

Appeal of Certification of Consistency

C20242-A3

FILED

Date: 11/7/2024

Step 1 - Appellant(s) Information

Appellant Representing: County of Sacramento, Sacramento County Water Agency, Sacramento Area Sewer District, and City of Stockton

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Step 2 - Covered Action being Appealed

Covered Action ID: C20242

Covered Action Title: 2024-2026 Proposed Geotechnical Activities

Agency Subject to Appeal: Department of Water Resources

Contact Person Subject to Appeal: Katherine Marquez

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Covered Action Description: The 2024–2026 Proposed Geotechnical Activities will not include all of the geotechnical activities described in the Final EIR, Chapter 3, Description of the Proposed Project and Alternatives. In particular, the 2024-2026 Proposed Geotechnical Activities will not include the following: work on levees, overwater activities, activities that involve trenching (e.g., “test trenches”), activities within the West Tracy Fault or Bethany Fault, pile driving, vibratory testing of dynamic properties, potholing, monument installation, test fills for settlement studies, 800-foot inclined boreholes, or ground improvement test zones. The 2024-2026 Proposed Geotechnical Activities include subsurface exploration and testing consisting of one or more of the following: 1) Borings with small diameter (less than 8-inch diameter) auger and/or mud rotary drill and soil and rock sampling; 2) CPTs utilizing a truck mounted rig equipped with one-to-two-inch diameter cone; and 3) Installation and removal of a temporary slotted polyvinyl chloride (PVC) pipe with a small submersible pump and water level transducer inside for water quality testing. DWR’s footprint at each site will be limited. Workspace at each site, not including staging areas, is expected to be approximately 0.022 acres, or 10 feet by 100 feet. The 2024-2026 Proposed Geotechnical Activities include up to 261 soil borings (including 31 soil borings with water quality tests), and up to 15 CPTs. The information obtained from the 2024-2026 Proposed Geotechnical Activities will inform the continued planning and design of the Delta Conveyance Project, including by informing subsequent investigation programs to support that planning and design. The 2024-2026 Proposed Geotechnical Activities are to be completed on properties with landowner approval or, if necessary, through court ordered entry. Wherever possible, DWR seeks landowners’ approval for

entry, via voluntary temporary entry agreements. Under these agreements, work will be conducted consistent with on-going landowner operations; landowners will be compensated as appropriate. Alternatively, where it is not possible to reach an agreement and it is necessary for DWR to enter onto a landowner's property, DWR files petitions for court-ordered entry. If the court grants the petitions (which would occur after each person who claimed an interest was given a due process opportunity to be heard on all issues), field investigations would occur in a manner consistent with the court's order.

Step 3 - Consistency with the Delta Plan

DELTA PLAN CHAPTER 2

[G P1/Cal. Code Regs., tit. 23, § 5002](#) - Detailed Findings to Establish Consistency with the Delta Plan.

G P1/Cal. Code Regs., tit. 23, § 5002 identifies what must be addressed in a certification of consistency filed by a State or local public agency with regard to any covered action and 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.

A certification of consistency must include detailed findings that address each of the regulatory policies identified in Cal. Code Regs., tit. 23, §§ 5002-5013 and listed on this Form that is implicated by the covered action.

As outlined in Cal. Code Regs., tit. 23, § 5002 (b)(1), 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:

a. [G P1\(b\)\(1\)/Cal. Code Regs., tit. 23, § 5002, subd. \(b\)\(1\)](#) - Coequal Goals

As outlined in **Cal. Code Regs., tit. 23, § 5002 (b)(1)**, 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.

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

Yes, Inconsistent

Answer Justification:

Please see the attached letter with exhibits. Appellants contend: (1) additional California Environmental Quality Act (CEQA) review is required to address new information of substantial importance regarding the 2024-2026 Proposed Geotechnical Activities (Activities) that are the purported "covered action" for which a certification of consistency has been submitted (Letter, III.); (2) the certification of consistency is improper and must be rejected because the Activities do not constitute a "covered action" within the meaning of the Delta Reform Act (Letter, IV.A.); and (3) the Activities are inconsistent with Delta Plan policies and

recommendations and will have significant adverse impacts on the Delta Plan's coequal goals (Letter, IV.B.1.) – specifically, Appellants argue DWR has failed to show there is a “covered action” (Letter, IV.B.1.a.) and DWR has not demonstrated that the Activities are consistent with Delta Plan policies or coequal goals in Policy G P1, subdivisions (a) and (b) (Letter, IV.B.1.b.). The Certification is further inconsistent with Delta Plan recommendation DP R9 because it would have an adverse impact on agritourism (Letter, IV.B.3.) and Delta Plan recommendation WQ R2 because the Activities will likely have a significant adverse impact on groundwater quality during drilling (Letter, IV.B.4.). [11072024 Cert of Consistency Geotech Appeal \(00188963-2xD2C75\).pdf](#)

a. [G P1\(b\)\(2\)/Cal. Code Regs., tit. 23, § 5002, subd. \(b\)\(2\)](#) - Mitigation Measures

G P1(b)(2)/Cal. Code Regs., tit. 23, § 5002, subd. (b)(2) provides that covered actions not exempt from CEQA, must include all applicable feasible mitigation measures adopted and incorporated into the Delta Plan as amended April 26, 2018, (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. For more information, see Cal. Code Regs., tit. 23, § 5002, and Delta Plan Appendix O, Mitigation Monitoring and Reporting Program, which are referenced in this regulatory policy.

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

Yes, Inconsistent

Answer Justification:

Please see the attached letter with exhibits. Appellants contend: (1) additional California Environmental Quality Act (CEQA) review is required to address new information of substantial importance regarding the 2024-2026 Proposed Geotechnical Activities (Activities) that are the purported "covered action" for which a certification of consistency has been submitted (Letter, III.); (2) the certification of consistency is improper and must be rejected because the Activities do not constitute a “covered action” within the meaning of the Delta Reform Act (Letter, IV.A.); and (3) the Activities are inconsistent with Delta Plan policies pertaining to mitigation measures - specifically, DWR has not demonstrated that the Activities include all applicable feasible mitigation measures that have been adopted in the Delta Plan in accordance with Policy G P1, subdivision (b)(2) (Letter, IV.B.1.c.); DWR has not demonstrated that environmental analysis and mitigation measures for the Activities are adequate (Letter, IV.B.1.d.); DWR has not demonstrated that the Activities include Delta Plan Mitigation Measures 7-1 and 7-2, or any substitute measures required to protect agricultural land uses (Letter, IV.B.1.e.); and DWR has not demonstrated that the Activities include Delta Plan mitigation measure 4-2 or any substitute measure required to avoid sensitive habitat (Letter, IV.B.1.f.). [11072024 Cert of Consistency Geotech Appeal \(00188963-2xD2C75\).pdf](#)

b. [G P1\(b\)\(3\)/Cal. Code Regs., tit. 23, § 5002, subd. \(b\)\(3\)](#) - Best Available Science

G P1(b)(3)/Cal. Code Regs., tit. 23, § 5002, subd. (b)(3) provides that, relevant to the purpose and nature of the project, all covered actions must document use of best available science. For more information, see [Appendix 1A](#), which is referenced in this regulatory policy.

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

Yes, Inconsistent

Answer Justification:

Please see the attached letter with exhibits. Appellants contend: (1) additional California Environmental Quality Act (CEQA) review is required to address new information of substantial importance regarding the 2024-2026 Proposed Geotechnical Activities (Activities) that are the purported "covered action" for which a certification of consistency has been submitted (Letter, III.); (2) the certification of consistency is improper and must be rejected because the Activities do not constitute a "covered action" within the meaning of the Delta Reform Act (Letter, IV.A.); and (3) DWR failed to demonstrate the Activities use best available science (BAS) – specifically, DWR has not provided adequate documentation that BAS has been or will be used when planning and conducting the Activities (Letter, IV.B.1.g.); DWR does not apply the Delta Plan's six criteria when determining whether BAS has been used (Letter, IV.B.1.h.); DWR does not adhere to the Delta Plan's steps (nor does it obtain peer review) when determining whether BAS has been used (Letter, IV.B.1.i.); and DWR ignores the scope of impacts relating to the Activities because it does not use BAS (Letter, IV.B.1.j.). [11072024 Cert of Consistency Geotech Appeal \(00188963-2xD2C75\).pdf](#)

DELTA PLAN CHAPTER 5

[DP P2 / Cal. Code Regs., tit. 23, § 5011](#) - Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats

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

Yes, Inconsistent

Answer Justification:

Please see the attached letter with exhibits. Appellants contend: (1) additional California Environmental Quality Act (CEQA) review is required to address new information of substantial importance regarding the 2024-2026 Proposed Geotechnical Activities (Activities) that are the purported "covered action" for which a certification of consistency has been submitted (Letter, III.); (2) the certification of consistency is improper and must be rejected because the Activities do not constitute a "covered action" within the meaning of the Delta Reform Act (Letter, IV.A.); and (3) the Activities are inconsistent with Delta Plan Policy DP P2 because, among other things, the Activities conflict with agricultural land uses and Sacramento Area Sewer District's Harvest Water program (Letter IV.B.2.). [11072024 Cert of Consistency Geotech Appeal \(00188963-2xD2C75\).pdf](#)

11/07/2024