

DRAFT

January 20, 2022

Ms. Susan Tatayon, Chair
Delta Stewardship Council
715 P Street, 15-300
Sacramento CA 95814

Re: Proposed amendments to the Council's administrative procedures governing appeals

Dear Chair Tatayon:

The Delta Protection Commission (Commission), in its role representing Delta communities and advising the Delta Stewardship Council (Council) on protecting and enhancing the unique Delta values, appreciates the opportunity to provide comments on amendments proposed to the Council's administrative procedures governing appeals of Delta Plan consistency determinations.

It has been almost a decade since these procedures were adopted. The procedures' strengths and shortcomings have been revealed through application in the certifications of consistency and appeals filed since the Delta Plan's approval. We have been observers and participants in your procedures, and this experience provides the basis for these recommendations.

Our recommendations emphasize 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. Public participation is fundamental to the Council's undertakings, and yet the proposed procedure amendments create unnecessary barriers to effective participation.

These include inadequate opportunity for review and comment on an agency's draft certification of consistency (Paragraph 3), new burdensome procedures for submitting additional information for the record (Paragraph 10), requiring all comments and submissions from parties other than certifying agencies, appellants, or the Commission to be in writing and submitted ten days prior to the Council's hearing, rather than orally at the hearing (Paragraph 11f), and the proposal that the Council will not take official notice of scientific or technical information that is the subject of debate among experts (Paragraph 29).

In addition, the proposals that parties must submit electronically any appeals and supporting information (Paragraph 6), supplements to the record (Paragraph 10(a)), and requests that the Council take notice of technical or scientific matters (Paragraph 29(b)(ii)) is a barrier to participation by those with lack the ability to submit electronically, either due to lack of

capabilities or poor internet service. The procedures should provide that upon request the Council staff will assist such persons in submitting materials.

(2) Acknowledge the full role granted to the Delta Protection Commission by 2009 amendments to the Delta Protection Act of 1992.

The provisions of SBX71, the statute establishing the Delta Reform Act and amending the Delta Protection Act of 1992, include Public Resources Code section 29773, which authorizes the Commission to provide comments and recommendations to the Council on any significant project that may affect the unique values of the Delta. The comment authority granted to the Commission is not limited to issues raised by appellants, but rather includes the following:

1. Identification of impacts to the cultural, recreational, and agricultural values of the Delta.
2. Recommendations for actions that may avoid, reduce, or mitigate impacts to the cultural, recreational, and agricultural values of the Delta.
3. Review of consistency of a project with the Commission's resources management plan and the Delta Plan.
4. Identification and recommendation of methods to address Delta community concerns regarding large-scale habitat plan development and implementation.

In addition, the statute requires that the Council take into consideration the recommendations of the Commission, including the recommendations included in our economic sustainability plan. If the Council, in its discretion, determines that a recommendation of the Commission is feasible and consistent with the objectives of the Delta Plan and the purposes of the Delta Protection Act of 1992, the Council must adopt the recommendation.

The proposed procedures appear to improperly restrict the Commission's comments to topics raised by a project's appellants (Paragraph 12(b)), rather than the full range of topics authorized by law. The proposed procedures would also require the Commission to rely upon evidence submitted or before the applicant when commenting on certifications, rather than addressing the broad range of topics provided in Public Resources Code section 29773. To the contrary, statute requires the Council to consider *any* comments submitted by the Commission and to consider their feasibility, which the Council must adopt if it determines they are feasible and consistent with the objectives of the Delta Plan and the purposes of the Delta Protection Act. This responsibility to consider our comments, assess their feasibility, and adopt them when feasible and consistent with the objectives of the Delta Plan and the purposes of the Delta Protection Act should be acknowledged in the administrative procedures.

As the Council's five-year review of the Delta Plan found, people who live, work, and recreate in the Delta feel they lack sufficient representation in the Council's deliberations. Embracing the Commission's role in Council proceedings provided by Public Resources Code section 29773 can demonstrate a commitment to listening to and respecting the voices of Delta people and agencies.

DPC January 20, 2022 meeting – Agenda Item 14 (Delta Stewardship Council Draft Regulations Governing Covered Action Appeals) Attachment 1

The Delta Plan acknowledges the role of Delta residents in shaping the future of the region through active and effective participation in Delta planning and management. The best available science confirms that this participation is essential to the Delta Plan’s success (Source: Environmental Protection Agency. 2005. *Community-Based Watershed Management: Lessons from the National Estuary Program*. EPA-842-B-05-003; North Sea Regional Program. 2012. *Management of Estuaries: The need to understand nature and society*. European Regional Development Fund Tidal River Development (TIDE) summary report). Delta people and organizations, including our Commission, can contribute significantly to furthering the coequal goals if opportunities for them to participate effectively in the Council’s review of covered actions are protected.

Our detailed comments on the draft procures are attached. The Commission considered and approved these comments on a X-X vote at its January 20, 2022 meeting.

Thank you for the opportunity to submit them.

Sincerely,

Don Nottoli
Chair

Enclosure

cc: Members, Delta Protection Commission

DRAFT

Delta Protection Commission

Detailed Comments on Draft Proposed Administrative Procedures Governing Appeals of Delta Plan Consistency Determinations- January 20, 2022

Part 1, Section 3. The ten-day period to review draft certifications of consistency is too brief. The rule applies to many projects – more than 40 percent of the certifications submitted to date are by agencies not subject to open meeting laws. The draft certifications present much of the record upon which agencies will base their submitted certifications and to which appellants must refer. With ecosystem restoration projects now potentially exempt from California Environmental Quality Act (CEQA), a draft certification may be the only written evaluation of a project available for concerned parties to review and comment upon. The draft certifications are potentially long and dense documents, especially when drafted for water management and ecosystem restoration projects.

Furthermore, given the importance of the record supporting the certification in any subsequent appeal, the notice provided of the draft certifications of consistency is too limited. Only those intimately familiar with the Council's procedures would know to request notice of a draft certification. No notice would otherwise be provided to others who have expressed interest in the project, such as those who commented on a project's CEQA documents, spoke at an earlier public hearing about a project, have governmental responsibilities at the project site, or have appealed previous certifications of the project.

In addition, the requirement to provide notice is applied too narrowly, applying only to agencies not subject to open meetings laws. To the extent that CEQA documents adopted by these agencies fully address all the issues required to certify consistency, this may suffice. But many projects' certifications must also address issues beyond CEQA's requirements, including water supply planning, conflicts with potential future habitat restoration, expanding floodplains, or consistency with levee priorities. A draft certification may be the first and only time interested parties are presented a record to support a project's Delta Plan consistency, upon which the Council's review of an appeal would be based. All interested parties deserve an opportunity to review that record, an agency's assessment of consistency, and submit comments and additional information for an agency to consider before a final certification is submitted.

To provide adequate notice and review opportunities of draft certifications, a review period for draft certifications should be no less than 45 days where a project is the subject of an environmental impact report or exempt from CEQA and 30 days when it is the subject of a negative declaration, the same period as applies to CEQA documents submitted to the state clearinghouse. To avoid needless delays, the procedures should encourage agencies to append a draft certification to its draft CEQA documents so review of a draft certification and CEQA

document can proceed concurrently. Notice of the draft certification should be provided to the public, the Delta Protection Commission (Commission), local governments and other agencies and special districts where the project is located, anyone who has requested notice, and any prior appellants (for recertifications of projects remanded by the Council). Notice should also be prominently posted at the project site. To the extent feasible, the record upon which an agency intends to base its certification should be appended to the notice. Posting a draft certification should be required of all agencies regardless of their status under open meeting laws.

Part 1, Section 4b. The procedures should define the term “the record that was before the state or local agency at the time it made its certification”. This should include any information submitted in comments on a draft certification or a project’s CEQA documents. Standards for the table of contents and other documents should be provided, so that interested parties and agencies can easily access and review the administrative record.

The provision that the administrative record supporting a certification need not be submitted until five days after an appeal is filed creates a Catch 22 for potential appellants. A successful appeal must be supported by substantial evidence in the administrative record. Yet, under the appeal procedures, that record is unavailable to appellants until 5 days *after* an appeal is filed. Our comments above on circulating the proposed administrative record with the draft certification, when feasible, attempts to address this. Expanded flexibility in supplementing the administrative record under Section 10 could also help address this inequity.

Part 1, Section 6. Section 6(b)(v)(A) misstates the grounds for an appeal, which is based on a project’s inconsistency with a Delta Plan policy, rather than “which provisions of the policy are being appealed”. This awkward construction needs editing.

Part 1, Section 10. As we commented on Section 4b, the procedures should define “the record that was before the state or local agency at the time it made its certification”. Appellants or the Commission should be able to submit any relevant information that was in the possession of a certifying agency at the time of certification. Certifying agencies should not be able to prevent consideration of relevant information in their possession simply by ignoring it when a certification is drafted.

In Section 10(f), participation by many Delta people and organizations will be limited by the provision that comments on an appeal from parties other than appellants, certifying agencies, or the Commission must be submitted in writing 10 days prior to a hearing on an appeal. Delta people are used to proceedings before city councils, boards of supervisors, planning commissions, and other local agencies where oral presentations by any interested party are welcome. They often speak from firsthand knowledge gained from living or working in the Delta, farming over generations, or many days boating or recreating, rather than citing agency reports or peer-reviewed studies. Their input will be constrained and their ability to share their knowledge with the Council will be restricted by prohibiting their oral presentations. In addition, oral testimony often helps participants in hearings better understand the diversity of

views about contested projects, the alternatives available, and the compromises reached, building acceptance of management actions.

Part 1, Section 12. As noted in our cover letter, Section 12(b) fails to acknowledge the Commission’s broad authority to comment on matters before the Council consistent with Public Resources Code section 29773. The paragraph should be revised to reflect the Commission’s authority to comment not only on a project’s conflicts with the Delta Plan and lack of substantial supporting evidence, but also consistent with the provisions enacted in Public Resources Code section 29773:

- 1) Identification of impacts to the cultural, recreational, and agricultural values of the Delta.
- 2) Recommendations for actions that may avoid, reduce, or mitigate impacts to the cultural, recreational, and agricultural values of the Delta.
- 3) Review of consistency of the project or proposed project with the Commission’s resources management plan and the Delta Plan.
- 4) Identification and recommendation of methods to address Delta community concerns regarding large-scale habitat plan development and implementation.

Commission comments about an appeal addressing these matters are not necessarily additional grounds for an appeal, but rather information to be considered in the Council’s action on an appeal. The note citing statutory provisions supporting the procedure should be expanded to also cite Public Resources Code section 29773.

Part 1, Section 14. The paragraph misstates the grounds upon which the Council may sustain an appeal or accept a certification. The Delta Reform Act (Water Code section 85225.25) and Section 14 of the current procedures are clear: after a hearing on an appeal, the Council shall either deny the appeal or remand it to the state or local agency “based on a finding that the certification of consistency is not supported by substantial evidence in the record”. The proposed revision to Section 14 incorrectly suggests that the standard of review is whether an appellant has shown that the certification is not supported by substantial evidence. Nothing in the Delta Reform Act places this obligation on appellants. Rather, as provided in Water Code section 85225.10, appellants must claim only that a project is inconsistent with the Delta Plan and will have a significant adverse effect on achieving the coequal goals or on a flood control program that reduces risks in the Delta, and then set forth the basis of their claim, including specific factual allegations. Once the Council receives an appeal pursuant to Section 7 of its appeal procedures, nothing in the law requires appellants to prove their claims based on evidence in the record. Rather, it is the Council’s responsibility to examine whether the project is consistent with the Delta Plan based on the evidence in the record, including such additional evidence as the Council may request from appellants or admit to the record pursuant to Section 10 or Section 29 of its appeal procedures, and considering the testimony it receives.

In addition, proposed Section 14 should be expanded to also acknowledge the Council’s duty under Public Resources Code section 29773 to consider the Commission’s recommendations on

an appeal, including the recommendations included in the economic sustainability plan, to determine whether recommendations of the Commission are feasible and consistent with the objectives of the Delta Plan and the purposes of the Delta Reform Act, and to adopt those recommendations that meet these tests. The note citing statutory provisions supporting the procedure should be expanded to also cite Public Resources Code section 29773.

Part 1, Section 15. The provisions of Sections 15(a) and 15(e) should be revised to reflect the standard of review provided in Water Code section 85225.25, as noted in our comments on Section 14 above.

Part 1, Section 29. The provision that the Council will not take notice of any subject about which there is substantial debate among experts in the relevant field would prohibit the Council from considering a wide variety of scientific and technical information relevant to its decisions on certifications. Few important topics in the Delta are free of disagreement. Examples include the causes of ecosystem decline, the impacts of degraded flows or water quality, the benefits of ecosystem restoration for scarce species of wildlife and fish, the likely extent of climate change, and many other matters. The proposal will be a barrier to the Council considering if a project has used the best available science, which clearly requires considering how the science that a project relies on compares with other scientific and technical studies. In addition, the proposed addition of Section 29(b)(iii)(A) would require a person asking for consideration of relevant technical or scientific information to summarize the extent of debate about the material and the expertise of the debaters. This provision would likely be difficult for a layperson to follow, hinder scientists' and other technical experts' participation in appeal proceedings, and undermine the Council's consideration of debates about the best available science supporting a project.

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