

Appeal of Certification of Consistency

FILED

Date:11/7/2024

C20242-A1

Step 1 - Appellant(s) Information

Appellant Representing: San Francisco Baykeeper, 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, and Restore the Delta

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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

Address: 1516 9th Street, 2nd floor

City, State, Zip: Sacramento, CA 95814

Telephone/Fax: (866) 924-9955

E-mail Address: 2024_2026_geotechcert@water.ca.gov

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 appeal letter. DWR has failed to provide a consistency determination of the entire covered action--the Delta Conveyance Project--and there is no evidence that the Delta Conveyance Project is consistent with the Delta Plan. Also attached is a copy of Delta Stewardship Council. 2024. Tribal and Environmental Justice Issues in the Sacramento-San Joaquin Delta: History and Perspectives. [2024.11.07 C20242 Consistency Determination Appeal.pdf](#), [2024-08-29-dsc-tribal-ej-issue-paper-public-review-draft-2.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:

See the attached appeal letter. DWR has provided no evidence the mitigation measures described in the FEIR will mitigate, avoid, or minimize the harms from the DCP. 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. The mitigation measures described in the FEIR and undertaken by DWR are fundamentally flawed and inadequate especially with respect to tribal cultural resources. [2024.11.07 C20242 Consistency Determination Appeal.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:

See the attached appeal letter. DWR has failed to provide evidence that the DCP is consistent with this policy. [2024.11.07 C20242 Consistency Determination Appeal.pdf](#)

c. [G P1\(b\)\(4\)/Cal. Code Regs., tit. 23, § 5002, subd. \(b\)\(4\)](#) - **Adaptive Management**

G P1(b)(4)/Cal. Code Regs., tit. 23, § 5002, subd. (b)(4) provides that an ecosystem restoration or water management covered action must include adequate provisions, appropriate to its scope, to assure continued implementation of adaptive management. For more information, see [Appendix 1B](#), which is referenced in this regulatory policy. Note that this requirement may be satisfied through both of the following:

(A) An adaptive management plan that describes the approach to be taken consistent with the adaptive management framework in Appendix 1B; and

(B) Documentation of access to adequate resources and delineated authority by the entity responsible for the implementation of the proposed adaptive management process.

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

Yes, Inconsistent

Answer Justification:

See the attached appeal letter. DWR has failed to provide evidence that the DCP is

consistent with this policy. [2024.11.07 C20242 Consistency Determination Appeal.pdf](#)

DELTA PLAN CHAPTER 3

[WR P1 / Cal. Code Regs., tit. 23, § 5003](#) - Reduce Reliance on the Delta through Improved Regional Water Self-Reliance

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

Yes, Inconsistent

Answer Justification:

See the attached appeal letter. The Delta Conveyance Project is not designed to and will not reduce reliance on the Delta as a water supply source. DWR has failed to provide evidence that the DCP is consistent with this policy. [2024.11.07 C20242 Consistency Determination Appeal.pdf](#)

[WR P2 / Cal. Code Regs., tit. 23, § 5004](#) - Transparency in Water Contracting

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

Yes, Inconsistent

Answer Justification:

See the attached appeal letter. DWR has failed to provide evidence that the DCP is consistent with this policy. [2024.11.07 C20242 Consistency Determination Appeal.pdf](#)

DELTA PLAN CHAPTER 4

[Cal. Code Regs., tit. 23, § 5002, subd. \(c\)](#) - Conservation Measure

Cal. Code Regs., tit. 23, § 5002, subd. (c) provides that 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 portion of the regulatory policy?

Yes, Inconsistent

Is a statement confirming the nature of the conservation measure from the California Department of Fish and Wildlife available?

Yes, Inconsistent

Answer Justification:

[2024.11.07 C20242 Consistency Determination Appeal.pdf](#)

[ER P1 / Cal. Code Regs., tit. 23, § 5005](#) - Delta Flow Objectives

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

Yes, Inconsistent

Answer Justification:

See the attached appeal letter. DWR has failed to provide evidence that the DCP is consistent with this policy. [2024.11.07 C20242 Consistency Determination Appeal.pdf](#)

[ER P2 / Cal. Code Regs., tit. 23, § 5006](#) - Restore Habitats at Appropriate Elevations

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

Yes, Inconsistent

Answer Justification:

See the attached appeal letter. DWR has failed to provide evidence that the DCP is consistent with this policy. [2024.11.07 C20242 Consistency Determination Appeal.pdf](#)

[ER P3 / Cal. Code Regs., tit. 23, § 5007](#) - **Protect Opportunities to Restore Habitat**

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

Yes, Inconsistent

Answer Justification:

See the attached appeal letter. DWR has failed to provide evidence that the DCP is consistent with this policy. [2024.11.07 C20242 Consistency Determination Appeal.pdf](#)

[ER P4 / Cal. Code Regs., tit. 23, § 5008](#) - **Expand Floodplains and Riparian Habitats in Levee Projects**

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

Yes, Inconsistent

Answer Justification:

See the attached appeal letter. DWR has failed to provide evidence that the DCP is consistent with this policy. [2024.11.07 C20242 Consistency Determination Appeal.pdf](#)

[ER P5 / Cal. Code Regs., tit. 23, § 5009](#) - **Avoid Introductions of and Habitat for Invasive Nonnative Species**

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

Yes, Inconsistent

Answer Justification:

See the attached appeal letter. DWR has failed to provide evidence that the DCP is consistent with this policy. [2024.11.07 C20242 Consistency Determination Appeal.pdf](#)

DELTA PLAN CHAPTER 5

[DP P1 / Cal. Code Regs., tit. 23, § 5010](#) - **Locate New Urban Development Wisely**

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

Yes, Inconsistent

Answer Justification:

See the attached appeal letter. DWR has failed to provide evidence that the DCP is consistent with this policy. [2024.11.07 C20242 Consistency Determination Appeal.pdf](#)

[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:

See the attached appeal letter. DWR has failed to provide evidence that the DCP is consistent with this policy. [2024.11.07 C20242 Consistency Determination Appeal.pdf](#)

DELTA PLAN CHAPTER 7

[RR P1 / Cal. Code Regs., tit. 23, § 5012](#) - **Prioritization of State Investments in Delta Levees and Risk Reduction**

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

Yes, Inconsistent

Answer Justification:

See the attached appeal letter. DWR has failed to provide evidence that the DCP is consistent with this policy. [2024.11.07 C20242 Consistency Determination Appeal.pdf](#)

[RR P2 / Cal. Code Regs., tit. 23, § 5013](#) - **Require Flood Protection for Residential Development in Rural Areas**

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

Yes, Inconsistent

Answer Justification:

See the attached appeal letter. DWR has failed to provide evidence that the DCP is consistent with this policy. [2024.11.07 C20242 Consistency Determination Appeal.pdf](#)

[RR P3 / Cal. Code Regs., tit. 23, § 5014](#) - **Protect Floodways**

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

Yes, Inconsistent

Answer Justification:

See the attached appeal letter. DWR has failed to provide evidence that the DCP is consistent with this policy. [2024.11.07 C20242 Consistency Determination Appeal.pdf](#)

[RR P4 / Cal. Code Regs., tit. 23, § 5015](#) - **Floodplain Protection**

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

Yes, Inconsistent

Answer Justification:

See the attached appeal letter. DWR has failed to provide evidence that the DCP is consistent with this policy. [2024.11.07 C20242 Consistency Determination Appeal.pdf](#)

11/07/2024