

Comments on DSC Staff Draft Determination on Consistency of WaterFix with Delta Plan

Appellant Group A3:

Friends of the River

California Sportfishing Protection Alliance, et al.

November 15, 2018

Organization of Presentation

- ✓ Comments in support of staff's recommended findings
- Key items on which Group A3 recommends the Council makes findings different from those recommended by staff

(Quotes are from Staff Draft Determination unless otherwise stated)

Group A3 supports staff on Policy ER P1 (Delta Flow Objectives) re E/I ratio

- DWR's effort to redefine compliance point for Export/Inflow ratio fails on its face (pp. 71-72)
- DWR's sensitivity analysis with E/I compliance at Freeport seeks an immediate do-over to correct DWR's overreach
- DWR inappropriately treats regulatory process like a real-time negotiation: remand is the correct resolution of inconsistency

Group A3 supports staff on Policy ERP1 (Delta Flow Objectives) re historic ops

- Staff Determination on at pp. 74-75 deconstructs DWR marketing of historical compliance rates
- DWR states % compliance at ALL req. points
- DWR-61 (Leahigh Pt 1 testimony) at 9:12 says: “Some of the standards govern operations much more frequently than others....”
- Staff: Days with ANY exceedances (2009: 60%)
- DWR counts compliance with flow/WQ variances requested under TUCPs as compliance w/D-1641

Group A3 supports staff on Policy G P1 (Best Available Science) re sea-level rise

- DWR inappropriately applied a standard for lower-risk projects
- DWR did not evaluate longer-term time frame, as recommended by NOAA and the Ocean Protection Council
- (Draft Determination, p. 28)

Group A3 supports staff on Policy WR P1 (Reduce reliance on Delta) (pp. 53-64)

- Policy applies to WaterFix
- Not limited to new or expanded water right
- Policy applies to CVP contractors
- No substantial evidence that CVP contractors have reduced reliance
- All 3 factors under subdivision (a) apply (water recipients have not reduced reliance; failure to reduce has caused demand from Delta; significant adverse impact in Delta)

Group A3 supports staff on Policy DP P2 (Respect local land use)

WaterFix:

- Conflicts with local land use plans (p. 93)
- Conflicts with existing Delta communities (p. 103)
- Has impermissible conflicts with local historical and cultural resources (pp. 106-107)
- Has impermissible conflicts with local parks and recreation (p. 118)
- Has impermissible traffic impacts (pp. 130-131)
- Has impermissible noise impacts (p. 144)

Group A3 disagrees that Policy G P1(b)(4) (Adaptive Management) is supported by substantial evidence (1)

- DWR's argument "DWR and Reclamation have no alternative but to comply with the terms and conditions of the BiOps" (cited in Determination, p. 48:16-17) is not substantial evidence or sufficient basis for consistency
- DWR's argument that BiOps create funding requirement (cited on p. 48: 37-42) is not substantial evidence or basis for consistency
- No signed Adaptive Management Plan for BiOps

Group A3 disagrees that Policy G P1(b)(4) (Adaptive Management) is supported by substantial evidence (2)

- “Project-Wide Adaptive Management Plan” (PAMP) focuses on ESA-listed species
- Water Code § 85308 (Delta Plan) at (f) requires a “formal adaptive management strategy for ongoing ecosystem restoration and water management decisions” (not limited to listed species)

PAMP outside of ESA/CESA ¶ 4.2 (p. 4-3): a plan to make a plan and an entity, not substantial evidence

DWR Delta Conveyance Office (DCO) and the JPA Design Construction Authority Activities pertaining to the MMRP commitments and permit conditions that would not affect ESA or CESA-listed species would be performed directly under DWR oversight.

The Department of Water Resources (DWR) has adjusted its organizational structure to ensure an efficient and effective construction program that protects the State's interests by managing risk and controlling costs. This adjustment includes the creation of the DWR Delta Conveyance Office (DCO).

The Department of Water Resources (DWR) entered into a Joint Exercise of Powers Agreement with the Delta Conveyance Design and Construction Joint Powers Authority (DCA), forming a partnership for the design and construction of California WaterFix. The DCA is a public agency composed of local public water agencies who are investing in California WaterFix. Through the DCO, the State of California will retain authority and oversight of WaterFix regulatory obligations, environmental mitigation and quality assurance. The DCO will oversee the work of the DCA. The DCO will be committed to transparency. The DCO will lead implementation of this PAMP acknowledging that technical support from the DCA may be necessary to develop the PAMP Annual Status Report and corresponding Decision Memo.

Group A3 disagrees that substantial evidence supports BOR compliance w/ Policy ER P1 (Delta Flow Objectives)

- DSC should take official notice of federal documents cited on p. 76:10-17, contrary to staff recommendation (Exhibit C)
- Denied documents are extraordinarily important and relevant in light of federal assertion that state laws may not or do not apply to federal entities

Draft Determination's prospective procedural remedy re BOR not supported by substantial evidence

- “We note that if any change to the relationship between Reclamation and the Department constitutes or leads to a covered action, that action would be subject to the Delta Reform Act’s consistency requirements.” (p. 76:18-21)
- There is no description of any process for subsequent review by DSC
- No defined opportunity for public participation in subsequent regulatory process
- No defined opportunity for legal review

General notes

- Group A3 continues to maintain that the SWRCB must act on petition for change before there sufficient project definition to allow DSC determination on consistency
- This summary regarding the draft Determination on Consistency is necessarily abbreviated and incomplete
- We thank the Council for the opportunity to highlight our areas of support and concern