



November 7, 2024

Appeal re: Covered Action C20242

*"2024-2026 Proposed Geotechnical Activities" for the Delta Conveyance Project
Consistency Determination by the Department of Water Resources*

I. INTRODUCTION

The Department of Water Resources' ("DWR") purported consistency determination for its 2024-2026 Geotechnical Activities (the "Proposed Geotechnical Activities") related to the Delta Conveyance Project ("DCP" or "Tunnel") fails to analyze the statutorily defined "covered action" under the Delta Reform Act. It slices the Tunnel's actual impacts into the thinnest of segments, asserting they may proceed despite DWR's legal obligation that the entirety of the DCP be analyzed under the Delta Reform Act. DWR's approach hides the harm the Tunnel would cause, flouts the plain language of the law, and seeks special treatment from the Delta Stewardship Council in contravention of the statutory and regulatory rules that apply to all

parties required to comply with the Delta Reform Act. The result is an absurd and incoherent submission in which DWR claims that a portion of a portion of a California Environmental Quality Act (“CEQA”) certified project should be granted a consistency determination despite that slice of action having, according to DWR’s submission, no impact on the coequal goals of the Delta Reform Act or the policies of the Delta Plan.

Because DWR has arbitrarily reviewed only a portion of the covered action, has failed to provide evidence that could support a reasonable determination that the proposed Tunnel project is consistent with the Delta Reform Act, has sought differential treatment from the Council, and has submitted a purported consistency determination that is inconsistent with the law, Winnemem Wintu, Shingle Springs Band of Miwok Indians, California Indian Environmental Alliance, Friends of the River, Center for Biological Diversity, Save California Salmon, California Sportfishing Protection Alliance, Golden State Salmon Association, Restore the Delta, and San Francisco Baykeeper (collectively, “Appellants”) appeal DWR’s determination and ask the Delta Stewardship Council to reject it.

II. A “COVERED ACTION” UNDER THE DELTA REFORM ACT

The legislature’s findings in the Delta Reform Act were clear. “The permanent protection of the Delta’s natural and scenic resources is the paramount concern to present and future residents of the state and nation. [¶] To promote the public safety, health, and welfare, and to protect public and private property, wildlife, fisheries, and the natural environment, it is necessary to protect and enhance the ecosystem of the Delta and prevent its further deterioration and destruction.” (Wat. Code § 85022.)¹

¹ The Delta Reform Act, DWR’s “consistency determination,” and this appeal generally refer to the “Delta” as legally defined in the statute. However, the scope of the legal Delta under California law misconceives reality. The Delta is a cultural landscape and resource that is not limited by man-made artificial lines or boundaries. It extends throughout the San Francisco Bay Estuary’s watershed and recognizes the intrinsic connectedness of waterways with all life.

As part of the Delta Reform Act, the Legislature created the Delta Stewardship Council (“Council”) and charged it with adopting and implementing a “Delta Plan” to further the coequal goals of the Act: “providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem”. (See Wat. Code, §§ 85054, 85200.) The Council adopted the Delta Plan in May 2013. The Delta Plan is “intended to be a foundational document that prioritizes actions and strategies in support of key objectives, such as the requirement to reduce reliance on the Delta to meet future water supply needs.” (*Delta Stewardship Council Cases*, (2020) 48 Cal. App. 5th 1014, 1042.) Potential projects and actions that will impact (1) the Delta, (2) the coequal goals in the Delta Reform Act, or (3) the policies of the Delta Plan must provide a certification of consistency for the “covered action” to ensure compliance with the Delta Reform Act. (See Wat. Code, § 85057.5.)

The Delta Reform Act defines a “covered action” as “a plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code that meets” certain conditions related to impacts on the Delta. (Wat. Code, § 85057.5.) That statute in turn defines a “project” as “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment,” and which is undertaken pursuant to any of several different scenarios, including when undertaken by any public agency. (Pub. Res. Code, § 21065.)

These statutory definitions are further explained in both regulations adopted under CEQA and the Delta Reform Act, and a long line of case law interpreting CEQA that predated the Delta Reform Act. First, the Council has adopted regulations further defining “covered action” as plans, programs, or projects which (a) are a “project” as defined under CEQA, (b) will occur in the Delta, (c) will be conducted or funded by a state or local agency, (d) will have a significant

Ensuring protection of the Delta requires considering more than the geographic confines of the legal Delta—an arbitrarily imposed limit that does not exist in the natural world.

impact on the coequal goals, and (e) are covered by the Delta Plan. (See Cal. Code Regs., tit. 23, § 5001.) Second, regulations under CEQA further explain what constitutes a “project” and therefore a “covered action”: a project is “the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment” (Cal. Code Regs., tit. 14, § 15378 [emphasis added].)

Finally, the Delta Reform Act, its regulations, and CEQA regulations also identify things that are not a “covered action” or a “project.” Under the Delta Reform Act, regulatory actions of state agencies, routine maintenance and operation of the Central Valley Project and State Water Project, and routine maintenance and operation of a facility located owned or operated by a local public agency located in the Delta are not “covered actions.” (See *Delta Stewardship Council Cases*, 48 Cal. App. 5th at pp. 1043-1044; see also Cal. Code Regs., tit. 23, § 5001(k)(2).) Similarly, under CEQA regulations, certain actions are explicitly excluded from being “projects.” (See Cal. Code Regs., tit. 14, § 15378(b).) However, none of the exempt activities under the Delta Reform Act or CEQA pertain to investigative or data collection activities that are otherwise part of a CEQA project. (See *id.*)

III. DWR HAS FAILED TO CERTIFY THE CONSISTENCY OF THE “COVERED ACTION” MAKING APPROVAL OF THE DEPARTMENT’S CONSISTENCY DETERMINATION INCONSISTENT WITH THE LAW

DWR’s certification asserts that the “covered action” has changed since DWR certified the “project” under CEQA in December of 2023. At the time the Final Environmental Impact Report (“FEIR”) was certified, the “project,” Pub. Res. Code § 21065, was alleged to be “the whole of,” 14 C.C.R. § 15378, the newest iteration of the Tunnel—a project that would allow dual conveyance of additional water out of the Sacramento River and Delta through a forty-five-mile-long tunnel buried hundreds of feet underground. Included in “the whole of,” 14 C.C.R. §

13578, the DCP were the extensive geotechnical activities described in Chapter 3 of the FEIR. As a result, the “covered action” has been officially defined by DWR since December 2023 as the construction and operation of the Tunnel, including the geotechnical activities necessary to investigate, plan, and ultimately build it.

Now, according to DWR, the “covered action” has changed. Rather than “the whole of” the CEQA project, DWR asserts that the only action relevant for the Council’s consideration is the Proposed Geotechnical Activities—a slice of a slice of what the covered action was just ten months ago.

The Council’s analysis should begin and end here. There is no need for the Council, the public, or taxpayers to waste their time and money trying to follow DWR’s shifting submissions, descriptions, or legal maneuvers. The Delta Reform Act requires a consistency determination for a “covered action.” A “covered action” is the same as the CEQA “project.” By DWR’s own election and as required under the law, the CEQA “project” here is the Tunnel, not just the Proposed Geotechnical Activities that are a slice of the whole project.

IV. DWR’S SUBMISSION LACKS THE EVIDENCE, ANALYSIS, OR INFORMATION NECESSARY TO REASONABLY SUPPORT A FINDING OF CONSISTENCY WITH THE DELTA PLAN

Beyond the legal failings, DWR’s failure to analyze the covered action has significant negative consequences. It deprives the public of necessary information to accurately understand and assess the impacts of the DCP. DWR’s piecemealing of the consistency determination under the Delta Reform Act risks forcing the Council to make preliminary decisions that risk later disastrous consequences. And the submission’s insistence that the “covered action” can be limited to the Proposed Geotechnical Activities results in the repeated assertion (for every objective and goal DWR was required to review) that the Delta Reform Act is “Not Applicable” to its conduct. This despite DWR’s acknowledgment that the project is a massive tunnel running

hundreds of feet underground for over forty miles in the Delta that will have significant and unavoidable negative impacts.

First, DWR's submission demonstrates the flaw in its arbitrary limitation of the covered action. While it is clear, admitted, and obvious that the DCP is a "covered action" under the Delta Reform Act and a "project" under CEQA, there is no analysis of the DCP in DWR's consistency determination. DWR pretends the Proposed Geotechnical Activities are isolated and limited—as if they could be undertaken with no future consequence or impact. In reality, they are a part of a part of a proposal that would have disastrous consequences on the Delta, the people and communities who currently reside there, the Tribes who have lived with the Delta for time immemorial, and the fish and wildlife that already face an ecological crisis.

But the consistency determination by DWR arbitrarily splices the covered action so thinly as to be unrecognizable. The Proposed Geotechnical Activities will not construct the Tunnel nor will they cause the two decades of pollution, noise, and other consequences that will come with it. They will not provide for allegedly increased or more reliable water supply. And they will not divert water from the Sacramento River and Delta that will drive fish to extinction and harm Tribes and environmental justice ("EJ") communities. But none of those potential benefits or very real harms are even addressed by DWR in its consistency determination, despite being at the core of the Project and the public's interest and concerns about it.

It is this type of piecemealing approach that California courts have repeatedly recognized is inconsistent with the definition of a "project" under CEQA. "The requirements of CEQA cannot be avoided by piecemeal review which results from chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences. For example, where an individual project is a necessary precedent for action on a larger project, or commits the lead agency to a larger project, with significant environmental effect, an EIR must address itself to the scope of the larger project. The

prohibition against piecemeal review is the flip side of the requirement that the whole of a project be reviewed under CEQA.” (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1208 [internal quotations and citations omitted]; see also *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283–284; *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal. App. 4th 351, 370; *Leonoff v. Monterey County Bd. of Supervisors* (1990) 222 Cal.App.3d 1337, 1346; *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1333; Pub. Res. Code § 15378(a); Pub. Res. Code § 15165.) DWR recognized this reality in its CEQA analysis, evaluating the Tunnel, not just the geotechnical activities encompassed by its design and construction. But that recognition has been abandoned before this body, where DWR now asserts that the same “project” is a different “covered action.”

Second, despite the obviousness of the scale of the Tunnel’s impacts, DWR’s answer to each of the eighteen times the application asks “is the covered action consistent with this regulatory policy” is identical: “N/A.” (See Certif. of Consistency C20242 at pp. 4-10.) Yet on the basis of all of these “not applicables,” DWR says the Proposed Geotechnical Activities are consistent with the Delta Plan. This is an astonishing claim and request. DWR asserts the Tunnel is a covered action, requiring consistency with the Delta Reform Act. It then says that the Proposed Geotechnical Activities have no impact on any of the goals or objectives of the Delta Reform Act, meaning they are not a covered action. And then concludes from those two pieces of information that the Proposed Geotechnical Activities are consistent with the Delta Plan and that the Tunnel (the actual covered action) need not be considered until some future time.

This is nothing short of a request for special treatment—an exemption from the requirements of the law because the Tunnel is complex and allegedly important. The Council should reject DWR’s request. That this request comes after years of behind-the-scenes and backroom meetings between DWR and the Council further demonstrates the special nature of the request. DWR relied upon “early consultation” as the rationale for moving forward with the

geotechnical work that is part of the DCP covered action prior to making a consistency determination—a claim the court rejected. (See DCP Final Certif. of Consistency, Attachment 2, p. 7.) The fact DWR and the Council have consulted on the consistency process does not change or eliminate the legal requirements of the Delta Reform Act, DWR’s obligations, or the Council’s ultimate obligation to comply with the Delta Reform Act.

Third, because DWR offers nothing to support a determination of consistency for either the actual covered action or the Proposed Geotechnical Activities, approving DWR’s determination would be arbitrary, capricious, and lacking any evidentiary basis. Because DWR argues that the Delta Reform Act and Delta Plan goals, policies, and objectives are not applicable to the Proposed Geotechnical Activities, there is no way for the Council or the public to know whether the work will be consistent with the Delta Plan. And because DWR artificially segregates the Proposed Geotechnical Activities from the Tunnel, the Council does not have information in the record adequate to approve or evaluate DWR’s overall conduct with respect to the Delta Plan.

Review of the specific regulatory policies demonstrates the insufficiency of DWR’s approach. For instance, how does conducting the Proposed Geotechnical Activities related to a state-dictated Tunnel under over forty miles of the Delta promote local land use? (See Cal. Code Regs., tit. 23, § 5008.) Or, how would the Proposed Geotechnical Work to build the DCP and allow increased water diversions preserve the Delta’s ecology, its native fish, or help to protect and restore those populations? (See Cal. Code Regs., tit. 23, §§ 5002(c), 5003, 5005.) And how would the Proposed Geotechnical Activities create new water supply benefits or reliability? (See Cal. Code Regs., tit. 23, § 5002(b)(1), 5003, 5004.)

DWR’s response is that each of these questions is just not applicable to the Proposed Geotechnical Activities. But the actual answers are obvious: the Proposed Geotechnical Activities will not further these policies. But the Tunnel will—it will substantially undermine

local land use choices and authority as the state dictates how local communities in the Delta must bear the burdens of pollution and water supply for the entire state; it will substantially harm fish, wildlife, and ecosystems in the Delta; and it will ultimately do little to help to prepare California's water supply systems for a sustainable future, to support EJ communities within or beyond Delta, or to push the state or localities away from reliance on extraction and exploitation of the Delta and toward localized sustainable water supply. (See Cal. Code Regs., tit. 23 §§ 5002(c), 5003, 5004, 5005, 5010, 5011.)

Finally, there is no evidence that the mitigation measures proposed by DWR will indeed be effective at avoiding the harms their conduct is likely to cause. (See Cal. Code Regs., tit. 23, § 5002(b)(2).) This is especially true, problematic, and potentially harmful with respect to mitigations designed to protect tribal cultural resources.

DWR's actions risk damaging or destroying irreplaceable buried Tribal cultural resources, relics, sites, and remains. There has been no comprehensive survey of the Delta to pinpoint and identify the location and extent of Tribal cultural resources, sites, remains, and relics, though there is no doubt such resources exist in the Delta. As a result, the Proposed Geotechnical Activities may inadvertently damage or destroy irreplaceable buried cultural resources. Even if proper consultation and monitoring occurs, significant and irreparable impacts may occur.

On past projects with DWR, Tribal consultation and monitoring have been difficult, a pattern Tribes fear is likely to continue regarding the Tunnel and the Proposed Geotechnical Activities. It took many years for DWR to ultimately understand that the entire Delta itself is a critically important cultural resource for Tribes. Yet even after the acknowledgment, Tribal monitors have not been adequately consulted and have often not been given sufficient (or any) notice of site inspections or activities that require cultural monitors. Obtaining access to private sites has been exceedingly difficult. Indeed, part of the reason Tribes do not know more about the

precise location of buried or living cultural resources is that Tribal members and monitors, despite being subject matter experts, have not been granted access to potential work sites nor provided adequate notice of site visits to survey for resources like plants, animals, and buried resources. In the past, Tribal cultural resource monitors have been notified of events requiring their presence less than 24 hours before such events and sometimes with only about an hour's notice. Given the distances Tribal monitors must travel to sites, this has presented difficulties obtaining what limited access the Tribe has been permitted to survey for resources.

Likewise, on recent site visits with DWR, Shingle Springs' cultural resource monitor was told they could not review soil samples for buried cultural resources. Given these issues, it is likely that extensive geotechnical investigations are likely to damage or even destroy important and irreplaceable cultural resources.

During a DWR-led site inspection connected to the DCP, the Shingle Springs Band of Miwok Indians were not present because DWR never confirmed the date and time with the Tribe, though representatives from other Tribes were, illustrating DWR's inadequate Tribal consultation practices. During the inspection, human remains were found—a fact Shingle Springs learned about only after the fact from other Tribal representatives who had been present.

V. ANY CONSISTENCY DETERMINATION RELATED TO THE TUNNEL MUST CONSIDER ENVIRONMENTAL JUSTICE AND TRIBAL INTERESTS PRIOR TO ANY APPROVAL FROM THE COUNCIL

The Delta Plan's existing policy objectives leave out Tribes, environmental justice communities, and ignore the long-standing and ongoing harm these groups suffer as a result of California's inequitable decisions related to water use, water rights, infrastructure development, and pollution burdens. These systems are rooted in racism, violence, and exclusion. Continuing to ignore these communities and this legacy by leaving the interests of those groups outside of the legal consideration performed by the state perpetuates this shameful and horrific legacy.

The Council has an opportunity to begin to move forward to take into consideration these interests and to reject the racist and exclusionary underpinnings the state's last 150 years of choices about water and infrastructure. But beginning the process of course correction requires action by the Council and robust opportunities and processes for meaningful participation from the entire public in the decisions that will impact Tribes and EJ communities.

The Delta itself is a Tribal cultural resource and a cultural landscape. As a result, the Proposed Geotechnical Activities will necessarily impair the Delta as such and Tribal members' ability to use and enjoy the Delta for recreational and cultural purposes.

Tribal cultural resources in the Delta can be categorized into two categories: living cultural resources like fish, birds, the water, plants, and the Delta itself, and buried cultural resources like relics, artifacts, and remains.

Tribal members use the Delta for ceremonial purposes at different times of the year. These ceremonies always have and always will involve the Delta, including by catching, cooking, and eating fish, and by utilizing the water for other purposes. Tribal members also gather plants for basketweaving in areas nearby the locations of the Proposed Geotechnical Activities. Both categories of resources are likely to be impacted by the geotechnical work DWR has planned.

To date, the Council has been too slow in updating its policies to incorporate these interests, people, and communities. In September 2024, five years after deciding to analyze the issue, the Council issued a draft report regarding Tribal and Environmental Justice issues. (See Delta Stewardship Council. 2024. Tribal and Environmental Justice Issues in the Sacramento-San Joaquin Delta: History and Perspectives ("DSC Tribal and EJ Report").)

The Council Tribal and EJ Report made a series of recommendations, both "specific to the Council" and more broadly for "all who work in the Delta." (DSC Tribal and EJ Report at 16.) Unfortunately, those recommendations are not reflected in the existing Delta Reform Act

consistency determination process, nor in the regulatory and policy objectives that DWR considered in its consistency determination.

First, the report recommends “**Make it easy to participate (P)**: Conducting direct, meaningful outreach and providing resources to support community participation is essential to achieving equity in governance processes and ensuring that all communities can be represented beyond already established networks.” (*Id.* at 17 [bolding in original].) The appeal process for consistency is anything but “easy” and the procedural barriers that must be overcome to simply file an appeal make it harder for “all communities [to] be represented beyond already established networks.” (*Id.*)

Beyond the procedural hurdles, DWR’s attempt to piecemeal its consistency determination for the Tunnel by offering hundreds of pages of “analysis” of a sliver of the geotechnical activities that are but one small part of the whole project makes participation harder in at least two ways. First, it confuses and disguises the actual impacts of what DWR is planning by pretending that the geotechnical activities are their own project, not part of a much larger and more destructive one. And second, it requires public participants to address issues related to the Tunnel and the Delta Plan serially. It is already an immense effort to (a) review DWR’s FEIR, (b) review DWR’s consistency determination and the dozens of referenced files and materials, (c) prepare an appeal based on those matters and other outside evidence and resources, and (d) navigate the logistical hurdles in filing that appeal. DWR’s demand that the public, especially Tribes, EJ communities and organizations, and environmental non-profit groups (as well as the Council) do all of these things twice is burdensome and prejudicial. This process makes a mockery of the general recommendation in the report to make participation easy and is wholly inconsistent with the procedural justice objective outlined in the report’s Conceptual Framework. (*Id.* at 28.)

Second, the Report recommends that “Tribal consultation should be undertaken on any activities that may be of interest to tribes and should be done as early as possible in the process.” (*Id.* at 18 [emphasis added].) While this is framed as a general recommendation and example of making participation easier, simply putting commitments or recommendations on paper does not advance the goals or objectives of including Tribes and accounting for their interests. Actions are required.

Third, the specific recommendations for the DSC, *id.* at 20-25, further highlight the need for the DSC to update its practices, policies, and to adequately understand and assess how projects will impact the Delta. For example, the first goal and first strategy identifies the need to “evaluate current Council planning documents (such as the Delta Plan), including policies/regulations and performance measures to assess opportunities to advance environmental justice within them” and to recommend amendments to those documents “if appropriate.” (*Id.* at 20.) Similarly, the second goal and strategies for achieving it further recognize the need for updates and improvements in the Council’s work and the Delta Plan. As the report explains, it is necessary for the Council to “recognize tribal rights” in its work. (*Id.* at 22.) The obvious corollary to this necessary improvement is that the current Delta Plan and the Council’s implementation of it, including through consistency determinations, does not in fact recognize tribal rights. This is a glaring omission, and one that demands immediate action and correction, prior to any legitimate and non-arbitrary certification of consistency.

Finally, while the report is a positive step, it suffered from flaws in process and in substance. For example, members of the EJ expert group that was contracted with to provide input and expertise were unable to review the complete drafts of the report before it was made public. (See DSC Meeting, September 26, 2024, comments of Ms. Sherri Norris and Ms. Barbara Barrigan-Parrilla.) This was not only a process failure but led to substantive deficiencies in the document. (*Id.*)

It is also only a first step. As Ms. Gloria Alonso explained during the same meeting, too often reports that raise EJ and Tribal issues and inequities throughout California too often are put in a drawer and never used again. The Council has an opportunity to actually apply, use, and further the goals and principles articulated in the paper.

As Ms. Barrigan-Parrilla explained to the Council during the September 26 hearing:

Applying an environmental justice lens to the co-equal goals requires prioritizing taking care of the disparate impacts on the people who are harmed in the Delta by the extraction of water and on the people around the state who need (and too often do not have) access to safe, clean, and affordable drinking water. Too often the Delta Plan's coequal goals act to protect wealthy water interests and contractors and result in pitting disadvantaged communities throughout the state against each other.

The Council should ensure that as it moves forward with this process, and in general, it accounts for the diverse Tribal, Environmental Justice, and civil rights issues that the report assesses. It should act to include not exclude, and to reduce barriers to participation and input for overburdened and under-resourced communities, people, and organizations. And it should withhold approval of DWR's consistency determination in the absence of advancing the goals, objectives, and strategies in the DSC Tribal and EJ Report.

VI. CONCLUSION

For the foregoing reasons, we request that the Delta Stewardship Council reject DWR's consistency determination.

Respectfully submitted,



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² I confirm that I have received authority from each of the below parties to submit this appeal on their behalf.

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