



July 20, 2016

Attention: Imported Water Committee

Status of Delta Stewardship Council Delta Plan (Information).

Purpose

The purpose of this memo is to describe the Delta Stewardship Council's Delta Plan and provide updates on a recent Superior Court decision that invalidated the plan.

Background

The Sacramento-San Joaquin Bay-Delta (the Bay-Delta) is a unique and important ecosystem that supports a diversity of plant and animal species. About two-thirds of California residents and over 40 percent of California's irrigated farmland receive at least some of their water from the Bay-Delta from two of California's largest developed water systems – the State Water Project (SWP) and the Central Valley Project (CVP). Nearly 20 percent of San Diego County Water Authority's supply originates in the Bay-Delta through water it purchases from the Metropolitan Water District (MWD). In recent years, the deteriorating ecosystem in the Bay-Delta due to multiple uses has impaired the ability for both projects to export water. MWD is the largest SWP contractor; through a take-or-pay contract it is responsible for about 50 percent of the project's cost.¹ As one of MWD's largest customers, the Water Authority has a vital interest in assuring that any Bay-Delta solution is sustainable and affordable.²

In 2009, the California legislature passed Senate Bill X7-1, known as the Sacramento-San Joaquin Delta Reform Act (Delta Reform Act) that established the state's policy to reduce reliance on the Bay-Delta.³ The Water Authority, a strong advocate for a sustainable Bay-Delta solution, actively encouraged passage of the 2009 measure. The Delta Reform Act established the coequal goals of "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem," while taking into account that restoration and maintenance of the Delta cannot be done through actions in the Bay-Delta alone.⁴ The Delta Reform Act also established the Delta

¹ http://www.mwdh2o.com/AboutYourWater/Sources%20Of%20Supply/Pages/Imported.aspx#tabs-State_Water_Project_SWP

² Previous Water Authority Bay-Delta memos and presentations are found here: <http://sdcwa.org/bay-delta-board-memos-presentations>.

³ The Delta Reform Act of 2009 states: "The policy of the State of California is to reduce reliance on the Delta in meeting California's future water supply needs through a statewide strategy of investing in improved regional supplies, conservation and water use efficiency. Each region that depends on water from the Delta watershed shall improve its regional self-reliance for water through investment in water use efficiency, water recycling, advanced water technologies, local and regional water supply projects and improved regional coordination of local and regional water supply efforts." For full text, see Water Code Section 85021 at http://leginfo.ca.gov/faces/codes_displayText.xhtml?lawCode=WAT&division=35.&title=&part=1.&chapter=2.&article=

⁴ Specifically, the "Delta Reform Act mandates many statewide strategies that the Delta Plan must address to achieve the coequal goals, including water efficiency and conservation; wastewater reclamation and recycling; desalination and advanced water treatment technologies; improved water conveyance, surface, and groundwater storage; improved water quality; and implementation of local and regional water supply projects (Water Code sections 85004(b), 85020(d) and (f), 85021, 85023, 85303, and 85304)." See http://deltacouncil.ca.gov/sites/default/files/documents/files/CH_03_Nov2012.pdf for more details. These objectives are likewise stated in Governor Brown's 2016 California Water Plan Update, available here: http://resources.ca.gov/docs/california_water_action_plan/Final_California_Water_Action_Plan.pdf.

Stewardship Council (DSC).⁵ The DSC is responsible for developing and implementing the “Delta Plan,” a long-term, comprehensive management plan to achieve the coequal goals for the Bay-Delta. The Delta Reform Act requires the DSC to consult and cooperate with federal, state, and local agencies with responsibilities in the Bay-Delta on the development of the Delta Plan.

The Delta Plan was unanimously adopted by the DSC on May 16, 2013. Subsequently, its 14 regulatory policies were approved by the Office of Administrative Law, a state agency that ensures the regulations are clear, necessary, legally valid, and available to the public. The Delta Plan became effective with claimed legally-enforceable regulations on September 1, 2013.

However, soon after the Delta Plan was adopted, multiple parties (including the state and federal water contractors) filed suits challenging the sufficiency and legality of the Delta Plan, asserting the environmental documents violated the California Environmental Quality Act (CEQA), as well as that the Delta Plan did not follow the requirements of meeting the coequal goals as written in the Delta Reform Act. Attachment 1 provides a brief description of the plaintiff(s) in each suit and the general content of the complaints. These suits were coordinated into one proceeding and heard in the Sacramento Superior Court.⁶

Discussion

In May 2016, the Sacramento Superior Court issued its ruling on the statutory challenges to the Delta Plan. The Court ruled that the Delta Plan fails to meet the Delta Reform Act’s requirement to establish “quantified or otherwise measurable targets.” However, groups found the ruling unclear, leading the DSC and others to file motions for clarification. Ultimately, Sacramento County Superior Court Judge Michael Kenny said that the Delta Plan is invalid and must be put on hold pending revisions because no quantifiable targets for reducing water exporters’ reliance on the Bay-Delta were included, as required by law. The Court also clarified that the challenges related to the Environmental Impact Report (EIR) and CEQA violations were moot because the plan must be revised in response to the Court’s findings.⁷ The Court mandated that the DSC revise the plan so that it complies with the law.

In essence, the Court ruled that due to the lack of quantified reduction elements, the Delta Plan fails to:

- Reduce reliance on the Bay-Delta by water exporters;
- Reduce risk of take and harm to Endangered Species Act (ESA) listed species by nonnative species;
- Restore more natural flows into and through the Bay-Delta; and
- Increase water supply reliability.⁸

⁵ The DSC is made up of seven members from different areas of California representing diverse areas of expertise such as agriculture, science, environmentalism, and government. Four members are appointed by the Governor, one member is appointed by the State Assembly, one member is appointed by the State Senate, and the seventh is the Chair of the Delta Protection Commission. More information on the Council Members is found at: <http://deltacouncil.ca.gov/delta-council-members>.

⁶ <http://deltacouncil.ca.gov/sites/default/files/2014/11/Coordination%20Order.pdf>

⁷ “In light of the Court’s finding of statutory violations and its finding that the Delta Plan is invalid, there is no longer a project with an EIR for which to conduct a CEQA analysis and review. Accordingly, the Court provided that the CEQA matters were moot, by which the Court implied, without expressly ordering, that there is no project, and consequently no EIR to currently review.” The filing is available in full here: <https://mavensnotebook.com/wp-content/uploads/2016/06/Delta-Plan-Lawsuit-Decision.pdf>

⁸ For updates on litigation visit: <http://deltacouncil.ca.gov/delta-plan-litigation>

The Bay Delta Conservation Plan

Beginning in 2006 and prior to the Delta Reform Act, the Bay Delta Conservation Plan (BDCP) was being developed as a 50-year conservation plan to restore the Bay-Delta. The BDCP was being advanced as a Habitat Conservation Plan (HCP)⁹ requiring approval by the federal government. The Delta Reform Act provides that if the BDCP was approved as both as an HCP and a Natural Community Conservation Planning program (NCCP),¹⁰ then it would be automatically incorporated by the DSC into the Delta Plan as a necessary component to further the state's coequal goals.¹¹ The cornerstone of the BDCP was a twin-tunnel conveyance system running under the Bay-Delta. The twin tunnels were intended to be used in conjunction with the existing surface water conveyance system and operated as one of the conservation measures. It was thought that the new intake tunnel locations coupled with the operations of the dual conveyance system would help reduce water exports' impact on the Bay-Delta ecosystem.

After receiving extensive public comment, the BDCP was bifurcated into "California WaterFix" and "California EcoRestore." The twin tunnel conveyance system previously envisioned under the BDCP is now being advanced under the moniker California WaterFix and is being developed through Section 7 of the ESA – a species-by-species permitting process similar to how the SWP is permitted currently. Abandoning the HCP/NCCP permitting route, the ecosystem restoration now known as California EcoRestore is narrowed to about 30,000 acres of habitat restoration – which includes about 25,000 acres of restoration already mandated under the current Biological Opinions.¹² Because the California WaterFix is not being pursued as an HCP/NCCP, the DSC is now required to certify the California WaterFix's consistency with the Delta Plan. However, since the plan was ruled invalid, it remains unknown with what regulations WaterFix must be consistent.

The capital cost estimate for the tunnel system, either under the BDCP or California WaterFix, is roughly the same, at around \$15 billion. The Delta Reform Act requires that the Bay-Delta water conveyance system be paid for by public water agencies, or the SWP and CVP contractors. How the costs would be allocated among water exporters (between SWP and CVP contractors and among SWP contractors) has been an on-going discussion among the water contractors; no financing plan has been publicly released. With no-cost allocation agreement in place, equally uncertain is the amount of supply benefit participating water contractors would receive. The invalidation of the Delta Plan – specifically, that the Delta Plan needs to include quantifiable and measurable metrics to reduce reliance on the Delta – adds more uncertainty to the supply benefit resulting from the twin tunnels.

Next steps

⁹ Info on HCP here: <https://www.fws.gov/endangered/what-we-do/hcp-overview.html>

¹⁰ Info on the NCCP here: <https://www.wildlife.ca.gov/Conservation/Planning/NCCP>

¹¹ Full text of Water Code Water Code§ 85320(e): (e) If the Department of Fish and Game approves the BDCP as a natural community conservation plan pursuant to Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code and determines that the BDCP meets the requirements of this section, and the BDCP has been approved as a habitat conservation plan pursuant to the federal Endangered Species Act (16 U.S.C. Section 1531 et seq.), the council shall incorporate the BDCP into the Delta Plan. The Department of Fish and Game's determination that the BDCP has met the requirements of this section may be appealed to the council.

¹² In contrast, the former BDCP proposed to restore, enhance, and/or protect over 110,000 acres of terrestrial and aquatic habitat.

http://baydeltaconservationplan.com/Libraries/Dynamic_Document_Library/Draft_BDCP_Highlights_12-9-13.sflb.ashx

The Executive Officer of the DSC stated, “[w]hile the Sacramento Superior Court’s May 19th ruling upheld significant aspects of the Council’s Delta Plan, the tentative ruling from today unfortunately moves to set aside the Delta Plan until specified revisions are completed.”¹³ It is unclear how the DSC will react to the ruling, but an appeal appears likely.

The Water Authority has long advocated for a “right-size” fix for the Bay-Delta that stabilizes the ecosystem, provides predictability for water supplies, is affordable, and is supported by a broad range of stakeholders to ensure it is implementable. This vision is described in the Water Authority’s Board adopted Delta Policy Principles. Water Authority staff will continue to monitor the status of the Delta Plan – including further litigation and its relationship to California WaterFix – and keep the Board informed.

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Attachment 1: Table 1. Coordinated Cases Challenging the Delta Plan

¹³ Full statement here: <https://mavensnotebook.com/2016/06/23/this-just-in-delta-stewardship-council-issues-statement-on-courts-tentative-delta-plan-ruling/>

Table 1. Coordinated Cases Challenging the Delta Planⁱ

Superior Court of California – case origin	Case Number & Short Title	Petitioners	Main Concerns	Coordinated at Judicial Council Coordination Proceeding No. 4758 at the Superior Court of California, County of Sacramento
County of Sacramento	34-2013-8001500 San Luis & Delta-Mendota Water Authority v. Delta Stewardship Council ⁱⁱ	Westlands Water District, San Luis, and Delta Mendota Water Authority	Plan failed to achieve coequal goals mandated in the Delta Reform Act.	
County of Sacramento	34-2013-8001530 State Water Contractors, et al. v. Delta Stewardship Council ⁱⁱⁱ	State Water Contractors, Antelope Valley-East Kern Water Agency, Alameda County Flood Control and Water Conservation District, San Bernardino Valley Municipal Water District, Santa Clara Valley Water District, Metropolitan Water District of Southern California, and Mojave Water Agency	CEQA requirements not met, plan failed to achieve the goals mandated in the Delta Reform Act.	
County of Sacramento	34-2013-8001534 North Coast Rivers Alliance, et al. v. Delta Stewardship Council ^{iv}	North Coast Rivers Alliance, Pacific Coast Federation of Fishermen’s Associations, San Francisco Crab Boat Owners Association, and Winnemem Wintu Tribe	CEQA requirements not met; plan failed to adhere to requirements of Delta Reform Act, the Public Trust Doctrine, and the Administrative Procedure Act.	
County of San Francisco	CPF13513047 California Water Impact Network, et al. v. Delta Stewardship Council ^v	Friends of the River, California Water Impact Network, California Sportsfishing Protection Alliance, and AquAlliance/Restore the Delta/Center for Biological Diversity	CEQA requirements not met; plan failed to adhere to requirements of Delta Reform Act, the Public Trust Doctrine, and the Administrative Procedure Act.	
County of San Francisco	CPF13513048 Central Delta Water Agency, et al. v. Delta Stewardship Council ^{vi}	Central Delta Water Agency, South Delta Water Agency, Lafayette Ranch, Inc., Cindy Charles, and Local Agencies of North Delta	CEQA requirements not met, plan failed to reduce reliance on the Bay-Delta as mandated in the Delta Reform Act.	
County of San Francisco	CPF13513049 Save the California Delta Alliance v. Delta Stewardship Council	Save the California Delta Alliance	Stating that the BDCP projects are exempt from the Delta Plan is unlawful; all enactments that interpret, or make specific a statute not adopted in compliance with the Administrative Procedure Act are invalid.	
County of San Joaquin	39201300298188 CUWMSTK City of Stockton v. Delta Stewardship Council ^{vii}	City of Stockton	CEQA requirements not met.	

ⁱ For details on the parties, visit: <http://deltacouncil.ca.gov/delta-plan-litigation>

ⁱⁱ Comments on BDCP/WaterFix here: <http://wwd.ca.gov/wp-content/uploads/2015/10/sldmwa-wwd-comments-on-rdeir.pdf>

ⁱⁱⁱ http://www.kmtg.com/sites/default/files/swc_dsc_petition.pdf

^{iv} <http://deltacouncil.ca.gov/sites/default/files/2014/11/North%20Coast%20Rivers%20Alliance%2C%20et%20al.%20Opening%20Brief.pdf>

^v For more information, visit <https://c-win.org/lawsuits-and-pressrooms/the-delta-plan/>

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<http://deltacouncil.ca.gov/sites/default/files/2014/11/Central%20Delta%20Water%20Agency%2C%20et%20al.%20and%20California%20Water%20Impact%20Network%2C%20et%20al.%20Opening%20Brief.pdf>

^{vii} <http://deltacouncil.ca.gov/sites/default/files/2014/11/City%20of%20Stockton%20Opening%20Brief.pdf>