

DECISION NO. D20242
STATE OF CALIFORNIA
DELTA STEWARDSHIP COUNCIL

San Francisco Baykeeper, Winnemem Wintu, Shingle Springs Band of Miwok Indians, Cal. 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

South Delta Water Agency

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

County of San Joaquin, Central Delta Water Agency, and Local Agencies of the North Delta

Appellants,

v.

California Department of Water Resources,

Respondent,

(Appeal Nos. C20242-A1, C20242-A2, C20242-A3, C20242-A4)

In the Matter of the Department of Water Resources' Certification of Consistency for 2024-2026 Proposed Geotechnical Activities

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BEFORE: Julie Lee, Chair; Gayle Miller, Vice-Chair; Diane Burgis; Frank C. Damrell, Jr.; Ben Hueso; Maria Mehranian; Daniel Zingale.

DECISION NO. D20242**DECISION**

On December 19, 2024, the Delta Stewardship Council (Council) conducted a hearing on four appeals challenging the Department of Water Resources' (Department) Certification of Consistency Number C20242 (Certification) for 2024-2026 Proposed Geotechnical Activities (Proposed Geotech). The Council, acting pursuant to the authority vested in it by California Water Code sections 85225, et seq., having taken the appeals under submission, and after careful consideration of the certification, appeals, record, party arguments and submissions, finds that the Proposed Geotech fails to meet the requirements for a covered action under Water Code section 85057.5(a)(3) and Title 23, California Code of Regulation, section 5001, subd. (k)(1)(E). When the Council determines on the appeal of a certification of consistency that the proposed action is not a covered action, the Council's review authority at that point ends, and no further findings are made.¹ Accordingly, the Council hereby dismisses the appeals for lack of jurisdiction. Because the Council has reviewed the Proposed Geotech and determined that it is not a covered action subject to a Delta Plan policy, the Department of Water Resources need not resubmit the Proposed Geotech to the Council as part of the certification of consistency for the related Delta Conveyance Project.

SUMMARY OF FINDINGS

The Department submitted a Certification for a small subset of geotechnical activities described in the Department's California Environmental Quality Act (CEQA) Final Environment Impact Report (EIR) for the Delta Conveyance Project.² The Certification describes the Proposed Geotech as independent data collection activity necessary to inform the planning and design of the Delta Conveyance Project. (Certification, p. 1-1.) The Department explains that it will submit a subsequent certification of consistency for the Delta Conveyance Project based in part on the data collected. (*Ibid.*, pp. 1-1 – 1-3.) Appellants each contend that all the activities described in the Final EIR for the Delta Conveyance Project constitute one covered action that must be submitted together in a single certification of consistency. Appellants point to regulations and case law under CEQA to argue that the Department cannot "chop the Delta Conveyance Project into bite-sized pieces and certify the pieces in complete isolation from the rest of the pieces." (Letter Attached to SDWA Appeal of Certification, p.1.) Appellants further argue that the Proposed Geotech is not a covered action and that the Council must reject the Certification. (Letter Attached to County of Sacramento et al.'s Appeal of Certification p.7.)

¹ Council has the authority to hear and decide appeals of certifications of consistency. This authority necessarily includes the power to determine on the appeal of a certification of consistency whether a proposed action that is the subject of a certification of consistency is a covered action in the first instance. (Wat. Code § 85225.20 [Council can determine whether issues raised on appeal are within the Council's jurisdiction or do not raise an appealable issue.]

² The Delta Conveyance Project is a large and complex infrastructure project that will add two new water intakes in the north Delta along the Sacramento River and convey water through an underground tunnel to a new pumping plant that will lift the water into the existing Bethany Reservoir south of the Delta. (Certification, p. 1-2.)

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Thus, there are two threshold issues raised in the appeals that concern the Council's authority and appellate jurisdiction. The first issue is whether CEQA case law and Guidelines govern certifications of consistency and prohibit the Department from submitting a separate certification of consistency for the Proposed Geotech. The second and more critical issue is whether the Proposed Geotech is a covered action, in the first instance.

As to the first issue, the Council finds that the Department did not necessarily violate the Delta Reform Act by submitting a certification of consistency for the Proposed Geotech separate from other activities described in the Final EIR for the Delta Conveyance Project. CEQA is a separate process under a different statutory scheme that is regulated by another state agency. CEQA does not govern the certification of consistency process under the Delta Reform Act, except to the extent it is specifically incorporated by Council regulations. Council regulations do not prohibit the Department from submitting a separate certification of consistency for preliminary data collection activity included in a Final EIR for a project, so long as the Department's decision is reasonable and in good faith as required by section 5001, subdivision (k)(3), of Title 23 of the California Code of Regulations and does not otherwise violate the Delta Reform Act or Council regulations. Here, the Council need not determine whether the Department acted reasonably in submitting the Certification for the Proposed Geotech, if the Council finds that it is not a covered action subject to the Council's appellate authority.³ There is no Delta Plan policy harm in separating the Proposed Geotech from the Delta Conveyance Project where the Council finds that the Proposed Geotech is not a covered action. The Proposed Geotech does not affect whether the Delta Conveyance Project is covered by a Delta Plan regulatory policy.

With respect to the second issue, the Council relies on a two-part test to determine whether an activity is a covered action. (Cal. Code Regs, tit. 23, § 5001, subd. (ee).) The Council first determines whether the activity is a "proposed action" as defined by section 5001, subdivision (ee), of Title 23 of the California Code of Regulations. The Council then determines whether the proposed action is covered by a Delta Plan regulatory policy. Having applied this two-part test, the Council finds that the Proposed Geotech is a "proposed action," but that it is not covered by a Delta Plan regulatory policy and therefore not a covered action. The specific findings are discussed in more detail below.

The Council therefore agrees with the Appellants that the Proposed Geotech is not a covered action. (Letter Attached to County of Sacramento et al.'s Appeal of Certification, pp. 7-8.) However, the Council does not reject or approve certifications. We do not exercise direct review and approval authority over certifications of consistency. (*Delta Stewardship Council Cases* (2020) 48 Cal.App.5th 1014, 1042.) Rather, the Council serves as an "appellate body" for a public agency's determinations of consistency. (*Ibid.*) The Council can either deny appeals or remand the matter to the

³ The Council presumes that the Department acted in good faith in performing its official duty with respect to its determination. (Cal. Evid. Code § 664; see also *Crowe v. Boyle* (1920) 184 Cal. 117, 127 [all presumptions of law in favor of the good faith of public officials.])

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public agency for reconsideration on a finding that the certification of consistency is not supported by substantial evidence in the record. (Wat. Code § 85225.25.) The Council may also dismiss appeals on specific grounds, including a lack of jurisdiction. (Wat. Code § 85225.20.) Whereas here the Council determines that a proposed action is not a covered action in the first instance, the appeals are dismissed for lack of jurisdiction and the Council makes no further findings. (Wat. Code § 85225.20; Cal. Code Regs, tit. 23, § 5034, subd. (d).) Accordingly, the appeals are dismissed.

This decision does not make any findings with respect to the Delta Conveyance Project (nor geotechnical activities that are not the subject of the Certification) and does not constitute approval or rejection of that project. Except as expressly provided herein, the Department must file a certification of consistency for the Delta Conveyance Project.

A. PROCEDURAL HISTORY**1. Certification of Consistency**

The Department submitted its Certification for the Proposed Geotech on October 8, 2024. The Department states that this is not a certification of consistency for the Delta Conveyance Project and that the proposed activity as described only concerns data collection, independent of the implementation of the Delta Conveyance Project. (Certification, pp. 3-1 – 3-2.)

2. Brief Description of the Covered Action

In the Certification, the Department describes the Proposed Geotech as subsurface exploration and testing consisting of: 1) “Borings with small diameter (less than 8-inch diameter) augur and/or mud rotary drill and soil and rock sampling”; 2) “CPTs [cone penetration tests] 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.” (Certification p. 3-16.) Workspace at each site, not including staging areas, is expected to be approximately 0.022 acres, or 10 feet by 100 feet. (*Ibid.*) The Proposed Geotech will consist of up to 261 soil borings, which include 31 soil borings with water quality tests, and up to 15 CPTs. (*Ibid.*) Individual soil boring activity 250 feet deep can take an average of 9 working days (maximum 11 working days). (*Ibid.*) Borings less than 50 feet will take a maximum of 2 working days. (*Ibid.*) The CPTs take an average of 2 days to complete, up to a maximum of 4 days. (Certification, p. 3-17.) Once the boring, cone penetration tests and water quality tests are complete, the holes will be sealed using cement-bentonite grout in accordance with State of California Regulations and industry standards. (Certification, pp. 3-16 – 3-17.) The Proposed Geotech work will take place in parts of Sacramento, San Joaquin, Contra Costa, and Alameda Counties from north of the town of Hood to Bethany Reservoir in the south. (Certification, p. 3-1; see Figure 1, below.)

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The Proposed Geotech does not include other geotechnical activities described in the Final EIR for the Delta Conveyance Project, such as 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.⁴ (Certification, p. 3-16.)

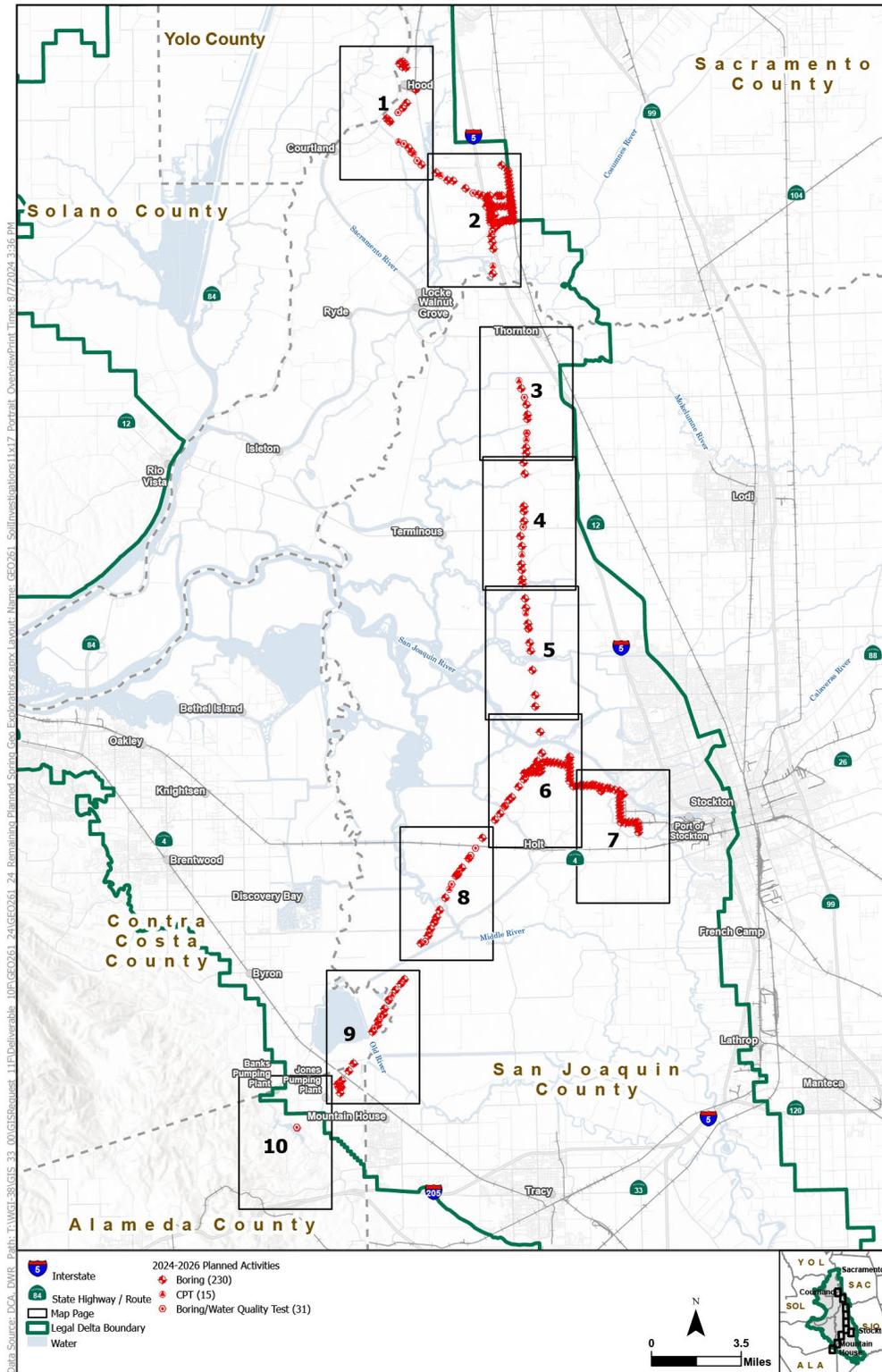
According to the Certification, the Proposed Geotech is “expected to yield important data about soil properties and water quality” that will inform planning and design of the Delta Conveyance Project. (Certification, p. 1-1.) The Certification states the data collected from these borings will provide information that will refine the layout and configuration of DCP plans, and support applications and requests to other agencies for permits, authorizations, or conditional approvals. (Certification, p. 3-13.)

Soil and rock samples obtained from soil borings and soil data from CPTs will be analyzed to determine the engineering properties of the soil and rock to validate and, if needed, to determine modifications to the conceptual design and layout of Delta Conveyance Project features. Soil and water quality tests will be conducted to assess the potential for the presence of high concentrations of metals, organic compounds, dissolved gasses, or other constituents that may be designated as hazardous; this assessment will help determine whether such constituents can be avoided and otherwise ensure that Delta Conveyance Project features and infrastructure are designed, planned, and constructed to allow for required treatment or disposal methods in consideration of the constituents identified.

(Certification, p. 3-13.) The Certification states that the geotechnical data collected will inform the substantial evidence supporting the future certification of consistency for the Delta Conveyance Project. (Certification, p. 3-14.)

⁴ These other geotechnical activities are not part of the proposed activity for this Certification and are therefore not the subject of the Council’s decision. These activities may or may not be a covered action. Absent a specific finding or determination that the activities are not a covered action or the filing of a certification of consistency (subject to appeal), DWR may not move forward with implementing these activities.

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Data Source: DCA, DWR, Path: T:\WG1\38\GIS\33_00\GISRequest_1\FI\Deliverable_HR\GE0261_24\Remaining Planned Spino Geo Explorations.mxd Layout: Name: GE0261_50\Investigations1\1x17 Portrait: Overview/Print Time: 8/7/2024 3:36 PM

Investigation Locations
Figure 1. 2024-2026 Proposed Geotechnical Activities Mapbook

DECISION NO. D20242**3. The Department’s Consistency Determination**

In the Certification, the Department makes the following determinations:

1. The Proposed Geotech meets the definition of project per Public Resources Code section 21065 because it is being undertaken by a public agency and has a potential for resulting in either a direct change in the environment or a reasonably foreseeable indirect physical change in the environment. (Certification, p. 4-1.)
2. The Proposed Geotech will occur within the boundaries of the Delta, and therefore “will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.” (Certification, p. 4-1.)
3. The Proposed Geotech “will be carried out, approved, or funded by the State or a local public agency.” The Department, a state agency, is the proponent of the proposed action. (Certification, p. 4-1.)
4. The Proposed Geotech “which involve only temporary activities at discrete locations to test soil and water quality conditions, would have no impact (and therefore would not have the potential to result in a significant impact) on the achievement of one or both of the coequal goals or on the implementation of a government-sponsored flood control program.” (Certification, p. 4-2.)
5. The Proposed Geotech is “not covered by one or more regulatory *Delta Plan* policies contained in Article 3 of the [Council’s] regulations codified at California Code of Regulations, Title 23, Sections 5003–5015.” (*Ibid.*)

The Certification states that because the Proposed Geotech will have no impact on the achievement of the coequal goals or on the implementation of a government-sponsored flood control program and is not covered by one or more of the regulatory policies in Article 3, “an assessment of consistency” with policy G P1 (23. Cal. Code Regs., tit. 23, § 5002) is not required. (Certification, p. 4-20; see *also* Cal. Code Regs, tit. 23, § 5002.) Nevertheless, the Certification includes detailed findings with respect to G P1 sub-policies and concludes that the Proposed Geotech is consistent with G P1. (Certification, p. 4-20.)

4. Appeals

On November 7, 2024, the Council received four timely appeals⁵ of the Proposed Geotech Certification from the following entities (collectively referred to as Appellants):

⁵ Any person who claims that a proposed covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, the action will have a significant adverse impact on the achievement of one or both of the coequal goals or implementation of government-sponsored flood control programs, may file an appeal of the certification of consistency. (Wat. Code, § 85225.10, subd. (a); Cal. Code Regs, tit. 23, § 5022, subd. (a).) An appeal must clearly and specifically set forth the basis for the claim that the covered action is inconsistent with the Delta Plan. (Wat. Code, § 85225.10, subd. (b); Cal. Code Regs, tit. 23, § 5022, subd. (c).) Specifically, an appeal must include a statement of the factual allegations upon which

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- 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 (SF Baykeeper)
- South Delta Water Agency (SDWA)
- County of Sacramento, Sacramento County Water Agency, Sacramento Area Sewer District, and City of Stockton (County of Sacramento)
- County of San Joaquin, Central Delta Water Agency, and Local Agencies of the North Delta (County of San Joaquin)

The Council consolidated the appeals pursuant to California Code of Regulations, Title 23, section 5031. The Council issued a notice of hearing and briefing schedule for written submissions on November 14, 2024. Appellants submitted additional briefs supporting their respective appeals on November 27, 2024, along with requests to supplement the record with additional information. The Delta Protection Commission also submitted a letter brief on November 27, 2024, pursuant to California Code of Regulations, title 23, section 5028.⁶ The Department submitted its response brief on December 13, 2024, along with its own request to supplement the record. The Council held a hearing on the appeals on December 19, 2024. The parties duly appeared at the hearing and presented their case to the Council.

The following is a brief summary of relevant issues raised in each appeal:

the appeal is based, a list of the specific Delta Plan policies that the appellant alleges the proposed covered action is inconsistent with, and for each challenged policy a concise statement of the authority, evidence, and arguments relied on to support the appellant's claim that the proposed covered action is inconsistent with the Delta Plan policy, and how the claimed inconsistency will have a significant adverse impact on one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people and property in the Delta. (*Ibid.*) The Council may dismiss an appeal that fails to comply with these requirements. (Wat. Code § 85225.10, subd. (c).) Parties have 30 days from the submission of the certification of consistency to file an appeal with the Council. (Wat. Code, § 85225.15.) The Council provided a briefing schedule and specific deadlines for written submissions by the appellants. Given that the Council has determined the Proposed Geotech is not a covered action, the Council does not address the sufficiency of the appeals presented. The Council strongly encourages future appellants to carefully comply with the regulations governing appeals of certifications of consistency, to avoid a procedural dismissal. (See Cal Code Regs., tit. 23, §§ 5020-5035.)

⁶ The Council considers comments of the Delta Protection Commission (Commission) *with respect to issues raised in an appeal* and whether the certification of consistency is supported by substantial evidence in the record. (Cal. Code Regs, tit. 23, § 5028, subd. (a)(1).) The Council considers the Commission's comments as those of an agency with expertise in matters that may affect the unique cultural, recreational, and agricultural values of the Delta ("Delta as place"), when preparing, considering, and adopting its findings. (Cal. Code Regs, tit. 23, § 5028, subd. (b).) The Commission's comment role is not that of a party, and it may not raise new issues or present legal arguments. To the extent the Commission did not address specific issues raised by an appellant concerning Delta as place, the Commission's comments are not considered.

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SF Baykeeper⁷ alleges in relevant part that the Certification is inconsistent with every Delta Plan regulatory policy.⁸ (See SF Baykeeper Appeal, No. C20242-A1.) However, the basis for this contention is that the Certification fails to analyze the whole of the Delta Conveyance Project, which SF Baykeeper contends should be the covered action. (*Ibid.*) SF Baykeeper claims that DWR “arbitrarily reviewed only a portion of the covered action” and “failed to provide evidence that could support a reasonable determination that the proposed Tunnel project is consistent with the Delta Reform Act.”⁹ (*Ibid.*, p. 2.) In effect, SF Baykeeper contends the project described in a CEQA Final EIR is necessarily the covered action that must be certified as one project to the Council. Appellant relies on CEQA regulations and case law. Notably the appeal does not allege that any of the Delta Plan regulatory policies are applicable to the Proposed Geotech described in the Certification and does not set forth the basis for why the Proposed Geotech is inconsistent with a specific regulatory policy, nor explains how that claimed inconsistency will have a significant adverse impact on one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people and property in the Delta.

SDWA alleges that the entirety of the Delta Conveyance Project as described in the Final EIR must be certified together in one certification. (Letter Attached to SDWA Appeal of Certification p. 1.) Similar to SF Baykeeper, SDWA relies on CEQA regulations and case law. SDWA points out that under CEQA, “project” means the whole of an action. (*Ibid.*, p. 2.) SDWA further alleges that a covered action cannot be “piecemealed”, because “[i]f a project proponent could subdivide a covered action into as many bite-sized pieces as it desired, there would never be an assessment of the cumulative effect from all of the pieces together on the co-equal (sic) goals and the Delta Plan’s policies.” (*Ibid.*, p. 4.) SDWA challenges the consistency determination with respect to Delta Plan regulatory policies ER P5 and DP P2. (*Ibid.*, pp. 6-12.) SDWA also challenges consistency with policy GP 1. However, as further explained below, G P1 is a general policy that only applies to covered actions and governs the requirements for a certification of consistency. G P1 does not apply if none of the Article 3 policies (Cal. Code Regs., tit. 23, §§ 5003 through 5015) cover the proposed action. (Cal.Code Regs, tit. 23, § 5002, subd. (a).)

County of Sacramento contends that the Certification is improper and should be rejected because the Proposed Geotech activities as described is not a covered action. (County of Sacramento et al.’s Appeal Letter p. 5.) The appeal states that because the Department claims that the Proposed Geotech would not impact the achievement of

⁷ For ease of reference, the Council will refer to the lead appellant for each appellant group.

⁸ SF Baykeeper contends that any consistency determination must evaluate specific environmental justice and tribal interests prior to any approval from the Council. However, Baykeeper also recognizes that existing Delta Plan regulatory policies do not cover the specific considerations raised. As explained in this decision, the Council does not approve certifications. The Council has publicly released a draft Tribal and Environmental Justice Issues Report for public comment that contains multiple recommendations.

⁹A public agency is required to certify consistency *with the Delta Plan’s regulatory policies*, not the Delta Reform Act generally nor the coequal goals. (Wat. Code § 85225.)

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one or both of the coequal goals or a government-sponsored flood control program it cannot comprise a covered action. (*Ibid.*, p. 7.) Accordingly, County of Sacramento requests that the Council reject the Certification. Like the other Appellants, County of Sacramento also claims that the Proposed Geotech is not a separate project from the Delta Conveyance Project. (*Ibid.*, pp. 5-6.) County of Sacramento asserts that the covered action must be the project as described under CEQA. (*Ibid.*) Without conceding that the Proposed Geotech is not a covered action, County of Sacramento claims that the Proposed Geotech is inconsistent with Delta Plan regulatory policies G P1 (including mitigation measures and best available science requirements) and DP P2, as well as Delta Plan Recommendations DP R9 and WQ R2.¹⁰

County of San Joaquin claims that the Council lacks jurisdiction to consider the Proposed Geotech. (Letter Attached to County of San Joaquin et al.'s Appeal of Certification, "Introduction & Procedural Matters," p.4.) Appellant alleges that CEQA piecemealing and case law govern covered actions, so that the Proposed Geotech should be reviewed in one CEQA document and one covered action. (*Ibid.*, pp. 4-6.) San Joaquin further alleges that the Department's mitigation measures are inadequate and inconsistent with G P1, subd. (b)(2), requirements. (County of San Joaquin et al.'s Appeal Letter, "GP 1(b)(2) Mitigations Measures," p. 1.) Appellant also claims that Delta Plan Regulatory Policy DP P2 applies to the Proposed Geotech because the grout for sealing borings is a permanent component and because the purpose of the geotechnical work is to support water management facilities. (County of San Joaquin Appeal Letter, "DP P2, Respect Local Land Use", p.1.) County of San Joaquin contends that the Proposed Geotech is inconsistent with DP P2. (*Ibid.*) Finally, County of San Joaquin objects to alleged ex parte communications to the Council due to purported early consultation activities.¹¹ (County of San Joaquin et al.'s Appeal Letter, "Introduction and Procedural Matters" p. 7.)

5. Administrative Record

The Council's appellate review is limited to the record before the state or local public agency that filed the Certification. (Wat. Code § 85225.25.) The record before the agency is composed of all the documents that the agency relied on or considered in

¹⁰ Delta Plan recommendations are meant to provide guidance to public agencies and are not enforceable Delta Plan regulations. (*Delta Stewardship Council Cases, supra*, 48 Cal.App.5th 1014, 1042 [Delta Plan recommendations are nonregulatory and call out actions essential to achieving the coequal goals, however it is the policies that are regulatory in nature and must be complied with by covered actions.])

¹¹ Council staff engage in early consultation with project agencies prior to the filing of a certification of consistency to assist state and local public agencies in the preparing a certification of consistency per statute pursuant to the Delta Reform Act. (Wat. Code § 85225.5.) The early consultation team is firewalled and separate from staff that assist the Council in appeals of certification of consistency. Moreover, Councilmembers do not participate in early consultation. Here, there has been no early consultation on either the Proposed Geotech or the Delta Conveyance Project once the ex parte communication prohibition went into effect on November 7, 2024, upon the filing of the first appeal. (Cal. Code Regs, tit. 23, § 5024.) Appellants have not presented facts showing a single instance of a prohibited ex parte communication and the Council is unaware of any such violations.

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making its determination, including public comments received concerning the certification or the proposed action's consistency with Delta Plan regulatory policies. No later than five calendar days after the Council posts notice of the appeals received, the certifying agency is required to submit to the Council the record that was before said agency at the time it made its certification and certify the record as "full and complete." (Cal. Code Regs, tit. 23, § 5022, subd. (e)(1).)

The Department certified the administrative record for the Proposed Geotech on November 13, 2024. The Council or its executive officer may supplement the record if the Council or its executive officer determines that additional information was part of the record before the Department but was not included in the record submitted to the Council. (Cal. Code Regs, tit. 23, § 5026.) The Council may also take official notice of any generally accepted technical or scientific matter within the Council's jurisdiction, and of any fact that may be judicially noticed by the courts of this State. (Cal. Code Regs, tit. 23, § 5032.) The parties may request that the Council supplement the record with additional documentation or information that was part of the record before the certifying agency but was not included in the certifying agency's submission to the Council.

The Department and the Appellants have requested that additional documents be added to the record because such documents are either: (a) part of the record before the Department but were not included in the Department's submission to the Council or, (b) generally accepted technical or scientific matter within the Council's jurisdiction.

Here, because the Council finds that the Proposed Geotech is not a covered action subject to the Council's jurisdiction, the Council will not rule on specific requests to supplement the record. The Council has reviewed and considered the record, and all the documents submitted by the parties in making this decision. None of the supplemental information submitted by the parties was material to the Council's determination of whether the Proposed Geotech is a covered action.

B. ANALYSIS**1. Standard of Review**

The Council does not approve or reject certifications of consistency. "Instead, State or local agencies self-certify Delta Plan consistency, and the Council serves as an appellate body for those determinations." (*Delta Stewardship Council Cases*, supra, 48 Cal.App.5th 1014, 1042.) The Delta Plan's regulatory policies are enforced through "the Council's appellate authority and oversight over covered actions." (*Ibid.*)

The Delta Reform Act provides that the appropriate standard of review for the Council is whether an appellant has shown that the certification of consistency is not supported by substantial evidence in the record. (Wat. Code, § 85225.25.) Substantial evidence means evidence that is "reasonable in nature, credible, and of solid value." (*Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335.) It includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (*Cf.* Cal. Code Regs., tit. 14, § 15384.) Speculation or conjecture alone is not substantial evidence. (*California Assn. of Medical Products Suppliers v. Maxwell-Jolly*

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(2011) 199 Cal.App.4th 286, 308.) Under the substantial evidence standard of review, the Council decides whether there is enough relevant information and reasonable inferences so that a fair argument can be made to support the Department's conclusions, even though other conclusions may also be reached. (See Cal. Code Regs., tit. 14, § 15384.)

The Council reviews a certification of consistency to determine whether it is supported by the administrative record, rather than simply reviewing it for error. (*Sierra Club v. California Coastal Comm.* (1993) 19 Cal.App.4th 547, 557.) The entire record will be reviewed, including evidence detracting from the decision. (*Utility Reform Network v. Public Utilities Commission* (2014) 223 Cal.App.4th 945, 959.) However, the Council cannot substitute its own findings or inferences for the Department's. (See *Sierra Club v. California Coastal Comm.* (1993) 19 Cal.App.4th 547, 557.) In most if not all instances, evaluating the certification requires interpretation of Delta Plan regulations. The Council, as drafter and administrator of the Delta Plan and its policy regulations, will interpret the Plan pursuant to its expertise. The Council will consider interpretations that the parties offer but will ultimately arrive at an independent determination reflecting our expertise. (See *Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, 1234.)

In arguing that certain certification findings are not based upon substantial evidence, the appellant carries the burden of demonstrating that the administrative record does not contain sufficient evidence to support the certification's findings. (See *State Water Res. Control Bd. Cases* (2006) 136 Cal.App.4th 674, 749; *Ocean Harbor House v. California Coastal Comm.* (2008) 163 Cal.App.4th 215, 227.) "A recitation of only the part of the evidence that supports the appellant's position is not the demonstration contemplated under the above rule." (*Ibid.* [internal citation and quotation marks omitted].) Thus, if an appellant fails to set forth specific facts showing that a finding is not supported by substantial evidence in the record, its claim must be dismissed. (*Salas v. Cal. Dept. of Transportation* (2011) 198 Cal.App.4th 1058, 1074 [the Council is not required to search the record to ascertain whether it contains support for the appellant's contentions].) The Council may also determine that matters raised on appeal are not within the Council's jurisdiction or do not raise an appealable issue. (Wat. Code, § 85225.20.) Finally, the Council may grant the appeal and remand the matter to the agency if, after examining the entirety of the record, a reasonable person could not have reached the agency's conclusion(s) in its consistency determination. (See *Patterson Flying Serv. v. California Dept. of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 426.)

2. The Council Has the Authority to Determine Whether a Project is a Covered Action When its Appellate Jurisdiction Has Been Invoked

As a threshold matter, the Council must address whether it has the authority to determine whether a proposed action is a covered action in the context of an appeal. It does.

The Delta Reform Act expressly contemplates that the Council may determine whether an appellant has properly invoked its jurisdiction. (See Wat. Code, § 85225.20 [requiring the Council to hold a hearing on an appeal within 60 days unless it "determines that the

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issue raised on appeal is not within [its] jurisdiction or does not raise an appealable issue”).) To properly invoke the Council’s jurisdiction, an appellant must claim that a “proposed *covered action* is inconsistent with the Delta Plan and, as a result of that inconsistency, the action will have a significant adverse impact” on one or both of the coequal goals. (Wat. Code, § 85225.10, subd. (a), italics added.) At the end of the day, the Council need not entertain appeals of certifications of consistency *unless* those appeals challenge covered actions. Moreover, the Council necessarily reviews the applicability of relevant Delta regulatory policies and may reach a different conclusion than the public agency or the appellants.¹² For these reasons, the Delta Reform Act empowers the Council to determine, on appeal, whether certified activity is a covered action.

3. The Council is an Independent Agency with the Power to Regulate Covered Actions

As a foundational matter, the Council is an independent state agency charged with adopting and implementing a legally enforceable Delta Plan.¹³ (*Delta Stewardship Council Cases*, supra, 48 Cal.App.5th 1014, 1038; Wat. Code §§ 85200(a) and 85300(a).) To establish the Delta Plan and achieve the State’s goals and objectives, the Legislature vested in the Council broad authority to adopt appropriate regulations and guidelines. (Cal. Wat. Code § 85210(i); *Delta Stewardship Council Cases*, supra, p. 1052.) As the California Court of Appeal explained in the seminal *Delta Stewardship Council Cases* decision:

This case involves a statutory scheme that identifies a complex problem (sustainable management of the Delta’s resources), sets forth general goals and policy objectives, identifies certain requirements that must be included in a plan adopted by the Council to achieve the goals and objectives, and then broadly empowers the Council to study the problem and to adopt appropriate regulations and guidelines as needed over time for state and local agencies that will achieve the goals and objectives. Given the language in the Act, it is clear to us that the Legislature chose to grant the Council broad authority to apply its expertise in determining how to accomplish the Legislature’s goals and objectives[.]

(*Delta Stewardship Council Cases*, supra, 48 Cal.App.5th 1014, 1052.) The Court of Appeal further expressly recognized the Council’s appellate authority and oversight over covered actions. (*Ibid.*, p. 1042[.]) Consequently, regulatory authority over certifications

¹² For example, the Council could have determined that the Proposed Geotech is a covered action, if the Council disagreed with the Department and found that the activity was covered by a Delta Plan regulatory policy. In that case, the Council would proceed with its appellate review and either remand the covered action or substantively deny the appeals.

¹³ The Council consists of seven voting members. Four members are appointed by the Governor and subject to Senate confirmation, one member is appointed by the Senate Committee on Rules, one member is appointed by the Speaker of the Assembly, and one member is the Chairperson of the Delta Protection Commission. (Wat. Code § 85200(b).) Councilmembers possess diverse expertise and reflect a statewide perspective. (Wat. Code § 85202.)

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of consistency and the covered action process is vested solely within the Council, not another agency.

The California Natural Resources Agency (Resources Agency) and the Governor's Office of Land Use and Climate Innovation (formerly known as the Office of Planning and Research),¹⁴ prepare and develop proposed guidelines for the implementation of CEQA by public agencies, including objectives and criteria for the orderly evaluation of projects and the preparation of environmental impact reports and negative declarations in a manner consistent with CEQA. (Pub. Res. Code § 21083, subd. (a) and subd. (e).) The Public Resources Code does not grant the Natural Resources Agency or the Office of Land Use and Climate Innovation any authority or purview over the Delta Reform Act, certifications of consistency or covered actions. In other words, these agencies do not have the authority to regulate covered actions, the certification of consistency process, the regulatory interpretation of the Delta Reform Act, or any authority over the Council or matters exclusively within the Council's jurisdiction (except to the extent that the Council, like other public agencies, is subject to CEQA compliance for its own projects). The Council's covered action authority is not subordinate to the regulatory authority of another agency.¹⁵

The Appellants point to a preliminary injunction order by the Sacramento Superior Court in litigation concerning the Delta Conveyance Project, to argue that CEQA requires a single certification of consistency for the Delta Conveyance Project. (See Sacramento County Superior Court, Tulare Lake Basin Water Storage District v. Cal. Dept. of Water Resources, Case No. 24WM000006, Ruling on Submitted Matter – Petitioner's Motions for Preliminary Injunction, filed June 20, 2024.) In the portion of the Superior Court's ruling stating that petitioners were likely to succeed on the merits, the court pointed to the Department's Final EIR defining the Conveyance Project as including geotechnical work, and then reasoned that "because the geotechnical work is part of the 'project' within the meaning of CEQA [California Environmental Quality Act; Pub. Resources Code, § 21065], it is necessarily part of a 'covered action' within the meaning of Water Code section 85225." However, that determination is not binding on the Council for several reasons. First, the Council is not a party to that litigation. Second, the ruling is

¹⁴ It is important to note that the California Natural Resources Agency has a role in the adoption of CEQA guidelines, further confirming that the Council's independence would be compromised and Legislative intent (and the language of the Delta Reform Act) contradicted if the Council was to be subject to CEQA guidelines. The California Natural Resources Agency is the parent agency of the Department of Water Resources, the project proponent for many covered actions, including the Delta Conveyance Project, as well as the Proposed Geotech at issue in this appeal. (See Pub. Res. Code § 21083(e) ["The Office of Planning and Research shall develop and prepare the proposed guidelines as soon as possible and shall transmit them immediately to the Secretary of the Resources Agency. The Secretary of the Resources Agency shall certify and adopt the guidelines..."]; see also Pub. Res. Code § 21083(f) ["The Office of Planning and Research shall, at least once every two years, review the guidelines adopted pursuant to this section and shall recommend proposed changes or amendments to the Secretary of the Resources Agency. The Secretary of the Resources Agency shall certify and adopt guidelines, and any amendments thereto, at least once every two years..."].)

¹⁵ The Council may use its broad authority to further regulate in this area in the future as it deems necessary.

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not a judgment; it is by its nature preliminary. Third, the Proposed Geotech as described in the Certification before the Council is a scaled-down version of the activities reviewed by the Court. For example, in the Certification DWR omits extensive test trenches, monuments and other features. Fourth, the Court did not consider or address the Council's Delta Plan regulatory policies, covered action process, or certification of consistency requirements. And, finally, the question of whether under the Delta Reform Act, the Proposed Geotech can be certified separately from the Delta Conveyance Project is not addressed in the ruling. For these reasons, the Court's injunction order does not prevent the Council from independently evaluating whether an agency's description of a project in its CEQA document must always be the same as its description of a project for covered action purposes.

4. The Council's Regulations Solely Govern Certifications of Consistency and Specifically Address Piecemealing Concerns for Covered Actions

Appellants argue that certain concepts set forth in CEQA regulations and case law are implied in the definition of project in the Delta Reform Act.¹⁶ However, as the Court of Appeal explained, “[e]ven a cursory review of the statutory scheme and the record confirms that the Legislature was well aware of existing statutory law governing the management of water resources and enacted the Delta Reform Act in light thereof with the intent of granting the Council broad regulatory authority to achieve the coequal goals” (*Delta Stewardship Council Cases*, supra, 48 Cal.App.5th 1014, 1060; see also *id.* at 1070 [“As we have explained, the Legislature delegated broad authority to the Council to ‘adopt regulations or guidelines as needed to carry out the powers and duties identified in this (Act).’”].) Consequently, as explained in more detail below, the CEQA concept of “piecemealing” does not apply to the certification of consistency process and cannot supersede or displace the Council's regulations. Importantly, where the Delta Reform Act and Council regulations intend to incorporate CEQA provisions, they do so expressly. (In addition to Pub. Res. Code, § 21065, see 23 Cal. Code Regs. tit. 23, § 5001(jj)(1-2) [incorporating three CEQA exemptions], and 23 Cal. Code Regs., tit. 23, § 5001(jj)(4) [incorporating, *but modifying*, a CEQA exemption].) Otherwise incorporating regulations from another agency without a clear grant of authority from the Legislature would be unlawful.

The Delta Reform Act and the Council's regulations focus on specific kinds of activities that a public agency will approve, fund or undertake. Specifically, the Legislature intended that “state and land use actions” that meet the definition of a “covered action”

¹⁶ (*Citing People v. Overstreet* (1986) 42 Cal.3d 891, 897 (“Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes ‘in the light of such decisions as have a direct bearing upon them.’” [Citations.]”) When the Delta Reform Act was adopted in 2009, case law pointed to CEQA regulations in recognizing a “mandate . . . that environmental considerations do not become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences.” (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283–284 [citing former 14 CCR § 15069]; also see *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonoma* (2007) 155 Cal.App.4th 1214, 1222 [citing 14 CCR § 15378 (a)].)

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be consistent with the Delta Plan. (Cal. Wat. Code § 85022(a).) The Delta Reform Act provides that an agency must submit a certification of consistency for a “covered action” prior initiating the implementation of that “covered action.” (Cal. Wat. Code § 85225; see also 23 Cal. Code Regs., tit. 23, § 5034.)

To meet the definition of a covered action, an activity needs to be *not only* a plan, program, or project as defined in section 21065 of the Public Resources Code; it must also meet four additional elements required by the Delta Reform Act, including being “covered” by one or more Delta Plan regulatory policies and having a “significant impact” on one or both of the coequal goals or a specified flood control program. (Cal. Wat. Code § 85057.5(a).) Public Resources Code section 21065 simply states that a “project” is an “activity” that would cause a “direct physical change” or “reasonably foreseeable indirect physical change” in the environment. This is a very low bar and only the first element for what constitutes a covered action. The Delta Reform Act is silent as to whether a “covered action” must be certified together with all related activity in a single certification of consistency. It simply states that a covered action is a certain type of activity that satisfies the criteria set forth in the Delta Reform Act. (Cal. Wat. Code § 85057.5(a).) It is important to note that here, the Department concedes that the Proposed Geotech is a project as defined under Public Resources Code Section 21065. (Certification, p. 4-1.)

While the CEQA process also begins with the same threshold question under Section 21065, compliance with CEQA serves a different purpose and proceeds on a separate track pursuant to the CEQA statutory scheme and Guidelines. On the other hand, covered actions are subject to the Delta Reform Act and the Council’s regulations, with a different compliance requirement: submittal of a certification of consistency. On its own, without reference to the additional requirements for a covered action, the Public Resources Code definition of project covers an extremely broad range of activities without geographical limitation within the State. A covered action may thus only be a subset of activity or multiple activities or sub-projects that constitute a single project for CEQA. For example, a CEQA project may straddle the legally defined Delta and have discrete activities occurring both within and outside those legal boundaries or a CEQA project may include discrete actions not covered by any Delta Plan regulatory policy. The Council has appellate review authority only over those activities that meet all the criteria for a covered action.

Appellants cite CEQA case law and guidelines and contend that “project” means the whole of an action, a concept that governs CEQA project descriptions for CEQA environmental review compliance purposes. While that may be true for CEQA purposes, the Council does not enforce CEQA and does not agree that the CEQA project description necessarily requires a single *certification of consistency*. The Public Resources Code has no bearing on Chapter 3 of the Delta Reform Act, governing *consistency of state and local public agency actions*. (See Wat. Code §§ 85225 et seq.) While a public agency should consider the “whole” of a project when making a covered

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action determination¹⁷, to make sure that all activities have been scrutinized, this does not compel the Council to accept or require a single certification for each CEQA project. It also does not expand the jurisdiction of the Council to activities that do not meet the criteria for a covered action.

The Council is mindful that the concept of piecemealing under CEQA was developed to ensure that projects do not evade CEQA review or diminish the significance of project impacts by segmenting the project into smaller parts. The Council's regulations directly address Appellants' concerns related to piecemealing in another way, specifically: 1) the Council's regulatory "significant impact" definition (Cal. Code Regs., tit. 23, § 5001, subd. (jj)); and 2) the Council's regulatory process that governs an agency determination of whether an activity is a covered action. (Cal. Code Regs., tit. 23, § 5001, subd. (k)(3).)

The Council's regulatory definition of "significant impact," used in the covered action analysis to determine whether there is such an impact to one or more of the coequal goals or a specified state-sponsored flood control program, requires that "the project's incremental effect is considered together with the impacts of other closely related past, present, or reasonably foreseeable future projects." (Cal. Code Regs, tit. 23, § 5001, subd. (jj)). This definition ensures that even if covered activities are phased for certification purposes, they would not evade the Council's "significant impact" threshold. If preliminary planning activities that serve to inform a future project are certified to the Council independently, the "significant impact" of that activity on the coequal goals or a government-sponsored flood control program must include consideration of the impact of the future project. (Cal. Code Regs, tit. 23, § 5001, subd. (jj).)

In addition, the Council's regulations that govern an agency's covered action determination also address concerns raised by Appellants. Pursuant to the Council's regulations, a state or local public agency is responsible in the first instance for determining whether the proposed plan, program or project is a covered action. (Cal. Code Regs., tit. 23, § 5001(k)(3).) That determination must be made in good faith and reasonable. (*Ibid.*) The determination would be an agency decision and a public record subject to judicial review. (*Ibid.*)

Accordingly, CEQA does not govern how a public agency must make a covered action determination and whether it may only ever submit a single certification of consistency based on the CEQA project description. A project may have discrete phases, sub-projects and related activities, or encompass both covered action activities and non-covered action activities. Although in most cases, public agencies will submit a single certification, the Council's regulations have some built-in flexibility for a public agency making a covered action determination to submit more than one certification of consistency, so long as the decision does not violate the Delta Reform Act or Council

¹⁷ A "covered action determination" means the public agency determination with respect to whether activity is a covered action. (Cal. Code Regs, tit. 23, § 5001, subd. (k)(3).) The requirement to make a covered action determination is distinct from the requirement to submit a certification of consistency.

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regulations and is reasonable and made in good faith. The principal concern for the Council is that all activities that trigger a covered action analysis are subject to an agency's covered action determination, and that all covered action activity be certified as consistent with the Delta Plan's regulations. A public agency cannot ignore or evade this requirement.¹⁸ Thus, where a public agency has a project that includes both activities that are a covered action and those that are not, that public agency must review all of the planned activities to determine which activities are a covered action, and which are not. (Cal. Code Regs., tit 23, § 5001, subd.(k)(3). The agency must submit a certification of consistency for those activities that are a covered action. (Wat. Code § 85225.) As, explained below, the Council finds that the Proposed Geotech is not a covered action.

5. Because the Proposed Geotech is Not Covered by an Applicable Delta Plan Policy, it is Not a Covered Action

The Delta Reform Act defines a covered action "as a plan, program, or project as defined pursuant to Public Resources Code 21065 that meets all of the following conditions:

1. Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh.
2. Will be carried out, approved, or funded by the state or a local public agency.
3. Is covered by one or more provisions of the Delta Plan.
4. Will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood programs to reduce risks to people, property, and state interests in the Delta

(Wat. Code § 85057.5, subd. (a).) Public Resources Code section 21065 defines "project" as follows:

"Project" means 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 any of the following:

- (a) An activity directly undertaken by any public agency.
- (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

¹⁸ The Department could never proceed to implement any of the proposed Geotechnical Activities described in the Final EIR without first having made a determination as to whether the activity is a covered action. To the extent an activity is a covered action, the Department is always required to file a certification of consistency. Even if the Department did not understand the proposed Geotech to constitute initiating the implementation of the Delta Conveyance Project, that does not excuse the requirement to make a covered action determination with respect to these specific activities. With the present certification, the Department has now made a covered action determination with respect to the Proposed Geotech.

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(c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

Accordingly, a covered action is an activity that will cause a direct or foreseeable indirect physical change in the environment, *and that meets additional specific conditions, such as having a significant impact on the achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs and being covered by a Delta Plan regulatory policy.*

The Council's regulations provide an analytical framework to determine whether an activity is a covered action in the form of a two-part test. Under this two-part test, an agency must first determine whether the activity is a "proposed action." (Cal. Code Regs, tit. 23, § 5001, subd. (ee).) The Council's regulations define "proposed action" as "a plan, program, or project" that 1) Is a "project," as defined pursuant to section 21065 of the Public Resources Code; 2) Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh; 3) Will be carried out, approved, or funded by the State or a local public agency; and 4) Will have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and State interests in the Delta. (Cal. Code Regs, tit. 23, § 5001, subd. (ee).) If the activity is a "proposed action," the agency must then evaluate whether the proposed action is covered by one or more Delta Plan regulatory policies in Article 3 to determine whether the proposed action is a "covered action." (*Ibid.*) If a regulatory policy applies, the activity is a covered action that must submit a certification of consistency. The G P1 policy requirements for a certification of consistency then also apply. (Cal. Code Regs, tit. 23, § 5002.) The Council will apply this framework to the Proposed Geotech.

Here, the Department admits that the Proposed Geotech meets the definition of project "because they are being undertaken by a public agency and have a potential for resulting in either a direct change in the environment or a reasonably foreseeable indirect physical change in the environment." (Certification, p. 4-1.) This is a very low threshold that is not directly challenged by Appellants. Rather, Appellants challenge the scope of the project based on CEQA. Given the Department's admission, the Council finds that the Proposed Geotech is an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment (Wat. Code § 85057.5(a); Public Resources Code § 21065.)

As it is undisputed, the Council also finds that the Proposed Geotech will occur in whole or in part in the Delta, and that the Proposed Geotech will be undertaken by the Department, a state agency. (Certification, p. 4-1.)

The final factor for activity to qualify as a proposed action, is a significant impact on the achievement of one or both of the coequal goals or the implementation of a government-sponsored flood program to reduce risks to people, property, and state

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interests in the Delta. The Council defines “significant impact” for the purpose of determining whether a project meets this requirement. (Cal. Code Regs, tit. 23, § 5001 (jj).) “Significant impact” means a substantial positive or negative impact on the achievement of one or both of the coequal goals or the implementation of a government-sponsored flood control program that is directly or indirectly caused by a project on its own or when the project's incremental effect is considered together with the impacts of other closely related past, present, or reasonably foreseeable future projects. (*Ibid*, emphasis added.) None of the parties, including the Department, address this regulation.

The Department contends that the Proposed Geotech, “which involve only temporary activities at discrete locations to test soil and water quality conditions, would have no impact (and therefore would not have the potential to result in a significant impact) on the achievement of one or both of the coequal goals or on the implementation of a government-sponsored flood control program.” (Certification, p. 4-2.) However, the Council must consider the incremental effect of the Proposed Geotech together with the impact of any closely related project. The Delta Conveyance Project is clearly a closely related project. (Final EIR, Certification Record DCP.D.1.00010, p. 3-137.) The Proposed Geotech is specifically intended to inform the planning and design of the Delta Conveyance Project. (Certification, p. 1-1.) Thus, the Council must consider the impacts of the Delta Conveyance Project along with the impact of the Proposed Geotech. It cannot be disputed that the Delta Conveyance Project will have a significant impact on the coequal goal of providing a more reliable water supply for California. Indeed, the Department acknowledges that the Delta Conveyance Project will have a significant impact on the achievement of one or more of the coequal goals or the implementation of a government-sponsored flood control program. (Department’s December 13, 2024, Letter, p. 2-3.) The Department explains that the Delta Conveyance Program is “essential” to ensuring California’s existing water infrastructure can continue to meet Californians’ water needs. (Certification., pp. 1-2 – 1-3.) Consequently, when considered together with the impact of the closely related Delta Conveyance Project, the Council finds that the Proposed Geotech will have a significant impact on the achievement of one or both of the coequal goals. The Proposed Geotech is therefore a “proposed action.” (Cal. Code Regs, tit. 23, § 5001, subd. (jj).)

Having determined that the Proposed Geotech is a “proposed action”. The Council next considers whether any Delta Plan regulatory policies apply to the proposed action. This is done by reviewing each Delta Plan regulatory policy in Article 3 of Title 23 of the California Code of Regulations and determining whether the Delta Policy covers the proposed action.¹⁹ The regulatory policies all include a provision that identifies the proposed actions that the policy covers. If one or more regulatory policy applies, the

¹⁹ Policy G P1 does not determine whether a proposed action is a covered action. G P1 only applies if a proposed action is a covered action because it is covered by an Article 3 policy (section 5003 through 5015).

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proposed action is a covered action, and the public agency must comply with the certification of consistency requirements and regulatory policy G P1. (Cal. Code Regs, tit. 23, § 5002.) If no regulatory policy applies, the proposed action is not a covered action.

In the present certification, the Department contends that none of the regulatory policies apply. The Appellants only substantively challenge Delta Plan regulatory policies ER P5, DP P2, and G P1. SF Baykeeper claims that the Proposed Geotech is inconsistent with every Delta Plan regulatory policy, but this claim is based on the argument that the covered action should be the Delta Conveyance Project and that the Department failed to provide evidence that the Delta Conveyance Project is consistent with each policy. SF Baykeeper does not present substantive arguments concerning the consistency of any policy with the Proposed Geotech, nor does their appeal contend that any specific regulatory policy applies to the Proposed Geotech. The County of Sacramento claims that the Proposed Geotech does not qualify as a covered action and ask that the Council reject the certification of consistency. The County of San Joaquin argues that the Council lacks jurisdiction to consider the covered action as submitted.

As explained in more detail below, the record supports the Department's determination that the Proposed Geotech is not covered by a Delta Plan regulatory policy. The proposed action therefore does not meet the requirements for a covered action under Water Code section 85057.5(a)(3) and Title 23, California Code of Regulation, section 5001, subdivision (k)(1)(E). Because the Proposed Geotech is not a covered action, the GP 1 policies in section 5002, subd. (b) do not apply. (Cal. Code Regs, tit. 23, § 5002, subd. (a)-(b).)

a. Policy WR P1 (Cal. Code Regs, tit. 23, § 5003): Reduce Reliance on the Delta Through Improved Regional Water Self-Reliance

Delta Plan policy WR P1 regulates the export, transfer through, or use of water in the Delta. The policy is designed to help reduce reliance on the Delta, provide a more reliable water supply for the state, and promote statewide water conservation, water use efficiency, and sustainable water use. (See Wat. Code §§ 85004, 85020-85021.) WR P1 ensures that urban and agricultural water suppliers take appropriate actions to contribute to the achievement of reduced reliance on the Delta and comply with certain requirements, such as the completion of an Urban or Agricultural Water Management Plan. (Cal. Code Regs, tit. 23, § 5003, subd. (c)(1).) The regulation describes the proposed actions that are covered by this policy:

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers a proposed action to export water from, transfer water through, or use water in the Delta, but does not cover any such action unless one or more water suppliers would receive water as a result of the proposed action. (Cal. Code Regs, tit. 23, § 5003, subd. (b).)

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The regulation therefore covers a proposed action that exports, transfers, or uses water in the Delta in manner that will result in the receipt of water by a water supplier.²⁰

In the Certification, the Department states that WR P1 does not apply: “[a]s described in Delta Plan Policy WR P1, Reduce Reliance on the Delta through Improved Regional Water Self-Reliance, this policy covers a proposed action to export water from, transfer water through, or use water in the Delta. This policy is not applicable to the 2024–2026 Proposed Geotechnical Activities, which do not include exporting water from, transferring water through, or using water in the Delta.” (Certification, p. 4-6.) None of the appellants address the applicability of WR P1 to the Proposed Geotech.

Consequently, the Council finds that the Proposed Geotech does not transfer, export or use water in the Delta that will result in the receipt of water by a water supplier and therefore, WR P1 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department’s determination that WR P1 does not apply to the proposed Geotech is not supported by substantial evidence in the record.

b. Policy WR P2 (Cal. Code Regs., tit. 23, § 5004): Transparency in Water Contracting

WR P2 regulates proposed actions to enter into, or amend, water supply or water transfer contracts related to the State Water Project and/or the Central Valley Project. The purpose of the regulation is to address the lack of accurate, timely, consistent, and transparent information on the management of California’s water supplies. This policy is meant to improve public involvement and transparency in decision making processes. The screening criteria for the policy states:

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers the following:

- (1) With regard to water from the State Water Project, a proposed action to enter into or amend a water supply or water transfer contract subject to California Department of Water Resources Guidelines 03-09 and/or 03-10 (each dated July 3, 2003), which are attached as Appendix 2A; and
- (2) With regard to water from the Central Valley Project, a proposed action to enter into or amend a water supply or water transfer contract subject to section 226 of P.L. 97-293, as amended or section 3405(a)(2)(B) of the Central Valley Project Improvement Act, Title XXXIV of Public Law 102-575, as amended, which are attached as Appendix 2B, and Rules and Regulations promulgated by the Secretary of the Interior to implement these laws. (Cal. Code Regs, tit 23, § 5004, subd. (b).)

In the Certification, the Department states that WR P2 “is not applicable to the 2024–2026 Proposed Geotechnical Activities because the proposed action here does not include entering into or amending a water supply or water transfer contract.”

²⁰ The Council defines “water supplier” in its regulations. (Cal. Code Regs, tit. 23, § 5001, subd. (pp).)

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(Certification, p. 4-7.) The Proposed Geotech consists of subsurface exploration and testing, including borings, cone penetration tests, and installation and removal of PVC pipes. (Certification, p. 3-16.) Appellants do not claim that WR P2 covers the Proposed Geotech.

Consequently, the Council finds that the Proposed Geotech is not a proposed action to enter into or amend a water supply or water transfer contract and therefore WR P2 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that WR P2 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

c. Policy ER P1 (Cal. Code Regs., tit. 23, § 5005): Delta Flow Objectives

Delta Plan policy ER P1 regulates water flow in the Delta. (Cal. Code Regs, tit. 23, § 5005.) Water flow in the Delta is critical due to its impact on the reliability of water supplies and the health of the Delta ecosystem. ER P1 requires compliance with the State Water Resources Board's Bay Delta Water Quality Control Plan flow objectives for the Delta. (*Ibid.*) The policy covers a proposed action that will significantly affect flow in the Delta:

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, the policy set forth in subsection (a) covers a proposed action that could significantly affect flow in the Delta. (Cal. Code Regs., tit. 23, § 5005). (Cal. Code Regs, tit. 23, §5005, subd. (b).)

The Proposed Geotech consists of subsurface exploration and testing, including borings, cone penetration tests, and installation and removal of PVC pipes. (Certification, p. 3-16.) The Certification states that the proposed action does not include in-water work and will not affect flow in the Delta. (Certification, p. 4-7.) Appellants do not claim that this policy covers the Proposed Geotech.

Consequently, the Council finds that the Proposed Geotech is not a proposed action that could significantly affect flow in the Delta and therefore ER P1 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that ER P1 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

d. Policy ER P2 (Cal. Code Regs., tit. 23, § 5006): Restore Habitats at Appropriate Elevations

ER P2 requires that habitat restoration be carried out in a manner consistent with Appendix 3 to the Council's regulations, which is Section II of the Draft Conservation Strategy for Restoration of the Sacramento-San Joaquin Delta Ecological Management Zone and the Sacramento and San Joaquin Valley Regions (California Department of Fish and Wildlife 2011). (Cal. Code Regs, tit. 23, § 5006, subd. (a).) The policy further

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requires the use of the elevation map attached as Appendix 4. (*Ibid.*) ER P2 covers proposed actions that include habitat restoration:

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers a proposed action that includes habitat restoration. (Cal. Code Regs., tit. 23, § 5006.)

The Proposed Geotech consists of subsurface exploration and testing, including borings, cone penetration tests, and installation and removal of PVC pipes. (Certification, p. 3-16.) The Certification states that the Proposed Geotech is not covered by ER P2 “because the proposed action here does not include habitat restoration”. (Certification, p. 4-8.) None of the Appellants allege that ER P2 applies to the Proposed Geotech.

Consequently, the Council finds that the Proposed Geotech is not a proposed action that includes habitat restoration and therefore ER P2 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department’s determination that ER P2 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

e. Policy ER P3 (Cal. Code Regs., tit. 23, § 5007): Protect Opportunities to Restore Habitat

ER P3 addresses the reduction of habitats supporting native species by requiring public agencies to avoid or mitigate significant impacts to the opportunity to restore habitats in priority habitat restoration areas. The regulation also furthers the goal of restoring large areas of interconnected habitats, establishing migratory corridors for fish, birds and other animals, and helping increase or restore migratory bird habitat. This policy covers proposed actions in priority habitat restoration areas:

(d) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers proposed actions in the priority habitat restoration areas depicted in Appendix 5. It does not cover proposed actions outside those areas. (Cal. Code Regs., tit. 23, §5007).

The Certification states that the policy is not applicable to the Proposed Geotech because the proposed action does not include actions in the priority habitat restoration areas shown in Appendix 5 of the Council’s regulations. (Certification, p. 4-8.) The Department provides an overlay map of the Proposed Geotech with the priority habitat restoration areas depicted in Appendix 5, which shows the Proposed Geotech will not occur in the priority habitat restoration areas. (Certification, Figure 4, p. 4-9.) Appellants do not claim that ER P3 applies to the Proposed Geotech.

Consequently, the Council finds that the Proposed Geotech will not occur in a priority habitat restoration area depicted in Appendix 5 and therefore ER P3 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department’s determination that ER P3 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

DECISION NO. D20242**f. ER P4 (Cal. Code Regs., tit. 23, §5008): Expand Floodplains and Riparian Habitats in Levee Projects**

Policy ER P4 addresses the reduction of habitats supporting native species. Proposed actions to construct new levees or substantially rehabilitate or reconstruct existing levees must evaluate and incorporate feasible alternatives, including setback levees, to increase floodplains and riparian habitats. (Cal. Code Regs, tit 23, § 5008, subd. (a).) This policy covers proposed actions to construct new levees or substantially rehabilitate or reconstruct existing levees:

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers a proposed action to construct new levees or substantially rehabilitate or reconstruct existing levees. (Cal. Code Regs., tit. 23, §5008).

The Certification states that Policy ER P4 is not applicable to the proposed action: “[a]s described in Delta Plan Policy ER P4, Expand Floodplains and Riparian Habitats in Levee Projects, this policy covers a proposed action to construct new levees or substantially rehabilitate or reconstruct existing levees. This policy is not applicable to the 2024–2026 Proposed Geotechnical Activities because the “proposed action here does not include constructing new levees or substantially rehabilitating or reconstructing existing levees” (Certification, p. 4-10.) The Proposed Geotech consists of subsurface exploration and testing, including borings, cone penetration tests, and installation and removal of PVC pipes. (Certification, p. 3-16.) Appellants do not address the applicability of ER P4 to the Proposed Geotech.

Consequently, the Council finds that the Proposed Geotech is not a proposed action to construct new levees or substantially rehabilitate or reconstruct existing levees and therefore ER P4 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department’s determination that ER P4 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

g. Policy ER P5 (Cal. Code Regs., tit. 23, § 5009): Avoid Introductions of and Habitat Improvements for Invasive Nonnative Species

Policy ER P5 addresses the new introduction of a nonnative species and/or the improvement of habitat conditions for a nonnative invasive species. This is one of two Article 3 polices substantively challenged by the appellants. The policy states:

“(a) The potential for new introductions of, or improved habitat conditions for, nonnative invasive species, striped bass, or bass must be fully considered and avoided or mitigated in a way that appropriately protects the ecosystem.

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(b) For purposes of Water Code Section 85057.5(a)(3) and Section 5001(k)(1)(E) of this Chapter, this policy covers a proposed action that has the reasonable probability of introducing, or improving habitat conditions for, nonnative invasive species. (Cal. Code Regs, tit. 23, § 5009.)

The Delta Plan defines “nonnative invasive species” for purposes of ER P5 as “species that establish and reproduce rapidly outside of their native range and may threaten the diversity or abundance of native species through competition for resources, predation, parasitism, hybridization with native populations, introduction of pathogens, or physical or chemical alteration of the invaded habitat.” (Cal. Code Regs., tit. 23, § 5001, subd. (z).)

In the Certification, the Department states that ER P5 is not applicable to the Proposed Geotech because the activities would result in minor disturbances with temporary impacts and these impacts would be mitigated by environmental commitments and Best Management Practices set forth in Final EIR Appendix 3B, Environmental Commitments and Best Management Practices, and specifically the requirements in EC-14: Construction Best Management Practices for Biological Resources. Measures to be implemented include the requirement that “all equipment used during field investigations will be cleaned and inspected by the qualified biologist... prior to entering the work areas and before moving between work areas.” (Delta Conveyance Project, Mitigation Monitoring and Reporting Program, Certification Record, CDP.C.1.00002.pdf, p.3-130)

SF Baykeeper and SDWA both allege that the Proposed Geotech is inconsistent with this policy. However, SF Baykeeper does not explain how the proposed action is inconsistent with ER P5 and does not even reference the policy in the memorandum submitted in support of the appeal or the additional brief. Rather, SF Baykeeper alleges that the Department did not provide evidence to show that the *Delta Conveyance Project* is consistent with ER P5. SF Baykeeper does not allege that ER P5 covers the Proposed Geotech.

In its appeal, SDWA does not claim that the Proposed Geotech could improve habitat conditions for nonnative species. Rather, SDWA argues that “DWR does not specify whether all vehicles will be so cleaned and inspected nor the clothing and footwear of personnel, both of which could reasonably result in the introduction of nonnative invasive species,” (SDWA Appeal, No. C20242-A2, SDWA’s November 27, 2024, letter, p.11.). SDWA does not cite the record or any evidence in support of its argument. Moreover, SDWA does not identify a nonnative species at issue or addresses how the concern expressed rises to the level of a “reasonable probability”. Appellant further does not point to an invasive species standard concerning vehicles, clothing and footwear of personnel.

In the Department’s subsequent brief, the Department clarifies that the reference to “equipment” in the Certification, includes work vehicles used as part of the Proposed Geotech. (Certification, DCP.X2.1.00020.pdf, p. 67). With respect to clothing, the Department argues that only a limited number of field personnel will access the proposed geotechnical investigation sites within the Delta and that the effectiveness of best management practices depends on existing land uses, the degree of human

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disturbances, and other factors. In addition, the activities will generally occur on already disturbed areas with compacted soil (Certification, DCP.X2.1.00020.pdf, p. 38), and that sites will be restored as close to pre-project conditions as possible (Certification, DCP.X2.1.00020.pdf, p. 170), a team of qualified biologists will conduct pre- and post-activity surveys (Certification, DCP.X2.1.00020.pdf, p. 227), and that environmental awareness training is provided to all new field personnel prior to each workday (Certification, DCP.X2.1.00020.pdf, p. 230). Further, “Appellants merely speculate that clothing of visitors to the Delta may create the reasonable probability of introducing or improving habitat conditions for nonnative invasive species.” (Department’s December 13, 2024, Letter, p.4-1.)

Although the Council has not defined “reasonable probability” in its regulations, a “reasonable” probability is necessarily more than a “mere possibility”. (See e.g. *People v. Watson* (1956) 46 Cal.2d 818, 837.) Therefore, to demonstrate a reasonable probability, there must be facts or evidence that establish a “reasonable chance and not merely an abstract possibility” that the proposed action will result in the introduction of a new nonnative invasive species or will improve the habitat conditions for nonnative invasive species. (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1050-1051 [explaining “reasonable probability” standard under Penal Code § 1405.].) Appellant SDWA does no more than raise a mere possibility, without reference to the record or any supporting evidence.

Consequently, the Council finds that it has not been established that the Proposed Geotech has a reasonable probability of introducing, or improving habitat conditions for, nonnative invasive species and therefore ER P5 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department’s determination that ER P5 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

h. Policy DP P1 (Cal. Code Regs., tit. 23, §5010): Locate New Urban Development Wisely

DP P1 restricts certain types of urban development outside of urban areas and rural communities to conserve farming and rural land use and to protect the unique character of Delta communities. This policy covers residential, commercial, and industrial development:

(c) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers proposed actions that involve new residential, commercial, and industrial development that is not located within the areas described in subsection (a). In addition, this policy covers any such action on Bethel Island that is inconsistent with the Contra Costa County general plan effective as of May 16, 2013. This policy does not cover commercial recreational visitor-serving uses or facilities for processing of local crops or that provide essential services to local farms, which are otherwise consistent with this Chapter. (Cal. Code Regs., tit. 23, §5010).

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The Department's Certification of Consistency states the Proposed Geotech is not covered by DP P1 because the proposed action does not include new residential, commercial, or industrial development. (Certification, p. 4-12.) The Proposed Geotech consists of subsurface exploration and testing, including borings, cone penetration tests, and installation and removal of PVC pipes. (Certification, p. 3-16.) Further, Appellants do not address the applicability of DP P1.

Consequently, the Council finds that the Proposed Geotech does not involve new residential, commercial, or industrial development and therefore DP P1 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that DP P1 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

i. DP P2 (Cal. Code Regs., tit. 23, §5011): Respect Local Land Use When Siting Water or Flood Facilities or Restoring Habitats

DP P2 requires the avoidance or reduction of conflicts with existing or planned land uses in locating water management facilities, ecosystem restoration, or flood management infrastructure in the Delta. (Cal. Code Regs, tit. 23, § 5011.) The policy states:

(a) Water management facilities, ecosystem restoration, and flood management infrastructure must be sited to avoid or reduce conflicts with existing uses or those uses described or depicted in city and county general plans for their jurisdictions or spheres of influence when feasible, considering comments from local agencies and the Delta Protection Commission. Plans for ecosystem restoration must consider sites on existing public lands, when feasible and consistent with a project's purpose, before privately owned sites are purchased. Measures to mitigate conflicts with adjacent uses may include, but are not limited to, buffers to prevent adverse effects on adjacent farmland. (Cal. Code Regs., tit. 23, §5011).

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers proposed actions that involve the siting of water management facilities, ecosystem restoration, and flood management infrastructure. (Cal. Code Regs., tit. 23, §5011).

The Certification states that DP P2 does not apply to the Proposed Geotech because the proposed action only includes temporary information collection activities and does not involve the physical placing (siting) of water management facilities, ecosystem restoration, and flood management infrastructure. The Certification further states that the proposed action does not commit DWR to site Delta Conveyance Project facilities in the specific investigation locations proposed[.] (Certification, pp. 4-12 – 4-13.)

None of the appellants allege that the Proposed Geotech involves ecosystem restoration or flood management infrastructure.

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The County of San Joaquin contends that the proposed action includes the placement of permanent components, namely the grout used to seal the borings and that because the purpose of the Proposed Geotech is to support water management facilities, it is a “water management facility that would conflict with existing land uses in the Delta.” (County of San Joaquin Appeal Letter, “DP P2, Respect Local Land Use”, p. 1.)

SDWA claims that because the Proposed Geotech is intended to investigate and confirm the suitability of sites for the Delta Conveyance Project’s facilities, it is therefore a substantial factor in the ultimate siting of those facilities. (SDWA Appeal, No. 20242-A2, SDWA’s Nov. 27, 2024, Letter, pp. 11-12.) SDWA further claims that there is no substantial evidence to support the Department’s consistency determination. (*Ibid.*)

The County of Sacramento contends that the Proposed Geotech is required to determine the ultimate siting and alignment of Delta Conveyance Project water management and conveyance facilities and that the Proposed Geotech will conflict with local agricultural land uses and the SacSewer Harvest Water Program. (County of Sacramento Appeal Letter, p.21.)

DP P2 applies to the siting (or location) of proposed water management facilities, ecosystem restoration, or flood management infrastructure. The policy requires certifying agencies to site *water management facilities, ecosystem restoration, or flood management infrastructure* in a manner that avoids or reduces conflict with existing land uses. (Cal. Code Regs, tit. 23, § 5011, subd. (a).) The Council finds that the Proposed Geotech is not itself a water management facility, ecosystem restoration, or flood management infrastructure. The bore holes with PVC pipes used for water quality testing would not constitute a water management facility because the PVC pipes will be removed, and the bore holes will be filled after the activities are concluded. (Certification, pp. 3-16 – 3-17.) Material left behind (cement-bentonite grout) will not be used for ongoing water management. Although the data collected may ultimately inform the planning and design of the Delta Conveyance Project, the actual siting of the Delta Conveyance Project is not at issue in this certification.

Consequently, the Council finds that the Proposed Geotech does not involve the siting of a water management facility, ecosystem restoration, or flood management infrastructure and therefore DP P2 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department’s determination that DP P2 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

j. Policy RR P1 (Cal. Code Regs., tit. 23, § 5012): Prioritization of State Investments in Delta Levees and Risk Reduction

This policy requires the prioritization of state investments in levee operation and maintenance of Delta project levees and nonproject levees based on categories listed in the regulation. The policy also requires an annual report. The policy applies to proposed actions that involve discretionary State investments in Delta levee operations, maintenance and improvements:

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(d) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers a proposed action that involves discretionary State investments in Delta flood risk management, including levee operations, maintenance, and improvements. Nothing in this policy establishes or otherwise changes existing levee standards. (Cal. Code Regs, tit. 23, § 5012, subd. (d).)

The Certification states that this policy is not applicable because the proposed action involves no investment in Delta levees or flood risk reduction. The Certification asserts that the Proposed Geotech would be funded through contributions from public water agencies that may participate in the Delta Conveyance Project. The Department also represents that the 2024–2026 Proposed Geotechnical Activities do not involve discretionary State investments in Delta flood risk management, including levee operations, maintenance, and improvements. (Certification, p.4-14.) The Proposed Geotech consists of the Proposed Geotech as subsurface exploration and testing consisting of, including borings, cone penetration tests, and installation and removal of PVC pipes. (Certification, p. 3-16.) Appellants do not contend that RR P1 applies.

Consequently, the Council finds that the Proposed Geotech does not involve discretionary State investments in Delta flood risk management, including levee operations, maintenance, and improvements and therefore RR P1 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department’s determination that RR P1 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

k. Policy RR P2 (Cal. Code Regs., tit. 23, § 5013): Require Flood Protection for Residential Development in Rural Areas

RR P2 requires the floodproofing of new residential developments to a level 12 inches above the 100-year base flood elevation, in addition to sufficient elevation that would protect against a 55-inch rise in sea level at the Golden Gate. (Cal. Code Regs, tit. 23, § 5013, subd. (a).) The policy covers a proposed action that involves a new residential development of five or more parcels:

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers a proposed action that involves new residential development of five or more parcels that is not located within the areas described in subsection (a). (Cal. Code Regs, tit. 23, § 5013, subd. (b).)

The Department states that this policy is not applicable to the Proposed Geotech because the proposed action here does not involve new residential development of five or more parcels. (Certification, p. 4-15.) The Proposed Geotech consists of the Proposed Geotech as subsurface exploration and testing consisting of, including borings, cone penetration tests, and installation and removal of PVC pipes. (Certification, p. 3-16.) None of the Appellants address the applicability of RR P2.

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Consequently, the Council finds that the Proposed Geotech does not involve new residential development of five or more parcels and therefore RR P2 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that RR P2 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

I. Policy RR P3 (Cal. Code Regs., tit. 23, § 5014): Protect Floodways

RR P3 restricts encroachments in floodways to reduce the risks to people, property, and state interests in the Delta, and to protect the carrying capacity of designated floodways. The policy covers proposed actions that would encroach in a floodway.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers a proposed action that would encroach in a floodway that is not either a designated floodway or regulated stream. (Cal. Code Regs, tit. 23, § 5014, subd. (b).)

The Certification states that the policy is not applicable to the Proposed Geotech because the proposed action here would not include any in-water work and would not encroach in a floodway that is not either a designated floodway or regulated stream. (Certification, p. 4-15.) Appellants do not claim that RR P3 covers the Proposed Geotech.

Consequently, the Council finds that the Proposed Geotech would not encroach in a floodway that is not either a designated floodway or regulated stream and therefore RR P3 does not cover the Proposed Geotech. The Council also finds that Appellants have failed to show that the Department's determination that RR P3 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

m. Policy RR P4 (Cal. Code Regs., tit. 23, § 5015): Floodplain Protection

RR P4 protects against encroachments in designated floodplains. The policy covers proposed actions that would encroach in the floodplains identified in the regulation.

(b) For purposes of Water Code section 85057.5(a)(3) and section 5001(k)(1)(E) of this Chapter, this policy covers a proposed action that would encroach in any of the floodplain areas described in subsection (a). (Cal. Code Regs., tit. 23, § 5015, subd. (b).)

The Certification states that this policy is not applicable to the Proposed Geotech because the proposed action here would not encroach in any of the floodplain areas described in California Code of Regulations, Title 23, Section 5015(a). (Certification, p. 4-17.) Appellants do not claim that RR P4 covers the proposed action.

Consequently, the Council finds that the Proposed Geotech would not encroach in any of the floodplain areas described in subsection (a) of Section 5015 (RR P4) and therefore RR P4 does not cover the Proposed Geotech. The Council also finds that

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Appellants have failed to show that the Department's determination that RR P4 does not apply to the Proposed Geotech is not supported by substantial evidence in the record.

CONCLUSION

The Appellants raised two primary issues in the appeals: 1) whether CEQA case law and Guidelines govern certifications of consistency and prohibit the Department from submitting a separate certification of consistency for the Proposed Geotech; and 2) whether the Proposed Geotech is a covered action subject to the Council's review. With respect to the first issue, the Council concludes that the Department is not necessarily precluded from submitting a separate certification of consistency for the Proposed Geotech due to CEQA's regulations. However, the Council finds on the second issue that the Proposed Geotech fails to meet the requirements for a covered action because it is not covered by one or more of the Delta Plan's regulatory policies. (Wat. Code § 85057.5(a)(3); Title 23, California Code of Regulation, section 5001, subd. (k)(1)(E).) Accordingly, the Proposed Geotech is not a covered action subject to the Council's appellate jurisdiction. The Council therefore dismisses the appeals for lack of jurisdiction.

Because the Council has reviewed the Proposed Geotech and determined that it is not a covered action subject to a Delta Plan regulatory policy, the Department of Water Resources need not re-submit the activities described in the Proposed Geotech certification, as part of a subsequent certification of consistency for the Delta Conveyance Project. This decision does not make any findings with respect to the Delta Conveyance Project (nor geotechnical activities that are not the subject of the Certification) and does not constitute approval or rejection of that project. Except as expressly provided herein, the Department must file a certification of consistency for the Delta Conveyance Project.