

# Preprint AB 1 (AB 39 content) – Assemblyman Huffman

## Summary & Comments

**SUMMARY:** Establishes new legal framework for Sacramento-San Joaquin Delta policy, requires near-term actions, and requires development of a new Delta Plan. Specifically, this proposal:

- 1) Establishes “coequal goals” of improving statewide water supply reliability and restoring the Delta ecosystem as the overarching management objectives for the Delta.
- 2) Requires development of comprehensive Delta Plan as centerpiece of state policy and investments in the Delta, as specified, by 2011 (with report to the Legislature by 3/31/12).
  - a) Requires council to consult with federal, state, and local agencies with responsibilities in the Delta, and consider state agency proposals for the Delta Plan. Authorizes the council to appoint state agencies to contribute to development of the plan.
  - b) Requires council to develop the Delta Plan consistent with federal law allowing the State to influence federal agency actions in the Delta (*e.g.* Coastal Zone Management Act).
  - c) Requires council to review and revise the plan every five years.
  - d) Specifies required components of Delta Plan, consistent with Strategic Plan goals:
    - i) Proposal developed by Delta Protection Commission to protect the Delta as an evolving place, with specified state agencies contributing portions.
    - ii) Ecosystem restoration to achieve, upon implementation, restoration of the Delta ecosystem, as defined and with scope of plan extending to first dam on the tributaries.
    - iii) Statewide water conservation, efficiency, and sustainable use, with recommendations to Legislature necessary to implement those actions.
    - iv) Options for water conveyance, water storage, and improved reservoir operations to achieve the Coequal Goals, and to integrate flood and water supply operations.
    - v) Reduced risks from Delta levee failures, including effective emergency preparedness, priorities for State levee investments, and local flood protection plans.
  - e) Requires the Delta Plan to be based on best available scientific information, and include quantified targets for achievement, effective adaptive management, and participation by the Delta Independent Science Board.
- 3) Preserves and does not supersede, preempt or amend existing environmental or water laws, including “area of origin” laws, California Endangered Species Act, water rights, and the Natural Community Conservation Planning (NCCP) Act.

- 4) Requires specified early actions, including actions related to governance, water supply reliability, instream flow determinations, and ecosystem restoration.
- 5) Requires that the Administration's "Bay Delta Conservation Plan," which is currently in development, comply with standards and requirements in the NCCP Act and the "habitat conservation plan" (HCP) provisions of federal Endangered Species Act (ESA).
  - a) Requires Department of Water Resources (DWR) to develop (including completion of an environmental impact report/EIR) , in consultation with the council, and propose an NCCP-compliant plan to the Department of Fish & Game (DFG) and states legislative intent that the plan also be developed as an HCP under ESA.
  - b) Requires the Delta Independent Science Board to review the EIR and submit findings to the council within 60 days of receipt.
  - c) Requires DWR to submit the final EIR to the council and authorizes the council, exclusively, to certify the final EIR.
  - d) Requires the Council to incorporate the Bay Delta Conservation Plan (BDCP) into the Delta Plan *if* the Council determines, in writing and after at least one public hearing, that:
    - i) BDCP is based on best available science and comprehensive investigation/analysis of:
      - (1) volume, quality, and timing of water required for a healthy Delta estuarine ecosystem under different conditions
      - (2) full range of Delta conveyance alternatives, including impacts to ecosystem
      - (3) full range of capacity/design options for conveyance alternatives, including a lined canal, unlined canal and pipelines
      - (4) potential effects of climate change
      - (5) potential impacts on migratory fish and aquatic resources
      - (6) potential impacts on Sacramento River and San Joaquin River flood management
      - (7) resilience and recovery in the event of catastrophic loss by natural disaster
      - (8) probability of achieving current Delta water quality for conveyance alternatives
    - ii) BDCP includes:
      - (1) objective to achieve goals in existing species recovery plans
      - (2) science-based and formal adaptive management program, as specified
  - e) Requires Delta Independent Science Board to evaluate BDCP achievements annually.
- 6) Defines certain terms for application to new Division 35 of the Water Code, including:
  - a) "Co-equal Goals" mean "the two goals of 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."
  - b) "Council" means the new Delta Stewardship Council.
  - c) "Delta" means the legal Delta, Suisun Marsh and the Yolo Bypass.

- d) “Delta Plan” means the comprehensive plan described in this proposal.
  - e) “Early actions” means the actions required before completion of the Delta Plan.
  - f) “Strategic Plan” means the Delta Vision Blue Ribbon Task Force's Strategic Plan and the Delta Vision Committee's Implementation Report, with priority to the Task Force plan.
- 7) Allows the council to incorporate other completed plans related to the Delta, to the extent such plans promote the Coequal Goals.
- 8) Makes proposal contingent upon enactment of other unspecified bills.

## *Comments*

This proposal includes four key components for resolving the current Delta crisis and reforming Delta policy – legal framework, early actions, Delta Plan, and Bay Delta Conservation Plan. Each one of these components raises important issues for the committees’ consideration.

### A. Legal Framework

- **Coequal Goals:** This proposal includes two parts also contained in Preprint Senate Bill 1 (Simitarian) (PSB 1) – General Provisions and Early Actions. The one difference between these parts in the two proposals is the definition of “Coequal Goals.” This term is defined in the definitions chapter and then referenced throughout the Delta legislation, thereby avoiding defining the term differently in different parts of any of the proposals. This proposal defines that term as:

*the two goals of 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*

PSB 1 defines the term as:

*the 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*

This proposal emphasizes “the two goals” of water supply reliability and ecosystem restoration, while secondarily providing for protection of the Delta “as an evolving place.” This definition is consistent with the Delta Vision Strategic Plan. In contrast, while the language in PSB 1 includes language similar to this proposal on the two goals, it also appears to elevate the objective of protecting, restoring, and enhancing the Delta “as an evolving place” to that of a third coequal goal.

According to PAB 1's author, *the PSB 1 definition merges a third concept in a way that may dilute the ecosystem goal and confuse the meaning of "co-equal goals."* It appears to condition ecosystem restoration on protection of the Delta as place. *Protecting agricultural values, for example, may not always be consistent with ecosystem restoration.*

The Delta Vision Strategic Plan proposed a definition very similar to that used in this PAB 1. Regarding the focus on just ecosystem restoration and water supply reliability, the Strategic Plan noted "They are co-equal because neither restoring the ecosystem nor creating a reliable water supply can be achieved without the other." However, the Strategic Plan also observed that is also necessary to "[r]ecognize and enhance the unique cultural, recreational, and agricultural values of the California Delta as an evolving place, an action critical to achieving the co-equal goals." In other words, while ecosystem restoration and water supply reliability are the twin objectives, protecting the Delta as an evolving place is a critically necessary condition for success. Water exporters and some environmental interest groups support this approach. They assert that to elevate protecting the Delta as an evolving place to that of ecosystem restoration and water supply reliability would defuse focus on those two objectives while possibly introducing additional conflicts among the goals unnecessarily.

PSB 1 reflects the perspective that as most of the proposed actions will occur in or directly affect the Delta, and as Delta Vision recognized, protecting the Delta as an evolving place is critical to success, it makes sense to elevate protecting the Delta up front to ensure that such a critical element to success is kept front and center. Delta interests and others support this approach.

The definition of coequal goals is central to this and the other proposals in the Delta package. The definition must be the same in each of the proposals. The Conference Committee will need to reconcile these differences.

Another question is what is meant by "assuring a reliable water supply for California"? The phrase is not defined in any of the proposals in the package, and it too is central to this and the other proposals in the Delta Package. Does it mean increasing maximum diversions? Does it mean keeping maximum diversions at current levels or lower, but receiving that quantity of water more regularly than in the past? Does it mean replacing "lost" yield from other sources? There are a number of potential interpretations.

CALFED left the definition of water supply reliability undefined, and in doing so led to countless hours of fruitless debate among partisans on all sides of each potential interpretation. The Conference Committee might wish to consider defining the term to bring greater clarity to the co-equal goals.

- **Delta Policies:** This proposal adopts several new Delta policies related to both water and land, which traditionally have not been connected. These policies recognize the inherent factual connection between the two natural resources and attempt to balance the State's management and investment in both. The policies also explicitly preserve long-standing legal principles, such as "area of origin" protections for water rights. The proposal does not supersede or preempt other regulatory authorities now held by existing state agencies, such as water rights, water quality, and the California Endangered Species Act, but the Conference Committee may wish to include language more explicitly affirming this point.

## B. Early Actions

- **Instream Flow Needs:** In recent years, much of the Delta debate has centered on instream flow needs for the Delta ecosystem, particularly its fishery resources. Some of that debate arises out of the State's current policy of moving freshwater from the Sacramento River through the Delta's existing channels to the State Water Project (SWP) and the federal Central Valley Project (CVP) water export pumping facilities in the South Delta. This north-south freshwater course acts as a barrier to saltwater incursion from San Francisco Bay. In some cases, this movement causes Delta streams to flow backwards, which led to some of the recent federal court restrictions on pumping.

The State Water Resources Control Board (SWRCB) and the BDCP process have been considering this instream flow issue. BDCP also is considering changes to how SWP/CVP convey water. If BDCP ultimately concludes that a new point of diversion on the Sacramento River is necessary to meet the needs of the ecosystem, then SWP/CVP will have to get a permit to move their diversion, which would require SWRCB to impose bypass flow requirements (*i.e.*, instream flows downstream of the new point of diversion). Future decisions as to Delta water will therefore require determinations, to put it simply, of how much water the Delta needs, for ecosystem and water quality purposes. DWR currently plans to seek SWRCB permits after the BDCP is completed.

This proposal would require both interim and final determinations as to the Delta's instream water flow needs. The interim "instream flow needs determinations" (§ 85086) are explicitly intended as a planning tool as the State develops the Delta Plan and considers other changes. These determinations, in consultation with DFG, would be based on existing scientific information, not a new study of Delta needs. The proposal provides for funding of those determinations and expedited judicial review if necessary. Pursuant to the Delta Vision Strategic Plan, the proposal also requires formal instream flow determinations by 2012.

Preprint SB 1 also includes language related to instream flows. The Conference Committee may wish to consider how to make the different provisions consistent and set a realistic timeline for completion.

## C. Delta Plan

- **Statewide Water Management:** This proposal requires the Delta Plan to "promote statewide water conservation, efficiency, and sustainable use." This is consistent with the linkage drawn in the Strategic Plan between statewide water efficiency and the Delta in its Goal 4 – "Promote statewide water conservation, efficiency, and sustainable use." Another proposal in this year's package, PAB 2 (Feuer/Huffman), promotes water conservation statewide, but has not been integrated into the council. The Conference Committee may wish to consider how to better clarify the relationship between PAB 2 and statewide water management goals in the Delta Plan.

- **Bay Delta Conservation Plan – NCCP Compliance:** State and federal agencies, water contractors, and some environmentalists began developing the BDCP in 2006. They now have set an ambitious timeline to issue a draft by the end of this year and finalize the plan by next year. Members of the BDCP Steering Committee have indicated that they plan to comply with the state NCCP Act, which has a higher conservation standard than Section 10 of the federal ESA and more procedural requirements for plan development. Their planning agreement, however, explicitly provides that BDCP is not required to be an NCCP.

This proposal would require BDCP to satisfy the higher environmental standards, process requirements, and other elements necessary to qualify as an NCCP. The NCCP Act has typically been applied to terrestrial – not aquatic – ecosystems. Applying the Act to BDCP therefore may require some additional specification as to the nature of the analysis and the plan, which is why this proposal provides some of that additional specification.

- **Bay Delta Conservation Plan – Decision Process:** BDCP has developed with the support and funding from the so-called “potentially regulated entities” or “PREs.” While DWR has assumed the legal responsibility as “lead agency,” much of the development work is performed by contractors hired by the PREs. While the Steering Committee (agencies, PREs, and environmentalists) is nominally “in charge,” a separate “management committee” – which includes PRE but not environmental representatives – actually directs the consultants' work. When references are made to BDCP taking action, it is not clear who takes that action and is held accountable for the outcomes.

This proposal makes DWR responsible for all BDCP development work. The proposal also shifts authority for certifying the EIR – which usually would be the responsibility of DWR as lead agency – to the new Delta Stewardship Council. The proposal requires the council to make a decision on whether to incorporate BDCP into the larger Delta Plan, based on specified requirements. Finally, in addition to requiring compliance with NCCP requirements for independent science, the proposal specifies how the Delta Independent Science Board reviews the BDCP EIR.

According to the author, the objective of these changes is to ensure that the council – which has broader responsibilities for the Coequal Goals (not just water supply) – makes the final cut on reviewing the environmental impacts and deciding whether BDCP makes sense for the Delta as a whole. The author further states that it is important to provide a direct point of accountability for BDCP by requiring DWR – not the PREs – to prepare an EIR and propose a conservation plan to DFG. Some stakeholders have raised technical/legal concerns about having the Council, which is not acting as lead agency for BDCP, certify the EIR. Others argue that shifting the jurisdiction of this planning process mid-course and altering its goals are potential threats to its success.

The Conference Committee may wish to consider alternatives to having the Council certifying the EIR, such as allowing DWR, DFG, or some other state agency to certify the EIR while reserving final decisions regarding funding, authorization, and incorporation into the Plan – *i.e.*, determinations as to whether BDCP actually proceeds – for the Council after the EIR is certified.

## Other Issues:

As the conference committee begins deliberating this proposal, it also may want to consider technical amendments to address the following:

- process for the council to consider and adopt DPC recommendations as to the plan for protecting the Delta “as an evolving place” (this proposal has no provision for such recommendations; however, PSB 4 (Wolk) includes a provision expressly requiring DPC recommendations to be incorporated into the Plan).
- BDCP's role as only one part of the more comprehensive ecosystem restoration plan, which is intended to achieve results that meet or exceed goals in existing species recovery plans, as well as the state/federal salmon doubling goal
- conditions for SWRCB issuing a change in place of diversion for SWP/CVP
- ensuring that all appropriate ecosystem types in the Delta, in addition to estuarial systems, are addressed in the Delta plan and in the proposal.
- ensuring that the BDCP NCCP is coordinated with surrounding terrestrial NCCPs and that the NCCPs be harmonized before approval

*The Assembly Water, Parks & Wildlife Committee and the Senate Natural Resources & Water Committee collaborated in preparing this analysis.*