

# Preprint SB 1 (SB 12 content) by Senator Simitian

## Summary and Comments

**Summary:** Preprint Senate Bill No. 1 (PSB 1) would establish the Delta Stewardship Council to advance the coequal goals of assuring a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem and enhancing the unique cultural, recreational, and agricultural values of the Delta as an evolving place.

Specifically, this proposal would enact the Sacramento-San Joaquin Delta Reform Act of 2009. This Act would:

- 1) Establish State policies for the Delta, including:
  - a) Setting 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” as the standard for long-term management of Delta water and environmental resources.
  - b) Setting the policy to reduce dependence on water from the Delta watershed, over the long-term, for statewide water supply reliability.
  - c) Restating – but not changing – the longstanding constitutional principle of reasonable use and the public trust doctrine as the foundation of state water management policy and as particularly important and applicable to the Delta.
- 2) Create the Delta Stewardship Council:
  - a) The Council would consist of 7 members:
    - i) 4 members appointed by the Governor and confirmed by the Senate
    - ii) 1 member appointed by the Senate Committee on Rules
    - iii) 1 member appointed by the Speaker of the Assembly
    - iv) The Chairperson of the Delta Protection Commission
  - b) Council members would be required to possess diverse expertise and reflect a statewide perspective.
  - c) The initial term of office of each member of the Council would be two, four, or six years and all subsequent terms shall be eight years.
  - d) The chairperson would serve full time. Other members would serve one-third time.
  - e) The Council would meet once a month in a public forum. At least two meetings each year would be required to take place at a location within the Delta.
- 3) Provide the Council standard administrative powers, including the power to sue or be sued, enter into contracts, employ the services of public, nonprofit, and private entities, etc.

4) Establish requirements for consistency with a Delta Plan

- a) The Council, by regulation, would be required to adopt a consultation process, that includes remedies, with all state agencies, departments, boards, and commissions that have specified responsibilities to develop, implement, monitor, and adhere to all or part of the Delta Plan.
- b) The Council would be required to identify those state agency plans that should be reviewed by the Council, and if necessary amended to be consistent with Delta Plan.
- c) The Council would be required to act on proposed state agency plan or plan amendments within 60 days from the date of submittal of the proposed plan or plan amendments.
- d) Proposal states that nothing in these requirements affect the authority of the Department of Fish and Game (DFG) or the State Water Resources Control Board (SWRCB).

5) Establish process to authorize Delta water conveyance

- a) Council would be required to authorize any water conveyance facility proposed to be constructed within or around the Delta consistent with Council's obligation to comprehensively address the coequal goals.
- b) Before taking any action to authorize the construction of any water conveyance facility within or around the Delta, the Council would be required to make the following determinations:
  - i) SWRCB has adopted instream flow determinations for the Sacramento River and waterways within the Delta that provide the volume, quality, and timing of water required for a healthy Delta ecosystem under different conditions, including seasonal, annual, and interannual bases, and including an assessment of increased spring and fall outflow and increased San Joaquin River inflow.
  - ii) Each water agency that relies on water exports from the Delta watershed has submitted to the Council a contingency plan for Delta water supply curtailments and drought, consistent with SWRCB's instream flow requirements, and a long-term plan for reducing reliance on those exports.
  - iii) The proposed water conveyance facility will be operated in a manner consistent with achieving the coequal goals.

6) Establish a Delta Water Master

- a) SWRCB would be required to appoint a special master for the Delta, whose title shall be "the Delta Watermaster."
- b) Council would be required to submit to SWRCB a list of at least one candidate to serve as Delta Watermaster. The Council would be required to recommend individuals who have extensive knowledge and experience in one or more of the following areas:
  - i) Water rights laws or water rights enforcement.
  - ii) Water quality laws or water quality enforcement.
  - iii) State Water Project (SWP) or federal Central Valley Project (CVP) operations.
  - iv) State or federal endangered species laws or endangered species enforcement.

- c) SWRCB would be required to 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 SWRCB found that none of the candidates met the requirements under this proposal, SWRCB would be required to notify the Council of that finding and that a vacancy exists.
- d) The Delta Watermaster would be an agent of SWRCB, and would be vested with all of the statutory enforcement authority granted to SWRCB as to daily operations of all surface water diversions within the Delta watershed.
- e) The Delta Watermaster's authority would include, but not be limited to, the duty to:
  - i) Enforce water rights for diversions.
  - ii) Exercise the state's public trust responsibilities.
  - iii) Enforce the California Endangered Species Act as to diversions.
  - iv) Make judgments as to reasonable use pursuant to the California Constitution.
  - v) Enforce water quality objectives established in the Delta Water Quality Control Plan.
  - vi) 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.
- f) SWRCB would be required to amend 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 SWRCB's behalf.
- g) Delta Watermaster decisions could be appealed to an administrative law judge, which would be appointed by SWRCB to consider such appeals.

7) Establish a Delta Independent Science Board

- a) The Delta Independent Science Board (Science Board) would have no more than 11 members, and could include employed or retired scientists from federal and state agencies not having major project or regulatory authority over the Delta, the University of California, the California State University, and nongovernmental organizations.
- b) Science Board would be required to develop a scientific program which would include:
  - i) Research critical scientific issues of both the physical Delta and elsewhere in the state relevant to Delta management.
  - ii) Organize, assess, and synthesize best available science for policymakers and Council.
  - iii) Review major projects undertaken to advance the goals of Delta Vision, upon request of other specified agencies, including the Council.
- c) Conduct independent science and engineering reviews of work of government agencies or consultants upon request of the Council or other state agencies.
- d) Science Board would be required to prepare an annual report for submission to the Council on scientific issues related to the Delta. The report would include scientific and technical findings regarding the management of the Delta and recommended actions of the Council, an identification of short-term and long-term matters for research, and a description of the relevance of these matters to achieving the coequal goals.

## 8) Direct Early Actions In The Delta

- a) Upon appointment of a quorum, Council would assume responsibility for overseeing implementation of early actions, with authority to identify early actions in addition to those specifically identified in this proposal pertaining to transportation, utilities, recreation, water supply, ecosystem improvements, and flood control.
- b) Within 60 days of appointment of a quorum, Council would be required to request a list of nominees to serve on Science Board from University of California, U.S. Geological Survey, and appoint Science Board within 30 days of receiving the list.
- c) Within 120 days of appointment of a quorum, Council would be required to
  - i) Develop and implement strategy to appropriately engage federal agencies with responsibilities in the Delta.
  - ii) Begin developing information necessary to develop the Delta Plan.
- d) Council would be required to develop an interim plan of recommendations for early actions, projects, including:
  - i) interim finance strategy for developing Delta Plan and taking early actions
  - ii) study of transfer of SWP to a separate public agency or utility
  - iii) designation of Department of Water Resources (DWR) and DFG to implement near-term restoration projects, including Dutch Slough tidal marsh restoration, Meins Island tidal marsh restoration, and floodplain improvements in the Yolo Bypass
  - iv) direction to DFG to submit recommendations as to the Delta's instream flow needs to SWRCB by April 1, 2010, based on existing information that DFG deems reliable
- e) DWR would be required to do all of the following:
  - i) Conduct a study of the Middle River Corridor Two-Barrier pilot project.
  - ii) Evaluate the effectiveness of the Three Mile Slough Barrier project.
  - iii) Construct demonstration fish protection screens at Clifton Court Forebay.
  - iv) Assist DFG in implementing early action ecosystem restoration projects.
- f) SWRCB would be required to establish effective system of Delta watershed diversion data collection and reporting, and determine Delta's instream flow needs, as follows:
  - i) States legislative intent for accelerated process to facilitate Delta planning decisions
  - ii) Requires SWRCB to make determinations, in consultation with the DFG, by June 30, 2010, for ecosystem and water quality purposes.
  - iii) Prohibits granting of any petition to change a point of diversion in the Delta for SWP or CVP until instream flow needs are determined.
  - iv) Requires SWRCB to charge DWR for the costs of this analysis and determination.
  - v) Requires DWR to obtain reimbursement for those charges from the State Water Project contractors and federal government.
  - vi) Requires SWRCB to give Council instream flow need determinations within 30 days.
  - vii) Limits judicial review of determinations to review by Court of Appeals, based on SWRCB record and the "arbitrary and capricious" standard.
- g) SWRCB, by December 31, 2010, would be required to submit prioritized schedule to complete instream flow need determinations as to Delta and high priority rivers in Delta watershed by 2012, and for all major rivers/streams outside Delta by 2018.

9) Establish a Delta finance structure

- a) Delta Plan would be required to apply “beneficiaries pay” principles.
- b) Council would be required to develop and adopt a multi-year estimate covering an unspecified period, in annual increments, of all federal and state funds reasonably expected to be available during that unspecified period to implement the Delta Plan.
- c) Council would be required to develop finance plan that ensures necessary funding to fulfill goals of the Delta Plan and to mitigate the impacts of implementing the Delta Plan.
- d) State Water Project contractors and federal Central Valley Project contractors would be required to pay the entire costs of the following actions and projects:
  - i) Environmental review, planning, design, construction, and operation of any new Delta water conveyance facility
  - ii) Necessary mitigation to reduce environmental damage caused by water export operations and to produce higher quality water for purposes of export
- e) Council would be required to impose an annual fee on each person or entity that holds a right, permit, or license to divert water within the watershed of the San Francisco Bay/Sacramento-San Joaquin Delta. Fee would apply to all holders of water rights.
- f) Until December 31, 2012, the Council would establish fees, by emergency regulation, to provide only for funding necessary to complete the Delta Plan, establish the Council, and implement the early actions.
- g) Beginning January 1, 2013, Council would, by regulation, set the fee schedule so that the total revenue collected from fees equals the appropriate proposed annual budget; or, total revenue equals amount needed in the Council’s judgment to pay for both:
  - i) Costs of facilities and program activities intended to mitigate damage to fish populations and other natural resources in the Delta and its tributaries reasonably related to the diversion of water and other activities of the holder of water rights.
  - ii) Costs of Council activities financed pursuant to this part, including all costs incurred to establish, administer, defend or collect the authorized fee.
- h) Council would set fee schedule to bear a fair and reasonable relationship to those charges.
- i) Council would review the fees each fiscal year and revise as necessary.
- j) Council would be authorized to issue revenue bonds

10) Provide for other miscellaneous issues

- a) Proposal includes numerous “savings” clauses, including "area of origin," Natural Community Conservation Planning Act, state liability for flood protection.
- b) Proposal includes legislative findings regarding history and importance of the Delta

## Comments

*NOTE: While this proposal raises a number of issues associated with co-equal goals, early actions, instream flow determinations and Bay-Delta Conservation Plan requirements and approvals, these issues are largely the same as those raised in Preprint Assembly Bill 1 (PAB 1). Consequently, such issues are addressed in the Summary and Comments on PAB 1.*

### A. Governance: Council Structure & Authority

- **Council Membership:** This proposal would form a 7 member Council. Council members would be required to possess diverse expertise and reflect a statewide perspective. However, this proposal would also designate the chair of the Delta Protection Commission as a member of the Council *ex officio*.

Delta Vision suggested the Council should have no slots set aside for persons with specific characteristics. Others suggest that there must be specific slots for persons with specific characteristics, such as, representing Delta interests, environmental interests, exporter interest, etc. This proposal appears to be a hybrid of the two approaches, with membership appointed as follows:

- 4 members appointed by the Governor and confirmed by the Senate,
- 1 member appointed by the Senate Committee on Rules,
- 1 member appointed by the Speaker of the Assembly, and
- The Chairperson of the Delta Protection Commission.

Delta Vision suggested the Council should all be appointed by the Governor, subject to Senate confirmation, with no *ex officio* members. That approach would rely solely on the Senate confirmation process to ensure the Governor's appointments fairly balanced state and local interests. This proposal provides the Senate and Assembly an additional method to ensure balance, at least from the Senate and Assembly's perspectives, by allowing each to appoint a member to the Council.

- **DPC Chair:** This proposal would designate the chair of the Delta Protection Commission as a member of the Council *ex officio*. However, another preprint in this package, Preprint Senate Bill 4 (PSB 4), gives the Delta Protection Commission specific responsibilities for making recommendations to the Council for inclusion in the Delta Plan. The Council would then be required to review the recommendations for consistency with the Delta Plan, and if it found consistency, the recommendations would be required to be included. There are other provisions as well where the Delta Protection Commission is required to make findings or recommendations, with Council review for consistency.

The question arises as to whether a conflict would arise when the Chair of the Delta Protection Commission, as a member of the Council, would be required to review the actions of the Delta Protection Commission. It is difficult to imagine a situation where the Chair of the Delta Protection Commission, as a member of the Council, would find against a finding of the Delta Protection Commission. The Conference Committee may wish to review and consider resolving such a conflict.

- **Staggered Terms:** This proposal would stagger the initial terms, but the subsequent terms would be for 8 years. Some have suggested that a shorter term would be more appropriate.

- **Science Board:** This proposal establishes a Science Board, and describes in some detail how the science board would be organized. However, it is largely quiet about the science program itself. In addition, the proposals appear to replace many of the current duties of the CalFed Independent Science Program. The Conference Committee may wish to consider expanding on the description of the science program and reconciling that program with the CalFed Independent Science Program.

## **B. Governance: Water Master Authority**

- **Concept:** This proposal would require SWRCB to appoint a “Delta Watermaster” who would be an agent of SWRCB, and would be vested with all of the statutory enforcement authority granted to SWRCB to direct daily operations of all surface water diversions within the Delta watershed. This proposal appears to be directed to ensure someone is responsible for ensuring all the laws and regulations regarding water diversions within the Delta watershed are enforced – essentially, the Delta Cop.

This approach differs from efforts within the Bay Delta Conservation Program. There, the strategy appears to be to have state and federal wildlife agencies and the project operators self-police the daily operations of the future water projects consistent with water supply and environmental objectives. Some would question how such a process would have a different result than that under the old CalFed program.

- **Expertise:** This proposal would require the Delta Watermaster to have a background in one or more of the following.
  - Water rights laws or water rights enforcement.
  - Water quality laws or water quality enforcement.
  - State Water Project or federal Central Valley Project operations.
  - State or federal endangered species laws or endangered species enforcement.

While expertise in water project operations would clearly be useful, questions of conflict of loyalties might arise if the Delta Watermaster’s immediately previous job was with the CVP, SWP or a CVP/SWP contractor. The Conference Committee may consider adding provisions to eliminate such appearance of conflict.

- **Responsibilities:** This proposal would provide the Delta Watermaster broad responsibilities, including operations of all projects in the watershed. That’s a tall order for a new position.

The Conference Committee might wish to consider providing the Delta Watermaster some initial priority focus, such as on CVP and SWP operations, in-delta water users, and in-delta water dischargers, or perhaps establishing a phase in of such responsibilities. Another option would be to direct SWRCB to establish such priorities.

This proposal would provide the Delta Watermaster authority to do all of the following:

- Enforce water rights for diversions.
- Exercise the state’s public trust responsibilities.
- Enforce the California Endangered Species Act as to diversions.
- Make judgments as to reasonable use pursuant to the California Constitution.
- Enforce water quality objectives established in the Delta Water Quality Control Plan.
- 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.

Some have suggested that to enforce all relevant laws, the Delta Watermaster may need additional authorities, especially regarding provisions of the Fish and Game Code. The appeal process for Watermaster actions also may require additional authorities.

### **C. Water Conveyance Decision**

- **Council Authority:** This proposal would require the Council to authorize any water conveyance facility proposed to be constructed within or around the Delta consistent with the Council's obligation to comprehensively address the coequal goals, including, but not limited to, water supply reliability. To do so, the Council would need to make a series of specific determinations.

Some have questioned the wisdom of providing this authority to an appointed board. A number of CVP and SWP contractors, for example, assert that DWR already has the authority to construct "delta facilities" and to the extent that such a decision on conveyance would have environmental impacts, the Bay Delta Conservation Plan will appropriately address them. Others have suggested that by delegating the decision making authority to an appointed board, the Legislature has abrogated its legislative responsibilities.

- **Conditions:** This proposal would require the Council, before taking any action to authorize the construction of any water conveyance facility within or around the Delta, to make the following determinations:
  - SWRCB has adopted instream flow determinations for the Sacramento River and waterways within the Delta that provide the volume, quality, and timing of water required for a healthy Delta ecosystem under different conditions, including seasonal, annual, and inter-annual bases, and including an assessment of increased spring and fall outflow and increased San Joaquin River inflow.
  - Each water agency that relies on water exports from the Delta watershed has submitted to the Council a contingency plan for Delta water supply curtailments and drought, consistent with SWRCB's instream flow requirements, and a long-term plan for reducing reliance on those exports.
  - The proposed water conveyance facility will be operated in a manner consistent with achieving the coequal goals.

Some have suggested that these conditions are unnecessarily expansive, others have suggested they are incomplete at best.

### **D. Delta Finance**

- **Diversion Fee:** This proposal requires the Council to impose an annual fee on each person or entity who holds a right, permit, or license to divert water within the watershed of the San Francisco Bay/Sacramento-San Joaquin Delta. The proposal further states that the proceeds are to be initially used to establish the Council, develop the Delta Plan, and implement the early actions. Beginning in 2013, the fees would be adjusted to cover the costs of facilities and program activities intended to mitigate damage to fish populations and other natural resources in the Delta and its tributaries that are reasonably related to the diversion of water and other activities of the holder of water rights, and a fair share of administrative costs.

Separately, this proposal would require SWP contractors and CVP contractors to pay the entire costs of the environmental review, planning, design, construction, and operation of any new Delta water conveyance facility, and any necessary mitigation to reduce environmental damage caused by water export operations. This raises a number of issues:

- The Delta Plan will include other programs and projects beyond conveyance and mitigation reasonably related to diversion of water. While the proposal also included revenue bond authority, it is not clear, for example, what the funding source would be for wetlands restoration, for example, or flood easements.
  - Council has broad authorities to define its Delta Plan, and has fee authority to cover much of its costs. It is not clear who, if anyone, has the authority to review the Delta Plan for its cost effectiveness or to reign in wasteful spending plans.
  - Fees paid by each person or entity are to bear a fair and reasonable relationship to those charges. It is not clear whether or not that means the fees are to be charged volumetrically, by capacity of diversion, seniority of right, or some other basis. Presumably, such issues would be determined by the regulation setting process. The Conference Committee might wish to provide some statutory guidance.
- **Finance Plan:** This proposal also requires the Council to develop a finance plan for implementation of the Delta Plan, which may identify additional sources for funding. These other sources are not specified, but may include general obligation bonds, federal funding, or funding "volunteered" pursuant to the BDCP or other regulatory agreements.

#### Other Issues:

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

- What About the California Bay-Delta Authority? This proposal would leave intact the California Bay Delta Authority Act. That act was enacted to oversee the implementation of the CalFed Bay Delta Program. Among other things, that Act created the California Bay Delta Authority (CBDA). The CBDA has not met in over two years because of inability to get a quorum. It is not clear whether this proposal is intended to completely replace CalFed, supplement CalFed, or operate independently from CalFed.
- Definition of the Delta needs to be cleaned up. For example, § 85058 refers to the "Delta estuary as defined in Section 12220," but § 12220 does not include the word "estuary"
- Section 85215 requires the council to review specified plans for consistency with the Delta Plan, including "all annual water project operation plans." It is not clear whether this includes just the SWP and CVP, Contra Costa's operations, Central and South Delta Water District operations, or those upstream in the upper watershed.
- It is not clear why the Council should have to meet at least twice in the Delta.

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