



ACTION ITEM

Consideration of Proposed Amendment to the Council's Administrative Procedures Governing Appeals (Appeals Procedures) and Potential Publication of the Appeals Procedures in the California Code of Regulations

Summary

Water Code section 85225.30 directs the Council to adopt administrative procedures governing appeals and exempts the adoption of those procedures from the Administrative Procedures Act rulemaking process. The Council has adopted procedures for its appeals process but has not published those procedures in the California Code of Regulations. At this time, staff proposes that the Council publish its procedures directly pertaining to appeals, including minor amendments, as regulations in the California Code of Regulations (CCR). This would make all of the Council's procedural regulations available in one place and more easily citable. Portions of the procedures not codified in the CCR would still remain part of the Council's informal procedures.

Requested Action

Staff recommends that the Council adopt the attached Resolution 2023-09. (Attachment 1 to this staff report). Adopting Resolution 2023-09 would approve and adopt proposed minor amendments to the 2022 Administrative Procedures Governing Appeals (Appeals Procedures); it would also direct and authorize the Executive Officer, or her delegee, to complete non-substantive changes to publish the finalized amended Administrative Procedures Governing Appeals with the Secretary of State for inclusion in the CCR and make them available on the Council's website. The proposal includes updates to Cal. Code Regs., tit. 23, Section 5001 (Definitions) and addition of new Sections 5020 to 5035 (Administrative Procedures Governing Appeals).

Background

The Council first adopted the Appeals Procedures on September 23, 2010. Based on lessons learned through the Council's first sequence of appeals and a recommendation in the Council's 2019 Five-Year Review, the Council adopted updated Appeals Procedures on October 27, 2022. The Council's Appeals Procedures are exempt from the Administrative Procedure Act rulemaking process (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code). (Water Code section 85225.30.)

The Appeals Procedures provide guidelines and requirements pertaining to a wide variety of Council activities, including the filing of certifications of consistency, submission of the record supporting the certification, filing of appeals of certifications of consistency, hearings, and determinations, among other matters. The Appeals Procedures also describe a process under which the Council would consider the (now obsolete) Bay Delta Conservation Plan for inclusion in the Delta Plan, and procedures the Council applies when providing advice to state or local agencies concerning the consistency of long-range plans with the Delta Plan. To date, the procedures directly pertaining to appeals have not been published in the CCR. To improve transparency, organization, citations, and increase the ease of locating all of the Council's enforceable regulations, staff proposes that the Council request that the Secretary of State publish those exempt procedures directly pertaining to appeals in the CCR.

In order to be published in the CCR, the procedures must be organized and written in a particular format. To facilitate this, certain technical, non-substantive edits to the content of the Appeals Procedures approved by the Council in October 2022 are proposed. In addition, while making these edits, Council staff identified a number of terms used in the existing Appeals Procedures that were not defined. These terms would be added to Section 5001 Definitions and be applicable only to the appeals procedures.

The recommended modifications and additions to Cal. Code Regs., tit. 23, inclusive of proposed changes to the text of the Appeals Procedures are provided in Attachment 1 to Resolution 2023-09. These proposed amendments and additions were made publicly available 10 days prior to the December 14, 2023, Council Meeting on December 4, 2023, via publication and posting of this staff report on the Council's website. The proposed amendments and additions consist of:

- *Amendments to Section 5001, Definitions*, to add definitions of the terms “certifying agency,” and “person,” which are used in the existing Appeals Procedures but not defined in the Council’s existing regulatory definitions.
- *Addition of Section 5020, Scope*, including content from 2022 Appeals Procedures Rule 1, with non-substantive technical edits to accommodate publishing in the CCR.
- *Addition of Section 5021, Filings and Mailings*, including content from 2022 Appeals Procedures Rule 30, with non-substantive technical edits to accommodate publishing in the CCR.
- *Addition of Section 5022, Filing of Appeal*, including content from 2022 Appeals Procedures Rules 4, 5, 6, and 7, with non-substantive technical edits to accommodate publishing in the CCR.
- *Addition of Section 5023, Notice of Appeal*, including content from 2022 Appeals Procedures Rule 8, with non-substantive technical edits to accommodate publishing in the CCR.
- *Addition of Section 5024, Ex Parte Communications*, including content from 2022 Appeals Procedures Rules 26, 27, and 28, with non-substantive technical edits to accommodate publishing in the CCR.
- *Addition of Section 5025, Additional Information from Appellant*, including content from 2022 Appeals Procedures Rule 9, with non-substantive technical edits to accommodate publishing in the CCR.
- *Addition of Section 5026, Supplemental Record*, including content from 2022 Appeals Procedures Rule 10, with non-substantive technical edits to accommodate publishing in the CCR.
- *Addition of Section 5027, Schedules and Oral Presentations*, including content from 2022 Appeals Procedures Rule 11, with non-substantive technical edits to accommodate publishing in the CCR.
- *Addition of Section 5028, Delta Protection Commission Comments*, including content from 2022 Appeals Procedures Rule 11.1, with non-substantive technical edits to accommodate publishing in the CCR.
- *Addition of Section 5029, Documentation and Written Submissions*, including content from 2022 Appeals Procedures Rule 12, with non-substantive technical edits to accommodate publishing in the CCR.

- *Addition of Section 5030, Hearing*, including content from 2022 Appeals Procedures Rule 13, with non-substantive technical edits to accommodate publishing in the CCR.
- *Addition of Section 5031, Consolidation*, including content from 2022 Appeals Procedures Rules 31 and 32, with non-substantive technical edits to accommodate publishing in the CCR.
- *Addition of Section 5032, Official Notice in a Hearing*, including content from 2022 Appeals Procedures Rule 29, with non-substantive technical edits to accommodate publishing in the CCR.
- *Addition of Section 5033, Issuance of Decision*, including content from 2022 Appeals Procedures Rule 14, with non-substantive technical edits to accommodate publishing in the CCR.
- *Addition of Section 5034, Implementation of Covered Action*, including content from 2022 Appeals Procedures Rule 15, with non-substantive technical edits to accommodate publishing in the CCR.
- *Addition of Section 5035, Appeal Following Remand*, including content from 2022 Appeals Procedures Rule 15.1, with non-substantive technical edits to accommodate publishing in the CCR.

Remaining sections of the existing Appeals Procedures that are not referenced above do not directly apply to appeals. These would be retained within the Council's informal Appeals Procedures and used when applicable in the context of certifications, the BDCP, advice concerning local long-term planning, and other matters.

Next Steps

If approved by the Council at today's meeting, staff would submit the proposed regulatory amendments and additions to the Appeals Procedures to the Secretary of State. The changes would be finalized and made available on the Council's website while awaiting publishing in the CCR by the Secretary of State.

Fiscal Information

Not applicable.

List of Attachments

Attachment 1: Resolution 2023-09

Attachment 2: Informal Administrative Procedures for Appeals

Contact

Jeff Henderson, Deputy Executive Officer, Planning and Performance Division

Jeff.henderson@deltacouncil.ca.gov

Deputy Executive Officer

Phone: (916) 842-9333