

Appeal of Certification of Consistency

**Appeal ID: C20188-A1
Date Submitted: 12/3/2018**

Step 1 - Appellant Information

Appellant Representing: Atherton Cove Property Owners Association ("ACPOA")
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Step 2 - Covered Action being Appealed

Covered Action ID:	C20188
Covered Action Title:	Smith Canal Gate Project
Agency Subject to Appeal:	San Joaquin Area Flood Control Agency
Contact Person Subject to Appeal:	Juan Neira
Covered Action Description:	<p>The San Joaquin Area Flood Control Agency (SJAFCA) is proposing the Smith Canal Gate Project (Project) to design and construct a fixed cellular sheet pile wall (fixed wall) and gate structure at the mouth of Smith Canal, adjacent to the San Joaquin River/Stockton Deep Water Ship Channel (DWSC), and in and adjacent to the city of Stockton, San Joaquin County, California (Figure 1; see “SmithCanal_Fig1_Location.pdf”). The Project area, shown in Figure 2 (see “SmithCanal_Fig2_area.pdf”), encompasses the areas of construction of proposed risk-reduction measures along the DWSC corridor, abutting Stockton Golf and Country Club to the northwest; Smith Canal and Louis Park to the east; Atherton Cove to the north; and Dad’s Point to the south.</p> <p>The Project is necessary for flood protection. The existing levees along Smith Canal are heavily encroached upon and cannot be certified as meeting Federal Emergency Management Agency (FEMA) standards or the State’s Urban Levee Design Criteria (ULDC). FEMA accreditation was thus revoked in 2009 and a large portion of central Stockton was placed in the Special Flood Hazard Area (SFHA) designation. Approximately 5,000 properties and approximately 15,000 residents were identified by FEMA as being in the FEMA 100-year floodplain, an area identified by FEMA as having an increased risk of flooding. And, based on topographical data recently developed by the California Department of Water Resources (DWR), FEMA had proposed remapping the region to include an additional 3,000 parcels and 9,000 residents in the 100-year floodplain. In addition to the current necessity of providing 100-year flood protection consistent with federal law, the Project design must also contribute to the 200-year level of flood protection mandated by SB 5 and construct improvements in accordance with ULDC. The Project’s purpose is to isolate the Smith Canal from the San Joaquin River, which would remove the affected area from the 100-year floodplain, thereby improving the FEMA rating, and would contribute to the 200-year level of performance mandated by State law. The proposed Project would accomplish this by closing off Smith Canal during high flow events to facilitate 100-year and ultimately 200-year performance (i.e., passage of high-flow events that have a 1% and 0.5% chance occurring in any given year, respectively), which would allow existing Smith Canal levees to function as a secondary risk-reduction measure. This system would conform to Federal and state flood protection criteria, and thereby reduce flood risk for approximately 8,000 properties behind the existing Smith Canal levees.</p> <p>The Project would close off Smith Canal during high flow events through a fixed wall structure filled with granular material that would extend approximately 800 feet from Dad’s Point to the right bank of the San Joaquin River at the Stockton Golf and Country Club. The top elevation of the fixed wall would be 15.0 feet (North American Vertical Datum of 1988 [NAVD 88]). The wall would include a 50-foot-wide gate to maintain tidal circulation and boat access. Gate controls would be installed in a weatherproof enclosure on Dad’s Point, adjacent to the fixed wall tie-in. The gate would be closed during high flow events forecast to exceed design operating water surface elevations (8.0 feet, North American Vertical Datum 88 [NAVD 88]), events that typically occur between November and April.</p> <p>When a high flow event is anticipated, the gate would be closed at the lowest tide prior to the forecasted high flow stage. The gate would remain closed until the water level in the San Joaquin River recedes to the water level in Smith Canal on low tide, at which point the gate would open, as described in the Smith Canal Gate Project Gate Operation and Interior Drainage Analysis Report (Peterson Brustad, Inc. 2016b [see “PBI_2016b_SC Gate Operation Interior Drainage.pdf”]). In the event that rainfall occurs while the gate is closed and causes the water level in Smith Canal to be higher than that in the Delta, the gate would open to release water from Smith Canal into the Delta. Gate closures are anticipated to typically last 6 to 8 hours. Other than as needed for flood control purposes, testing, inspection, and maintenance, the gate would remain open to allow for tidal movement, navigation, and recreation in Smith Canal. The fixed wall structure would be built with an additional 2.5 feet of elevation to account</p>

for both projected sea level rise through 2050 and hydraulic uncertainty, which would further reduce future flood risk for the properties behind the existing Smith Canal levees as well as for those on Atherton Island.

Flood control improvements to Dad's Point would also be implemented. Approximately 1,660 linear feet of continuous floodwall and seismic stability wall would be constructed of single sheet piles along the eastern portion of Dad's Point. The floodwall and seismic stability would be continuous and would be installed along the San Joaquin River side of the Dad's Point levee fill crown. The floodwall would predominately be underground; however, a concrete cap would be installed on top of the wall in areas where it would be exposed. The floodwall would be designed in accordance with the U.S. Army Corps of Engineers (USACE) Engineering and Construction Bulletin Number 2014-18 (Design and Evaluation of I-Walls Including Sheet Pile Walls) and USACE Engineering Circular Number 1110-2-6066 (Design of I-Walls). The top elevation of Dad's Point improvements would be 15.0 feet NAVD 88. An access road would be installed on top of Dad's Point. Fill material would be placed in some areas to raise the elevation of Dad's Point. Disturbed areas would be re-landscaped following the completion of construction activities.

Recreation facilities would be installed on Dad's Point to replace amenities affected by project construction; the types of facilities would be selected based on current uses of the space including fishing, wildlife viewing, walking, biking, and running. Dredging may be necessary to remove material from the channel bottom along the entire alignment of the fixed wall to provide a level surface. Silt curtains would be used along the limits of dredging. All dredged material would be disposed of at the Lovelace Materials Recovery Facility in Manteca or at the North County Recycling Center and Sanitary Landfill in Lodi, which were specified as material disposal sites for the Project in the EIR. Alternatively, the dredge material could be disposed of at an upland site with no connectivity to waters of the United States.

The Project is included in the Recommended Plan of the Lower San Joaquin River Feasibility Study; has an executed Memorandum of Understanding for credit under Section 221 of the Flood Control Act of 1970, as amended; and has an approved Independent Panel of Experts (IPE) and Safety Assurance Review (SAR) Plan. SJAFCA has also entered into two cost share agreements with DWR—one for design services and one for construction services.

Project details are included in Chapter 2, Proposed Project and Alternatives, of the Smith Canal Gate Project Final Environmental Report (FEIR [see "SmithCanal_FEIR_2015.pdf"]), as well as in the two FEIR addenda, "Addendum to the Smith Canal Gate Project Final Environmental Impact Report" and "Addendum II to the Smith Canal Gate Project Final Environmental Impact Report" (see "Smith_Canal_Addendum_2017.pdf" and "Smith Canal Addendum 2018.pdf", respectively). Project construction details are also included in Chapter 2 of the FEIR. Project design details for the floodwall and Dad's Point are included in the engineering drawings (see "Smith_Canal_Engineering_Drawings.pdf").

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:

ACPOA appeal from SJAFCA's Certification of Consistency with respect to G P1(b)(2): Mitigation Measures, G P1(b)(3): Best Available Science, G P1(b)(4): Adaptive Management, and ER P5: Invasive Nonnative Species. The Project is not consistent with these regulations. Additional information regarding the Project’s inconsistency with applicable requirements is included in ACPOA’s appeal letter and exhibits. [Ex A BSK Report 2015.pdf](#), [Ex B Tahoe Keys IWMP 2016.pdf](#), [Ex K ICF International, Comment on Hydrodynamic Modeling 2014.pdf](#), [18.12.03 ACPOA Consistency 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

Answer Justification:

ACPOA appeal from SJAFCA's Certification of Consistency with respect to G P1(b)(2): Mitigation Measures, G P1(b)(3): Best Available Science, G P1(b)(4): Adaptive Management, and ER P5: Invasive Nonnative Species. The Project is not consistent with these regulations. Additional information regarding the Project’s inconsistency with applicable requirements is included in ACPOA’s appeal letter and exhibits. [Ex C Berg & Sutula 2015.pdf](#), [Ex D Brutemark 2015.pdf](#), [Ex E Lehman 2005.pdf](#), [Ex F Toft 2003.pdf](#), [Ex G SJAFCA Meeting Transcript 2015.pdf](#), [Ex H Kurobe 2013.pdf](#), [Ex I Ksander & Spencer 2005.pdf](#), [Ex J Sabalow 2015.pdf](#), [Ex L Boyer & Sutula 2015.pdf](#), [Ex M Cohen & Moyle 2004.pdf](#), [Ex N Tsui 2010.pdf](#), [Ex O Coglianor 2010.pdf](#), [Ex A BSK Report 2015.pdf](#), [18.12.03 ACPOA Consistency Appeal.pdf](#)

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

- c. 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

Answer Justification: ACPOA appeal from SJAFCA's Certification of Consistency with respect to G P1(b)(2): Mitigation Measures, G P1(b)(3): Best Available Science, G P1(b)(4): Adaptive Management, and ER P5: Invasive Nonnative Species. The Project is not consistent with these regulations. Additional information regarding the Project's inconsistency with applicable requirements is included in ACPOA's appeal letter and exhibits. [Ex A BSK Report 2015.pdf](#), [18.12.03 ACPOA Consistency Appeal.pdf](#)

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: While ACPOA does not appeal SJAFCA's consistency determination with respect to this regulation, it does not concede that the Project is consistent with this regulation. [18.12.03 ACPOA Consistency 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: While ACPOA does not appeal SJAFCA's consistency determination with respect to this regulation, it does not concede that the Project is consistent with this regulation. [18.12.03 ACPOA Consistency 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: While ACPOA does not appeal SJAFCA's consistency determination with respect to this regulation, it does not concede that the Project is consistent with this regulation. [18.12.03 ACPOA Consistency 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: While ACPOA does not appeal SJAFCA's consistency determination with respect to this regulation, it does not concede that the Project is consistent with this regulation. [18.12.03 ACPOA Consistency 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

Answer Justification: While ACPOA does not appeal SJAFCA's consistency determination with respect to this regulation, it does not concede that the Project is consistent with this regulation. [18.12.03 ACPOA Consistency Appeal.pdf](#)

[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: While ACPOA does not appeal SJAFCA's consistency determination with respect to this regulation, it does not concede that the Project is consistent with this regulation. [18.12.03 ACPOA Consistency 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: While ACPOA does not appeal SJAFCA's consistency determination with respect to this regulation, it does not concede that the Project is consistent with this regulation. [18.12.03 ACPOA Consistency 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: ACPOA appeal from SJAFCA's Certification of Consistency with respect to G P1(b)(2): Mitigation Measures, G P1(b)(3): Best Available Science, G P1(b)(4): Adaptive Management, and ER P5: Invasive Nonnative Species. The Project is not consistent with these regulations. Additional information regarding the Project's inconsistency with applicable requirements is included in ACPOA's appeal letter and exhibits. [Ex A BSK Report 2015.pdf](#), [Ex K ICF International, Comment on Hydrodynamic Modeling 2014.pdf](#), [18.12.03 ACPOA Consistency 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

Answer Justification: While ACPOA does not appeal SJAFCA's consistency determination with respect to this regulation, it does not concede that the Project is consistent with this regulation. [18.12.03 ACPOA Consistency Appeal.pdf](#)

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

Answer Justification: While ACPOA does not appeal SJAFCA's consistency determination with respect to this regulation, it does not concede that the Project is consistent with this regulation. [18.12.03 ACPOA Consistency Appeal.pdf](#)

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

Answer Justification: While ACPOA does not appeal SJAFCA's consistency determination with respect to this regulation, it does not concede that the Project is consistent with this regulation. [18.12.03 ACPOA Consistency Appeal.pdf](#)

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: While ACPOA does not appeal SJAFCA's consistency determination with respect to this regulation, it does not concede that the Project is consistent with this regulation. [18.12.03 ACPOA Consistency Appeal.pdf](#)

RR P3 - Protect Floodways

Is the covered action inconsistent with this regulatory policy?

☒ Yes, Inconsistent ☐ No, Consistent

Answer Justification: While ACPOA does not appeal SJAFCA's consistency determination with respect to this regulation, it does not concede that the Project is consistent with this regulation. [18.12.03 ACPOA Consistency Appeal.pdf](#)

RR P4 - Floodplain Protection

Is the covered action inconsistent with this regulatory policy?

☒ Yes, Inconsistent

☐ **No, Consistent**

Answer Justification:

While ACPOA does not appeal SJAFCA's consistency determination with respect to this regulation, it does not concede that the Project is consistent with this regulation. [18.12.03 ACPOA Consistency Appeal.pdf](#)