

Appendix A
The Delta Stewardship Council's Role
Regarding Conveyance

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The Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act or Act) potentially gives the Delta Stewardship Council (Council) three distinct but connected roles relating to conveyance: contingent authority to approve proposed conveyance improvements, authority to generally recommend conveyance options in the Delta Plan, and authority to provide comments to other agencies during the Bay Delta Conservation Plan (BDCP) process.¹

Regulatory Authority over Conveyance

As a practical matter, the Council would have occasion to decide in the first instance what conveyance improvements are permissible only if (a) an agency proposes a conveyance improvement prior to the incorporation of the BDCP into the Delta Plan, (b) the proposed conveyance improvement is a “covered action” under Water Code section 85057.5, and (c) the proposed conveyance improvement, as a covered action, is appealed to the Council as not being consistent with the Delta Plan. For reasons explained below, it is unlikely that an agency will propose a conveyance improvement prior to the completion of (or the failure of) the BDCP process. Accordingly, it would be wasteful now to include in the Delta Plan regulatory policies prescribing/limiting conveyance. If events in subsequent years reveal that the BDCP will not be successful in a timely fashion, the Council will consider then whether to amend the Delta Plan to prescribe conveyance.

The Delta Reform Act mandates that the Council’s Delta Plan “promote options” for improving conveyance and storage to meet the coequal goals (Water Code section 85303). Thus, the Council has the authority to dictate in the Delta Plan conveyance improvements it views as meeting the coequal goals. In addition, proposed conveyance improvements that are “covered actions”² under the Act must be consistent with the Delta Plan,³ and the Council determines (upon appeal) consistency.⁴ Through specifying conveyance improvements in the Delta Plan (should the Council do so), the consistency

¹ This is an attempt to summarize the Council's relationship with the BDCP and conveyance for the purpose of clarity. However, it does not purport to summarize the Council's complete authority in this regard. The Council retains all authority provided to it under the Delta Reform Act.

² Proposed conveyance improvements would almost certainly be a covered action: Such a project would (1) be a California Environmental Quality Act project; (2) occur at least in part within the Sacramento-San Joaquin Delta; (3) be carried out, approved, or funded by a public agency; (4) be covered by one or more provisions of the Delta Plan; and (5) have a significant impact on the coequal goals (Water Code section 85057.5).

³ An agency proposing a conveyance covered action would have to certify that the project is consistent with the Delta Plan (Water Code section 85225).

⁴ The Council would review this consistency determination if and when it was appealed to the Council (Water Code section 85225.10; Council's Appeals Procedures).

requirement, and the Council’s appellate role over consistency determinations, the Council has the authority to regulate conveyance improvements.

This is best viewed as *contingent* regulatory authority. The Council may never get to exercise it. Most relevant and as a practical matter, occasion to exercise that authority is contingent in the near term on the BDCP.

Conveyance options are currently being studied *in detail* by the agencies and interested parties preparing the BDCP. A public draft of the BDCP Environmental Impact Statement/Environmental Impact Report is planned for release by the end of 2013. Upon successful completion of the BDCP process, and if the BDCP meets certain requirements explained in Water Code section 85320(e), the BDCP becomes part of the Delta Plan.⁵ Subsequently, if another government agency (California Department of Water Resources, most likely) proposes to implement the new conveyance project that is selected by BDCP as the preferred conveyance option and that project qualifies as a “covered action” (it would qualify, most likely), the project would be consistent with the Delta Plan regardless of whether the Delta Plan had previously endorsed a different conveyance option. Accordingly, the Council’s regulatory authority over conveyance is contingent upon conveyance being proposed prior to the BDCP’s incorporation into the Delta Plan.

It is highly unlikely that a conveyance proposal will come before the Council prior to BDCP completion, or at least the anticipated deadline for BDCP completion. The Council considers it highly unlikely that an agency will propose a new conveyance facility while the BDCP is under way. Accordingly, the Council does not expect to review a conveyance improvement consistency determination separate from the BDCP unless the BDCP process fails.

For this reason, the Delta Plan does not include any regulatory policies regarding conveyance. In addition, the BDCP has been under way since 2006; and in the last 5 years, the involved agencies and interested parties have invested significant time, resources, and expertise in that process. The lead agencies of the BDCP will also be conducting extensive environmental analysis of the various conveyance alternatives they consider. The Council has determined that the best option at this point is to encourage the lead agencies of the BDCP to complete their work in short order. It would be a wasteful and duplicative exercise for the Council *now* to include a regulatory policy regarding conveyance. Doing so would require the same extensive policy, scientific, and environmental analysis the BDCP is already doing.

However, should the BDCP process not be completed by January 1, 2016, the Council intends to revisit the issue of conveyance to determine how to facilitate improved conveyance facilities without the BDCP. If the Council then decides to amend the Delta Plan to include regulatory policies regarding conveyance, the Council would do so only after extensive analysis of the conveyance options and associated detailed environmental review.

Authority to Recommend Options

Implicit in the Council’s regulatory authority relating to conveyance (that the Delta Plan shall promote options for improving conveyance) (Water Code section 85304) is its authority to recommend to other agencies conveyance options it views as meeting the coequal goals. This authority can be exercised through making Recommendations about conveyance in the Delta Plan.

The Act, therefore, gives the Council the authority to opine generally about improving conveyance as it may relate to the rest of the Delta Plan and the coequal goals. Accordingly, the Council has authority to recommend to BDCP preferred conveyance options that the BDCP should evaluate. Nevertheless, for the same reasons the Delta Plan at this time does not include any regulatory policies regarding conveyance,

⁵ The California Department of Fish and Wildlife’s decision that the BDCP meets the requirements for incorporation into the Delta Plan may be appealed to the Council under Water Code section 85320(e).

the Delta Plan likewise does not include any Recommendations (i.e., opinion preferences) regarding conveyance. At this time, the agencies pursuing BDCP are best positioned to develop possible options, evaluate them, and decide on the best one.

Authority to Provide Comment during the BDCP Process

The Delta Reform Act provides the Council with a consultative and responsible agency role in the BDCP process (Water Code section 85320(c)). Thus, the Council may, separate from the Delta Plan, provide comment and guidance to lead agencies regarding BDCP, including the conveyance options those agencies consider, study, and ultimately choose.

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