



## INFORMATION ITEM

### Delta Stewardship Council Appeals Process Overview

#### Summary

The Sacramento-San Joaquin Delta Reform Act of 2009 (Wat. Code, § 85000 et seq.; Delta Reform Act) charges the Delta Stewardship Council (Council) with implementing the Delta Plan and grants the Council appellate authority over certifications of consistency for covered actions.

Today, Council staff will discuss the Council's appeal process for certifications of consistency.

#### Covered Actions

##### What is a Covered Action?

The Delta Reform Act charges the Council to develop, adopt, and implement the Delta Plan, which is a comprehensive, legally enforceable resource management plan for the Sacramento-San Joaquin River Delta and Suisun Marsh (Delta). (Wat. Code § 85300.) As part of this charge, the Legislature gave the Council regulatory and appellate authority over "covered actions" (Wat. Code § 85057.5) defined as:

- Plans, programs, or projects as defined in Public Resources Code section 21065:
  - Taking place, in whole or in part, in the Delta;
  - Carried out, approved, or funded by a State or local public agency;
  - Covered by one or more regulatory provisions of the Delta Plan; and
  - That will have a significant impact on achieving one or both of the coequal goals or implementing government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta.

It is the express intent of the Legislature that state and local land use actions identified as covered actions be consistent with the Delta Plan. (Wat. Code §

85022(a).) The Delta Plan has 14 regulatory policies that identify proposed actions that are covered and set forth the requirements for consistency. (See Cal. Code Regs., tit. 23, §§ 5003-5015.) As described below, a public agency proposing to undertake a covered action must submit a certification of consistency to the Council, which may be appealed.

## Certifications of Consistency

### What is a Certification of Consistency?

A public agency that proposes to undertake a covered action must submit a written certification of consistency to the Council prior to initiating the implementation of that covered action. The certification must contain detailed findings as to whether the covered action is consistent with the Delta Plan's regulatory policies. (See Wat. Code § 85225; Cal. Code Regs., tit. 23, § 5002(b)(1).) This requires the agency to evaluate the applicability of each regulatory policy to the covered action, and for each applicable policy, provide findings on whether the covered action is consistent with the requirements of that policy.

## Appeals

### What is an Appeal? Who can File an Appeal?

Any person may file an appeal of a certification of consistency on the grounds that the proposed covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, the action will have a significant adverse impact on the achievement of one or both of the coequal goals or implementation of government-sponsored flood control programs to reduce risks to people and property in the Delta. (Wat. Code §§ 85225.10; Cal Code Regs., tit. 23, § 5022(a).) An appeal must be filed no later than 30 calendar days after the certification of consistency is submitted to the Council. (Wat. Code § 85225.15.)

### What's Required in an Appeal?

The requirements for an appeal are found in [the Council's Administrative Procedures Governing Appeals](https://bit.ly/4kNDR4t) (https://bit.ly/4kNDR4t). (Cal Code Regs., tit. 23, §§ 5020 through 5035.) An appeal must be in writing and clearly and specifically set forth the basis for the claim that the covered action is inconsistent with the Delta Plan. Specifically, an appeal must contain a statement of the factual allegations upon which the appeal is based and a list of the specific Delta Plan policies that the

appellant alleges the proposed covered action is inconsistent with. For each policy identified, the appeal must include both: 1) a concise statement of the authority, evidence, and arguments relied on to support the appellant's claim that the proposed covered action is inconsistent with the Delta Plan policy; and 2) how the claimed inconsistency will have a significant adverse impact on one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people and property in the Delta. (Cal Code Regs., tit. 23, § 5022(c).)

It is important to note that the Council has appellate authority and oversight over covered actions. (*Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1042.) The Council does not otherwise approve covered actions. If no appeals are filed with respect to a certification of consistency, the covered action may proceed.

#### [What Happens After an Appeal is Filed?](#)

The filing of an appeal triggers the Council's appeals process. (See Cal. Code Regs., tit. 23, §§ 5020 et seq.) The filing of an appeal also triggers restrictions on ex parte communications concerning the subject matter of the appeal. (Cal Code Regs., tit. 23, § 5024.) The Council posts a Notice of Appeal within five business days of the effective date of an appeal. The certifying agency then submits the full and complete record for the certification. (Cal Code Regs., tit. 23, § 5022(e)(1).) The Council will subsequently issue a notice of hearing to the parties, which includes a briefing schedule, associated deadlines, and other details. (Cal Code Regs., tit.23 §§ 5023 and 5027.). The parties are each provided with an opportunity to submit a written brief addressing the issues raised on appeal.

The Council holds a public hearing within 60 calendar days of the effective date of the appeal(s). (Cal. Code Regs., tit. 23, §5030.) Following the hearing, the Council must issue a decision within 60 calendar days of the hearing. (Cal Code Regs., tit.23 § 5033.) A majority vote of the voting membership of the Council is required to approve a decision. (Wat. Code § 85210.5.)

In an appeal, the Council may consider the comments and presentation of the Delta Protection Commission as those of an expert agency in matters that may affect the unique cultural, recreational, and agricultural values of the Delta when preparing, considering, and adopting its findings. (Cal Code Regs., tit.23 § 5028.)

## Council Decisions

### What are the Outcomes of the Council's Decision?

In its decision, the Council determines whether the certification of consistency is supported by substantial evidence in the record before the certifying agency. (Cal. Wat. Code 85225.25.) The Council may:

- Dismiss appeals for: 1) failure to state an appealable issue, 2) failure to provide requested information, or 3) for lack of jurisdiction; or
- Deny appeals if there is substantial evidence in the record that supports the certification of consistency; or
- Remand the matter to the certifying agency for reconsideration based on the finding that the certification of consistency is not supported by substantial evidence in the record.

(Cal. Wat. Code 85225.10, 85225.20, and 85225.25; Cal Code Regs., tit. 23, §§ 5025, 5033, and 5034.)

### What Happens After the Council's Decision?

If the Council dismisses and/or denies all of the appeals, the covered action may proceed with implementation. If the Council remands, the certifying agency cannot proceed with implementation until the Council's findings are addressed in a revised certification. (Wat. Code, § 85525.25.) If the certifying agency submits a revised certification, any appeals of that revised certification are limited to the issue(s) remanded by the Council, and/or any changes to the covered action previously certified. (Cal. Code Regs., tit. 23, § 5035.)

## By the Numbers

### How Many Certifications and Appeals Have Occurred?

As of July 1, 2025, a total of 58 certifications of consistency have been submitted to the Council's Covered Action Portal since the Delta Plan regulations took effect in 2013. Most certifications have been for habitat restoration or levee-related projects. As of July 1, 2025, six of the 58 certifications of consistency submitted to the Council have been appealed<sup>1</sup>.

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<sup>1</sup> The number of certifications and appeals include a recertification and appeal of the recertification.

## List of Attachments

*Attachment 1: Certification and Appeal Process diagram*

## Contact

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