

South Delta Water Agency's
Presentation in Support of its Appeal of DWR's Certification of Consistency
for its 2024-2026 Proposed Geotechnical Activities (C20242)
Appeal No. C20242-A2
December 19, 2024

DWR's Attempted Certification of a Portion of the Delta Conveyance Project (DCP) Must be Denied Because:

- **Under the Delta Reform Act, the “Whole of the Action” that comprises the DCP must be certified together in the same certification; and**
- **DWR has NOT certified the “Whole of the Action” that comprises the DCP.**

Because DWR effectively concedes the latter, the only issue is whether the Legislature intended that the “Whole of the Action” of the DCP must be certified together in the same certification. It can be easily demonstrated that it did.

Water Code section 85225 provides:

“A state or local public agency that proposes to undertake a **covered action**, prior to initiating the implementation of that **covered action**, shall prepare a written certification of consistency with detailed findings as to whether the **covered action** is consistent with the Delta Plan and shall submit that certification to the council.”

By “covered action” did the Legislature mean “any piece of a covered action” or “the whole of the action that comprises the covered action”?

The Legislature intended “covered action” to mean the “Whole of the Action” that comprises the covered action. The Legal Analysis that definitively confirms that is Simple and Straightforward:

- (1) The Legislature defined “covered action” as a “plan, program, or project as defined pursuant to Section 21065 of the Public Resources Code” (Wat. Code, § 85057.5.)
- (2) Section 21065 is part of CEQA and defines “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”
- (3) **Prior to** the creation of the Delta Reform Act in 2009, it was well-established in CEQA’s regulations and case law that “project” under Section 21065 means “the whole of the action” that may cause direct or indirect physical changes in the environment.
- (4) “[T]he Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes in the light of such decisions as have a direct bearing upon them.” (*People v. Overstreet* (1986) 42 Cal.3d 891, 897, with internal quotations omitted.)
- (5) Accordingly, when the Legislature stated that a “covered action” is a project “as defined pursuant to Section 21065,” the Legislature knew that “project” under section 21065 meant “whole of the action” and, therefore, intended that a “covered action” include the “whole of the action” that comprises that covered action.

There is no wiggle room in that simple and straightforward legal analysis.

Hence the remaining question is: Did DWR submit a certification of consistency for the “whole of the action that comprises the DCP”?

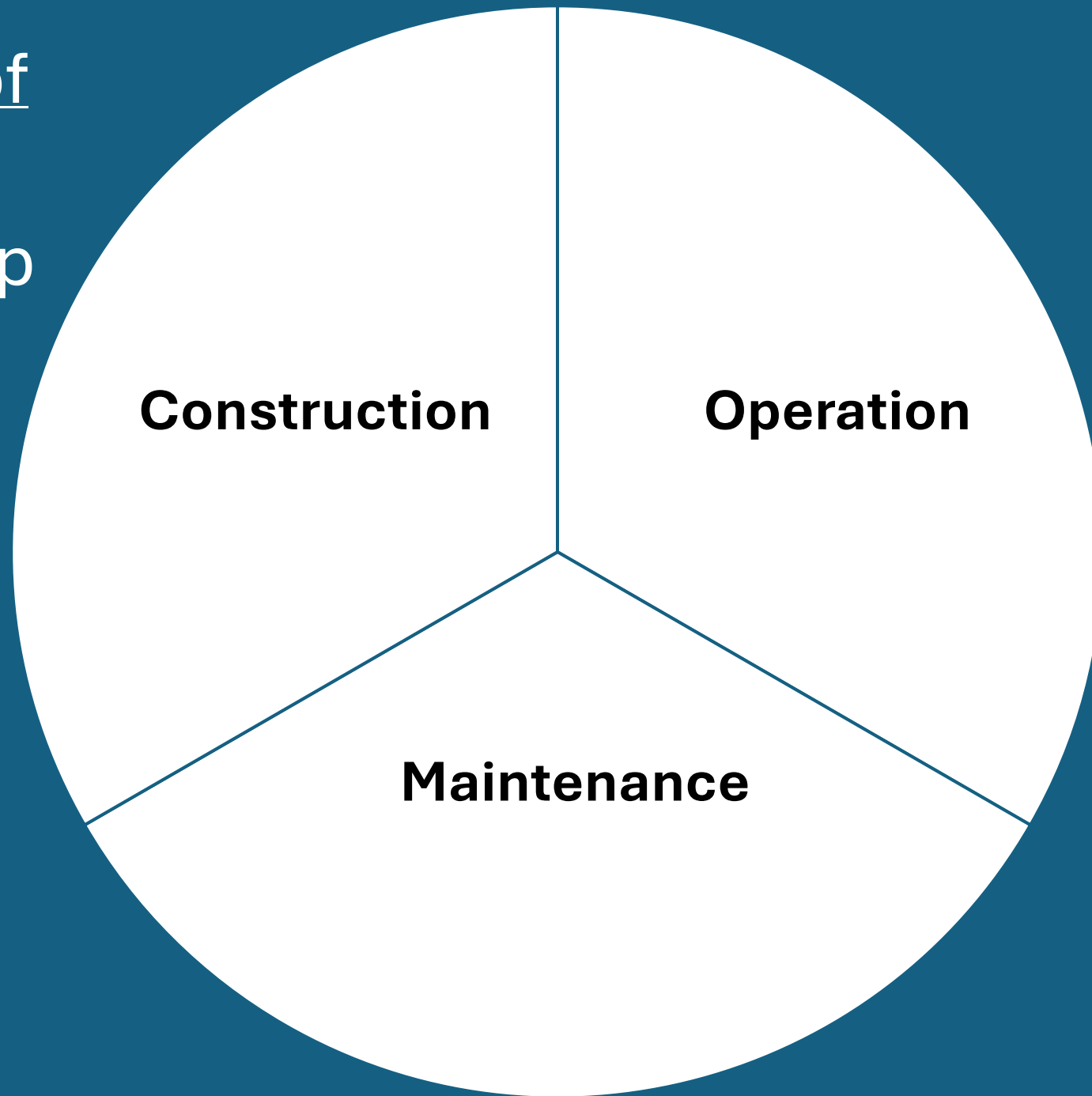
No. It is UNDISPUTED that DWR did not come anywhere close to doing that.

On December 21, 2023, after certifying its Final EIR for the DCP, DWR issued a Notice of Determination declaring and informing the public that it APPROVED the DCP. In particular, DWR APPROVED the following:

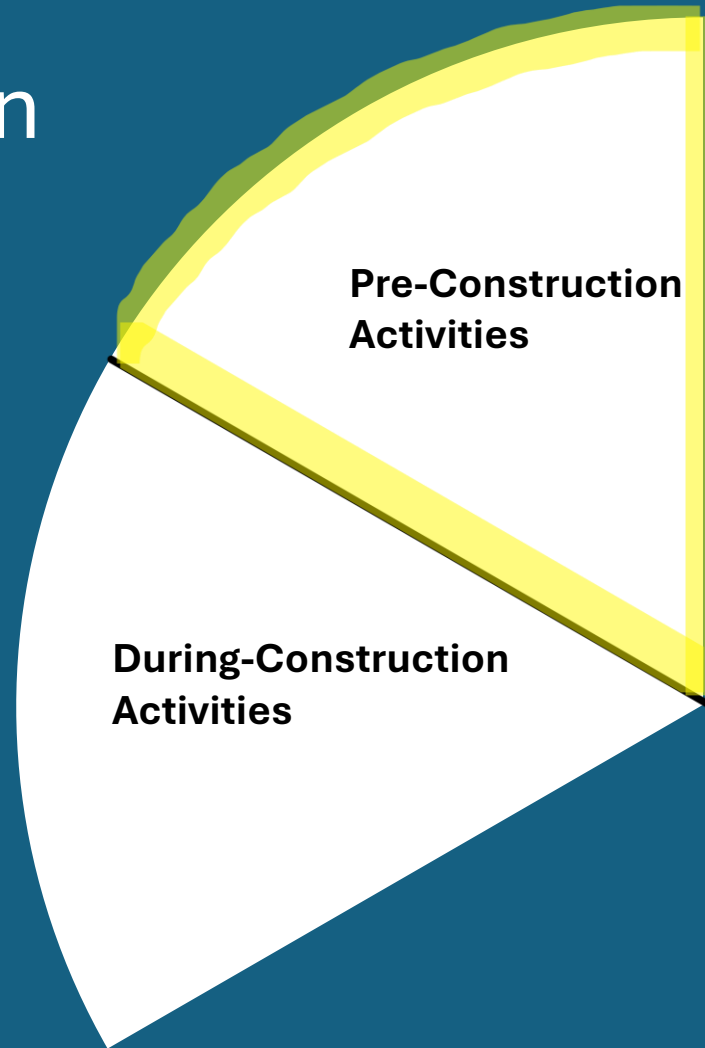
“[T]he CONSTRUCTION, OPERATION, AND MAINTENANCE of new State Water Project (SWP) water diversion and conveyance facilities in the Delta [i.e., the DCP] that would be operated in coordination with the existing SWP facilities.”

(DCP.A.1.00001.pdf, p. 3.)

The “Whole of the Action”
that makes up
DWR’s
Approved
Delta
Conveyance
Project



Construction Activities



Pre-Construction Activities consist of the following:

● Soil Borings, CPTs, & Groundwater Testing & Monitoring

● Test Trenches

● Monument Installation

● Pilot Studies for Settlement

● Pilot Studies for Pile Installation Methods at Intakes

● Validation of Ground Improvement Methods

● Vibratory Testing of Dynamic Properties of Peat Soils

● Surveys for Groundwater & Natural Gas Wells

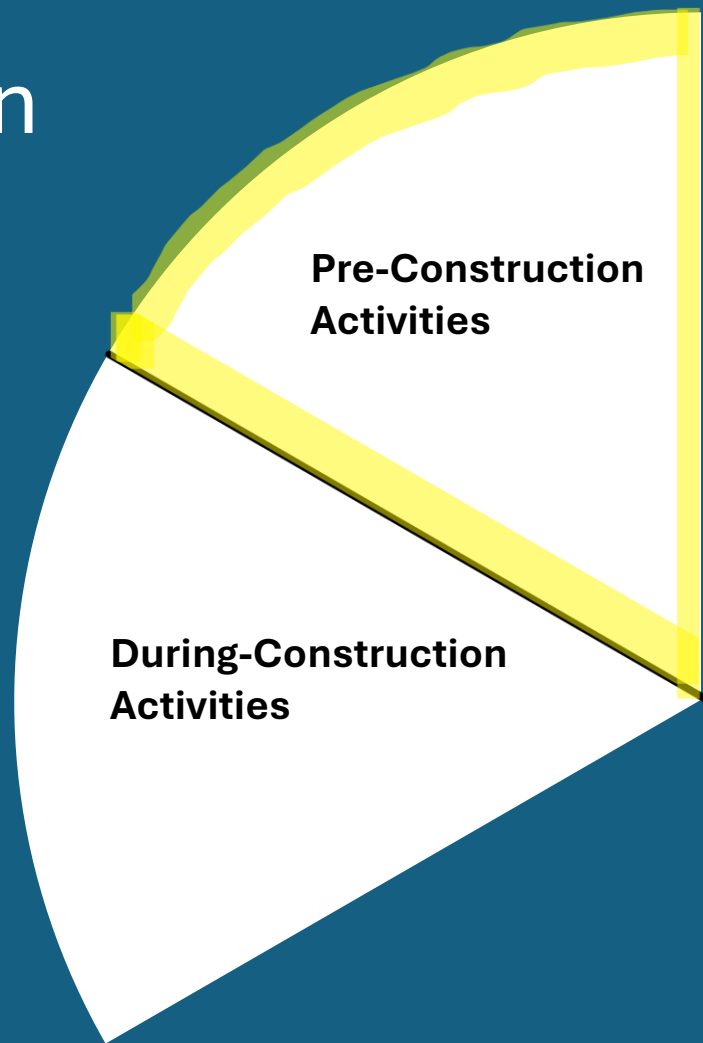
● Agronomic Testing

● Utility Potholing

● Bethany & West Tracy Fault Studies

(Source: Ch. 3 of FEIR for DCP, pp. 3-134 thru 3-140.)

Construction Activities



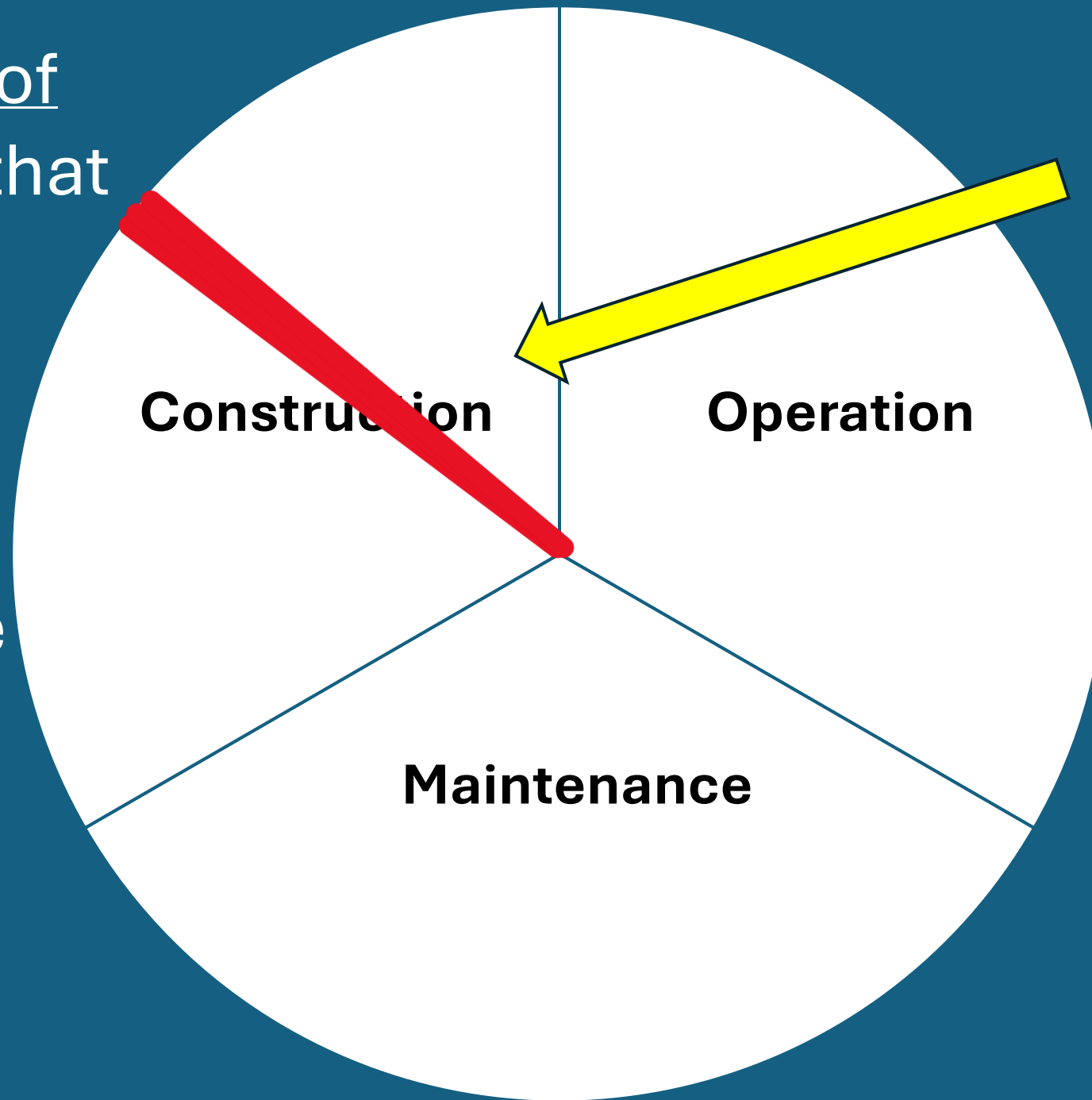
(Source: Ch. 3 of FEIR for DCP, pp. 3-134 thru 3-140.)

Pre-Construction Activities

DWR Whittled Down the
**Soil Borings, CPTs and
Groundwater Testing &
Monitoring** to the following:

- Land-based Soil Borings
 - **ONLY A LIMITED NUMBER OF THEM**
- Land-based Cone Penetration Tests (CPTs)
 - **ONLY A LIMITED NUMBER OF THEM**
- Groundwater Testing
 - **ONLY A LIMITED NUMBER OF TEST SITES**
- ~~● Overwater Soil Borings~~
- ~~● Overwater Cone Penetration Tests (CPTs)~~
- ~~● Groundwater Monitoring~~

The “Whole of the Action” that makes up DWR’s Approved Delta Conveyance Project



The Bite-Sized Piece of the Whole of the Action that DWR is Certifying.

The degree to which DWR chopped up the DCP into pieces for purposes of certification and implementation of the DCP is STAGGERING.

What DWR is attempting to do cannot be remotely reconciled with the Legislature's intent in Water Code section 85225 that the "whole of the action that comprises the covered action" be certified together prior to implementation of that covered action.

DWR's attempted reconciliations are GROSSLY MISPLACED.

- The 2024-2026 Geotech Activities do NOT have "independent utility" from the DCP.
- The 2024-2026 Geotech Activities are NOT a mere "distant step" towards implementation of the DCP.

The 2024-2026 Geotech Activities, in DWR's own words, comprise one of the five "KEY COMPONENTS AND ACTIONS" of the approved DCP (DCP.A.1.00001.pdf, p. 3):

"The [approved DCP] Project would include the following **KEY COMPONENTS AND ACTIONS** [5] Efforts to identify **GEOTECHNICAL**, hydrogeologic, **agronomic, and other field conditions** that will guide appropriate construction methods and monitoring programs for final engineering design and construction."

It is not possible to conclude in good faith and with a straight face that the 2024-2026 Geotech Activities are not a part of the “Whole of the Action” that comprises the DCP.

Nevertheless, if the DSC were to accept DWR’s invitation to act contrary to the law and facts and find that the 2024-2026 Geotech Activities are their own covered action that is entirely separate and independent from the DCP, then the question becomes:

What is the “Whole of the Action” that comprises this separate and independent covered action that can be certified and implemented independently of the DCP?

- If the DSC were to do what DWR seemingly suggests, i.e., create (out of thin air or via an underground regulation) a separate and independent category of covered actions for “activities that may inform permits and/or certifications of consistency for another separate covered action,” then here, DWR has grossly failed to include “the whole of the action” that comprises those activities.
- Here, the “whole of the action” for any such covered action would necessarily include ALL of the **PRE-CONSTRUCTION ACTIVITIES** which DWR has likewise indicated may inform the permits and/or certification of consistency for the DCP, not just the small portion of them included in the 2024-2026 Geotech Activities.
- DWR not only unlawfully chopped up the “Whole of the Action” of the DCP into pieces, but DWR also unlawfully chopped up the Pre-Construction Activities into pieces.