

CONSISTENCY DETERMINATION APPEAL

Winnemem Wintu Tribe, 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, Restore the
Delta, and San Francisco Baykeeper

Delta Conveyance Project – 2024-2026 Geotechnical Activities

Consistency Determination No. C20242

Appeal No. C20242-A1

December 19, 2024

Presented by Eric Buescher
Managing Attorney
San Francisco Baykeeper

Approval of DWR's
Consistency
Determination violates
the law, lacks evidence
or logic, is arbitrary, and
perpetuates injustice
and exclusion

The Delta Conveyance Project, not just two years of limited geotechnical work, is the legally covered action

The Delta Conveyance Project, not just two years of limited geotechnical work, is the logical and relevant consideration

DWR's identification of the covered action as two years of limited geotechnical work is arbitrary

The Council should follow its own recommendations to include the rights and interests of Tribes and EJ communities

DWR OFFERS NO ANALYSIS OF THE LEGAL “COVERED ACTION”

Delta Reform Act “Covered Action”

A “covered action” is a “plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code” that occurs in the Delta, is approved or funded by the state or public agency, is covered by the Delta Plan, and will have a significant impact on one or both of the Delta Reform Act’s coequal goals.

(Water Code section 85057.5(a) (emphasis added); see also Cal. Code Regs., tit. 23, section 5001.)

Cal. Env. Quality Act “Project”

Pub. Res. Code section 21065 defines a “project” as “an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment,” and CEQA’s regulations and consistent case law further explain that a project encompasses “the whole of an action.”

(Pub. Res. Code section 21065, and Cal. Code Regs., tit. 14, section 15378 (emphases added); *see e.g., Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1208.)

DWR OFFERS NO ANALYSIS OF THE LEGAL “COVERED ACTION”

Consistency Determination “Covered Action”

“The 2024-2026 Proposed Geotechnical Activities will not include all the geotechnical activities described in the Final EIR, Chapter 3... [They] include subsurface exploration and testing consisting of ... (1) [261] borings ... (2) [up to 15] CPTs ... and (3) installation and removal of a temporary slotted PVC pipe ... for water quality tests [at 31 of the boring locations].”

(DWR Consistence Certification at p. 2.)

Final CEQA Env. Impact Rep. “Project”

Identifying “the proposed project as a 6,000 cfs diversion capacity alternative. ... The identified proposed project consists of the construction, operation, and maintenance of new SWP water diversion and conveyance facilities in the Delta that would ... divert water from two new north Delta intakes via a single tunnel ... to the south Delta and discharge it to the Bethany Reservoir.”

(DCP.D1.1.00010 at 3-6 (PDF pg. 10) (emphasis added).)



COMMON SENSE AND EVIDENCE BASED DECISION-MAKING REQUIRE THE COUNCIL TO REJECT DWR'S CONSISTENCY DETERMINATION

DWR'S COVERED ACTION CHECKLIST ANALYSIS:

Step 2, Question 4 of the Checklist asks whether the project "will have 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 to reduce risks to people, property, and State interests in the Delta." As discussed further in Section 4.1, *Coequal Goals*, the 2024–2026 Proposed Geotechnical Activities, 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.

(DCP.X2.1.00001 at 4-2.)

COUNCIL'S COVERED ACTION CHECKLIST:

If "NO" to any in step 2 above, the plan, program, or project, for purposes of the Delta Plan, does not meet the definition of Covered Action, NO FURTHER STEPS REQUIRED.

If "YES" to all four in step 2 above, then the plan, program or project is considered, for purposes of the Delta Plan, a Proposed Action – PROCEED TO STEP 3.

The 2024-2026 Geotechnical Activities are part of a covered action. They are not themselves a covered action. The Council's review of DWR's attempt to evade the law should end here.

DWR'S ILLOGIC PERVADES ITS IMPACTS ANALYSIS:

Logic Requires

- What is the impact of the covered action on the policies and objectives of the Delta Plan?
- Does the Covered Action further, or have an impact on achieving, one or both of the goals?

DWR says

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CONSISTENCY

DWR'S PIECEMEAL APPROACH TO THE CONSISTENCY DETERMINATION IS ARBITRARY

DWR's Consistency Determination relies on arbitrary choices and ignores the impacts of the DCP on Tribes, communities, and an ecosystem in crisis

- Why only through 2026?
- Why is it different from the Geotech activities described in FEIR Ch. 3?
- Why 261 Borings?
- Why 31 Water Quality Tests?
- Why No Trenching?
- Why 15 CPTs?
- Why these locations, not others?



- No analysis of impacts of operations on Delta ecology or fish and wildlife, including the 7 endangered fish species in the Bay-Delta watershed
- No analysis of impacts on EJ communities in the Delta from construction or operations
- No analysis of impacts of DCP construction or operations on Tribes or Tribal interests in the Delta and throughout the watershed



THE PROPOSED GEOTECHNICAL WORK RISKS HARMS TO TRIBAL CULTURAL RESOURCES

- *Delta is a Tribal Cultural Landscape, DWR has recognized as much and the Council should do the same*
- While there are not extensive surveys of Tribal cultural resources throughout the Delta, *known Tribal Cultural Resources exist around locations impacted by the Proposed Geotechnical work*
- DWR's proposed mitigation has proven inadequate and ineffective. (See Declarations of Senock, Ramirez, and Sarmiento.)



THE COUNCIL MUST INCLUDE AND CONSIDER TRIBES, EJ COMMUNITIES, AND THEIR INTERESTS

Exclusion of Tribal resources and rights, plus the lack of Tribal participation undermines the legitimacy of the existing process.

Council does not have to endorse or perpetuate the history of exclusion and racism in California's water rights and allocation decisions.

It can follow its own recommendations to better include and account for the people live in the Delta and those who lived with it for time immemorial.

Exclusion of EJ communities and the people in them from the Delta Plan undermines the legitimacy of the existing process.

THE RECORD IS BOTH INCOMPLETE AND OVERINCLUSIVE

DWR's communications with the DSC on Early Consultation should be included in the record

The Council cannot change the law through "early consultation" or regulatory practices that are contrary to the statute

Because DWR's proposed covered action is not the CEQA Project, DWR's inclusion of the FEIR analyzing Project impacts is misleading, irrelevant, and obfuscates relevant information

Approval of the Consistency Determination is unlawful, arbitrary, and lacks evidentiary support

We ask that you remand with instructions to DWR to evaluate the *entire* covered action

Certifying DWR's Consistency Determination is Unlawful

Ignoring the Actual Covered Action Contravenes Principles of Logical, Evidence Based Decision Making

The Consistency Determination Rests on a Series of Arbitrary Choices by DWR

On Remand, the Council Should Require DWR to Consider Impacts to Tribes and EJ Communities in Evaluating the DCP