Summary Minutes of the
Delta Protection Commission Meeting
Thursday, November, 16, 2006

ADMINISTRATIVE AGENDA

1. Call to Order/Flag Salute
Chairman McGowan called the meeting to order at 6:40 p.m.

2. Roll Call
Present: Chairman McGowan, Vice Chairman Ferguson, Commissioners Cabaldon, Calone, Johnson, Kelly, Morey, Nottoli, Perez, Piepho, Reagan, Sanders, Simonsen, Trott, van Loben Sels, and Wilson.

Absent: Commissioners Beckman, Ornellas, and Scriven.

Ms. Fiack introduced Ken Trott, California Department of Food and Agriculture, Division of Agriculture and Environmental Stewardship. Mr. Trott replaced Commissioner Shaffer.

3. Public Comment - Opportunity for members of the public to address the Commission. Comments also welcome as agenda items are discussed.
No one addressed the Commission

CONSENT AGENDA (ITEMS 4-11)

Commissioner van Loben Sels asked that Item 11a be moved to the regular agenda. Chairman McGowan also moved Item #5 to the regular agenda.

Commissioner van Loben Sels moved approval of the Consent Agenda; Commissioner Simonsen seconded. The Consent Agenda was approved unanimously.

REGULAR AGENDA

5. Approve 2007 Commission Meeting Schedule
Chair McGowan suggested that the meeting schedule be modified to add February 22, 2007 to the list of 2007 meeting dates.

Commissioner Sanders moved approval; Commissioner Johnson seconded. The motion was approved unanimously.

11a. Receive Information Update from Commission Executive Director: General Update, Including Budget and Legislation
Commissioner van Loben Sels asked for clarification on the additional funding for the Commission and the appointment of additional members to the Commission. Ms. Fiack reported that the recently adopted strategic plan directed the Commission to look at funding options through member entity contributions. She said she submitted a Budget Concept Proposal to the

Secretary for Resources that allows for an equal contribution among the six state agencies and the County representatives on the Commission. She received a preliminary response that the request would not move forward; however, she would continue to pursue funding through a Memorandum of Understanding instead of legislation. She also reported that she met with Assemblymember Lois Wolk and various other legislators who are very supportive of the direction this Commission is moving in pursuant to its strategic plan.

Commissioner van Loben Sels moved approval of the informational update; Commissioner Sanders seconded. The motion was approved unanimously.

12. Receive Input from Commission Members Relative to Appointment of New Commission Members Pursuant to Assembly Bill 797

Ms. Fiack reported that AB 797 (Wolk) called for the addition of four new members to the Commission. The members will be gubernatorial appointees and will represent the public member from the California-Delta Authority from the Delta region, and three members from the general public who are Delta residents/landowners that represent the interests of production agriculture with a background in promoting the agricultural viability of Delta farming; wildlife and habitat resources of the Delta region and ecosystem and outdoor recreational opportunities, including, but not limited to, hunting and fishing. Ms. Fiack said she spoke to the Secretary of the Resources Agency to provide input to the Governor for consideration and asked for Commission input.

Commissioner van Loben Sels asked that a candidate from the Nature Conservancy be considered; Chair McGowan asked that Jeff Hart, owner of Hart Restoration be considered and Commissioner Johnson asked that Linda Bendsen be considered as a recreational candidate.

13a. Receive Informational Update on Action Taken by the Yolo County Board of Supervisors on the Clarksburg Old Sugar Mill Project

Ms. Fiack reported that the Yolo County Board of Supervisors (BOS) met on October 24, 2006, where it received public comment and correspondence; took action and adopted a resolution certifying the FEIR and related approvals; adopted a resolution approving the specific plan and design guidelines; made a determination of consistency with the Clarksburg General Plan and Countywide General Plan; made related findings and determinations required by CEQA; adopted the mitigation monitoring plan; adopted a resolution amending the text of the Clarksburg General Plan to reference and incorporate the Old Sugarmill Specific Plan; adopted an ordinance creating the Old Sugarmill Specific Plan and rezoning the land included therein; and adopted an ordinance adopting and improving a development agreement for the Old Sugarmill Specific Plan Project. She also reported that copies of the October 24, 2006 staff report and related documents including previous actions by the Yolo BOS, County Planning Commission and Clarksburg General Plan Advisory Committee were on file at the Commission office.

13b. Hearing to Determine Whether the Appeals of the October 24, 2006 Decision of the Yolo County Board of Supervisors to Approve the Clarksburg Old Sugar Mill Specific Plan and EIR Raises an Appealable Issue Within the Commission's Jurisdiction.

Dan Siegel announced that the Natural Resources Defense Council and the Concerned Citizens of Clarksburg filed appeals with the Commission. He said that under the Commission's regulations there will be hearings in two stages. The first stage will determine if the project is within the Commission's jurisdiction and whether the project raises an appealable issue. The

second hearing, if the project is determined to be in the Commission's jurisdiction, will be set on the actual merits of the appeal. Mr. Siegel also announced that any Commissioner receiving ex-parte communication had to disclose the information at the meeting.

Commissioner Wilson announced that he received a letter from Senator Patrick Johnston and that he spoke with Mark Wilson, Steve Mello and Stanley Eddie.

Commissioner van Loben Sels announced that he received a letter from Senator Johnston.

Commissioner Johnson announced that he had a telephone conversion with Senator Johnston.

Commissioner Sanders announced that he received a call from Senator Johnston. He said the two discussed the importance of the appeal and the need to have a full membership. He also received a letter from the Senator.

Commissioner Nottoli announced that he received a letter from the Senator but did not speak to him by phone. He asked how to handle members of the press. Mr. Siegel responded that he should respond that the matter was pending and he was not in a position to comment.

Commissioner Kelly announced that she received a call from Senator Johnston asking if she would be attending the meeting; she responded yes. She asked if the Commissioners were allowed to divulge public information. Mr. Siegel said yes; however, only procedural, not substantive information.

Chairman McGowan announced that he received calls from Gary Merwin, Don Fenocchio and Mark Wilson.

Mr. Siegel reminded the public that they could contact the Commissioners through letters to staff; however, they could not have direct contact. He announced that any Commissioner who was also a County Supervisor could sit through an item and would not have to excuse him/herself, as long as the person has no overt bias and keeps as open mind during the hearings.

Mr. Siegel stated that the Department of Justice believes the Commission has jurisdiction over the project matter; appealable issues are being raised, the project is in the Primary Zone, and the project constitutes development. He said that the project is governed by the Commission's statute which defines the Primary Zone as excluding areas within the urban limit line of any local government's general plan as of January 1, 1992. The urban limit line is defined in the first of two key statutory sentences as the area beyond urban development that is not publicly proposed. The area proposed for the project was listed as industrial in Yolo County's general plan but appears to be an urban designation. He said an argument could be made that this particular use is not urban, as the use of the property was previously agriculture and the general plan provides for priority to "structures which support agriculture in the lands surrounding Clarksburg". Secondly, the second key statutory sentence states that "the precise boundary line of the Primary Zone includes lands and water shown on the map . . . on file with the Secretary of State.

Mr. Siegel said the map on file with the Secretary of State prevails because of the use of the word "precise" in the statute. He said that that interpretation is reinforced by the Attorney General's 1994 opinion. He said that the courts give weight to an agency interpretation where an agency is responsible for implementing a statute. Moreover, the adopted Resource Management

Plan describes the towns in the Primary Zone as including Clarksburg and legislative history supports the interpretation because a map showing Clarksburg was before a legislative committee while it was drafting the Delta Protection Act. He further said that the courts do not look at outside or post enactment statements of legislators or committees as they only look at what the legislators had before them when they voted on the particular language.

Mr. Siegel reported that the County of Yolo submitted arguments that the passage of time does not make the word "precise" correct and Clarksburg is not in the Primary Zone. Yolo County submitted a letter from the former Executive Director of the Commission that included a map that showed Clarksburg outside of the Primary Zone in addition to an undated/unsigned letter on Commission letterhead that Clarksburg is out of the Primary Zone. Mr. Siegel said it is DOJ's belief that the Commission's action of adopting a regional plan that lists Clarksburg as being in the Primary Zone and the DOJ's 1994 analysis have more weight than those two documents. He said that both sides have submitted many documents that would not be admissible and the Commission should disregard those documents.

Mr. Siegel said that the Commission also needs to determine whether the project is development that is subject to Commission review under the statute. The statute expressly excludes "development within or adjacent to the unincorporated towns in the Delta as permitted in the general plan of Yolo County authorized in 1992". There is no dispute that the general plan for the project area did not permit uses other than industrial uses and no dispute that the proposed project includes non-industrial uses; therefore, it is believed this was not permitted in the plan, as it is not an industrial project.

Mr. Siegel recommended the Commission find that both of the appeals involve matters that fall within its jurisdiction and they raise one or more appealable issues, and direct staff to commence a hearing at the next regularly scheduled meeting to review the merits of the appeals.

Greg Loarie, attorney for EarthJustice, said the Act gives the Commission review authority. He said EarthJustice agrees with the DOJ analysis and the map defines "precise" boundary lines of the Primary Zone and that map puts Clarksburg and the Sugarmill project in the Primary Zone. Mr. Loarie said that Clarksburg made a conscious decision not to grow and therefore Yolo left it in the Primary Zone, therefore it is too late to reinterpret the map as it delineates the precise boundaries of the Primary Zone, and the Act is clear. Mr. Loarie said that if the County of Yolo wanted to change the Primary Zone map to exclude Clarksburg it should speak with the Legislature. Mr. Loarie said that the Act grandfathers in only development that was permitted in the existing general plan of 1992; of which, the Sugarmill was not. He urged the Commission to consider the merits of the appeals.

Jim Pachl, attorney for the Concerned Citizens of Clarksburg, stated he submitted a rebuttal letter on November 16, 2006. Mr. Pachl said the precise boundary of the Primary Zone is shown on the map submitted to the legislature. He said the letters submitted on behalf of the applicant and County of Yolo are based on confusion and/or mis-statements; however, the attorney general resolved the confusion with his 1994 letter. He reiterated that one incorporated city and portions of Stockton, Pittsburg and Rio Vista are in the Secondary Zone, whereby unincorporated communities in the Primary Zone include Courtland, Hood, Locke, Walnut Grove, Ryde and Clarksburg. Mr. Pachl said there is nothing in the Plan that says that Clarksburg is excluded in the Primary Zone and the 2001 Clarksburg general plan states that the town is in the Primary Zone of the Sacramento-San Joaquin Delta. He said that the particular concern of his clients is

flooding and the future of the surrounding areas. He said experience has shown that when a new area is surrounded by farmland the invariable result is pressure for more development and/or suburbanization to change land use designation to allow for more development; additionally, if the project continues there will be increasing pressure to do other similar projects. The map shows that Clarksburg is in the Primary Zone. He strongly urged that the Commission find the area in the Primary Zone and sustain the appeal.

Jim Moose, attorney for Yolo County, stated that the Commission does not have jurisdiction over the project. He said that the County concedes that if the Commission were to disagree with the County, the nature of the questions posed are appealable questions. Mr. Moose said there is a conflict of the statutory definition of the Primary Zone and the substance of the map, as it erroneously shows Clarksburg in the Primary Zone. He said the language is clear that the definition of Primary Zone is defined by what is not within urban limit line or spheres of influence. He also said the fundamental principle in interpreting statutes is to look at the plain language of the statute and if the language is unambiguous and clear, then that's as far as you go. He said the map is in error because the word precise is something that should be more refined than the general statement. Mr. Moose circulated a 1994 document by Commission staff stating that Clarksburg is not in the Primary Zone. Mr. Moose said the statute is unambiguous and the town of Clarksburg was within an urban limit line within the meaning of the Statute and a map that contradicts that was not a more precise rendering of the statutory language but an erroneous application of the statutory language. He said that if the Commission were to find that Clarksburg is in the Primary Zone, it is not subject to Commission jurisdiction because of the exemption from the term development as used in the Act.

Tim Taron, said the project entails 105 acres; 25 acres designated for residential, and the rest designated for industrial/commercial uses. He said the residential development is designed to support workers and internal growth within the town. Mr. Taron said the literal language in the statute should trump the map. He also said it is evident that there was confusion with Commission staff and Yolo County staff as to Clarksburg's boundary. He said that Yolo County's interpretation may have been complacent, however, that NRDC is wrong. He said these small towns will die if the Board of Supervisors are not permitted to make the decisions to revitalize.

Mr. Loarie said that assuming that Yolo County could exclude Clarksburg from the Primary Zone map, it chose not to do so.

Mr. Pachl said that basically, the 1994 DOJ opinion clarifies the misunderstanding regarding parcels outside of the Primary Zone.

Mr. Moose rebutted by saying that the Plan is based on DOJ's opinion and the substance of the Plan would not trump the statute. He also said that he did not believe the full legislature voted on the map.

Commissioner Cabaldon asked if other unincorporated towns that have urban limit lines or spheres of influence are designated on the map. Mr. Siegel responded he did not know because the map does not specify. Commissioner Wilson responded that as a member of the local Delta Community Municipal Advisory Committee, there is a designated urban limit line to two other cities. Commissioner Nottoli said that there is a general plan designation where the language for

Sacramento County looked at zoning but the reliance was on the general plan. Mr. Siegel said in DOJ's preliminary research it did not find other urban limit lines in the general plans as of 1982. Commissioner Cabaldon asked if it was Yolo County's position that all unincorporated towns in the Delta are out of the Primary Zone. Mr. Moose said he had not looked at the other towns to determine if they had urban limit lines or not.

Commissioner Trott asked if there was any follow-up from Yolo County to the Commission's staff's April 19, 1994 letter regarding the boundaries. Mr. Siegel said he did not know. Phil Pogledich, Yolo County responded that on the letter there is a notation from Commission staff saying the boundary "looks ok". He said he did not know if Yolo County staff spoke to staff directly.

Commissioner Nottoli asked Mr. Siegel if it was his interpretation that all the other unincorporated towns are within the Primary Zone. Mr. Siegel said yes, with the exception of Oakley and Isleton.

Commissioner Reagan asked if the Sugarmill was inside the Primary Zone on the map. Matt Campbell, attorney with the Department of Justice responded that the Sugarmill was depicted as within the boundary of the Primary Zone. Commissioner Reagan also asked if an unincorporated town qualified as a local government. Mr. Siegel said that the statute defines a local government as incorporated cities or counties.

Commissioner Sanders referenced letters dated April 18, 1994 and November 26, 1994 and asked if there were attempts by staff to define the line of the Primary Zone or is it just representation by DOJ that should be taken. Mr. Siegel responded that the DOJ letter was the result of an analysis for the Commission.

Chair McGowan convened the public hearing.

Senator Patrick Johnston said that the current map represented the many meetings with the five Delta counties and many of the cities and various other organizations. He said that Contra Costa County used the term urban limit line because eastern CCC had unincorporated communities such as Oakley and Discovery Bay; therefore, that term was incorporated into the Act, as was the term sphere of influence which is used for cities. Senator Johnston said that his quotes in Mr. Moose's transcripts were wrong in saying that he had meant to designate Clarksburg in the Secondary Zone. He said the overall mission of the Act was to protect the five Delta counties and ten cities against encroaching urbanization. He said the exchange with Supervisor Thompson reflects that spheres of influence and urban limit lines determine how Secondary Zones would be allowed to grow. He also said that Supervisor Thompson spoke about Clarksburg at those meetings. He said they attempted to have a different provision for Clarksburg. He said the term urban was never applied to the small unincorporated communities such as Clarksburg, Ryde and Locke. He said the language in the Act was confusing; however the attempt was to say that the Primary Zone contained unincorporated towns whereas the Secondary Zone contained incorporated cities. Senator Johnson said the decision for the Commission was to review how the values of the Delta are consistent or inconsistent with any given proposal.

Bruce Kemp, South County Farmers for Progress, said his group is a grassroots group comprised of farmers and landowners that are working to bring innovative changes to the Delta through private and public sectors. Mr. Kemp said the group has consistently supported the Sugarmill project because of what the project will bring to the Clarksburg area. He asked that the Commission dismiss the appeals and support the actions of the Yolo County Board of Supervisors.

Ken Wilson, Clarksburg, said that the Commission should allow the proposal because it would be good for the town. He suggested that Clarksburg be added to the urban limit line and taken out of the Primary Zone and rezoned for homes.

Robert Kirkland said he was appalled by the comments being made at the hearing. He said the challenge is to look at the original land patents of the Delta and the Commission should review its role in the Delta.

Susan Treabess, Office of Assemblymember Lois Wolk, read a letter from the Assemblymember. The letter stated that the Assemblymember did not have an opinion on whether the issue is appealable before the Commission, but the Assemblymember believed it is important for the Commission to exercise to it fullest capacity its authority in protecting the Delta. The letter went on to say that urbanization, both in and near the Delta poses a significant threat to the Delta's future.

Steve Heringer, Clarksburg, said that the only way to keep a strong Delta is to keep a strong farm economy. He said the farm economy in the Delta is no longer economically viable. He further said it was the Commission's opportunity to keep the Delta strong.

Don Fenocchio, Clarksburg, said he agrees with the provisions of the Clarksburg General Plan and he also agrees with Yolo County that Clarksburg does not lie in the Primary Zone.

Ted Smith, Clarksburg, said that he would save his remarks for another time.

Peter Simpson, said that he felt the Commission should hear the appeal.

John Bohl, Clarksburg, stated that he read both the Act and Plan. Mr. Bohl said the mood of the Act, Plan, and Commission says that Clarksburg is in the Primary Zone. He said the Commission staff has repeatedly warned the applicant that the lands are in the Primary Zone and the applicant has not once sought to change things until recently. Mr. Bohl urged the Commission to accept the appeal.

Peggy Bohl, Concerned Citizens of Clarksburg, said that she spoke with the previous Executive Director of the Commission who stated that all questions were answered by the DOJ in its letter of November 18, 1994 that Clarksburg is in the Primary Zone. She said she found it strange that Yolo County in their EIR stated that Clarksburg is in the Primary Zone, but then reversed its opinion. She said her group decided to file the appeal because it believes in the Delta and that high density residency has no place in the Delta. She urged the Commission to support the appeal and accept the DOJ opinion.

Steve Mello, Walnut Grove, said that he served on the Commission from 1992 – 2000. He said originally the unincorporated communities in the Delta were located in the Primary Zone; therefore, the issue is appealable. Mr. Mello said that it was not the intent for the Commission to strangle the small communities, and the background reports and the Plan allowed for development within and adjacent to the unincorporated communities in the Delta. He said the Commission cannot allow these small communities to die.

Russell van Loben Sels, Clarksburg, stated that the project is in the Primary Zone and constitutes development. He said it is the Commission's responsibility under the law. He also said the Commission should accept the appeal because then it can accept what is good and change what is bad about the project.

Dan Siegel stated that there is a strong indication that unincorporated towns were intended to be in the Primary Zone. He said there is an exclusion for certain development.

Commissioner Reagan said that Yolo County did not exclude the small communities from the Primary Zone when it could have; therefore the project is appealable.

Commissioner Reagan moved that the Clarksburg Sugarmill project was appealable to the Commission; Commissioner Piepho seconded. The motion was tabled for discussion.

Commissioner van Loben Sels stated that proponents of the project should not address their concerns before the Commission. He said that the issue should be brought before the Legislature because the Legislature directs the Commission whereby if the language in the Act states that if the language in the Act is different from the map, the Commission is instructed to go to the map for precise boundaries of the Primary and Secondary Zones.

Commissioner Reagan moved that the Clarksburg Sugarmill project was located in the Primary Zone and the issue is appealable to the Commission. The motion was amended.

Commissioner Reagan moved that the Clarksburg Sugarmill project is located in the Primary Zone; the issue is appealable to the Commission; and the project constitutes development. The motion was withdrawn.

Commissioner Kelly said she was unsure about what the appealable issue is.

Commissioner Reagan responded that the appealable issue is the character of the development. He said he interpreted in his motion that the project is in the Primary Zone, therefore it is in the Commission's jurisdiction. The project is obviously development and/or redevelopment, therefore it is an appealable issue that would have to be reviewed.

Chairman McGowan said he would not support the motion because he is struggling with whether the project is truly located in the Primary Zone; however, he did not struggle with the fact that Yolo County has to prove the project. Chairman McGowan further stated that it would be a death knell if all the unincorporated communities in the Delta are located in the Primary Zone. He said that counties have the jurisdiction to set policies and make decisions, and those decisions are not subject to Commission jurisdiction.

Commissioner Cabaldon stated that he did not agree with any of the attorneys on the matter. He said there are major drafting problems with the Act that need to be acknowledged. He also said he does not agree that the map determines jurisdiction and the Commission should look at the actual purpose of the Act and the definition of the Primary Zone and the Commission's role in terms of its jurisdiction. He said he felt the Act defines the unincorporated town as being in the Primary Zone and the Commission has jurisdiction.

Commissioner Nottoli stated that after reviewing the information submitted, the project falls under the purview of the Commission.

Commissioner Reagan moved that the Sugarmill project is located in the Primary Zone; Commissioner Piepho seconded. The motion was approved unanimously.

Commissioner Reagan moved that the development is subject to the jurisdiction of the Commission; Commissioner Piepho seconded; Chairman McGowan opposed. The motion was approved by voice vote.

Commissioner Reagan moved that each of the appeals raises one or more appealable issues as stipulated by both sides and counsel; Commissioner Piepho seconded. The motion was approved unanimously.

Chairman McGowan announced that the Commission will hold a hearing on the merits of the project at the next regularly scheduled meeting on January 25, 2007.

14. Commissioner Comments/Announcements

Commissioner Piepho announced that Contra Costa County wants to develop a stakeholder coalition with other interested agencies and organizations to obtain funding for non project flood control levees under Proposition 1E. Roberta Goulart will serve as the contact.

The meeting was adjourned at 10:00 p.m.

Attachments:

1. Correspondence List (relative to November 16, 2006 hearing)
2. Exhibits Entered Into the Record of the November 16, 2006 Hearing

(Exhibits on file with Commission)

a. James P. Pachl Letter dated November 16, 2006
b. Delta Protection Commission Letter to Steve Jenkins dated April 18, 1994
c. Transcription of the Recorded Yolo County Board of Supervisors Meeting March 31, 1992
d. EarthJustice Third Reading of Senate Rules Committee Hearing on May 13, 1992
e. Letter from South County Farmers for Progress, dated November 16, 2006
f. Letter from Assemblymember Lois Wolk, dated November 16, 2006
g. Letter from Heringer Holland Land and Farming Co., dated November 16, 2006
h. Secretary of State map of Proposed Delta Protection Act of 1992 – Map of Zones
i. Secretary of State map of Proposed Delta Protection Act of 1992 – Map of Zones