

# Preprint SB 4 (SB 458 Content) by Senator Wolk.

## Summary and Comments.

**Bill Summary:** Preprint Senate Bill No. 4 (PSB 4) would revise the provisions of the Delta Protection Act and would create the Sacramento-San Joaquin Delta Conservancy to advance the coequal goals of assuring a reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem and the unique cultural, recreational, and agricultural values of the Delta as an evolving place.

Specifically, this bill would:

- 1) Reconstitute the Delta Protection Commission (DPC).
  - a) Reduce the membership of the DPC from 23 to 15, eliminating several state agencies.
  - b) Designate the DPC chair as a voting member of the Delta Stewardship Council (council).
- 2) Add Provisions Regarding A Regional Economic Development Plan.
  - a) Require the DPC to develop a new regional economic development plan for the Delta region, based on local plans, that identifies ways to encourage recreational investment along the key river corridors, as appropriate.
  - b) Create the Delta Investment Fund in the State Treasury.
    - i) Any funds within the Delta Investment Fund would be available, upon appropriation by the Legislature, to the DPC for the implementation of the regional economic development plan.
    - ii) Delta Investment Fund could receive funds from federal, state, local, and private sources.
- 3) Revise Requirements for the DPC's Resource Management Plan (RMP).
  - a) Instead of listing required outcomes, the RMP would be required to include specific elements, such as public safety recommendations.
  - b) Add a requirement that the RMP be updated every 5 years in years ending in 1 or 6.
  - c) Add requirement that Council review RMP for consistency with the Delta Plan and require the Council to approve the RMP, if consistent with the Delta Plan.
  - d) Requires DPC to implement RMP.
  - e) Eliminate the Office of planning and Research from RMP review and comment process.

4) Require DPC to Propose Recommendations for Inclusion in the Delta Plan.

- a) Require the DPC to develop, for consideration and incorporation in the Delta Plan by the council, a proposal to protect, enhance, and sustain the unique and enduring cultural, historical, recreational, agricultural, and economic values of the Delta as an evolving ecosystem.
- b) Require the DPC to include the following in its proposal:
  - i) Relevant strategies described or recommended by Delta Conservancy's strategic plan.
  - ii) Plan to establish state and federal designation of the Delta as a place of special significance, which may include application for a federal designation as a National Heritage Area.
  - iii) Regional economic plan, for submission to the council, to support increased investment in agriculture, recreation, tourism, and other resilient Delta land uses.
- c) Require, to assist the DPC in its preparation of the proposal:
  - i) The Department of Parks and Recreation to prepare a proposal to expand within the Delta the network of state recreation areas, combining existing and newly designated areas. The proposal may incorporate appropriate aspects of any existing plans.
  - ii) The Department of Food and Agriculture to prepare a proposal, for submission to the commission, to establish market incentives and infrastructure to protect and enhance the economic and public values of Delta agriculture.
- d) Require the council to review and approve and incorporate the proposal, including RMP recommendations, into the Delta Plan, if the council determines that a DPC recommendation is feasible and consistent with the objectives of the Delta Plan,

5) Revise Provisions Regarding DPC Review and Approval of General Plans.

- a) Change the trigger for local governments to submit proposed general amendments for a consistency review:
  - i) *from* within 180 days of adoption by the DPC of a new or revised resources management plan,
  - ii) *to* within 180 days of adoption by the council of a Delta Plan, or a new or revised RMP, which ever comes first.
- b) Delete from the criteria for general plan reviews the criteria that the general plan, and any development approved or proposed that is consistent with the general plan, be consistent with the RMP.
- c) Add a requirement that if the DPC finds that a general plan is not consistent with the RMP:
  - i) The DPC would remand the general plan back to the originating local government with findings on items to be addressed.
  - ii) The local government would have 120 days to make changes and resubmit the revised general plan to the commission for review.
- d) Add a restriction that after the DPC approves a general plan or general plan amendment, no additional development could occur in the primary zone of the Delta unless the relevant proposed amendment to the general plan is determined to be consistent with the RMP.

6) Authorize DPC To Make Recommendations to Delta Stewardship Council.

- a) Authorize DPC to review, comment, and make recommendations to the council on any significant project or proposed project within the scope of the Delta Plan that may affect the unique cultural, recreational, and agricultural values within the primary and the secondary zones.
- b) Include in the review and comment authority all of the following:
  - i) Identifying impacts to the cultural, recreational, and agricultural values of the Delta.
  - ii) Recommending actions to avoid, reduce, or mitigate impacts to the cultural, recreational, and agricultural values of the Delta.
  - iii) Reviewing consistency of proposed project with the RMP and the Delta Plan.
  - iv) Identifying and recommending methods to address Delta community concerns regarding large-scale habitat plan development and implementation.
- c) Require the council to consider the recommendations of the DPC during a public hearing and to make findings regarding whether the recommendations will be incorporated into the project and whether the recommendations are consistent with the Delta Plan.

7) Make Other Miscellaneous Changes to the Delta Protection Act.

- a) Authorize the DPC to act as the facilitating agency for the implementation of a national heritage area designation in the Delta.
- b) Eliminate the Office of Planning and Research from the RMP review/comment process.
- c) Require the DPC, by January 1, 2012, to prepare and submit to the Legislature recommendations regarding the potential expansion of or change to the primary zone.
- d) Revise the requirements for the DPC's annual report to the Governor and Legislature:
  - i) *From* an evaluation of the effectiveness of *the RMP* in preserving agricultural lands, restoring delta habitat, improving levee protection and water quality, providing increased public access and recreational opportunities, and other functions as required.
  - ii) *To* An evaluation of the effectiveness of the *DPC* in undertaking its mandated functions, including:
    - (1) Determining the consistency of local general plans with the Delta Plan.
    - (2) Outcomes of appealed local land use decisions.
    - (3) Outcomes of reviews initiated by the commission.
    - (4) Facilitating regional economic development.
    - (5) Supporting other regional activities for the enhancement of Delta communities.

8) Create A New Sacramento-San Joaquin Delta Conservancy (Conservancy).

- a) Create in the Natural Resources Agency the Sacramento-San Joaquin Delta Conservancy,
- b) Charge the conservancy to work in collaboration and cooperation with local governments and interested parties.

- c) Require the conservancy to support efforts that advance both environmental protection and the economic well-being of Delta residents in a complementary manner.
  - d) Require the conservancy to undertake efforts to enhance public use and enjoyment of lands owned by the public.
- 9) Establish The Conservancy's Governing Board.
- a) Create a board that would consist of 11 voting members and five nonvoting members.
  - b) Designate the 11 voting members of the board:
    - i) The Secretary of the Natural Resources Agency, or designee.
    - ii) The Director of Finance, or designee.
    - iii) One member each of the board, or a designee, who is appointed by the Contra Costa, Sacramento, San Joaquin, Solano, and Yolo County Boards of Supervisors, who is a resident of each respective county.
    - iv) Two public members, appointed by the Governor.
    - v) One public member appointed by the Senate Committee on Rules.
    - vi) One public member appointed by the Speaker of the Assembly.
  - c) Designate the five nonvoting members:
    - i) A designee of the San Francisco Bay Conservation and Development Commission for coordination purposes.
    - ii) A designee of the State Coastal Conservancy for coordination purposes.
    - iii) A designee of the Suisun Resource Conservation District for coordination purposes.
    - iv) A Member of the Senate, appointed by the Senate Committee on Rules, who represents a district that encompasses a portion of the Delta.
    - v) A Member of the Assembly, appointed by the Speaker of the Assembly, who represents a district that encompasses a portion of the Delta.
  - d) Designate an additional four nonvoting liaison advisers who would serve in an advisory, nonvoting capacity:
    - i) One representative of the United States Fish and Wildlife Service.
    - ii) One representative of the United States National Marine Fisheries Service.
    - iii) One representative of the United States Bureau of Reclamation.
    - iv) One representative of the United States Army Corps of Engineers.
  - e) Establish the terms of the board members as follows:
    - i) The public member appointed by the Governor shall serve at his or her pleasure.
    - ii) The locally appointed members and alternates shall serve at the pleasure of the appointing board of supervisors.
    - iii) The public members appointed by the Senate Committee on Rules and the Speaker of the Assembly shall serve for a term of four years, with a two-term limit.
    - iv) The Members of the Senate and Assembly shall serve for a term of four years, with a two-term limit.
  - f) Require the voting members of the board to elect a chairperson and vice chairperson, and other officers as necessary, from among the voting members.
    - i) The chairperson must be from among county supervisor members.

- ii) If the office of the chairperson or vice chairperson becomes vacant, a new chairperson or vice chairperson would be elected by the voting members of the board to serve for the remainder of the term.

10) Provide the Conservancy Administrative Powers, including,

- a) The authority to hire staff, adopt rules and procedures for conduct of the Conservancy's business, establish advisory committees, enter into contracts, etc.
- b) Requirement that Conservancy hold two regular meetings in the Delta or Rio Vista.

11) Establish and Limit The Conservancy's Powers & Duties.

- a) Limit the jurisdiction and activities of the conservancy to the Delta and Suisun Marsh except if the board makes all of the following findings:
  - i) Project implements the ecosystem goals of the Delta Plan.
  - ii) Project is consistent with the requirements of any applicable state and federal permits.
  - iii) Conservancy has given notice to and receives and reviews any comments from affected local jurisdictions and the DPC.
  - iv) Conservancy has given notice to and reviewed any comments received from any state conservancy where the project is located.
  - v) Project will provide significant benefits to the Delta.
- b) Establish the Sacramento-San Joaquin Delta Conservancy Fund in the State Treasury, which may provide funding for ecosystem restoration projects consistent with the Conservancy's strategic Plan or for "regional sustainability" consistent with the Delta Protection Commission's "Regional Sustainability and Land Use Plan."
- c) Authorize the Conservancy, subject to specified conditions, to acquire, manage and transfer interests in property and water rights, except for title in fee, which the Conservancy is barred from acquiring.
- d) Authorize the Conservancy to accept funding from a broad range of sources, including creation and management of endowments.
- e) Require the Conservancy to develop a strategic plan consistent with the Delta Plan, Delta Protection Commission's Regional Sustainability and Land Use Plan, the Central Valley Flood Protection Plan, the Suisun Marsh Preservation Act, and the Habitat Management, Preservation and Restoration Plan for the Suisun Marsh.
- f) Authorize the Conservancy to collaborate with other organizations.
- g) Prohibits the Conservancy from regulating land-use, exercising power over water rights held by others, or exercising the power of eminent domain.

12) Include Other Miscellaneous Provisions Regarding the Conservancy.

- a) Define terms and make numerous findings and declarations regarding the Delta.
- b) Require DPC to conduct meetings in compliance with Bagley-Keene Open Meeting Act.
- c) Reduce the number of required advisory committees from 3 to 1.

## *Comments*

### **A. Delta Protection Commission: Relationship to Council and Local Governments.**

#### DPC and the Delta Stewardship Council.

- **The Delta Plan:** This proposal would require the DPC develop “a proposal to protect, enhance, and sustain the unique and enduring cultural, historical, recreational, agricultural, and economic values of the Delta as an evolving ecosystem.” The council would be required to consider the recommendations of the DPC, including the recommendations included in the RMP. If the council determined that a recommendation of the DPC is feasible and consistent with the objectives of the Delta Plan, the council would be required to adopt the recommendation.

However, what would happen if the DPC made a recommendation that was consistent with the *objectives* of the Delta Plan, but was in conflict with specific programs, projects, or elements of the Delta Plan? More specifically, what if the Delta Plan included the Bay-Delta Conservation Plan (BDCP) and the BDCP included a peripheral canal *to improve water supply reliability* (one of the objectives of the Delta Plan)? Further, what if the DPC, in order to “protect, enhance ...”, instead recommended more aggressive water recycling and ocean desalination to improve water supply reliability? As this proposal is written, the council would likely be required to dump the BDCP and instead go with the DPC recommendation.

- **The RMP:** This proposal would require the council to review the RMP for consistency with the Delta Plan and to approve the RMP. Two issues:

What would happen if the council were to find a proposed RMP was not consistent with the Delta Plan? Could the Council revise the RMP? Or would it be required to return the RMP to the DPC for direction for how it should be revised? This proposal is silent as to what would happen.

Also, this proposal does not give the council a specific time within which to approve or disapprove the RMP. Some sort of time requirement seems appropriate

- **Local/General Plans:** This proposal would revise the requirements for the DPC to review and approve local general plans and general plan amendments.

The principle requirement appears to be consistency with the RMP. It might make sense to also add a requirement that DPC also include determining consistency with the Delta Plan.

- **Criteria:** In a number of instances, this proposal requires the council to determine whether recommendations, proposals, or plans are consistent with the Delta Plan. However, it is silent as to what criteria the council would be required to use to determine such consistency.

One way to resolve this would be to establish specific criteria in statute. Another would be to direct the council to develop regulations to govern such consistency findings.

## DPC and Local Governments.

- **State/Federal Participation:** The Delta Vision Committee Implementation Report (a.k.a. the Chrisman Report), dated December 31, 2008, recommends “that the Delta Protection Commissioners include: five county supervisors, one from each Delta County selected by its Board of Supervisors, three representatives of Delta cities, selected by Councils of Governments, and three representatives of Delta Reclamation Districts or water agencies.” The Report also states that “consistent with the recommendation of the Task Force, the DPC may invite state and federal agencies to participate as non voting members.”

This measure would reduce the membership of the DPC from 23 to 15 members, removing many of the non-local government members and adding the Secretaries for the Natural Resources and Business, Transportation, and Housing Agencies. However, PSB 4 continues to have the non-local government commissioners as voting members.

- **Economic Elements:** This measure would require DPC to develop a RMP that includes information on the “economic elements of local general plans and other local economic efforts.” Typically cities and counties do not create “economic elements” in the general plans; however, they do often establish “economic development policies” for their communities that are reflected in the seven required elements of their general plan. The Conference Committee may wish to adjust this language for purposes of clarity.
- **Timing of DPC Review:** This measure would require all local governments, within 180 days from the date of the Council’s adoption of the Delta Plan *or* DPC’s adoption of the RMP, *whichever event occurs first*, to submit to the DPC proposed general plan amendments and land use elements to make their general plans consistent with the RMP with respect to land in the primary zone. Two issues:

How would a local government adopt a general plan amendment that is consistent with the RMP if the council adopts a Delta Plan before the DPC adopts the RMP? Or, what if the DPC adopts the RMP, but the council finds the RMP is not consistent with the Delta Plan? One solution would be for the trigger to be the council’s approval of the DPC’s RMP (this is similar to the requirement in existing law).

Also, there is no need to state that a local government must submit their amended general plan and land use element. Since the land use element is part of the general plan the proposal should only reference the submission of the general plan amendments.

- **Review Standards:** This proposal repeals the existing Section 29763.5, regarding the standards the Commission must use when reviewing and approving general plans and replaces it with two new sections, Sections 29763.1 and 29763.2. However, in separating the previous section into two sections, this proposal appears to have removed the requirement the DPC find that general plan and general plan amendments meet a series of environmental and other criteria. Instead, the proposal would require DPC only have to make written findings as to the potential impact of the proposed amendments on those criteria. The Conference Committee may wish to reestablish the link between those criteria and DPC’s ability to approve the proposed general plans and general plan amendments.

- **RMP Requirements:** This proposal repeals and replaces the existing Section 29760. That section establishes the requirements for the RMP. The new Section 29760 in this proposal appears to move away from an *outcomes based* set of requirements, such as “protect and preserve the cultural values” and “preserve and protect delta dependent fisheries”, and appears to moves to an *included elements* approach, such as “public safety recommendations” and “economic elements of local general plans”.

The preprint includes a [PLACEHOLDER] for other required elements of the RMP. Consequently, the language is not clear as to what other changes the author intends to make to the requirements of the RMP.

Nonetheless, the proposed requirement for the RMP to include public safety, economic development, and flood management recommendations is, for some, a significant departure from the existing function of the RMP as a land use policy document. While the Delta Vision Strategic Plan recommended creating a regional economic development plan, it did not suggest transforming the RMP into such a plan. The Conference Committee may wish to consider whether the RMP should include these broader policies that local General Plans would then need to be consistent with.

## **B. Conservancy: Scope of Authority.**

- **Mission:** This proposal creates the Delta Conservancy as a “state agency to work in collaboration and cooperation with local governments and interested parties.” However, the proposal does not identify the overarching mission or purpose of the Conservancy. The Legislature created most state conservancies with the primary purpose of conserving, restoring or enhancing natural resources. Delta Vision recommends the creation of a conservancy “for implementing and coordinating Delta ecosystem enhancement and related revitalization projects.” The Conference Committee may wish to consider stating the mission or primary purpose for the Conservancy.
- **Connection to Council:** The Delta Vision Strategic Plan recommends specific responsibilities and legal authorities for the Conservancy, including consistency with the policies and plans adopted by the Council. In particular, it recommends that the conservancy be charged with “[c]oordinating state ecosystem-related and urban waterfront projects in the Delta, Suisun Marsh, and local plan areas. The Suisun Marsh area is regulated by the Bay Conservation and Development Commission, so integration of its authority and that of the Conservancy should be given first priority.”

This proposal includes two connections – consistency between the Conservancy's Strategic Plan and the Delta Plan (as well as several other plans), and discretion to act outside the Delta/Suisun Marsh if implementing the goals of the Delta Plan. It does not include any provision for the Conservancy to follow direction from the Council, integrate its actions with the Bay Conservation and Development Commission, or implement the ecosystem restoration part of the Delta Plan.

- **DPC/Conservancy Chair:** This proposal specifies that only a Delta County Supervisor may chair the Conservancy board. To some, this appears unduly restrictive with no apparent rational or policy basis. The Conference Committee may wish to consider whether all voting members of the board are co-equals without regard to geographic origin and, therefore, whether all voting member should be eligible to chair the board.



- **Terms/At Pleasure:** This proposal specifies that the Governor's and the county appointments to the Conservancy board are *at pleasure* appointments but the Legislative appointments, both public members and members of the Legislature, are for fixed 4-year terms. Moreover, this proposal states that the members of the Legislature may serve two terms. Two points:

- 1) Pleasure appointments tend to lead appointees to closely follow the direction of their appointing power, instead of exercising independent judgment. It is not unheard of for pleasure appointees to be abruptly removed for making technically correct, but politically unpopular decisions. It is not clear why the Governor's appointees should serve at pleasure, but the Legislature's public appointees should serve fixed terms.

- 2) While the proposal calls for Legislative members to serve fixed 4-year terms, those appointments do not necessarily align with legislative terms. This is especially true in the Assembly, where term limits allow members to serve only 6 years, making two 4-year term appointments impossible. The Conference Committee may wish to consider which appointments should be at pleasure and which should be fixed terms.

- **Board Hires:** This proposal requires the board to appoint an executive officer and employ other staff as necessary. It is unusual for a board to hire staff; the board typically hires the executive officer who then has hiring authority, as the executive officer would have day-to-day management of and provide direction to staff.
- **Land Acquisition:** This proposal authorizes the Conservancy to acquire an interest in real property. However, it prohibits the Conservancy from acquiring a fee interest (e.g., holding absolute ownership) of property.

All state conservancies, with the exception of the Sierra Nevada Conservancy, are authorized to acquire a fee interest in property; such authority constitutes one of the most important and fundamental conservation tools for entities whose primary mission is to conserve natural resources. Many view a Delta Conservancy as playing a critical role in the implementation of the Bay Delta Conservation Plan or ecosystem elements of the Delta Plan "...given the scope, urgency and need for effective integration among multiple ecosystem restoration efforts," as stated in the Delta Vision Committee's Implementation Report.

Previous versions of this proposal authorized the Conservancy to acquire a fee interest and transfer it within two years. As an alternative, this approach could be resurrected, but consideration should be given to allowing the Conservancy a longer period of time to transfer the interest, e.g. at least five years. The Conference Committee may wish to consider whether to grant the Conservancy authority to acquire a fee interest of property and if so, under what conditions if any.

Additionally, while this proposal expressly prohibits the Conservancy from acquiring a fee interest in property it is unclear whether grantees may do so. Section 32364 authorizes an entity to apply for a grant to acquire an interest in real property but does not specify whether this includes a fee interest. The Conference Committee may wish to consider clarifying that grantees have this authority.

- **In Lieu of Taxes:** This proposal requires a grant applicant wishing to purchase an interest in real property to demonstrate how payments in lieu of taxes, assessments, or charges otherwise due to local government will be provided. While this might address the concern

that certain land acquisitions may reduce or eliminate property tax assessments and thus county revenues, this appears to be an unprecedented requirement that may effectively stymie such acquisitions (and the goals of the Conservancy), especially if the funding mechanism (e.g., bonds) does not expressly permit or authorize such payments.

The above requirement is not sensitive to the fact that different acquisitions impact property tax assessments differently. According to the Civil Code, the creation of a conservation easement itself does not result in an automatic reduction in the assessed value of the property subject to the easement. Moreover, the conveyance of this interest does not generally constitute a change in ownership of the underlying property (only a change in ownership would trigger a reassessment).

At the same time, nothing in the bill authorizes the Conservancy to deny a grant application absent such a demonstration nor does the bill provide any criteria or guidance to the Conservancy when reviewing this provision. With respect to lands acquired for agricultural preservation, existing law requires the Coastal Conservancy to “take all feasible action to return [these lands] to private use or ownership.” If the Coastal Conservancy leases agricultural lands to a private individual, it may transfer 24 percent of the gross income to the county in which the lands are located. These requirements could serve as models for a Delta Conservancy.

### **C. Conservancy: Ecosystem Restoration & Economic Development.**

- **"Complementary":** This proposal requires the Conservancy to support efforts that advance both environmental protection and economic well-being in a complementary manner. It further lists examples of these efforts, including protection and enhancement of habitat, preservation of agriculture, promotion of Delta communities and economic vitality, and protection of water quality.

Because the above mandate requires the satisfaction of two objectives in a complementary fashion, a persuasive argument can be made that riparian restoration or protection of water quality, for example, may not advance the economic well-being of Delta residents. The Conference Committee may wish to consider setting a “primary” mission for the Conservancy, consistent with the other conservancies, for ecosystem restoration.

- **Public Use:** This proposal requires the Conservancy, when undertaking one of the above “efforts” to enhance public use and enjoyment of lands owned by the public. This subdivision is vague and could be interpreted as limiting the creation or enhancement of recreational opportunities to lands only owned by public agencies. If so, this could be unnecessarily restrictive.

#### Other Issues:

As the Conference Committee begins deliberating this bill, it also may want to consider technical amendments to address the following:

- Granting the following authorities to the Conservancy in order to maximize conservation or preservation opportunities and to ensure appropriate use of public resources or bond proceeds. One or more of the existing conservancies have these authorities.

- Authorize the Conservancy to require a grantee to enter into an agreement with the Conservancy on terms and conditions specified by the Conservancy.
  - Authorize the Conservancy to require a cost-share or local funding requirement for a grant, contingent upon, for example, the total amount of funding available, fiscal resources of the applicant, urgency of the project. The Conservancy should also be authorized to waive cost-share requirements.
  - Authorize the Conservancy to sell, rent, or exchange an interest in real property to a person or entity subject to appropriate terms and conditions (the bill only authorizes the Conservancy to improve, lease or transfer an interest).
  - Authorize the Conservancy to enter into an option to acquire an interest (with an appropriate cap). Proceeds from a sale or lease of lands should be deposited in the Conservancy Fund.
  - Authorize the Conservancy to fund or award grants for plans and feasibility studies consistent with its strategic plan or the Delta Plan. The bill only authorizes the Conservancy to award grants to facilitate “collaborative planning” efforts.
  - Authorize the Conservancy to seek repayment or reimbursement of funds granted on terms and conditions it deems appropriate. Proceeds of repayment shall be deposited in Conservancy Fund.
  - Exempt an acquisition of an interest in real property to the Property Acquisition Law, consistent with the Delta Vision Strategic Plan recommendations.
  - Require any funds over and above eligible or approved project or acquisition costs to be returned to the Conservancy and available for expenditure when appropriated by the Legislature.
  - Authorize the Conservancy to sue and be sued.
- Clarifying under existing law who is the responsible party for the appropriate environmental review of the RMP.
  - Assessing whether all the findings and declarations are necessary for aiding in determining Legislative intent regarding how the provisions of the proposal should be implemented.
  - This proposal has been heavily amended as it has evolved. It would benefit from double check references, eliminate redundant provisions, edit awkward phrases, and refine references, e.g., the *Regional Sustainability and Land Use Plan* cited in Section 32360 is undefined.

*The following policy committees collaborated in preparing this Summary & Comments: Assembly Local Government, Assembly Natural Resources, Assembly Water, Parks & Wildlife, Senate Local Government, and Senate Natural Resources and Water.*