

Appeal of Certification of Consistency

FILED

Date: 11/7/2024

C20242-A2

Step 1 - Appellant(s) Information

Appellant Representing: South Delta Water Agency
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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
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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

Covered Action Description: 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:

See attached Memorandum. [SDWA Memo in Support of its Appeal of DWR's Certification of Consistency for its 2024-2026 Geotechnical Activities__Nov 7, 2024.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 attached Memorandum. [SDWA Memo in Support of its Appeal of DWR's Certification of Consistency for its 2024-2026 Geotechnical Activities__ Nov 7, 2024.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:

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DELTA PLAN CHAPTER 4

[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 attached Memorandum. [SDWA Memo in Support of its Appeal of DWR's Certification of Consistency for its 2024-2026 Geotechnical Activities__ Nov 7, 2024.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:

See attached Memorandum. [SDWA Memo in Support of its Appeal of DWR's Certification of Consistency for its 2024-2026 Geotechnical Activities__ Nov 7, 2024.pdf](#)

11/07/2024