

Appeal of Certification of Consistency

**Appeal ID: C20185-A7
Date Submitted: 8/27/2018**

Step 1 - Appellant Information

Appellant Representing: San Joaquin County, Contra Costa County, Solano County, Yolo County, and Local Agencies of the North Delta

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Step 2 - Covered Action being Appealed

Covered Action ID:	C20185
Covered Action Title:	California WaterFix
Agency Subject to Appeal:	California Department of Water Resources
Contact Person Subject to Appeal:	Katherine Marquez
Covered Action Description:	<p>The Department of Water Resources' (DWR) fundamental purpose in proposing the California WaterFix is to make physical and operational improvements to the State Water Project (SWP) system in the Delta necessary to restore and protect ecosystem health, water supplies of the SWP and Central Valley Project (CVP) south of the Delta, and water quality within a stable regulatory framework, consistent with statutory and contractual obligations. The fundamental purpose is informed by past efforts taken within the Delta and the watersheds of the Sacramento and San Joaquin Rivers, including those undertaken through the CALFED Bay-Delta Program and Delta Risk Management Strategy.</p>

Attached is a summarized project description of California WaterFix from the Final Environmental Impact Report/Environmental Impact Statement (Final EIR/EIS) describing the conveyance facilities, operations and Environmental Commitments. For a detailed version see Final EIR/EIS, Chapter 3, Description of Alternatives.

As typical for construction projects of this size, engineering refinements have developed through the planning process. The California WaterFix Project Refinements document of this July 2018 certification of consistency describes these refinements, as documented in the California WaterFix Addendum to the Final Environmental Impact Report (EIR) and in the California WaterFix Draft Supplemental EIR/Environmental Impact Statement (EIS). The California WaterFix Project Refinements document goes on to describe how the refinements in each CEQA document do not conflict with the conclusions nor do they significantly change the detailed findings for each of the Delta Plan Policies in the Delta Plan Certification of Consistency for the California WaterFix as supported, in part, by the 2016 Final EIR/EIS and 2017 certified Final EIR.

The WaterFix certification of consistency is based on DWR's interpretation of the Delta Plan policies, which was developed with support from DSC staff through the early consultation process. If it is determined by the DSC Delta Council that a Delta Plan policy DWR finds to be not applicable to California WaterFix, in fact does apply to portions of California WaterFix, and/or full consistency with the policy as interpreted by the Council is not feasible, California WaterFix should still be found to be consistent with the Delta Plan pursuant to subdivision (b) (1) of section 5002 of title 23 of the California Code of Regulations. That provision states that, where full consistency with all relevant regulatory policies may not be feasible, an agency proposing a covered action may nevertheless certify that the action is consistent with the overall Delta Plan by certifying that the action is consistent with the coequal goals themselves. As demonstrated in the Final EIR/EIS and described in California WaterFix and the Coequal Goals document, California WaterFix is consistent with the coequal goals themselves.

Step 3 - Consistency with the Delta Plan

DELTA PLAN CHAPTER 2

G P1 / 23 CCR SECTION 5002 – Detailed Findings to Establish Consistency with the Delta Plan.

In General: (23 CCR SECTION 5002 (a), (b), (1)) This regulatory policy specifies what must be addressed in a certification of consistency filed by a State or local public agency with regard to any covered action.

This regulatory policy only applies after a “proposed action” has been determined by a State or local public agency to be a covered action because it is covered by one or more of the regulatory policies listed under Delta Plan Chapters 3, 4, 5, and 7 of this form. Inconsistency with this policy may be the basis for an appeal.

Covered actions, in order to be consistent with the Delta Plan, must be consistent with this regulatory policy and with each of the regulatory policies listed under Delta Plan Chapters 3, 4, 5 and 7 of this form implicated by the covered action. The Delta Stewardship Council acknowledges that in some cases, based upon the nature of the covered action, full consistency with all relevant regulatory policies may not be feasible. In those cases, the agency that files the certification of consistency may nevertheless determine that the covered action is consistent with the Delta Plan because, on whole, that action is consistent with the coequal goals. That determination must include a clear identification of areas where consistency with relevant regulatory policies is not feasible, an explanation of the reasons why it is not feasible, and an explanation of how the covered action nevertheless, on whole, is consistent with the coequal goals. That determination is subject to review by the Delta Stewardship Council on appeal;

Specific requirements of this regulatory policy:

Mitigation Measures (23 CCR SECTION 5002 (b), (2))

- a. The covered action is not exempt from CEQA, and includes applicable feasible mitigation measures identified in the Delta Plan’s Program Environmental Impact Report, (unless the measure(s) are within the exclusive jurisdiction of an agency other than the agency that files the certification of consistency), or substitute mitigation measures that the agency that files the certification of consistency finds are equally or more effective.

Is the covered action inconsistent with this portion of the regulatory policy?

☒ Yes, Inconsistent ☐ No, Consistent

Answer Justification: San Joaquin County, Contra Costa County, Solano County, Yolo County, and Local Agencies of the North Delta (“Delta Counties and LAND”) generally appeal DWR’s entire consistency determination for the Delta Tunnels Project. The Project is not consistent with any of the Council’s applicable regulations or the Coequal Goals. Additional information regarding the Project’s inconsistency with applicable requirements is included in Delta Counties/LAND’s Appeal documents. [SJC 223 Lambie.pdf](#), [Antioch 300 Paulsen.pdf](#), [Antioch-500 Paulsen.pdf](#), [CCC-SC 10.pdf](#), [CCC-SC 11.pdf](#), [ccc-sc 63 Increased Exports During Dry Periods.pdf](#), [ccc-sc 67 MWD Presentation July 10 2018.pdf](#), [ccc-sc-59 HC3 Comparison.pdf](#), [DCL- 2 1986 Coordinated Operations Agreement CVP SWP.pdf](#), [DCL- 3 DSC Item 11 Update Re CWF Feb. 22-24 2017.pdf](#), [DCL-1 WIFIA Solic.pdf](#), [DCL-4 cwfnotice_pet_hrg.pdf](#), [DCL-5 CCC Letter re Plan B.pdf](#), [dwr 1292 Reyes Memo.pdf](#), [land 121 USACE Permit App.pdf](#), [ndwa 500 Kienlen.pdf](#), [ndwa 502 MBK Report.pdf](#), [NRDC-204 Burman Ltr.pdf](#), [scwa 200 Mehl.pdf](#), [scwa 300 Schmitz.pdf](#), [sdwa 320 MWD Board Meeting Packet July 10 2018.pdf](#), [sdwa 321 Michael.pdf](#), [SJTA 203 Woodley Letter.pdf](#), [sosc 81Wirth Presentation.pdf](#), [stkn 47 Paulsen.pdf](#), [ccc-sc 52 CVP Share of Exports under H3+.pdf](#), [dwr-1143 Revised Operations Criteria.pdf](#), [172-11ExhIndex.xlsx](#), [DCL Exh Index.xlsx](#), [DCL Appeal.pdf](#)

Best Available Science (23 CCR SECTION 5002 (b), (3))

- b. The covered action documents use of best available science as relevant to the purpose and nature of the project.

Is the covered action inconsistent with this portion of the regulatory policy? [Appendix 1A](#) is referenced in this regulatory policy.

☒ Yes, Inconsistent ☐ No, Consistent

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Adaptive Management (23 CCR SECTION 5002 (b), (4))

The covered action involves ecosystem restoration or water management, and includes adequate provisions, appropriate to its scope, to assure continued implementation of adaptive management

Is the covered action inconsistent with this portion of the regulatory policy? [Appendix 1B](#) is referenced in this regulatory policy.

☒ Yes, Inconsistent

☐ No, Consistent

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DELTA PLAN CHAPTER 3

[WR P1 / 23 CCR SECTION 5003](#) - Reduce Reliance on the Delta through Improved Regional Water Self-Reliance

Is the covered action inconsistent with this regulatory policy?

☒ Yes, Inconsistent ☐ No, Consistent

Answer Justification: San Joaquin County, Contra Costa County, Solano County, Yolo County, and Local Agencies of the North Delta ("Delta Counties and LAND") generally appeal DWR's entire consistency determination for the Delta Tunnels Project. The Project is not consistent with any of the Council's applicable regulations or the Coequal Goals. Additional information regarding the Project's inconsistency with applicable requirements is included in Delta Counties/LAND's Appeal documents. [DCL Exh Index.xlsx](#), [DCL Appeal.pdf](#)

[WR P2 / 23 CCR SECTION 5004](#) - Transparency in Water Contracting

Is the covered action inconsistent with this regulatory policy? [Appendix 2A](#) and [Appendix 2B](#) are referenced in this regulatory policy.

☒ Yes, Inconsistent ☐ No, Consistent

Answer Justification: San Joaquin County, Contra Costa County, Solano County, Yolo County, and Local Agencies of the North Delta ("Delta Counties and LAND") generally appeal DWR's entire consistency determination for the Delta Tunnels Project. The Project is not consistent with any of the Council's applicable regulations or the Coequal Goals. Additional information regarding the Project's inconsistency with applicable requirements is included in Delta Counties/LAND's Appeal documents. [DCL-1 WIFIA Solic.pdf](#), [DCL-221 Consolidated Contract.pdf](#), [DCL-222 BOR Notice of Neg COA.pdf](#), [DCL-223 PCL Comment Letter.pdf](#), [DCL-224 CWIN Letter to Sen Jackson.pdf](#), [DCL-225 CCWD Letter to BOR.pdf](#), [DCL-226 MWD Mtg. March 27 2018 2a Presentation.pdf](#), [sdwa_316 Meeting Transcript.pdf](#), [sdwa_315 MWD Presentation.pdf](#), [DCL Exh Index.xlsx](#), [DCL Appeal.pdf](#)

DELTA PLAN CHAPTER 4

Conservation Measure: (23 CCR SECTION 5002 (c))

A conservation measure proposed to be implemented pursuant to a natural community conservation plan or a habitat conservation plan that was:

(1) Developed by a local government in the Delta; and

(2) Approved and permitted by the California Department of Fish and Wildlife prior to May 16, 2013

is deemed to be consistent with the regulatory policies listed under Delta Plan Chapter 4 of this form (i.e. sections 5005 through 5009) if the certification of consistency filed with regard to the conservation measure includes a statement confirming the nature of the conservation measure from the California Department of Fish and Wildlife.

Is the covered action inconsistent with this regulatory policy?

☒ Yes, Inconsistent ☐ No, Consistent

Answer Justification: San Joaquin County, Contra Costa County, Solano County, Yolo County, and Local Agencies of the North Delta ("Delta Counties and LAND") generally appeal DWR's entire consistency determination for the Delta Tunnels Project. The Project is not consistent with any of the Council's applicable regulations or the Coequal Goals. Additional information regarding the Project's inconsistency with applicable requirements is included in Delta Counties/LAND's Appeal documents. [DCL Exh Index.xlsx](#), [DCL Appeal.pdf](#)

[ER P1 / 23 CCR SECTION 5005](#) - Delta Flow Objectives

Is the covered action inconsistent with this regulatory policy?

☒ Yes, Inconsistent ☐ No, Consistent

Answer Justification: San Joaquin County, Contra Costa County, Solano County, Yolo County, and Local Agencies of the North Delta ("Delta Counties and LAND") generally appeal DWR's entire consistency determination for the Delta Tunnels Project. The Project is not consistent with any of the Council's applicable regulations or the Coequal Goals. Additional information regarding the Project's inconsistency with applicable requirements is included in Delta Counties/LAND's Appeal documents. [CCC-SC_20 DISB letter to DWR.pdf](#), [DWR-1012 Testimony Greenwood.pdf](#), [DWR-1029 PPT Greenwood.pdf](#), [DWR-1069 Modeling Output Figures.pdf](#), [DCL Exh Index.xlsx](#), [DCL Appeal.pdf](#)

ER P2 / 23 CCR SECTION 5006 - Restore Habitats at Appropriate Elevations

Is the covered action inconsistent with this regulatory policy? [Appendix 3](#) and [Appendix 4](#) are referenced in this regulatory policy.

☒ Yes, Inconsistent ☐ No, Consistent

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ER P3 / 23 CCR SECTION 5007 - Protect Opportunities to Restore Habitat

Is the covered action inconsistent with this regulatory policy? [Appendix 4](#) and [Appendix 5](#) are referenced in this regulatory policy.

☒ Yes, Inconsistent ☐ No, Consistent

Answer Justification: San Joaquin County, Contra Costa County, Solano County, Yolo County, and Local Agencies of the North Delta ("Delta Counties and LAND") generally appeal DWR's entire consistency determination for the Delta Tunnels Project. The Project is not consistent with any of the Council's applicable regulations or the Coequal Goals. Additional information regarding the Project's inconsistency with applicable requirements is included in Delta Counties/LAND's Appeal documents. [DCL Exh Index.xlsx](#), [DCL Appeal.pdf](#)

ER P4 / 23 CCR SECTION 5008 - Expand Floodplains and Riparian Habitats in Levee Projects

Is the covered action inconsistent with this regulatory policy? [Appendix 8](#) is referenced in this regulatory policy.

☒ Yes, Inconsistent ☐ No, Consistent

Answer Justification: San Joaquin County, Contra Costa County, Solano County, Yolo County, and Local Agencies of the North Delta ("Delta Counties and LAND") generally appeal DWR's entire consistency determination for the Delta Tunnels Project. The Project is not consistent with any of the Council's applicable regulations or the Coequal Goals. Additional information regarding the Project's inconsistency with applicable requirements is included in Delta Counties/LAND's Appeal documents. [DCL Exh Index.xlsx](#), [DCL Appeal.pdf](#)

ER P5 / 23 CCR SECTION 5009 - Avoid Introductions of and Habitat for Invasive Nonnative Species

Is the covered action inconsistent with this regulatory policy?

☒ Yes, Inconsistent ☐ No, Consistent

Answer Justification: San Joaquin County, Contra Costa County, Solano County, Yolo County, and Local Agencies of the North Delta ("Delta Counties and LAND") generally appeal DWR's entire consistency determination for the Delta Tunnels Project. The Project is not consistent with any of the Council's applicable regulations or the Coequal Goals. Additional information regarding the Project's inconsistency with applicable requirements is included in Delta Counties/LAND's Appeal documents. [DCL Exh Index.xlsx](#), [DCL Appeal.pdf](#)

DELTA PLAN CHAPTER 5

DP P1 / 23 CCR SECTION 5010 - Locate New Urban Development Wisely

Is the covered action inconsistent with this regulatory policy? [Appendix 6](#) and [Appendix 7](#) are referenced in this regulatory policy.

☒ Yes, Inconsistent ☐ No, Consistent

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DP P2 / 23 CCR SECTION 5011 - Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats

Is the covered action inconsistent with this regulatory policy?

☒ Yes, Inconsistent ☐ No, Consistent

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DELTA PLAN CHAPTER 7

[RR P1](#) - Prioritization of State Investments in Delta Levees and Risk Reduction

Is the covered action inconsistent with this regulatory policy?

☒ Yes, Inconsistent ☐ No, Consistent

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[RR P2](#) - Require Flood Protection for Residential Development in Rural Areas.

Is the covered action inconsistent with this regulatory policy? [Appendix 7](#) is referenced in this regulatory policy.

☒ Yes, Inconsistent ☐ No, Consistent

Answer Justification: San Joaquin County, Contra Costa County, Solano County, Yolo County, and Local Agencies of the North Delta ("Delta Counties and LAND") generally appeal DWR's entire consistency determination for the Delta Tunnels Project. The Project is not consistent with any of the Council's applicable regulations or the Coequal Goals. Additional information regarding the Project's inconsistency with applicable requirements is included in Delta Counties/LAND's Appeal documents. [DCL Exh Index.xlsx](#), [DCL Appeal.pdf](#)

[RR P3](#) - Protect Floodways

Is the covered action inconsistent with this regulatory policy?

☒ Yes, Inconsistent ☐ No, Consistent

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[RR P4](#) - Floodplain Protection

Is the covered action inconsistent with this regulatory policy?

☒ Yes, Inconsistent ☐ No, Consistent

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