



## **INFORMATION ITEM**

Workshop: Draft Amendments to Administrative Procedures Governing Appeals

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**Summary:** This Council workshop is intended to provide information and solicit input from the public on draft amendments to the Council’s Administrative Procedures Governing Appeals (“Appeals Procedures”). Staff will present draft revisions to the Appeals Procedures for discussion and Councilmember input, with the intent to revise based on input and comments received for potential adoption at a future Council meeting.

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### **BACKGROUND**

The Council adopted the Appeals Procedures, pursuant to Water Code Section 85225.30, on September 23, 2010, several years before the first certification of consistency was filed, and eight years before the first appeal of a covered action (see Attachment 1). The Council’s Appeals Procedures are exempt from the rulemaking process under the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code). (Water Code section 85225.30.)

Since 2018, four certifications of consistency and one revised certification of consistency have been appealed.<sup>1</sup> Conducting the appeals proceedings highlighted areas where the Appeals Procedures could be revised to address issues not foreseen in 2010 when the Appeals Procedures were adopted. The Council’s 2019

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<sup>1</sup> The Council has received the following appeals: 1) The California Department of Water Resources (DWR) filed a certification of consistency for California WaterFix on July 27, 2018. Nine appeals were submitted. The Council conducted a public workshop on November 15-16, 2018, regarding a staff draft Determination prepared to address issues on appeal. DWR withdrew its certification for the project on December 7, 2018, before the Council issued a final Determination; 2) the San Joaquin Area Flood Control Agency filed a certification of consistency for the Smith Canal Gate Project on November 2, 2018. One appeal was submitted. The Council issued its final Determination on March 21, 2018; 3) the Westlands Water District filed a certification of consistency for the Lower Yolo Ranch Restoration Project on April 7, 2020. One appeal was submitted. The appeal was withdrawn on June 12, 2020, before the Council held an initial hearing; 4) DWR filed a certification of consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project on February 22, 2021. Four appeals were submitted. The Council issued its final Determination on July 16, 2021; and 5) DWR filed a revised certification of consistency for the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project on December 30, 2021. Two appeals were submitted. The Council issued its final Determination on April 28, 2022. Records of these appeals proceedings are available at <https://coveredactions.deltacouncil.ca.gov>.

Five-Year Review of the Delta Plan also highlighted areas for potential amendments to the Appeals Procedures.

On December 10, 2021, the Council released an underline/strike-out version of proposed draft amendments to the Appeals Procedures for a 90-day public review period, which concluded on March 7, 2022. The proposed amendments that were circulated are attached for discussion purposes (see Attachment 2).

This report summarizes the proposed amendments to the Appeals Procedures which were circulated for public review and the rationale for the proposed changes. It also summarizes the nature of the comments received.

At today's meeting, the Council will conduct a public workshop. Staff will present the content of the proposed amendments that were circulated for public review, summarize the comments received on the proposed amendments, and provide an opportunity to receive additional public comment(s). The proposed amendments to the Appeals Procedures are not recommended by staff for adoption at this meeting, but staff is seeking Council input and direction on next steps. Staff would bring the proposed amended Appeals Procedures addressing the comments and input back to the Council for possible adoption at a future public meeting.

#### **SUMMARY OF DRAFT AMENDMENTS CIRCULATED FOR PUBLIC REVIEW**

The draft amendments to the Appeals Procedures circulated for public review (provided as Attachment 1 to this staff report) propose to revise 16 of the 31 existing rules, and add one new rule. The amendments may be summarized as follows:

- **Language to Mirror Delta Reform Act:** Revise wording regarding Council authority to mirror the Delta Reform Act (Rules 2 and 4).
- **Filing Deadlines:** Clarify deadlines for the filing of certifications and appeals (Rule 7).
- **Timeliness and Completeness:** Clarify standards for appeals to be considered timely and complete (Rules 4, 6, and 7).
- **Evidentiary Requests:** Clarify the requirements related to evidentiary issues, such as requiring a copy of the document or information item that is the subject of an evidentiary request to be provided along with the request (Rules 10, 29, and 30).

- **Notices:** Clarify the process for establishing deadlines, schedules, and timelines for appeals at Council meetings and hearings by applicable notices (Rule 9).
- **Party Submittals:** Clarify and refine standards for written submittals by the parties to the Council, and clarify the process for establishing deadlines, schedules, and timelines related to written submittals by applicable notices (Rules 11 and 12);
- **Review of and Decisions on Appeals:** Clarify appeals proceedings related to the substantive review and decision of the Council, including stipulations for extension of timelines, dismissals, remand, and denial (Rules 13, 14, and 15); and
- **Accessibility:** Encourage that electronic submittals to the Council meet federal and State website document accessibility standards (Rules 4, 6, 13, and 30).

#### **SUMMARY OF COMMENTS RECEIVED**

The Council received a total of seven (7) comment letters from: the Department of Water Resources (DWR), Delta Protection Commission (Commission), San Luis & Delta-Mendota Water Authority, Santa Clara Valley Water District, Solano County Water Agency, State Water Contractors, and Soluri Meserve (see Attachment 3 for compilation of all comment letters). Comments received were on the proposed amendments and some raised additional issues and suggested revisions for consideration. Commenters also posed numerous questions regarding how current rules and proposed revisions would be interpreted by the Council.

Key comment themes are identified below<sup>2</sup>:

- **Role of the Delta Protection Commission:** The current Appeals Procedures provide that the Commission may testify before the Council concerning an appeal. Commenters state that the Appeals Procedures fail to acknowledge the Commission's broad authority to comment on matters before the Council, including appeals, referencing Public Resources Code section 29773. The Council's interpretation is that the Commission may only raise new issues on appeal within the 30-day timeline for appeals provided by Water Code Section 85225.15 of the Delta Reform Act.

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<sup>2</sup> Not all comments received are summarized in this staff report.

- **Burden of Proof and Standard of Review:** Proposed revisions to the Appeals Procedures reiterate that the Council's standard of review in an appeal is substantial evidence, pursuant to Water Code section 85225.25, and clarify that the burden of proof to show that a certification of consistency is not supported by substantial evidence in the record lies with the appellant. Commenters state that these revised rules misstate the standard of review and inappropriately place the burden on appellants. The Council has addressed these concerns previously in its Determinations on the Lookout Slough Tidal Habitat Restoration and Flood Improvement Project dated July 16, 2021 and April 28, 2022, and its interpretation is supported by applicable law. (Rules 12, 14, and 15).
- **Certifications, Early Consultation, and Appeals for Remanded Issues:** The current Appeals Procedures do not address the scope of potential appeals for revised certifications submitted to the Council following a remand. Commenters request that the Appeals Procedures clarify that successive appeals are to be limited to issues identified in the Council's findings for remand or due to material changes to the project.
- **Early Consultation Following Remand:** Commenters request that the Council create a role for the public and previous appellants in early consultation following a remand. The Council's current practice is to rely on the certifying agency to determine the parties that participate in early consultation (Rules 2 and 15).
- **Public Notice for Draft Certifications of Consistency:** The current Appeals Procedures include a 10-day website posting requirement for an agency not subject to Brown Act or Bagley-Keene Act public meeting requirements to post its draft certification conspicuously on its website for public review and comment. The procedures further advise that agencies provide notice of the posting to "all persons requesting notice." Commenters request extending the time for this to 30-days or 45-days and identify specific parties that should be provided notice of posting (Rule 3).
- **Contents of an Appeal:** Proposed revisions to the Appeals Procedures identify contents that must be included in an appeal, including the identification of each Delta Plan policy appealed with the specific provisions of the policy that are the subject of the appeal. Commenters state that this creates confusion and should be simplified. Commenters also state that the

addition of more specific, detailed requirements unduly raises the bar for appeals beyond Water Code requirements (Rule 6).

- **Evidentiary Requests:** Current Appeals Procedures Rules 10 and 29 specify the parameters for supplementing the record submitted by the certifying agency, including requests for official notice. The proposed revisions would clarify the content required for any request to supplement the record. Commenters suggest that for records to be considered “before the agency” under Rule 10, appellants should provide support that the requested records were submitted to or considered by the certifying agency and not merely in existence at the time of certification. Commenters also request that the certifying agency be given an opportunity to respond to any requests for record augmentation before the Council decides to grant a request (Rules 4, 10, and 29).
- **Hearing Presentations and Comments:** Proposed revisions to the Appeals Procedures provide that parties and the Commission may make presentations and that all other persons may make written comments; they also provide that the order and timing of presentations would be specified in the notice. Commenters state that these proposed changes would preclude those other than the parties and the Commission from making oral presentations during the hearing, and that oral presentations by non-parties may be appropriate in very limited circumstances<sup>3</sup>. Commenters also request that the Appeals Procedures clarify that the certifying agency be given presentation time at any hearing equal to the combined presentation time afforded to all appellants and the Commission (Rule 11).
- **Timeline for Submitting the Record:** The current Appeals Procedures require that the record supporting a certification of consistency be submitted within 10 days following the effective date of an appeal. Proposed revisions would shorten that time period to 5 days and state that the certifying agency is “strongly encouraged” but not required to submit the record with the certification. Shortening the timeframe affords both staff and appellants additional time with access to the record, which is important given staff’s analysis needs and appellant’s burden relative to the record. Some commenters request that the current 10-day requirement should be

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<sup>3</sup> Proposed revisions to Rule 11 were not intended to limit public comments to written comments and this will be clarified in a future revision.

maintained. Others request that the Council require that the record be submitted with the certification (Rule 4).

#### **NEXT STEPS**

Following the Council discussion and public comments, staff requests Council input and direction and recommends that the Council direct staff to revise the current draft of the proposed amended Appeals Procedures in consideration of public and Council comments received and distribute the revised version of the proposed amended Appeals Procedures for public review prior to bringing them back to the Council for consideration and potential adoption at a future public Council meeting or for further discussion at an additional workshop.

#### **FISCAL INFORMATION**

Accessibility guidelines described in proposed changes to Rule 30 may cause the parties to remediate certain existing documents to meet the stated guidelines if they were not already otherwise required to be remediated. Rule 30 encourages the remediation but does not require it. No specific estimates are available at this time. However, for covered actions with voluminous records, costs could be substantial.

#### **LIST OF ATTACHMENTS**

Attachment 1: Existing Administrative Procedures Governing Appeals

Attachment 2: December 7, 2021 Proposed Revisions to Administrative Procedures Governing Appeals

Attachment 3: Comment letters on December 7, 2021 Proposed Revisions to Administrative Procedures Governing Appeals

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