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## CITY OF STOCKTON

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June 8, 2012

Phil Isenberg, Chairman and Council Members  
Delta Stewardship Council  
Attn: P. Joseph Grindstaff, Executive Officer  
980 Ninth Street, Suite 1500  
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### **CITY OF STOCKTON COMMENTS ON FINAL (6TH) STAFF DRAFT DELTA PLAN**

The City of Stockton (City) appreciates the opportunity to review and comment on the Final (6th) Staff Draft Delta Plan (Final Plan), which will serve as the revised project to be analyzed in a Supplemental Draft Program Environmental Impact Report (SPEIR) for the adoption of the Final Delta Plan. The City will provide more specific comments regarding the potential environmental impacts of the Delta Plan as part of our review of the subsequently circulated Supplemental Draft Program EIR, in accordance with the provisions of the California Environmental Quality Act (CEQA) process.

The City also appreciates the Delta Stewardship Council's (DSC) and DSC staff's acknowledgment of some of the City's concerns and the amendments incorporated into the Final Plan that address some of the City's comments expressed in our September 29, 2011 comment letter on the 5<sup>th</sup> Staff Draft Delta Plan (attached as Exhibit 1) and our February 2, 2012 comment letter on the Draft Program EIR for the 5<sup>th</sup> Staff Draft Delta Plan. Overall, the City believes that the Final Plan is significantly improved over prior versions in several sections of the document. However, the City respectfully believes that additional modifications and clarifications are necessary to provide clear policy and administrative procedural direction for implementation of the Final Plan, as discussed below.

As the largest urban area in the Delta, the governance provisions as well as the economic and fiscal impacts of the Draft Plan are of critical concern to the City. The City's comments on the Final Plan include both general and specific concerns, with a focus on how the Final Plan impacts the Delta as an evolving place and a few specific concerns arising from the policies and recommendations contained in the Final Plan.

The following comments summarize the City's general and specific concerns with the existing content of the Final Plan and lists key recommendations:

1. In Chapter 2, Page 56, Policy G P1, Detailed Findings to Establish Consistency with the Delta Plan, the third bullet point states as follows:

"Covered actions not exempt from CEQA must include applicable mitigation measures identified in the Delta Plan's Program EIR, or substitute mitigation measures that the proposing agency finds are equally or more effective."

The City is concerned that this language is too vague and open ended and may potentially commit the City to requiring mitigation measures that may be unenforceable or beyond the City's jurisdiction to require and enforce. The City would suggest the following alternative language (shown in **bold**):

- **Covered actions not exempt from CEQA must include applicable mitigation measures identified in the Delta Plan's Program EIR, or substitute mitigation measures that the proposing agency finds are equally or more effective, and over which that agency has enforcement authority or for which that agency can require compliance in accordance with the provisions of the California Environmental Quality Act (CEQA).**
2. Consistent with Policy DP P1 in Chapter 5 (page 192), the Final Plan should more clearly acknowledge that new urban development within "Urban" and "Urbanizing Areas" within the Secondary Zone of the Delta and designated on and consistent with adopted city or county General Plans as of the effective date of the Delta Plan, which is proposed within cities, their spheres of influence or other urban areas (e.g., Mountain House General Plan Community Boundary and Contra Costa County Urban Limit Line) approved by a Local Agency Formation Commission (LAFCO) (as shown on Figure 5-1, attached as Exhibit 2), or Legacy Communities (as shown in Appendix K), shall be administratively excluded or exempt from being considered "covered actions" and from the related certification process.

This intent is stated in Chapter 5, page 171, in the first paragraph of the section entitled "The Delta's Urban Communities", as shown below (emphasis added in **bold**):

"The region's urban communities, including Sacramento, West Sacramento, Stockton, Lathrop, Tracy, Oakley, Brentwood, Antioch, and Pittsburg, are located entirely or partially in the Delta's Secondary Zone. The general plans of Delta cities and counties describe where development of these communities may occur. These plans or actions by the respective local area formation commission describe "spheres of influence" for each expanding jurisdiction and often identify an urban limit line beyond which intense development cannot occur without amendment of the plan. About 26,000 acres of the Delta within these spheres of influence are expected to undergo urbanization, about the same area as was

developed in the Delta between 1984 and 2008 (DPC 2012b). (See Figure 5-1.) To encourage the location of new development within these spheres of influence, rather than in rural areas, and within portions of the Legacy Communities already planned for urban uses, the policies of Chapter 4 and Chapter 7 exempt development there from policies to protect ecosystem restoration opportunities or increase flood protection standards. **The Delta Plan includes no policies or recommendations to control land use or density in these urban and urbanizing areas.**"

Furthermore, the Final Plan's proposed Policy DP P1, Locate New Development Wisely (Chapter 5, page 192), states that new urban development shall be limited to defined urban or urbanizing areas and their spheres of influence, consistent with the urban designations on city or county General Plans (as shown on Figure 5-1) and/or to Legacy Communities (as shown in Appendix K).

Accordingly, the narrative in Chapter 5, page 171, and the language of Policy DP P1 on page 192 imply that new urban development that is appropriately designated on the applicable city or county General Plan and will be located within a city, their sphere of influence or other LAFCO-approved urban areas, or Legacy Community (as shown on Figure 5-1), will not be considered a covered action and will be exempt from the related certification provisions. However, that intent is not specifically stated or confirmed in the policies or elsewhere in the Final Plan.

Consistent with Policy DP P1, the City respectfully recommends that the Final Plan be amended to specifically exclude or exempt new urban development within existing urban or urbanizing areas (as shown on Figure 5-1) from being considered a covered action and from the provisions for consistency determinations. This exclusion/exemption may be addressed under the "Administrative Exemptions" section in Chapter 2, pages 53 – 54. In addition, the City recommends that the following revised language be adopted for Policy DP P1, Locate New Development Wisely (Chapter 5, page 192) (additions shown in **bold**):

"New urban development, including residential, commercial, and industrial uses (other than commercial recreational visitor-serving uses or facilities for processing of local crops or that provide essential services to local farms) must be limited to areas that city or county general plans, as of the effective date of this policy, designate for development in cities, their spheres of influence **or other LAFCO-approved urban areas (e.g., Mountain House General Plan Community Boundary and Contra Costa County Urban Limit Line)** (as shown in Figure 5-1), or Legacy Communities (as shown in Appendix K). **Such new urban development shall not be covered actions and shall not be subject to the consistency certification provisions under the Delta Plan.**

This policy covers proposed actions that involve new urban development, including residential, commercial, and industrial uses, that is located outside of cities, their spheres of influence, **other LAFCO-approved urban areas (as shown in Figure 5-1)**, or Legacy Communities **(as shown in Appendix K)**. It

does not cover visitor serving uses, or industrial or commercial uses to process local crops or that provide essential services to local farms.”

3. In addition to the “Covered Actions” exemptions listed under the “Administrative Exemptions” section in Chapter 2, pages 53 – 54, the City recommends that the Final Plan include the following exemptions as new bullet points (new text in **bold**):

- **Any project , and/or portion thereof, as defined pursuant to Section 21065 of the Public Resources Code, including subsequent entitlements and supporting infrastructure improvements required for implementation of such project, within an “Urban Area or Urbanizing Area” in the secondary zone or Legacy Communities, as shown in Figure 5-1 (Urban and Legacy Communities of the Delta), that is contained within, covered by, and substantially conforms with a General Plan, Sphere of Influence, Specific or Master Plan, Community Plan, and/or a Development Agreement adopted by the applicable local land use authority(ies) within said Urban or Urbanizing Area or Legacy Community.**
- **Any upgrades to existing drinking water, stormwater, or wastewater treatment, storage, or conveyance facilities, within the existing physical footprint and/or legal property boundaries, as applicable, of that facility to meet a state and/or federal water quality compliance order; consistent with state standards or federal standards, or both, and which have complied with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) or the federal National Environmental Policy Act (42 U.S.C. Sec. 4321 et seq.), or both.**
- **Any flood control projects in the secondary zone of the Delta that are consistent with the applicable provisions of Senate Bill 5, the Central Valley Flood Protection Act (“CVFPA”), which would provide protection to an Urban or Urbanizing Area, as shown in Figure 5-1 (Urban and Legacy Communities of the Delta) and as defined in Section 65007 of the Government Code, or existing public infrastructure, and which have complied with the California Environmental Quality Act (Division 13 (commencing with Section 21000) of the Public Resources Code) or the federal National Environmental Policy Act (42 U.S.C. Sec. 4321 et seq.), or both.**

In order to provide additional statutory support for the above-note exemptions, the Delta Coalition, including the City of Stockton, is also promoting new legislation proposing that the same or similar covered actions exemption language be added to Section 85057.5 (b) of the California Water Code (Delta Reform Act of 2009).

4. Unless the above-noted exemption language is incorporated into the Final Plan, the requirement that agencies file a consistency certification for any of their approved plans or projects within an existing urban or urbanizing area places a massive financial and administrative burden on local governments, especially during the current fiscal crisis and with significantly reduced resources, to prepare such consistency findings. In addition, and even though previously approved/certified plans are not covered actions, yet-to-be-approved projects that are consistent with these previously approved plans could still be held inconsistent with the Delta Plan. For example, projects that are in the pipeline and that are consistent with the City's 2007 General Plan could now be invalidated through the covered action consistency certification process.

The development and implementation of the Final Plan, including determining the consistency of covered actions must be done in a way that does not adversely affect the "Delta as an evolving place." Indeed, the entire exercise of preparing the Delta Plan is geared towards achieving the "coequal goals". Meeting the coequal goals, while recognizing the values of the Delta as an evolving place, applies equally throughout the Delta – not just to sparsely populated areas. Potential conflict exists where local governments continue to engage in activities and approve projects essential to the economic and social well-being of the people of the Delta. Those activities may potentially be at risk, unless the Final Plan is amended as recommended in Comments 2 and 3 above. As the economy improves, a significant number of development proposals are anticipated to be filed consistent with locally-adopted General Plans within existing urban and urbanizing areas in the Secondary Zone. The development review process for such conforming development proposals must be streamlined to facilitate the economic recovery. Should these proposals be considered "covered actions" subject to the Delta Plan's certification of consistency requirements, the DSC and DSC staff may be inundated with the review of said certification documents and related appeals which will only delay, if not prevent, the implementation of such conforming projects within existing urban and urbanizing areas.

Furthermore, unless amended as recommended in Comments 2 and 3 above, the consistency certification provisions for covered actions within urban and urbanizing areas will provide new obstacles not only to new development, but also potentially to improvements and upgrades of existing infrastructure, redevelopment projects, and other necessary projects within said urban areas that protect and enhance the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.

5. To the extent the Final Plan seeks to ensure adequate flood protection for urban development and consistent with the discussion, policies, and recommendations in Chapter 7 (pages 261-262 and 272-273), the recommended exemption for flood control projects within urban and urbanizing areas is included in Comment 3, third bullet, because state law already requires that the specified levels of flood protection

be provided (i.e., Central Valley Flood Protection Act (CVFPA) and Local Flood Protection Planning Act.).<sup>1</sup> Moreover, requiring a consistency determination for such flood control projects in urban areas would make all urban development within those areas subject to a consistency finding (and associated appeal process and litigation), even if such development is proposed pursuant to previously approved plans. The result is to create a type of "double jeopardy," whereby local agencies' prior planning efforts are subject to a cumbersome, lengthy, and uncertain as to outcome, layer of new administrative and potential judicial review, even if the associated flood control measures are consistent with the applicable provisions of Senate Bill 5, the CVFPA.

6. The Final Delta Plan must not be developed, adopted, 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 Delta Plan cannot be used to prohibit water users within the areas of origin from continuing to put water to reasonable and beneficial use. 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 Final Plan must not alter this regulatory framework.

In closing, the City looks forward to the continued opportunity to work with the DSC and DSC staff in making the Final Delta Plan a success 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. Should you have any questions or wish to discuss these comments, please contact City Attorney John Luebberke at (209) 937-8934 or planning consultant Michael M. Niblock at (209) 662-4784.

  
ANN JOHNSTON  
MAYOR

AJ/JL/MMN:jl

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<sup>1</sup> For example, the CVFPA already requires general plans to incorporate information from CVFPP and agencies to conform their general plan and zoning ordinances upon completion of the next Housing Element update, accordingly, and/or following such amendments or by July 1, 2015, whichever occurs first, impose conditions on development to ensure adequate levels of flood protection (200 years in urban areas, 100 in nonurban areas). In order to enter into a development agreement, or issue a permit to construct a residence, or approve a parcel map within a flood hazard zone, a city or county must find that existing facilities protect urban and urbanizing areas to a 1-in-200 chance of flooding (or lower) in any given year, or the FEMA standard of flood protection in nonurbanized areas, or impose conditions on the development that will provide the required level of protection, or find that the local flood management agency has made adequate progress on construction of the flood protection system to provide the required level of protection.

Attachments (Exhibits 1 and 2)

emc: Stockton City Council w/attachments  
The Honorable Joan Buchanan, Member of the Assembly w/attachments  
Tina Cannon Leahy, Consultant, Assembly Water, Parks and Wildlife Committee w/attachments  
Delta Coalition c/o Julie Lalonde w/attachments  
San Joaquin County Board of Supervisors w/attachments  
Port of Stockton w/attachments  
Stockton Planning Commission w/attachments  
Stockton Development Oversight Commission w/attachments  
Bob Deis, City Manager w/attachments  
John Luebberke, City Attorney w/attachments  
Mel Lytle, Director of Municipal Utilities w/attachments  
Jeff Willett, Deputy Director Municipal Utilities w/attachments  
David Stagnaro, Planning Manager, CDD/Planning and Engineering Services 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  
Barry Brokaw and Donne Brownsey, Sacramento Advocates, Inc. w/attachments  
Paul Simmons, Attorney, Somach Simmons & Dunn w/attachments  
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September 29, 2011

Phil Isenberg, Chairman  
Council Members  
Delta Stewardship Council  
Attn: P. Joseph Grindstaff, Executive Officer  
980 Ninth Street, Suite 1500  
Sacramento, California 95814

### **CITY OF STOCKTON COMMENTS ON THE DELTA PLAN – FIFTH STAFF DRAFT**

The City of Stockton (City) appreciates the opportunity to review and comment on the Fifth Staff Draft Delta Plan (Draft Plan), which will serve as the basis for the draft Environmental Impact Report (EIR) for the adoption of the final Delta Plan. The City will provide more detailed comments as the Delta Plan progresses, and will have specific comments regarding the potential environmental impacts of the Delta Plan as part of the California Environmental Quality Act (CEQA) process.

The Delta Stewardship Council (DSC) has circulated several iterations of a draft Delta Plan, receiving comments and suggestions for revisions to the various drafts. As the largest urban area in the Delta, the governance provisions as well as the economic and fiscal impacts of the Draft Plan are of critical concern to the City. The City's concerns with the Draft Plan include general concerns and specific concerns. Below, we outline some of our general concerns, provide a broader discussion of how the Draft Plan impacts the Delta as a place, and address a few specific concerns arising from the policies and recommendations contained in the Draft Plan

The following comments summarize the City's general concerns with the existing content of the Draft Plan and lists key recommendations:

- Over 50 percent (21,256 acres) of the City'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 (see attached Exhibit 1). All development within these boundaries must be consistent with the City's adopted 2035 General Plan, Infrastructure Master Plans, and the Local Agency Formation Commission's adopted Sphere Plan and

Municipal Service Review for the City. A comprehensive Environmental Impact Report, which was in full compliance with CEQA, and certified on December 11, 2007, and for which a Notice of Determination was filed on December 12, 2007, addressed those approved plans. As there are still discretionary approvals required for some projects contemplated by these approved plans, the Delta Plan, as currently drafted, could act as a *de facto reversal* of the prior approvals and indirectly usurp the City's existing land use authority within the areas covered by the Delta Plan. The Delta Plan certainly cannot retroactively invalidate otherwise lawfully adopted plans and should be revised to eliminate the potential conflicts with existing adopted plans.

- The effect of the Delta Plan must not be to stifle progress in existing urban areas or prevent orderly and carefully planned growth. The Draft Plan should consider more carefully the application of "consistency determinations" as applied to urban areas within the Secondary Zone of the Delta and should be revised to exempt planned urban development within the incorporated City limits and the City's adopted Sphere of Influence, which is defined as of the effective date of the Delta Plan.
- The definition of "project" should mirror the definition of "project" in CEQA, including all of the exemptions recognized by CEQA.
- All levee improvements and any other flood control projects should be exempt from the consistency determination process.
- Urban development within existing planning areas, located behind levees that meet current federal standards, should be considered consistent with the Delta Plan.
- Any improvements to existing public facilities should not be covered actions, particularly those required by regulatory agencies. For example, anticipated upgrades to the City's Regional Wastewater Control Facility (RWCF) to meet state water quality requirements should not be a covered action.
- As the Delta Independent Science Board has stated, there is no broadly accepted objective methodology for prioritizing stressors. The Council has no mechanism to assess fair and equitable stressor fees.
- Pollutant loading fees for constituents discharged under limits established by permits issued by the Regional Water Quality Control Board duplicate existing discharge fees, usurp the authority of the Regional Board, and most importantly ignores that municipalities incur tremendous costs to comply with water quality standards adopted for protection of beneficial

uses. Accordingly, no such pollutant loading fees should be assessed or recommended by the Delta Stewardship Council.

- The Delta Plan should address economic sustainability impacts within the Secondary Zone of the Delta, particularly in urban areas like Stockton and the Port of Stockton. The Economic Sustainability Plan prepared by the Delta Protection Commission (DPC), as input to the Draft Delta Plan, focuses solely on the Primary Zone and does not address the economic impacts within the Secondary Zone of the Delta.
- The Delta Plan must not 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 Delta Plan cannot be used to prohibit water users within the areas of origin from continuing to put water to reasonable and beneficial use. 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 Delta Plan must not alter this regulatory framework.
- The Delta Plan should not use the “assessed value” of Delta lands as a measure of “worth.” Instead, the Delta Plan must recognize the significant importance of the continued vitality of Delta agriculture, including its economic multiplier effect, and its contribution to maintaining an adequate food supply for people throughout the state and country.

## **I. IMPACT OF DELTA PLAN ON LOCAL COMMUNITIES**

At this juncture, and given the status of the Delta Plan and commencement of CEQA review, the City believes that this is a good opportunity to pause and review the Draft Plan overall; including as it relates to governance generally and its impact on the “Delta as a place.” A revisit to these overarching themes helps to place the specifics of the Delta Plan in context and allows for a more thoughtful consideration of the policies and recommendations contained in the Plan as they relate to the coequal goals and Delta as a place.

### **A. Local Governance and the Delta As A Place**

The Delta Plan will likely have the most impact on local and regional government agencies in and around the Delta through its implementation, which is the subject of Chapter 3. Chapter 3 includes a discussion of “Covered Actions” and consistency findings, which would apply to many actions taken by local agencies on matters

addressed by the Delta Plan. Indeed, the most likely cause of conflict over the implementation of the Delta Plan is the tension created by subjecting the decision-making authority of local governments to the strict, and frequently subjective, requirements of the Delta Plan as well as the oversight by the Delta Stewardship Council.

The development and implementation of the Delta Plan, including determining the consistency of covered actions must be done in a way that does not adversely affect the “Delta as an evolving place.” Indeed, the entire exercise of preparing the Delta Plan is geared towards achieving the “coequal goals,” which are defined as:

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. (Wat. Code, § 85054 (emphasis added).)

Meeting the coequal goals, while recognizing the values of the Delta as an evolving place, applies equally throughout the Delta – not just to sparsely populated areas. Potential conflict exists where local governments continue to engage in activities and approve projects essential to the economic and social well-being of the people of the Delta. Those activities may potentially be at risk due to the Draft Plan as proposed.

The question then, is how far can and will the Delta Plan reach into local sovereignty and what types of activities and/or projects can potentially be “prohibited” by the implementation of the Delta Plan through application of the DSC’s “consistency” determinations?

## **B. Covered Actions**

The City continues to have serious concerns about the Draft Plan’s definition and treatment of “covered actions.” Whether a particular action by the City is a covered action has significant policy, legal, financial, and practical consequences to the City, its residents, businesses, property owners, *and developers*. As drafted, the plan appears to exceed the Legislature’s intent with regard to covered actions, and in doing so overreaches, duplicates provisions of existing law, and subjects even previously approved development to a cumbersome, time consuming, uncertain layer of administrative, and potential judicial review.

Water Code section 85225 provides that:

[a] state or local public agency that proposes to undertake a covered action, prior to initiating the implementation of that covered action, shall prepare a written certification of

consistency with detailed findings as to whether the covered action is consistent with the Delta Plan and shall submit that certification to the council.

“Covered actions” are defined as plans, programs, or projects<sup>1</sup>, that meet *all* of the following conditions:

- (1) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.
- (2) Will be carried out, approved, or funded by the state or a local public agency.
- (3) Is covered by one or more provisions of the Delta Plan.
- (4) Will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta.

(Water Code, § 85057.5(a).) Water Code section 85057.5, subdivision (b) contains various exceptions to plans, programs, or projects that are, by definition, not “covered actions” under the Delta Plan.

Chapter 3 of the Draft Plan touches on the concept of “covered actions” and begins to address how covered actions will ultimately be measured against the Delta Plan. Again, Water Code section 85057.5 requires, among other things, that in order to be a covered action, a plan, program, or project must be “covered by one or more provisions of the Delta Plan.” The Draft Plan at page 57, lines 27-28, clarifies that being “covered by one or more provision” means that one of the policies contained in the Delta Plan must be applicable to the proposed project. In other words, only where *no* policies are implicated by a proposed project is the project not a covered action.<sup>2</sup>

While the concept of determining consistency with the specific policies in the Delta Plan appears straightforward, Policy G P1 appears to provide for a much more

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<sup>1</sup> “Project,” for the purpose of the Delta Plan, has the same meaning as the use of that term for CEQA purposes.

<sup>2</sup> The Draft Plan uses the terms “policies” in certain places and the concepts of “coequal goals” and “inherent objectives” in others. It is unclear whether, in order to demonstrate “consistency,” an approving agency must demonstrate consistency with policies contained in the Delta Plan, or whether the approving agency must demonstrate consistency with the more vague concepts of “coequal goals” and “inherent objectives” of the Delta Plan. It should also go without saying that, in order to be “consistent” with the Delta Plan, a project must not jeopardize or degrade *the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.*

subjective standard. Policy G P1 discusses consistency not only with the policies contained in the Delta Plan, but also with the “coequal goals” and “inherent objectives,” however they may be defined. This loose language appears to subject covered actions to a much more subjective review by the Council – a process by which local agencies might not now how some “inherent objective” will be interpreted when an appeal is filed. Delta Plan policies must be drafted in a way that works towards attaining the coequal goals and the “inherent objectives.” Where a local agency is required to make consistency findings, those findings must be based on specific policies articulated in the Delta Plan – not on vague concepts applied subjectively.

While there is some implicit recognition that “covered actions” might occur outside the Delta, the real and practical effect of implementing the Delta Plan will be that the majority of “covered actions” will consist of projects approved by local government agencies – those agencies with primary land use and other approval authority in the Delta. It is these local government agencies that will shoulder the significant added burden and cost associated with this new administrative requirement. However, the Draft Plan’s potential impact extends much farther than delays and increased cost in the approval of future development. As discussed below, the proposed Delta Plan goes so far as to reopen projects that are consistent with previously adopted land use plans through its requirement that agencies file a consistency certification for any of their previously approved plans or programs that have not been incorporated into the Delta Plan. (See Draft Plan p. 61:32-35.) This requirement places a massive financial and administrative burden on local governments, especially during the current fiscal crisis and with significantly reduced resources, to prepare such consistency findings. In addition, and even though previously approved plans are not covered actions, yet-to-be-approved projects that are consistent with these previously approved plans could still be held inconsistent with the Delta Plan. For example, projects that are in the pipeline and that are consistent with the City’s 2007 General Plan could now be invalidated through the covered action process. The practical effect of the application of the consistency determination process, as it relates to existing approved General Plans, could be to invalidate parts of lawfully adopted General Plans, or at least subject them to post-hoc appellate review and litigation.

Moreover, the Draft Plan’s definition of covered actions, which incorporates CEQA’s definition of “project,” also overreaches by failing to incorporate CEQA’s statutory and categorical exemptions, except for ministerial projects. Because the Draft Plan requires local agencies to make detailed findings for all significant impacts of *any* covered action, the omission of CEQA’s categorical exemptions effectively nullifies the effect of these exemptions. This is contrary to the Legislature’s direction that certain projects not be subject to the time, expense, and burden of CEQA compliance. In addition to creating a CEQA-like environmental assessment and findings requirement for projects that otherwise would not be subject to CEQA, for projects that are subject to CEQA, this requirement makes the DSC a separate administrative appellate body for CEQA in the Delta. This additional requirement adds a layer of review and timeline that

is inconsistent with CEQA and its timelines for project approval, in particularly its short statute of limitations.<sup>3</sup>

### **C. Consistency with the Delta Plan**

When a local agency undertakes a “covered action,” that agency *must* prepare a “written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan and shall submit that certification to the council.” (Wat. Code, § 85225.) The Draft Plan discusses consistency in the context of specific policies contained in the Delta Plan, as well as in the context of the “coequal goals,” the “inherent objectives” of the Delta Plan, and the Delta Plan generally. In this regard, some clarity regarding consistency with the Delta Plan, its policies and/or the coequal goals may be appropriate.

Water Code sections 85225.10 through 85225.25 provide for procedures by which any person, including a member of the DSC or its executive officer, can “appeal” a local agency’s certification of consistency to the DSC.<sup>4</sup> Water Code section 85225.30 directs the DSC to adopt administrative procedures for appeals, which are contained in Appendix B of the Draft Plan.

Appendix B provides very short timeframes for the local agency, at its own cost, to prepare and submit the complete record before that local agency at the time the certification was made, including a requirement that the local agency prepare a table of contents of that record as well as a chronology of events and actions relevant to the “covered action.” If the local agency fails to provide all of this information within 10 days of an appeal being filed, the DSC may automatically affirm the appeal and find the project inconsistent with the Delta Plan. The DSC must, with limited exception, hear an appeal within 60 days of the filing of an appeal and must render a decision within 60 days of hearing the appeal. If the appeal is granted, the DSC “remands” the action back to the local agency for reconsideration.

Notwithstanding Water Code section 85225.25’s authorization for the local agency to proceed with a covered action either as originally proposed or as modified by the local agency in response to the DSC’s findings, the administrative procedures appended to the Draft Plan prohibit a local agency from implementing a project unless an appeal has been denied or otherwise dismissed, or the local agency files a revised certification of consistency addressing the DSC’s findings and no further appeal has

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<sup>3</sup> As discussed below, even a single appeal of a consistency determination (without an appeal of any remand), is likely to extend far beyond any CEQA statute of limitation for a local agency’s land use approval.

<sup>4</sup> The Draft Plan contains no requirement that a person appealing a consistency determination to the DSC participate in the project proceedings before the local agency. The Draft Plan should be revised to contain such a requirement to afford the local agency with an opportunity to address any alleged deficiencies in the first instance.

been filed.<sup>5</sup> This added requirement appears at odds with the statutory language providing the local agency with the final say on whether a proposed project should proceed. (Water Code, § 85225.25.)

The appeal process is highly burdensome to local agencies and is likely to result in substantial cost and staff resources. The appellate procedures also place a substantial burden on local agency funds and staff resources and include unreasonable, if not infeasible, timelines for local agency action, with potentially dire consequences if agencies are unable to comply. In addition to the concerns generally regarding the intrusion on local sovereignty, the City is concerned that this new program being implemented by the State through the DSC creates an unfunded mandate in violation of Article XIII B, section 6 of the California Constitution. The City has experienced significant reductions in funding and staff resources over the last three years and simply does not have the luxury of extra staff and resources necessitated by these new requirements.<sup>6</sup>

It is within this new world that many local and regional government agencies in the Delta will be required to operate. The numerous Delta Plan policies, concepts of “coequal goals” and “inherent objectives” will provide new obstacles not only to new development, but also potentially to improvements and upgrades of existing infrastructure, redevelopment projects, and other necessary projects that protect and enhance the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.

A prime example of the problems and conflicts associated with the Draft Plan’s treatment of covered actions and consistency is found in Draft Plan Policy RR P3. Draft Plan Policy RR P3 requires all covered actions to be consistent with Table 7-1. Table 7-1, in turn, includes “all urban development” under “covered actions.” By including “all urban development” within the definition of “covered actions,” Table 7-1 unreasonably broadens the Legislature’s definition of “covered action” (see Wat. Code, § 85057.5(a); Draft Plan at p. 57), which limits “covered actions” to those that will have a “significant impact on the achievement of one more of the coequal goals.”

While the DSC’s legal advisers have publicly stated that the interpretation of a covered action is expected to be rather narrow due in part to the “significant impact” language in Water Code section 85057.5, the plain language of Policy RR P3 (and Table 7-1) appears to cast a wide net over all future development within the area covered by the Delta Plan, including the City of Stockton. Under Table 7-1, urban development that meets the highest levels of flood protection (urban), and thus should

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<sup>5</sup> Water Code section 85225.25 contemplates a project moving forward notwithstanding the DSC’s finding of inconsistency. The administrative rules create a circumstance by which a local agency can be caught in a never-ending circle of remands and appeals.

<sup>6</sup> At a minimum, the Draft Plan should be revised to require an appellant to pay for the cost of the administrative record – similar to the same requirement in CEQA.

not implicate the policy concerns behind Policy RR P3, becomes a covered action whether or not it has a significant effect on achievement of the coequal goals (a Legislative prerequisite). To the extent the plan seeks to ensure adequate flood protection for urban development, this provision is unnecessary because state law already requires that the specified levels of flood protection be provided (i.e., Central Valley Flood Protection Act (CVFPA), Local Flood Protection Planning Act.).<sup>7</sup> Moreover, it makes all urban development within the Delta subject to a consistency finding (and associated appeal process and litigation), even if such development is proposed pursuant to previously approved plans. The result is to create a type of “double jeopardy,” whereby local agencies’ prior planning efforts are subject to a cumbersome, lengthy, and uncertain as to outcome, layer of new administrative potential judicial review.

Another example is the Draft Plan’s potential to nullify the intent and implementation of the City’s General Plan and other important plans that have been adopted as a result of years of planning, community participation and expense. Under the Draft Plan the DSC could find that specific projects that implement the City’s General Plan, specific plans or community plans are inconsistent with the Delta Plan, thereby frustrating the City’s ability to provide for orderly development within its boundaries. This also introduces an element of uncertainty to the land development process that could stifle needed and desirable development within the existing urban areas of the Delta. If landowners and developers cannot rely on the measure of certainty provided by proposing development consistent with an adopted General Plans, it is foreseeable they will choose to go elsewhere, depriving Delta cities and counties of needed economic and redevelopment. Such a result is directly contrary to the legislative finding and declaration that carefully planned future development is essential to the economic and social well being” of persons living and working in the Delta.

The Draft Plan should be revised to recognize the need to protect the economic and social well-being of existing Delta residents; including those living in existing urban areas. The practical effect of the Delta Plan cannot be to stifle progress in existing urban areas and prevent orderly and carefully planned growth. The Delta Plan certainly

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<sup>7</sup> For example, the CVFPA already requires general plans to incorporate information from CVFPP and agencies to conform their general plan and zoning ordinances upon completion of the next Housing Element update, accordingly, and/or following such amendments or by July 1, 2015, whichever occurs first, impose conditions on development to ensure adequate levels of flood protection (200 years in urban areas, 100 in nonurban areas). In order to enter into development agreement, or issue a permit to construct a residence, or approve a parcel map within a flood hazard zone, a city or county must find that existing facilities protect urban and urbanizing areas to a 1-in-200 chance of flooding (or lower) in any given year, or the FEMA standard of flood protection in nonurbanized areas, or impose conditions on the development that will provide the required level of protection, or find that the local flood management agency has made adequate progress on construction of the flood protection system to provide the required level of protection.

cannot retroactively invalidate otherwise lawfully adopted plans, such as the City's 2035 General Plan. In this regard, the Draft Plan should more carefully consider the application of "consistency determinations" as applied to urban areas and should be revised to eliminate the potential conflicts with existing plans. The Draft Plan should also be revised to not place the significant burden of the appeals process on local governments.

**D. The Delta Plan should not Devalue Delta Agriculture**

The Draft Plan, in an apparent attempt to justify the abandoning of certain Delta islands, makes the assertion that the cost of maintaining, improving, or repairing levees "may be more than the assessed value of the use of the land they protect in some cases." (Draft Plan at p.23:23-24.) Of course, the same can be said, that the cost to maintain levees exceeds the "assessed value", of lands that provide habitat, open space, parks, infrastructure, roads, and other land uses that provide important public values. This statement is contrary to the recognition of the substantial value of Delta agriculture as expressed earlier in the Draft Plan. (Draft Plan at p.15:1-3.) As such, the statement regarding the assessed value of Delta agricultural land and the cost of maintaining levees should be removed from the Draft Plan.

**E. Risk Reduction Policy RR P3 Is Inappropriate**

The protection of the inhabitants of the City and surrounding areas from flooding is of utmost importance to the City. The City's current land use policies and building restrictions, combined with federal levee requirements provide the City with the appropriate tools to continue to address this critical issue. The City's comments regarding the Draft Plan's attempt to inappropriately constrain the City's land use authority should not be construed as a reduction of the City's commitment to protect the public.

The City has very serious concerns with RR P3 and accompanying Table 7-1. The problem statement that purports to support the policy contained in RR P3 claims that existing Delta levee standards and laws are insufficient to reduce flood risks to lives, property, and "State interests" in the Delta." (Draft Plan at p.173:8-10.) Policy RR P3 attempts to address this problem statement, requiring all covered actions in the Delta to be consistent with Table 7-1. (Draft Plan at p.173:12.) Table 7-1, in turn, provides for acceptable land uses and minimum levee design classifications. The practical effect of this "policy" would be to inhibit the orderly growth within the City's Sphere of Influence, growth that has undergone significant planning and environmental review, negates federal requirements already developed to protect life, property, and other interests, and would preclude the key objectives of the Delta Protection Commission's Economic Sustainability Plan. RR P3 and Table 7-1 should be removed from the Draft Plan.

The City of Stockton and/or the Port of Stockton have several fully-entitled and environmentally-cleared development projects in the City limits located within the

Secondary Zone of the Delta that are in various phases of the development process (see attached Exhibit 2). Some of those projects have approved Master Development Plans with Development Agreements, Planned Development Permits, Large-lot and/or Small-lot Tentative Subdivision Maps, or property leases, and are approaching buildout (requiring only ministerial approvals, such as Final Subdivision/Parcel Maps, building permits, etc.). Other approved master planned projects are in the early phases of the development process and may require additional discretionary entitlements (e.g., Small-lot Tentative Subdivision or Parcel Maps, Conditional Use Permits, etc.). The City respectfully requests that the buildout of those projects and future planned urban development projects in the City's corporate limits and Sphere of Influence, located within the Secondary Zone of the Delta, be exempt from the "consistency determination" provisions of the Draft Plan and that Risk Reduction Policy RR P3 and Table 7-1 be removed from the Draft Plan.

## **II. IMPACT OF DELTA PLAN ON LOCAL WATER SUPPLIES**

The Draft Plan includes policies and recommendations on reducing reliance on the Delta through improved regional self-reliance. For many water suppliers in and around the Delta, these policies and recommendations create a contradiction.

As the Draft Plan notes, water supply self-reliance is achieved, in part, through the development of local and regional water supplies. For the City, those local and regional supplies include the Delta. The Draft Plan should be revised to recognize that certain areas of the State rely upon the Delta as a *local* water supply. To the extent the Delta Plan continues to require communities in the Delta watershed to develop alternate supplies while also promoting continued export through new conveyance options, it violates the area of origin laws as set forth in Water Code sections 10504 et seq., Water Code sections 11460 et seq., and Water Code section 12200 et seq.

Local water supplies also include groundwater. The Eastern San Joaquin County Groundwater Basin is designated as critically overdrafted. (DWR Bulletin 118-80.) Since that time, local stakeholders have been working towards achieving a consensus-based approach, which has resulted in the Eastern San Joaquin Integrated Regional Water Management Plan (IRWMP). This plan contemplates diverting surface water in surplus years to conjunctively manage water local water resources in an effort to achieve regional self-reliance. WR R10 recommends the State Water Resources Control Board (SWRCB) to take certain actions, including potential groundwater basin adjudications, where certain conditions exist. The Draft Plan should promote consensus-based approaches to managing available water resources and help make clear that adjudications, which consume a tremendous amount of time and resources, should only be initiated as a last resort.

### **III. DELTA PLAN AND WATER QUALITY**

#### **A. Recommendation WQ R6 is Impractical**

WQ R6 recommends that the SWRCB and regional boards adopt certain objectives and TMDLs. (Draft Plan at p.148:22-38.) The Draft Plan recommends adopting narrative or numeric water quality objectives for nutrients by the end of 2013. Considering the lack of information currently available, setting such a deadline for the adoption of nutrient water quality objectives is unreasonable and impractical. The Draft Plan also recommends accelerating the completion of TMDLs for pyrethroids to January 1, 2016. This short timeframe is also unreasonable and impractical. There are no existing water quality standards for pyrethroid pesticides. Prior to establishing a TMDL, water quality standards must be adopted into the relevant Basin Plans, and approved by U.S. EPA. This process itself takes considerable time and recommending completion of a pyrethroid TMDL by the end of 2015 is unreasonable and impractical. Instead of recommending unachievable goals, the Draft Plan should strive to recommend goals that are actually achievable.

Another example of unrealistic expectations in the Draft Plan can be found in the Water Quality Driver Performance Measures at page 150. There, the Draft Plan provides that a Driver Performance Measure is meeting TMDLs for critical pesticides by 2020. This is, of course, problematic because the Central Valley Pesticide TMDL is currently behind schedule and is still in development. It is inappropriate to set a compliance date for meeting TMDLs when TMDL adoption may be years out still.

With respect to the issue of emerging contaminants, special studies cannot be conducted until an appropriate test methodology is established for such contaminants. Thus, the 2014 deadline suggested here is also unrealistic.

The City also takes issue with the WQ R8. It suggests that the Central Valley Water Board shall require treatment just because it may be feasible – not because it is required. First, the Central Valley Water Board may not dictate the manner of compliance. (See Wat. Code, § 13360(a).) In other words, for POTWs, the Central Valley Water Board is required to set effluent limitations to protect beneficial uses and ensure compliance with water quality standards. POTWs must then determine how they will comply with the effluent limitations. Compliance methods may include, but are not limited to, treatment, source control, special studies, or other mechanisms. For urban stormwater, municipalities must implement control methods to reduce the discharge of pollutants to the maximum extent practicable. (33 U.S.C.S., §1342(p)(3).) Accordingly, WQ R8 proposes a recommendation that directly contradicts applicable water quality laws and must be removed.]

#### **IV. DELTA PLAN AND ECONOMIC SUSTAINABILITY IMPACTS WITHIN SECONDARY ZONE OF THE DELTA**

The Delta Plan should address economic sustainability impacts within the Secondary Zone of the Delta, particularly on urban areas like Stockton and the Port of Stockton (e.g., impacts on shipping, dredging, and industrial development and operations within and in the vicinity of the Port of Stockton; agricultural operations; boating, marinas, parks, and other recreational/tourism land uses and operations; etc.). The Economic Sustainability Plan prepared for the Delta Protection Commission (DPC), as input to the Draft Delta Plan, focuses solely on the Primary Zone and does not address the economic impacts within the Secondary Zone of the Delta.

#### **V. CONCLUSION**

The City looks forward to the continued opportunity to work with DSC staff in making the Delta Plan a success 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. Should you have any questions or wish to discuss these comments, please contact Deputy City Manager Michael E. Locke at (209) 937-5011 or City Attorney John Luebberke at (209) 937-8934.



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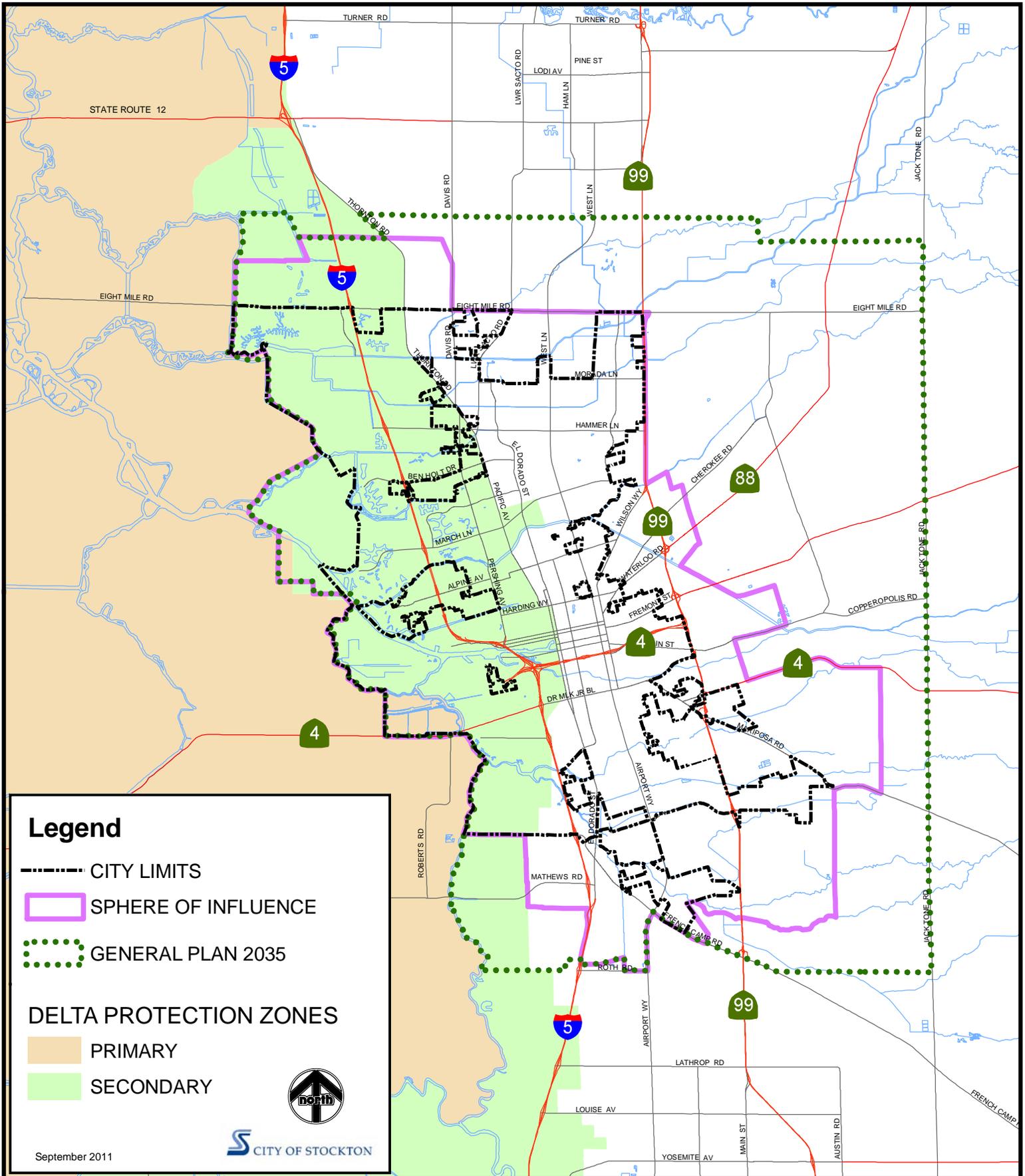
ANN JOHNSTON  
MAYOR

AJ/ML/JL/MMN:ss

#### Attachments

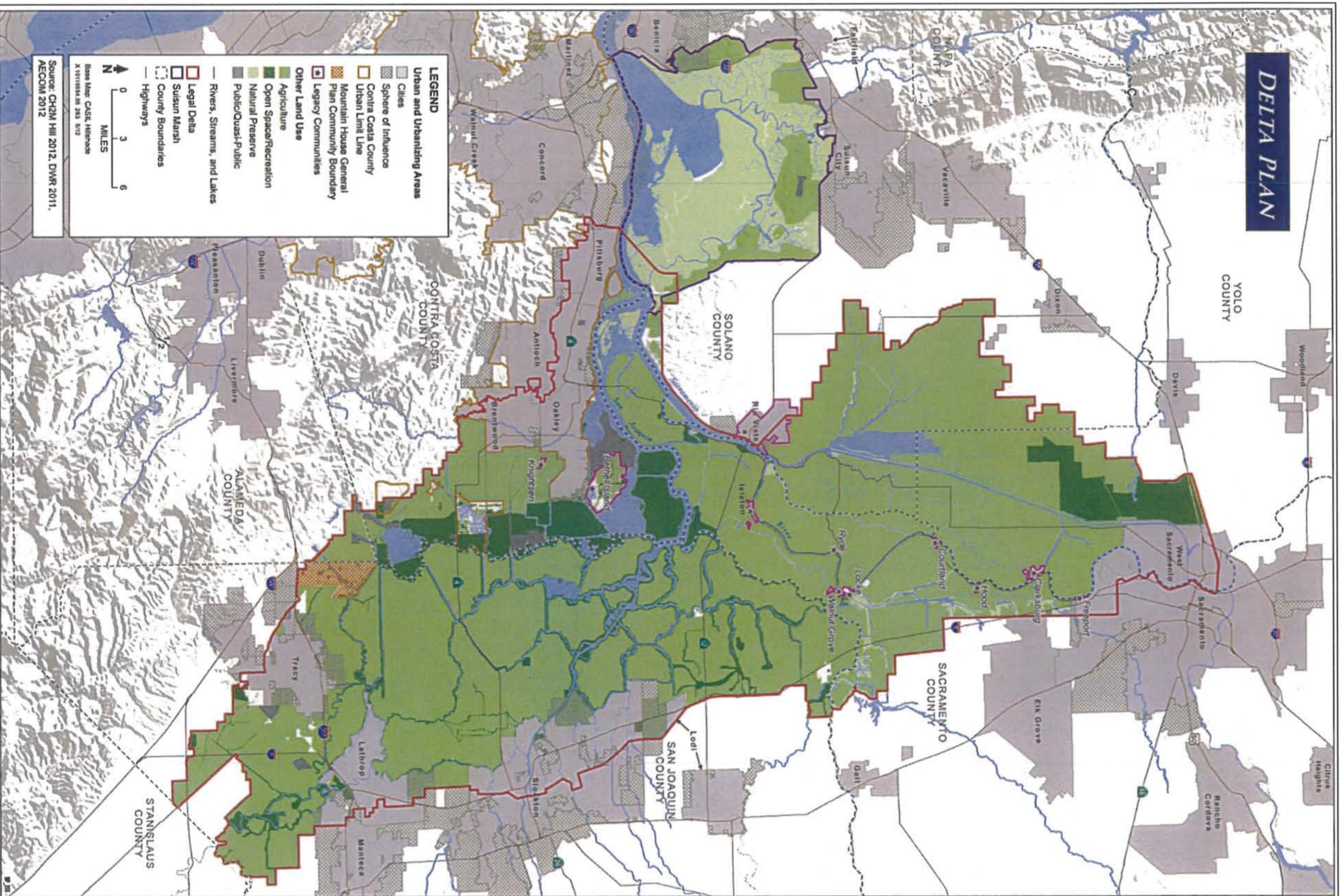
emc: Stockton City Council w/attachments  
Bob Deis, City Manager w/attachments  
Michael E. Locke, Deputy City Manager w/attachments  
John Luebberke, City Attorney w/attachments  
Jeff Willett, Acting Municipal Utilities Director w/attachments  
Michael Niblock, Community Development Interim Program Specialist w/attachments  
David Stagnaro, AICP, Planning Manager, CDD/Planning and Engineering Services Division 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  
Mel Lytle, San Joaquin County Water Resources Coordinator w/attachments  
Scott Hudson, San Joaquin County Agricultural Commissioner w/attachments  
Brandon Nakagawa, San Joaquin County Senior Civil Engineer w/attachments  
Richard Aschieris, Director, Port of Stockton w/attachments  
Steven Herum, Legal Counsel, Port of Stockton w/attachments  
Steve Escobar, Real Estate/Properties Development Manager, Port of Stockton w/attachments  
Karen McLaughlin, Manteca Deputy City Manager w/attachments  
Andrew Malik, Tracy Director of Development & Engineering Services w/attachments  
William Dean, Tracy Assistant Director of Development & Engineering Services w/attachments  
Cary Keaton, Lathrop City Manager w/attachments  
Konradt "Rad" Bartlam, Lodi City Manager w/attachments  
D. Stephen Schwabauer, Lodi City Attorney w/attachments  
James Glaser, San Joaquin County LAFCO Executive Officer w/attachments  
Paul Simmons, Attorney, Somach Simmons & Dunn w/attachments  
John Beckman, CEO, BIA of the Delta w/attachments



# DELTA PROTECTION ZONES / CITY BOUNDARIES





1 **Figure 5-1**  
2 Urban and Legacy Communities of the Delta  
3  
4