

**Delta Protection Commission Meeting
January 20, 2022**

AGENDA ITEM 14: Delta Stewardship Council Draft Regulations Governing Appeals of Delta Plan Covered Actions

Prepared by: Virginia Gardiner and Erik Vink

Presented by: Erik Vink

Requested Action: **Approve proposed comment letter**

Type of Action: Action

Background: The Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act) directed the Delta Stewardship Council to adopt a Delta Plan and requires that proponents of projects within the Legal Delta must certify their projects as consistent with the Delta Plan. These certifications of consistency can be appealed to the Council.

In the years since adoption of the Delta Plan in 2013, some three dozen covered actions have submitted certifications of consistency. Of these, three project certifications have been appealed, two of which were sponsored by California Department of Water Resources (DWR) and which the Commission provided comments and recommendations on: California WaterFix (CA WaterFix) and Lookout Slough Tidal Habitat Restoration and Flood Improvement Project (Lookout Slough). CAWaterFix was withdrawn by DWR following a Council staff recommendation to remand the project to DWR in November 2018. Lookout Slough was remanded to DWR by Council action in July 2021. DWR resubmitted a certification of consistency for Lookout Slough on December 30, 2021.

Practical application of the certification appeals process, and the recent five-year review of the Delta Plan implementation, have prompted the Council to propose modification to some of the appeals regulations as outlined below. These proposed amendments to the Administrative Procedures Governing Appeals were released by Council staff on December 10, 2021, and the Council has requested comments by March 7, 2022.

The Commission’s experience with the certification appeals process has also highlighted some areas that should be strengthened, though not necessarily as proposed by the Council in the current proposed amendments. Commission staff raise two major areas of concern regarding the proposed amendments in the attached comment letter, for which we are seeking Commission approval. The letter states that the amendments should:

DPC January 20, 2022 meeting – Agenda Item 14 (Delta Stewardship Council Draft Regulations Governing Covered Action Appeals)

- Ensure there is a workable public involvement process for Delta citizens; and
- Affirm the meaning and intent of Public Resources Code section 29773, which grants the Commission the authority to offer recommendations on any matter to the Council, and if feasible and consistent with the Delta Plan and Commission mandate, the Council shall adopt the recommendation.

Background: Appeals of Certifications of Consistency with the Delta Plan: The Delta Reform Act established a certification process for demonstrating consistency with the Delta Plan that requires any State or local agency proposing to undertake a “covered action” to submit a written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan (Water Code section 85225).

A certification of consistency may be appealed by any person who claims that:

- a proposed covered action is inconsistent with the Delta Plan and, as a result, the action will have significant adverse impact on achieving one or both of:
 - the coequal goals (water supply reliability and Delta ecosystem restoration) or
 - implementation of government sponsored flood control programs to reduce risks to people and property in the Delta. (Water Code section 85225.10).

The Delta Reform Act provides for an appeals process on covered action certifications (Water Code sections 85225-85225.30), and the Council adopted administrative procedures governing appeals in 2010. The Council’s December 2021 draft amendments propose to revise 16 of the 31 appeal rules (and to add one new rule) to:

- Align wording used to describe Council authority with the Delta Reform Act;
- Streamline the filing and notification process by clarifying deadlines and requiring the use of the Council’s online covered actions portal for the filing of certifications and appeals;
- Clarify standards for appeals to be considered timely and complete;
- Set standards for evidentiary requests (under rules 10 and 29), including a requirement that evidentiary requests include a copy of the document or information item that is the subject of the request;
- Clarify the Council’s authority to establish procedures, deadlines, schedules, and timelines related to appeals hearings in applicable notices issued by the Council;
- Set standards for written submissions to the Council, and clarify the Council’s authority to establish procedures, deadlines, schedules, and timelines related to written submissions in applicable notices issued by the Council;

DPC January 20, 2022 meeting – Agenda Item 14 (Delta Stewardship Council Draft Regulations Governing Covered Action Appeals)

- Clarify the outcomes of appeals proceedings under a variety of potential circumstances; and
- Encourage documents submitted to the Council to meet federal and State document accessibility standards (New).

It should be noted that because adoption of the appeals procedures is exempt from the Administrative Procedure Act rulemaking process, there would be no opportunity for comment to the Office of Administrative Law. The Council has requested comments on its proposed amendments by March 7, 2022.

Proposed Commission Comments: Commission staff have reviewed the Council’s proposed amendments to the appeals regulations and offer several comments. These comments are grouped around two themes:

- 1) Maintain opportunities for the Commission and people who work, live, and recreate in the Delta to participate actively and effectively in the Council’s review of certifications of consistency and appeals of agencies’ actions in the Delta.
- 2) Acknowledge the full role granted to the Delta Protection Commission by 2009 amendments to the Delta Protection Act of 1992 (specifically, Public Resources Code section 29773).

Commission staff support a covered action appeals process that maximizes the opportunity for interested parties (whether in the Delta or outside) to participate in the process and ensure that their concerns are registered by the Council. Unfortunately, too many of the proposed amendments would move away from this standard and toward a process that would favor highly organized entities.

More importantly, Commission staff believe that an important provision of the Delta Protection Act of 1992 is disregarded by these proposed regulations, as it was earlier dismissed by Council staff during the Lookout Slough appeal process in the summer of 2021. Public Resources Code section 29773, which allows the Commission to comment on any significant project or proposed project within the scope of the Delta Plan that affects the unique Delta values (and provides the Council, in its discretion, to determine that a Commission recommendation is feasible and consistent with the Delta Plan, and therefore to adopt the recommendation), should allow the Commission to comment on a covered action appeal, and for its comments to be fully considered by the Council. During the Lookout Slough appeal process, the Commission raised concerns in its written comments that were dismissed by Council staff because the arguments were not raised by appellants. Commission staff believe this is contrary to Public Resources Code section 29773.

Commission staff are seeking Commission approval of the attached proposed comment letter. If approved by the Commission, this letter could go out under Chair Nottoli’s signature.

Recommended Action: Commission staff request the Commission’s support of the proposed letter from Chair Nottoli to Council Chair Tatayon.

Relationship to Vision 2030 (Commission strategic plan):

Education and Outreach (Strategic Theme)

O.1 Ensure consistent, proactive communications between and among Delta interests and decision makers.

1.2 Respond to emerging issues of importance in the Delta in a prompt, effective and transparent manner, with a high degree of flexibility.

1.3 Foster two-way communication throughout the Delta.

1.3.1 Actively seek input and opinions from the diverse populations of the Delta to inform decisions impacting the region.

1.3.2 Provide a forum for residents, businesses, and Delta interests to participate in decisions affecting the Delta.

1.3.3 Foster communication between Delta interests for improved, coordinated action.