



ACTION ITEM

Revised Draft Amendments to Administrative Procedures Governing Appeals

Summary

After a September 22, 2022, workshop, staff was directed by the Council to revise the draft proposed amendments to the Council's Administrative Procedures Governing Appeals ("Appeals Procedures"), which were discussed at the workshop, in consideration of public and Council comments received in order to bring back the revised draft to the Council for possible adoption at a future Council meeting. Staff distributed the revised version of the proposed amended Appeals Procedures for public review on October 13, 2022 and are presenting that updated draft of the proposed amended Appeals Procedures at this meeting for possible adoption by the Council.

Requested Action

Staff recommends that the Council adopt the attached Resolution 2022-07 *Amendments to Administrative Procedures Governing Appeals* (Attachment 1 to this staff report). Adopting Resolution 2022-07 would approve and adopt proposed amendments to the 2010 Administrative Procedures Governing Appeals (which are Attachment A to Resolution 2022-07) to be effective as of November 1, 2022; it would also direct and authorize the Executive Officer, or her delegee, to complete non-substantive changes and to make the finalized amended Administrative Procedures Governing Appeals available on the Council's website.

Background

The Council adopted the Appeals Procedures, pursuant to Water Code Section 85225.30 on September 23, 2010, (Attachment 2 to this staff report) several years before the first certification of consistency for a covered action was filed and eight years before the first appeal of a certification of consistency. 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.¹ 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 first adopted. The Council's 2019 Five-Year Review of the Delta Plan also highlighted areas for potential amendments to the Appeals Procedures.

On December 10, 2021, the Council released a bold underline/strike-out version of proposed draft amendments to the Appeals Procedures (December 2021 Draft, see attachment 3 to this Staff Report) for a 90-day public review period, which concluded on March 7, 2022. The Council received seven (7) comment letters on the December 2021 Draft from: the Department of Water Resources (DWR), San Luis-Delta Mendota Water Agency, Valley Water, the State Water Contractors, Solano County Water Agency, Soluri Meserve, and the Delta Protection Commission (Commission).

On September 22, 2022, the Council conducted a public workshop on the proposed amendments to the Appeals Procedures in the December 2021 Draft. The December 2021 Draft shows in bold underline/strikeout proposed revisions to the Council's currently effective Appeals Procedures adopted in 2010. At the workshop, staff presented the content of the December 2021 Draft, summarized the comments received on the proposed amendments, provided an opportunity to

¹ 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>.

receive additional public comments, and received Council input. After addressing the comments and input received at the September 22, 2022 workshop, staff is now bringing a revised draft of the proposed amended Appeals Procedures (October 2022 Draft) back to the Council for consideration and possible adoption. The October 2022 Draft of the Appeals Procedures is Attachment A to Resolution 2022-07 and reflects in bold underline/strikeout the revisions made to the December 2021 Draft.

This report summarizes the revisions to the December 2021 Draft proposed in the October 2022 Draft.

Summary of Revisions to the Draft Amendments

Staff considered all of the written comments received prior to the workshop, the six (6) oral comments received at the September 22, 2022, Council meeting workshop, and input from the Council, including direction from the Council to revise the December 2021 Draft, which resulted in the October 2022 Draft (Attachment A to Resolution 2022-07) that is before the Council today. Some key changes are identified below.

Role of the Delta Protection Commission:

The current Appeals Procedures establish that the Commission may make a presentation before the Council regarding an appeal. Some commenters stated that the Appeals Procedures fail to acknowledge their interpretation of the Commission's broad authority to comment on matters before the Council, including appeals, referencing Public Resources Code section 29773, and that the Commission's presentation should not be limited by the scope of the appeal.

- The revised October 2022 Appeals Procedures propose a new Rule (11.1) clearly outlining the Commission's role in an appeal. Under proposed Rule 11.1, the Delta Protection Commission may provide a written submission to the Council commenting on issues raised by an appellant in an appeal and whether the certification of consistency for the proposed covered action is supported by substantial evidence in the record before the certifying agency.
- Under proposed Rule 11.1, the Delta Protection Commission may further make an oral presentation to the Council regarding issues raised by an appellant in an appeal at the time and date of the hearing on the appeal.

- Under proposed Rule 11.1, the council shall consider the Delta Protection Commission's comments and presentation regarding issues raised by an appellant in an appeal as those of an expert in matters that may affect the unique cultural, recreational, and agricultural values of the Delta when preparing, considering, and adopting its findings.

Burden of Proof and Standard of Review:

The December 2021 Draft stated that the Council's standard of review in an appeal is substantial evidence, pursuant to Water Code section 85225.25. Those revisions also stated 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 (Rules 12, 14, and 15). Some commenters stated 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.

- No substantive edits are proposed in response to these comments in the October 2022 Draft. The burden of proof that a certification of consistency is not supported by substantial evidence in the record lies with the appellant(s).

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. Some commenters suggested 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.

- The revised October 2022 Appeals Procedures propose a new rule (Rule 15.1) specifying that any appeal of a revised certification of consistency following a remand shall be limited to: 1) An alleged failure to address each of the Council's findings on the remanded issues; or 2) Issues resulting from material changes to the covered action.
- Additional clarifications are proposed that would establish that no person shall raise new grounds for appeal which were not raised in a prior appeal, nor reassert grounds that were raised or were rejected by the Council.

Early Consultation Following Remand:

Some commenters suggested 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).

- No substantive edits are proposed in response to comments on this matter in the October 2022 Draft.

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." Some commenters suggested extending the time for this to 30-days or 45-days and identify specific parties that should be provided notice of posting (Rule 3).

- No substantive edits are proposed in response to comments on this matter in the October 2022 Draft.

Contents of an Appeal:

The December 2021 Draft identified 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. Some commenters stated that this creates confusion and should be simplified. Some commenters also stated that the addition of more specific, detailed requirements unduly raises the bar for appeals beyond Water Code requirements (Rule 6).

- The October 2022 Draft proposes numerous modifications to Rule 6 to simplify what must be included in an appeal, specifying a required statement of factual allegations and an explanation of how the claimed inconsistency is alleged to have a significant adverse impact on one or both of the coequal goals or implementation of a government-sponsored flood control program.

Evidentiary Requests:

Current Appeals Procedures Rules 10 and 29 specify the parameters for the Council to supplement the record submitted by the certifying agency, including requests for official notice. The December 2021 Draft included language that clarifies the content required for requests for the Council to supplement the record and addresses the scope of "the record before the agency". Some commenters

suggested 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. Some commenters also requested 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).

- No substantive edits are proposed in response to comments on this matter in the October 2022 Draft.

Hearing Presentations and Comments:

The December 2021 Draft provided that parties and the Commission may make presentations and that all other persons may make written comments. Those proposed revisions also provided that the order and timing of presentations would be specified in the applicable notice.

- The Council received numerous comments regarding placing limits on public comments. The October 2022 Draft clarifies that public oral and/or written comments to the Council concerning an appeal may be provided in accordance with the Bagley-Keene Open Meeting Act (Rule 11).
- Additional clarifications are proposed regarding the hearing schedule, oral presentation rules, and time allotted to the parties at the hearing (Rules 11 and 11.1)

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. The December 2021 Draft shortened that time period to five (5) days. The current Appeals Procedures also state that the certifying agency is “strongly encouraged” but not required to submit the record with the certification.

- The October 2022 Draft would keep the shortened 5-day submittal period. Shortening the timeframe affords both staff and appellants additional time with access to the record, which is important given staff’s analysis needs.
- An additional proposed change to Rule 4 would require the certifying agency to submit, with the certification of consistency, a document listing the materials that constitute the record before the certifying agency at the time of certification. This would clarify early on what constitutes the record the certifying agency relied on (Rules 4 and 10).

The current Appeals Procedures do not specifically state the effect when deadlines for submittals and requests occur on weekends and State holidays.

- The October 2022 Draft has an added rule stating that if the last day for a timely submittal or filing to the Council falls on a weekend or a State holiday, that deadline shall be the next business day (Rule 3.1).

The December 2021 Draft included edits related to the timeliness of an appeal (Rule 7) and the completeness of an appeal (Rule 6).

- The October 2022 Draft proposes further revisions to make these requirements clearer and more concise (Rules 6 and 7).

Requested Action

Today, staff is recommending that the Council adopt the attached Resolution 2022-07 *Amendments to Administrative Procedures Governing Appeals* (Attachment 1 to this staff report), which would approve and adopt the October 2022 Draft of the Appeals Procedures (Attachment A to Resolution 2022-07 to be effective as of November 1, 2022; it would also direct and authorize the Executive Officer, or her delegee, to complete non-substantive changes and to make the finalized amended Administrative Procedures Governing Appeals available on the Council's website.

Next Steps

If approved by the Council at today's meeting, the October 2022 Draft of the Administrative Procedures Governing Appeals would take effect on November 1, 2022. The October 2022 Draft would be finalized and made available on the Council's website.

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: Resolution 2022-07: *Amendments to Administrative Procedures Governing Appeals (which includes as Attachment A to Resolution 2022-07 the October 2022 Draft of the revised Appeals Procedures)*

Attachment 2: Current Administrative Procedures Governing Appeals adopted in 2010

Attachment 3: December 7, 2021, Proposed Draft Revisions to the Council's Administrative Procedures Governing Appeals (December 2021 Draft)

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