**DEPARTMENT OF WATER RESOURCES**
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*Sent via Email:* procedures@deltacouncil.ca.gov

March 7, 2022

Ms. Jessica Pearson
Executive Officer
Delta Stewardship Council
715 P Street, 15-300
Sacramento, California 95814

RE: Draft Amendments to Administrative Procedures Governing Appeals

Dear Ms. Pearson:

The Department of Water Resources (DWR) appreciates the opportunity to comment on the Draft Amendments to Administrative Procedures Governing Appeals (Draft Amendments.) As DWR regularly files certifications of consistency with the Delta Stewardship Council (DSC) and has participated in multiple appeals proceedings for certifications of consistency, DWR believes that these improvements will benefit all parties in the event of any future appeals proceedings.

However, DWR is concerned that the administrative procedures could result in a misapplication of the substantial evidence standard, the applicable standard of review for certifications of consistency, as neither the Delta Reform Act nor the Draft Amendments provide a definition for this standard. The Delta Reform Act states that after a hearing the DSC "shall make specific written findings either denying an appeal or remanding the matter to the certifying agency..... " (Water Code§ 85225.25). The DSC may only uphold an appeal "on the finding that the certification of consistency is not supported by substantial evidence in the record before the state or local public agency that filed the certification." (Water Code§ 85225.25.)

The California Supreme Court has held that "[w]here the language of a statute uses terms that have been judicially construed, the presumption is almost irresistible that the terms have been used in the precise and technical sense which had been placed upon them by the courts." *(Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570-571, internal quotation marks omitted.) For that reason, the Court construed "substantial evidence" as it appears in CEQA consistent with long-standing case law applying the standard in other contexts. *(Id.* at p. 570.) The CEQA Guidelines provide a clear definition of what does, and does not constitute substantial evidence:

(a) "Substantial evidence" as used in these guidelines means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.... Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.

(b) Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.

(14 Cal. Code Regs.,§ 15384.)

The substantial evidence standard of review is "highly deferential" to an agency's challenged findings of fact. *(Environmental Law Foundation v. Beech-Nut Nutrition Corp.* (2015) 235 Cal.App.4th 307, 323.) A reviewing body subject to the substantial evidence standard of review must uphold challenged findings if there is any substantial evidence in the record supporting those findings, whether contradicted or uncontradicted by other substantial evidence in the record, and whether or not the reviewing body would have made a different finding based on the same evidence. (*Citizens Business Bank v. Gevorgian* (2013) 218 Cal.App.4th 602, 613.) When "applying the substantial evidence standard of review, all conflicts in the evidence are resolved in favor of the prevailing party and all legitimate and reasonable inferences are made to support the agency's decision." *(Holden v. City of* San *Diego* (2019) 43 Cal.App.5th 404, 410.) A reviewing body may not substitute its own judgment for that of the agency. *(Ibid,* citing *Western States Petroleum* Assn. *v. Superior Court* (1995) 9 Cal.4th 559, 571-572.)

Under the substantial evidence standard of review it is irrelevant if appellants can point to evidence in the record or introduce their own evidence to contradict an agency's findings. The California Supreme Court has emphasized this point, explaining that "[a] court's task on review is then to decide whether the agency's determination is supported by substantial evidence; the court's job is not to weigh conflicting evidence and determine who has the better argument." *(Friends of College of* San *Mateo Gardens* v. San *Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 953.) As a result, "[t]he substantial evidence standard of review is generally considered the most difficult standard of review to meet, as it should be, because it is not the function of the reviewing court to determine the facts." *(In re Michael* G. (2012) 203 Cal.App.4th 580, 589.)

DWR recommends the DSC adopt the definition provided above in its procedures so that this standard is clear for staff and others attempting to apply it in an appellate context. This would allow parties to understand the scope of the DSC's jurisdiction on appeal.

DWR also asks that the DSC consider additional clarifications to further improve future appeals proceedings and provides the following comments on the Draft Amendments for your consideration:

Part I, Para. 3: The sentence"... and include any public comments received in the record submitted to the council in the case of an appeal" should be clarified to indicate that it refers to public comments received by the certifying agency regarding the draft certification during the 10-day posting period.

Part I, Para. 4(a): It is DWR's understanding that this checklist already exists and recommends that this paragraph cite to where the checklist can be located.

Part I, Para. 4(b): Regarding submission of the record, some certification records could be significant in size. A record with a voluminous number of documents could present

significant technological challenges to electronically transfer to the DSC within the proposed 5-day period. Will there be any allowances if IT problems are encountered, but good faith efforts are made? Will the DSC provide technical assistance to help ensure the record submission is feasible during the shortened timeframe?

Part I, Para. 4(b): Regarding the record itself, it would be beneficial if more detail was provided regarding the contents and scope of the record. The scope of the record should be limited to documentation and information that are relevant to the determinations in a certification of consistency. As acknowledged by the DSC, the purpose of an appeal proceeding is not to determine whether the certifying agency has complied with CEQA, it is to determine consistency with the Delta Plan by evaluating whether a certification of consistency is supported by substantial evidence. (Determination Regarding Appeal of the Certification of Consistency by San Joaquin Area Flood Control Agency for Smith Canal Gate Project (C20188), Delta Stewardship Council, March 22, 2019, part V(A)3(a)(i).)

Part I, Para. 4(c): Water Code section 85225.25 states that "After a hearing on an appealed action, the council shall make specific findings either denying the appeal or remanding the matter to the state or local public agency for reconsideration based on the finding that the certification of consistency is not supported by substantial evidence in the record before the state or local public agency that filed the certification." If, as contemplated by subparagraph 4(c), a state or local agency fails to submit the record to the DSC as required under subparagraph (b), the deadline for which occurs before a hearing would have taken place, it is unclear how the certification could be remanded and how remanding the matter could impact resubmission of a certification of consistency and any future associated appeals proceedings. Additionally, the statutory language requires a remand to be based on specific written findings by the DSC on whether the agency's certification is supported by substantial evidence.

Part I, Para. 6 and 9: Will an appeal be considered incomplete, and therefore not filed, if it does not meet the requirements of paragraph 6 and/or will it be denied pursuant to paragraph 9? Will the DSC be making such determinations prior to any initial hearing pursuant to Water Code section 85225.10 and Para. 9?

Part I, Para. 10: Under subparagraph (b)(iii) a request for supplemental records has to provide "Specific evidence that the document or information requested for admission was part of the record before the agency prior to the date of the council's receipt of the certification." To be considered "before the agency" appellants should provide evidentiary support that the requested records were submitted to or considered by the certifying agency, and not merely in existence prior to the filing date of the certification of consistency. Additionally, to ensure fundamental fairness to all parties, this paragraph should allow for the certifying agency to respond to requests to supplement the record. Finally, will the relevance of requested additional information be considered in determining what is appropriate for admission under this paragraph? Supplemental records would be of limited relevance if they concern issues not within the DSC's jurisdiction or non-appealable issues. Supplemental records would also be of limited relevance when the record as submitted already contains substantial evidence.

Part I, Para. 11: It would be beneficial for the preparation of all parties that may be involved in an appeal proceeding for there to be a standard hearing structure, including general time limits and order of presentations.

Part I, Para. 11(c): The intent and relevance of the following sentence is unclear: 'The record will not include a transcript of any proceedings before the certifying agency unless provided by a party to the proceedings or requested by the council." DWR requests further clarification on what is intended by this addition. Presumably any transcript of a proceeding before the certifying agency would only be within the scope of the record to the extent that it is relevant to the determinations in the certification of consistency.

Part I, Para. 11 (d): It is unclear if the oral presentations themselves are included within the definition of "evidence" and how these presentations may be considered by the DSC when making its findings.

Part I, Para. 11(e): Who would be considered a third party that would appear at the hearing for purposes of this subparagraph? Is this in reference to a party appearing on behalf of an appellant or local or state agency? Does this include public commentors?

Part I, Para. 11(f): It is unclear if this subparagraph is requiring all public comments to be provided in writing in advance, or if the public will be able to provide oral comments at the hearing as well.

Part I, para 13(c): This subparagraph states that the DSC, on its own, "may continue the hearing where it determines that a continuance would be appropriate." It is unclear what is meant by continuance in this subparagraph. Would any postponement of an initial hearing still take place within 60 days of the date of the filing of an appeal pursuant to the timeline mandated by the Delta Reform Act? (Water Code§ 85225.20.) Further clarification would also be beneficial regarding the circumstances for which a continuance would be appropriate.

Part I, Para. 14: Given the addition of Part!, subparagraph 13(b), consider revising the first sentence to read "The council shall make its decision on the appeal within 60 days of hearing the appeal, pursuant to paragraph 13, subparagraph (a), ....."

Part I, para 15 (b): Further clarification should be provided regarding the scope of any appeals proceedings that may result from the submission of a revised certification of consistency and what is considered an appealable issue for purposes of such proceedings. The Delta Reform Act states that if the certifying agency decides to proceed with the covered action, the agency shall "file a revised certification of consistency that addresses each of the findings made by the council and file that revised certification with the council." (Water Code§ 85225.25.) This section impliedly limits the DSC's review of the subsequent revised certification. As the purpose of submitting a revised certification of consistency is for a certifying agency to address any specific findings made by the DSC that determined the certification of consistency was not supported by substantial evidence in the record, the DSC should clarify that appeals proceedings on a revised certification are limited to those revisions as a matter of law.

In quasi-judicial proceedings the scope of an adjudicatory body's review is limited based on the doctrine of res judicata, the purpose of which is the promotion of judicial economy. As noted by the Supreme Court of California, res judicata "benefits both the parties and the courts because it 'seeks to curtail multiple litigation causing vexation and expense to the *parties* and wasted effort and expense in *judicial administration.'" (Mycogen Corp. v. Monsanto* Co. (2002) 28 Cal.4th 888, 897.) "This policy can be as important to orderly administrative procedure as to orderly court procedure." *(Hollywood Circle, Inc. v. Department of Alcoholic Beverage Control* (1961) 55 Cal.2d 728,732.) In *Hollywood Circle, Inc.,* the California Supreme Court determined that res judicata is applicable when an administrative agency is performing a purely judicial function, such as when "reviewing another agency's decision to determine whether that decision conforms to the law and is supported by substantial evidence." *(Ibid.)* The same conclusion was made by the United States Supreme Court, which stated that "[w]hen an administrative agency is acting in a judicial capacity and resolved disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." *(U.S. v Utah Const. & Min.* Co. (1966) 384 U.S. 394,422, superseded by statute on other grounds.)

Part I, Para. (29): Further information should be provided on what specific evidence has to be provided to show that information requested for official notice is appropriate for admission under this paragraph, per subparagraph (b)(iii). "The burden is on the party requesting judicial notice to supply the court with sufficient, reliable, and trustworthy sources of information about the matter." *(People v. Maxwell* (1978) 78 Cal.App.3d 124, 130.) "Judicial notice may not be taken of any matter unless authorized or required by law." (Evid. Code,§ 450.) The participant seeking official notice has the threshold burden of showing that the evidence is relevant. "Judicial notice is the recognition and acceptance by the court, for use by the trier of fact or by the court, of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter." *(Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882, citation and internal quotation marks omitted.) "[T]he purpose of judicial notice is to expedite the production and introduction of otherwise admissible evidence." *(Mazzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578.)

It is also unclear how extra-record evidence admitted under this paragraph may be considered by the DSC when makings its findings. Materials that are judicially noticed only confirm the existence of the materials and not the truth of the matters stated therein. (See *Californians for Pesticide Reform v. Department of Pesticide Regulation* (2010) 184 Cal.App.4th 887, 910.) As the California Supreme Court explained: "extra-record evidence can never be admitted merely to contradict the evidence the administrative agency relied on ... or to raise a question regarding the wisdom of that decision." *(Western States PetroleumAssn. v. Superior Court* (1995) 9 Cal.4th 559, 579.) Additionally, parties should be given the opportunity to respond to requests for official notice under this paragraph.

Part I, Para. 29(a): This subparagraph may benefit from clarifying what is meant by the "agency's submission." Is this a reference to the record that the certifying agency submits pursuant to Part 1, Para. 4?

Sincerely,

Emily Cummings, Attorney
Office of the General Counsel
Department of Water Resources

cc: Karla Nemeth, Director, Department of Water Resources
Thomas Gibson, General Counsel, Department of Water Resources
Nancy Vogel, Deputy Secretary for Water, California Natural Resources Agency
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March 7, 2022

**SENT VIA EMAIL**
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**susan.tatayon@deltacouncil.ca.gov)**

Susan Tatayon, Chair
Delta Stewardship Council
715 P Street, 15-300
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**RE: Comments on the Proposed Amendments to the Council's Administrative Procedures Governing Appeals**

Dear Chair Tatayon:

This office has participated in several appeals representing appellants and offers these comments on the Proposed Amendments to the Delta Stewardship Council's ("Council") Administrative Procedures Governing Appeals ("Proposed Amendments") to assist in improving the appeal process for all participants. The Council's reasoning for producing amendments to the Administrative Procedures Governing Appeals ("Appeals Procedures") is unclear. The December 10, 2021, Notice of Release provides some insight, however, it may have been more helpful to hold a workshop at the time of the release of the Proposed Amendments, or leading up to the release, rather than waiting to explain the intent behind the changes until after the comment period.

In any case, we are concerned that amendments appear to shorten timelines for public participation and fail to correct gaps that have been previously identified in consistency appeals. These issues are discussed below.

**Part 1, Section 2.** This office continues to be troubled by the Council's so called "early consultation process" for covered actions seeking recertification when a project has already been certified as consistent with the Delta Plan and appealed. To the extent the Council wishes to consult further with an applicant regarding the consistency of a project that was previously appealed, that process should occur in the open and include appellants. As stated in Section 2, the early consultation process applies "before" projects have been certified for consistency.

Should an applicant wish to receive further consultation after an unsuccessful certification process on the means to attain a project's consistency with the Delta Plan policies, that discussion should occur in public view, and Part 1, Rule 26 *Ex Parte* Restrictions should apply. Agencies working to recertify covered actions that could not be found consistent should not be allowed private and unfettered access to the Council and staff in order to press for a different result on the same project.

**Part 1, Section 3.** The Proposed Amendments fail to correct deficiencies with the current 10 day notice period.

The list of parties that would receive notice of a draft certification is too limited. Notice of a draft certification should be provided to parties that have requested notice, the public, Delta Protection Commission, government agencies and special districts located near the project's location and any party that has previously appealed the project. In addition, the Council should post the notice on its Covered Action website to assist in notifying the public of the upcoming consistency certification filing.

Second, the Council must require that the required notice period is followed. With respect to the Department of Water Resources' ("DWR") recent Lookout Slough re-certification, DWR failed to wait 10 days before filing the certification. On December 30, 2021, this office sent an email to DWR staff on the 10th day of the notice period pointing out that certain public comments received in the record submitted to the Council were missing. On that same day, the Council provided notice of DWR's filing of recertification of consistency for the project.

Although the Council was advised of DWR's premature filing of its recertification of consistency (on the 10th day) and the missing public comments, the Council took no action to correct these procedural deficiencies, and commenced the 30 day appeal period one day early. As the agency responsible for processing consistency determinations and consistency appeals, the Council should ensure that its procedures are followed. This includes directing certifying agencies to wait the full 10 days before submitting their certifications of consistency; if the agencies fail to comply, the certification submittal should recommence with a new 10 day period.

Last, we agree with the Delta Protection Commission that 30 days notice of intent to submit a certification of consistency would be more appropriate. Research regarding a project may be necessary to understand the project and to

determine whether an appeal should be filed. In addition, having a short 10 day period can facilitate abuses, such as DWR submitting a notice on December 20, 2021 for the Lookout Slough recertification during the winter holiday period when the public was least able to respond, with comments due by December 30, 2021. A 30 day notice period, with a more thorough attempt to notify the interested public, would be more conducive to public understanding and participation in the Council's covered action consistency process.

**Part 1, Section 4b.** The requirements contained in Section 4(b) as revised may create inconsistencies and be overly burdensome for a party wishing to appeal a certification.

Only after an appeal has been lodged does Section 4(b) require an agency to produce the record used for the certification. However, amendments to Section 6 now appear to require that additional detail to be included in appeals. Therefore, by continuing to allow the record to be submitted after an appeal is lodged may create new difficulties for any party contemplating an appeal. As suggested by the Delta Protection Commission, it may be more appropriate for the certifying agency to submit the record with the certification.

The reference to the deadline to submit the record being the next business day if the deadline falls on a weekend or State holiday is unnecessary and creates confusion. California Code of Civil Procedure section 12a already applies to the Council's deadline for the record, and all other deadlines in the Appeals Procedures. If the Council would like parties to be aware of this generally applicable legal requirement with respect to deadlines, it would be best to simply refer to the applicability of Code of Civil Procedure section 12a to the Appeals Procedures generally.

Additionally, Section 4(b) requires the agency to produce "the record that was before the state or local agency at the time it made its certification." However, this phrase is inconsistent with other aspects of the Appeals Procedures. Section 10 allows a party, once it has appealed, to submit a request to supplement the record "with additional documentation or information that was part of the record before the agency but was not included in the agency's submission to the council." This is unclear, because either those documents were produced by the agency pursuant to Section 4b or the documents should not have been "before the agency." The Appeals Procedures should clarify the definition of "the record that was before the state or local agency at the time it made its certification."

It may be more appropriate for the agency to initially submit the documents it specifically relied upon in making the certification, rather than the entire record. To the extent the contents of the administrative record as defined by the California Environmental Quality Act is intended to be the certification record, the listing of contents is found in Public Resources Code section 22267.6, subdivision (e).

**Part 1, Section 6.** First, it is unclear whether the amended language in Section 6 would result in a modified appeal form for appellants to fill out online. If the appeal form is being updated, it should be amended so that appellants may format the writing for readability. The current form does not allow for indents or line spacing and produces printouts that are very difficult to review and read. This problem may be one reason that appellants prefer to submit appeals in letter format.

Second, Section 6(b)(v)(A) requires an appellant to specify the grounds for appeal, "including which provisions of the policy are being appealed and an explanation that specifies how the proposed action is inconsistent with that policy[.]" However, the use of the phrase "which provisions of the policy are being appealed," creates confusion. The appeal is for the certification of consistency, not a Delta Plan policy. This language should be clarified.

**Part 1, Section 7.** Section 7 provides guidance for determining the timeliness of an appeal. The Water Code states, "The appeal shall be filed no later than 30 days after the submission of the certification of consistency." (Wat. Code, § 85225.15.) At first Section 7 mimics this language and states an appeal shall be considered timely if it is received "by the council no later than 5:00 PM on the thirtieth calendar day following the council's receipt of the certification of consistency." However, the amended language goes on to state, "Separately, the effective date of filing for a timely submittal of an appeal shall be designated to be no later than the thirtieth day from the date of receipt of the certification of consistency." It is unclear what this sentence is attempting to require. This language should be clarified.

**Part 1, Section 10.** First, Section 10 contains the same language as Section 4b regarding the record. It may be helpful, as discussed above, to further refine this language.

* * *

Thank you for considering these comments. Please feel free to contact me (osha@semlawyers.com) or James Crowder (james@semlawyers.com) with any questions.

Very truly yours,

**SOLURI MESERVE**
A Law Corporation

By: 
Osha R. Meserve

ORM/mre

cc: Cindy Whitlock (cindy.whitlock@deltacouncil.ca.gov)

**San Luis & Delta-Mendota Water Authority**

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March 7, 2022

***VIA EMAIL***

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Re: Comments – Draft Amendments to Administrative Procedures Governing Appeals

To Whom It May Concern:

The San Luis & Delta-Mendota Water Authority ("Water Authority") submits the following comments on the Delta Stewardship Council's draft amendments to its Administrative Procedures Governing Appeals ("Appeals Procedures") announced on December 10, 2021. The Water Authority appreciates this opportunity to provide input on potential changes to the appeals process established by the Council pursuant to the Sacramento-San Joaquin Delta Reform Act of 2009. (Wat. Code, § 85225 et. seq.) As is further detailed below, the Water Authority suggests the Council modify its Appeals Procedures to limit the scope of successive appeals. The Water Authority further suggests that the time for a certifying agency to provide its record to the Council remain at ten days, and that certain additional improvements be made to the proposed amendments regarding requests to augment the record and for official notice and the consideration of evidence by the Council.

The Water Authority is a public agency formed in 1992 as a joint powers authority and has twenty-seven member agencies. Twenty-five of these agencies contract with the United States for the delivery of water from the federal Central Valley Project ("CVP"). The CVP is operated and managed by the United States Bureau of Reclamation. Most of the Water Authority's member agencies depend upon the CVP as the principal source of water they provide to users within their service areas. That water supply serves approximately 1.2 million acres of agricultural lands within areas of San Joaquin, Stanislaus, Merced, Fresno, Kings, San Benito, and Santa Clara Counties, a portion of the water supply for over 2 million people, including in urban areas within Santa Clara County referred to as Silicon Valley, and approximately 200,000 acres of managed wetlands and wildlife refuges within the largest continuous wetland in the western United States.

The CVP conveys water through the Delta and diverts water at the Delta, including at the C.W. "Bill" Jones Pumping Plant located near the City of Tracy. The Water Authority acts as the operation and maintenance entity for the Jones Pumping Plant and other Delta Division and south of Delta CVP facilities that the Water Authority's member agencies depend on for the delivery of their water supply. The Water Authority and its member agencies have a significant stake in the effective, consistent, practical, and efficient implementation of the Delta Reform Act, including the Council's appeals process related to certification of covered actions.

**The Appeals Procedures Should Limit the Scope of Successive Appeals**

One of the flaws inherent in the current appeals process is the potential for repeated, successive appeals following remand and recertification. The text and legislative history of section 85225.25 of the Delta Reform Act strongly indicate that the Legislature did not intend that a revised certification of consistency in response to a remand by the Council would be subject to further appeals. The Court of Appeal, however, has upheld provisions of the Council's regulations that allow for appeal of a revised certification of consistency. (*Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1067.) This creates a potential for abuse. Project opponents may employ successive appeals of revised certifications, with each successive appeal raising a new issue that could and should have been raised and resolved on the first appeal but was tactically held in reserve for purposes of obstruction and delay. It may also encourage project opponents to again raise issues on a successive appeal that were rejected by the Council on a prior appeal.

To prevent such abuse through appeals of revised certifications of consistency, the Council should at a minimum, amend its Appeal Procedures (e.g. ¶ 15) to limit appeals of revised certifications of consistency to: (1) an alleged failure to adequately address the issue or issues that resulted in the Council's remand after the initial appeal; and (2) issues that could not have been raised on appeal of a prior certification, because for example the project has been materially changed since the prior appeal. This would prevent any person from newly raising grounds for appeal that could have been but were not raised in a prior appeal, and from reasserting grounds that were raised on a prior appeal but were rejected by the Council.

**A Certifying Agency Should Be Allowed Ten Days to Submit its Record**

The existing Appeal Procedures allow an agency whose consistency certification has been appealed ten days from notice of the appeal to prepare and submit to the Council the administrative record supporting its certification. (Administrative Procedures, § 4.b.) A proposed amendment would shorten that time to five calendar days. Failure to meet the deadline could result in a "remand" presumably requiring the agency to recertify consistency.

Issues such as a temporary shortage of agency staff could result in failing to meet a five-day deadline. Weekends and holidays could also pose additional resource limitations. We respectfully submit that five days is too short a time, especially considering the potential delay and other

consequences of requiring an agency to recertify consistency. We suggest leaving the period for providing the record at ten days.

**Improvements to Proposed Amendments Regarding Requests to Augment the Record or Take Official Notice and the Consideration of Evidence by the Council**

Proposed amendments to paragraph 10 of the Appeal Procedures would elaborate on the process and requirements for augmenting the record prepared by the certifying agency. In general, the Water Authority supports the clarification provided by the amendments. One further addition we propose is that the certifying agency be given an opportunity to respond to any requests for augmentation of the record before the Council decides whether to grant the request. For example, the agency may be able to clarify that a particular document was not before it when it made its certification and hence should not be included in the record.

Proposed amendments to paragraph 11 include changes to several provisions regarding the submission of information. Subparagraph (d) as drafted would preclude those other than the appellant, state or local agency, and Delta Protection Commission from making oral presentation during the hearing. The Water Authority respectfully suggests that oral presentation by non-parties may be appropriate in very limited circumstances, upon a showing of good cause and a determination by the Council that the presentation would not include irrelevant evidence.

Proposed amendments to paragraph 29 would allow any party to an appeal and the Delta Protection Commission to request the Council to take official notice of additional information that was not included in the agency's submission to the Council. The Water Authority proposes that the certifying agency be given an opportunity to respond to any requests for official notice before the Council decides whether to grant the request.

**Conclusion**

The Water Authority appreciates this opportunity to comment on the proposed amendments to the Appeal Procedures and welcomes the opportunity to work with the Council to revise the procedures to address our concerns.

Regards,

Federico Barajas, Executive Director
San Luis & Delta-Mendota Water Authority

March 7, 2022

*Delivered via email*: procedures@deltacouncil.ca.gov

The Honorable Members of the Delta Stewardship Council &
Ms. Jessica Pearson, Executive Officer
715 P Street, 15-300
Sacramento, CA 95814

**Re: Proposed Changes to Appeals Procedures Governing Consistency Determinations**

Dear Honorable Council Members and Ms. Pearson:

The Santa Clara Valley Water District (Valley Water) supports efforts by the Delta Stewardship Council (Council) to update and clarify its administrative procedures governing appeals of agency determinations of consistency with the Delta Plan. We appreciate the Council staff's thoughtful approach to improving this process, as well as the opportunity to provide comment on the proposed changes.

Valley Water is the water supply, groundwater management, flood protection, and stream stewardship agency for the two million people and thousands of job-creating businesses of Santa Clara County. We are the only water agency in the state that contracts for water supply from both the State Water Project and the federal Central Valley Project.

Valley Water supports the comments submitted by the State Water Contractors regarding the Council's proposed changes. We also support most of the Council's proposed rule changes, including efforts to modernize proceedings to allow for internet filings and new rules clarifying the conduct of appeals proceedings.

Our concerns are based on compliance with the Delta Reform Act, as codified in California Water Code Section 85225.25. The heart of an appeal proceeding is a determination by the Council as to whether the certifying agency's consistency determination is supported by "substantial evidence." This is a commonly used, formal legal standard of review that primarily governs appellate-type proceedings whereby a reviewing body reviews the factual record that was in front of a prior decision-making body and determines whether that record supports the prior decision-maker's action. This formal legal standard of review intentionally gives *significant deference* to the prior agency's action or determination based on the facts or record that was before it and is distinguishable from the less deferential "independent judgment" standard of review.

Under the "substantial evidence" standard of review, if there is any reasonable evidence in the record supporting the certifying agency's consistency determination, then the Council should find that its determination was supported by substantial evidence. This would be true even if there is other

evidence suggesting that the agency made the wrong determination. Based on California case law, this is the undisputed meaning of a "substantial evidence" review.

> Under this deferential standard of review, our role is different from the [prior] agency's. The agency must weigh the evidence before it and make a finding based upon the weight of the competing evidence. ***As a reviewing court, we do not reweigh the evidence. Instead, we must affirm the agency's finding if there is any substantial evidence, contradicted or uncontradicted, to support it. We resolve all evidentiary conflicts in the agency's favor and indulge ... all legitimate and reasonable inferences to uphold the agency's finding***. *
>
> * (World Business Academy v. California State Lands Commission (2018) 24 Cal.App.5th 476, 498-499, [quotations omitted, emphasis added, quoting Berkeley Hillside Preservation v. City of Berkeley (2015) 60 Cal.4th 1086, 1114] [reviewing body's "task is not to weigh conflicting evidence and determine who has the better argument or whether an opposite conclusion would have been equally or more reasonable"].)

The Water Code sections governing appeals of consistency determinations require that these proceedings are not to be evidentiary hearings involving testimony and the development of a new or further factual record. Instead, the hearing of an appeal of a consistency determination should only involve legal *argument* or *public comment* on the factual record relied on by the certifying agency.

Accordingly, Valley Water urges the Council to reconsider, limit, or clarify any rules or procedures (specifically, Rules 9 - 11 and 29) that appear to invite the purported introduction of new facts or "evidence" that was not before the agency submitting the consistency determination. If the Council improperly relies upon such "extra-record evidence" in a decision, this would be a legal error and it may cause a court to invalidate a Council decision.

We very much appreciate your consideration of these concerns as well as the changes proposed by the State Water Contractors.

Sincerely,

Vincent Gin
Deputy Operating Officer

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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.

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 procedures are attached. The Commission considered and approved these comments on a 9-0-3 vote at its January 20, 2022 meeting, with Commission members representing state agencies abstaining.

Thank you for the opportunity to submit them.

Sincerely,

Don Nottoli
Chair

Enclosure

cc: Members, Delta Protection Commission

**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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# SOLANO COUNTY WATER AGENCY

March 7, 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 Solano County Water Agency (SCWA), as a water supply agency providing water to cities and agricultural districts throughout Solano County and the broader Delta, appreciates the opportunity to provide comments on amendments proposed to the Delta Stewardship Council's (Council) administrative procedures governing appeals of Delta Plan consistency determinations.

The Council's appeal procedures were originally adopted in 2010 and since that time, deficiencies in the procedures have been revealed through appeals filed for certifications of consistency adopted since the Delta Plan's approval. SCWA has been an observer and participant in the application of these procedures, and this experience provides the basis for these recommendations.

**Recommendations**

***Part 1, Section 3***. SCWA believes the ten-day period to review draft certifications of consistency is too brief. The draft certifications present much of the record upon which agencies base their submitted certifications and the sole record to which appellants must refer. With ecosystem restoration projects now potentially exempt from CEQA review, a draft certification of a project may be the only written evaluation available for concerned parties to review and comment upon. Draft certifications drafted for complex ecosystem restoration projects are often long and dense documents, requiring more than ten days to thoroughly review.

Alternatively, SCWA suggests a review period for draft certifications of 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.

***Part 1, Section 4b***. SCWA believes the procedures should more specifically define the term "the record that was before the state or local agency at the time it made its certification" to include any information submitted in comments on a draft certification or a project's CEQA documents.

***Part 1, Section 10***. As commented on Section 4b, SCWA believes the procedures should more specifically define "the record that was before the state or local agency at the time it made its

certification." Further, SCWA believes appellants 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.

***Part 1, Section 14***. SCWA believes this paragraph misstates the grounds upon which the Council may sustain an appeal or accept a certification. The Delta Reform Act (Water Code section 855225.25) and Section 14 of the current procedures make 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." However, 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 85525.10, 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 based on 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.

***Part 1, Section 15.*** SCWA believes 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 comments on Section 14 above.

***Part 1, Section 29***. SCWA believes 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 as few important topics in the Delta are free of disagreement. This proposed amendment will serve as a barrier to the Council considering if a project has used the best available science, which requires considering how the science that a project relies on compares with other scientific and technical studies.

Sincerely,

Roland Sanford
General Manager
Solano County Water Agency

March 7, 2022

*Delivered via email*: procedures@deltacouncil.ca.gov

Delta Stewardship Council
715 P Street, Suite 15-300
Sacramento, CA 95814

**Subject: Draft Amendments to the Administrative Procedures Governing Appeals**

The State Water Contractors (SWC) appreciate this opportunity to comment on the Delta Stewardship Council's (Council's) Draft Amendments to the Administrative Procedures Governing Appeals (Draft Amendments). SWC appreciates the Council's efforts to improve the appellate procedures, given its experience adjudicating appeals in a manner consistent with the Delta Reform Act and in the interests of justice. Most of the Draft Amendments will further those objectives; however, we recommend further amendments to ensure appeals are adjudicated fairly and consistent with the substantial evidence standard of review.

The SWC is an organization representing 27 of the 29 public water entities that hold contracts with the California Department of Water Resources (DWR) for the delivery of State Water Project (SWP) water.[1] Collectively, the SWC members provide a portion of the water supply delivered to approximately 27 million Californians, roughly two-thirds of the State's population, and to over 750,000 acres of irrigated agriculture. Water supply delivered to the Bay Area, San Joaquin Valley, central coast and southern California from the SWP is diverted from the Sacramento-San Joaquin River Delta. Through charges for participation in the SWP, SWC's members have funded and continue to fund extensive ecosystem restoration required as mitigation in SWP permits. SWC and some of its largest member agencies have a long history of supporting and funding improved monitoring and scientific research to inform both water management and ecosystem restoration in the Delta. Thus, the SWC and its members have a substantial interest and expertise that can inform any Delta activities, regulations, and policies, including those that affect appeals of certifications of consistency for ecosystem restoration and water supply covered actions in the Delta.



[1] The SWC members are: Alameda County Flood Control & Water Conservation District, Zone 7; Alameda County Water District; Antelope Valley East Kern Water Agency; Central Coast Water Authority; City of Yuba City; Coachella Valley Water District; County of Kings; Crestline-Lake Arrowhead Water Agency; Desert Water Agency; Dudley Ridge Water District; Empire-West Side Irrigation District; Kern County Water Agency; Littlerock Creek Irrigation District; Metropolitan Water District of Southern California; Mojave Water Agency; Napa County Flood Control & Water Conservation District; Oak Flat Water District; Palmdale Water District; San Bernardino Valley Municipal Water District; San Gabriel Valley Municipal Water District; San Gorgonio Pass Water Agency; San Luis Obispo County Flood Control & Water Conservation District; Santa Clara Valley Water District; Santa Clarita Valley Water Agency; Solano County Water Agency; Tulare Lake Basin Water Storage District; and, Ventura County Watershed Protection District.

**1. Paragraph 29 should either be deleted, or it should be amended to acknowledge that admission of extra-record evidence by way of official notice will be denied unless the applicant shows it is both relevant and qualifies for an exception to the prohibition on extra-record evidence.**

The Draft Amendments and original regulations recognize that under Water Code section 85225.25, the sole question before the Council in an appeal is whether substantial evidence in the administrative record before the certifying agency when it submits its certification of consistency supports the certification's findings. However, under the original regulations and Draft Amendments to paragraph 29, the Council gives itself authority to take "official notice" of extra-record evidence if certain conditions are met.

Neither the original regulations, nor the Draft Amendments, acknowledges that under California law, only relevant evidence is admissible, even in response to a request for judicial notice,[2] and with only very narrow exceptions, the only relevant evidence in a certification appeal is the evidence in the certifying agency's record.

In *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559 (*Western States*), the California Supreme Court held that but for certain narrow exceptions, extra-record evidence is not admissible in traditional mandamus actions under the California Environmental Quality Act (CEQA) to challenge an agency's actions either on the ground that the agency's decision is not supported by substantial evidence (*id*. at p. 571), or on the ground that the agency failed to proceed in the manner required by law (*id.* at p. 576). In addition, the Court laid down the rule that "[e]xtra-record evidence can *never* be admitted merely to contradict the evidence the administrative agency relied on in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision." (*Western States*, *supra*, 9 Cal.4th at p. 579, emphasis added.)

*Western States* is instructive for several reasons. First, the Court explained that "we presume that when the Legislature included the words 'substantial evidence' in Public Resources Code section 21168.5 [CEQA's standard of review], *it intended them to have their established legal meaning*. [Citation]." (*Id*. at pp. 570-571.) The same is true of the Legislature's use of "substantial evidence" in Water Code section 85225.25, which should be reflected in the Council's amended Administrative Procedures Governing Appeals.

Second, the Court held that the substantial evidence standard of review has been judicially construed in countless cases, and under them, whether the record contains substantial evidence is a question of law, not "a question of fact that may be disputed by contradictory evidence." (*Ibid*.) Third, as the *Western States* Court observed regarding CEQA, in the Delta Reform Act, "the Legislature has expressly stated that the existence of substantial evidence depends solely on the record before the administrative agency." (*Id*. at p. 571, compare Water Code, § 85225.25 [in ruling on an appeal, "the council shall make specific written findings either denying the appeal or remanding the matter to the state or local public agency for reconsideration of the covered action *based on the finding that the certification of consistency is not supported by substantial evidence*

[2] Evid. Code, § 350 ("No evidence is admissible except relevant evidence"); *Mangini v. R. J. Reynolds Tobacco Co*. (1994) 7 Cal.4th 1057, 1063 ("Although a court may judicially notice a variety of matters (Evid. Code, § 450 et seq.), only relevant material may be noticed").

*in the record before the state or local public agency that filed the certification*[,]" emphasis added].) Under analogous CEQA precedent, the Court has held that "a court generally may consider only the administrative record in determining whether a quasi-legislative decision was supported by substantial evidence within the meaning of Public Resources Code section 21168.5." (*Western States*, *supra*, 9 Cal.4th at p. 573.) And under the substantial evidence standard, reviewing courts must defer to the agency's factual determinations if there is substantial evidence in the record to support them, even if, based on the same record evidence, "an opposite conclusion would have been equally or more reasonable." (*Id*. at p. 574, quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392-393, internal quotation marks omitted.[3]) The same applies to the Council's administrative review of a certification of consistency under Water Code section 85225.25.

The Court even opined on admission of extra-record evidence by way of judicial notice, holding this would be error because only relevant evidence is admissible:

> [I]t would never be proper to take judicial notice of evidence that (1) is absent from the administrative record, *and* (2) was not before the agency at the time it made its decision. This is so because only relevant evidence is subject to judicial notice (*People v. Superior Court* (*Smolin*) (1986) 41 Cal.3d 758, 768, revd. on other grounds *sub nom*. *California v. Superior Court of California* (1987) 482 U.S. 400; *Mozzetti v. City of Brisbane* (1977) 67 Cal.App.3d 565, 578), and the only evidence that is relevant to the question of whether there was substantial evidence to support a quasi-legislative administrative decision under Public Resources Code section 21168.5 is that which was before the agency at the time it made its decision. (*Del Mar Terrace Conservancy, Inc. v. City Council*, *supra*, 10 Cal.App.4th 712, 744.)

(*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573, fn. 4, original italics, parallel citations omitted.)

Under section 85225.25, the Council's job in hearing certification appeals is not that of a finder of fact; its sole charge is to review the record before the certifying agency when it submitted its certification of consistency to determine if it contains substantial evidence to support the certification. Contrary extra-record evidence is irrelevant to that task and, in any event, as long as substantial evidence exists in the record, the Council must deny the appeal, even if record or extra-record evidence would support a contrary determination.

Contrary to the plain language of Water Code section 85225.25 and Supreme Court precedent interpreting the substantial evidence standard of review, paragraph 29 currently and as proposed

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[3] The same deferential substantial evidence standard of review and rule against consideration of extra-record evidence applies in non-CEQA cases and when reviewing quasi-adjudicatory project approvals. (E.g., *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 374 ["When a finding is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence in the record, contradicted or uncontradicted, that will support the finding. When two or more inferences can be reasonably deduced from those facts, the reviewing court has no power to substitute its deductions for those of the fact finder. [Citation] On review of administrative agency findings, extra-record evidence cannot be admitted merely to contradict the evidence on which the agency relied in making a quasi-legislative decision or to raise a question regarding the wisdom of that decision. [Citation]," citing *Western States*, *supra*, 9 Cal.4th 559 at pp. 571, 579]; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1032, fn. 13 ["under Code of Civil Procedure section 1094.5 [applicable to quasi-adjudicatory agency actions], courts can only review evidence that was actually before the administrative decision makers prior to or at the time of their decision. [Citation]"].)

to be amended authorizes admission of irrelevant, extra-record evidence. Thus, the Council's appellate regulations should be amended strike paragraph 29 and all references to it elsewhere. Alternatively, paragraph 29 should be amended to expressly acknowledge that extra-record evidence is generally inadmissible and will not be given official notice absent a showing based on citations to California precedent that the evidence is both relevant to the question whether substantial evidence in the record before the certifying agency exists *and* qualifies for a judicially recognized exception to the general prohibition on its admission.

Anything less invites the Council to commit prejudicial legal error by weighing extra-record evidence against the record evidence to reach its own determination based on evidence not before the certifying agency whether a covered action is consistent with the Delta Plan, or whether the record evidence is substantial. The California Supreme Court has held such outcomes to be inconsistent with the well-established deferential substantial evidence standard of review, which the Legislature unequivocally invoked when it enacted Water Code 85225.25.

2. **For the same reasons, Draft Amendments paragraph 11(b) should be modified to avoid suggesting that the Council "shall" consider evidence presented at a hearing if it is relevant and "the sort of evidence on which reasonable persons are accustomed to rely upon in the conduct of serious affairs."**

Amended paragraph 11 would add a new subdivision (b), which provides:

> **The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be considered if it is the sort of evidence on which reasonable persons are accustomed to rely upon in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a court proceeding. Unduly repetitious or irrelevant evidence may be excluded upon order of the council, chairperson, or executive officer.**

Because only relevant evidence should be considered by the Council, and the relevant evidence is limited to the record before the certifying agency, it would be improper to require the Council to consider *factual* witness testimony at the hearing because it would be irrelevant extra-record evidence.

Instead, the Council may consider oral argument that directs the Council to record evidence to determine whether it is substantial, or to an alleged lack of evidence in the record to support any of the certifying agency's consistency findings. The Council may not consider extra-record evidence offered by a witness without committing legal error, as shown in SWC's first comment, above.

Thus, subdivision (b) should be revised to state:

> ~~**The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be considered if it is the sort of evidence on which reasonable persons are accustomed to rely upon in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence**~~

> ~~over objection in a court proceeding.~~ **Unduly repetitious or irrelevant evidence may be excluded upon order of the council, chairperson, or executive officer.**

3. **Paragraph 11(d) should be amended for clarity and to require that the certifying agency be given time at any hearing equal to the combined time afforded all appellants and the Delta Protection Commission.**

To ensure hearings are fair, SWC proposes these additional amendments in yellow highlight:

> **d)** The appellant, the state or local agency, **and** the Delta Protection Commission~~,~~ ~~or any other person~~ may **make oral presentations** ~~testify~~ before the council regarding an appeal **during the hearing, as specified in the hearing notice issued by the council**. Presentations ~~may be oral or in writing,~~ shall address only whether the record **before the certifying agency prior to the council's receipt of the certification of consistency** supports the certification of consistency**,** and shall be as brief as possible. ~~Written submissions should be provided to the council at least 10 days prior to the hearing to ensure that they, or in appropriate cases, summaries, may be circulated to council members for their review ahead of the hearing. The council's presiding officer may establish reasonable time limits for presentations.~~ **The council or executive officer or delegee shall have the discretion to set time limits on oral presentations and the order of presenters, which shall be provided in the hearing notice. At a minimum, the certifying agency shall be afforded the same time as afforded to all appellants and, if applicable, the Delta Protection Commission combined. Other interested parties may only present comments as provided in subsection (f), below.**

4. **Paragraph 12(c) should be amended to expressly provide that it does not shift the burden of proof to the certifying agency.**

Under the Delta Reform Act, common law, and as recognized in the Draft Amendments, the appellant bears the burden of proving that a certification of consistency is not supported by substantial evidence in the record before the certifying agency. As paragraph 12(c) is drafted, it is unclear whether the Council intends that the burden shifts to a certifying agency to show that the record contains substantial evidence supporting its certification. When faced with multiple appeals and numerous alleged failures to support consistency findings with substantial evidence, a certifying agency may inadvertently overlook one or more allegations, or may inadvertently overlook supporting evidence in the short timeframe provided under the Water Code and the Council's procedures to provide written responses.

The burden does not shift, and a failure to comply with 12(c) should not become a "gotcha" provision. Accordingly, SWC proposes that 12(c) be amended as follows:

> **c) The certifying agency's written submission shall respond to the allegations of the appeal(s) with specificity, including citations to evidence in the record to support the certification of consistency; however, this requirement relieves no appellant of its burden to show there is no substantial evidence to support the certification of consistency, and any failure to respond under this**

**subsection shall not be considered an admission or evidence that an appellant has met its burden of proof.**

5. **Paragraph 13(b) should require a public workshop or hearing on a staff draft determination where more than one appeal is filed and heard on the merits.**

While SWC supports the Council's discretion to hold additional hearings or workshops, when multiple appeals are heard on the merits, SWC recommends that the Council always hold a public hearing or workshop at least two weeks before the Council meets to take final action on the appeals.

**b) The council may hold additional hearings or workshops at its discretion as it deems necessary; however, it shall hold at least one public hearing or workshop on a staff draft determination involving multiple appeals of a certification of consistency at least two weeks before the council meets to take final action on the appeals.**

6. **Paragraph 14 should contain a firm time limitation within which the Council must issue its written decision after the close of hearing.**

Although SWC understands that there are certain circumstances (such as when there are multiple appeals of a consistency determination) in which it makes sense to allow the Council, with the consent of the parties, to take longer than 60 days to issue its written decision, we believe that it is in everyone's interest to continue to maintain a firm time limitation within which the Council must issue its decision, bringing finality to a proceeding. Accordingly, SWC proposes the following change to the Council's proposed new last sentence of paragraph 14:

**The parties and the council or the executive officer or delegee may agree to an extension of the timeline for the council's decision taking into account the circumstances of the matter subject to appeal and the council's hearing schedule and associated workload, provided that in all events the council shall issue its decision within 120 days of the close of the hearing.**

We appreciate the effort that the Council and its staff have put into this amendment. We are interested in continuing to work with the Council and staff as the process moves forward. If you have questions about our comments or would like to discuss ways we can help support the process, please call me at (916) 447-7357 ext. 203.

Sincerely,

Jennifer Pierre
General Manager