THE STATE WATER RESOURCES CONTROL BOARD'S ROLE IN IMPLEMENTING THE DELTA PLAN

A Report to the State Water Resources Control Board
and
the Delta Stewardship Council

by

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INTRODUCTION

The Sacramento-San Joaquin Delta Reform Act of 2009 established a governance structure that directs efforts across state agencies to develop a legally enforceable Delta Plan. Water Code § 85001(c). The Delta Plan creates a comprehensive, long-term management plan for the Delta. Water Code § 85059.

The Delta Stewardship Council must develop, adopt, and commence implementation of the Delta Plan on or before January 1, 2012 to further the co-equal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. Water Code § 85300. The Delta Plan may also identify specific actions that state or local agencies may take to implement specified subgoals and strategies.

The State Water Resources Control Board (State Water Board), as the state's principal water resources regulatory agency, has the authority to help implement many of these goals, subgoals, and strategies. It is the purpose of this report to list these authorities and describe how they may be used to help implement the Delta Plan.

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DISCUSSION

The State Water Board is the principal agency exercising the adjudicatory and regulatory functions of the state in the field of water resources. Water Code § 174. Included in these functions are the authorities to enforce the constitutional requirement that water be diverted and used reasonably (Water Code § 275), the authority to require that water be diverted and used consistent with the public trust doctrine (*National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419, the power to prevent unlawful diversion of water (Water Code §§ 1052, 1825), and the responsibility for the coordination and control of water quality (Water Code § 13001.)

The State Water Board's broad and sweeping authority places it in a central position to help implement the Delta Plan's co-equal goals, including its subgoals and strategies.

Co-Equal Goals

A. The Reliable Water Supply Co-Equal Goal

- Improved conveyance facilities. Construction of any conveyance facility may not commence until after the State Water Board issues an order approving a change in the point(s) of diversion from the southern Delta to a point(s) farther north on the Sacramento River. Any such order must include appropriate flow criteria to protect the Delta. Water Code §§ 85056(c)(2), 85088.

- Additional storage projects. Any such facilities would require water rights permits(s) from the State Water Board.

- Operation of conveyance facilities and/or storage systems. Operation would have to be consistent with permit terms and conditions of the State Water Board relating to flows and water quality protection.

- The "Paper Water" Issue. The Delta Stewardship Council's Final Interim Plan contains the following statement: "The State Board reports that the face value of existing water rights permits in the Delta watershed is more than eight times the average annual unimpaired flows in the watershed." It is recommended that this statement be clarified in the Delta Plan. The face value of water rights is not a sufficient measure of water that can be used to determine the over-allocation of water in the watershed because:

    1) The face value of many water rights are for nonconsumptive uses, such as power;
    2) The face value represents a maximum possible water diversion, which is far greater than what is actually used;

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3) Permit/license terms, such as those for protection of instream uses, further reduce below the face value the amount of water that can be diverted;
4) Water, when applied, is typically not consumed up to the full face value and the same water (return flow) is often used multiple times as it runs downstream.

While actual water use may be only a fraction of the face value of water rights, the state's water supplies have been over-allocated in many areas. The State Water Board's statutory authority to declare stream systems to be "fully appropriated" may be a method to prevent additional appropriations from being issued in already over-allocated watersheds. Water Code § 1205-1207. In addition, the State Water Board may enforce the provisions of the Water Code that are designed to prevent permit and license holders from claiming rights in excess of the amounts properly perfected and maintained under the appropriative water right system. These include the requirements for construction of permitted facilities and putting water to beneficial use with due diligence (Water Code §§ 1395 et seq., 1940) and the forfeiture of water rights for nonuse. (*Id*. §§ 1241, 1410, 1675.)

B. The Delta Ecosystem Restoration Co-Equal Goal

- The Delta Plan must include measures to reduce ecosystem stressors (Water Code § 85302(c)(4)), restore Delta flows (Water Code § 85302(e)(4)), protect beneficial uses of water (Water Code § 85302(d)(1)), protect water quality (Water Code § 85302(d)(3)), promote water use efficiency (Water Code § 85303)), and provide monitoring to determine progress (Water Code § 85308(c)).

  The State Water Board's authority extends to all of these measures:

  1) Stressors:

     a) Flows: The Water State Board will establish Delta flow criteria (Water Code § 85086(c)(2)). These flow criteria do not have the effect of water quality objectives, but if the State Water Board later adopts flow objectives or other objectives the attainment of which depends on adequate flows, the State Water Board may reopen water rights to impose appropriate requirements to implement those objectives.
     b) Upstream contaminants. The State Water Board (together with the Nine Regional Water Quality Control Boards) issues permits for wastewater treatment plants and other urban individual discharges (such as the Sacramento Regional Treatment Plant). The Water Boards also regulate stormwater discharges from cities and smaller communities, construction projects, industrial

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plants, CalTrans, and agricultural return flow discharges. These permits contain provisions to limit contamination.

c) Invasive Species. The Water Boards' permitting authority extends to discharge of ballast water, a prime source of invasive species introduction.

d) Legacy Pollutants. The Water Boards' authority extends to the regulation of mercury and other legacy pollutants discharged from abandoned mines.

2) Water Use Efficiency. The state's Reasonable Use Doctrine is enforced by the State Water Boards and may be used to promote the efficient use of water and to prohibit the waste, unreasonable use, unreasonable method of use or unreasonable method of diversion of water.

3) Monitoring. The Water Boards have comprehensive authority to monitor both the use of water and the quality of the state's waters.

Other Plans

The Delta Plan may incorporate other completed plans related to the Delta into the Delta Plan to the extent that the other plans promote the co-equal goals. Water Code § 85350. The following two plans should be incorporated:

A. The State Water Board's 2008 Strategic Workplan for Activities in the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Delta Strategic Workplan) http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/strategic_plan/docs/baydelta_workplan_final.pdf .

The Delta Strategic Workplan describes actions the Water Boards will complete to protect beneficial uses in the Delta. Workplan activities are divided into nine broad elements, covering a range of actions that: 1) implement the Water Boards' core water quality responsibilities; 2) continue meeting prior Water Board commitments to enforce water quality and water rights laws; 3) are responsive to priorities of the Delta Vision Strategic Plan; and 4) build on existing processes, such as the Bay Delta Conservation Planning effort (BDCP).

The Delta Strategic Workplan, by identifying a range of actions to protect the Bay-Delta, should be summarized and incorporated into the Delta Plan.

B. The State Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (2006) http://www.waterboards.ca.gov/waterrights/water_issues/programs/bay_delta/wq_control_plans/2006wqcp/docs/2006_plan_final.pdf .

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The Bay Delta Water Quality Control Plan (Bay-Delta Plan) establishes water quality objectives for the Bay-Delta Estuary. Like all water quality control plans, this plan consists of: 1) beneficial uses to be protected, 2) water quality objectives for the reasonable protection of beneficial uses; and 3) a program for implementation for achieving the water quality objectives. It requires control of salinity (caused by saltwater intrusion, municipal discharges, and agricultural drainage) and water project operations (flows and diversions).

Most of the objectives in the plan are being implemented by assigning responsibilities to water right holders because the parameters to be controlled are primarily impacted by flows and diversions. The objectives include: Delta outflow, Sacramento and San Joaquin River flows, export limits and salinity. The plan also recognizes that there are a number of emerging issues that will be evaluated in the future.

The Bay-Delta Plan should also be incorporated into the Delta Plan.

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CONCLUSIONS

1) The Delta Plan should identify the authorities of the State Water Board that may be employed to implement its goals, subgoals, and strategies.

2) The State Water Board's Bay Delta Plan and Delta Strategic Workplan should be incorporated into the Delta Plan.

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