AMENDED IN SENATE JUNE 19, 2012

AMENDED IN SENATE JUNE 12, 2012

AMENDED IN SENATE JUNE 22, 2011

AMENDED IN ASSEMBLY MAY 27, 2011

AMENDED IN ASSEMBLY MARCH 31, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL No. 1095

Introduced by Assembly ~~Members Bill Berryhill and~~ *Member* Buchanan
(Principal coauthors: Assembly Members Bill Berryhill and Galgiani)

February 18, 2011

An act to amend Section 85057.5 of the Water Code, relating to the Sacramento-San Joaquin Delta.

LEGISLATIVE COUNSEL'S DIGEST

AB 1095, as amended, ~~Bill Berryhill~~ *Buchanan*. Sacramento-San Joaquin Delta Reform Act of 2009: covered actions.

Existing law, the Sacramento-San Joaquin Delta Reform Act of 2009, establishes the Delta Stewardship Council as an independent agency of the state. Existing law requires a state or local public agency that proposes to take a covered action that will occur within the boundaries of the Delta or the Suisun Marsh to prepare, and submit to the council, a specified written certification of consistency with the Delta Plan prior to taking those actions. Existing law defines a "covered action" to mean a plan, program, or project, as specified.

Existing law, the Johnston-Baker-Andal-Boatwright Delta Protection Act of 1992, requires the Delta Protection Commission to review and maintain a comprehensive long-term resource management plan for land uses within the primary zone, as defined, of the Delta. Existing law defines the secondary zone as all the Delta land and water area within the boundaries of the Delta not included within the primary zone, subject to the land use authority of local government, as prescribed.

This bill would exclude from the definition of "covered action" any project or portion of a project that falls within an urban or urbanizing area within the Delta's secondary zone and which is covered by a general plan, sphere of influence, specific or master plan, community plan, or development agreement adopted by the relevant local land use authority.

Existing law, the California Environmental Quality Act (CEQA) requires a lead agency to prepare and certify the completion of an environmental impact report on a project, as defined, that it proposes to carry out or approve that may have a significant impact on the environment or to adopt a negative declaration if it finds that the project will not have that effect. The National Environmental Policy Act (NEPA) requires federal agencies to prepare environmental assessments or environmental impact reports that contain statements of the environmental effects of proposed federal agency actions.

This bill would exclude from the definition of "covered action" any upgrade to an existing drinking water, stormwater, or wastewater treatment, storage, or conveyance facility within the existing physical footprint *or legal property boundaries, as applicable,* of the facility, to meet a state or federal water quality compliance order, as specified. This bill would also exclude from the definition of "covered action" any flood control project undertaken within the Delta's secondary zone that is consistent with the Central Valley Flood Protection Act of 2008 and which would provide protection to an urban or urbanizing area or existing public infrastructure. These upgrades and projects would have to comply with CEQA or NEPA, or both.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. The Legislature finds and declares all of the
2 following:

(a) The Legislature passed and the Governor signed Senate Bill 1 of the Seventh Extraordinary Session of 2009 (Chapter 5 of the Seventh Extraordinary Session of the Statutes of 2009), which establishes the framework to achieve the coequal goals of providing a more reliable water supply to California and restoring and enhancing the Delta ecosystem.

(b) This statute created the Delta Stewardship Council (DSC), an independent seven-member body that is tasked with developing a long-term plan for the Delta that meets the coequal goals of providing a more reliable water supply for California while preserving, enhancing, and protecting the Delta ecosystem and respecting the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.

(c) The DSC is tasked with drafting and implementing the Delta Plan, and requires that actions in the primary and secondary zones be consistent with the plan as determined by the council upon an appeal.

(d) Inherent in Senate Bill 1 of the Seventh Extraordinary Session of 2009 is the subjective standard of consistency of the coequal goals as interpreted by the DSC. Local government decisions on private and public development within the primary and secondary zones of the Delta are subject to decisions where statutory ambiguity related to their sovereign powers is the cause of unintended consequences.

(e) Several projects in the secondary zone are located in areas that will not cause any findings of inconsistency with the coequal goals, but are currently under a significant cloud due to this ambiguity.

(f) The ambiguity will have the significant impact of either stalling or destroying years of actions and local government approvals for municipal private development, and local governments' authority to comply with state and federal law with respect to flood control projects in the secondary zone consistent with the Bay Delta Conservation Plan or levee improvements are also clouded, jeopardizing public safety.

(g) It is the intent of this act to provide a very narrow description of enumerated actions in order to relieve the necessity of these actions from being reviewed by the DSC for consistency, including specific exclusions from the statutory definition of "covered actions" as defined in subdivision (b) of Section 85057.5 of the

Water Code for specific areas of private development and for a limited and specific number of levee and flood control projects within the secondary zone.

(h) It is the intent of this act to relieve these enumerated projects from the cloud of ambiguity of the consistency standard that could disrupt financing of private developments in ~~the final stages~~ *progress*.

SEC. 2. Section 85057.5 of the Water Code is amended to read:

85057.5. (a) "Covered action" means 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 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.

(b) "Covered action" does not include any of the following:

(1) A regulatory action of a state agency.

(2) Routine maintenance and operation of the State Water Project or the federal Central Valley Project.

(3) Regional transportation plans prepared pursuant to Section 65080 of the Government Code.

(4) Any plan, program, project, or activity within the secondary zone of the Delta that the applicable metropolitan planning organization under Section 65080 of the Government Code has determined is consistent with either a sustainable communities strategy or an alternative planning strategy that the State Air Resources Board has determined would, if implemented, achieve the greenhouse gas emission reduction targets established by that board pursuant to subparagraph (A) of paragraph (2) of subdivision (b) of Section 65080 of the Government Code. For purposes of this paragraph, "consistent with" means consistent with the use designation, density, building intensity, transportation plan, and applicable policies specified for the area in the sustainable communities strategy or the alternative planning strategy, as

applicable, and any infrastructure necessary to support the plan, program, project, or activity.

(5) Routine maintenance and operation of any facility located, in whole or in part, in the Delta, that is owned or operated by a local public agency.

(6) Any plan, program, project, or activity that occurs, in whole or in part, in the Delta, if both of the following conditions are met:

(A) The plan, program, project, or activity is undertaken by a local public agency that is located, in whole or in part, in the Delta.

(B) Either a notice of determination is filed, pursuant to Section 21152 of the Public Resources Code, for the plan, program, project, or activity by, or the plan, program, project, or activity is fully permitted by, September 30, 2009.

(7) (A) Any project within the secondary zone, as defined pursuant to Section 29731 of Public Resources Code as of January 1, 2009, for which a notice of approval or determination pursuant to Section 21152 of the Public Resources Code has been filed before the date on which the Delta Plan becomes effective.

(B) Any project for which a notice of approval or determination is filed on or after the date on which the final Bay Delta Conservation Plan becomes effective, and before the date on which the Delta Plan becomes effective, is not a covered action but shall be consistent with the Bay Delta Conservation Plan.

(C) Subparagraphs (A) and (B) do not apply to either of the following:

(i) Any project that is within a Restoration Opportunity Area as shown in Figure 3.1 of Chapter 3: Draft Conservation Strategy of the Bay Delta Conservation Plan, August 3, 2009, or as shown in a final Bay Delta Conservation Plan.

(ii) Any project that is within the alignment of a conveyance facility as shown in Figures 1 to 5, inclusive, of the Final Draft Initial Assessment of Dual Delta Water Conveyance Report, April 23, 2008, and in future revisions of this document by the department.

(8) Any project, as defined by Section 21065 of the Public Resources Code, or part of a project, including, but not limited to, subsequent entitlements and supporting infrastructure improvements required for implementation of a project, that is both within an urban area or urbanizing area, as shown in Figure 5-1 in the Final Staff Draft Delta Plan (dated May 14, 2012), and

in the secondary zone, as defined by Section 29731 of the Public Resources Code, and is contained within *the boundaries of*, covered by, and substantially conforms with, a general plan, sphere of influence, specific or master plan, community plan, or a development agreement adopted by the applicable local land use authority within the urban or urbanizing area.

(9) Any ~~upgrade~~ *upgrades* to ~~an~~ existing drinking water, stormwater, or wastewater treatment, storage, or conveyance facility, within the existing physical footprint *or legal property boundaries, as applicable,* of that facility, to meet a state or federal water quality compliance order, or both, consistent with state standards or federal standards, or both, and which complies with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) or the *federal* National Environmental Protection Act (42 U.S.C. Sec. 4321 et seq.), or both.

(10) Any flood control project in the secondary zone of the Delta that is consistent with the applicable provisions of the Central Valley Flood Protection Act of 2008 (Part 6 of Division 5 (commencing with Section 9600)), which would provide protection to an urban or urbanizing area, as shown by Figure 5-1 in the Final Staff Draft Delta Plan (dated May 14, 2012), and as defined by Section 65007 of the Government Code, or existing public infrastructure, and which has complied with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) or the National Environmental Quality Act (42 U.S.C. Sec. 4321 et seq.), or both.

(c) Nothing in the application of this section shall be interpreted to authorize the abrogation of any vested right whether created by statute or by common law.

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