

# DELTA STEWARDSHIP COUNCIL

## *2024-2026 GEOTECHNICAL ACTIVITIES FOR DELTA CONVEYANCE PROJECT*

Appeal No. C20242 A3

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

December 19, 2024

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- Covered Action = a project under CEQA + will have a significant impact on one or both of the Delta Reform Act's coequal goals (among other provisions)
    - DWR has admitted this is not a covered action
      - Certification, p. 4-2: the Geotechnical Activities “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.”
    - The facts show this is not a covered action

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- Question before the trial court:

- **A. Petitioners' Likelihood of Success on the Merits**

- All of the motions raise a single identical issue with respect to likelihood of success on the merits—the Department's compliance with the Delta Reform Act. Petitioners contend that the Department's plan to undertake geotechnical investigations prior to certifying the DCP as consistent with the Delta Plan violates Water Code section 85225, which requires such certification "prior to initiating the implementation" of a "covered action."

- Standard of review:

- The question before the Court is an issue of statutory interpretation.

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- DWR’s argument before the trial court:

“covered action.” The Department argues that Petitioners’ interpretation is unworkable, claiming that it is afraid that, even though it has completed all of the in-depth studies, analysis, and specificity required under CEQA, it does not yet have enough information to self-certify that the DCP is consistent with the Delta Plan. The Department argues it will not be able to prepare such a certification until it has completed the geotechnical work.

- Court's ruling
  - Disagreement with DWR's position

In opposition, the Department acknowledges that the DCP qualifies as a “covered action” under Water Code section 85057.5, and that it will need eventually to prepare a certification of consistency. The Department argues, however, that even though the geotechnical activities are included as part of the project in the FEIR for CEQA purposes, “implementation” under Water Code section 85225 should not be read to encompass the geotechnical work at issue here because they are “preliminary activities” that merely serve to inform the final design.

But this argument ignores that “implementation” relates to “covered action,” which is defined as consisting of the “project” under CEQA, and the CEQA project in this case includes the geotechnical investigations. The Department offers no case law or other legal support for its position that it should be allowed to define “covered action” more narrowly than section 85057.5 defines that term. Just because the purpose of the geotechnical work is to gather information to aid in making the final design decisions, does not mean that it is not a component of the project that requires implementation. The geotechnical work, just like the ultimate project construction, will likely have an impact on the environment in the Delta that not only requires CEQA review and approval but also certification of consistency with the Delta Plan. The Department's interpretation would require the Court to ignore the plain language of the Delta Reform Act and create a new exemption for the DCP. The Court has no such authority.

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- Court's ruling
    - Geotechnical activities are part of the “covered action”

The Department defined the DCP to include the geotechnical work at issue here. The FEIR analyzed the geotechnical work as part of the project (Baykeeper RJN, Ex. A, pp. 3-2, 3-134 to 3-141), and the Notice of Determination described it as a “key component” of the project (*Id.*, Ex. B, Attachment 2). **Because the geotechnical work is part of the “project” within the meaning of CEQA, it is necessarily part of a “covered action” within the meaning of Water Code section 85225.**

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- Court's conclusion
    - DWR must file certification of consistency for DCP prior to undertaking the geotechnical work described in the FEIR

CONCLUSION

The motions for preliminary injunction are granted. The geotechnical work at issue here is part of the covered action, which requires certification of consistency with the Delta Plan before it is implemented. The Department is, therefore, enjoined from undertaking the geotechnical work described in Chapter 3 of the FEIR prior to completion of the certification procedure that the Delta Reform Act requires.

- DSC has no authority to overrule the trial court's order



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- Policy G P1 (a), (b): DWR cites **no evidence** supporting a conclusion that the Activities will provide more reliable water supply or protect, restore, or enhance the Delta's ecosystem or that the Activities will advance any of the objectives, goals or policies of the Delta Plan or Delta Reform Act.
  - Policy G P1 (b)(2): DWR failed to include pertinent mitigation measures or to show equally or more effective substitute measures were adopted.
  - Policy G P1 (b)(3): DWR failed to document use of best available science.



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- Policy DP P2: DWR has forfeited any argument that its certification is consistent with this policy and its certification is not supported by substantial evidence.
  - DWR has failed to show consistency with Delta Plan Recommendations DP R9 and WQ R2.
  - DWR failed to cite substantial evidence that the geotechnical activities will not have an adverse impact on the Coequal Goals.

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The appeals should be granted because: (1) there is no covered action; (2) the certification of consistency violates a court order; and (3) DWR has failed to show substantial evidence supports its certification of consistency.