

The Delta Plan: Covered Actions

August 2013

The Delta Reform Act of 2009 established a certification process for compliance with the Delta Plan. This means that state and local agencies that propose to carry-out, approve or fund a qualifying action, called a “covered action” in the Delta Plan, must certify that this action is consistent with the Delta Plan and must file a certificate of consistency with the Delta Stewardship Council.

What Is a Covered Action?

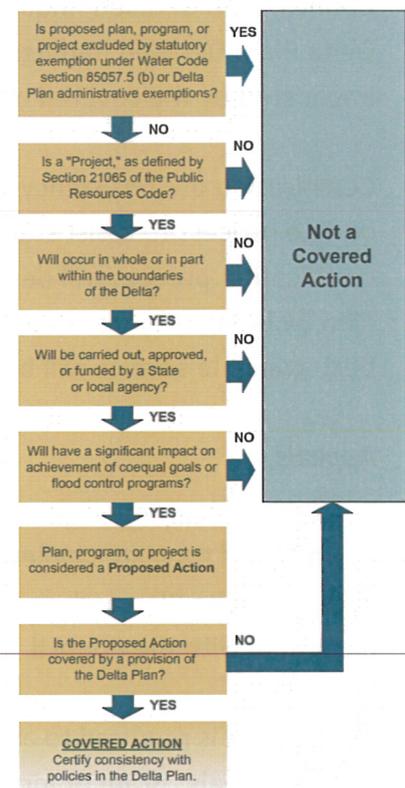
A State or local agency that proposes to carry out, approve, or fund a plan, program, or project is the entity that must determine whether that plan, program, or project is a covered action. That determination must be reasonable, made in good faith, and consistent with the Delta Reform Act and relevant provisions of the Delta Plan.

Both the Delta Reform Act and the Delta Stewardship Council’s own Administrative Procedures contain exemptions for such things as state agency regulatory actions, routine maintenance of certain facilities, projects located within specified regional planning areas, or specific ministerial actions.

Unless otherwise exempt, start with the Delta Reform Act to determine whether proposed plans, programs, or projects are covered actions under the Delta Plan and therefore subject to the regulatory provisions in the plan. The Act defines a covered action as (Water Code section 85057.5(a)):

...a plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code that meets all of the following conditions:

- 1. Will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh;*
- 2. Will be carried out, approved, or funded by the state or a local public agency;*
- 3. Is covered by one or more provisions of the Delta Plan;*
- 4. Will have a significant impact on the achievement of one or both of the coequal goals or the implementation of government-sponsored flood control programs to reduce risks to people, property, and state interests in the Delta.*



If an agency determines that a proposed plan, program, or project is not a covered action that determination is not subject to Council regulatory review, but is subject to judicial review as to whether it was reasonable, made in good faith, and is consistent with the Delta Reform Act and relevant provisions of the Delta Plan.

Early Consultation

If requested, the Council staff will meet with the agency's staff during early consultation to review the consistency of the proposed action and to offer non-binding advice as to whether the proposed plan, program, or project appears to be a covered action, provided that the ultimate determination in this regard must be made by the agency.

Certification of Consistency

A state or local agency that proposes to undertake a covered action, prior to initiating the implementation of that covered action, is required to submit a written certification to the Council, with detailed findings demonstrating that the covered action is consistent with the Delta Plan. Detailed findings must address consistency with each policy in the Delta Plan that is implicated by the covered action.

Certification of Consistency requests are to be submitted on-line. The Council has developed an on-line process to assist state and local agencies in preparing the required certification. The certification process will demonstrate whether a covered action is consistent with the Delta Plan by being fully transparent, disclosing potential environmental impacts, and identifying how best available science will be used in decision-making and adaptive management.

Appeals

The Council has appellate authority to determine the consistency of covered actions with the Delta Plan if they are challenged. Any person who claims that a covered action is inconsistent with the Delta Plan and, as a result would have a significant adverse impact has 30 days to file an appeal with the Council.

The Council is required to apply the standard of substantial evidence when reviewing covered action appeals. State or local agencies are required to submit detailed findings upon filing their consistency determination, described previously. These findings and the record will provide the basis for the Council's decision making. Upon receiving an appeal, the Council has 60 days to hear the appeal and an additional 60 days to make its decision and issue specific written findings. If the covered action is found to be inconsistent, the project may not proceed until it is revised so that it is consistent with the Delta Plan.