

Sep 2022

# Draft Amendments to Administrative Procedures Governing Appeals

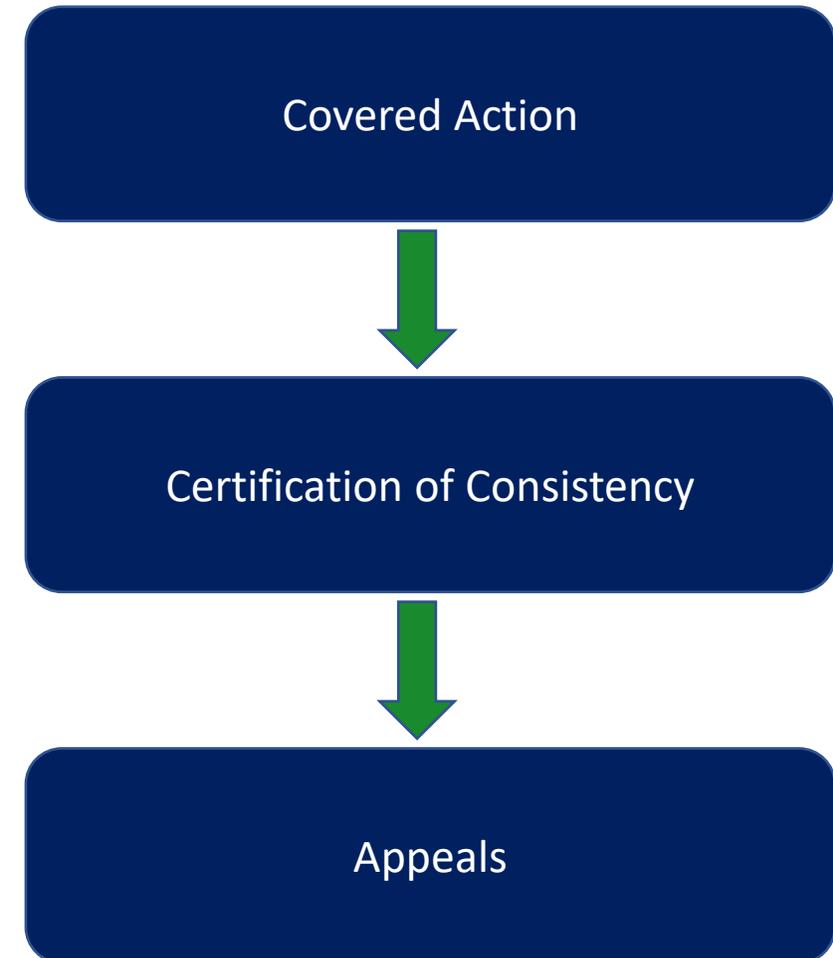


**Delta  
Stewardship  
Council**

A CALIFORNIA STATE AGENCY

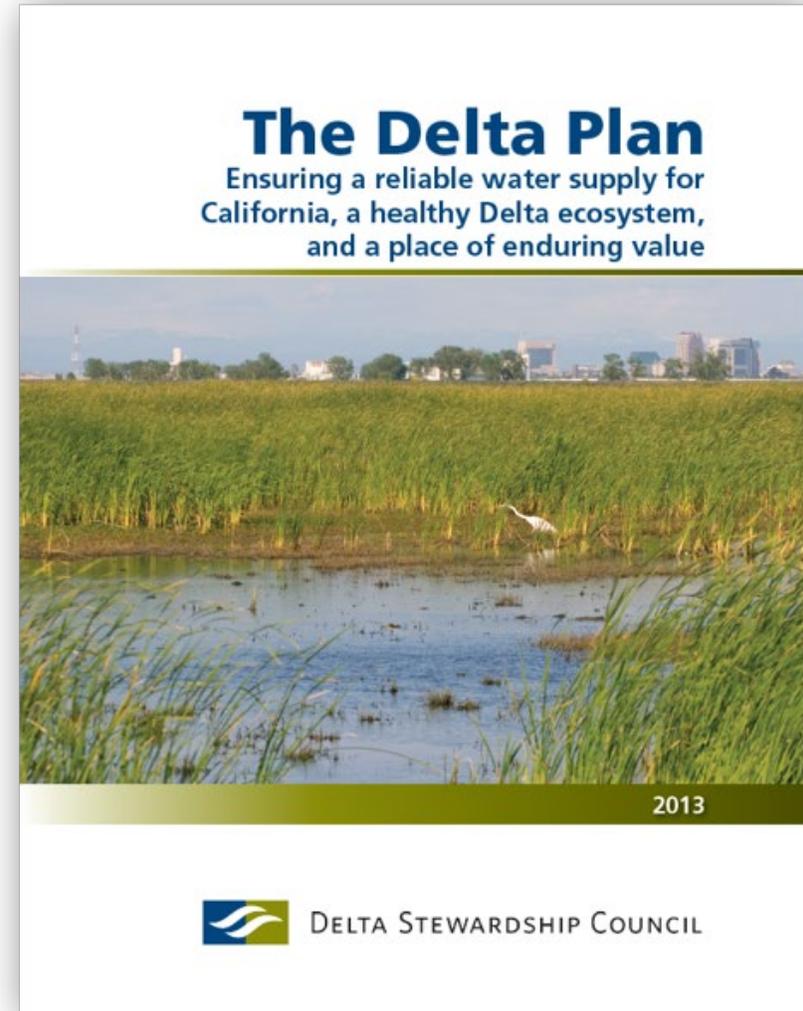
# Covered Actions and Appeals

- 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



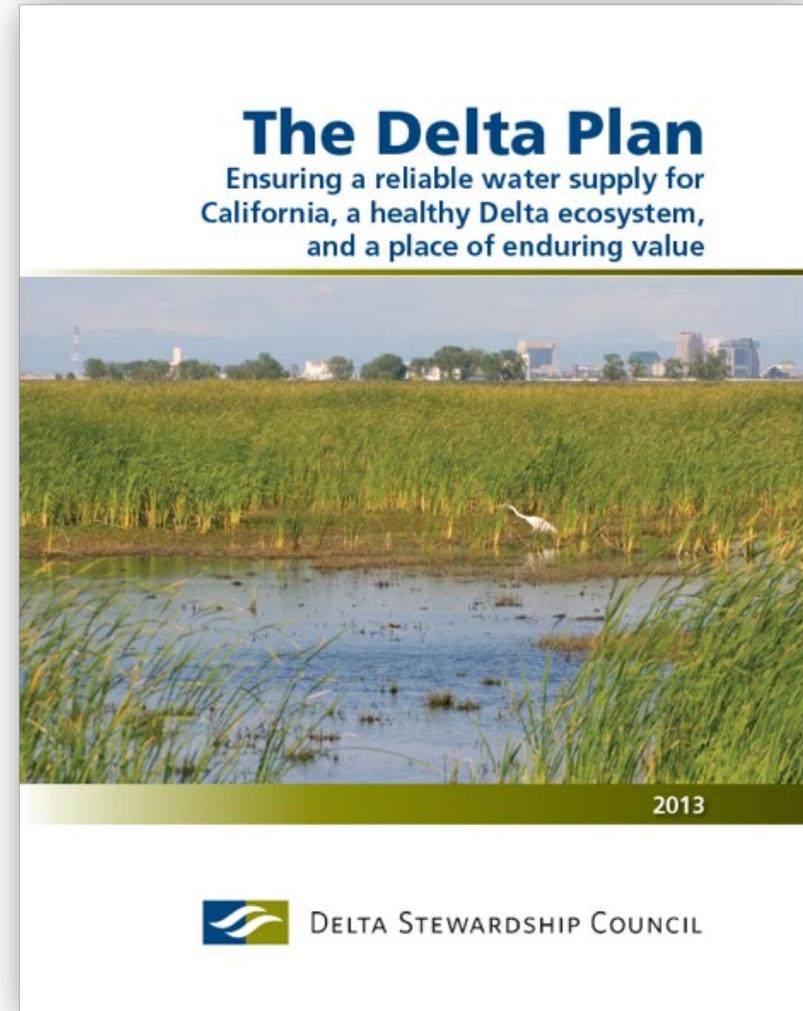
# Background

- 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 a September 22, 2022 Council workshop, staff presented the draft amendments and a summary of the comments received for further public comment and Council discussion
- Council directed staff to complete revisions in consideration of the comments received and release for public review prior to bringing the item back to the Council for consideration



# Background

- On October 13, 2022, the Council released revised draft amendments to the Appeals Procedures for public review
- At today's meeting, staff will present the revised draft amendments
- The Council will have opportunity to hear public comments regarding the revised draft amendments
- **Recommendation:** Adoption of the attached Resolution 2022-06 *Adoption of Amendments to Administrative Procedures Governing Appeals* which would approve and adopt proposed amendments to the 2010 Administrative Procedures Governing Appeals to be effective as of November 1, 2022



# 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 REVISIONS TO THE DRAFT AMENDMENTS

- Role of the Delta Protection Commission
  - The current Appeals Procedures establish that the Commission may testify before the Council concerning an appeal
  - The revised October 2022 Appeals Procedures propose a new Rule (11.1) clearly outlining the Commission's role in an appeal.
    - The Commission may provide a written submission to the Council commenting on issues raised by an appellant in an appeal and whether the certification of consistency for the proposed covered action is supported by substantial evidence in the record before the certifying agency.
    - The Commission may further make an oral presentation to the Council regarding issues raised by an appellant in an appeal at the time and date of the hearing on the appeal.
    - The Council shall consider the Commission's comments and presentation regarding issues raised by an appellant in an appeal as those of an expert in matters that may affect the unique cultural, recreational, and agricultural values of the Delta when preparing, considering, and adopting its findings.

## SUMMARY OF REVISIONS TO THE DRAFT AMENDMENTS (CONT'D)

- Burden of Proof and Standard of Review
  - December 2021 draft amendments state that the Council's standard of review in an appeal is substantial evidence, pursuant to Water Code section 85225.25.
  - December 2021 draft amendments state 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 (Rules 12, 14, and 15).
  - No substantive edits are proposed in response to comments on this matter in the revised October 2022 draft. The burden of proof lies with the appellant.

## SUMMARY OF REVISIONS TO THE DRAFT AMENDMENTS (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.
  - The revised October 2022 Appeals Procedures propose a new rule (Rule 15.1) specifying that any appeal of a revised certification of consistency following a remand shall be limited to:
    - 1) An alleged failure to address each of the Council's findings on the remanded issues; or
    - 2) Issues resulting from material changes to the covered action.
  - Additional clarifications are proposed that would establish that no person shall raise new grounds for appeal that were not raised in a prior appeal, nor reassert grounds that were raised or were rejected by the Council.

## SUMMARY OF REVISIONS TO THE DRAFT AMENDMENTS (CONT'D)

- Early Consultation Following Remand
  - Current practice is to rely on the certifying agency to determine the parties participating in early consultation (Rules 2 and 15)
  - No substantive edits are proposed in response to comments on this matter in the revised October 2022 draft.

## SUMMARY OF REVISIONS TO THE DRAFT AMENDMENTS (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.”
  - No substantive edits are proposed in response to comments on this matter in the revised October 2022 draft.

## SUMMARY OF REVISIONS TO THE DRAFT AMENDMENTS (CONT'D)

- Contents of an Appeal
  - December 2021 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.
  - The revised October 2022 Appeals Procedures propose modifications to Rule 6 to simplify the content of what must be included in an appeal, emphasizing the required statement of factual allegations, and the requirement for the claimed inconsistency to have a significant adverse impact on one or both of the coequal goals or implementation of a government-sponsored flood control program.

## SUMMARY OF REVISIONS TO THE DRAFT AMENDMENTS (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.
  - The December 2021 proposed revisions included language that clarifies the content required for requests for the Council to supplement the record and addresses the scope of “the record before the agency.”
  - No further edits are proposed in response to comments on this matter in the revised October 2022 draft.

## SUMMARY OF REVISIONS TO THE DRAFT AMENDMENTS (CONT'D)

- Hearing Presentations and Public Comments
  - The December 2021 proposed revisions stated that parties and the Delta Protection Commission may make presentations and that all other persons may make written comments. The proposed revisions also provided that the order and timing of presentations would be specified in the applicable notice.
  - The Council received numerous comments regarding placing limits on public comments. The revised October 2022 Appeals Procedures propose that oral and/or written comments to the Council concerning an appeal from all other persons are welcome in accordance with the Bagley-Keene Open Meeting Act (Rule 11).
  - Additional changes are proposed regarding the hearing schedule, oral presentation rules, role of the Delta Protection Commission, and time allotted to the parties at the hearing (Rules 11 and 11.1)

## SUMMARY OF REVISIONS TO THE DRAFT AMENDMENTS (CONT'D)

- Timeline for Submitting the Record
  - The December 2021 proposed amendments shortened the time period for submittal of the record in the case of an appeal from 10-days to 5-days.
  - The revised October 2022 Appeals Procedures would retain the proposed shortened 5-day submittal period.
    - Shortening the timeframe affords both staff and appellants additional time with access to the record, which is important given staff's analysis needs and appellant's burden relative to the record (Rule 4).
  - An additional proposed change to Rule 4 would require the certifying agency to submit, with the certification of consistency, a document listing the materials that constitute the record before the certifying agency at the time of certification.
    - This would clarify for the Council and possible appellants from the beginning what constitutes the record the certifying agency relied on (Rules 4 and 10).

# Next Steps

## Staff Recommendation

- Staff recommends that the Council adopt the attached Resolution 2022-06 *Adoption of Amendments to Administrative Procedures Governing Appeals*. Adopting Resolution 2022-06 would:
  - approve and adopt proposed amendments to the 2010 Administrative Procedures Governing Appeals to be effective as of November 1, 2022; and
  - direct and authorize the Executive Officer, or her delegee, to complete non-substantive changes and to make the finalized amended Administrative Procedures Governing Appeals available on the Council's website.

# Thank you

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