

November 13, 2019

**Attention: Imported Water Committee**

**Bay-Delta Update (Presentation)**

**Purpose**

This memo provides an update on various activities that could impact State Water Project yield and the proposed Bay-Delta project.

**Executive Summary**

- Over the last several months, state and federal agencies have worked on issues that could impact State Water Project (SWP) yield and the proposed Bay-Delta project.
- Governor Newsom's administration is expected to release a draft set of Water Resilience Portfolio recommendations this fall, and final recommendations are expected before the end of 2019.
- The SWP Contractors and the Department of Water Resources (DWR) are undergoing negotiations to create an Agreement in Principle (AIP) for an eventual supply contract amendment to account for and allocate the proposed Bay-Delta project costs and benefits.
- Draft recommendations for voluntary agreements (VAs) to implement the goals of the Water Quality Control Plan for the San Francisco Bay/Sacramento–San Joaquin Delta Estuary (Bay-Delta Plan) are expected this fall.
- The biological opinions for the long-term operations of the Central Valley Project (CVP) and SWP, released on October 21, 2019, aim to maximize water deliveries and increase operational flexibility.
- These issues will continue to evolve due to pending activity in the months ahead.

**Background**

In July 2019, the Water Authority hosted key members of the Newsom Administration to tour regional facilities and showcase the Water Authority's demonstrated commitment to a portfolio supply development approach. At its July Board meeting, the Water Authority supported Governor Newsom's water resilience portfolio approach, including a single-tunnel Bay-Delta project, and integrated multi-benefit solutions. The support for the single-tunnel project is conditioned upon project costs being allocated fairly to supply charges. The Water Authority's Bay-Delta Policy Principles were updated to reflect this position.

**Discussion**

This report provides an update on recent developments affecting Bay-Delta policies and SWP operations since the Board updated its Bay-Delta Policy Principles.

*Water Resilience Portfolio*

In April 2019, Governor Newsom issued Executive Order N-10-19 directing the development of a Water Resilience Portfolio that provides for a diverse statewide water supply portfolio with

regional, multi-benefit projects. The portfolio effort is being conducted by a Water Resilience Portfolio team led by the secretaries of the California Natural Resources Agency (CNRA), California Environmental Protection Agency, and California Department of Food and Agriculture; managed by a director, Nancy Vogel; and coordinated by staff within the agencies. The agencies have solicited public input on strategies to develop a climate-resilient water system<sup>1</sup> and have begun to inventory and assess current and future water supplies, demands, quality, and climate change impacts. The team is expected to release a draft set of recommendations in the fall, with final recommendations to be submitted to Governor Newsom before the end of 2019.

### *Bay-Delta Project*

As part of the portfolio approach, the administration and agencies are continuing the planning process for a single-tunnel Bay-Delta project to address SWP exports due to the deterioration of the Bay-Delta ecosystem, as well as climate change impacts and seismic risk. Much of this work is being conducted through two Joint Powers Authorities originally formed for the now-defunct CA WaterFix (WaterFix) project: the Delta Conveyance Design and Construction Authority (DCA) and the Delta Conveyance Finance Authority (Finance Authority).

The DCA, under oversight from DWR, is currently performing engineering design and preparation for DWR's environmental review of the Bay-Delta single-tunnel project. At its meeting on September 19, 2019, the DCA established the Delta Stakeholder Engagement Committee to inform and receive input from a variety of stakeholder groups on the development of the Bay-Delta project. The committee, consisting of representatives of the DCA and the public,<sup>2</sup> will meet monthly for at least six months to discuss ways in which the engineering and design of the project can avoid or minimize impacts and identify potential benefits for Bay-Delta communities. Members were appointed to the 18-person committee on October 17, 2019.<sup>3</sup>

The Finance Authority, originally formed to issue bonds to finance WaterFix, has met on an as-needed basis to complete administrative actions since the shift in direction to a single-tunnel project. At its September and October meetings, the Finance Authority discussed the role it would play in the future Bay-Delta fix as the project definition develops, including through potential treasury management for the DCA.

### *SWP Contract Negotiations*

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<sup>1</sup> The Water Authority sent comments on the Water Resilience Portfolio to the Newsom Administration on August 27, 2019: <https://mwdprograms.sdcwa.org/wp-content/uploads/2019-08-27-WA-Acting-GM-ltr-to-State-re-Governors-Water-Resilience-Portfolio-Initiative.pdf>

<sup>2</sup> The Delta Counties Coalition, consisting of officials from Sacramento, San Joaquin, Contra Costa, Solano, and Yolo Counties, elected not to submit applications to participate in the committee out of disagreement with the process and scope of the committee. See the letter from the Coalition to the DCA on October 2, 2019: <https://delta.saccounty.net/content/Documents/2019-10-02%20DCA%20Stakeholder%20Engagement%20Committee.pdf>

<sup>3</sup> A list of Delta Stakeholder Engagement Committee members can be found on the DCA website: <https://www.dcdca.org/pdf/StakeholderEngagementPressRelease.pdf>

Since July 2019, DWR and the SWP Contractors have been in negotiations for proposed amendments to the SWP supply contracts in a series of public meetings in Sacramento.<sup>4</sup> The negotiations center around the proposed Bay-Delta project and methods to account for its benefits and ensure that those benefits and project costs are allocated only to participating agencies. Though the process was not originally intended to define the project, DWR and the Contractors now plan to include a project definition in the AIP. As the project and other details remain to be defined, DWR and the Contractors plan to produce a final AIP in late 2019.

Similar negotiations took place for WaterFix in 2018. Because the Contractors' participation in WaterFix was required (with the exception of North-of-Delta Contractors which would not benefit from the project), the resulting WaterFix AIP contained provisions that exempted North-of-Delta Contractors but provided an avenue for South-of-Delta Contractors to transfer or exchange their cost share with other Contractors via adjustments to their contractual rights to Table A supplies.<sup>5</sup> In contrast, the most recent draft of the new AIP allows individual Contractors to opt into the project and receive water and rights to use available facility capacity based on their "contracted proportionate share." DWR will operate the new project as part of the SWP and intends to account for benefits by "validating the operational scheduling processes with actual deliveries."

Additionally, the Bay-Delta fix—whether the now defunct twin-tunnel WaterFix or the single-tunnel Bay-Delta project—has the same purpose as the never-constructed Peripheral Canal and is intended to "complete" the SWP to address the export issues surrounding moving water from the Bay-Delta. However, in a divergence from the historical characterization of similar facilities as "conservation" (supply) facilities in SWP contract language and DWR publications,<sup>6</sup> the WaterFix AIP arbitrarily allowed Contractors to, at their own discretion, recover costs through supply "and/or transportation" charges. All references to WaterFix were removed from the SWP contracts in May 2019 as a result of Governor Newsom's executive order. In the draft 2019 AIP, Contractors will repay project costs based on their contracted proportionate share, including capital, operations, maintenance, power, and replacement costs. A cost allocation methodology has not been defined as of November 2019.<sup>7</sup>

The five Contractors located north of the Bay-Delta will not participate in the project or pay any costs. Additionally, the Central Coast Water Authority voted on October 25, 2019 not to participate

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<sup>4</sup> The meeting documents, including the latest draft Agreement in Principle, can be found on DWR's webpage: <https://cadwr.app.box.com/s/irusyewojv4nwzmxfnghzmgli9sswcw>

<sup>5</sup> For adjusted WaterFix participation factors for the SWP Contractors in February 2019, see page 61 of the April 16, 2019 Desert Water Agency board packet: <https://dwa.org/board-meeting-agenda/board-of-directors-agendas-packets/438-april-16-2019-packet/file>

<sup>6</sup> The Peripheral Canal is characterized in DWR's Appendix B to Bulletin 132-18 as a conservation facility, for which costs are to be recovered through conservation (supply) charges in MWD's SWP supply contract. For more information, see the memo *Bay-Delta Policy Update* starting on page 42 of the Water Authority's July 25, 2019 Board packet here: [https://www.sdcwa.org/sites/default/files/2016-12/Board/2019\\_Agendas/2019\\_07\\_25FormalBoardPacketSEC\\_0.pdf](https://www.sdcwa.org/sites/default/files/2016-12/Board/2019_Agendas/2019_07_25FormalBoardPacketSEC_0.pdf)

<sup>7</sup> The Water Authority's Acting General Manager sent a letter to DWR on August 7, 2019 with comments on the negotiation process: <https://mwdprograms.sdcwa.org/wp-content/uploads/2019-08-07-WA-Acting-GM-to-DWR-re-SWP-contract-amendment.pdf>

in the project, citing cost concerns.<sup>8</sup> The new draft AIP allows for transfers and exchanges between participating and non-participating Contractors based on existing supply contract language, and for the paid use of available excess capacity by non-participants.

Once the AIP is reached, Contractors will bring the document to their respective boards for consideration and approval. In early 2020, DWR is expected to issue a Notice of Preparation for an Environmental Impact Report (EIR), which will identify and analyze impacts of the AIP and alternatives to mitigate those impacts. A draft EIR is expected in late 2020, with the entire California Environmental Quality Act (CEQA) and permitting processes expected to last two to three years. When the CEQA process is complete, DWR and the Contractors will opt whether to certify the EIR and sign a contract amendment based on the AIP. The AIP will also be used to define the Bay-Delta project for its separate CEQA review process.

#### *Voluntary Agreements*

The State Water Resources Control Board (State Board) is in the process of updating the Bay-Delta Plan. In December 2018, the State Board released updated flow requirements and salinity standards for the San Joaquin River (Phase 1 of the Bay-Delta Plan) that are estimated to result in a 14 percent reduction on average in surface water supply for users. While the State Board is currently developing measures for the Sacramento River and Bay-Delta (Phase 2), the CNRA is simultaneously negotiating VAs with water agencies and non-governmental conservation organizations to update and implement the goals of the Bay-Delta Plan without relying solely on regulation of unimpaired flows. In March 2019, DWR and the California Department of Fish and Wildlife (CDFW) submitted a framework for the agreements to the State Board for further review. These agencies are expected to submit recommendations to the State Board this fall, when the submissions will then undergo scientific peer review and environmental review, with final VAs planned to be complete and implemented in 2021.

#### *Bureau of Reclamation Activities*

In July 2019, the Bureau of Reclamation (Bureau) released a draft environmental impact statement (EIS), required by the National Environmental Policy Act (NEPA), evaluating the potential effects of coordinated operations of the CVP and SWP. The EIS underwent public review throughout the summer and a final EIS is expected in December 2019, with a record of decision expected in January 2020. Simultaneously, federal agencies worked to update the biological opinions for CVP and SWP coordinated operations under Section 7 of the federal Endangered Species Act, a process expedited by President Trump through a memorandum in October 2018. The Bureau released a biological assessment in February 2019, and the National Marine Fisheries Services (NMFS) and the U.S. Fish and Wildlife Service (FWS) reviewed the proposed action in the assessment to determine whether it would be likely to adversely affect protected species or critical habitat. On July 1, 2019, NMFS submitted a draft biological opinion that concluded the proposed increase in pumping would jeopardize the existence of Chinook salmon, steelhead, and orcas—a decision that could have led to increased restrictions on Bay-Delta exports. A few days after the draft opinion

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<sup>8</sup> See “Santa Barbara Water Agencies Say No to State Water Tunnel Project” from *Noozhawk* on October 25, 2019: [https://www.noozhawk.com/article/santa\\_barbara\\_water\\_agencies\\_say\\_no\\_to\\_state\\_water\\_tunnel\\_project](https://www.noozhawk.com/article/santa_barbara_water_agencies_say_no_to_state_water_tunnel_project)

was submitted, the regional director of FWS coordinating the review assembled a new team to revise it and requested an extension for the final biological opinion.<sup>9</sup>

On October 21, 2019, NMFS and FWS issued biological opinions<sup>10</sup> which will have the effect of maximizing CVP water deliveries and creating “more nimble and responsive water project operations.” The NMFS opinion notes some adverse impacts on both listed and non-listed species, especially in severe drought years. As part of their analysis, these agencies assumed several changes in current pumping and reservoir operations in order to drop the current season-based pumping limits. The Bureau has proposed using real-time monitoring of fish locations and other conditions to increase operational flexibility, with exports curtailed when fish are near the pumps. The Bureau will also adjust average May 1 storage levels in Lake Shasta to improve cold water management. The plan includes a \$1.5 billion investment from the CVP and SWP<sup>11</sup> on a variety of projects, including the creation of a hatchery for smelt and other species, habitat restoration, and science programs. The new rules could go into effect as early as January 2020 but may be subject to litigation. The Metropolitan Water District of Southern California released a statement in support of the real-time monitoring approach in the opinions.

In September 2019, the Bureau issued proposed changes to the fall X2 adaptive management action required by the existing (2008) FWS biological opinion for CVP and SWP operations. The Bureau signaled it would not participate in the required action.<sup>12</sup> X2 is the location in the Bay-Delta with tidally averaged salinity levels of 2 parts per thousand and is thought to be critical habitat for Delta smelt. The fall X2 action aims to maintain a specified level of outflow in the Bay-Delta to improve conditions for the smelt.<sup>13</sup> The Bureau’s proposed changes were harshly criticized by DWR and CDFW, who indicated that the changes rely on SWP contributions, have potential environmental impacts that have not been sufficiently evaluated and could be in violation of NEPA and other laws, and could disrupt the VA negotiation process.<sup>14</sup> In response to these criticisms, the Bureau stated that it would not implement the action.<sup>15</sup>

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<sup>9</sup> See “Salmon study may foil Trump’s plan to boost water deliveries to Central Valley farms” from the *Los Angeles Times* on July 18, 2019: <https://www.latimes.com/environment/story/2019-07-18/endangered-salmon-threaten-trump-delta-plan>

<sup>10</sup> Read more about the 2019 Biological Opinions at the FWS website: <https://www.fws.gov/sfbaydelta/cvp-swp/index.htm>

<sup>11</sup> Regional director of the Bureau Ernest Conant stated that funding would come from the state and federal governments in approximately equal amounts, though no details have been released about funding. See the article “Trump rewrites Delta rules to pump more California water to Valley. Will Newsom fight him?” from *The Sacramento Bee* on October 22, 2019: <https://www.sacbee.com/news/politics-government/capitol-alert/article236506123.html>

<sup>12</sup> Read the September 4, 2019 memo from the Bureau to FWS here: [https://www.fws.gov/sfbaydelta/cvp-swp/documents/Reclamation\\_Request\\_Memo.pdf](https://www.fws.gov/sfbaydelta/cvp-swp/documents/Reclamation_Request_Memo.pdf)

<sup>13</sup> The Fall X2 adaptive management action aims to maintain the location of X2 at 74 km from the Golden Gate Bridge in wet years and 82 km from the Golden Gate Bridge in above-normal years.

<sup>14</sup> The September 24, 2019 letter from the Director of CDFW to the Mid-Pacific Regional Director of the Bureau of Reclamation can be found here: <https://mavensnotebook.com/wp-content/uploads/2019/09/Letter-DFW-to-Reclamation-re-Fall-X2-Action-2019.pdf>

<sup>15</sup> See the October 1, 2019 letter from the Bureau to CDFW here: <https://mwdprograms.sdcwa.org/wp-content/uploads/2019-10-01-USBR-Letter-Fall-X2-Action.pdf>

*SWP Operations Incidental Take Permit*

DWR's current incidental take permit (ITP) for the SWP for CESA-listed longfin smelt expires at the end of December 2019. Historically, DWR has sought a consistency determination from CDFW finding that the federal biological opinions comply with CESA for SWP operations—the current ITP is tied to the 2008 and 2009 biological opinions. In April 2019, DWR announced its intention to seek a new ITP that does not rely on the federal ESA consultation process and that would provide authorization for SWP operations under CESA, protecting listed species regardless of whether there are changes to federal law.<sup>16</sup> Due to timing requirements for the CEQA process for this action, a new ITP is not expected until early 2020, leaving a potential gap between the implementation of the new biological opinions and the adoption of a new ITP. If DWR proceeds with the new ITP, the SWP and CVP could have separate permits and operations, which may affect Bay-Delta exports. If the new biological opinions maximizing deliveries and increasing operational flexibility for the CVP are implemented but the new SWP ITP contains more stringent requirements than the new biological opinions, SWP exports could be restricted to meet CESA obligations for both projects.

**Next Steps**

Water Authority staff will continue to monitor activities that will affect the Bay-Delta project and SWP yields and report back to the Board with additional updates as necessary.

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<sup>16</sup> Read more on DWR's webpage: <https://water.ca.gov/-/media/DWR-Website/Web-Pages/News/Public-Notices/Files/NOP-for-LTO-EIR-signed-19Apr2019.pdf?la=en&hash=78C0BEF67E47C5FD40DA5371446C103E298FD805>