

This document shows proposed amendments to the Administrative Procedures Governing Appeals. Proposed changes shown are from the December 2021 draft amendment to the October 2022 revised draft amendment to the Administrative Procedures. The additions are shown in **bold underline**; deletions from the original Procedures are ~~italics~~; deletions from the December 2021 draft are shown in ~~bold~~.

Amend the Administrative Procedures Governing Appeals to read as follows:

## **DELTA STEWARDSHIP COUNCIL**

### **I. ADMINISTRATIVE PROCEDURES GOVERNING APPEALS II. STATUTORY PROVISIONS REQUIRING OTHER CONSISTENCY REVIEWS III. OTHER FORMS OF REVIEW OR EVALUATION BY THE COUNCIL**

#### **PART I – ADMINISTRATIVE PROCEDURES GOVERNING APPEALS**

##### **Introduction**

1. Purpose. These informal administrative procedures govern how the Delta Stewardship Council (council) considers appeals with regard to:
  - a) Adequacy of certifications of consistency with the Delta Plan submitted to the council by a state or local public agency pursuant to Water Code sections 85225.10 and 85225.30; and
  - b) Determinations by the Department of Fish and Game that the Bay Delta Conservation Plan has met the requirements of Water Code section 85320 for inclusion in the Delta Plan.

NOTE: Authority cited: Water Code sections 85001, 85020(h), 85022, 85057.5, 85200, 85210, 85212, 85225, 85225.5, 85225.10, 85225.15, 85225.20, 85225.25, 85225.30, 85300, 85320(e).

##### **Review of certifications of consistency with Delta Plan**

2. Any state or local public agency (certifying agency) proposing to undertake a covered action, as defined in Water Code section 85057.5 is encouraged to consult with the council at the earliest possible opportunity, preferably no later than 30 days before submitting its certification to the council pursuant to Water Code section 85225. The council's staff will meet with the agency's staff to review the consistency of the proposed action and to make recommendations, as appropriate. During this early consultation, the agency's staff may also seek clarification on whether the proposed project is a "covered

action”; provided that the ultimate determination on whether it is a covered action shall be made by the agency, subject to judicial review.

NOTE: Authority cited: Water Code sections 85212, 85225, 85225.5, 85225.30.

3. At least 10 days prior to its submission of a certification to the council, a **certifying ~~state or local~~** agency that is not subject to open meeting laws (that is, the Bagley-Keene Open Meeting Act [Gov. Code sec.11120 et seq.] or the Brown Act [Gov. Code sec.54950 et seq.]) with regard to its certification, shall post, for public review and comment, its draft certification conspicuously on its website and in its office, mail it to all persons requesting notice, and include any public comments received in the record submitted to the council in the case of an appeal. A **certifying ~~state or local~~** agency that is subject to open meeting laws with regard to its certification is encouraged to take those actions.

NOTE: Authority cited: Water Code sections 85225, 85225.30.

3.1 **If the last day for a submittal or filing to the council required under these procedures is a weekend or a State holiday, that deadline shall be the next business day.**

**NOTE: Authority cited: Code of Civil Procedure section 12a; Water Code section 85225.30**

4.

a) Any certification of consistency filed by a **certifying ~~state or local~~** agency pursuant to Water Code section 85225 shall set forth detailed findings that the covered action is consistent with the Delta Plan. The council ~~shall~~ **has prepared** a checklist, **posted on the council’s website**, that agencies may use to assist them in preparing the certification and making the required findings. Certifications shall be filed on the ~~c~~**Council’s** covered actions portal (<https://coveredactions.deltacouncil.ca.gov>).

**b) A certifying agency shall include with the certification of consistency submitted to the council a document listing the materials that constitute the record before the certifying agency at the time of certification.**

~~b-c)~~ A **certifying ~~state or local~~** agency shall submit to the council, no later than 5 calendar days after receiving notice of an appeal pursuant to Paragraph 8, the record **listed in subsection (b)** that was before the certifying ~~state or local~~ agency at the time it made its certification, ~~including a table of contents of documents contained therein a brief chronology of events and actions relevant to the covered action.~~ **The record shall be certified by the ~~state or local~~ agency as being “full and complete”. Any modifications to the certified record shall be** subject to these procedures.

Given the tight, statutory deadlines for hearing and deciding appeals, a **certifying state or local** agency is nevertheless strongly encouraged to **either submit or make** the record **publicly available** at the time it files its certification of consistency **and provide information on its location in the certification** ~~to ensure the opportunity for thorough review by the council in the event of an appeal.~~

~~ed~~) The failure by a **certifying state or local** agency to submit the record to the council on a timely basis as required by subparagraph (~~b~~ **c**), shall be grounds for the council to remand the matter to the **certifying state or local** agency on the basis that there was not substantial evidence presented to support the certification of consistency.

~~de~~) Any filings, documents, and information required by this Paragraph (4) shall be submitted in electronic form to facilitate availability and public access and shall be public records.

NOTE: Authority cited: Water Code sections 85225, 85225.30.

5. Any person, including any member of the council or its executive officer or delegee, who claims that a proposed covered action is inconsistent with the Delta Plan and, as a result of that inconsistency, that action will have a significant adverse impact on the achievement of one or both of the goals of the Act or implementation of government sponsored flood control programs to reduce risks to people and property in the Delta, may file an appeal with regard to a certification of consistency submitted to the council no later than 30 calendar days after the date that the certification of consistency was submitted to the council.

NOTE: Authority cited: Water Code sections 85225.10 (a), 85225.15, 85225.30.

6.

**a)** All appeals, **and any supporting documentation** shall be **in writing and submitted with any supporting documentation** in electronic form on the council's covered actions portal (<https://coveredactions.deltacouncil.ca.gov>) to facilitate availability and public access and shall be public records.

**ab)** The appeal shall **be in writing, and it shall** clearly and specifically set forth the basis for the claim that the covered action is inconsistent with the Delta Plan, **and it must contain:**

~~b) The appeal shall be in writing and set forth the following information:~~

i.) Appellant's name, **residence address or mailing** ~~and~~ address, **email address, and telephone number;**

ii.) The **project** name of the covered action, and **its certification of consistency identification** number issued by the council, ~~that is the~~

*subject of the appeal;*

iii.) The **name of the certifying agency** *identity of the state or local government body whose certification is being appealed;*

~~iv.) A list of the specific Delta Plan policies with which the proposed covered action is claimed to be inconsistent; and~~

**iv. A statement of factual allegations upon which the appeal is based;**

~~v. For each policy that is appealed based on the claim that the proposed covered action is inconsistent with the Delta Plan, clearly and specifically provide the following:~~

~~A. The specific grounds for appeal, including which provisions of the policy are being appealed and an explanation that specifies how the proposed action is inconsistent with that policy;~~

~~B. How, as a result of the claimed inconsistency, the action will have a significant adverse impact on the achievement of one or both of the coequal goals or the implementation of a government-sponsored flood control program to reduce risks to people and property in the Delta; and~~

~~C. A detailed statement of the specific facts on which the appeal for that policy is based.~~

~~iv v.) A list of the specific Delta Plan policies **with which the proposed covered action is claimed to be inconsistent; and that appellant alleges that the proposed covered action is to be inconsistent with; and for each policy identified:**~~

- ~~A. **A concise statement of the authority, evidence and arguments relied on to support the appellant's claim that the proposed covered action is inconsistent with the policy; and**~~
- ~~B. **How the claimed inconsistency will have a significant adverse impact on one or both of the coequal goals set forth in Water Code section 85054 or the implementation of a government-sponsored flood control program to reduce risks to people and property in the Delta.**~~

NOTE: Authority cited: Water Code sections 85225.10, 85225.30.

7.

**a) For purposes of determining the timeliness of an appeal under Water Code section 85225.15, an appeal shall be considered timely when received by the council no later than 5:00 PM on the thirtieth calendar day following the council's receipt of the certification of consistency. ~~Separately, the effective date of filing for a timely submittal of an appeal shall be designated to be no later than the thirtieth day from the date of receipt of the certification of consistency. A copy of the appeal shall be stamped "Filed" by the council staff with the effective date of filing indicated. The effective date of filing shall govern the timeframe established by Water Code section 85225.20.~~**

**b) The effective date of a timely appeal shall be the thirtieth day after the date of receipt of the certification of consistency.**

**c) A copy of the appeal shall be stamped "Filed" with the effective date. The effective date of filing shall govern the timeframe established by Water Code section 85225.20.**

NOTE: Authority cited: Water Code sections 85225.10, 85225.20, 85225.30; Government Code sections 6707, 11020(a).

8. Within five working days of the effective date ~~of filing~~ of an appeal ~~with the council~~, the executive officer or delegee shall:

a) Post a notice and brief description of the appeal and its effective date in a conspicuous location in the council's office and on its website;

b) Mail to the affected state or local public agency and to any third party whose proposal is the subject of the certification, a copy of the notice and a brief description, with a copy of the appeal documents filed with the council;

c) Mail copies of the appeal to each member of the council, and to the Delta Protection Commission for informational purposes consistent with Public Resources Code section 29773; and

d) Mail notice to the appellant that the appeal has been filed and stating the effective date of filing.

e) The council or executive officer or delegee may issue supplemental notices as necessary.

f) Notices shall be mailed electronically.

NOTE: Authority cited: Water Code sections 85225.30.

9. The council or its executive officer or delegee may request from the appellant further information necessary to clarify, amplify, correct, or otherwise supplement the information submitted with the appeal to be provided by the deadlines specified by the council or its executive officer or delegee. The council or its executive officer may dismiss the appeal for failure of the appellant to provide information requested by a specified deadline, if the information requested is in the possession of or under the control of the appellant.

NOTE: Authority cited: Water Code sections 85225.10, 85225.20, 85225.25, 85225.30.

10. The council or its executive officer or delegee may supplement the record submitted by the state or local agency if the council or its executive officer or delegee determines that additional information was part of the record before the agency at the time of certification, but was not included in the agency's submission to the council.

a) Any party to an appeal and the Delta Protection Commission may submit a request to the council to supplement the record with additional documentation or information that was part of the record before the agency but was not included in the agency's submission to the council. Any such request, including the documentation or information requested for admission, shall be submitted to the council in electronic form and by the deadline specified by the council for such submittals in the applicable notice. Requests that are not submitted by the specified deadline, in the required format, or that do not include the required documentation or information shall not be considered for admission.

b) To be considered for admission pursuant to this Paragraph 10, each request shall include all of the following for each specific document or information requested to be considered for admission:

i. Specification that the request is being submitted pursuant to Paragraph 10 of these procedures.

ii. The documentation or information that is the subject of the request. Each document or information that is the subject of a request must be provided as a separate electronic document or file. Multiple documents or information submitted as one electronic file shall not be considered for admission.

iii. Specific evidence that the document or information requested for admission was part of the record before the agency prior to the date of the council's receipt of the certification.

NOTE: Authority cited: Water Code sections 85225.10, 85225.20, 85225.25, 85225.30.

11. ~~Except as otherwise specified in these procedures, deadlines, schedules, and timelines, including for hearings, requests for admission of additional information pursuant to Paragraph 10 and/or Paragraph 29, written submissions by the parties to an appeal and the Delta Protection Commission pursuant to Paragraph 12, oral presentations and related materials, and public comment procedures shall be specified in the applicable notice issued by the council or executive officer or delegee. Requests and submissions provided after deadlines specified in the applicable notice shall not be considered. All submissions, requests, presentations, and related materials shall be submitted in electronic form.~~

All deadlines and scheduling related to the appeal, including but not limited to hearings, written submissions, and requests for admission of additional information pursuant to Paragraph 10 and/or Paragraph 29, shall be specified in a notice issued by the council or executive officer or delegee, unless already specified by statute or these procedures. Requests and submissions provided after deadlines specified in the applicable notice shall not be considered. Except for submissions under 11(f), all submissions, requests, presentations, and related materials shall be submitted in electronic form.

a) The council shall conduct ~~any a~~ hearing on an appeal ~~made pursuant to Paragraph 6~~ in a manner deemed most suitable to ensure fundamental fairness to all parties concerned, and with a view toward securing all relevant information and material necessary to render a decision without unreasonable delay.

b) The hearing need not be conducted according to technical rules relating to evidence and witnesses. ~~Any relevant evidence shall be considered if it is the sort of evidence on which reasonable persons are accustomed to rely upon in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a court proceeding.~~ Unduly repetitious or irrelevant evidence may be excluded upon order of the council, chairperson, or executive officer.

c) Except as provided in sections 10 and 29, evidence is limited to the record that was before the certifying agency prior to the council's receipt of the certification of consistency. The record will not include a transcript of any proceedings before the certifying agency unless provided by a party to the proceedings or requested by the council.

~~d) The appellant, the state or local agency, and the Delta Protection Commission, may make oral presentations testify before the council regarding an appeal during the hearing, as specified in the hearing notice issued by the council. Presentations may be oral or in writing, shall address only whether the record supports the certification of~~

~~consistency, and shall be as brief as possible. The council or executive officer or delegee shall have the discretion to set time limits on oral presentations and the order of presenters, which shall be provided in the hearing notice. Other interested parties may only present comments as provided in subsection (f), below.~~

**d) The appellant(s) and certifying agency may each make oral presentations regarding the appeal at the time and date of the hearing set forth in the notice issued by the council or executive officer or delegee. Presentations shall address the issues and facts raised in the appeal and shall be as brief as possible. The council or executive officer or delegee shall have the discretion to set time limits on oral presentations and decide the order of presenters. The certifying agency shall be afforded the combined amount of presentation time that is afforded to appellant(s).**

e) Council members may ask questions of the appellant, the **certifying state or local** agency, the Delta Protection Commission, any third party appearing at the hearing, or council staff. Questioning of speakers at the hearing by other persons shall not be permitted except by permission of the presiding officer.

~~f) Any other person may submit written comments concerning an appeal. Comments should be submitted to the council at least 10 days prior to the hearing to ensure that they, or in appropriate cases, summaries, may be circulated to council members for their review ahead of the hearing.~~

**f) Any other person may provide oral comment and/or written comments to the council concerning an appeal in accordance with the Bagley-Keene Open Meeting Act. Written comments may be submitted any time, but to ensure that written comments may be circulated to council members for their review ahead of the applicable meeting concerning an appeal, written comments should be submitted to the council at least 10 days prior to that meeting. Written comments may be submitted electronically.**

NOTE: Authority cited: Water Code sections 85225.10, 85225.20, 85225.25, 85225.30; **Government Code section 11125.7)**

**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. 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. 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.**

**NOTE: Authority cited: Water Code section 85225.30.**

12. ~~Any submissions to the council except those pursuant to Paragraph 11, subdivision (f) shall be in electronic form.~~ Documentation and information provided with a submission and not included in the record submitted by the certifying party is subject to the requirements of Paragraphs 10 and/or 29 of these procedures for consideration of admissibility, as applicable based upon the request for admission.

a) Each submittal shall include a cover sheet that lists the following information in the order listed below:

**i. The certification of consistency number and name of the covered action; The project name of the covered action and identification number issued by the council;**

ii. The name of the party submitting the document;

iii. The date of submission; and

iv. The document title.

b) A written submission by an appellant or the Delta Protection Commission in support of an appeal shall provide specificity for each appealed policy, including citations to evidence in the record, to support the grounds for appeal identified in the appeal. An appellant or the Delta Protection Commission shall not introduce additional grounds for appeal in a written submission. Any such additional grounds shall not be considered as part of the appeal.

c) The certifying agency’s written submission shall respond to the allegations of the appeal(s). **To the extent possible, the certifying agency shall cite with specificity, including citations** to evidence in the record to support the certification of consistency. **This requirement shall not be construed to relieve an appellant’s burden to show that the certification of consistency is not supported by substantial evidence in the record.**

NOTE: Authority cited: Water Code section 85225.30.

13.

- a) The council shall hear appeals of certifications of consistency filed pursuant to Water Code section 85225 within 60 days of filing unless:
- i.) The parties and the council or executive officer or delegee agree to an extension, taking into account the circumstances of the matter subject to appeal and the council's hearing schedule and associated workload; or
  - ii.) Prior to the hearing, the council, or its executive officer or delegee, determines that the issue(s) raised on appeal is/(are) not within the council's jurisdiction or does/(do) not raise an appealable issue(s); or
  - iii.) **The council or its executive officer or delegee determines that all issues raised on appeal are moot; or All issues on appeal are dismissed prior to the hearing pursuant to these procedures; or**
  - iv.) **The council or its executive officer or delegee determines that all issues on appeal should be dismissed or the matter remanded for failure to comply with these procedures. The council or its executive officer or delegee determines that the issue raised on appeal is moot.**
  - v.) **The council or its executive officer or delegee remands the matter to the certifying agency for failure to submit the record pursuant to paragraph 4(d).**

b) The council may hold additional hearings or workshops at its discretion as it deems necessary.

c) The council may, **upon a determination of good cause**, continue the hearing. ~~where it determines that a continuance would be appropriate.~~

NOTE: Authority cited: Water Code sections 85225, 85225.10, 85225.20, 85225.30.

14. The council shall make ~~its~~ **a** decision on the appeal **with specific written findings** within 60 days of hearing the appeal. ~~, and shall make specific written findings defining the covered action under review and either denying the appealed issues or remanding the matter or specific issues to the state or local public agency for reconsideration of the covered action based on the finding that the appellant has or has not shown that the certification of consistency is not supported by substantial evidence in the record before the state or local public~~

~~agency that filed the certification.~~ The parties and the council or the executive officer or delegee may agree to an extension of the time~~line~~ for the council's decision ~~taking into account the~~ considering circumstances of the matter subject to appeal, ~~and~~ the council's hearing schedule, and associated workload.

NOTE: Authority cited: Water Code sections 85210.5, 85225.20, 85225.25, 85225.30.

15. No covered action which is the subject of an appeal shall be implemented unless one of the following conditions has been met:

- a) The council has found that no appellant has shown that the certification of consistency is not supported by substantial evidence in the record on any appealed issue; or
- b) After remand, the public agency has pursuant to Water Code section 85225.5 decided to proceed with the action as proposed or modified and has filed with the council a revised certification of consistency addressing each of the findings made by the council and any changes made to the proposed action, 30 days has elapsed and no person has appealed the revised certification; or
- c) The appellant has withdrawn the appeal; or
- d) The council or its executive officer or delegee has dismissed the appeal(s) under these procedures.
- e) If, after hearing an appeal, The appeal is deemed denied because the council has not adopted findings that the appellant has shown that the certification of consistency is not supported by substantial evidence in the record ~~on any appealed issue.~~

**NOTE: Authority cited: Water Code sections 85225.20, 85225.25, 85225.30**

**15.1:**

- (a) **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.**
- (b) **Except as provided in subdivision (a)(2) above, 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. Such grounds may be considered non-appealable issues and dismissed.**

NOTE: Authority cited: Water Code sections 85210.5, 85225.5, 85225.25,

85225.30.

### **Review of Bay Delta Conservation Plan**

16. If the Department of Fish and Game (department) determines that the Bay Delta Conservation Plan (BDCP) referred to in Water Code section 85053 meets all of the requirements of Water Code section 85320 for inclusion in the Delta Plan, it shall file the BDCP and its determination with the council.

NOTE: Authority cited: Water Code sections 85053, 85225.30, 85320.

17. Upon receipt of the department's determination, the executive officer of the council shall:

a) Post a notice and brief description of the BDCP, the department's determination, the date of filing and the right of any person to appeal that determination on its website and in a conspicuous location in the council's office;

b) Mail a notice and brief description of the BDCP, the department's determination and the right of appeal to any person requesting notice; and

c) Mail copies of the determination to each member of the council.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

18. Any person, including any member of the council or its executive officer, may appeal to the council the determination of the department that the BDCP meets all of the requirements of Water Code section 85320 for inclusion in the Delta Plan.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

19.

a) Any appeal to the council made pursuant to Paragraph 18 shall be made within 30 days of the later of the following:

1. the filing with the council of the department's determination that the BDCP meets all the requirements of Water Code section 85320 for inclusion in the Delta Plan, or

2. the conclusion of the council's hearing or hearings held pursuant to Water Code section 85320(d).

b) The appeal shall be in writing and filed in electronic form. It shall clearly set forth the specific grounds for the appeal and the specific facts upon which it is based. These shall include a list of each specific requirement of Water Code section 85320 that the BDCP allegedly fails to meet. The

appeal shall be considered filed with the council when the appellant's appeal is received, determined by staff to contain all the information required in this paragraph, and a hard-copy is printed and stamped "Filed" by the council staff with the date of filing indicated.

c) If an appeal is filed before the council publicly notices a hearing to be held pursuant to Water Code section 85320(d), the council, in its discretion, may combine the hearing on appeal and the hearing pursuant to Water Code section 85320(d).

NOTE: Authority cited: Water Code sections 85225.30, 85320.

20. Within five working days of the filing of an appeal pursuant to Paragraph 18, the executive director shall:

a) Post a notice and brief description of the appeal on its website and in a conspicuous location in the council's office;

b) Mail a notice and brief description of the appeal to any person requesting copies of such appeals; and

c) Mail copies of the appeal and a brief description of the appeal to each member of the council.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

21. The council or its executive officer may request from the appellant or the department additional information necessary to clarify, amplify, correct, or supplement the information submitted with the appeal within a reasonable period.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

22. Any appeal made pursuant to Paragraph 18 may be dismissed if the council or its executive officer determines that it does not raise an appealable issue or if the appellant has failed to provide requested information to support her charge within a reasonable time, if that information is in the possession of or under the control of the appellant.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (e).

23. The council shall determine, based upon a preponderance of the evidence, whether the department correctly determined that the BDCP meets all of the requirements of Water Code section 85320 for inclusion in the Delta Plan. In reaching its decision, the council shall give weight to the reasoning and factual findings of the department. The council may seek clarification from the department of its reasoning and factual findings prior to the council making its final determination.

NOTE: Authority cited: Water Code section 85225.30, 85320(b), (e).

## 23.5

- a) The council shall conduct any hearing on an appeal made pursuant to Paragraph 18 in a manner deemed most suitable to ensure fundamental fairness to all parties concerned, and with a view toward securing all relevant information and material necessary to render a decision without unreasonable delay.
- b) The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be considered if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in a court proceeding. Unduly repetitious or irrelevant evidence shall be excluded upon order of the council or its chairperson.
- c) Subject to Paragraph 23, evidence before the council includes, but is not limited to, the record before the department. The record will not include a transcript of any proceedings before the department unless provided by a party to the proceedings or requested by the council.
- d) Any interested person may testify before the council regarding an appeal concerning the BDCP. Speakers' presentations shall be to the point and shall be as brief as possible. Visual and other materials may be used as appropriate. The council may establish reasonable time limits for presentations; such time limits shall be made known to all affected persons prior to any hearing. Where speakers use or submit to the council visual or other materials, such materials shall become part of the hearing record and shall be identified and maintained as such. Speakers may substitute reproductions of models or other large materials but shall agree to make the originals available upon request of the executive director.
- e) Council members may ask questions of the appellant, the department's representative(s), any third party appearing at the hearing or staff. Questioning of speakers at the hearing by other persons shall not be permitted except by permission of the Chairperson.
- f) Interested persons may submit written comments concerning an appeal. Any such comments will be considered by the council if they are received by the council at or before the hearing on the appeal; provided that those written comments should be submitted to the council at least 10 days prior to the hearing to ensure that they, or in appropriate cases, summaries, may be circulated to council members for their review ahead of the hearing.
- g) The council may continue the hearing where it determines that a continuance would be appropriate.

NOTE: Authority cited: Water Code sections 85225.30, 85320(e).

24. The council's decision shall include specific written findings. The council shall post its decision on its website and mail copies to the department and all parties requesting notice.

NOTE: Authority cited: Water Code sections 85225.30, 85320(e).

25. If the council decides that the department incorrectly determined that the BDCP meets all of the requirements of section 85320 for inclusion in the Delta Plan, and consequently grants the appeal, the department may revise its determination to meet the issues raised by the council, or may respond to the council's findings in detail, setting forth reasons why it has concluded that the BDCP meets all of the requirements of section 85320 for inclusion in the Delta Plan. Unless the council decides that the department's determination, as submitted or revised, correctly concludes that the BDCP meets all of the requirements of section 85320 for inclusion in the Delta Plan, the BDCP shall not be incorporated in the Delta Plan and the public benefits associated with the BDCP shall not be eligible for state funding.

NOTE: Authority cited: Water Code sections 85225.30, 85320 (a), (b), (e).

#### **Ex Parte Contact Restrictions Applicable to All Appeals**

26. Hearings on appeals are subject to the ex parte communication restrictions of California Administrative Procedures Act (Gov. Code § 11430.10 et seq.). Under that Act, an ex parte communication is a "communication, direct or indirect, regarding any issue in the proceeding, to the [council or council member] from an employee or representative of an agency that is a party or from an interested person outside the agency, without notice and opportunity for all parties to participate in the communication." (Gov. Code § 11430.10.) The restrictions apply from the date that the appeal is filed to the date that the council reaches a final decision on the appeal.

NOTE: Authority cited: Government Code sections 11430.10, 11430.80, Water Code section 85225.30.

27. To ensure compliance with these provisions, members should avoid ex parte communications while an appeal is pending. If they nevertheless receive one, such as by an individual sending a letter to a member concerning a pending matter, the member should notify the council's legal adviser or executive officer so that appropriate measures can be taken.

NOTE: Authority cited: Government Code sections 11430.10, 11430.80, Water Code section 85225.30.

28. At the first appropriate meeting after an appeal is anticipated or filed, the council's legal adviser will remind the council of this restriction and answer

questions about its scope.

NOTE: Authority cited: Government Code sections 11430.10, 11430.80,  
Water Code section 85225.30.

### Official Notice

29. Notwithstanding any provision of these procedures to the contrary, the council may take official notice in any hearing that it conducts, of any generally accepted technical or scientific matter within the council's jurisdiction ~~not subject to substantial debate among experts in the relevant field~~ and of any fact that may be judicially noticed by the courts of this State.

a) Any party to an appeal and the Delta Protection Commission may submit a request to the council to take official notice of additional information that was not included in the certifying agency's ~~submission~~ submitted record to the council. Any such request, including the documentation or information requested for admission, shall be submitted to the council in electronic form and by the deadline specified by the council for such submittals in the applicable notice. Requests that are not submitted by the specified deadline, in the required format, or that do not include the required documentation or information shall not be considered for admission.

b) To be considered for admission pursuant to this Paragraph 29, each request shall include all of the following for each specific document or information requested to be considered for admission:

- i. Specification that the request is being submitted pursuant to Paragraph 29 of these procedures.
- ii. The documentation or information that is the subject of the request. Each document or information that is the subject of a request must be provided as a separate electronic document or file. Multiple documents or information submitted as one electronic file shall not be considered for admission.
- iii. Specific evidence that the information requested for admission is either:
  - A. A generally accepted technical or scientific matter within the council's jurisdiction; or
  - B. A fact that may be judicially noticed by the courts of this State.

NOTE: Authority cited: Government Code section 11515, Water Code section 85225.30.



### **Filings and Mailings**

30. All filings and mailings required by ~~sections 1-32~~ of these procedures shall be made electronically. Filings and mailings should use 12-point black font. The Council encourages electronic submittals to comply with the Web Content Accessibility Guidelines 2.0, or a subsequent version effective at the time of the filing of the certification of consistency, published by the Web Accessibility Initiative of the World Wide Web Consortium at a minimum Level AA success criteria.

NOTE: Authority cited: Water Code section 85225.30. Government Code sections 7405, 11135, 11546.7.

### **General Appeals Issues**

31. The council, at its discretion, may consolidate appeals raising similar issues.

NOTE: Authority cited: Water Code section 85225.30.

32. The council or its executive officer or delegee may address issues related to these procedures in individual or consolidated appeals as necessary to further the interests of justice.

NOTE: Authority cited: Water Code sections 85225.30, 85225.5.

## **PART II – STATUTORY PROVISIONS REQUIRING OTHER CONSISTENCY REVIEWS (AFTER ADOPTION OF THE DELTA PLAN)**

In several other sections of SB X7 1, the council is directed to review for consistency with the Delta Plan, various plans of specified public agencies. This Part is directed at those reviews, which fall outside the scope of the procedures covered by Part I.

### **1. Delta Protection Commission's Economic Sustainability Plan.**

Public Resources Code section 29759 requires the Delta Protection Commission (DPC), by July 1, 2011, to adopt an economic sustainability plan. That plan must include information and recommendations that inform the council's policies regarding the socioeconomic sustainability of the Delta's region.

Public Resources Code section 29761.5(b) requires the DPC to transmit copies of the plan to the council within 60 days of adoption. The council is required, within 180 days of the adoption of the plan, to review the plan for consistency with the Delta Plan.

## 2. Local and Regional Planning Documents.

Water Code section 85057.5(b)(3), excepts from the definition of “covered action”, regional transportation plans prepared pursuant to Government Code section 65080. Paragraph (4) of that same section, excepts from the definition of “covered action”, plans, programs, projects or activities within the secondary zone of the Delta that the applicable metropolitan planning organization under Government Code section 65080 has determined is consistent with either a sustainable communities strategy or an alternative planning strategy that would achieve specified greenhouse gas emission reduction targets as determined by the Air Resources Board.

Because they are not “covered actions”, these types of local and regional planning documents are not subject to the statutory provisions governing consistency of state and local public agency actions (Water Code secs. 85225 et seq.), or the council’s Administrative Procedures Governing Appeals (Part I, above), with one exception noted in paragraph (d), below.

However, Water Code section 85212 provides a separate requirement and process for consistency review by the council of these types of local and regional planning documents.

In particular:

- (a) The council is required to review and provide timely advice to local and regional planning agencies regarding the consistency of local and regional planning documents, including sustainable communities strategies and alternative planning strategies prepared pursuant to Government Code section 65080, with the Delta Plan.
- (b) The council’s input must include, but not be limited to, reviewing the consistency of local and regional planning documents with the ecosystem restoration needs of the Delta and reviewing whether the lands set aside for natural resources protection are sufficient to meet the Delta’s ecosystem needs.
- (c) A metropolitan planning organization preparing a regional transportation plan that includes land within the primary or secondary zones of the Delta must consult with the council early in the planning process regarding the issues and policy choices relating to the council’s advice.
- (d) No later than 60 days prior to the adoption of a final regional transportation plan, the metropolitan planning organization must provide the council with a draft sustainable communities strategy and an alternative planning strategy, if any. Concurrently, the metropolitan planning organization must provide notice of its submission to the council in the same manner in which agencies file a certificate of

consistency with regard to covered actions.

- (e) If the council concludes that the draft strategies are inconsistent with the Delta Plan, the council must provide written notice of the claimed inconsistency to the metropolitan planning organization no later than 30 days prior to the adoption of the final regional transportation plan.
- (f) If the council provides timely notice of a claimed inconsistency, the metropolitan planning organization's adoption of the final regional transportation plan must include a detailed response to the council's notice.

### **PART III – OTHER FORMS OF REVIEW OR EVALUATION BY THE COUNCIL**

1. Interested parties, including federal, state and local public agencies, are encouraged to confer with the council or its executive officer over the scope and potential impacts of the interim plan developed under Water Code section 85084. Interested parties will be provided an opportunity to comment and provide input on the interim plan as it is developed.
2. Similarly, prior to adoption of the Delta Plan, project proponents are encouraged to consult with the council or its executive officer early in the planning stages of projects that may constitute "covered actions" under Water Code section 85057.5 once the Delta Plan is adopted. Subject to available resources, the council may review and comment on planning documents and environmental review documents regarding potential "covered actions".
3. Subject to available resources, the executive officer or his designee may meet with interested parties, upon their request, to help mediate relevant disputes, including disputes, once the Delta Plan is adopted, over whether a project constitutes a "covered action" under Water Code section 85057.5. The intent of this mediation will be to provide an objective and informal forum for dispute resolution that will serve as a more efficient alternative to costly and time- consuming litigation.
4. Interested parties, including federal, state and local agencies, are encouraged to confer and coordinate with the council or its executive officer with regard to agency plans, studies, strategies, and recommendations required, or otherwise suggested, to be considered by the council for incorporation into the Delta Plan.