

THE DELTA PLAN HAS SPAWNED LITIGATION THAT COULD KEEP WATER SUPPLY IN CALIFORNIA UNDER A CLOUD FOR THE INDEFINITE FUTURE

On June 14th, various parties filed seven lawsuits in three separate Superior Courts (San Francisco, Sacramento and San Joaquin Counties) challenging the Delta Plan prepared by the Delta Stewardship Council (the "Council"). The Council acted pursuant to the Sacramento-San Joaquin Delta Reform Act of 2009 (the "Reform Act") delegating to it the responsibility for preparing and administering the Delta Plan and the environmental impact report ("EIR") on which it relies.

The Legislature enacted the Reform Act in a special session in the Fall of 2009, attempting to address the perceived crisis in water supply and environmental degradation in the Delta due to various legal and regulatory forces at work. The lawsuits filed on June 14 represent only the first wave of predictable assaults on the various stages of the effort set up by the Legislature and Governor Schwarzenegger.

The Delta Plan does not stand alone. To the contrary, it is but one part of a complex framework established by the Reform Act, a framework that includes other interrelated plans currently in the process of preparation. It also creates several other administrative agencies to which it assigns various interrelated roles.

The lawsuits already filed -- and those that will inevitably attack the other parts of the program as they emerge -- threaten to cast a cloud of uncertainty over water supply issues in California for perhaps as long as a decade.

To place the issues in context, a brief summary of the setting is in order.

From the *Save the California Delta Alliance petition*, paragraph 2:

The Sacramento, San Joaquin, Cosmunes and Mokelumne Rivers along with their tributaries drain the vast Delta watershed which covers 45,000 square miles (30,000,000 acres) stretching from

Fresno to the Oregon border. The Delta is formed at the confluence of these rivers and covers an area of approximately 1,300 square miles located in a triangular area roughly between Sacramento, Manteca and Benicia. The Delta's myriad branching sloughs, marshes and islands provide critical habitat for numerous species, a boating and recreational wonderland enjoyed by hundreds of thousands of Californians each year, and a productive agricultural landscape rich in cultural history.

The Delta is also the hub of California's water infrastructure system; more than two-thirds of the state's residents and over 2,000,000 acres of farmland receive water exported from the Delta through state and federal pumping plants and canals. Cal. Water Code § 85004(a). The federally operated Central Valley Project, state operated State Water Project, and locally operated regional canals form the largest contiguous piece of water supply infrastructure in the world, reaching almost every corner of the state. The vast amount of water exported through this water conveyance system from the Delta's critical aquatic habitat causes "an ever-spiraling tension over water exports and ecosystem decline."

Some might quibble with this or that in the foregoing statement but it gives a true sense of the setting and the dimensions of the problem the Reform Act attempted to address.

The Legislature arguably kicked the most pressing problems down the road for solution in the planning process, without providing the type of guidance that might have made those problems less daunting. For example, the legislature delegated to the Council the task of preparing a plan for management of the Delta. But one of the most critical questions the planners must resolve is establishing an improved mechanism for "conveyance" of water through, around or under the Delta – a spiritual offspring of the Peripheral Canal proposal that sparked intense controversy in the '80s. That task, planning for "conveyance," the Legislature delegated to a consortium of agencies consisting of the Department of Water Resources, the State Department of Fish and Wildlife and others, to be resolved in the Bay Delta Conservation Plan ("BDCP").

The BDCP was intended to be part of the Delta Plan and somehow integrated with it. That goal assumed completion of the BDCP beforehand. But the Delta Plan and its EIR are now out and under attack, whereas the latest draft of the BDCP and its EIR are not scheduled for public release until late in 2013. That fact has prompted many of the Petitioners to complain in their lawsuits that one cannot evaluate the Delta Plan and its EIR in a vacuum. Without the critical component of the BDCP and its EIR analysis with respect to “conveyance,” the picture remains woefully incomplete as a matter of law and common sense.

And most people involved in the process are sure that the BDCP will adopt as its preferred alternative Governor Brown’s plan for conveyance. Paragraph 32 on p. 9 of the petition of the North Coast Rivers Alliance, *et al* describes that plan in as follows:

... The BDCP proposes construction of a massive 35-mile-long “dual bore” tunnel some 40 feet in diameter that would divert most of the Sacramento River’s flow underneath the Delta for export. It would divert up to 9,000 cubic feet per second (cfs) – about 6.5 million acre feet per year, sufficient to flood the entire state of Rhode Island under nearly seven feet of water – from Sacramento River to Clifton Court Forebay for export south. Diverting this staggering quantity of water threatens to exacerbate rather than reverse the Delta’s ecologic decline.

Although one may argue with some of the details and hyperbole, the foregoing is generally accurate – and certainly reflects the way the conveyance facility the BDCP will propose is perceived by those who oppose it.

The existing system depends upon drawing water from the southern Delta at the “Tracy Pumps” after the water has traveled through the Delta labyrinth of sloughs and streams. From the Tracy Pumps, the California Water Project water is transported south in the California Aqueduct, and the CVP water is transferred south through the Delta Mendota Canal. Those facilities serve a wide variety of agricultural enterprises and urban water purveyors. The CVP

project also operates the San Luis Reservoir in the hills west of Los Banos, a facility that provides limited storage for excess flows during high water periods and serves other purposes.¹

The inefficiencies of a system based on the existing arrangement provided one of the major catalysts for the Reform Act in the first place. Among other issues, water that transits the Delta before it is diverted for delivery into the canals has quality issues that would be eliminated by diversion above the Delta, around or under it, in canals or tunnels.

Second, the Tracy Pump diversions have created backwaters in low water periods that have injured and killed fish species protected under the Endangered Species Act, resulting in highly publicized curtailments and reductions in deliveries.

Third, the deteriorating condition of the levees that protect many of the Delta islands raises the specter that levee failure would draw a rush of saltwater up from San Francisco Bay to flood the affected islands. Earthquake caused levee failure is the risk that is cited as potentially the most catastrophic. After such an event, Delta water would be rendered unsuitable for human consumption or irrigation. The resulting contamination might take decades and billions of dollars to reverse, if it could be reversed at all.

Proponents of the conveyance facilities claim that they would solve all of the foregoing problems and thus become a critical component if not the centerpiece of planning for the Delta. The facilities would provide a more reliable water supply and, according to proponents, be consistent with enhancing the environment of the Delta. But as noted above, the EIR that will address these issues and provide the necessary information has not yet been released, something that is not expected to occur for several months.

¹ The CVP provides storage accommodation for the California Water Project water under an agreement with the Department of Water Resources (“DWR”).

As a result, one of the most cogent arguments made by petitioners on all sides of the litigation is the fact that consideration of the Delta Plan makes little sense without consideration of possible conveyance facilities – and the additional storage facilities that will probably be necessary in order to make conveyance truly functional and efficient.

The Legislature also complicated the task by directing the relevant agencies to achieve “coequal goals” in their planning activities, defined in Water Code § 85054 as follows:

“Co-equal goals” means the two goals of providing a more reliable water supply for California and protecting, restoring and enhancing the Delta ecosystem. The co-equal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, natural resource, and agricultural values of the Delta as an evolving place.

Predictably, the petitions filed by parties south of the Delta and others concerned about constraints on water supply emphasize the “more reliable water supply” language of the “co-equal” goals, criticizing those provisions of the Delta Plan that they perceive as constraining rather than facilitating water supply. Those petitioners who oppose increased water exports for agricultural and municipal development emphasize protection, restoration and enhancement of the Delta ecosystem, reflecting their perception that excessive export caused the crisis in the first place, a condition that cannot be cured by increasing export. The cases encompass other issues, but this debate is clearly the main battleground.

When the agencies in charge of the process complete the BDCP and certify the EIR for it, the existing petitioners, and presumably others, will file challenges to those actions as well. When all of the cases are combined and assigned to a single judge for resolution, the proceeding will likely include at least 40 or more parties. It will take a herculean effort even to obtain a consensus with respect to the administrative record for such a case, let alone other issues of case

management. At least a decade of litigation appears inevitable. In short, a classic Augean mess looms on the horizon.

Governor Brown has often expressed his disdain for the CEQA litigation process and he will probably attempt to find a shortcut. He may even ask the legislature to exempt the Delta Plan and the BDCP from CEQA, a course of action likely to encounter vigorous resistance from the environmental community. But in any case, the petitions are not restricted to allegations of CEQA violation. Many of them claim that the Council's actions in adopting the Delta Plan also violates the Reform Act. Perhaps the Governor will attempt to foreclose those claims as well, a course of action that would likely open up new avenues for attack under the separation of powers doctrine, among other possibilities.

While this melodrama unfolds, the issue of water supply for Californians will remain in limbo. That uncertainty could cloud the process of performing water supply assessments for developments, the assurance of supplies for agricultural enterprises, the due diligence analysis for lending and purchase transaction, and long-term planning in general. Although California law has generally recognized that rights to water are entitled to the constitutional protections of other property rights, those rights are subject to the limitations that arise from various background principles of California law. These include the primacy of the public trust (for protection of environmental and natural resources) and the obligation to make reasonable and beneficial use of the water for which the right is claimed, a concept that is currently under intense enforcement scrutiny by the State Water Resources Control Board. Escalated enforcement of the reasonable beneficial use limitation is another express goal of the Reform Act legislative package – which also authorized the State Water Resources Control Board to hire a cadre of field enforcers whose compensation may depend upon the number of violations they

uncover. This structure suggests the advent of a concerted effort to squeeze existing water rights in the hopes of freeing up “surplus” water that can then be allocated to others. It is too early to assess how all this will play out.

In short, uncertainty will complicate all types of planning and transactional due diligence analysis, probably for the foreseeable future, reaching into areas where water rights have customarily been taken for granted, based on “will-serve” assurances and contracts from water agencies. Another layer of inquiry has now been added to the process, at the very least. Those who disregard that risk may find themselves dealing with an ugly surprise, no actual wet water on which their enterprise depends, contrary to expectations that would have been reasonable pre Reform Act.

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