

January 2025

Consideration and Possible Adoption of a Determination on Appeals of Department of Water Resources Certification of Consistency Number C20242 for the 2024-2026 Proposed Geotechnical Activities



**Delta
Stewardship
Council**

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Overview

- Covered action authority and process
- Covered action description
- Summary of staff report and Draft Determination

The Council's Covered Actions Authority

2009 Delta Reform Act

- Established the coequal goals
- Established the Council and authorized the Council to develop and implement the Delta Plan
- Granted Council regulatory and appellate authority over covered actions
- State and local agencies must demonstrate consistency with Delta Plan policies when carrying out, approving, or funding covered actions, prior to implementation

Certifications and Appeals

2009 Delta Reform Act

Certification of Consistency

- State or local public agency determines if a project is a covered action
- Covered actions require written certification with detailed findings as to whether the covered action is consistent with the Delta Plan

Appeals

- Any person who claims a covered action is inconsistent with the Delta Plan may file an appeal within 30 days
- Appeal must include specific factual allegations

Certifications and Appeals Noticed and Listed on Council Website

- <https://coveredactions.deltacouncil.ca.gov>

Hearings and Determination

2009 Delta Reform Act

- Council must conduct a hearing on the appeals within 60 days of filing
- Council must make a decision regarding appeals within 60 days of the hearing
- Determination options:
 - *Deny the appeals* – the certifying agency may proceed with implementation
 - *Remand the matter for reconsideration* – if the certifying agency decides to proceed with the action, as modified to respond to the findings of the Council, the agency shall file a revised Certification of Consistency addressing the Council’s findings prior to proceeding with the action.
- Council or Executive Officer may also **dismiss appeals** that raise non-appealable issues, are outside the Council’s jurisdiction, or that fail to provide required specificity to support the appellant’s claims

Substantial Evidence

Standard of Review

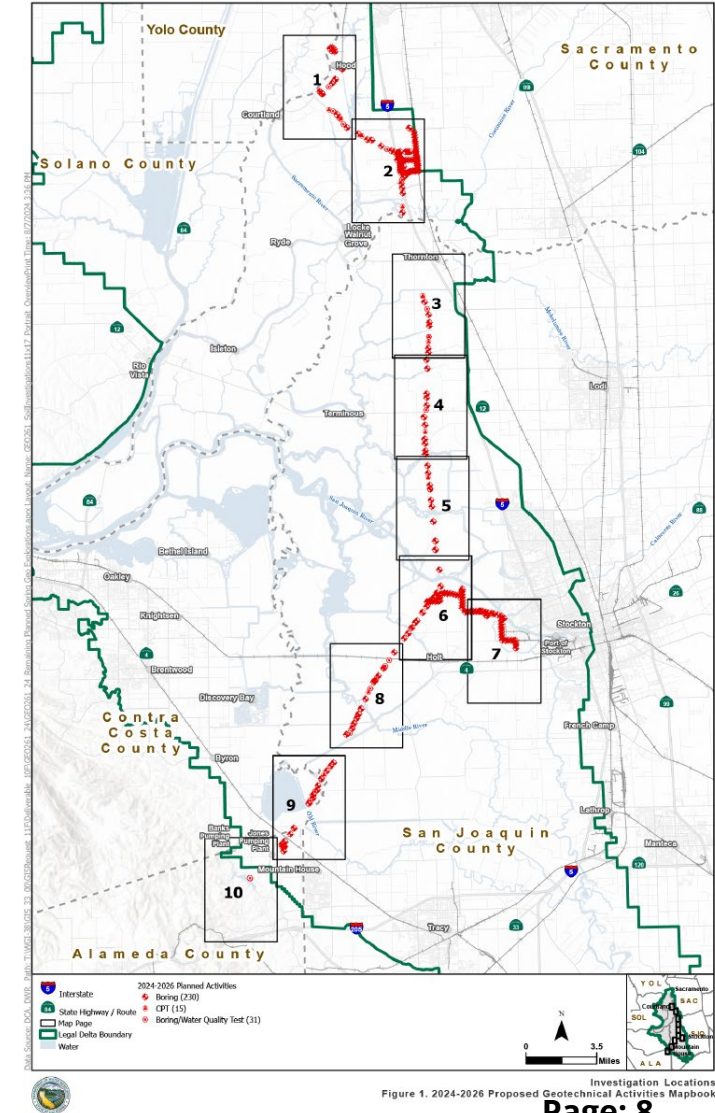
- Council does not independently review the covered action to determine if it is consistent with Delta Plan
- Council does determine if substantial evidence in record supports the Department's Certification that the activity is consistent with Delta Plan, in light of appeals
- Scope of Council's review is whether the Certification is supported by substantial evidence in the record (Wat. Code, § 85225.25.)
- Appellants carry the burden of demonstrating that the administrative record does not contain substantial evidence to support the Department's findings

Timeline

- **October 8, 2024** – Department filed Certification of Consistency
- **November 7, 2024** – Appeals deemed filed
- **November 13, 2024** – Department certified the record as full and complete
- **November 27 – December 13, 2024** – Party briefs filed
- **December 19, 2024** – Council held a hearing on the appeals
- **January 13, 2025** – Council provided notice of today's meeting
- **January 17, 2025** – Council released Draft Determination
- **January 23, 2025** – Council considers and may adopt Draft Determination

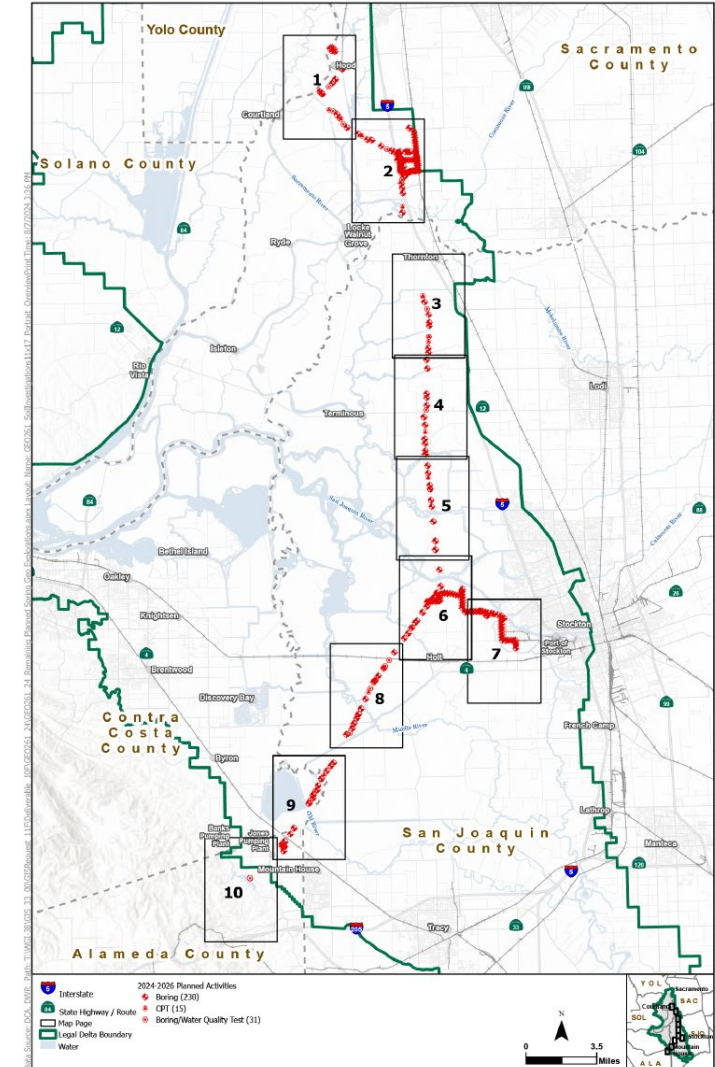
Proposed Geotechnical Activities Description

- Proposed Geotechnical Activities intended “to support the planning and design of the Delta Conveyance Project (DCP).”
- “Located in Sacramento, San Joaquin, Contra Costa, and Alameda Counties, from north of Hood to Bethany Reservoir.”
- “Proposed to collect data to refine the DCP alignment and design.”
- “Consists of 230 soil borings, 15 cone penetration tests (CPTs), and 31 water quality tests.”



Proposed Geotechnical Activities Description Continued

- “Continued planning and design will assist DWR when submitting a certification of consistency for the future implementation of the Delta Conveyance Project.”
- “DWR understands the activities to be preliminary investigations related to the DCP’s planning and design, which DWR understands to be separate from the DCP’s implementation.”



Investigation Locations
Figure 1. 2024-2026 Proposed Geotechnical Activities Mapbook

Certification Summary

Date Filed

October 8, 2024

Delta Plan Policies

The Department’s finding for each Delta Plan policy is summarized in the table:

Delta Plan Policies	Not Applicable
G P1(b)(1) – Coequal Goals	X
G P(1)(b)(2) – Mitigation Measures	X
G P(1)(b)(3) – Best Available Science	X
G P1(b)(4) – Adaptive Management	X
WR P1 - Reduce Reliance	X
WR P2 - Transparency in Water Contracting	X
ER P1 - Delta Flow Objectives	X
ER P2 - Restore Habitats at Appropriate Elevations	X
ER P3 – Protect Opportunities to Restore Habitat	X
ER P4 – Expand Floodplains and Riparian Habitat in Levee Projects	X
ER P5 - Avoid Invasive Nonnative Species	X
DP P1 – Locate New Urban Development Wisely	X
DP P2 - Respect Local Land Use	X
RR P1 - Prioritization of Levee Investments	X
RR P2 – Require Flood Protection in Residential and Rural Areas	X
RR P3 – Protect Floodplain	X
RR P4 – Floodplain Protection	X

Certification of Consistency C20242 and Appeals

The Council received timely appeals on November 7, 2024, from four parties:

- C20242-A1 – San Francisco Baykeeper, Winnemem Wintu, 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, and Restore the Delta. (**San Francisco Baykeeper et al.**)
- C20242-A2 – South Delta Water Agency (**SDWA**)
- C20242-A3 – County of Sacramento, Sacramento County Water Agency, Sacramento Area Sewer District, and City of Stockton (**County of Sacramento et al.**)
- C20242-A4 – County of San Joaquin, Central Delta Water Agency, and Local Agencies of the North Delta (**San Joaquin County et al.**)

Certification and appeals are available on Council's covered actions website

Appeals Summary

Appealed Policies (Short Title)	Appealed By			
	San Francisco Baykeeper et al.	South Delta Water Agency	County of Sacramento et al.	SJC et al.
G P1(b)(1) – Coequal Goals	X	X	X	X
G P1(b)(2) – Mitigation Measures	X	X	X	X
G P1(b)(3) – Best Available Science	X	X	--	--
G P1(b)(4) – Adaptive Management	X	--	--	--
WR P1 - Reduce Reliance	X	--	--	--
WR P2 - Transparency in Water Contracting	X	--	--	--
ER P1 - Delta Flow Objectives	X	--	--	--
ER P2 - Restore Habitats at Appropriate Elevations	X	--	--	--
ER P3 - Protect Opportunities to Restore Habitats	X	--	--	--
ER P4 - Expand Floodplains and Riparian Habitats	X	--	--	--
ER P5 - Avoid Invasive Nonnative Species	X	X	--	--

Appeals Summary Continued

Appealed Policies (Short Title)	Appealed By			
	San Francisco Baykeeper et al.	South Delta Water Agency	County of Sacramento et al.	SJC et al.
DP P1 – Locate New Urban Development Wisely	X	X	X	X
DP P2 - Respect Local Land Use	X	--	--	--
RR P1 - Prioritization of Levee Investments	X	--	--	--
RR P2 – Require Flood Protection	X	--	--	--
RR P3 – Protect Floodways	X	--	--	--
RR P4 – Floodplain Protection	X	--	--	--

Threshold Issues

Two threshold issues raised by appeals

1. Does CEQA govern certifications of consistency and prohibit the Department from submitting a separate certification for the Proposed Geotech?
2. Is the Proposed Geotech a covered action?

Issue 1: Does CEQA govern certifications and prohibit a separate certification for Proposed Geotech?

No

- Department did not necessarily violate the Delta Reform Act by submitting certification for Proposed Geotech separately from other activities described in the EIR for DCP
- Council is an independent agency with power to regulate covered actions
 - CEQA does not govern the certification process, except as specifically incorporated by Council regulations
 - Council's covered action authority is not subordinate to regulatory authority of another agency

Issue 1: Does CEQA govern certifications and prohibit a separate certification for Proposed Geotech?

- Council regulations solely govern certifications and specifically address piecemealing concerns
 - Submitting more than certification of consistency is not prohibited by Council regulations, so long as the decision to do so is reasonable and made in good faith
 - Piecemealing concerns are addressed by Council's regulatory definition of "significant impact" as criteria for covered actions
 - requires that "the project's incremental effect is considered together with the impacts of other closely related past, present, or reasonably foreseeable future projects."

Issue 2: Is Proposed Geotech a covered action?

No

- Council has authority to determine whether a project is a covered action when its appellate jurisdiction has been invoked
- Two-part test
 1. Is Proposed Geotech a “proposed action”?
(Yes)
 2. Is the proposed action a “covered action”?
(No)
- Because Proposed Geotech is not covered by one or more Delta Plan policies, it is not a covered action
- Council does not reject or approve certifications
- Council may dismiss appeals on specific grounds, including lack of jurisdiction

Is Proposed Geotech a “proposed action”?

Yes

1. It would occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh
2. It would be carried out, approved, or funded by the state or a local public agency
3. It would have a significant impact on achievement of one or both of the coequal goals or the implementation of government-sponsored flood programs ...
 - “Significant impact” = on its own or when the project's incremental effect is considered together with the impacts of other closely related past, present, or reasonably foreseeable future projects

Is the proposed action a “covered action”?

No

1. It would not be covered by one or more provisions of the Delta Plan
 - Provisions = 13 Article 3 regulatory policies
2. Record supports Department’s determination that Proposed Geotech is not covered by a regulatory policy
3. All regulatory policies contain a provision describing what “covered” means for purposes of determining if a proposed action is “covered”
 - Appellants substantively challenged ER P5, DP P2
 - Staff evaluated “covered” provisions for all 13 policies, none are met
4. Because Proposed Geotech is not a covered action, GP 1 policies (mitigation measures, adaptive management, best available science) do not apply

Is the proposed action a “covered action”?

ER P5 – Invasive Non-Native Species

1. Policy covers a proposed action that has the reasonable probability of introducing, or improving habitat conditions for, nonnative invasive species.
2. Department states ER P5 is not applicable because proposed activities would result in minor disturbances with temporary impacts mitigated by environmental commitments and Best Management Practices
3. Appellants claim inconsistency, stating that DWR does not specify whether all vehicles will be cleaned and inspected nor the clothing and footwear of personnel, both of which could reasonably result in the introduction of nonnative invasive species

Is the proposed action a “covered action”?

ER P5 – Invasive Non-Native Species

4. Analysis:

- Appellants do not claim the action could improve habitat conditions for nonnative species or cite evidence that concern rises to a “reasonable probability”
- Appellants do not point to an invasive species standard for vehicles, clothing, and footwear
- Department’s BMPs address work vehicles
- A limited number of field personnel will access the proposed sites

5. Reasonable probability has not been established and therefore ER P5 does not cover the Proposed Geotech

6. Appellants have failed to show that Department’s determination that ER P5 does not apply is not supported by substantial evidence in the record

Is the proposed action a “covered action”?

DP P2 – Respect Local Land Use

1. Policy covers proposed actions that involve siting of water management facilities, ecosystem restoration, and flood management infrastructure
2. Department states DP P2 does not apply because the proposed action only includes temporary information collection activities and does not involve physical placing (siting) of facilities
3. Appellants claim:
 - Proposed action includes placement of permanent components, namely grout used to seal the borings
 - Purpose is to support water management facilities, so it is a “water management facility”
 - Proposed action will conflict with agriculture and Harvest Water Program

**Is the proposed
action a “covered
action”?**

DP P2 – Respect Local Land Use

4. Analysis:
 - Bore holes with PVC pipes used for water quality testing would not constitute a water management facility because PVC pipes will be removed, and bore holes will be filled after activities are concluded
 - Material left behind (cement-bentonite grout) will not be used for ongoing water management
 - Although data collected may inform planning and design of the DCP, actual siting of the DCP is not at issue in this certification
5. Proposed action does not involve siting of a water management facility and therefore DP P2 does not cover the Proposed Geotech
6. Appellants have failed to show that Department’s determination that DP P2 does not apply is not supported by substantial evidence in the record

Recommended Findings

- **Dismiss appeals** for lack of jurisdiction
- No further findings
 - No findings with respect to DCP
 - No findings with respect to geotechnical activities that are not part of the certification
- Department must file certification for DCP

Staff Recommendation

Based on the analysis and findings in the Draft Determination, staff recommends that the Council:

1. Adopt Resolution 2025-01, which in relevant part would:
 - Adopt the Draft Determination and the findings contained therein, and thereby
 - Dismiss the appeals pursuant to Water Code section 85225.10, subdivision (c), and Cal. Code Regs, tit. 23, § 5034, subd. (d)

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