# Appendix B
# Administrative Procedures Governing Appeals, Statutory Provisions Requiring Other Consistency Reviews, and Other Forms of Review or Evaluation by the Council

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**[ADOPTED 9/23/2010]**

# DELTA STEWARDSHIP COUNCIL

## I. ADMINISTRATIVE PROCEDURES GOVERNING APPEALS
## II. STATUTORY PROVISIONS REQUIRING OTHER CONSISTENCY REVIEWS
## III. OTHER FORMS OF REVIEW OR EVALUATION BY THE COUNCIL

## PART I- ADMINISTRATIVE PROCEDURES GOVERNING APPEALS

### Introduction

1. Purpose. These administrative procedures govern how the Delta Stewardship Council considers appeals with regard to:

a) Adequacy of certifications of consistency with the Delta Plan submitted to the council by a state or local public agency pursuant to Water Code sections 85225.10 and 85225.30; and

b) Determinations by the Department of Fish and Game that the Bay Delta Conservation Plan has met the requirements of Water Code section 85320 for inclusion in the Delta Plan.

NOTE: Authority cited: Water Code sections 85001, 85020(h), 85022, 85057.5, 85200, 85210, 85212, 85225, 85225.5, 85225.10, 85225.15, 85225.20, 85225.25, 85225.30, 85300, 85320(e).

### Review of certifications of consistency with Delta Plan

2. Any state or local public agency proposing to undertake a covered action, as defined in Water Code section 85057.5 is encouraged to consult with the council at the earliest possible opportunity, preferably no later than 30 days before submitting its certification to the council pursuant to Water Code section 85225, to ensure that the project will be consistent with the Delta Plan. The council's staff will meet with the agency's staff to review the consistency of the proposed action and to make recommendations, as appropriate. During this early consultation, the agency's staff may also seek clarification on whether the proposed project is a "covered action"; provided that the ultimate determination on whether it is a covered action shall be made by the agency, subject to judicial review.

NOTE: Authority cited: Water Code sections 85212, 85225, 85225.5, 85225.30.

3. At least 10 days prior to its submission of a certification to the council, a state or local public agency that is not subject to open meeting laws (that is, the Bagley-Keene Open Meeting Act [Gov.Code sec.11120 et seq.] or the Brown Act [Gov.Code sec.54950 et seq.]) with regard to its certification, shall post, for public review and comment, its draft certification conspicuously on its website and in its office, mail it to all persons requesting notice, and include any public comments received in the record submitted to the council in the case of an appeal. A state or local public agency that is subject to open meeting laws with regard to its certification is encouraged to take those actions.

NOTE: Authority cited: Water Code sections 85225, 85225.30.

4. a) Any certification of consistency filed by a state or local agency pursuant to Water Code section 85225 shall set forth detailed findings that the covered action is consistent with the Delta Plan. The council shall prepare a checklist that agencies may use to assist them in preparing the certification and making the required findings.

b) A state or local agency shall submit to the council, no later than 10 days after receiving notice of an appeal pursuant to Paragraph 8, the record that was before the state or local agency at the time it made its certification, including a table of contents of documents contained therein and a brief chronology of events and actions relevant to the covered action. The record shall be certified by the state or local agency as being "full and complete." Given the tight, statutory deadlines for hearing and deciding appeals, a state or local agency is nevertheless strongly encouraged to submit the record at the time it files its certification of consistency, to ensure the opportunity for thorough review by the council in the event of an appeal.

c) The failure by a state or local agency to submit the record to the council on a timely basis as required by subparagraph (b), shall be grounds for the council to affirm the appeal on the basis that there was not substantial evidence presented to support the certification of consistency.

d) Any filings required by this Paragraph (4) shall be submitted in electronic form to facilitate availability and public access, and shall be public records.

NOTE: Authority cited: Water Code sections 85225, 85225.30.

5. Any person, including any member of the council or its executive officer, who claims that a proposed covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, that action will have a significant adverse impact on the achievement of one or both of the goals of the Act or implementation of government sponsored flood control programs to reduce risks to people and property in the Delta, may file an appeal with regard to a certification of consistency submitted to the council no later than 30 calendar days after that submittal.

NOTE: Authority cited: Water Code sections 85225.10 (a), 85225.15, 85225.30.

6. The appeal shall clearly and specifically set forth the basis for the claim that the covered action is inconsistent with the Delta Plan. The appeal shall be in writing and set forth the following information:

a) Appellant's name and address;

b) The name and address of the party, if any, whose proposal is the subject of the appeal;

c) A description of the covered action that is the subject of the state or local public agency certification;

d) The identity of the state or local government body whose certification is being appealed;

e) The specific grounds for appeal; and

f) A detailed statement of facts on which the appeal is based.

The appeal shall be filed in electronic form.

NOTE: Authority cited: Water Code sections 85225.10 (b), 85225.30.

7. The appeal shall be considered "filed" with the council when the appellant's appeal is received, determined by staff to contain all of the information listed in Paragraph 6, and a hard-copy is printed and stamped "Filed" by the council staff with the date of filing indicated.

NOTE: Authority cited: Water Code sections 85225.10, 85225.20, 85225.30.

8. Within five working days of the filing of an appeal with the council, the executive officer shall:

a) Post a notice and brief description of the appeal and its effective date in a conspicuous location in the council's office and on its website;

b) Mail to the affected state or local public agency and to any third party whose proposal is the subject of the certification, a copy of the notice and a brief description, with a copy of the appeal documents filed with the council;

c) Mail copies of the appeal to each member of the council, and to the Delta Protection Commission for informational purposes consistent with Public Resources Code section 29773; and

d) Mail notice to the appellant that the appeal has been filed and stating the effective date of filing.

NOTE: Authority cited: Water Code sections 85225.30.

9. The council or its executive officer may request from the appellant further information necessary to clarify, amplify, correct, or otherwise supplement the information submitted with the appeal, within a reasonable period. The council or by delegation its executive officer may dismiss the appeal for failure of the appellant to provide information requested within the period provided, if the information requested is in the possession of or under the control of the appellant.

NOTE: Authority cited: Water Code sections 85225.10, 85225.20, 85225.25, 85225.30.

10. The council or its executive officer may supplement the record submitted by the state or local agency if the council or its executive officer determines that additional information was part of the record before the agency, but was not included in the agency's submission to the council.

NOTE: Authority cited: Water Code sections 85225.10, 85225.20, 85225.25, 85225.30.

11. The appellant, the state or local agency, the Delta Protection Commission, or any other person may testify before the council regarding an appeal. Presentations may be oral or in writing, shall address only whether the record supports the certification of consistency, and shall be as brief as possible. Written submissions should be provided to the council at least 10 days prior to the hearing to ensure that they, or in appropriate cases, summaries, may be circulated to council members for their review ahead of the hearing. The council's presiding officer may establish reasonable time limits for presentations.

NOTE: Authority cited: Water Code sections 85225.10, 85225.20, 85225.25, 85225.30.

12. All written submissions to the council may be in electronic form.

NOTE: Authority cited: Water Code section 85225.30.

13. The council shall hear all appeals of certifications of consistency filed pursuant to Water Code section 85225 within 60 days of filing unless:

a) The parties agree to a reasonable extension approved by the executive officer, taking into account the circumstances of the matter subject to appeal and the council's hearing schedule and associated workload, or

b) The council, or by delegation its executive officer, determines that the issue raised on appeal is not within the council's jurisdiction or does not raise an appealable issue.

NOTE: Authority cited: Water Code sections 85225, 85225.20, 85225.30.

14. The council shall make its decision on the appeal within 60 days of hearing the appeal, and shall make specific written findings defining the covered action under review and either denying the appeal or remanding the matter to the state or local public agency for reconsideration of the covered action based on the finding that the certification of consistency is not supported by substantial evidence in the record before the state or local public agency that filed the certification.

NOTE: Authority cited: Water Code sections 85225.20, 85225.25, 85225.30.

15. No covered action which is the subject of an appeal shall be implemented unless one of the following conditions has been met:

a) The council has denied the appeal;

b) The public agency has pursuant to Water Code section 85225.5 decided to proceed with the action as proposed or modified and has filed with the council a revised certification of consistency addressing each of the findings made by the council, 30 days has elapsed and no person has appealed the revised certification; or

c) The council or its executive officer has dismissed the appeal for one or both of the following reasons:

1. The appellant has failed to provide information in her possession or under her control within the time requested or
2. The issue raised is not within the council’s jurisdiction or fails to raise an appealable issue.

NOTE: Authority cited: Water Code sections 85225.5, 85225.25, 85225.30.

**Review of Bay Delta Conservation Plan**

16. If the Department of Fish and Game (department) determines that the Bay Delta Conservation Plan (BDCP) referred to in Water Code section 85053 meets all of the requirements of Water Code section 85320 for inclusion in the Delta Plan, it shall file the BDCP and its determination with the council.

NOTE: Authority cited: Water Code sections 85053, 85225.30, 85320.

17. Upon receipt of the department's determination, the executive officer of the council shall:

a) Post a notice and brief description of the BDCP, the department's determination, the date of filing and the right of any person to appeal that determination on its website and in a conspicuous location in the council's office;

b) Mail a notice and brief description of the BDCP, the department's determination and the right of appeal to any person requesting notice; and

c) Mail copies of the determination to each member of the council.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

18. Any person, including any member of the council or its executive officer, may appeal to the council the determination of the department that the BDCP meets all of the requirements of Water Code section 85320 for inclusion in the Delta Plan.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

19. a) Any appeal to the council made pursuant to Paragraph 18 shall be made within 30 days of the later of the following:

1. the filing with the council of the department's determination that the BDCP meets all the requirements of Water Code section 85320 for inclusion in the Delta Plan, or
2. the conclusion of the council's hearing or hearings held pursuant to Water Code section 85320(d).

b) The appeal shall be in writing and filed in electronic form. It shall clearly set forth the specific grounds for the appeal and the specific facts upon which it is based. These shall include a list of each specific requirement of Water Code section 85320 that the BDCP allegedly fails to meet. The appeal shall be considered filed with the council when the appellant's appeal is received, determined by staff to contain all the information required in this paragraph, and a hard-copy is printed and stamped "Filed" by the council staff with the date of filing indicated.

c) If an appeal is filed before the council publicly notices a hearing to be held pursuant to Water Code section 85320(d), the council, in its discretion, may combine the hearing on appeal and the hearing pursuant to Water Code section 85320(d).

NOTE: Authority cited: Water Code sections 85225.30, 85320.

20. Within five working days of the filing of an appeal pursuant to Paragraph 18, the executive director shall:

a) Post a notice and brief description of the appeal on its website and in a conspicuous location in the council's office;

b) Mail a notice and brief description of the appeal to any person requesting copies of such appeals; and

c) Mail copies of the appeal and a brief description of the appeal to each member of the council.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

21. The council or its executive officer may request from the appellant or the department additional information necessary to clarify, amplify, correct, or supplement the information submitted with the appeal within a reasonable period.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

22. Any appeal made pursuant to Paragraph 18 may be dismissed if the council or its executive officer determines that it does not raise an appealable issue or if the appellant has failed to provide requested information to support her charge within a reasonable time, if that information is in the possession of or under the control of the appellant.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

23. The council shall determine, based upon a preponderance of the evidence, whether the department correctly determined that the BDCP meets all of the requirements of Water Code section 85320 for inclusion in the Delta Plan. In reaching its decision, the council shall give weight to the reasoning and factual findings of the department. The council may seek clarification from the department of its reasoning and factual findings prior to the council making its final determination.

NOTE: Authority cited: Water Code section 85225.30, 85320(b), (e).

23.5 a) The council shall conduct any hearing on an appeal made pursuant to Paragraph 18 in a manner deemed most suitable to ensure fundamental fairness to all parties concerned, and with a view toward securing all relevant information and material necessary to render a decision without unreasonable delay.

b) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be considered if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a court proceeding.

Unduly repetitious or irrelevant evidence shall be excluded upon order of the council or its chairperson.

c) Subject to Paragraph 23, evidence before the council includes, but is not limited to, the record before the department. The record will not include a transcript of any proceedings before the department unless provided by a party to the proceedings or requested by the council.

d) Any interested person may testify before the council regarding an appeal concerning the BDCP. Speakers' presentations shall be to the point and shall be as brief as possible. Visual and other materials may be used as appropriate. The council may establish reasonable time limits for presentations; such time limits shall be made known to all affected persons prior to any hearing. Where speakers use or submit to the council visual or other materials, such materials shall become part of the hearing record and shall be identified and maintained as such. Speakers may substitute reproductions of models or other large materials but shall agree to make the originals available upon request of the executive director.

e) Council members may ask questions of the appellant, the department's representative(s), any third party appearing at the hearing or staff. Questioning of speakers at the hearing by other persons shall not be permitted except by permission of the Chairperson.

f) Interested persons may submit written comments concerning an appeal. Any such comments will be considered by the council if they are received by the council at or before the hearing on the appeal; provided that those written comments should be submitted to the council at least 10 days prior to the hearing to ensure that they, or in appropriate cases, summaries, may be circulated to council members for their review ahead of the hearing.

g) The council may continue the hearing where it determines that a continuance would be appropriate.

NOTE: Authority cited: Water Code sections 85225.30, 85320(e).

24. The council's decision shall include specific written findings. The council shall post its decision on its website and mail copies to the department and all parties requesting notice.

NOTE: Authority cited: Water Code sections 85225.30, 85320(e).

25. If the council decides that the department incorrectly determined that the BDCP meets all of the requirements of section 85320 for inclusion in the Delta Plan, and consequently grants the appeal, the department may revise its determination to meet the issues raised by the council, or may respond to the council's findings in detail, setting forth reasons why it has concluded that the BDCP meets all of the requirements of

section 85320 for inclusion in the Delta Plan. Unless the council decides that the department's determination, as submitted or revised, correctly concludes that the BDCP meets all of the requirements of section 85320 for inclusion in the Delta Plan, the BDCP shall not be incorporated in the Delta Plan and the public benefits associated with the BDCP shall not be eligible for state funding.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (a), (b), (e).

**Ex Parte Contact Restrictions Applicable to All Appeals**

26. Hearings on appeals are subject to the ex parte communication restrictions of California Administrative Procedures Act (Gov. Code § 11430.10 et seq.). Under that Act, an ex parte communication is a "communication, direct or indirect, regarding any issue in the proceeding, to the [council or council member] from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication." (Gov. Code § 11430.10.) The restrictions apply from the date that the appeal is filed to the date that the council reaches a final decision on the appeal.

NOTE: Authority cited: Government Code sections 11430.10, 11430.80, Water Code section 85225.30.

27. To ensure compliance with these provisions, members should avoid ex parte communications while an appeal is pending. If they nevertheless receive one, such as by an individual sending a letter to a member concerning a pending matter, the member should notify the council's legal adviser or executive officer so that appropriate measures can be taken.

NOTE: Authority cited: Government Code sections 11430.10, 11430.80, Water Code section 85225.30.

28. At the first appropriate meeting after an appeal is anticipated or filed, the council's legal adviser will remind the council of this restriction and answer questions about its scope.

NOTE: Authority cited: Government Code sections 11430.10, 11430.80, Water Code section 85225.30.

**Official Notice**

29. Notwithstanding any provision of these procedures to the contrary, the council may take official notice in any hearing that it conducts, 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.

NOTE: Authority cited: Government Code section 11515, Water Code section 85225.30.

**Filings and Mailings**

30. All filings and mailings required by sections 1-29 of these procedures may be made electronically.

NOTE: Authority cited: Water Code section 85225.30.

**Consolidation of Appeals**

31. The council, at its discretion, may consolidate appeals raising similar issues.

NOTE: Authority cited: Water Code section 85225.30.

**PART II—STATUTORY PROVISIONS REQUIRING OTHER CONSISTENCY REVIEWS (AFTER ADOPTION OF THE DELTA PLAN)**

In several other sections of SB X7 1, the council is directed to review for consistency with the Delta Plan, various plans of specified public agencies. This Part is directed at those reviews, which fall outside the scope of the procedures covered by Part I.

1. Delta Protection Commission's Economic Sustainability Plan.

Public Resources Code section 29759 requires the Delta Protection Commission (DPC), by July 1, 2011, to adopt an economic sustainability plan. That plan must include information and recommendations that inform the council's policies regarding the socioeconomic sustainability of the Delta's region.

Public Resources Code section 29761.5(b) requires the DPC to transmit copies of the plan to the council within 60 days of adoption. The council is required, within 180 days of the adoption of the plan, to review the plan for consistency with the Delta Plan.

2. Local and Regional Planning Documents.

Water Code section 85057.5(b)(3), excepts from the definition of "covered action", regional transportation plans prepared pursuant to Government Code section 65080.

Paragraph (4) of that same section, excepts from the definition of “covered action”, plans, programs, projects or activities within the secondary zone of the Delta that the applicable metropolitan planning organization under Government Code section 65080 has determined is consistent with either a sustainable communities strategy or an alternative planning strategy that would achieve specified greenhouse gas emission reduction targets as determined by the Air Resources Board.

Because they are not “covered actions”, these types of local and regional planning documents are not subject to the statutory provisions governing consistency of state and local public agency actions (Water Code secs. 85225 et seq.), or the council’s Administrative Procedures Governing Appeals (Part I, above), with one exception noted in paragraph (d), below.

However, Water Code section 85212 provides a separate requirement and process for consistency review by the council of these types of local and regional planning documents.

In particular:

(a) The council is required to review and provide timely advice to local and regional planning agencies regarding the consistency of local and regional planning documents, including sustainable communities strategies and alternative planning strategies prepared pursuant to Government Code section 65080, with the Delta Plan.

(b)The council’s input must include, but not be limited to, reviewing the consistency of local and regional planning documents with the ecosystem restoration needs of the Delta and reviewing whether the lands set aside for natural resources protection are sufficient to meet the Delta’s ecosystem needs.

(c) A metropolitan planning organization preparing a regional transportation plan that includes land within the primary or secondary zones of the Delta must consult with the council early in the planning process regarding the issues and policy choices relating to the council’s advice.

(d) No later than 60 days prior to the adoption of a final regional transportation plan, the metropolitan planning organization must provide the council with a draft sustainable communities strategy and an alternative planning strategy, if any. Concurrently, the metropolitan planning organization must provide notice of its submission to the council in the same manner in which agencies file a certificate of consistency with regard to covered actions.

(e) If the council concludes that the draft strategies are inconsistent with the Delta Plan, the council must provide written notice of the claimed inconsistency to the metropolitan planning organization no later than 30 days prior to the adoption of the final regional transportation plan.

(f) If the council provides timely notice of a claimed inconsistency, the metropolitan planning organization's adoption of the final regional transportation plan must include a detailed response to the council's notice.

## PART III--OTHER FORMS OF REVIEW OR EVALUATION BY THE COUNCIL

1. Interested parties, including federal, state and local public agencies, are encouraged to confer with the council or its executive officer over the scope and potential impacts of the interim plan developed under Water Code section 85084. Interested parties will be provided an opportunity to comment and provide input on the interim plan as it is developed.

2. Similarly, prior to adoption of the Delta Plan, project proponents are encouraged to consult with the council or its executive officer early in the planning stages of projects that may constitute "covered actions" under Water Code section 85057.5 once the Delta Plan is adopted. Subject to available resources, the council may review and comment on planning documents and environmental review documents regarding potential "covered actions".

3. Subject to available resources, the executive officer or his designee may meet with interested parties, upon their request, to help mediate relevant disputes, including disputes, once the Delta Plan is adopted, over whether a project constitutes a "covered action" under Water Code section 85057.5. The intent of this mediation will be to provide an objective and informal forum for dispute resolution that will serve as a more efficient alternative to costly and time- consuming litigation.

4. Interested parties, including federal, state and local agencies, are encouraged to confer and coordinate with the council or its executive officer with regard to agency plans, studies, strategies, and recommendations required, or otherwise suggested, to be considered by the council for incorporation into the Delta Plan.