Delta Plan*. The regulation is confusing because a local agency cannot determine whether consistency with the Delta Plan is also consistent with the coequal goals. This provision suggests that a covered action could be consistent with the Delta Plan but be inconsistent with the coequal goals.

Subdivision (b)(4) provides mandatory language regarding adaptive management related to ecosystem restoration and "water management covered actions." However, it is unclear what is meant by "water management covered actions." Subdivision (b)(4) also provides that these actions must "include adequate provisions, appropriate to the scope of the covered actions, to assure continued implementation of adaptive management." The regulations, however, do not explain what "adequate provisions" are, explain what is meant by "appropriate to the scope of the covered actions," or what is needed to "assure" continued implementation. Are the assurances sought financial? Legal? Physical? Local agencies cannot be left to guess precisely what needs to be included in Certifications of Consistency.

Section 5004 fails to comply with the Necessity and Clarity standards contained in the APA.

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

Section 5005 sets forth a proscription against, among other things, using water in the Delta. However, this provision is unclear. For example, subdivision (c)(1) provides that a water supplier cannot "use" water from the Delta unless, among other things, the water supplier has "adequately contribute[d] to reduced reliance on the Delta and improved regional self-reliance consistent with all of the requirements listed" in subdivision (e)(1). Subdivision (e)(1) provides that water suppliers that have done all of the things contained in the paragraph "are contributing to reduced reliance on the Delta . . ." The regulation is unclear as to whether "contributing to reduced reliance" as set forth in subdivision (e)(1) have "adequately contribute[d]" for the purpose of subdivision (c)(1).

Moreover, Section 5005 conflicts with California Water Code section 11460 and 10505, among others, which provides a preference to the use of water in the "areas of origin." Section 5005 can be read to favor the export of water for use outside the areas of origin (the Delta) over the use of water in the areas of origin, in direct conflict with Water Code sections 10505 and 11460, among others.

Section 5007. Update Delta Flow Objectives

Section 5007, subdivision (a), provides a "recommendation" to the SWRCB that it "should update the Bay-Delta Water Quality Control Plan objectives" within certain time frames. Subdivision (a) is unnecessary, as it simply provides a suggestion to another State agency. Subdivision (d) provides that certain policies cover "a proposed action

that could affect flow in the Delta.” It is unclear, however, what is meant by “could affect flow.” For example, the construction of a bridge abutment “could affect flow”. The construction of a dam could also “affect flow,” as could the diversion or discharge of water. It is entirely unclear what this regulation is intended on impacting. It is also unclear whether this regulation seeks to regulate activities that affect the timing, magnitude, quality, or frequency of flow. Section 5007 does not comply with the Clarity or Necessity standards in the APA.

Section 5010. Expand Floodplains and Riparian Habitats in Levee Projects

Section 5010 provides for alternatives to levee projects to increase floodplains and riparian habitat. It appears to incorporate materials not yet developed, namely “criteria developed by the Department of Water Resources, in conjunction with the Central Valley Flood Protection Board, the Department of Fish and Game, and the Sacramento-San Joaquin Delta Conservancy.” It is unclear what these future criteria, when ultimately developed, would do and whether they would be clear in the context of Section 5010. This regulation is therefore unclear.

Section 5012. Locate New Development Wisely

Section 5012 proscribes “new urban development” in the Plan area in all but limited geographical areas. The reach and scope of Section 5012 has been, and continue to be, of great concern to the City of Stockton, as the City’s core area is located within the Secondary Zone of the Delta. In its June 8, 2012 comment letter to the DSC on the 6th Draft Delta Plan (which is incorporated by this reference), the City noted that the language in the Delta Plan’s proposed policy DP P1 (Locate New Development Wisely) was unclear and suggested revised language to provide better clarity. Similarly, On July 17, 2012, the City of Stockton transmitted a letter to DSC Chairman Phil Isenberg requesting confirmation that planned development, consistent with an adopted General Plan within an urban and urbanizing area in the Secondary Zone of the Delta and in a sphere of influence or urban limit line, is geographically exempt from the certification of consistency requirements of the Delta Plan (see Attachment 1: City of Stockton Letter to Delta Stewardship Council on Exemption of Urban/Urbanizing Areas, Dated July 17, 2012).

We have continued to get clarity on the application of Section 5012 specifically to various existing and potential future projects in the City. Absolute clarity on this issue is critical to the City as a literal reading of Section 5012 could prohibit certain development – and even redevelopment in the City’s core downtown area and other areas. Even the Council’s most recent letter to the City, dated November 8, 2012 (and attached hereto as Attachment 2) recognizes that the application of Section 5012 to certain projects is unclear. In that letter, the Council explained that “routine urban development in areas already planned for urban uses in cities, their spheres of influence, or other urban areas *will rarely if ever* cross the threshold to require certifications of consistency with the Delta Plan.” (November 8, 2012 letter, page 3.) As it relates to projects already in the pipeline, the Council recommended “that the project proponents should obtain written

determinations that they fall within these exemptions from the applicable State or local agencies that approved and/or funded the projects.” (November 8, 2012 letter, page 2.) However, it is the Council itself that should be able to say whether these projects are or are not subject to the requirements for certifications of consistency. The inability to opine on whether or not these project are subject to the Delta Plan’s consistency determinations is further evidence that the proposed regulations are unclear.

Comments on Cost Analysis For Proposed Regulations

The Council has prepared a Cost Analysis as required by Government Code sections 11346.3 and 11346.5. The Cost Analysis, however, appears to suffer from substantial deficiencies.

First, the discussion regarding the ability of local agencies to “recover costs” associated with the implementation of the Delta Plan is wrong and out of date. In this regard, the Cost Analysis relies on the case of *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, to suggest that “regulatory fees” can simply be imposed to recover costs. This case, however, is based on the law prior to the passage of Proposition 26 – a proposition that further restricted the ability of state and local agencies to raise revenue and recover certain costs. (See *California Farm Bureau Federation v. State Water Resources Control Board* (2011) 51 Cal.4th 421, 428 (fn.2) “[o]n November 2, 2010, the voters approved Proposition 26, which requires a two-thirds supermajority vote of the Legislature to pass certain fees. None of the parties have asserted that the law enacted by Proposition 26 applies to this case”].) The Cost Analysis, to be accurate and informative, should consider the ability of local agencies to recover costs in light of Proposition 26.

Moreover, the Cost Analysis assumes that most of the regulatory components of the Delta Plan will have no costs associated with implementation. This is somewhat surprising, given the Cost Analysis recognizes that “the Delta Plan policies will become regulations that all State and local agencies, as they are identified within each policy, must observe.” (Cost Analysis, p.12.) Yet, the Cost Analysis argues that Section 5005 “does not mandate substantial new costs on water suppliers” because those water suppliers are already subject to the water management planning and implementation of existing laws set forth in Section 5005. For Section 5006, the Cost Analysis states that this provision simply provides that contracting “will follow [already] established procedures” and therefore “imposes no new costs to state or local agencies or on private entities.” (Cost Analysis, p.14.) For Section 5007, the Cost Analysis states that “no mandates are made” through the proposed regulation and, therefore, there are no additional costs on any state or local agencies or on private entities. (Cost Analysis, p.14.) The discussion of Section 5008 is remarkably similar, explaining that Section 5008 “does not mandate any additional habitat restoration actions nor is it likely to significantly alter future restoration plans” and therefore “imposes no new costs.” (Cost Analysis, Page 14.)

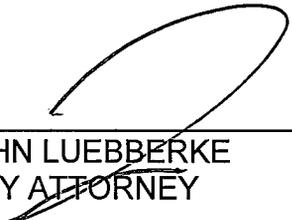
The same is true for Section 5010 (policy only requires *consideration* of alternatives and therefore is not anticipated to impose additional costs); Section 5011 (policy would already be covered by required CEQA mitigation and therefore imposes no new costs); Section 5012 (policy imposes no direct costs); Section 5013 (“[t]his policy does not differ significantly from existing conditions”); and Section 5014 (recognizes existing efforts underway and claims no additional costs).

The analysis used in the Cost Analysis appears to contradict the Delta Plan, the Proposed Regulations, and the Initial Statement of Reasons supporting the regulations. The Initial Statement of Reasons argues that “[t]he adoption of these regulatory policies is necessary to carry out the legislative requirement that the Council adopt a legally enforceable long-term management plan for the Delta” and “are necessary to carry out the legislative intent of achieving the coequal goals and objections specified” in the Water Code. (Initial Statement of Reasons, p.1) The Cost Analysis, however, argues that the Regulations impose no additional costs on anyone, in part, because existing law already imposes the same mandates contained in the Regulations. The Council cannot have it both ways. Either the proposed regulations are indeed necessary to effectuate the legislation – and the associated costs are attributable to the regulations – or, as argued in the Cost Analysis, they are not necessary.

Conclusion

The Proposed Regulations fail to meet the standards set forth in the APA for clarity, nonduplication, and necessity and must therefore be revised. The cost analysis must be redone to reflect the actual costs that will flow from the implementation of the Delta Plan.

Should you have any questions or wish to discuss these comments, please contact City Attorney John Luebberke at (209) 937-8934 (John.Luebberke@stocktongov.com) or Daniel Kelly, Somach, Simmons, & Dunn at (916) 446-7979 (dkelly@somachlaw.com).



JOHN LUEBBERKE
CITY ATTORNEY

JL:jm

Attachments

1. City of Stockton Letter to Delta Stewardship Council on Exemption of Urban/Urbanizing Areas, Dated July 17, 2012.
2. Delta Stewardship Council November 8, 2012 Response to City of Stockton July 17, 2012 Letter.

emc: Senator Fran Pavley, Chair, Senate Natural Resources & Water Committee (SNR&WC) w/attachments
Senator Anthony Cannella, Vice Chair, SNR&WC w/attachments

City of Stockton Comments on Rulemaking Package for Regulations in Delta Plan
January 14, 2013
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Senator Noreen Evans, SNR&WC w/attachments
Senator Jean Fuller, SNR&WC w/attachments
Senator Hanna-Beth Jackson, SNR&WC w/attachments
Senator Ricardo Lara, SNR&WC w/attachments
Senator Bill Monning, SNR&WC w/attachments
Senator Michael J. Rubio, SNR&WC w/attachments
Senator Lois Wolk, SNR&WC w/attachments
The Honorable Joan Buchanan, Member of the Assembly w/attachments
The Honorable Cathleen Galgiani, Member of the Senate w/attachments
Secretary John Laird, CA Natural Resources Agency w/attachments
Susanna Schlendorf, Chief of Staff for the Honorary Joan Buchanan, Member of the Assembly w/attachments
Mayor and Stockton City Council w/attachments
Bob Deis, City Manager w/attachments
Kurt O. Wilson, Deputy City Manager w/attachments
John Lueberke, City Attorney w/attachments
Mel Lytle, Municipal Utilities Director w/attachments
Steve Chase, Community Development Director w/attachments
Wendy Saunders, Economic Development Director w/attachments
Forest Ebbs, Deputy Director, CDD/Planning and Engineering Services w/attachments
David Stagnaro, AICP, Planning Manager, CDD/Planning and Engineering Services w/attachments
Stockton Planning Commission w/attachments
Stockton Development Oversight Commission w/attachments
San Joaquin County Board of Supervisors w/attachments
Manuel Lopez, San Joaquin County Administrator w/attachments
David Wooten, San Joaquin County Counsel w/attachments
Terry Dermody, San Joaquin County Special Water Counsel w/attachments
Elena Reyes, San Joaquin County Deputy County Administrator w/attachments
Tom Gau, San Joaquin County Public Works Director w/attachments
Kerry Sullivan, San Joaquin County Community Development Director w/attachments
Richard Aschieris, Director, Port of Stockton w/attachments
Steven Herum, Legal Counsel, Port of Stockton w/attachments
Mike Machado, Delta Protection Commission w/attachments
Delta Coalition w/attachments
Delta Counties Coalition w/attachments
Delta Caucus (Farm Bureau) w/attachments
Stephen Qualls, League of California Cities w/attachments
David Jones, Emanuels Jones & Associates w/attachments
Barry Brokaw and Donne Brownsey, Sacramento Advocates, Inc. w/attachments
Paul Simmons and Dan Kelly, Somach Simmons & Dunn w/attachments
Michael Niblock, Principal, MMN Planning Solutions w/attachments
Chris Knopp, Executive Officer, Delta Stewardship Council w/attachments
Dan Ray, Chief Deputy Executive Officer, Delta Stewardship Council w/attachments
Kevan Samsam, Delta Stewardship Council w/attachments
recirculateddpeircomments@deltacouncil.ca.gov w/attachments
deltaplancomment@deltacouncil.ca.gov w/attachments
RulemakingProcessComment@deltacouncil.ca.gov w/attachments

ANN JOHNSTON
Mayor

KATHERINE M. MILLER
Vice Mayor
District 2



CITY OF STOCKTON

OFFICE OF THE CITY COUNCIL

CITY HALL • 425 N. El Dorado Street • Stockton, CA 95202-1997

209/937-8244 • Fax 209/937-8568

www.stocktongov.com

ELBERT H. HOLMAN, JR.
District 1

PAUL CANEPA
District 3

DIANA LOWERY
District 4

SUSAN TALAMANTES EGGMAN
District 5

DALE FRITCHEN
District 6

July 17, 2012

Phil Isenberg, Chairman
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Dear Chairman Isenberg:

Pursuant to your testimony on July 3, 2012 before the Senate Natural Resources and Water Committee during the hearing on AB 1095 (Buchanan) and the direction and request by Chair Fran Pavley to clarify expeditiously the status of projects within the secondary zone, we are requesting your prompt attention and response to address and resolve our concerns which were discussed at this hearing.

As you already know, during that hearing, you stated, in part:

"... in August 2011, we (the Delta Stewardship Council (DSC)) issued the 5th Draft Delta Plan ..., saying that **areas within city boundaries and within their spheres of influence are not covered**. Ms. Buchanan has mentioned three projects ... (1) the Mountain House project was specifically listed as a project that was **not intended to be covered by key elements of the Delta Plan** and we (the DSC) incorporated the County of San Joaquin map on the Mountain House project (in the Delta Plan), (2) Ms Buchanan raised the issue of the Sanctuary project which is within the city limits of Stockton and, **by definition, is not covered**, and (3) the River Islands project, which has been around since 1994 and has gotten approval, is in the City of Lathrop..." (Emphasis added in bold and underline).

Based on the above-noted statements, I respectfully request written confirmation that development proposals within an urban or urbanizing area in the Secondary Zone of the Delta (as shown in the Delta Plan), which are located within existing city limits and/or adopted sphere of influence or urban limit lines are geographically exempt from the key provisions contained in the Final (6th) Draft Delta Plan and, therefore, exempt from the definition and certification requirements of covered actions. In addition, please cite the specific language in the Delta Plan that contains the exemption and/or exclusion of the subject areas from the Delta Plan and its key covered actions provisions. Such clarification and written confirmation is urgently needed.

As you recall during that July 3, 2012 hearing, the proponents of AB 1095 (Buchanan) shared with the committee the negative reactions of investors and other private and public interests involved in approved and future planned projects in the urban areas of the secondary zone. The lack of clarity with regard to the potential impact of the covered actions provisions of the draft Delta Plan on planned development within existing spheres of influence casts a giant shadow on both approved and planned development, halting activities already initiated or planned for, and threatening the economic revitalization of several Delta communities. Further, the City of Stockton provided the committee with examples of the state and federal compliance orders required for the water treatment utilities to upgrade their water treatment technologies and facilities in order to meet the Clean Water Act mandates, which we also believe should be exempt from the definition and provisions of covered actions.



Phil Isenberg, Chairman
Delta Stewardship Council
July 17, 2012
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In conclusion, this letter requests that you provide clear guidance in the form of written confirmation that planned development within urban and urbanizing areas in the Secondary Zone and located in existing spheres of influence or urban limit lines are exempt from the provisions of the Delta Plan and will be deemed not a covered action. We are seeking that affirmative confirmation to lift the dark cloud of uncertainty which has placed the affected areas in limbo. It is essential that progress within the bounds of the secondary zone's urban area's spheres of influence or urban limit lines not be suspended during the next 6-18 months while the DSC approves a final Delta Plan and implements the regulations associated with the Plan.

We look forward to an expedited response to this request. If you need additional information or would like to meet to discuss this request, we will make ourselves available as soon as possible.

Sincerely,



ANN JOHNSTON
MAYOR

CC: Senator Fran Pavley, Chair, Senate Natural Resources & Water Committee (SNR&WC)
Senator Doug La Malfa, Vice Chair, SNR&WC
Senator Anthony Cannella, SNR&WC
Senator Noreen Evans, SNR&WC
Senator Jean Fuller, SNR&WC
Senator Christine Kehoe, SNR&WC
Senator Alex Padilla, SNR&WC
Senator Joe Simitian, SNR&WC
Senator Lois Wolk, SNR&WC
The Honorable Joan Buchanan, Member of the Assembly
The Honorable Bill Berryhill, Member of the Assembly
The Honorable Cathleen Galgiani, Member of the Assembly
Dennis O'Connor, Consultant, Senate Natural Resources & Water Committee
Barry Brokaw and Donne Brownsey, Sacramento Advocates, Inc.
Stockton City Council
Stockton City Manager
Delta Coalition
Stephen Qualls, League of California Cities
David Jones, Emanuels Jones & Associates
Secretary John Laird, CA Natural Resources Agency
Joe Grindstaff, Executive Director, DSC



DELTA STEWARDSHIP COUNCIL
A California State Agency

980 NINTH STREET, SUITE 1500
SACRAMENTO, CALIFORNIA 95814
WWW.DELTACOUNCIL.CA.GOV
(916) 445-5511

November 8, 2012

Mayor Ann Johnston
City of Stockton
425 N. El Dorado Street
Stockton, California 95202

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MAYOR
CITY OF STOCKTON

Chair
Phil Isenberg

Members
Randy Fiorini
Gloria Gray
Patrick Johnston
Hank Nordhoff
Don Nottoli

Executive Officer
Christopher M. Knopp

Dear Mayor Johnston:

As you may know, Assemblymember Buchanan hosted a meeting at the State Capitol on October 29, 2012, to continue discussions about the application of the Delta Reform Act's covered action provisions to certain development projects already approved within Delta cities or their spheres of influence. The meeting was attended by, among others, City of Stockton representatives Councilmember Eggman, Mike Niblock, and John Luebbarke. We know that you have a strong interest in this issue—most recently expressed in your July 17th letter to Council Chair Phil Isenberg—and are therefore writing to confirm for you that which we conveyed to Ms. Buchanan and the other meeting participants.

Who Determines Whether a Plan, Program or Project is a Covered Action?

It is important to note (as we related at the meeting and in previous communications), that the State or local agency that proposes to carry out, approve, or fund a specific project is the entity that must determine whether the project is a "covered action," including whether it falls within an applicable statutory or administrative exemption. Similarly, with regard to projects already approved, the State or local agency that carried out, approved, or funded the project is the entity that must make that determination. The Council staff will attempt to offer advice in this regard—like we have done here—but the ultimate decision must be made by the State or local agency in good faith, subject to judicial review. In this regard, the September 5, 2012, Final Draft Delta Plan provides as follows:

"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 this Plan. If requested, Council staff will meet with an agency's staff during early consultation to review consistency with the Delta Plan and to offer 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. 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

"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."

Reform Act and relevant provisions of this Plan.” (Page 54, Lines 25-34, September 5, 2012 Final Draft Delta Plan).

The Development Projects at Issue

Within this context, at the meeting we discussed our understanding of specific covered action exemptions contained in the Delta Reform Act (Water Code Section 85057.5(b)(6) and (7)) and their potential applicability to the development projects at issue. Our discussions also referenced the “no abrogation of vested rights” provision associated with the application of the covered action provisions (Water Code Section 85057.5(c)).

Based on what we know and have been told about the projects at issue --- all of which are in the statutory Delta secondary zone and have CEQA documents and other approvals that predate the Delta Plan’s yet-to-be-established effective date --- we believe that all would be exempt from the covered action process pursuant to these provisions. We reiterated, however, that project proponents should obtain written determinations that they fall within these exemptions from the applicable State or local agencies that approved and/or funded the projects.

A question was raised as to whether a project would “lose” its exemption if the project was subsequently changed. We think that a reasonable interpretation is that the exemption would still apply unless substantial changes were proposed in the project that were not anticipated and addressed in its EIR, and therefore would require major EIR revisions (and likely significant new or revised regulatory permits).

We explained, however, that even under these hypothetical circumstances, the project, as proposed to be changed, would likely still not be a covered action unless it met all of the statutory “covered action” screening criteria, including having a substantial impact on one or both of the coequal goals or government sponsored flood control programs, and being covered by one or more policies in the Delta Plan.

In this regard, at the request of meeting participants, we specifically explained the types of projects that would and would not be covered by the Delta Plan’s policy regarding urban land use.

The Final Draft Delta Plan and Urban Land Use

The Final Draft Delta Plan does not include a policy that controls routine urban uses in areas planned for development in cities, their spheres of influence, Mountain House, and other unincorporated urban areas or towns listed in the Delta Plan. As the Final Draft Delta Plan states:

- The Delta Plan includes no policies or recommendations to control land use or density in these communities (p. 176, line 26-27).

Policy DP P1, the Delta Plan’s policy regarding locating new urban development, applies only to “new urban development, including residential, commercial, and industrial uses, that is *not* located within 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; areas within Contra Costa County’s 2006 voter-

Mayor Ann Johnston
City of Stockton
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approved urban limit line, except Bethel Island; areas within the Mountain House General Plan Community Boundary in San Joaquin County; or the unincorporated Delta towns of Clarksburg, Courtland, Hood, Locke, Ryde, and Walnut Grove". (Page 198, lines 3-21 September 5, 2012 Final Draft Delta Plan)

For this reason, consistency determinations for urban developments within these areas would not be required unless they were somehow covered by another policy in the Delta Plan, which we believe will rarely if ever occur.

A determination of whether another policy of the Delta Plan applied to these projects, and whether the project significantly impacted achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs, can be made by examining the project's description and environmental impact documents. As we said in the October 29th meeting, we believe routine urban development in areas already planned for urban uses in cities, their spheres of influence, or other urban areas will rarely if ever cross the threshold to require certification of consistency with the Delta Plan.

We hope that this letter is useful in clarifying these important issues for the City of Stockton and other Delta cities and counties. We look forward to working with you and your staff as we move forward with completing and then implementing the Delta Plan. If you have any questions do not hesitate to contact me at (916) 445-4294.

Sincerely,



Dan Ray,
Chief Deputy Executive Officer
Delta Stewardship Council

cc: Senator Fran Pavely, Chair, Senate Natural Resources & Water Committee (SNR&WC)
Senator Doug La Malfa, Vice Chair, SNR&WC
Senator Anthony Cannella, SNR&WC
Senator Noreen Evans, SNR&WC
Senator Jean Fuller, SNR&WC
Senator Christine Kehoe, SNR&WC
Senator Alex Padilla, SNR&WC
Senator Joe Simitian, SNR&WC
Senator Lois Wolk, SNR&WC
The Honorable Joan Buchanan, Member of the Assembly
The Honorable Bill Berryhill, Member of the Assembly
The Honorable Cathleen Galgiani, Member of the Assembly
Dennis O'Connor, Consultant, Senate Natural Resources & Water Committee (SNR&WC)
Barry Brokaw and Donne Brownsey, Sacramento Advocates, Inc.
Stockton City Council
Stockton City Manager

Mayor Ann Johnston
City of Stockton
November 8, 2012
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Susana Schlendorf, Chief of Staff for The Honorable Joan Buchanan, Member of the Assembly
Delta Coalition
Stephen Qualls, League of California Cities
David Jones, Emanuels Jones & Associates
Secretary John Laird, CA Natural Resources Agency
Chris Knopp, Executive Director, DSC
Kevan Samsam, Delta Stewardship Council