

AMENDED IN SENATE JUNE 19, 2012

AMENDED IN SENATE JUNE 12, 2012

AMENDED IN SENATE JUNE 22, 2011

AMENDED IN ASSEMBLY MAY 27, 2011

AMENDED IN ASSEMBLY MARCH 31, 2011

CALIFORNIA LEGISLATURE—2011–12 REGULAR SESSION

ASSEMBLY BILL

No. 1095

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

February 18, 2011

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

LEGISLATIVE COUNSEL'S DIGEST

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

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

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

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

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

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

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

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

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

1 (a) The Legislature passed and the Governor signed Senate Bill
2 1 of the Seventh Extraordinary Session of 2009 (Chapter 5 of the
3 Seventh Extraordinary Session of the Statutes of 2009), which
4 establishes the framework to achieve the coequal goals of providing
5 a more reliable water supply to California and restoring and
6 enhancing the Delta ecosystem.

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

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

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

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

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

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

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

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

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

9 85057.5. (a) "Covered action" means a plan, program, or
10 project as defined pursuant to Section 21065 of the Public
11 Resources Code that meets all of the following conditions:

12 (1) Will occur, in whole or in part, within the boundaries of the
13 Delta or Suisun Marsh.

14 (2) Will be carried out, approved, or funded by the state or a
15 local public agency.

16 (3) Is covered by one or more provisions of the Delta Plan.

17 (4) Will have a significant impact on achievement of one or
18 both of the coequal goals or the implementation of
19 government-sponsored flood control programs to reduce risks to
20 people, property, and state interests in the Delta.

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

22 (1) A regulatory action of a state agency.

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

25 (3) Regional transportation plans prepared pursuant to Section
26 65080 of the Government Code.

27 (4) Any plan, program, project, or activity within the secondary
28 zone of the Delta that the applicable metropolitan planning
29 organization under Section 65080 of the Government Code has
30 determined is consistent with either a sustainable communities
31 strategy or an alternative planning strategy that the State Air
32 Resources Board has determined would, if implemented, achieve
33 the greenhouse gas emission reduction targets established by that
34 board pursuant to subparagraph (A) of paragraph (2) of subdivision

35 (b) of Section 65080 of the Government Code. For purposes of
36 this paragraph, "consistent with" means consistent with the use
37 designation, density, building intensity, transportation plan, and
38 applicable policies specified for the area in the sustainable
39 communities strategy or the alternative planning strategy, as

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

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

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

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

10 (B) Either a notice of determination is filed, pursuant to Section
11 21152 of the Public Resources Code, for the plan, program, project,
12 or activity by, or the plan, program, project, or activity is fully
13 permitted by, September 30, 2009.

14 (7) (A) Any project within the secondary zone, as defined
15 pursuant to Section 29731 of Public Resources Code as of January
16 1, 2009, for which a notice of approval or determination pursuant
17 to Section 21152 of the Public Resources Code has been filed
18 before the date on which the Delta Plan becomes effective.

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

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

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

30 (ii) Any project that is within the alignment of a conveyance
31 facility as shown in Figures 1 to 5, inclusive, of the Final Draft
32 Initial Assessment of Dual Delta Water Conveyance Report, April
33 23, 2008, and in future revisions of this document by the
34 department.

35 (8) Any project, as defined by Section 21065 of the Public
36 Resources Code, or part of a project, including, but not limited to,
37 subsequent entitlements and supporting infrastructure
38 improvements required for implementation of a project, that is
39 both within an urban area or urbanizing area, as shown in Figure
40 5-1 in the Final Staff Draft Delta Plan (dated May 14, 2012), and

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

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

17 (10) Any flood control project in the secondary zone of the
18 Delta that is consistent with the applicable provisions of the Central
19 Valley Flood Protection Act of 2008 (Part 6 of Division 5
20 (commencing with Section 9600)), which would provide protection
21 to an urban or urbanizing area, as shown by Figure 5-1 in the Final
22 Staff Draft Delta Plan (dated May 14, 2012), and as defined by
23 Section 65007 of the Government Code, or existing public
24 infrastructure, and which has complied with the California
25 Environmental Quality Act (Division 13 (commencing with Section
26 21000) of the Public Resources Code) or the National
27 Environmental Quality Act (42 U.S.C. Sec. 4321 et seq.), or both.

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