RLO011 City of Stockton

CITY OF STOCKTON

COMMUNITY DEVELOPMENT DEPARTMENT
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Delta Stewardship Council
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CITY OF STOCKTON COMMENTS ON RECIRCULATED DRAFT PROGRAM ENVIRONMENTAL IMPACT REPORT (VOLUME 3) FOR THE FINAL DRAFT DELTA PLAN

The City of Stockton (City) appreciates the opportunity to review and comment on the Delta Stewardship Council's (DSC's) Recirculated Draft Program Environmental Impact Report (Recirculated DPEIR or RDPEIR) for the Final Draft Delta Plan (Plan or Revised Project) RLO011-1 issued on November 30, 2012. This letter provides the City's individual detailed written comments on the Recirculated DPEIR in accordance with the provisions of the California Environmental Quality Act (CEQA) and CEQA Guidelines. In addition to this comment letter, the City, in conjunction with other Delta Coalition stakeholders, is submitting a separately RLO011-2 transmitted joint comment letter, which is incorporated by this reference.

The City has been an active participant in the public process associated with development of the Delta Plan and the Draft Program EIR. The City submitted detailed comments on the 5th Draft of the Plan and the corresponding Draft Program EIR, as well as on prior drafts of the Plan and on the subsequent 6th draft of the Plan. The City has not received any response to any of its prior comments on the drafts of the Plan or on the Draft Program EIR and thus continues to have significant concerns about the scope and regulatory effect of the Plan. Since most of the City's comments on the first Draft Program EIR for the Delta Plan remain the same and no written responses have been received, the City's February 2, 2012, comment letter is hereby incorporated by this reference. Similarly, since several of the City's RLO011-3 comments on the 6th Draft Delta Plan remain the same regarding the Revised Project and no specific written responses have been received regarding that letter, the City's June 8, 2012, comment letter on the 6th Draft Delta Plan is also hereby incorporated by this reference. The City's specific concerns with the Proposed Regulations for implementation of the Final Draft Delta Plan are expressed in our separately transmitted comment letter, dated January 14, 2013, which is attached and incorporated by this reference (Attachment 1: City of Stockton

Response to comment RLO011-1

Comment noted.

Response to comment RLO011-2

Please see the responses to the commenter's joint comment letter, RLO015.

Response to comment RLO011-3

Please see the responses to the commenter's prior letter, LO195.

Comments on Rulemaking Package for Regulations Contained in Delta Plan, January 14, 2013). RLO011-3

The City's comments on the Recirculated DPEIR include both general and specific concerns regarding the technical and legal adequacy of the Recirculated DPEIR. Based on the substantive comments provided below and those of the other Delta Coalition stakeholders, the City believes that the Recirculated DPEIR fails to meet CEQA's informational mandate. In accordance with CEQA Guidelines Section 15088.5, the City respectfully requests that the Recirculated DPEIR be modified to more adequately evaluate the Plan's potential significant environmental impacts and recirculated for a 90-day noticed public review and comment period. RLO011-4

A. MAJOR CONCERNS/COMMENTS

The Recirculated DPEIR leaves many key questions about the effects of the Plan unanswered. The lack of information about effects of critical elements of the Plan has deprived the City and public of the opportunity to understand and comment on the Plan's effects and rendered the EIR inadequate as an informational document. The following comments summarize the City's overarching concerns/comments with regard to the technical and legal adequacy of the Draft EIR.

1. The RDPEIR Fails to Discuss How Incorporation of the Bay Delta Conservation Plan Will Affect the Scope and Impacts of the Delta Plan

The Delta Reform Act directs that the Bay Delta Conservation Plan (BDCP) be automatically incorporated into the Delta Plan if the BDCP meets certain statutory requirements. The BDCP is described as covering the operation of the State Water Project[1], the construction and operation of facilities for movement of water through the Delta, the implementation of conservation actions, and diversion and discharge of water by Mirant. However, the RDPEIR does not clearly explain how the incorporation of the BDCP into the Delta Plan will change the scope and regulatory effect of the Delta Plan. Thus the EIR's discussion of the BDCP raises more questions than it answers, both as to the BDCP's effect on the scope of the Delta Plan and its potential environmental effects. RLO011-5

The subsequent incorporation of the unfinished and evolving BDCP and the uncertainties of how this incorporation will operate cause the project as analyzed to suffer from a shifting and uncertain project description. "An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." [County of Inyo v. City of Los Angeles (3rd Dist. 1977) 71 Cal. App. 3rd 185, 193.] This failure to provide a stable and adequate project description contaminates the entire

[1] The BDCP will also provide certain authorization for the continued operation of the federal Central Valley Project (CVP). It is unclear why the DEIR omits mention of operation of the CVP from a description of the BDCP.

Response to comment RLO011-4

The Revised Project included extensive changes to the text and organization of the Delta Plan, which, in accordance with CEQA Guidelines Section 15088.5, required additional analysis of the environmental impacts resulting from the project. The Revised Draft PEIR sufficiently discloses all significant environmental impacts that are anticipated to result from implementation of the Revised Project, and all project alternatives. See also Master Response 2.

Response to comment RLO011-5

The proposed BDCP is a reasonably foreseeable future project that is not part of the Delta Plan. It is being evaluated by the Department of Water Resources as the CEQA lead agency. The cumulative impacts of the proposed Delta Plan, in combination with the impact of the proposed BDCP, are described in EIR Sections 22 and 23. Please see the responses to the commenter's prior letter, LO195 and Master Response 1.

analysis, and introduces a fatal legal flaw that has not been remedied in the current draft.

Neither CEQA nor the Delta Reform Act provides any statutory exemption for the incorporation of the BDCP into the Plan and the CEQA Guidelines don't as well. The time for reviewing this action is at the first opportunity to do so, which is now. Should the DSC wait, the analysis will occur too late in the process for any meaningful analysis to be done that will have a chance to affect the composition of the project being considered. Rather, it will amount to nothing more than a post- hoc rationalization of decisions already made by virtue of actions already taken. [See, CEQA Guidelines section 15352, subd (a); Stand Tall on Principles v. Shasta Union High School Dist. (3rd Dist. 1991) 235 Cal. App. 3rd 772, 781 and 783.]

Standing on its own, if the BDCP is adopted as a HCP/NCCP, it will apply only to those entities that voluntarily seek to participate in it and who obtain ESA coverage under the terms of any permits issued by the relevant agencies.

How will the regulatory effect of the BDCP change if it is incorporated into the Delta Plan?

If the BDCP is incorporated into the Delta Plan, will its provisions be deemed to constitute "policies" of the Delta Plan with which all covered actions under the Plan must demonstrate consistency? If so, then the BDCP's incorporation into the Delta Plan would dramatically expand the scope of both the BDCP and the Delta Plan, converting what was intended to be voluntary participation in a HCP into a mandatory regulatory program affecting a much wider range of actions within the Delta. RLO011-5

Section 23.6 of the RDPEIR (page 23.2) states as follows:

> At this time, the specific details of BDCP have not been defined, and because the BDCP is a voluntary program, there is no mandate to complete the BDCP within a specific schedule or with specific features or operations. However, if the BDCP is approved by DFG in compliance with Water Code section 85320 and approved as a federal HCP, the Council is required to incorporate the BDCP into the Delta Plan (Water Code section 85320(e)).

How will the BDCP be used for future consistency determinations and what impacts are associated with imposing the BDCP on non-participants?

CEQA requires that an EIR evaluate the whole of the action that will be approved, including the reasonably foreseeable indirect physical changes to the environment that will occur from the project. Given that the Delta Reform Act deprives the Council of any discretion as to the Delta Plan's incorporation of the BDCP, the BDCP should properly be treated as a reasonably foreseeable future element of the Project, rather than a cumulative project, as in the RDPEIR. The RDPEIR should provide a full discussion of the BDCP in the project description and evaluate the impacts of the BDCP as part of the Revised Project and all alternatives. The RDPEIR should be revised to clearly explain how, if at all, the mandatory incorporation of the BDCP into the Delta Plan would alter or

No comments

- n/a -

expand the scope of the Delta Plan's regulatory effect, and analyze the potential environmental effects of this expanded regulatory scope of the BDCP. For example, how would incorporation of the BDCP into the Delta Plan affect the existing HCPs within the Delta?

When the Legislature directed that the BDCP be automatically incorporated into the Delta Plan, it must have presumed that the BDCP would be completed prior to the Delta Plan and thus the scope and impacts of the BDCP would be known to the Council, public and potentially regulated entities. Given that the BDCP remains incomplete and continues to evolve, it is impossible to understand its impact on the scope and impacts of the Delta Plan. The environmental impacts of the proposed conveyance (in so far as it is currently described in the draft BDCP documents) should be evaluated in detail in the Delta Plan EIR, and the environmental impacts of the associated conversion of land and water to restored natural habitat should be fully described, using maps and acreage already known to be targets of restoration in the BDCP. The lack of information in the RDPEIR about the regulatory and environmental consequences of incorporating the BDCP into the Delta Plan makes it impossible for the Council and the public to comprehend the environmental consequences of adoption of the Delta Plan. The significance of this information to potentially regulated parties cannot be understated. It would be both imprudent and inconsistent with CEQA's informational mandate for the Council to adopt a Plan that is likely to have far-reaching significant impacts as a result of incorporation of the BDCP prior to the completion of the BDCP and certification of the BDCP EIR and Environmental Impact Statement (EIS) under the National Environmental Policy Act (NEPA). RLO011-5

For these reasons, the Council should put CEQA review of the Plan on hold and request that the Legislature revise the Delta Reform Act to remove automatic incorporation of the BDCP from the Delta Plan. If the Council elects to move forward and certify an EIR on the Plan as drafted, to comply with CEQA, it must revise the RDPEIR so that the project description and impacts analysis clearly and thoroughly explain the scope of the Plan with respect to the BDCP and evaluate the resulting environmental impacts. Specifically, the DEIR must be revised to fully explain the BDCP's role in the Delta Plan and the type and significance of environmental effects that will occur if all covered actions are required to comply with the BDCP. Because the BDCP continues to evolve, the RDPEIR should describe the changes that have been made to the BDCP since the RDPEIR was prepared as well as evaluate any significant environmental effects associated with those changes. The revised RDPEIR must then be recirculated for public review and comment so that the public, potentially regulated parties, and the Council can properly evaluate the project and its impacts.

2. The RDPEIR Fails to Analyze the Effects of Implementing the Recommended New Flow Criteria and a More Natural Flow Regime

The City is concerned about the effects on its existing levees, and the safety of its residents, homes and businesses, of potential changes in Delta flow criteria that may result from the Plan. Much of the City is protected by levees in compliance with the federal 100-year standard of flood protection The City is protected from flooding by approximately 140 miles of levees and other flood control facilities. In the 1800's, levees RLO011-6

Response to comment RLO011-6

Please refer to Master Response 5.

were first constructed for agricultural protection, but over the years have evolved to provide protection for residents and businesses in our community. There are currently levee improvement efforts underway and future flood protection projects under study.

Section 3.4.3.2.1 of the RDPEIR (page 3-7) states as follows:

> The development of future flow and water quality objectives under the Revised Project would be the same as described under the Proposed Project in Section 3.4.3.2, Delta Ecosystem Restoration of the Draft PEIR, and would likely result in a more natural flow regime in the Delta and Delta tributaries.

The Draft EIR, however, fails to identify the potential environmental risks associated with requiring the various water and flood control projects to operate in such a way as to provide a more natural flow regime. While the RDPEIR does discuss a natural flow regime in the context of ecosystem restoration and also discusses the State's flood control system – it fails to discuss them in a way that informs the public of the critical connection between the two. RLO011-6

For example, the prior DPEIR characterized the existing Delta flood protection system as fragile (prior DPEIR, 5-11.) At the same time, the RDPEIR (and the Delta Plan) suggests that the State's flood protection system be re-operated to provide a more natural flow regime in the Delta. The flood protection system, however, was constructed and is operated to release peak flows gradually following storm events (prior DPEIR, 5-4.) Any change in operations of the various flood control facilities to allow for water to flow more naturally could have adverse impacts on the flood control system and levees generally. To the extent a more natural flow regime would result in higher peak flows or prolonged flows – can our levee system handle this added pressure? Will levees rebound from storm events with the higher water levels one would expect from a "more natural flow regime?"

Section 5.4.3.2 of the RDPEIR, discussing Delta Flood Risk in the context of Delta Ecosystem Restoration, fails to even acknowledge the presence of increased flows in certain times of the year as part of a "more natural flow regime." If the Delta Plan and RDPEIR assume the SWRCB will follow the Delta Plan's recommendations and implement a more natural flow regime in the Delta – the RDPEIR must explain the connection between flows and flood risk and adequately describe the environmental impacts and risks to the public associated with those increased flows.

3. The EIR Does Not Address the Secondary Physical Environmental Impacts That Are Likely to Result from the Plan's Financing Measures and Regulatory Delays

In accordance with CEQA Guidelines Section 15131, the Draft EIR should acknowledge and address the secondary physical environmental effects that may result from the socio-economic/economic sustainability impacts of the Delta Plan within the Secondary Zone of the Delta. It should be noted that the Economic Sustainability Plan prepared by the Delta Protection Commission (DPC) does not address the Plan's direct and indirect economic sustainability impacts within the Secondary Zone of the Delta. Accordingly, RLO011-7

Response to comment RLO011-7

Please see the responses to the commenter's prior letter, LO195. See also Master Response 2.

the Draft EIR fails to address the secondary physical environmental effects that may result from the socio-economic/economic sustainability impacts of the Delta Plan.

The implementation of the Delta Plan could adversely impact the financial viability of local communities through increased restrictions and by creating regulatory uncertainties, delays, and potentially leading to extended and costly litigation. The RDPEIR should address the Delta Plan's potential to nullify the intent and implementation of city and county infrastructure/municipal utility master plans that have been adopted as a result of years of planning, community participation and at great expense. Upon review of an appeal of a city's or county's certification of consistency for implementation of a future phase of an adopted infrastructure/utility master plan, the DSC could find that specific project(s) are inconsistent with the Delta Plan, thereby potentially frustrating the city's or county's ability to provide for orderly planned improvements within their respective boundaries. If such improvements are jeopardized, it introduces an element of uncertainty to the land development process that could stifle needed and desirable development and redevelopment within the existing urban areas of the Delta. Such indirect secondary effects may include: the potential closure or relocation of industrial, agricultural, port, and/or commercial-related businesses and the resulting loss of jobs in Stockton and San Joaquin County. This may lead to a corresponding loss of income, retail sales taxes, and property taxes and a resulting increase in residential and non-residential vacancies and foreclosures, which may result in an increased level of urban blight. RLO011-7

Accordingly, the RDPEIR should address the direct and indirect economic sustainability impacts that may affect cities and counties within the Secondary Zone of the Delta should planned infrastructure/utility improvements and operational measures, in compliance with State or Federal regulatory orders, be stifled by an adverse DSC appeal determination (e.g., direct impacts on industrial, commercial, and housing development and operations within the City of Stockton and agricultural operations, boating, marinas, parks, and other recreational/tourism land uses and operations in San Joaquin County that may rely on such infrastructure/utility improvements; and the corresponding secondary/indirect environmental impacts that may result in increased vacancies, foreclosures, and urban blighting, etc.).

4. The RDPEIR Still Fails to Evaluate the Effect of Area of Origin Protections on the Ability to Implement Plan Policies Related to Water Supply

The Water Resources chapter (Section 3.2, Regulatory Setting, or Section 3.3, Environmental Setting) in the RDPEIR should acknowledge and address the fact that the Delta Plan cannot be developed, drafted, or implemented in a way that would undermine the current protections for the areas of origin, as codified in California Water Code, Section 11460. The RDPEIR should acknowledge that the Delta Plan cannot be used to prohibit water users within the areas of origin from continuing to put water to reasonable and beneficial use. RLO011-8

Water Code Section 1485 - The City of Stockton's effort to secure a reliable source of surface water from the Delta to serve the Stockton Metropolitan Area was initiated with an application for the right to divert water from the Sacramento-San Joaquin Delta on

Response to comment RLO011-8

Please see the responses to the commenter's prior letter, LO195, and to Master Response 5. In addition, please refer to Master Response 1 regarding the authority of the Delta Stewardship Council and the scope of covered actions.

April 18, 1996 under water rights application 30531 for 125,900 acre-feet per year. After completion of a Feasibility Report in 2003 and certification of the Draft and Final Programmatic Environmental Impact Report by the Stockton City Council on November 8, 2005; Water Rights Permit 21176 was issued by the State Water Resources Control Board, Division of Water Rights, dated March 8, 2006 under Water Code Section 1485. As stated:

> *Any municipality, governmental agency, or political subdivision operating waste disposal plants producing disposal water meeting the requirements of the appropriate regional board, and disposing of said water in the San Joaquin River may file an application for a permit to appropriate an equal amount of water, less diminution by seepage, evaporation, transpiration or other natural causes between the point of discharge and the point of recovery, downstream from said disposal plant and out of the San Joaquin River or the Sacramento-San Joaquin Delta. A permit to appropriate such amount of water may be granted by the board upon such terms and conditions as in the board's judgment are necessary for the protection of the rights of others. Water so appropriated may be sold or utilized for any beneficial purpose. The right to the use of water granted by this section shall not include water flowing in underground streams. The Legislature finds and declares that the problems incident to the full utilization of the waters of the San Joaquin River and the Sacramento-San Joaquin Delta into which it flows, are unique and that a general law cannot be made applicable thereto.* RLO011-8

Stockton then invested over $200 million to develop the Delta Water Supply Project, culminating in their first ever water diversion from the Sacramento-San Joaquin Delta on May 28, 2012. The maximum amount diverted under this permit shall not exceed 33,600 acre-feet per year. Future water rights for the City of Stockton will come either through an expansion of the amount under Water Code Section 1485 and Application 30351A, or through Area of Origin or Delta Protection Statutes under Application 30351B. Any effort on the part of the Delta Plan to require in-Delta users to reduce their dependency on water supply diverted from the Delta would undo many years of planning, capital and environmental investment and future viability of the City of Stockton. The current RDPEIR fails to adequately determine the impacts of the Plan's recommendations regarding reduced reliance on water use within the Delta watershed.

The RDPEIR should note that the Delta Stewardship Council does not have authority over the diversion and use of water, and the determination of whether existing or future diversion and/or use of water complies with state law currently rests with the State Water Resources Control Board. The RDPEIR should note that the Delta Plan must not alter this regulatory framework.

5. The Water Resources Chapter (Section 3.4) of the RDPEIR Fails to Recognize the Lack of Alternate Sources of Water for Delta Communities

The Water Resources chapter (Section 3.4, Impacts Analysis of Revised Project) of the RDPEIR should more specifically address how the Delta Plan's requirement that water users "reduce reliance" on the Delta will impact "in-Delta" water users. The RDPEIR should note that for many local communities within the Delta, the local water supplies RLO011-9

Response to comment RLO011-9

Please see the responses to the commenter's prior letter, LO195, and to Master Response 5.

include the Delta and it may not be possible or practicable to find alternate sources of water.

A vast number of water users within the Delta beneficially use water pursuant to riparian and/or overlying rights, which are among the most senior of water rights in the State, and are duly protected from the State Water Project and federal Central Valley Project's ("Projects") export operations which are based on *junior* appropriative water rights. In addition, the Watershed Protection Act (Wat. Code, § 11460, et seq.), the Delta Protection Act (Wat. Code, § 12200, et seq.), the Protected Areas Act (Sections 1215 - 1222), the Delta Reform Act of 2009, and CALFED all impose fundamental limitations on the Projects ability to transfer "surplus" water from the Delta watershed to water-deficient areas to the south and west of the Delta. These acts and legislation contain the core protections and assurances including the Delta "common pool doctrine", which the Legislature afforded such water users when the Projects were initially authorized that the Projects will indeed be limited to the transfer of water that is truly surplus to their needs. The City of Stockton is situated within the Delta watershed, and with a substantial portion of its lands within the boundaries of the "legal Delta." Therefore, the proper interpretation of these acts is of paramount importance to not only the City but all in-Delta water users, both human and environmental, that depend on water from that watershed. RLO011-9

The RDPEIR should acknowledge and address the potential impacts to local water supplies and the possible environmental impacts associated with having to find alternate sources of water supplies not tied to the Delta including groundwater. The RDPEIR should also discuss how the Delta Plan policies could actually inhibit regional self-reliance through the continued beneficial use of water from local sources, including the Delta.

B. DETAILED COMMENTS

This section provides detailed substantive and technical comments regarding specific documentation and/or determinations contained in the RDPEIR, which are listed in sequential order by page number(s) and/or section(s), and/or line numbers, as applicable, in the RDPEIR.

1. Sections 2.1.4, Delta Ecosystem Restoration, 2.1.5, Protection of Delta as an Evolving Place, 4.2, Biological Resources – Regulatory Framework, 6.2, Land Use and Planning – Regulatory Framework: RLO011-10

   These sections and other applicable sections of the RDPEIR should recognize and incorporate into the Delta Plan the existing and on-going habitat conservation/mitigation activities of the San Joaquin County Multi-Species Habitat Conservation and Open Space Plan (SJMSCP) as part of the existing regulatory setting and as part of the project description for San Joaquin County.

2. Section 2.1.5, Protection and Enhancement of Delta as an Evolving Place (prior DPEIR Section 2.2.5.1, Overview of the Economic Sustainability Plan): RLO011-11

Response to comment RLO011-10

Please see the responses to the commenter's prior letter, LO195.

Response to comment RLO011-11

Please see Master Response 1 regarding the Delta Protection Commission's Economic Sustainability Plan and Master Response 2 regarding the EIR's consideration of social and economic effects.

It should be noted that the Delta Protection Commission's Economic Sustainability Plan only covers the Primary Zone of the Delta and is, therefore, incomplete. The Economic Sustainability Plan must be expanded by addressing the Secondary Zone of the Delta and the Suisun Marsh areas to provide a comprehensive analysis of the entire Delta. Absent the completion of the Economic Sustainability Plan for the entire Delta, the RDPEIR is also incomplete with regard to addressing the potential secondary environmental effects that may result from the socio-economic/economic sustainability impacts of the Delta Plan within the Secondary Zone of the Delta and the Suisun Marsh. RLO011-11

3. Section 3.3, Water Resources – Environmental Setting (prior DPEIR Section 2.2.3.1.9, Overview of Improved Drinking Water and Environmental Water Quality Programs – Wells):

   The RDPEIR should acknowledge that the City (and California Water Service Company) has already implemented a program of abandoning contaminated wells, replacing them with new wells in areas with better quality water, and initiated groundwater recharge programs. However, this has limited practicality due to an over-drafted aquifer and limited surface water availability for groundwater recharge. RLO011-12

4. Section 2.1.8, Funding Principles to Support the Coequal Goals, Page 2-25 (prior DPEIR Sec. 2.2.6, Recommendations for Financing Framework, Lines 31-32):

   The City disagrees with the conclusion that the funding principle recommendations shall not be considered separately in the Draft EIR. The establishment of "stressor fees" and other fees may adversely affect the ability of local agencies to implement public improvement projects, which may, in turn, result in adverse physical environmental impacts if projects are delayed or abandoned. Therefore, these recommendations should be considered separately in the RDPEIR.

   Moreover, information about the funding mechanisms and implementation measures is critical to understanding the feasibility of the proposed Delta Plan, especially in relation to the alternatives. The Plan assumes that it will be successful and that the funding for Plan projects will come from entities contributing to the problem (i.e., "stressor pays"). As a result of Proposition 218, the Delta Stewardship Council and potentially regulated entities such as the City lack authority to levy fees for projects such as water quality improvement projects. Instead, such fees require approval of a 2/3 vote of the electorate. History has shown that such approval is highly unlikely. RLO011-13

   The City's efforts to increase revenues to fund stormwater quality improvements are instructive. In August of 2010, the City of Stockton mailed ballots for a vote on a Clean Water Fee for stormwater permit compliance and infrastructure operation, maintenance and repair. The existing stormwater fee of $2.10 per month per home (without a CPI) dated from the early 1990s. The proposed fee was $2.88, to be in addition to the $2.10. City staff made 37 separate presentations to industrial and commercial groups, homeowner associations, rental associations and community leadership groups. Educational newsletters were mailed to 77,000 stormwater customers, a hot-line and web site was maintained, and the local government channel ran an educational video. The results of the balloting were 16,374 opposed and 7,813 in favor resulting in a failure

Response to comment RLO011-12

Please see the responses to the commenter's prior letter, LO195.

Response to comment RLO011-13

Please see the responses to the commenter's prior letter, LO195.

to pass the Clean Water Fee. This has led to an overall underfunding of the storm water program for the City, which currently places water quality and flood protections in jeopardy. RLO011-13

5. Section 3.3 Water Resources – Environmental Setting (prior DPEIR Section 3.3.3.2. Surface Water Quality, Lines 36-43):

The statement that low dissolved oxygen is a concern in the interior Delta because of enhanced treated effluent loading from Stockton, and that loading from the Stockton Regional Wastewater Control Facility has the greatest effect in reducing DO is inaccurate. The source sited (Jassby and Hiewenhuyse, 2005) is out of date. The Final Report, Stockton Deep Water Ship Channel Demonstration Dissolved Oxygen Aeration Facility Project (ICF International, Dec. 2010) states that the Aeration Facility can increase the DWSC DO by about 1 mg/l, enough to maintain the DO objectives because the major source of inflow BOD has been eliminated since 2007 with the completion of the City of Stockton's RWCF nitrification facility. RLO011-14

6. Section 3.3 Water Resources – Environmental Setting (prior DPEIR Section 3.3.3.4.3 Groundwater Use, Lines 3-4 and Sec. 3.3.4.2.4, Lines 27-28):

The statement that the City of Stockton depends almost entirely on groundwater for its municipal and industrial water needs is incorrect. The City (and California Water Service Company) has a policy and practice of conjunctive use of surface water and groundwater, with a current allocation of approximately 75% surface water and 25% groundwater.

The City of Stockton sits on the Eastern San Joaquin Groundwater Basin that was deemed critically overdrafted by the State Department of Water Resources in Bulletin 118. Efforts to implement conjunctive use water supply system were hindered for many years due to the inability to access a sufficient and reliable surface water supply from the Sierras through a contract with the Stockton East Water District. Groundwater pumping continued to meet demand therefore exasperating an already over-taxed groundwater source causing saline water to migrate under the Stockton Metropolitan Area. Years of planning and a major investment on the part of the City of Stockton has resulted in an environmentally sound source of surface water supply from the Delta that achieves three main objectives: RLO011-15

- Replaces existing unreliable surface water supplies,
- Protects an overdrafted groundwater basin,
- Provides for current and future planned growth.

7. Section 4.2, Biological Resources – Regulatory Framework (prior DPEIR Section 4.2 Regulatory Framework):

A brief summary listing/description of all of the adopted Habitat Conservation Plans (HCPs) and Natural Community Conservation Plans (NCCPs), as described in Appendix RLO011-16

Response to comment RLO011-14

Please see the responses to the commenter's prior letter, LO195.

Response to comment RLO011-15

Please see the responses to the commenter's prior letter, LO195.

Response to comment RLO011-16

Please see the responses to the commenter's prior letter, LO195.

D, should be provided as part of the environmental and regulatory setting and should be incorporated as part of the project description for the Delta Plan. RLO011-16

8. Section 4.3, Biological Resources – Environmental Setting (prior DPEIR Section Sec. 4.3.1 Biological Resources, Major Sources of Information):

   This listing should also include the San Joaquin County Multi-Species Habitat Conservation and Open Space Plan (SJMSCP) and other adopted HCPs and NCCPs, as listed in Appendix D. RLO011-17

9. Section 4.4, Biological Resources – Impacts Analysis of Revised Project (prior DPEIR Section 4.4.3.1.5 Biological Resources, Impact 4-5a):

   It is noted that the Proposed Project would not affect the provisions of adopted (HCP and NCCP) plans or the long-term assurances received by the permitted entities regarding incidental take. Upon incorporation of the BDCP as an integral component of the Delta Plan, would existing adopted HCPs and NCCPs be superseded by the BDCP or recognized as acceptable mitigation where applicable? RLO011-18

10. Section 4.4, Biological Resources – Impacts Analysis of Revised Project (prior DPEIR Section 4.4.3.2.5 Biological Resources, Impact 4-5b, Lines 1-4).:

    The RDPEIR should address the potential individual and cumulative effects related to the increase in demand for lands suitable for ecosystem restoration actions associated with the implementation of the BDCP and the noted DFG Conservation Strategy and the extent to which said ecosystem restoration activities could restrict the availability of land for mitigation actions by permit holders under the San Joaquin County Multi-Species Habitat Conservation and Open Space Plan (SJMSCP) and the East Contra Costa County HCP/NCCP. RLO011-19

11. Section 4.4 Biological Resources – References (prior DPEIR Section Sec. 4.5 Biological Resources, References):

    Include reference for San Joaquin Council of Governments. 2000. San Joaquin County Multi-Species Habitat Conservation and Open Space Plan (SJMSCP). RLO011-20

12. Section 5.3 Delta Flood Risk (prior DPEIR Section 5.3.4.3 Non-Project Levees in the Delta and Suisun Marsh, lines 17-23):

    Should be rewritten. The Flood Protection Restoration Project is not a "recently initiated non-project flood protection facilities in the Delta." The Project was completed in the late 1990s and consisted of raising existing project levees upstream of I-5 to correct freeboard deficiencies. It also did not include any new levees. The design and construction of the Project was approved/certified by USACE. As a result of the Project, FEMA did not place the greater Stockton metro area into the 100-year floodplain. RLO011-21

13. Section 5.3 Delta Flood Risk (prior DPEIR Section 5.3.5.1.2 FEMA Flood Areas, lines 33-38):

RLO011-22

Response to comment RLO011-17

Please see the responses to the commenter's prior letter, LO195.

Response to comment RLO011-18

Please see the responses to the commenter's prior letter, LO195.

Response to comment RLO011-19

Please see the responses to the commenter's prior letter, LO195.

Response to comment RLO011-20

Please see the responses to the commenter's prior letter, LO195.

Response to comment RLO011-21

Please see the responses to the commenter's prior letter, LO195.

Response to comment RLO011-22

Please see the responses to the commenter's prior letter, LO195.

Certification documentation for all the PAL levees in San Joaquin County were submitted to and approved by FEMA with two exceptions: i) south levee of Bear Creek west of I-5 adjacent to Twin Creeks; and ii) east levee of San Joaquin River from French Camp Slough to Stockton Deep Water Ship Channel and north levee of French Camp Slough from I-5 to San Joaquin River. RLO011-23

14. Section 5.3 Delta Flood Risk (prior DPEIR Section 5.3.5.2, Earthquake Risks, line 23):

    The RDPEIR should mention that strong ground motions will not only affect existing levees but also any new water conveyance within the Delta. RLO011-23

15. Section 6.4 Land Use and Planning, Impacts Analysis of Revised Project (prior DPEIR Section 6.4.2 Thresholds of Significance; Page 6-46, Sec. 6.4.3 Proposed Project; and Pages 6-62 – 6-64 Mitigation Measures):

    The RDPEIR should specifically address the potential environmental implications from the implementation of Delta Plan Governance Policy G P1 (Certifications of Consistency with the Delta Plan) on the City's ability to implement planned improvements and upgrades to existing infrastructure/municipal utility facilities which are consistent with the City's adopted General Plan, Sphere of Influence/Municipal Service Review Sphere Plan, and related Master Infrastructure/Municipal Utility Plans (Water, Wastewater, Stormwater, Transportation/Circulation, Bicycle, and Parks). The RDPEIR should also specifically address the potential individual and cumulative socio-economic, economic sustainability, and fiscal impacts and associated secondary physical environmental effects that may result should the Delta Stewardship Council (DSC) uphold appeals and/or order modifications to approved amendments to and implementation of approved Master Infrastructure/Municipal Utility Plans that may effectively nullify local land use decisions within the Secondary Zone of the Delta.

    Infrastructure and utility plant upgrades will be necessary to implement State and Federal regulatory compliance orders and to accommodate future downtown and infill development in Stockton. Such upgrades will likely be deemed to be covered actions RLO011-24 requiring the City to make findings of consistency with the Delta Plan and making such determinations subject to appeals to the DSC. Accordingly, the RDPEIR should address the direct and indirect economic sustainability impacts that may affect cities and counties within the Secondary Zone of the Delta should planned infrastructure/utility improvements and operational measures, in compliance with State or Federal regulatory orders, be stifled by an adverse DSC appeal determination.

    Also, the 2008 Settlement Agreement between the City, the Sierra Club, and the Attorney General of the state of California requires the City to make good faith efforts to adopt policies that encourage the construction of at least 4,400 units of Stockton's new housing growth in the Downtown area. As previously mentioned, much of the Downtown area is located in the Secondary Zone of the Delta. The Settlement Agreement also requires that City staff submit, for City Council adoption, policies and programs (e.g. Climate Action Plan, amendments to the 2035 General Plan) that specifically direct growth to infill areas (e.g. Downtown). Should the City not be able to fulfill its commitments to accommodate new infill growth due to an inability to implement

Response to comment RLO011-23

Please see the responses to the commenter's prior letter, LO195.

Response to comment RLO011-24

Please see the responses to the commenter's prior letter, LO195.

planned infrastructure/utility improvements and operational measures, in compliance with State or Federal regulatory orders, then Stockton will necessarily grow into areas on the urban fringe, thereby violating the intent of the 2008 Settlement Agreement, the Goals and Policies of the General Plan, and cause previously unanticipated significant environmental impacts as a result of pushing growth, including supporting utility infrastructure to the edge of the urbanized area.

The Plan substantially impedes the ability of the City to undertake the good faith efforts called for and to otherwise comply with the Settlement Agreement. The Plan, as currently presented, represents bad faith on the part of the state in that it undermines the Settlement Agreement previously executed by the state and relied upon by the City. Given this circumstance, the state through the DSC must consider the affect the Plan will have on the Settlement Agreement and refrain from adopting policies that undermine its effective implementation.

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/or 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 2: City of Stockton Letter to Delta Stewardship Council on Exemption of Urban/Urbanizing Areas, Dated July 17, 2012). As noted in the attached November 8, 2012 response letter from the DSC, "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, designated for development in cities or their spheres of influence..." (Source: page 205, Chapter 5, Final Draft Delta Plan, Nov. 30, 2012) (see Attachment 3: Delta Stewardship Council November 8, 2012 Response to City of Stockton July 17, 2012 Letter). The DSC letter also states that "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". In addition, the letter states that "...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". RLO011-24

Accordingly, pursuant to Policy DP P1 and the November 8, 2012 DSC letter, if urban development in areas designated for such development in the City's General Plan and/or Sphere of Influence is excluded by Policy DP P1 from the covered actions consistency provisions and such planned development does not conflict with other policies in the Delta Plan, then, Policy DP P1 should effectively preclude or significantly minimize any procedural hurdles in relation to urban development in areas designated for such development in the City's General Plan and/or Sphere of Influence, particularly in infill areas.

Pursuant to the above-noted comments/observations, the Draft EIR should address the revised project's and alternatives' potential environmental, socio-economic, and fiscal impacts that may result should the Delta Stewardship Council (DSC) uphold appeals

No comments

- n/a -

and/or order modifications to approved infrastructure and municipal utility upgrades that effectively nullify local land use decisions within the Secondary Zone of the Delta that are otherwise consistent with the City's General Plan and other local infrastructure/utility master plans for the western half of the City of Stockton and its Sphere of Influence. RLO011-24

16. Section 20.4 Utilities and Service Systems, Impacts Analysis of Project and Alternatives:

Same comments as stated in B.15 above. Further, the RDPEIR should specifically address the potential environmental implications from the implementation of the Delta Plan on the construction, operation, and management of the existing and planned utilities and service system. For example, if the City's planned expansion/modification of the City's wastewater treatment plant (located in the Primary and Secondary Zone of the Delta) was for all intents and purposes stopped as a result of DSC action, the City may be forced to move its wastewater treatment facility and related utility infrastructure out of the Delta. The geographical placement of the existing wastewater treatment plant takes RLO011-25 advantage of gravity in-flows thereby reducing energy consumption and the resultant air pollution that would otherwise be needed to pump effluent for treatment. Relocating the existing wastewater treatment plant to anywhere else (i.e higher ground) in the City, would by necessity, increase air pollution due to increased pumping and no doubt cause a significant impact on an already impacted air basin. Should other existing and planned utilities and service systems need to be planned or relocated out of the Secondary Zone due the DSC's effective prohibition on development in this area to other areas of the City (e.g. north or east) increases in environmental impacts would occur (e.g. agricultural land conversion, increased vehicle miles traveled, air pollution).

17. Section 20.4.4.6.2, Impact 20-2: Require or Result in the Construction of New Wastewater Treatment Facilities or the Expansion of Existing Facilities, the Construction or Operation of Which Would Have Significant Environmental Effects:

The statement that new wastewater systems are prompted by increased customer demand ignores the historic record of increasingly strict water quality regulations or that treatment plants constructed decades ago require reconstruction or the conversion to more efficient technology. Prior comments made by the City of Stockton on the Draft Delta Plan have suggested that construction at wastewater treatment plants to meet standards imposed by the Regional Water Quality Control Board should be exempt as covered actions, as the imposition of those standards are exempt from covered actions. Additionally, construction to replace aging and failing infrastructure or antiquated treatment technology should be exempt. RLO011-26

The City is concerned that construction of new wastewater systems could be determined to not be in conformance with the Delta Plan. In particular, wastewater treatment plants are typically constructed to use gravity to the greatest extent possible to move wastewater to the plant. Consequently, Stockton's wastewater treatment plant is located within the legal Delta. By not excluding improvements to existing wastewater treatment plants to meet standards imposed by the Regional Water Quality Control Board, the City is concerned that the Delta Plan could require such construction to be moved out of the Secondary Zone. The potential impacts of such a move would necessarily involve substantial wastewater pumping with the associated energy

Response to comment RLO011-25

Please see the responses to the commenter's prior letter, LO195.

Response to comment RLO011-26

Please see the responses to the commenter's prior letter, LO195.

demand, and could involve construction of a completely new treatment facility. Such impacts are not considered in the Draft EIR and could well be considered significant.

A potential consequence of increased wastewater treatment costs is a corresponding increase in the costs passed through to housing projects. These additional costs represent a real and substantial impact on the ability of the City to encourage and to ultimately supply the affordable housing that it is obligated to produce and/or facilitate RLO011-26 pursuant to state law and the Settlement Agreement with the Attorney General on its General Plan. Affordable housing is a difficult product to produce even in good economic times, but in the current economy and with the state having dissolved the City's redevelopment agency (which was the most important and successful tool available to facilitate the production of affordable housing), with the approval of the Plan the state has further eroded the City's ability to care for its most vulnerable citizens; a group largely made up of underserved racial and ethnic minority populations. Should further costs to these areas be required, the costs would potentially be very significant and would be passed through to each affected project, including affordable housing projects, reuse and remodeling projects, and other in-fill projects, rendering them less feasible and helping to ensure the decline of the City's existing downtown core.

18. Section 20.4.4.6.2, Impact 20-3: Require or Result in the Construction of New Stormwater Drainage Facilities or the Expansion of Existing Facilities, the Construction or Operation of Which Would Have Significant Environmental Effects:

The Revised Project does not exempt stormwater drainage facilities from covered actions. Stormwater drainage facilities, using gravity for water movement to the greatest extent possible, are, for the City of Stockton, primarily located within the Secondary Zone. The statement that new stormwater drainage facilities are prompted by increased impervious surfaces ignores the historic record of increasingly strict water quality regulations. Any decision that necessary stormwater drainage facilities are not consistent with the Delta Plan would put the City of Stockton in the untenable position of not being able to discharge stormwater from the City or not meeting imposed water quality requirements. It is difficult to imagine the potential environmental impacts of trying to move stormwater from within the Delta to outside of the Delta for discharge or treatment, particularly if pumping plants are not exempt from covered actions. The RDPEIR clearly does not address these potential impacts which could be significant. RLO011-27

A potential consequence of increased storm water facility costs is a corresponding increase in the costs passed through to housing and other projects. These additional costs represent a real and substantial impact on the ability of the City to encourage and to ultimately supply the affordable housing that it is obligated to produce and or facilitate pursuant to state law and the Settlement Agreement with the Attorney General on its General Plan. Affordable housing is a difficult product to produce even in good economic times, but in the current economy and with the state having dissolved the City's redevelopment agency (which was the most important and successful tool available to facilitate the production of affordable housing), with the approval of the Plan the state has further eroded the City's ability to care for its most vulnerable citizens; a group largely made up of underserved racial and ethnic minority populations. As to storm water this has a particularly high propensity to impact infill development, such as

Response to comment RLO011-27

Please see the responses to the commenter's prior letter, LO195. Social and economic impacts are not effects on the environment under CEQA, and are not analyzed in the EIR. CEQA Guidelines §§ 15064(e) and 15131; see also Master Response 2.

affordable housing projects in the City's downtown. The reason for this disproportionate impact is that there is no infrastructure in place, no available land, or financing that is reasonably available to implement any mechanical or natural solutions to the discharge of pollutants to the City's MS4 in the areas of the City that have been built-out under previous development standards. Should further mitigation in these areas be required, the costs would potentially be very significant and would be passed through to each affected project, including affordable housing projects, reuse and remodeling projects, and other in-fill projects, rendering them less feasible and helping to ensure the decline of the City's existing downtown core. RLO011-27

19. Section 22-2 Cumulative Impacts of the Revised Project:

The Cumulative Impacts section of the RDPEIR fails to address the potential cumulative effects of the revised project and/or project alternatives related to environmental justice issues that may result from the implementation of the Delta Plan's policies and/or recommendations. California law (Government Code § 65040.12) defines Environmental Justice as: "The fair treatment of people of all races, cultures and incomes with respect to the development, adoption, implementation, and enforcement of environmental laws, regulations and policies." The Draft EIR fails to acknowledge and address the fact that the City of Stockton, the surrounding metropolitan area, and San Joaquin County as a whole have been disproportionately severely impacted by the on-going economic recession and housing foreclosure crisis. For example, the potential loss of agricultural-related jobs due to conversion of agricultural land by ecosystem restoration and flood control projects associated with the proposed project will severely and disproportionately impact the existing low-income, minority population within the City and adjacent County areas within the Primary and Secondary Zones of the Delta. Specifically, the proposed project will further disproportionately impact that low-income, minority population by leading to a loss of jobs and the corresponding loss of income and resulting increase in foreclosures.

In 2007, approximately 55 percent of the City of Stockton's population was non-white compared to 45 percent non-white in San Joaquin County or 40 percent for the state. Household incomes in Stockton are lower than incomes in the state. For example, approximately 36 percent of the Stockton households earned less than $30,000 in 2007, compared to 29 percent of state households. Households earning $75,000 or greater consisted of only 29 percent of Stockton households, but accounted for almost 40 percent of all California households. RLO011-28

In 1970 the residents of Stockton, the state of California and the nation as a whole had about the same average personal income. However, by the early 1980s, Stockton's average per capita income had decreased compared to California and national averages. From 1984 to 2006 the personal income gap between Stockton and the rest of California was four times greater ($12,354) than it was in 1984 ($3,091).

In 2010, the overall poverty rate for Stockton was 16.4 percent compared to 15.1 percent nationally. The change in median household income from 2007-2010 was a negative 9.4 percent. Stockton's poor population increased 56.4 percent from 2000 to

Response to comment RLO011-28

Please see the responses to the commenter's prior letter, LO195.

2010. According to the U.S. Census Bureau, in 2010 Stockton had the tenth highest poverty rate of all suburban areas in the nation.

At the end of 2011, Stockton had the highest foreclosure of any city in the U.S. One out every 120 homes got hit with a foreclosure filing in November, up 20% from October and 9% from November 2010. On average, foreclosures were filed on one out of every 579 homes in the U.S.

On June 28, 2012, the City of Stockton filed a petition for protection under Chapter 9 of the United States Bankruptcy Code. The City's General Fund, which is the fund that provides essential services, such as police and fire, has exhausted its reserves and is burdened with obligations it cannot pay. The City had no other choice but to move forward and use the features and protections afforded by the Bankruptcy Code to preserve basic public health and safety services for the citizens of Stockton. The City has addressed over $90 million in deficits during the past 3 years, and was facing an insurmountable additional $26 million deficit in the current fiscal year that began on July 1, 2012. RLO011-28

The City has reduced Police officers by 25%, Fire department staffing by 30% and all other City employees by 43%. These reductions occurred in a city that has one of the highest crime rates and some of the busiest fire stations in the country.

The Cumulative Impacts section of the Draft EIR should provide a programmatic environmental justice analysis of potentially disproportionately high and adverse human health or environmental effects to low-income or minority populations within the City of Stockton and surrounding County areas, consistent with the environmental justice provisions in California Government Code, Section 65040.12 and with the environmental justice guidelines for NEPA in the federal document, Environmental Justice: Guidance Under the National Environmental Policy Act (Council on Environmental Quality 1997).

20. Section 23.6.1 Water Resources:

The Revised Project could degrade water quality at the intake for Stockton's Delta Water Supply Project. In California, water quality objectives exist to protect all beneficial uses of water. In the Sacramento-San Joaquin River Delta, water quality objectives for salinity have been set to protect drinking water supplies, agriculture, fish and wildlife. Salinity objectives and other measures set forth by the State Water Resources Control Board (State Board) have been regularly exceeded in the South Delta. Salinity in excess of the standard can cause extensive water quality impacts. The United States Bureau of Reclamation (Reclamation), and the California Department of Water Resources (DWR), are obligated by State Law under their Water Right Permit terms to operate the Central Valley Projects (CVP) and State Water Project (SWP) in a manner to meet the salinity standards at both Vernalis, on the Lower San Joaquin River, and in other locations within the Delta. Unfortunately, the CVP and SWP have been operated by Reclamation and the DWR in violation of their Water Right Permit terms. With at drinking water diversion facility located within the Delta, any proposed changes to water quality due to Revised Project outlined in the RDPEIR must thoroughly address possible impacts to water quality at the City's point of diversion and elsewhere. RLO011-29

Response to comment RLO011-29

Please see the responses to the commenter's prior letter, LO195 and Master Response 5.

C. CONCLUDING COMMENTS

Based on the substantive comments provided above and those of the other Delta Initiative stakeholders, the City believes that the Recirculated Draft Program EIR is technically and legally inadequate, as it does not comply with the provisions of CEQA and the CEQA Guidelines. In accordance with CEQA Guidelines Section 15088.5, the City respectfully requests that the Recirculated Draft Program EIR be revised to adequately address our concerns and recirculated for a 90-day noticed public review and comment period.

The City appreciates the opportunity to review and comment on the Recirculated Draft Program EIR for the Final Draft Delta Plan and looks forward to the opportunity to review a subsequently revised and recirculated Draft EIR that adequately addresses a modified Final Draft Delta Plan that acknowledges and addresses the City's concerns. City staff is committed to working closely with the DSC and DSC staff in ensuring that the Delta Plan is successful in achieving the coequal goals in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place. RLO011-30

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 Michael M. Niblock, Principal, MMN Planning Solutions at (209) 662-4754 (mmnplanningsolutions@gmail.com).

G. MEL LYTLE, PH.D.
DIRECTOR OF MUNICIPAL
UTILITIES

STEVE CHASE, DIRECTOR
COMMUNITY DEVELOPMENT DEPARTMENT

Attachments

1. City of Stockton Comments on Rulemaking Package for Regulations Contained in Delta Plan, January 14, 2013.
2. City of Stockton Letter to Delta Stewardship Council on Exemption of Urban/Urbanizing Areas, Dated July 17, 2012.
3. 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
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

Response to comment RLO011-30

Comment noted.

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 Luebberke, 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

No comments

- n/a -

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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

No comments

- n/a -

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.)

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[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".

No comments

- n/a -

The Policies contained in the Delta Plan, that constitute the "regulations[3]" 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.

No comments

- n/a -

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

No comments

- n/a -

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

No comments

- n/a -

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.)

No comments

- n/a -

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

No comments

- n/a -

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 Luebberke, 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

No comments

- n/a -

ANN JOHNSTON
Mayor

KATHERINE M. MILLER
Vice Mayor
District 2

Stockton
All-America City
2004
1999

CITY OF STOCKTON

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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.

No comments

- n/a -

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

No comments

- n/a -

DELTA STEWARDSHIP COUNCIL
A California State Agency

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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

No comments

- n/a -

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-

No comments

- n/a -

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
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Stockton City Council
Stockton City Manager

No comments

- n/a -

Susana Schlendorf, Chief of Staff for The Honorable Joan Buchanan, Member of the Assembly
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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

No comments

- n/a -