

RESOLUTION OF THE DELTA STEWARSHIP COUNCIL TO ADOPT REGULATIONS FOR
CERTIFICATION OF CONSISTENCY APPEALS PROCEDURES (CAL. CODE REGS., TIT. 23,
§§ 5001, 5020 et seq.)

WHEREAS, the Sacramento-San Joaquin Delta Reform Act of 2009 (Wat. Code, § 85000 et seq.) (“Delta Reform Act”) creates and directs the Delta Stewardship Council (“Council”) to develop an enforceable, comprehensive, long-term management plan for the Sacramento-San Joaquin Delta and the Suisun Marsh (collectively, “the Delta”) referred to as the Delta Plan; and

WHEREAS, the Delta Reform Act declares it is the intent of the Legislature that state and local land use actions identified as covered actions be consistent with the Delta Plan (Wat. Code, § 85022); and

WHEREAS, what qualifies a state or local land use action as a covered action under the Delta Reform Act is defined in Water Code section 85057.5 and California Code of Regulations, title 23, section 5001; and

WHEREAS, the Delta Reform Act requires a state or local public agency that proposes to undertake a covered action to prepare and submit to the Council a written certification of consistency with detailed findings as to whether the covered action is consistent with the Delta Plan prior to initiating the implementation of that covered action; and

WHEREAS, the Delta Reform Act authorizes any person to file an appeal with the Council on a claim that a proposed covered action is inconsistent with the Delta Plan and as a result of that inconsistency the action will have a significant adverse impact on the achievement of one or both of the coequal goals or implementation of government-sponsored flood control programs to reduce risks to people and property in the Delta (Wat. Code, §§ 85225.10, 85225.15 85225.20, 85225.25); and

WHEREAS, the Delta Reform Act defines the coequal goals 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); and

WHEREAS, the Council has the power to “adopt regulations or guidelines as needed to carry out the powers and duties identified in [the Delta Reform Act]” (Wat. Code, § 85210, subd. (i)); and

WHEREAS, Water Code section 85225.25 requires the Council to adopt administrative procedures governing appeals and declares the adoption of those procedures to be exempt from the Administrative Procedure Act (Gov. Code, § 11340 et seq.); and

WHEREAS, the Council previously adopted certification of consistency appeals procedures on September 23, 2010, and most recently adopted amendments to those procedures on September 22, 2022;

NOW, THEREFORE, BE IT RESOLVED by the Delta Stewardship Council as follows:

Section 1. The Executive Officer, or their designee, is authorized to take the actions necessary to file and print pursuant to Government Code section 11343.8 these regulations for the Delta Plan (Cal. Code Regs., §§ 5001, 5020 et seq.) specific to the certification of consistency appeals procedures in substantially the same form as presented in Attachment A.

Section 2. The Executive Officer, or their designee, is authorized to execute and deliver any documents and take any steps, including making any changes to these regulations to secure approval by the Office of Administrative Law for filing and printing only pursuant to Government Code section 11343.8, that the Executive Officer, or their designee, may deem necessary or advisable to effectuate the purposes of this resolution.

Section 3. This resolution takes effect immediately upon approval.

CERTIFICATION On a motion by Councilmember _____, seconded by Councilmember _____, and a vote of the Council, the foregoing resolution was passed and adopted by the Delta Stewardship Council by the following vote at a regular meeting of the Delta Stewardship Council on December 14, 2023.

Burgis _____

Damrell _____

Hueso _____

Lee _____

Madueño _____

Mehranian _____

Zingale _____

Dated: December 14, 2023

Emma Askea

Clerk of the Board of the Delta Stewardship Council

ATTACHMENT A

DELTA STEWARDSHIP COUNCIL
CALIFORNIA CODE OF REGULATIONS, TITLE 23. WATERS, DIVISION 6. DELTA
STEWARDSHIP COUNCIL
AMENDING SECTION 5001, DEFINITIONS;
ADDING ARTICLE 5, APPEALS OF CERTIFICATIONS OF CONSISTENCY

Deletions in ~~strikeout~~ and additions in underline.

SECTION 5001. DEFINITIONS

As used in this division, the terms listed below shall have the meanings noted:

(a) “Adaptive management” means a framework and flexible decision-making process for ongoing knowledge acquisition, monitoring, and evaluation leading to continuous improvement in management planning and implementation of a project to achieve specified objectives.

(b) “Agricultural water management plan” means a plan prepared, adopted, and updated by an agricultural water supplier pursuant to the Agricultural Water Management Planning Act, Water Code section 10800 et seq.

(c) “Agricultural water supplier” under the Water Code refers to both agricultural retail water suppliers and agricultural wholesale water suppliers, but not the California Department of Water Resources or the United States Bureau of Reclamation, and includes both of the following:

(1) A water supplier, either publicly or privately owned, providing water to 10,000 or more irrigated acres, excluding recycled water; and

(2) A water supplier or contractor for water, regardless of the basis of the water right, that distributes or sells water for ultimate resale to customers.

(d) “Base Flood” means the flood that has a 1-percent probability of being equaled or exceeded in any given year (also referred to as the 100-year flood).

(e) “Base Flood Elevation” (BFE) means the water surface elevation associated with the base flood.

(f) “Best available science” means the best scientific information and data for informing management and policy decisions. Best available science shall be consistent with the guidelines and criteria found in Appendix 1A.

(g) “Central Valley Flood Protection Board” or “Board” means the Central Valley Flood Protection Board (formerly The Reclamation Board) of the Resources Agency of the State of California as provided in Water Code section 8521.

(h) “Certifying agency” means, for purposes of article 5, a State or local public agency that proposes to undertake a covered action.

~~(h)~~ (i) “Coequal goals” means 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. In addition, “achievement” for the purpose of determining whether a plan, program, or project meets the definition of a “covered action” under section 5001(j) is further defined as follows:

(1) “Achieving the coequal goal of providing a more reliable water supply for California” means all of the following:

(A) Better matching the state's demands for reasonable and beneficial uses of water to the available water supply. This will be done by promoting, improving, investing in, and implementing projects and programs that improve the resiliency of the state's water systems, increase water efficiency and conservation, increase water recycling and use of advanced water technologies, improve groundwater management, expand storage, and improve Delta conveyance and operations. The evaluation of progress toward improving reliability will take into account the inherent variability in water demands and supplies across California;

(B) Regions that use water from the Delta watershed will reduce their reliance on this water for reasonable and beneficial uses, and improve regional self-reliance, consistent with existing water rights and the State's area-of-origin statutes and Reasonable Use and Public Trust Doctrines. This will be done by improving, investing in, and implementing local and regional projects and programs that increase water conservation and efficiency, increase water recycling and use of advanced water technologies, expand storage, improve groundwater management, and enhance regional coordination of local and regional water supply development efforts; and

(C) Water exported from the Delta will more closely match water supplies available to be exported, based on water year type and consistent with the coequal goal of protecting, restoring, and enhancing the Delta ecosystem. This will be done by improving conveyance in the Delta and expanding groundwater and surface storage both north and south of the Delta to optimize diversions in wet years when more water is available and conflicts with the ecosystem are less likely, and limit diversions in dry years when conflicts with the ecosystem are more likely. Delta water that is stored in wet years will be available for water users during dry years, when the limited amount of available water must remain in the Delta, making water deliveries more predictable and reliable.

In addition, these improvements will decrease the vulnerability of Delta water supplies to disruption by natural disasters, such as, earthquakes, floods, and levee failures.

(2) “Achieving the coequal goal of protecting, restoring, and enhancing the Delta ecosystem” means successfully establishing a resilient, functioning estuary and surrounding terrestrial landscape capable of supporting viable populations of native resident and migratory species with diverse and biologically appropriate habitats, functional corridors, and ecosystem processes.

(3) “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” means accepting that change, including change associated with achieving the coequal goals, will not cease, but that the fundamental characteristics and values that contribute to the Delta's special qualities and that distinguish it from other places can be preserved and enhanced while accommodating these changes. In this regard, the following are core strategies for protecting and enhancing the unique values that distinguish the Delta and make it a special region:

(A) Designate the Delta as a special place worthy of national and state attention;

(B) Plan to protect the Delta's lands and communities;

(C) Maintain Delta agriculture as a primary land use, a food source, a key economic sector, and a way of life;

(D) Encourage recreation and tourism that allow visitors to enjoy and appreciate the Delta and that contribute to its economy;

(E) Sustain a vital Delta economy that includes a mix of agriculture, tourism, recreation, related industries and business, and vital components of state and regional infrastructure; and

(F) Reduce flood and other risks to people, property, and other interests in the Delta.

(j) (i) “Commercial recreational visitor-serving uses” means a land use designation that describes visitor-serving uses, accommodations, restaurants, and shops, that respect the rural character and natural environmental setting. These uses also include campgrounds and commercial recreational facilities.

(k) (1) “Covered action” means a plan, program, or project that meets all of the following criteria (which are collectively referred to as covered action screening criteria):

(A) Is a “project,” as defined pursuant to section 21065 of the Public Resources Code;

(B) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh;

(C) Will be carried out, approved, or funded by the State or a local public agency;

(D) 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; and

(E) Is covered by one or more provisions of the Delta Plan, which for these purposes, means one or more of the regulatory policies contained in Article 3.

(2) "Covered action" does not include any plan, program, or project that is exempted pursuant to Water Code section 85057.5(b).

(3) A State or local public agency that proposes to carry out, approve, or fund a plan, program, or project that may be subject to this Chapter must determine whether that proposed plan, program, or project is a covered action. That determination, which is subject to judicial review, must be reasonable, made in good faith, and consistent with the Delta Reform Act and this Chapter.

(4) Nothing in the application of the definition of a "covered action" shall be interpreted to authorize the abrogation of any vested right whether created by statute or by common law.

~~(k)~~ (l) "Delta" means the Sacramento-San Joaquin Delta as defined in section 12220 of the Water Code and the Suisun Marsh, as defined in section 29101 of the Public Resources Code.

~~(j)~~ (m) "Delta Plan" means the comprehensive, long-term management plan for the Delta to further the achievement of the coequal goals, as adopted by the Delta Stewardship Council in accordance with the Sacramento-San Joaquin Delta Reform Act of 2009.

~~(m)~~ (n) "Designated Floodway" means those floodways, as defined in California Code of Regulations, Title 23, section 4 (i), under the jurisdiction of the Central Valley Flood Protection Board.

~~(n)~~ (o) "Encroachment" means any obstruction or physical intrusion by construction of works or devices, planting or removal of vegetation, or by any means for any purpose, into or otherwise affecting a floodway or floodplain.

~~(o)~~ (p) "Enhancement" or "enhancing," for purposes of section 5001(h)(2), means improving existing desirable habitat and natural processes. Enhancement may include, by way of example, flooding the Yolo Bypass more often to support native species or to expand or better connect existing habitat areas. Enhancement includes many fish and wildlife management practices, such as managing wetlands for waterfowl production or shorebird habitat, installing fish screens to reduce entrainment of fish at water diversions, or removing barriers that block migration of fish to upstream spawning habitats.

~~(p)~~ (q) “Feasible” means capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors.

~~(q)~~ (r) “Floodplain” means any land area susceptible to being inundated by flood waters from any source.

~~(r)~~ (s) “Floodplain values and functions” has the same meaning as set forth in 33 Code of Federal Regulations section 320.4(l)(1).

~~(s)~~ (t) “Floodproofing” means any combination of structural and nonstructural additions, changes, or adjustments appropriate for residential structures, which reduce or eliminate risk of flood damage to real estate, improved real property, or structures with their contents.

~~(t)~~ (u) “Floodway” means the portion of the floodplain that is effective in carrying flow (that is, the channel of a river or other watercourse and the adjacent land areas that convey flood waters).

~~(u)~~ (v) “Government-sponsored flood control program to reduce risks to people, property, and State interests in the Delta” means any State or federal strategy, project, approval, funding, or other effort that is intended to reduce the likelihood and/or consequences of flooding of real property and/or improvements, including risks to people, property, and State interests in the Delta, that is carried out pursuant to applicable law, including, but not limited to the following:

- (1) State Water Resources Law of 1945, Water Code section 12570 et seq.;
- (2) Sacramento-San Joaquin River Flood Control Projects (Flood Control Act of 1941, P.L. 77-228);
- (3) Local Plans of Flood Protection prepared pursuant to the Local Flood Protection Planning Act (Water Code section 8200 et seq.), that are consistent with the Central Valley Flood Protection Plan pursuant to Water Code section 9612;
- (4) Central Valley Flood Protection Plan (Water Code section 9600 et seq.);
- (5) Subventions Program, Special Projects Program (Water Code section 12300 et seq.);
- (6) Way Bill 1973-Subventions Program, Special Projects Program (Water Code section 12980 et seq.);
- (7) Central Valley Flood Protection Board Authority (California Code of Regulations, Title 23, Division 1); and
- (8) National Flood Insurance Program (National Flood Insurance Act of 1968, 42 U.S.C. 4001 et seq., P.L. 90-448).

~~(v)~~ (w) “High Priority islands or tracts” means the tracts of land listed under “High Priority” in the Table (Delta Levees Investment Strategy Priorities) of Section 5012 of this title and depicted in Appendix P to the Delta Plan.

~~(w)~~ (x) “Levee improvement” means any activity that is not levee operation and maintenance, and that is intended to reduce the probability of flooding or the addition of a feature that did not previously exist. Examples of levee improvements include changing levee geometry to reach a higher level of protection, providing riprap where none previously existed, and other similar activities.

~~(x)~~ (y) “Levee operation and maintenance” means any activity to retain or maintain the intended functions of flood control facilities and of existing encroachments or needed to keep the system functioning properly. Examples of maintenance activities include mowing, tree and brush trimming and removal, revetment restoration, rodent control, spraying, painting, coating, patching, burning, and other similar activities but does not include any significant excavation or any excavation during flood season.

(z) “Nonnative invasive species,” for purposes of section 5009, means species that establish and reproduce rapidly outside of their native range and may threaten the diversity or abundance of native species through competition for resources, predation, parasitism, hybridization with native populations, introduction of pathogens, or physical or chemical alteration of the invaded habitat.

(aa) “Nonproject levee” means a local levee owned or maintained by a local agency or private owner that is not a project facility under the State Water Resources Law of 1945, Chapter 1 (commencing with Water Code section 12570) and Chapter 2 (commencing with section 12639 of Part 6 of the Water Code).

(bb) “Other Priority islands or tracts” means the tracts of land listed under “Other Priority” in the Table (Delta Levees Investment Strategy Priorities) of Section 5012 of this title and depicted in Appendix P to the Delta Plan.

(cc) “Person” means, for purposes of article 5, any person, firm, association, organization, partnership, business trust, corporation, limited liability company, or company, and state or local public agency.

~~(ee)~~ (dd) “Project levee” means a federal flood control levee that is a project facility under the State Water Resources Law of 1945, Chapter 1 (commencing with Water Code section 12570) and Chapter 2 (commencing with section 12639 of Part 6 of the Water Code).

~~(dd)~~ (ee) “Proposed action” means a plan, program, or project that meets the covered action screening criteria listed in section 5001(j)(1)(A) through (D). Proposed action is also a “covered action,” and therefore subject to compliance with the regulatory policies contained in Articles 2 and 3-if the proposed action meets the covered action screening criterion listed in section 5001(j)(1)(E).

~~(ee)~~ (ff) “Protection” or “protecting,” for purposes of section 5001(h)(2), means preventing harm to the ecosystem, which could include preventing the conversion of existing habitat, the degradation of water quality, irretrievable conversion of lands suitable for restoration, or the spread of invasive nonnative species.

~~(ff)~~ (gg) “Regulated stream” means those streams identified in Table 8.1 of California Code of Regulations, Title 23, section 112, under the jurisdiction of the Board.

~~(gg)~~ (hh) “Restoration” or “restoring,” for purposes of section 5001(h)(2), has the same meaning as in Water Code section 85066. Restoration actions may include restoring interconnected habitats within the Delta and its watershed, restoring more natural Delta flows, or improving ecosystem water quality.

~~(hh)~~ (ii) “Setback levee” means a new levee constructed behind an existing levee which allows for removal of a portion of the existing levee and creation of additional floodplain connected to the stream. In the Delta, a “setback levee” may not necessarily result in removal of the existing levee.

~~(ii)~~ (jj) “Significant impact” for the purpose of determining whether a project meets the definition of a “covered action” under section 5001(j)(1)(D) means a substantial positive or negative impact on the achievement of one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people, property, and State interests in the Delta, that is directly or indirectly caused by a project on its own or when the project’s incremental effect is considered together with the impacts of other closely related past, present, or reasonably foreseeable future projects. The following categories of projects will not have a significant impact for this purpose:

(1) “Ministerial” projects exempted from CEQA, pursuant to Public Resources Code section 21080(b)(1);

(2) “Emergency” projects exempted from CEQA, pursuant to Public Resources Code section 21080(b)(2) through (4);

(3) Temporary water transfers of up to one year in duration.

(4) Other projects exempted from CEQA, unless there are unusual circumstances indicating a reasonable possibility that the project will have a significant impact under Water Code section 85057.5(a)(4), as further defined by this section. Examples of unusual circumstances could arise in connection with, among other things:

(A) Local government general plan amendments for the purpose of achieving consistency with the Delta Protection Commission’s Land Use and Resource Management Plan; and

(B) Small-scale habitat restoration projects, as referred to in CEQA Guidelines, section 15333 of Title 14 of the California Code of Regulations, proposed in important

restoration areas, but which are inconsistent with the Delta Plan's policy related to appropriate habitat restoration for a given land elevation (section 5006 of this Chapter).

~~(jj)~~ (kk) "Very-High Priority islands or tracts" means the tracts of land identified under "Very-High Priority" in the Table (Delta Levees Investment Strategy Priorities) of Section 5012 of this title and depicted in Appendix P to the Delta Plan.

~~(kk)~~ (ll) "Urban area" means a developed area in which there are 10,000 residents or more.

~~(ll)~~ (mm) "Urbanizing area" means a developed area or an area outside of a developed area that is planned or anticipated to have 10,000 residents or more within the next 10 years.

~~(mm)~~ (nn) "Urban water management plan" means a plan prepared, adopted, and updated by an urban water supplier pursuant to the Urban Water Management Planning Act, Water Code section 10610 et seq.

~~(nn)~~ (oo) "Urban water supplier" refers to both "urban retail water suppliers" and "urban wholesale water suppliers":

(1) "Urban retail water supplier" means a water supplier, either publicly or privately owned, that directly provides potable municipal water to more than 3,000 end users or that supplies more than 3,000 acre-feet of potable water annually at retail for municipal purposes.

(2) "Urban wholesale water supplier" means a water supplier, either publicly or privately owned, that provides more than 3,000 acre-feet of potable water annually at wholesale for municipal purposes.

~~(oo)~~ (pp) "Water supplier" refers to both "urban water suppliers" and "agricultural water suppliers," but for purposes of section 5003, does not include agricultural water suppliers during the time that they may be exempted by section 10853 of the Water Code from the requirements of Parts 2.55 and 2.8 of Division 6 of the Water Code.

NOTE: Authority cited: Sections ~~85210~~ 85210, 85225.30, and 85306, Water Code.
Reference: Sections 10608.12, 10853, 85020, 85052, 85054, 85057.5, 85058, 85059, 85066, 85300, 85302 and 85308, Water Code.

ARTICLE 5. APPEALS OF CERTIFICATIONS OF CONSISTENCY

SECTION 5020. SCOPE

This article applies to appeals of the adequacy of certifications of consistency with the Delta Plan filed with the council by a certifying agency pursuant to Water Code sections 85225.10 and 85225.30.

NOTE: Authority cited: Sections 85001, 85020, 85022, 85057.5, 85200, 85210, 85225, 85225.5, 85225.10, 85225.15, 85225.20, 85225.25, 85225.30, 85300, and 85320, Water Code.

SECTION 5021. FILINGS AND MAILINGS

(a)(1) All filings, submissions, and mailings required to be submitted pursuant to this article shall be made electronically. Filings, submissions, and mailings shall be in 12-point black font.

(2) The council encourages electronic submittals to comply with the Web Content Accessibility Guidelines 2.0, or a subsequent version effective at the time of the filing of the certification of consistency, published by the Web Accessibility Initiative of the World Wide Web Consortium at a minimum Level AA success criteria.

(b) If the last day for a filing or submissions to the council required pursuant to this article is a weekend or a State holiday, that deadline shall be the next business day.

NOTE: Authority cited: Section 12a, Code of Civil Procedure; Sections 7405, 11135, and 11546.7, Government Code; Section 85225.30, Water Code.

SECTION 5022. FILING OF APPEAL

(a) No later than 30 calendar days after the date a certification of consistency is filed with the council, any person, including a member of the council or its executive officer, or delegee, may file an appeal claiming that a proposed covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, that action will have a significant adverse impact on the achievement of one or both of the coequal goals of the Sacramento-San Joaquin Delta Reform Act of 2009 (Wat. Code, § 85000 et seq.) or implementation of government-sponsored flood control programs to reduce risks to people and property in the Delta.

(b) All appeals shall be in writing and filed with any supporting documentation through the council's covered actions portal and shall be public records consistent with the California Public Records Act (Gov. Code § 7920.000 et seq.).

(c) An appeal shall be in writing and clearly and specifically set forth the basis for the claim that the covered action is inconsistent with the Delta Plan. It shall contain all of the following:

(1) Appellant's name, residence address or mailing address, email address, and telephone number.

(2) The project name of the covered action, and identification number issued by the council.

(3) The name of the certifying agency.

(4) A statement of the factual allegations upon which the appeal is based.

(5) A list of the specific Delta Plan policies that the appellant alleges the proposed covered action is inconsistent with, and for each policy identified, both of the following:

(A) A concise statement of the authority, evidence, and arguments relied on to support the appellant's claim that the proposed covered action is inconsistent with the Delta Plan policy.

(B) How the claimed inconsistency will have a significant adverse impact on one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people and property in the Delta.

(d)(1) An appeal shall be considered timely when received by the council no later than 5:00 p.m. (PT) on the 30th calendar day following the council's receipt of the certification of consistency.

(2) The effective date of a timely appeal shall be the 30th day after the date of receipt of the certification of consistency.

(3) A copy of the appeal shall be stamped "Filed" with the effective date. The effective date of filing shall govern the timeframe established by Water Code section 85225.20.

(e)(1) No later than five calendar days after the council has posted a notice of appeal pursuant to subsection (a), a certifying agency shall submit to the council the record that was before the certifying agency at the time it made its certification. The record shall be certified by the agency as being "full and complete."

(2) Any modifications to the certified record shall be subject to this article.

(3) A certifying agency is strongly encouraged to either submit or make the record publicly available at the time it files its certification of consistency and provide information on its location in the certification.

(4) The failure by a certifying agency to submit the record to the council on a timely basis as required pursuant to paragraph (1) shall be grounds for the council to remand the matter to the certifying agency on the basis that there was not substantial evidence presented to support the certification of consistency.

NOTE: Authority cited: Sections 6707 and 11020, Government Code; Sections 85225.10, 85225.15, 85225.20, and 85225.30, Water Code.

SECTION 5023. NOTICE OF APPEAL

(a) Within five business days of the effective date of an appeal, the executive officer, or

delegee, shall do all of the following:

- (1) Post a notice and brief description of the appeal and its effective date in a conspicuous location in the council's office and on its website.
- (2) Mail to the affected certifying agency and to any third party whose proposal is the subject of the certification a copy of the notice, a brief description, and a copy of the appeal documents filed with the council.
- (3) Mail copies of the appeal to each member of the council, and to the Delta Protection Commission for informational purposes consistent with Public Resources Code section 29773.
- (4) Mail notice to the appellant that the appeal has been filed and stating the effective date of filing.
- (b) The council or executive officer, or delegee, may issue supplemental notices as necessary.
- (c) Notices shall be mailed electronically consistent with section 5021.

NOTE: Authority cited: Section 85225.30, Water Code.

SECTION 5024. EX PARTE COMMUNICATIONS

- (a) Hearings on appeals are subject to the ex parte communication restrictions of the Administrative Procedure Act (Gov. Code § 11430.10 et seq.). Pursuant to Government Code section 11430.10, an ex parte communication is a "communication, direct or indirect, regarding any issue in the proceeding, to the [council or council member] from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication."
- (b) The restrictions on ex parte communications apply from the date the appeal is filed to the date that the council issues a final decision on the appeal.
- (c) To ensure compliance with this section, council members shall avoid ex parte communications while an appeal is pending. If a council member receives an ex parte communication, including, but not limited to, by an individual sending a letter to a council member concerning a pending appeal matter, the council member shall notify the council's legal adviser or executive officer.
- (d) At the first appropriate publicly noticed council meeting after an appeal is filed, the council's legal adviser shall remind the council of this ex parte communications restriction and answer questions about its scope.

NOTE: Authority cited: Sections 11430.10 and 11430.80, Government Code; Section 85225.30, Water Code.

SECTION 5025. ADDITIONAL INFORMATION FROM APPELLANT

The council or its executive officer, or delegee, may request from the appellant further information necessary to clarify, amplify, correct, or otherwise supplement the information submitted with the appeal to be provided by the deadlines specified by the council or its executive officer, or delegee. The council or its executive officer, or delegee, may dismiss the appeal for the failure of the appellant to provide information requested by a specified deadline if the information requested is in the possession of or under the control of the appellant.

NOTE: Authority cited: Sections 85225.10, 85225.20, 85225.25, and 85225.30, Water Code.

SECTION 5026. SUPPLEMENTAL RECORD

(a) The council or its executive officer, or delegee, may supplement the record submitted by the certifying agency if the council or its executive officer, or delegee, determines that additional information was part of the record before the certifying agency at the time of certification but was not included in the certifying agency's record submitted to the council.

(b) Any party to an appeal and the Delta Protection Commission may submit a request to the council to supplement the record with additional documentation or information that was part of the record before the certifying agency but was not included in the certifying agency's submission to the council. That request, including the documentation or information requested for admission, shall be submitted to the council by the deadline specified by the council for that type of submission in the applicable notice. Requests that are not submitted by the specified deadline in the required format or that do not include the required documentation or information shall not be considered for admission.

(c) To be considered for admission pursuant to this section, each request shall include for each specific document or information requested to be considered for admission all of the following:

(1) Specification that the request is being submitted pursuant to this section.

(2) The documentation or information that is the subject of the request. Each document or information that is the subject of a request shall be provided as a separate electronic document or file. Multiple documents or information submitted as one electronic file shall not be considered for admission.

(3) Specific evidence that the document or information requested for admission was part of the record before the certifying agency prior to the date of the council's receipt of the certification.

NOTE: Authority cited: Sections 85225.10, 85225.20, 85225.25, and 85225.30, Water Code.

SECTION 5027. SCHEDULES AND ORAL PRESENTATIONS

(a)(1) All deadlines and scheduling related to an appeal, including, but not limited to, hearings, written submissions, and requests for admission of additional information pursuant to sections 5026 and 5032, shall be specified in a notice issued by the council or executive officer, or delegee, except as already specified by statute or this article.

(2) Requests and submissions provided after the deadlines specified in the applicable notice shall not be considered.

(b) The council shall conduct a hearing on an appeal in a manner deemed most suitable to ensure fundamental fairness to all parties concerned and with a view toward securing all relevant information and material necessary to render a decision without unreasonable delay.

(c) The hearing shall not be subject to common law, statutory rules of evidence, or technical or formal rules of procedure, except as set forth in in this article. Unduly repetitious or irrelevant evidence may be excluded upon order of the council, chair, or executive officer.

(d) Except as provided in sections 5026 and 5032, evidence is limited to the record that was before the certifying agency prior to the council's receipt of the certification of consistency. The record shall not include a transcript of any proceedings before the certifying agency unless provided by a party to the proceedings or requested by the council.

(e)(1) The appellant and certifying agency may each make oral presentations regarding the appeal at the time and date of the hearing set forth in the notice issued by the council or executive officer, or delegee pursuant to this section.

(2) Presentations shall address the issues and facts raised in the appeal and shall be as brief as possible.

(3) The council or executive officer, or delegee, shall have the discretion to set time limits on oral presentations and decide the order of the presenters. The certifying agency shall be afforded the combined amount of presentation time that is afforded to the appellant.

(f) Council members may ask questions of the appellant, the certifying agency, the

Delta Protection Commission, any third party appearing at the hearing, or council staff. The questioning of speakers at the hearing by other persons shall not be permitted except by permission of the council, chair, or executive officer.

(g) Any person other than the certifying agency or appellant may provide oral comment or written comments to the council concerning an appeal in accordance with the Bagley-Keene Open Meeting Act (Gov. Code, § 11120 et seq.). Written comments may be submitted any time, but to ensure that written comments may be circulated to council members for their review ahead of the applicable meeting concerning an appeal, written comments shall be submitted to the council at least 10 calendar days prior to that meeting. Written comments may be submitted electronically.

NOTE: Authority cited: Section 11125.7, Government Code; Sections 85225.10, 85225.20, 85225.25, and 85225.30, Water Code.

SECTION 5028. DELTA PROTECTION COMMISSION COMMENTS

(a) (1) The Delta Protection Commission may submit written comments on issues raised by an appellant in an appeal and whether the certification of consistency for the proposed covered action is supported by substantial evidence in the record before the certifying agency.

(2) The Delta Protection Commission may further make an oral presentation to the council regarding issues raised by an appellant in an appeal at the time and date of the hearing on the appeal.

(b) The council shall consider the comments and presentation submitted by the Delta Protection Commission regarding issues raised by an appellant as those of an expert in matters that may affect the unique cultural, recreational, and agricultural values of the Delta when preparing, considering, and adopting its findings.

NOTE: Authority cited: Section 85225.30, Water Code.

SECTION 5029. DOCUMENTATION AND WRITTEN SUBMISSIONS

(a) Documentation and information provided with a written submission and not included in the record submittal by the certifying party shall be subject to the requirements of sections 5026 and 5032 for consideration of admissibility, as applicable based upon the request for admission.

(b) Each submittal shall include a cover sheet that lists all of the following information in the following order:

(1) The project name of the covered action and identification number issued by the council.

(2) The name of the party submitting the document.

(3) The date of submittal.

(4) The document title.

(c)(1) A written submission by an appellant or the Delta Protection Commission in support of an appeal shall provide specificity for each appealed policy, which shall include citations to evidence in the record, to support the grounds for appeal identified in the appeal.

(2) An appellant or the Delta Protection Commission shall not introduce additional grounds for appeal in a written submission. Those additional grounds shall not be considered as part of the appeal.

(d) The certifying agency's written submission shall respond to the allegations of the appeal. To the extent possible, the certifying agency shall cite to evidence in the record to support the certification of consistency. This requirement shall not be construed to relieve an appellant's burden to show that the certification of consistency is not supported by substantial evidence in the record.

NOTE: Authority cited: Section 85225.30, Water Code.

SECTION 5030. HEARING

(a) The council shall hear appeals of certifications of consistency filed pursuant to Water Code section 85225 within 60 days of the effective date.

(b) Notwithstanding subsection (a), the council may hear an appeal for a certification of consistency outside of 60 days of the effective date if any of the following:

(1) The parties and the council or executive officer, or delegee, agree to an extension, taking into account the circumstances of the matter subject to appeal, council's hearing schedule, and associated workload.

(2) Prior to the hearing, the council or its executive officer, or delegee, determines that the issues raised on appeal are not within the council's jurisdiction or do not raise an appealable issue.

(3) The council or its executive officer, or delegee, determines that all issues raised on appeal are moot.

(4) The council or its executive officer, or delegee, determines that all issues on appeal should be dismissed or the matter remanded for failure to comply with this article.

(5) The council or its executive officer, or delegee, remands the matter to the certifying agency for failure to submit the record pursuant to the procedures governing the filing of a certification of consistency.

(c) The council may hold additional hearings or workshops at its discretion and as it deems necessary.

(d) The council, upon a determination of good cause, may continue the hearing.

NOTE: Authority cited: Sections 85225, 85225.10, 85225.20, and 85225.30, Water Code.

SECTION 5031. CONSOLIDATION

(a) The council, at its discretion, may consolidate appeals raising similar issues.

(b) The council or its executive officer, or delegee, may address issues related to this article in individual or consolidated appeals as necessary to further the interests of justice.

NOTE: Authority cited: Sections 85225.5 and 85225.30, Water Code.

SECTION 5032. OFFICIAL NOTICE IN A HEARING

(a) Notwithstanding any other provision of this article, the council may take official notice in any hearing that it conducts of any generally accepted technical or scientific matter within the council's jurisdiction and of any fact that may be judicially noticed by a court.

(b)(1) A party to an appeal and the Delta Protection Commission may submit a request to the council to take official notice of additional information that was not included in the certifying agency's submitted record to the council. That request, including the documentation or information requested for admission, shall be submitted to the council by the deadline specified by the council for those submittals in the applicable notice.

(2) Requests for additional information that are not submitted by the council's deadline in the required format or that do not include the required documentation or information shall not be considered for admission.

(c) To be considered for admission pursuant to this section, each request for each specific document or information requested to be considered for admission shall include all of the following:

(1) Specification that the request is being submitted pursuant to this section.

(2) The documentation or information that is the subject of the request. Each document or information that is the subject of a request shall be provided as a separate electronic document or file. Multiple documents or information submitted as one electronic file shall not be considered for admission.

(3) Specific evidence that the information requested for admission is of the following:

(A) A generally accepted technical or scientific matter within the council's jurisdiction.

(B) A fact that may be judicially noticed by a court.

NOTE: Authority cited: Section 11515, Government Code; Section 85225.30, Water Code.

SECTION 5033. ISSUANCE OF DECISION

(a) The council shall make a decision on the appeal with specific written findings within 60 days of hearing the appeal.

(b) The parties and the council or the executive officer, or delegee, may agree to an extension of the time for the council's decision considering the circumstances of the matter subject to appeal, council's hearing schedule, and associated workload.

NOTE: Authority cited: Sections 85210.5, 85225.20, 85225.25, and 85225.30, Water Code.

SECTION 5034. IMPLEMENTATION OF COVERED ACTION

A covered action that is the subject of an appeal shall not be implemented unless at least one of the following conditions has been met:

(a) The council has found that no appellant has shown that the certification of consistency is not supported by substantial evidence in the record on any appealed issue.

(b) After remand, all of the following have occurred:

(1) The certifying agency has decided to proceed with the action as proposed or modified.

(2) The certifying agency has filed with the council a revised certification of consistency addressing each of the findings made by the council and any changes made to the proposed action.

(3) Thirty days has elapsed, and no person has appealed the revised certification.

(c) The appellant has withdrawn the appeal.

(d) The council or its executive officer, or delegee, has dismissed the appeal pursuant to this article.

(e) If, after hearing an appeal, the council has not adopted findings that the appellant has shown that the certification of consistency is not supported by substantial evidence in the record.

NOTE: Authority cited: Sections 85225.20, 85225.25, and 85225.30, Water Code.

SECTION 5035. APPEAL FOLLOWING REMAND

(a) An appeal of a revised certification of consistency following a remand shall be limited to either of the following:

(1) An alleged failure to address each of the council's findings on the remanded issues.

(2) Issues resulting from material changes to the covered action.

(b) Except as provided in subsection (a)(2), a person shall not raise new grounds for appeal that were not raised in a prior appeal or reassert grounds that were raised or were rejected by the council. Those grounds may be considered non-appealable issues and dismissed.

NOTE: Authority cited: Sections 85210.5, 85225.5, 85225.25, and 85225.30, Water Code.