

Sep 2022

Draft Amendments to Administrative Procedures Governing Appeals

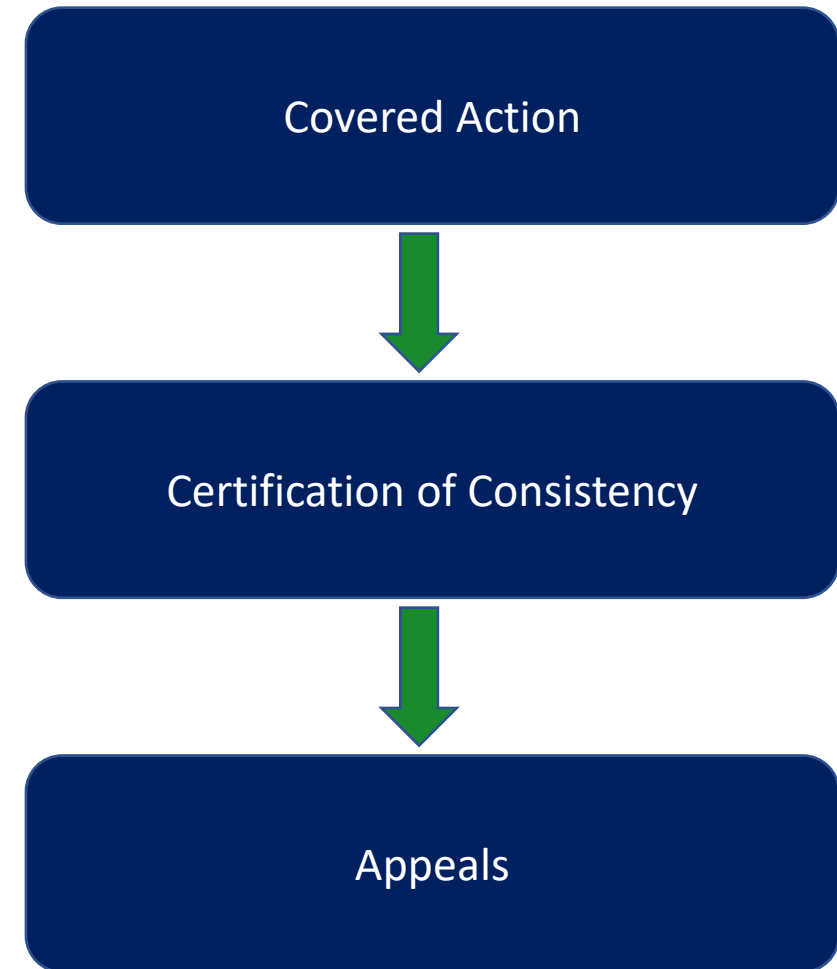


**Delta
Stewardship
Council**

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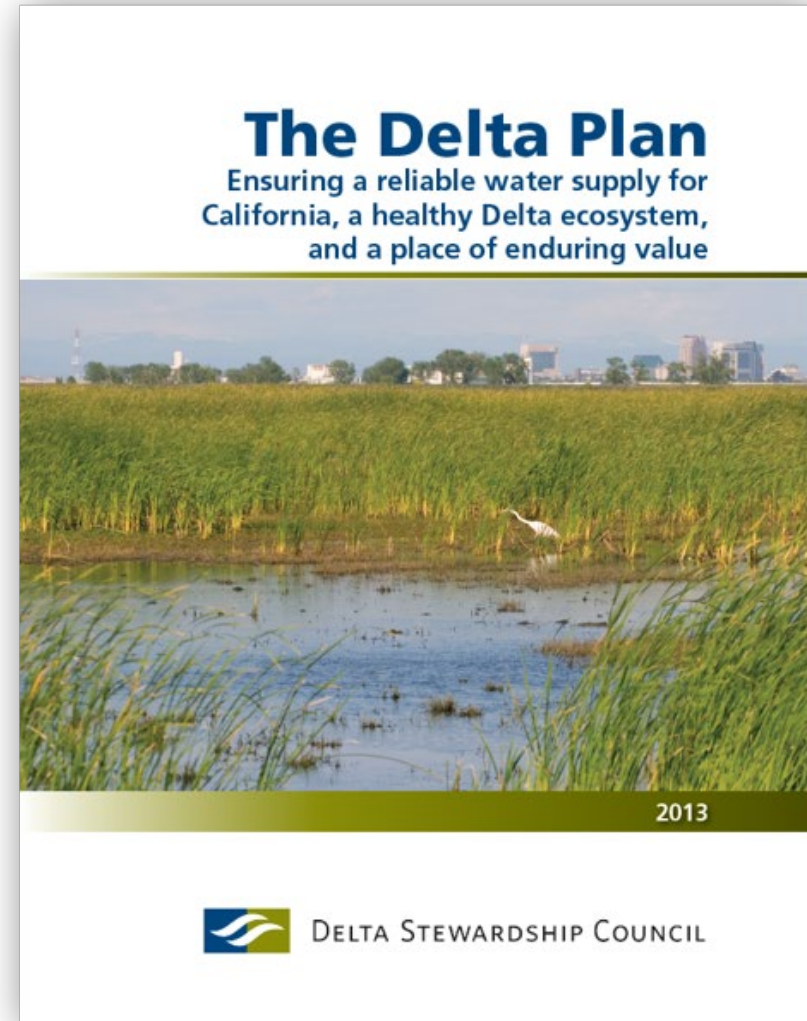
Covered Actions and Appeals

- Covered Actions
 - Certifying agency determines if project is a Covered Action pursuant to Water Code section 85057.5
 - Checklist available on Council website
 - Early Consultation
- Certification of Consistency with the Delta Plan
 - Submitted to Council by certifying agency to Council through online Covered Actions Portal
 - Requires detailed findings regarding consistency with the Delta Plan
- Appeals
 - "Any person" may file an appeal of a Certification of Consistency no later than 30 days after the submission of the certification of consistency
 - Council hears appeals and makes findings either to denying the appeal or remanding the matter to the certifying agency for reconsideration
 - Substantial evidence standard of review



Background

- On December 10, 2021, the Council released proposed draft amendments for 90-day public review period, which concluded March 7, 2022
- Seven comment letters received identifying a range of issues and concerns
- At today's workshop staff will present the draft amendments and summary of the comments received for further public comment and Council discussion
- **Recommendation:** Direct staff to prepare and circulate a revised version of the draft amendments to the Appeals Procedures for potential adoption at a future meeting or bring back for further discussion at an additional workshop



Administrative Procedures Governing Appeals

- “Rules of the Road” for Council’s appeals process
 - Currently 31 “Rules”
- Current Appeals Procedures were adopted by the Council in 2010
 - Prior to the Delta Plan, regulations, covered actions, or appeals
- Appeals Procedures exempted from the Administrative Procedure Act rulemaking process
- Conducting appeals proceedings highlighted areas where Appeals Procedures could be revised to address issues not foreseen in 2010
- Staff identified need for amendments in the 2019 Five-Year Review and prepared draft amendments

[ADOPTED 9/23/2010]

DELTA STEWARDSHIP COUNCIL

- I. ADMINISTRATIVE PROCEDURES GOVERNING APPEALS
- II. STATUTORY PROVISIONS REQUIRING OTHER CONSISTENCY REVIEWS
- III. OTHER FORMS OF REVIEW OR EVALUATION BY THE COUNCIL

PART ONE- ADMINISTRATIVE PROCEDURES GOVERNING APPEALS

Introduction

1. Purpose. These administrative procedures govern how the Delta Stewardship Council considers appeals with regard to:
 - a) Adequacy of certifications of consistency with the Delta Plan submitted to the council by a state or local public agency pursuant to Water Code sections 85225.10 and 85225.30; and
 - b) Determinations by the Department of Fish and Game that the Bay Delta Conservation Plan has met the requirements of Water Code section 85320 for inclusion in the Delta Plan.
- NOTE: Authority cited: Water Code sections 85001, 85020(h), 85022, 85057.5, 85200, 85210, 85212, 85225, 85225.5, 85225.10, 85225.15, 85225.20, 85225.25, 85225.30, 85300, 85320(e).

Review of certifications of consistency with Delta Plan

2. Any state or local public agency proposing to undertake a covered action, as defined in Water Code section 85057.5 is encouraged to consult with the council at the earliest possible opportunity, preferably no later than 30 days before submitting its certification to the council pursuant to Water Code section 85225, to ensure that the project will be consistent with the Delta Plan. The council’s staff will meet with the agency’s staff to review the consistency of the proposed action and to make recommendations, as appropriate. During this early consultation, the agency’s staff may also seek clarification on whether the proposed project is a “covered action”; provided that the ultimate determination on whether it is a covered action shall be made by the agency, subject to judicial review.

NOTE: Authority cited: Water Code sections 85212, 85225, 85225.5, 85225.30.

SUMMARY OF DRAFT AMENDMENTS CIRCULATED FOR PUBLIC REVIEW

- Language to Mirror Delta Reform Act
 - Revise wording regarding Council authority to mirror the Delta Reform Act
- Filing Deadlines
 - Clarify deadlines for the filing of certifications and appeals
- Timeliness and Completeness
 - Clarify standards for appeals to be considered timely and complete
- Evidentiary Requests
 - Clarify requirements related to evidentiary issues
- Notices
 - Clarify the process for establishing deadlines, schedules, and timelines for appeals

SUMMARY OF DRAFT AMENDMENTS CIRCULATED FOR PUBLIC REVIEW (CONT'D)

- Party Submittals
 - Clarify and refine standards for written submittals by the parties to the Council
 - Clarify the process for establishing deadlines, schedules, and timelines
- Review of and Decisions on Appeals
 - Clarify appeals proceedings related to the substantive review and decision of the Council, including stipulations for extension of timelines, dismissals, remand, and denial
- Accessibility
 - Encourage that electronic submittals to the Council meet federal and State document accessibility standards

KEY ISSUES AND CONCERNS IDENTIFIED IN COMMENTS

- Role of the Delta Protection Commission
 - The current Appeals Procedures provide that the Commission may testify before the Council concerning an appeal
 - Commenters state that the Appeals Procedures fail to acknowledge the Commission's broad authority to comment on matters before the Council, including appeals, referencing Public Resources Code section 29773

KEY ISSUES AND CONCERNS IDENTIFIED IN COMMENTS

- Burden of Proof and Standard of Review
 - Draft amendments reiterate that the Council's standard of review in an appeal is substantial evidence, pursuant to Water Code section 85225.25
 - Draft amendments clarify that the burden of proof to show that a certification of consistency is not supported by substantial evidence in the record lies with the appellant
 - Commenters state draft amendments misstate the standard of review and inappropriately place the burden on appellants

KEY ISSUES AND CONCERNS IDENTIFIED IN COMMENTS (CONT'D)

- Certifications, Early Consultation, and Appeals for Remanded Issues
 - Current Appeals Procedures do not address the scope of appeals for revised certifications submitted to the Council following a remand
 - Commenters request that the Appeals Procedures clarify that successive appeals are limited to issues identified in the Council's findings or due to material changes to the project

KEY ISSUES AND CONCERNS IDENTIFIED IN COMMENTS (CONT'D)

- Early Consultation Following Remand
 - Commenters request that the Council create a role for the public and previous appellants in early consultation following a remand
 - Current practice is to rely on the certifying agency to determine the parties participating in early consultation

KEY ISSUES AND CONCERNS IDENTIFIED IN COMMENTS (CONT'D)

- Public Notice for Draft Certifications of Consistency
 - Appeals Procedures currently include a 10-day posting requirement for an agency not subject to Brown Act or Bagley-Keene Act public meeting requirements to make a draft Certification of Consistency available for public review and comment
 - Current procedures further advise that agencies provide notice of the posting to “all persons requesting notice”
 - Commenters request extending the time for this to 30-days or 45-days and identify specific entities that should be provided notice of posting

KEY ISSUES AND CONCERNS IDENTIFIED IN COMMENTS (CONT'D)

- Contents of an Appeal
 - Draft amendments identify contents that must be included in an appeal, including the identification of each Delta Plan policy appealed with the specific provisions of the policy that are the subject of the appeal
 - Commenters state that this creates confusion and should be simplified
 - Commenters also state that adding more specific, detailed requirements unduly raises the bar for appeals beyond Water Code requirements

KEY ISSUES AND CONCERNS IDENTIFIED IN COMMENTS (CONT'D)

- Evidentiary Requests
 - Rules 10 and 29 of the current Appeals Procedures specify parameters for supplementing the record submitted by the certifying agency, including requests for official notice
 - Draft amendments would clarify the content required for any request to supplement the record
 - Commenters suggest that for records to be considered “before the agency” under Rule 10, appellants should provide support that the requested records were submitted to or considered by the certifying agency and not merely in existence at the time of certification
 - Commenters also request that the certifying agency be given an opportunity to respond to any requests for record augmentation before the Council decides to grant a request

KEY ISSUES AND CONCERNS IDENTIFIED IN COMMENTS (CONT'D)

- Hearing Presentations and Public Comments
 - Proposed revisions provide that parties and the Commission may make presentations and that all other persons may make written comments and that the order and timing of presentations would be specified in the hearing notice
 - Commenters state that these proposed changes would preclude those other than the parties and the Commission from making oral presentations during the hearing, and that oral presentations by non-parties may be appropriate in very limited circumstances
 - Commenters also request that the Appeals Procedures clarify certifying agency be given presentation time at any hearing equal to the combined presentation time afforded to all appellants and the Commission

KEY ISSUES AND CONCERNS IDENTIFIED IN COMMENTS (CONT'D)

- Timeline for Submitting the Record
 - Appeals Procedures currently require that the record supporting a certification of consistency be submitted within 10 days following the effective date of an appeal
 - Proposed revisions would shorten that time period to 5-days and state that the certifying agency is “strongly encouraged” but not required to submit the record with the certification
 - Shortening the timeframe affords additional time with access to the record, which is important to both staff and appellants
 - Some commenters request that the current 10-day requirement should be maintained
 - Other commenters request that the Council *require* that the record be submitted with the certification

Next Steps

Staff Recommendation

- Following Council discussion and public comments, staff requests Council input and direction and recommends that the Council direct staff to revise the current draft of the proposed amended Appeals Procedures in consideration of public and Council comments received and distribute the revised version of the proposed amended Appeals Procedures for public review prior to bringing them back to the Council for consideration and potential adoption at a future public Council meeting or for further discussion at an additional workshop.

Thank you

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