



ENVIRONMENTAL DEFENSE FUND

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August 29, 2009

Hon. Fran Pavley, Chair
Senate Committee on Natural Resources and Water
State Capitol
Sacramento, CA 95814

Hon. Jared Huffman, Chair
Assembly Committee on Water, Parks, Wildlife
State Capitol
Sacramento, CA 95814

Re: EDF Comments on 2009 Proposed Delta/Water Legislation

Honorable Chairs,

On behalf of more than 65,000 members and activists in California, EDF submits these comments and recommendations with regard to the Delta water legislation package. We appreciate the immense effort that you and your staff have put into this process and are committed to working with you to resolve the remaining issues. As you are aware from our prior submissions, while we believe there is a great deal of merit in the bills, there are a number of key issues that we believe require refinement and revision. Our recommended language changes are included in italic type below.

Instream Flows

Comment: The bill package appropriately directs the SWRCB to expeditiously make flow determinations for the Bay-Delta estuary and its watershed, and requires that these determinations be made prior to the issuance of any SWRCB change in point of diversion permit. **EDF strongly supports these provisions and much of our support for the package is contingent on maintaining them.** By expediting the completion of flow determinations, which is an existing regulatory requirement of the SWRCB, prior to issuing any change in point of diversion permits, the bill will benefit the Bay Delta Conservation Plan (BDCP) process in several ways. The water flow determinations will help to strengthen the scientific basis and credibility of the BDCP and help advance a final plan in a much timelier manner. Delaying this necessary assessment will only prolong BDCP completion. Far from delaying the BDCP, the bill provisions would coordinate and expedite the SWRCB review necessary to BDCP implementation.

To strengthen the bill, however, it should be amended to clarify that the flow determinations must be fully implemented as a condition of any water facility permit, and are not merely informational or advisory

Recommendation:

Preprint SB 1, 85086(c)(2) The board may not grant any petition to change a point of diversion in the Delta that is submitted by the department on behalf of the State Water Project or by the United States Bureau of Reclamation on behalf of the federal Central Valley Project before the board makes its determination pursuant to paragraph (1). *Further, no construction of any facility related to such permit(s) may be initiated unless and until the stream flow determinations referenced in this legislation are fully implemented.*

Delta Watermaster

Comment: EDF supports the establishment of a new position that would provide daily water project operations with an independent status sufficient to ensure that water operations are conducted in a manner that will meet both ecosystem protection and water management goals. In our view, the watermaster concept in the current draft mixes two distinct issues: enforcement and operation. We recommend that these two issues be clearly articulated as distinct functions.

Enforcement. We concur with the bill authors that enforcement of water rights has been a problem for the SWRCB, and concur with the SWRCB testimony that this is an issue largely related to capacity and resources at the Board itself. We do not believe that a watermaster is necessary at the SWRCB to deal with enforcement issues. We do strongly support the provisions of preprint SB 2 (Pavley) to increase the Board's authority and capacity to deal with enforcement issues. We also support the establishment of a corps of, or at least a few, administrative law judges (ALJs) to help address enforcement issues. In addition, the legislature should provide direction to the SWRCB to establish clearer and more consistently applied consequences for violations of water quality standards.

Operational Discretion. The watermaster concept grew out of a need to change the dynamic in daily water operations decision making. Prior to the issuance of the most recent Biological Opinions, operational discretion for how to allocate water to the environment (within regulatory parameters) was within the purview of the federal and state water projects. While there were operational groups that include fishery and other agencies, the State Water Project (SWP) and the Central Valley Project (CVP), remained the final decision makers on daily operations affecting not only water supply, but the availability of water to meet environmental needs as well. EDF has long maintained that to advance Delta Vision's coequal goals approach, it is important to change this dynamic and establish a position with operational authority that has the dual mandate of meeting not only water supply contract obligations, but also the ecological health of the estuary.

However, the proposal in the preprint bills appears to establish that the watermaster although very powerful in many ways, would have enforcement functions with only limited involvement in making daily operation decisions. Within the boundaries of the relevant environmental parameters, daily

management discretion about whether and how to provide water for consumptive and ecological purposes would remain within the Bureau of Reclamation and Department of Water Resources. As many have observed, this is the central governance issue that is at least in part responsible for the current problems in the Delta and the cycle of environmental degradation.

Operating flexibility is expected to play an increasingly important role as science and monitoring improve, particularly if proposals for Delta conveyance are implemented. EDF supports an improved approach to managing water project operations and decision-making among the resource management agencies (USFWS, NMFS & CDFG) and water project agencies (DWR and USBR) than existed under the pre-Biological Opinions process under the Water Operations Management Team (WOMT). In our view, it is essential that a Delta Stewardship Council, through an operating entity, more effectively coordinate the management and project agencies.

Recommendation: The resource and water project agencies should retain their current legal responsibilities, but we would assign responsibility for any operating flexibility in connection with the state and federal projects to a Water Operations Entity (whether that entity is called a Delta Watermaster or an Independent Water Operator or a Fishmaster). This entity should be housed within the Delta Stewardship Council, and would be responsible for operations on a day-to-day basis, specifically the key real time discretionary issues of greatest concern to balancing supply and ecological prerogatives involving the rate, timing and location of water releases.

This proposal assumes the continuation of the WMOT, or a similar process to bring together water management and resource agencies to address daily operations, and is focused on the area of discretion that, under the current Biological Opinions, is now assigned to the Fish and Wildlife Service and NMFS. It assumes that most of the functions of running the system would remain with the project operators, but would slice off the key discretionary decisions that have the most impact on the health of the Delta ecosystem and fishery resources.

Chapter 3. Delta Watermaster

85230. (a) If, and only if, the federal and state governments successfully complete a Bay Delta Conservation Plan and adopt such a plan as an HCP and also as an NCCP, and if as a result of such adoption the Biological Opinions that are in place for the protection of salmon, Delta smelt and other fish species in the Bay-Delta estuary are withdrawn, the board shall appoint a special master for the Delta, whose title shall be "the Delta Watermaster."

(b) The council shall provide a list to the board recommending at least one candidate to serve as the Delta Watermaster. The initial recommendation shall be made within *30 days of the rescission of the relevant Biological Opinions*. ~~90 days of the appointment of a quorum of the council~~. The council shall make subsequent recommendations within 60 days of notification by the board of a vacancy.

- (c) The council shall recommend individuals who have ~~extensive knowledge and experience in one or more~~ *all* of the following *qualifications areas*:
- (1) *a graduate degree or higher in fish biology or ecosystem sciences; ~~Water rights laws or water rights enforcement.~~*
 - (2) *extensive knowledge and experience with major water project operations; and ~~Water quality laws or water quality enforcement.~~*
 - (3) *extensive knowledge and experience with state and federal water rights and environmental laws, and endangered species laws in particular. ~~State Water Project or federal Central Valley Project operations.~~*
 - (4) *~~State or federal endangered species laws or endangered species enforcement.~~*

(d) The board shall select one individual from the list provided by the council to act as the Delta Watermaster, within 60 days of receipt of the list. If the board finds, that none of the candidates meet the requirements of this chapter, the board shall notify the council of that finding and that a vacancy exists.

85231. (a) The Delta Watermaster shall be an agent of the *Council*.

(b) The Delta Watermaster is authorized and directed to convene and chair an operations group consisting of representatives from state and federal fishery agencies, the board, the department and the Bureau of Reclamation. [include language clarifying that it is understood that federal participation cannot be required in state law but that it would be expected and welcomed.] The Delta Watermaster may appoint an environmental coordinator to coordinate the perspectives of the relevant natural resources fisheries agencies, unless those agencies select such a coordinator themselves. The Delta Watermaster may appoint a project coordinator who would be responsible for coordinating the perspectives of the water supply agencies, unless those agencies select such a coordinator themselves. The Watermaster shall also include at least 2 representatives from the Science Board to serve on the operations group as well.

(c) The purpose of the operations group is to make decisions about the daily operations of the state, and to the extent allowable by law or agreement the federal, water projects within the parameters of all relevant and applicable law. The operations group is directed to make decisions that are most likely to ensure that the ecosystem restoration objectives of the Delta Plan are met while minimizing adverse impacts to water supply reliability. Decisions of the operations group shall also take into account impacts to the Delta as a place.

(d) It is anticipated that the Operations Group will generally reach consensus. In the event that it does not, the Delta Watermaster is the final decision maker.

(e) Nothing in this section is intended in any way to alter or modify the authority of any natural resource agency under any current environmental law including but not limited to [ESA, CWA, etc.]

(f) Nothing in this section is intended in any way to alter or modify the authority of DWR, the Bureau of Reclamation pursuant to their water right permits or licenses.

~~board, and shall be vested with all of the statutory enforcement authority granted to the board to direct daily operations of all surface water diversions within the Delta watershed. The Delta Watermaster's authority shall include, but is not be limited to, the duty to do all of the following:~~

- ~~(1) Enforce water rights for diversions.~~
 - ~~(2) Exercise the state's public trust responsibilities.~~
 - ~~(3) Enforce the California Endangered Species Act (Chapter 1.5 (commencing with Section 2050) of Division 3 of the Fish and Game Code) as to diversions.~~
 - ~~(4) Make judgments as to reasonable use pursuant to Section 2 of Article X of the California Constitution.~~
 - ~~(5) Enforce water quality objectives established in the Delta Water Quality Control Plan.~~
 - ~~(6) Consider and decide on petitions for changes, with a duration of 90 days or less, in water right permits or licenses for diversions within the Delta watershed.~~
- ~~(b) The board shall amend the terms and conditions of water right permits or licenses for diversions within the Delta watershed to delegate authority to the Delta Watermaster to act on the board's behalf.~~

~~85232. Delta Watermaster decisions may be appealed to an administrative law judge, which shall be appointed by the board to consider appeals pursuant to this section. The administrative law judge may issue an order that stays a decision by the Delta Watermaster pending a full board review of the decision, if the administrative law judge determines that the decision of the Delta Watermaster was not supported by substantial evidence in the record. An order of the administrative law judge that stays an order of the Delta Watermaster shall be set for hearing before the full board at the earliest possible meeting.~~

Coequal Goals

Comment: Regarding the concept of "coequal goals" as discussed in the Delta Vision Task Force reports, EDF notes that the Task Force correctly recognized that water management for many decades has failed to treat environmental health and sustainability

as a management objective on par with maximizing consumptive supply. It sought to remedy this by establishing a policy of placing these objectives on the same plane.

The challenge is how to translate this concept into bill language that, among other things, is consistent with existing state and federal constitutional requirements and laws. Water supply and the Delta's ecological health do not come to this debate from an "equal" starting point. As is widely acknowledged, the Delta estuary and its watershed have been in a spiral of decline for decades with many key species threatened with extinction. Conversely, extractions of water from the Delta for consumptive use have historically increased over time. Restoring a policy balance will necessarily require greater consideration for environmental concerns until a sustainable level of ecological health is achieved.

The Mono Lake case provides an excellent example of this sort of consideration. In 1994, the SWRCB determined that Los Angeles' diversions from the Mono Basin were causing inappropriate harm to the Lake, its tributaries, fisheries and other public trust resources. It required the City to restore Mono Lake to a sustainable level. This required the City to give up its entitlement to water in the Basin for several years, eventually returning to a lesser amount of water diversions than it had used historically that would ensure a basic level of ecological health in the Basin. (SWRCB Order D-1631) Thus, the "coequal goal" was reached by providing benefits to the ecosystem, and decreasing the historic diversions of the City, in order to rectify longstanding imbalance. Note that the City did not lose all of its original water right, and the Lake will never return to anything approaching its natural level.

To end the cycle of litigation, actions of this type will be fundamental to achieve the legislature's oft-stated goal of restoring the Delta estuary and its fisheries, while still providing a reliable water supply for reasonable uses. However, as drafted the "coequal goals" concept is not clear. It could be construed not as a mandate to rectify imbalance in water management, but as a simple directive to in all cases treat water supply and the ecosystem as "coequal," leaving it ultimately to the courts to sort out what this means.

EDF recommends that the legislation be clarified to ensure that the coequal concept be fully integrated and made consistent with state public trust and other environmental laws designed to redress damage to the state's natural resources. Given the difficulty with defining the term "coequal goals," as well as the various terms embedded within that definition, we strongly recommend elimination of Section 85020(a) which would establish this term as the "standard for long-term management of Delta water and environmental resources." In addition, this Section sets up a conflict with Section 85023, which provides that the reasonable use and public trust doctrines are the "foundation of state water management."

Recommendations: Preprint AB 1 (AB 39)

~~85020. (a) The coequal goals shall be the standard for long-term management of Delta water and environmental resources.~~

~~(b)–The policy of the State of California is to achieve the following objectives that the Legislature declares are inherent in the coequal goals for management of the Delta:~~

~~85020(6) Establish *sufficient reservation of water* an appropriate balance between water reserved for public trust and ecosystem restoration purposes to enable appropriate allocation and water available for allocation and appropriation for other beneficial uses.~~

85023. The longstanding constitutional principle of reasonable use and the public trust doctrine shall *continue to* be the foundation of state water management policy and are particularly important and applicable to the Delta.

85054. “Coequal goals” means the two goals of *water supply reliability and ecosystem health*. ~~assuring a reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem. The coequal goals shall be achieved in a manner that protects and enhances the unique cultural, recreational, and agricultural values of the Delta as an evolving place.~~

85054(b) *“Water supply reliability” means limiting extreme fluctuations in supply, it does not mean increasing the amount of water provided to a specific water contractor, or for a particular economic use.*

New Delta Stewardship Council: Membership

Comment: The Council’s purpose makes it important that its 7 members are individuals with the integrity, expertise and independence to serve. While there is no one way to accomplish this, EDF believes that some set of qualifications is preferable to having none. Clearly this will be a political body regardless of how the Council is constituted. The question is one of degree. A council with no requirements for diversity in background and expertise runs a greater risk of being ineffective or overly political than one that must meet basic requirements of competence, skill and independence.

Recommendations: Amendments Preprint SB 1 (SB 12)

Revise Section 85200(b)(1) to provide that the 7 seats on the Council are to be filled as follow:

Those eligible for appointment to the Council Board must have specific qualifications, experience and expertise in areas such as fisheries and ecosystems biology, environmental or water law, and engineering or hydrology.

Add a new section 85200(g) to provide seats for 4 federal participants representing FWS, Bureau of Reclamation, NMFS and the Army Corps to the extent their participation is allowed by appropriate federal law.

Add a new section 85200(h) establishing financial conflict of interest requirements for Council members.

We appreciate the concern that having representatives of the resource and water management agencies sit on the Council Board could create a conflict. In our view, however, since the Council's basic purpose is to coordinate plans and activities among those agencies it would better serve to have those political appointees sit on the Board to ensure a key level of agency "buy-in" to the Council's actions, and to provide checks and balances with the public members available to provide outside perspective. A major problem noted by the Little Hoover Commission and others with the Calfed governance process was that the most relevant agencies did not feel bought into that process or otherwise bound to participate fully.

New Delta Stewardship Council: Relationship to BDCP

Comment: EDF has long supported the BDCP process and continues to believe that it is an extremely important effort. We see merit in the legislature's proposal that the Council be involved in that effort – prior to its finalization – to ensure that the BDCP is consistent with other mandates and requirements for the Delta watershed. A number of the provisions in the bill appear to us to provide strong support to the BDCP process and substantially increase the likelihood that it will be successful. In particular:

- We concur with the provision requiring the Science Board to review the BDCP EIR. This should be done as early in the process as is feasible and should be an ongoing responsibility to help ensure that commitments made in the BDCP are met and adaptive management principles are adhered to. [85320]
- We concur with the provision requiring that the final BDCP must include, among other things, an objective that the fisheries management activities in the BDCP "will achieve results that meet or exceed the goals in the existing species recovery plans and the state and federal salmon doubling goal." [[85320(j)(2)(A)]
- We concur with the provision directing that the final BDCP must meet the standards of the state Natural Communities Conservation Planning Act (NCCPA). [85320]
- We concur that it is useful for the Council to review the draft BDCP and to provide feedback to the BDCP participants **prior** to the finalization of that Plan.
- We concur that the BDCP should be incorporated into the Council's overall Delta plan if it makes the findings set forth in the bill package regarding best available science, environmental water, climate change impacts and other considerations, as well as the probability of

achieving Delta water quality standards for each conveyance alternative. [85320(j)(1)]

Recommendations:

The bill should be amended to provide that the California Department of Fish and Game certify the EIR rather than the Council.

The bill should be amended to include consideration of a conveyance alternative that reduces the amount of water exported from the Delta. [See Sections 85320(j)(1)(B); 85304]

Finally, we are concerned about whether it is appropriate to delegate to the Council the final decision on whether to proceed with a peripheral conveyance and recommend that the legislature revisit this issue.

Ecosystem Health Standards

Comment: The package appropriately requires measures to attain the biological health of the Delta estuary and includes detailed characteristics of, and strategies to achieve, a healthy ecosystem. EDF strongly supports these provisions.

Recommendation: The bill should be amended to clarify that these strategies must be actually implemented, and to establish consequences that will ensue if the strategies are not implemented or the desired characteristics (objectives) not achieved. In addition, public funding for implementing the BDCP should be linked to meeting the NCCP objectives and requirements.

Beneficiary Pays Causation Requirement

Comment: The package establishes a beneficiary pays principles, which EDF strongly supports, but it also appears to establish a causality requirement linking payments to demonstrated environmental harm. This is an invitation to litigation and conflict since establishing a specific causal link to a specific diversion is complex. Financial responsibility should be tied to financial benefits from proposed facilities, which can be quantified with reasonable clarity.

Similarly, as drafted, the financial obligations of the SWP and CVP for mitigation are based upon establishing a causal relationship between environmental damage and water project operations. The evidentiary standard is again relatively low (“reasonably related”), but still invites dispute and may result in limiting funding and prolonged conflict over the issue of causation which is hotly contested. [85404]

The term “beneficiary pays principle” is defined in the bill to mean “the allocation of project or program costs to beneficiaries in approximate proportion to the benefits received.” [85400 (a)] EDF concurs with this formulation.

Recommendation:

Amend Section 85404(a)(2): Any necessary mitigation to reduce environmental damage *reasonably related to caused by* water export operations and to produce higher quality water for purposes of export, including activities intended to mitigate for damage to fish populations and other natural resources in the Delta and its tributaries. ~~that are reasonably related to the export of water and other activities of the State Water Project and the federal Central Valley Project.~~

85404 (d) The council shall set the fee schedule authorized by this section so that both of the following requirements are met:

(1) The fees paid by each person or entity pursuant to this section ~~bear a fair and reasonable relationship to the environmental damage within the Delta or its tributaries committed in the past or occurring in the present, or likely to occur in the future, from the person's or entity's diversion of water that is subject to fees pursuant to this part.~~ shall be allocated in approximate proportion to the benefits received.

Water Quality Testing

Comment: EDF supports the groundwater monitoring provisions in the bill package. It is important to include as well water quality monitoring and testing as part of those provisions.

Recommendation: Amend SB 2 (Pavley) to include a requirement for groundwater water quality testing.

Thank you for your consideration of our views. We look forward to working with you and your staff on this important matter.

Sincerely,



Cynthia Koehler
Senior Consulting Attorney
Environmental Defense Fund