



**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

**Chair**  
Phil Isenberg

**Members**  
Randy Fiorini  
Gloria Gray  
Patrick Johnston  
Hank Nordhoff  
Don Nottoli

**Executive Officer**  
Christopher M. Knopp

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

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."*

– CA Water Code §85054

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 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  
November 8, 2012  
Page 3 of 4

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  
Page 4 of 4

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