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Appendix G

The Delta Stewardship Council's Role Regarding Conveyance

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Appendix G: The Delta Stewardship Council's Role Regarding Conveyance

The Delta Reform Act potentially gives the 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 Bay Delta Conservation Plan 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 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 requirement, and the Council’s appellate role over consistency determinations, the Council has the authority to regulate conveyance improvements.

¹ This is an attempt to summarize the Council’s relationship with 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 CEQA project; (2) occur at least in part within the Delta; (3) be carried out, approved, or funded by a public agency; (4) would 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).

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

4 Conveyance options are currently being studied *in detail* by the agencies and interested parties preparing
5 the BDCP. A public draft of the BDCP Environmental Impact Statement/Environmental Impact Report is
6 planned for release by the end of 2011. Upon successful completion of the BDCP process, and if BDCP
7 meets certain requirements explained in Water Code section 85320(e), BDCP becomes part of the Delta
8 Plan.⁵ Subsequently, if another government agency (Department of Water Resources, most likely)
9 proposes to implement the new conveyance project that is selected by BDCP as the preferred conveyance
10 option and that project qualifies as a “covered action” (it would qualify, most likely), the project would be
11 consistent with the Delta Plan regardless of whether the Delta Plan had previously endorsed a different
12 conveyance option. Accordingly, the Council’s regulatory authority over conveyance is contingent upon
13 conveyance being proposed prior to BDCP’s incorporation into the Delta Plan.

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

19 For this reason, the 2012 Delta Plan does not include any regulatory Policies regarding conveyance. In
20 addition, BDCP has been underway since 2006, and in the last 5 years, the involved agencies and
21 interested parties have invested significant time, resources, and expertise in that process. The lead
22 agencies of BDCP will also be conducting extensive environmental analysis of the various conveyance
23 alternatives they consider. The Council has determined that the best option at this point is to encourage
24 the lead agencies of BDCP to complete their work in short order. It would be a wasteful and duplicative
25 exercise for the Council *now* to include a regulatory policy regarding conveyance. Doing so would require
26 the same extensive policy, scientific, and environmental analysis BDCP is already doing.

27 However, should the BDCP process not be completed by January 1, 2014, the Council intends to revisit
28 the issue of conveyance to determine how to facilitate improved conveyance facilities without BDCP. If
29 the Council then decides to amend the Delta Plan to include regulatory Policies regarding conveyance, the
30 Council would do so only after extensive analysis of the conveyance options and associated detailed
31 environmental review. Accordingly, the Delta Plan includes the following policy.

32 **Authority to Recommend Options**

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

37 The Act, therefore, gives the Council the authority to opine generally about improving conveyance as it
38 may relate to the rest of the Delta Plan and the coequal goals. Accordingly, the Council has authority to
39 recommend to BDCP preferred conveyance options BDCP should evaluate. Nevertheless, for the same
40 reasons the Delta Plan at this time does not include any regulatory Policies regarding conveyance, the
41 Delta Plan likewise does not include any Recommendations (i.e., opinion preferences) regarding

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

1 conveyance. At this time, the agencies pursuing BDCP are best positioned to develop possible options,
2 evaluate them, and decide on the best one.

3 **Authority to Provide Comment during the BDCP** 4 **Process**

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

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