

Revised – As Amended RN0925376

SENATE THIRD READING
SB 1 X7 (Simitian and Steinberg)
As Amended November 3, 2009
Majority vote

SENATE VOTE: 29-5

SUMMARY: Reforms state policies, programs and governance for the Sacramento-San Joaquin Delta (Delta), and establishes guidelines for developing a new Delta Plan.

- 1) Expands the "basic goals" for the Delta and the DPC, to include achieving the two coequal goals of providing a more 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, natural resources, and agricultural values of the Delta as an evolving place.
- 2) Adds Knightsen and Collinsville as "unincorporated towns" in the Delta.
- 3) Reconstitutes the Delta Protection Commission (DPC):
 - a) Reduces membership of the DPC from 23 to 15, including:
 - i) Five members from the five Delta county Boards of Supervisors;
 - ii) Three elected city council members, from south, west and north Delta;
 - iii) Three members representing reclamation (i.e., levee) districts in specified regions;
 - iv) Secretary of Food and Agriculture, or sole designee;
 - v) Executive Officer of State Lands Commission, or sole designee;
 - vi) Secretary of Natural Resources Agency, or sole designee; and,
 - vii) Secretary of Business, Transportation and Housing, or sole designee.
 - b) Allows member appointments at the pleasure of the appointing entity;
 - c) Designates DPC chair as a voting member of the Delta Stewardship Council (Council); and,
 - d) Changes nature of DPC advisory committees, to have one with broader representation.
- 4) Requires DPC to create a regional economic sustainability plan, including creation of a Delta Investment Fund in the State Treasury.

- 5) Authorizes DPC to make recommendations to Council, including specified issues, and requires Council to consider DPC recommendations and determine, in Council discretion, if recommendations are feasible and consistent with the objectives of the Delta Plan.
- 6) Requires the DPC, by July 2010, to prepare and submit to the Legislature recommendations regarding the potential expansion of or change to the Delta's primary zone.
- 7) Requires DPC to report annually to the Governor and the Legislature on specified issues.
- 8) Creates a new Sacramento-San Joaquin Delta Conservancy (Conservancy):
 - a) Authorizes Conservancy, as a primary state agency for ecosystem restoration, to support efforts that advance environmental protection and the economic well-being of Delta residents, including specified activities;
 - b) Creates Conservancy board with 11 voting members of the board, including the Secretary of the Natural Resources Agency; Director of Finance; one member (or designee) of each of board of supervisors for Contra Costa, Sacramento, San Joaquin, Solano, and Yolo Counties; two public members, appointed by the Governor; one public member appointed by the Senate Committee on Rules; and, one public member appointed by the Speaker;
 - c) Designates nonvoting members of the board and nonvoting liaison advisers who would serve in an advisory, nonvoting capacity;
 - d) Establishes terms of board members, from "at the pleasure" (for Governor and boards of supervisors) to four years (for legislative appointments) with 2-term limit;
 - e) Requires voting members of the board to elect a chairperson and vice chairperson, and other officers as necessary, from among the voting members, but chairperson must be from among county supervisor members; and,
 - f) Provides the Conservancy administrative powers, including authority to hire staff, adopt rules and procedures for conduct of the Conservancy's business, establish advisory committees, and enter into contracts.
- 9) Establishes and limits the Conservancy's powers and duties, including:
 - a) Authorizes Conservancy, as a primary state agency for ecosystem restoration, to support efforts that advance environmental protection and the economic well-being of Delta residents, including specified activities;
 - b) Limits the jurisdiction and activities of the Conservancy to the Delta and Suisun Marsh except if the board makes certain findings;
 - c) Establishes 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 DPC's "Regional Sustainability and Land Use Plan;"

- d) Authorizes Conservancy, subject to specified conditions, to acquire, manage and transfer interests in property and water rights, with a preference for conservation easements;
- e) Authorizes the Conservancy to accept funding from a broad range of sources, including creation and management of endowments;
- f) Requires the Conservancy to develop a strategic plan consistent with the Delta Plan, DPC'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;
- g) Authorizes the Conservancy to collaborate with other organizations and impose certain conditions on any grants it makes; and,
- h) Prohibits the Conservancy from regulating land-use, exercising power over water rights held by others, or exercising the power of eminent domain.

10) Repeals the California Bay-Delta Authority Act.

11) Establishes new legal framework for Delta management, which:

- a) Sets the coequal goals of "providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem" as the foundation for state decisions as to Delta management;
- b) Sets certain objectives as inherent in the coequal goals;
- c) Sets state policy of reducing reliance on the Delta to meet future water supply needs through a statewide strategy of investing in improved regional supplies and conservation;
- d) Requires the Delta Stewardship Council (Council) land-use decisions to be guided by certain findings, policies, and goals;
- e) States certain "fundamental goals for managing land use in the Delta;"
- f) Describes the longstanding constitutional principle of reasonable use and the public trust doctrine as the foundation of state water management policy;
- g) Preserves procedural and legal protections under water rights law, as specified, and maintains scope of State Water Resources Control Board (SWRCB)/court jurisdiction;
- h) Preserves specified statutes and legal doctrines as unaffected by this new division in the Water Code, including area-of-origin protections, water rights and public trust doctrine;
- i) Establishes the Council as the successor to the California Bay-Delta Authority, and provides for the Council to assume its responsibilities;
- j) Defines certain terms, including but not limited to the following key terms:

- i) "Coequal goals" means "the two goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem," but those goals are achieved in a manner to protect the Delta as an evolving place;
 - ii) "Council" means the Delta Stewardship Council, as established in Part 3;
 - iii) "Covered action" means Delta-related plan or program that meets certain conditions, including significant impact on achievement of the coequal goals. Specifies exemptions and clarifies that the definition will not abrogate vested rights; and,
 - iv) "Restoration" means achieving a close approximation of the Delta's ecosystem's natural potential, given past physical changes and future impact of climate change.
- 12) Requires the Council, the Department of Water Resource (DWR) or the Department of Fish & Game (DFG) to take certain "early actions," including:
- a) Appointment of Delta Independent Science Board;
 - b) Development of strategy to engage federal government in the Delta;
 - c) Development of DFG recommendations for in stream flow needs in the Delta; and,
 - d) Certain Delta near-term ecosystem restoration projects, including the "Two-Gates Fish Protection Demonstration Project."
- 13) Requires the State Water Resources Control Board (SWRCB) to develop new "flow criteria," to facilitate planning in Delta Plan and Bay Delta Conservation Plan, for the Delta ecosystem necessary to protect public trust resources;
- a) Specifies process and substance for development of flow criteria;
 - b) Requires SWRCB approval of change in State Water Project (SWP) and Central Valley Project (CVP) point of diversion, as specified, to include "appropriate" flow criteria;
 - c) Requires SWRCB to enter agreement with SWP/CVP contractors to pay costs;
 - d) Preserves SWRCB authority to review water rights and impose terms and conditions on water right permits; and,
 - e) Requires SWRCB to submit flow criteria to Council, for information purposes.
- 14) Requires SWRCB to submit prioritized schedule and costs for instream flow studies for the Delta and other high priority streams, with completion by certain dates.
- 15) Prohibits DWR from commencing construction of any new Delta diversion, conveyance or other facility related a change in the point of diversion, until:
- a) SWRCB issues an order approving a change in the point of diversion; and,

- b) SWP/CVP contractors execute a contract to pay the costs for environmental review, planning, design, construction, and mitigation for the construction, operation, and maintenance of any new Delta water conveyance facility, including mitigation of property tax or assessments levied by local agencies for land used in such construction.

16) Creates the Council as an independent state agency;

- a) Establishes a seven-member Council, with four appointments by the Governor, two by the Legislature, and the chair of the Delta Protection Commission;
- b) Specifies both initial and subsequent staggered terms for Council members;
- c) Provides for Council salaries, hiring of Council staff and headquarters;
- d) Requires members to "possess diverse expertise and reflect a statewide perspective;" and,
- e) Specifies Council administrative authorities (e.g., contracting) and hearing authority.

17) Authorizes Council to review "covered [in-Delta] actions" by state and local agencies for consistency with Delta Plan.

- a) Requires state and local agencies that implement "covered [in-Delta] actions" to submit certification of project consistency with Delta Plan to Council;
- b) Allows any person to appeal such certifications, within 30 days;
- c) Requires Council to review certification and determine consistency;
- d) Requires covered actions deemed inconsistent to be reviewed by proposing agency, which makes changes and resubmits a certification if it decides to proceed; and,
- e) Specifies process for Council review of agency certifications.

18) Creates the "Delta Watermaster" as enforcement officer for SWRCB in the Delta.

- a) Requires SWRCB to delegate certain enforcement – not adjudicatory – authorities; and,
- b) Limits Delta Watermaster authority to in-Delta diversions and SWRCB orders and terms/conditions on water right permits that apply to conditions in the Delta.

19) Creates the Delta Independent Science Board (Science Board) and Delta Science Program.

20) Requires Council to develop, adopt, and commence implementation of the "Delta Plan" by January 1, 2012, with a report to the Legislature by March 31, 2012;

- a) Requires Council to consider strategies and actions set forth in the Delta Vision Blue Ribbon Task Force Strategic Plan (Strategic Plan);

- b) Allows Council to identify actions that state or local agencies may take to implement the sub-goals or strategies;
 - c) Requires Council to submit the Delta Plan to appropriate federal authorities for federal approval, if it complies with Coastal Zone Management Act;
 - d) Requires consultation and cooperation between the Council and federal, state and local agencies in developing the Delta Plan;
 - e) Requires Council to review the Delta Plan every five years, allowing the Council to request state agency recommendations for revisions;
 - f) Requires Council to develop the Delta Plan consistent with federal statutes, including the Coastal Zone Management Act, Clean Water Act and the Reclamation Act; and,
 - g) Requires "performance measurements" to allow Council to track Delta Plan progress.
- 21) Requires the Delta Protection Commission (DPC) to develop proposal to protect, enhance, and sustain the unique cultural, historical, recreational, agricultural, and economic values of the Delta as an evolving place, for consideration by the Council as part of Delta Plan, including proposals for:
- a) Federal/state designation of the Delta as a place of special significance;
 - b) Regional economic plan to increase investment in agriculture, recreation, tourism and other resilient land uses in the Delta, including administration of Delta Investment Fund;
 - c) Expansion of state recreation areas in the Delta; and,
 - d) Market incentives and infrastructure to support Delta agriculture.
- 22) Requires the Delta Plan to further the coequal goals of Delta ecosystem restoration and a reliable water supply;
- a) Limits geographic scope of ecosystem restoration projects to the Delta (defined separately as legal Delta and Suisun Marsh), except for ecosystem projects outside the Delta that contribute to achievement of coequal goals; and,
 - b) Requires Delta Plan to promote specified characteristics and include specified strategies for a healthy Delta ecosystem.
- 23) Requires the Delta Plan to promote a more reliable water supply to:
- a) Assist in meeting the needs of reasonable and beneficial uses of water;
 - b) Sustain the economic vitality of the state; and,
 - c) Improve water quality to protect human health and the environment.

- 24) Requires the Delta Plan to promote statewide water conservation, water use efficiency, and sustainable use of water, as well as improvements to water conveyance/storage and operation of both to achieve the coequal goals.
- 25) Requires the Delta Plan to attempt to reduce risks to people, property, and state interests in the Delta by promoting effective emergency preparedness, appropriate land uses, and strategic levee investments;
 - a) Allows the Delta Plan to include actions outside the Delta that reduce flood risks, and local plans of flood protection;
 - b) Requires Council to recommend priorities for state investments in levee operation, maintenance, and improvements in the Delta;
 - c) Allows Council, in consultation with the California Department of Transportation, to address climate change effects on state highways in the Delta in the Delta Plan; and,
 - d) Allows Council, in consultation with the California Energy Commission, to address the needs of Delta energy development, storage and distribution in the Delta Plan.
- 26) Requires the Delta Plan to comply with the following requirements:
 - a) Be based on best available scientific information and advice from the Science Board;
 - b) Includes quantified targets for achieving the objectives of the Delta Plan;
 - c) Utilizes monitoring and analysis to determine progress toward targets;
 - d) Describes methods to measure progress; and,
 - e) Includes adaptive management strategy for ecosystem restoration and water management.
- 27) Requires DWR to prepare proposal to coordinate flood and water supply operations of the State Water Project and Central Valley Project, for Council consideration.
- 28) Requires Council to consider including the Bay Delta Conservation Plan (BDCP) under certain circumstances, including:
 - a) Conditions BDCP incorporation into Delta Plan and state funding for BDCP public benefits on compliance with the Natural Community Conservation Planning (NCCP) Act and California Environmental Quality Act (CEQA);
 - b) Requires certain analyses as part of CEQA compliance:
 - i) Reasonable range of flow criteria, rates of diversion and other operational criteria required to satisfy NCCP Act;
 - ii) Reasonable range of Delta conveyance alternatives, and capacity/design options for a lined canal, an unlined canal, and pipelines;

- iii) Potential effects of climate change on conveyance and habitat restoration activities;
 - iv) Potential effects on migratory fish and aquatic resources;
 - v) Potential effects on Sacramento River/San Joaquin River flood management;
 - vi) Resilience/recovery of conveyance alternatives in event of natural disaster; and,
 - vii) Potential effects of each conveyance alternative on Delta water quality;
- c) Requires DWR to consult with Council and the Science Board during development of BDCP;
 - d) Requires Council to have at least one public hearing and incorporate BDCP into Delta Plan if DFG approves BDCP as NCCP;
 - e) Requires annual report to Council on BDCP implementation;
 - f) Allows Council to make recommendations to BDCP implementing agencies;
 - g) Requires BDCP to include a transparent, real-time operational decision-making process in which fishery agencies ensure applicable biological performance measures are achieved in a timely manner; and,
 - h) Specifies that BDCP chapter does not amend or create any additional legal obligation or cause of action under NCCP Act or CEQA.
- 29) Allows Council to incorporate other completed Delta-related plans into the Delta Plan.
- 30) Makes legislative findings regarding the Delta and California water.
- 31) Conforms certain laws to provide for creation of the Council.
- 32) Appropriates \$28 million for the "Two-Gates Fish Protection Demonstration Program."
- 33) Makes bill contingent on enactment of SB 6 X7 (Steinberg) and SB 7 X7 (Steinberg)

EXISTING LAW establishes the CALFED Bay-Delta Program and the California Bay-Delta Authority to implement programs and projects to improve conditions in the Delta.

FISCAL EFFECT: Unknown

COMMENTS: For several years, the Delta has suffered a crisis - ecosystem, water supply, levee stability, water quality, policy, program, and litigation. In June 2004, a privately owned levee failed and the state spent nearly \$100 million to fix it and save an island whose property value was far less. In August 2005, the Department of Fish & Game (DFG) reported a trend showing severe decline in the Delta fishery. In 2006, the Legislature reorganized Delta programs and funding under the Resources Agency Secretary. In 2007, a federal judge, acting under the

federal Endangered Species Act, declared illegal certain federal biological opinions about near-extinct fish and restricted water exports from the Delta, to the San Francisco Bay Area, the San Joaquin Valley and Southern California. The Governor shortly thereafter called the Legislature into an extraordinary session on water.

Delta Vision: Through this enduring Delta crisis, the Legislature and the Governor initiated, in 2006, a process to develop a new long-term vision for the Delta. SB 1574 (Kuehl) of 2006 requires a cabinet committee to present recommendations for a Delta vision. The Governor created a Delta Vision Blue-Ribbon Task Force to advise the Cabinet Committee. The Task Force produced an October 2008 Strategic Plan, which the Cabinet Committee largely adopted and submitted the recommendations to the Legislature on January 3, 2009. This year, the Legislature held numerous hearings on Delta Vision and a set of five bills. In August, policy committees in both houses held hearings on the topics in these bills, and considered "pre-print" versions. A Conference Committee on these bills heard several issues arising out of these bills and substantially amended the pre-prints.

Delta Protection Commission (DPC): The DPC Delta Conservancy parts of this bill originated in a series of this year's bills by Senator Lois Wolk, who withdrew as an author of SB 458 this summer. Senator Wolk has authored several bills in recent years to reform DPC, giving DPC additional authority and balancing state and local representation on the Commission. The most significant recent change required, instead of allowed, local agencies to change a land-use decision to conform to a DPC appellate decision. DPC exercised this new authority in its 2007-08 review of the so-called "Sugar Mill" decision for a property in Clarksburg.

This bill reshapes DPC, to make it a stronger and clearer voice for the interests of those who live and work in the Delta. More than two-thirds of the membership comes from the Delta. The DPC chair, representing a county board of supervisors, sits on the Delta Stewardship Council, which adopts DPC recommendations under certain circumstances. It has responsibility for developing a Delta economic sustainability plan and the Delta Investment Fund. DPC also will study and recommend whether to change the boundaries of the Primary Zone. It retains its existing authority to consider appeals of Primary Zone land-use decisions. In the context of other new Delta governance, such as the Delta Stewardship Council, DPC will now contribute the local Delta voice to the broader State deliberations on Delta issues.

Delta Conservancy: In the last decade, several bills have been introduced to create a Delta conservancy. This conservancy proposal was developed in close cooperation with the in-Delta stakeholders, particularly the five Delta Counties. The board's makeup reflects the Delta Counties' request, that each board of supervisors have one representative, of the 11 members, just under a majority. This conservancy has the dual role of ecosystem restoration and economic development, which will require a delicate balance in expending its resources and reflects in-Delta interests in ensuring that the Delta economy will be sustainable as the Delta changes.

This bill creates the Delta Conservancy as a "state agency to work in collaboration and cooperation with local governments and interested parties." The Legislature created most state conservancies with the primary purpose of conserving, restoring or enhancing natural resources. Delta Vision recommends creation of a conservancy "for implementing and coordinating Delta ecosystem enhancement and related revitalization projects." This bill makes the conservancy "a primary state agency" for ecosystem restoration, but does not set ecosystem restoration as the conservancy's primary mission.

Legal Framework for the Delta: Since statehood, California has asked much of the Delta. Conflicting demands have led to crisis and conflict – between and among agencies, stakeholders and natural resources. The Delta Vision process spent more than 18 months, investigating the Delta, engaging agencies and stakeholders, and thinking carefully about the Delta's challenges and prospects for change. The Task Force's first recommendation was to change the fundamental legal framework for the state to make decisions as to its activities in the Delta – encapsulated in two "coequal goals" of "restoring the Delta ecosystem and creating a more reliable water supply for California." This bill sets a new legal and governance framework for the Delta's future, explicitly stating for the first time how the state should approach resolving the inherent conflicts in managing Delta resources. This framework includes legislative findings, policies and definitions, which provides the foundation for new governance in the Delta. This framework, however, does not counteract long-standing legal principles, such as the public trust and reasonable use, because those and other legal protections are preserved in the framework's "savings clauses" (as discussed below).

Scope of "Delta": This bill defines the "Delta" to include both the legally defined Delta as well as the Suisun Marsh. While both currently have separate legal protections in the Public Resources Code, they, in fact, operate as a single system, particularly for ecosystem purposes. The bill preserves Suisun Marsh's statutory protection, but brings public agency activities under the auspices of the Delta Council and the Delta Plan, in order to ensure that the two areas act as the natural estuary system they comprise. While conflicts between competing purposes may arise, this bill establishes a framework for resolving those conflicts in state policy.

Given this broader definition of the Delta, SB 1 X7 nevertheless limits the scope of most of its program and the Delta Plan to this Delta (including Suisun Marsh). The bill narrows the focus of the ecosystem restoration to the Delta, allowing ecosystem projects outside the Delta only if the Council finds the project contributes to the achievement of the coequal goals. The Delta Conservancy is similarly limited in its focus. Some criticized the CALFED Bay-Delta Program for the breadth of both its "problem area" (the Central Valley) and its even broader "solution area" (including Southern California and San Francisco Bay Area that rely on exports from the Delta Watershed). That criticism suggested that the breadth of the CALFED program led to CALFED losing its focus on fixing the Delta. This bill will restore the spotlight to the legal Delta and Suisun Marsh, as an estuary system.

Protection for Existing Law: When the August pre-print versions of the Delta bills came out, some questioned whether the Delta bills would change existing legal protections for water rights/quality and the environment. This bill includes several "savings" sections that protect certain statutes, water rights and other legal protections from any implied changes by this bill. These sections have been expanded to ensure the continued effectiveness of various water law principles that protect other water right holders, particularly upstream in the Delta watershed. Those principles preserve procedural and substantive legal protections that include, but are not limited to: "area of origin" protections, the "no injury" rule for all "legal users of water," and the domestic-use preference. These sections also maintain SWRCB jurisdiction and preserve regulatory authority generally, in order to clarify that the new Delta Stewardship Council is NOT a super-regulatory agency that trumps other regulatory agencies, such as SWRCB and DFG. These sections were written, and should be interpreted, to broadly protect legal rights of all.

Early Actions: This bill identifies a series of actions that existing and new agencies need to take as soon as possible – before the Council completes its new Delta Plan. Some actions are administrative. Others are substantive projects for the Delta ecosystem and/or water supply reliability. The early actions part communicates the urgency of responding to the Delta crisis, without waiting for the completion of the new Delta plan.

Flow Criteria: One key "early action" is the SWRCB developing "flow criteria," which is a new legal concept. The bill requires SWRCB to adopt such flow criteria within nine months, pursuant to a specified "informational proceeding" under existing SWRCB regulations. Those regulations provide an opportunity for all interested persons to submit comments and evidence, as part of the proceeding. SWRCB staff indicated that, in order to accomplish the 9-month deadline, they would use this established process.

Such "flow criteria" are neither federal water quality "criteria," nor state "flow objectives." In 1994, the United States Supreme Court held that the federal Clean Water Act may not provide explicitly for setting flow standards, but states may do so consistent with certain provisions in that federal statute. *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700 (1994). This bill's "flow criteria" reflect a landmark concept of the state exercising its public trust authority to ask – FIRST – what the Delta needs, before completing plans for fundamental change to the nature of the Delta, as envisioned by the Bay Delta Conservation Plan.

Water Code Section 85086(c)(1) specifies that the flow criteria for the Delta ecosystem developed under that subdivision shall not be considered "predecisional" in a subsequent SWRCB proceeding. In this context, the word "predecisional" means that the flow criteria do not predetermine how any issue will be decided in any later proceeding before SWRCB. Nor will the flow criteria, at the conclusion of the nine-month process, establish any obligations on other parties outside the Bay Delta Conservation Plan process as described in paragraph (c)(2) and below.

Transforming these criteria into "flow objectives," which is the term used in the state Porter-Cologne Water Quality Control Act, would require further proceedings, pursuant to existing law. In a landmark decision on Delta water quality issues, *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82 (1986), the state court established a two-step process required to set water quality objectives and then – subsequently and separately – allocate responsibility for those objectives among water right holders. These flow criteria will not constitute even the first step in that process. While state and local agencies may use the flow criteria for other purposes in the Delta and the SWRCB may use the "flow criteria" as the foundation for developing new water quality "objectives" in a new Delta Water Quality Control Plan, SWRCB will need a complete record, as required by existing law, from a subsequent proceeding to adopt them as "flow objectives."

The flow criteria do not require a particular outcome in such further proceedings. Their development does not have the effect of a regulatory standard or precedential decision, and they do not affect the legal burden of proof in the later SWRCB proceeding. Also, because the development of the flow criteria does not amount to a determination as to how any issues will be decided in a later proceeding, a board or staff member is not be required to avoid participation in the development of the criteria in order to avoid the appearance of prejudging issues that may be presented in the later proceeding.

The flow criteria adopted under Water Code Section 85086(c)(2) may differ from the flow criteria developed under Water Code Section 85086(c)(1), and their legal effect is very different. Paragraph (c)(2) specifies that certain water right change orders, involving specified changes in the points of diversion for the Central Valley Project or the State Water Project, must include "appropriate" Delta flow criteria. While the analysis used in developing flow criteria under paragraph (c)(1) will be considered in setting flow criteria under paragraph (c)(2), neither the analysis nor the criteria themselves predetermine the outcome of the later proceeding to determine what criteria are "appropriate" for inclusion in the water right change order. In addition, while the flow criteria developed under paragraph (c)(1) do not have regulatory effect – they serve instead as recommendations for consideration in the Delta Plan and the Bay Delta Conservation Plan – the flow criteria set under paragraph (c)(2) are included in the water right change order, and have the effect of terms and conditions of that order.

This requirement for flow criteria should also be read in the context of the savings clauses in Water Code Sections 85031-32, which ensure protection for all water rights holders as the Bay Delta Conservation Plan and the Delta Plan develop. Several upstream parties have raised concerns about these flow criteria, suggesting that they will be held responsible for complying with these flow criteria. The combination of the focus on use of flow criteria early in Delta planning efforts, specified process for developing flow criteria, and the savings clauses ensure consistent legal protection for upstream water users without rewriting water law to focus protections on specific concerns.

Council Membership: The foundation of this bill's change in Delta governance is the new Delta Stewardship Council, which this bill creates with seven members. Council members would be required to possess diverse expertise and reflect a statewide perspective. However, this bill would also designate the chair of the Delta Protection Commission as a voting member of the Council *ex officio*. The bill now specifies that the Governor's appointments have either four or six-year terms, with subsequent four-year terms, to allow some staggering of terms over the long-term. The legislative appointments have four-year initial and subsequent terms.

Delta Vision suggested the Council should have no slots set aside for persons with specific characteristics, all appointed by the governor. Others suggest that there must be slots for persons with specific characteristics, such as representation or expertise. This bill appears to be a hybrid of the two approaches. It requires members "with diverse expertise and a statewide perspective," appointed by several different entities and one regional representative from the Delta, but no other specified slots. This approach relies on the Senate confirmation process to ensure the Governor's appointments fairly balance different interests and reflect different expertise. This bill 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.

Science Program: This bill establishes a "Delta Independent Science Board" and science program, using the CALFED Bay-Delta Program science program as its model. The CALFED science program has received broad acclaim for success as an effective *independent* science program, while CALFED now receives intense criticism for its alleged failure to address the Delta's crises. The science program in this bill therefore adopts and succeeds the CALFED science program.

Delta Watermaster: This bill includes a provision that requires SWRCB to appoint a Delta Watermaster. This version, however, is much narrower than the proposal in the August pre-print

version, which had broader authority. The Watermaster in this bill acts by delegation of authority from the SWRCB. It is SWRCB's enforcement – not adjudicatory – officer, with specified delegated authorities. The Watermaster's jurisdiction is limited to diversions in the Delta and conditions on permits that relate to conditions in the Delta.

Federal Government Participation: In order to encourage federal government participation under the state's leadership, this bill requires the Delta Plan to be developed consistent with certain statutes that allow for certain state discretion over federal activities. These statutes include the Coastal Zone Management Act (CZMA), the Reclamation Act of 1902 (which governs the Bureau of Reclamation's Central Valley Project), and the Clean Water Act. If the Council decides to adopt the Delta Plan pursuant to the CZMA, then the bill requires submission to the Secretary of Commerce for approval, so the state may exercise certain authority over federal agency actions. It is widely anticipated that California may need Congress to enact laws to protect the Delta consistent with the state's plan – perhaps a "Delta Zone Management Act." This bill allows for that eventuality, by providing for submission of the Delta Plan to whatever federal official a subsequent federal statute identifies.

Delta Plan/Balancing Coequal Goals: This bill includes substantial detail as to the nature of the Delta Plan, focusing on balancing the two coequal goals of ecosystem restoration and water supply reliability. It specifies certain elements, strategies for incorporation into the Delta Plan. It also includes several standards for completion of the plan, such as use of best available science. All these requirements still connect back to the fundamental "co-equal goals."

Levees/Flood Protection: The bill requires the Delta Plan to reduce risks to people, property and state interests in the Delta with emergency preparedness, appropriate land uses and strategic levee investments. The Delta Plan will include recommendations for priorities for state investments in levees. These recommendations, in combination with the Council's authority to ensure that state agencies act consistently with the Delta Plan, will ensure that levee spending by DWR and the Central Valley Flood Protection Board (CVFPB) reflects these priorities. The Legislature generally does not appropriate funding to specific Delta levee projects, and has not succeeded in imposing priorities on state levee spending in the Delta. Instead, the State Budget leaves the discretion to DWR and the CVFPB to determine how to spend state money on both levees in the State Plan of Flood Control and non-project levees. These priorities will affect both the Delta levee subvention program (non-project levees) and the special projects program (levees with a State interest).

Consistency Review: One of the cornerstones of the fundamental change that this bill portends is the development and enforcement of a unified state plan for the Delta. The bill ensures consistency with the state's Delta Plan by requiring state and local agencies that propose to implement "covered actions" to submit consistency certifications and subjecting those certifications to appeal to the council. The Council reviews the certification and issues raised by an appellant and determines whether the project is consistent with the Delta Plan, with specific findings. If not, then the proponent must determine whether to proceed with the project, but must amend and submit a new certification if it decides to proceed with the project.

The Council's role in developing and enforcing consistency with the Delta Plan will provide a critical component of crafting a coherent and sustainable long-term state policy for the Delta. As the Delta Vision Task Force noted, more than 200 federal, state and local agencies have authority in the Delta. State policy often has made competing demands on Delta resources, leading to the

current crisis. State agencies often have reached gridlock, allowing the Delta to collapse as they dispute how to proceed. While the CALFED Bay-Delta Program had the noble goal of coordinating state and federal policy in the Delta, the Bay-Delta Authority lacked the authority to resolve conflicts among agencies and set a unified direction. When the Delta ecosystem crisis arose, CALFED agencies degenerated into interagency conflict and could not respond adequately to the mounting evidence of crisis, even to complete the Legislature's requirement to develop a short-term response to stabilize the Delta ecosystem. The Council can provide some coherence to how the State manages important water and environmental resources in the Delta.

Covered Actions: The threshold for certification of consistency and Council review requires the action to fall within the scope of "covered actions." Determining whether a particular project is a "covered action" requires review of both the definition's four factors as well as the exemptions in that definition. The first, and possibly the most central, factor for that determination is that the project "will occur, in whole or in part, within the boundaries of the Delta or Suisun Marsh." Actions that outside the legal boundaries of the Delta (including Suisun Marsh), such as upstream diversions, will not be covered actions and, therefore, not subject to certification or the Council's consistency review. The existing diversions by the San Francisco Public Utilities Commission from the upper reaches of the Tuolumne River, for example, do not constitute "covered actions."

If the project "occurs" in the Delta, it still may not be a "covered action" because an exemption may apply. The first exemption applies to "regulatory actions," in order to clarify that the Council does not have authority to countermand a regulatory determination, such as a water right or water quality order or a determination under the California Endangered Species Act. This exemption reaffirms, combined with the savings clauses, the overall intent of the bill that the Council does not become a super-regulator that can trump regulatory decisions of other agencies. Recent changes have added several new exemptions that:

- 1) Exempt regional transportation plans.
- 2) "Grandfather" certain existing activities in the Delta, or activities that have completed the CEQA process by the time the Council adopts the Delta Plan.
- 3) Allow continued "routine maintenance and operation" of Delta facilities.
- 4) Support sustainable land-use planning under state law.

Bay Delta Conservation Plan: This bill requires Council consideration of the BDCP for incorporation into the larger Delta Plan, but conditions state funding and incorporation of BDCP on DFG's approval as a Natural Community Conservation Plan (NCCP) and completion of robust investigation and analysis pursuant to CEQA. While some agencies have asserted that BDCP would be an NCCP, the December 2006 planning agreement specifically provided that the signatories were not committed to achieving the higher ecosystem recovery standard for an NCCP. This bill sets the higher NCCP standard ("the gold standard") as the threshold for state funding of the public benefits of BDCP activities, while relying on existing law. The specified issues that will be analyzed under CEQA add credibility to the outcome of BDCP, but also rely on the context of existing CEQA law to ensure an impact on the ultimate BDCP decisions.

Delta Conveyance: This bill does NOT authorize "the Peripheral Canal." There has been a

debate about DWR's legal authority to construct a new Delta water conveyance system, and this bill does not address that issue. Instead, it specifies certain requirements for BDCP in considering options for changing Delta water conveyance for the State Water Project (SWP) and federal Central Valley Project (CVP). First, BDCP must analyze certain factors in the CEQA process. Second, BDCP must meet "the gold standard" of achieving approval as an NCCP, if it wants state funding and incorporation into the long-term Delta Plan. NCCP requirements include both public process and adaptive management of BDCP projects and programs, which may include new Delta water conveyance. Third, BDCP must include a "transparent, real-time operational decision-making process" that includes fishery agencies. Fourth, construction of any new conveyance facility may not start until SWRCB issues the necessary water rights change permits and the water project contractors have agreed to pay the costs of environmental review, planning, design, construction and mitigation of the conveyance facility.

These requirements ensure that any decision as to a new conveyance system for Delta water will consider all the necessary factors, and CEQA requirements will ensure that environmental impacts will be resolved. Construction does not start until cost and permitting issues are resolved. The requirements appear to balance the competing interests in "setting a clear path" to new Delta water conveyance, ensuring restoration of the Delta ecosystem, and providing comprehensive analysis of alternatives that address issues unique to the Delta.

Delta Finance: SB 1 X7 states legislative intent to rely on past water bond funding for the costs of developing the new Delta Plan required by this bill. Previous proposals to charge fees to fund Delta programs have been deleted. The bill does require, however, that water users pay the costs of building any new conveyance facility, as well as the costs of any necessary mitigation for such facilities.

Two-Gates Project: This bill promotes implementation of the Federal Government's proposed "Two-Gates Fish Protection Demonstration Program." This project would experiment with certain flow gates in the Delta to see if it improves conditions for certain at-risk fish species. The bill identifies this project as an "early action" and appropriates \$28 million, from bond funding, as the State's contribution to the experiment.

Recent Changes: Since the Assembly Water, Parks and Wildlife (WP&W) Committee considered the Delta governance and planning provisions, as part of SB 68 (the regular session version of this bill), on September 11, this portion of the 2009 Delta/Water legislative package has changed in limited ways, to address certain concerns.

- **Governor's Council Appointments:** This bill restructures the original proposal for staggering the Governor's initial appointments to the Council. Instead of staggering the Governor's first appointments by one to four years, two initial gubernatorial appointees will have four-year terms and two will have six-year terms. After those initial appointments both gubernatorial and legislative appointees to the Council will have four-year terms.
- **Delta Water Quality:** This bill amended SB 68's original findings and state policies to incorporate water quality concerns for human health and the environment.
- **Savings Clauses:** This bill expanded the provisions that preserve legal protections in existing law, to assure that water rights are respected and water right holders receive the

procedural and substantive protections of existing law.

- **"Covered Actions" Exemptions/Grandfather Clause:** The definition of "covered actions" sets the scope of what agency actions may be appealed to the Council as inconsistent with the Delta Plan. This bill includes exemptions to the definition for: 1) regulatory actions; 2) regional transportation plans; 3) local plans or projects that comply with Government Code provisions for sustainable communities; 4) routine maintenance and operation of federal, state and local government facilities in the Delta; 5) local agency projects that are either "fully permitted" or have completed the CEQA process by September 30, 2009; and 6) certain projects in the Delta's secondary zone finalized before adoption of the Delta Plan.
- **Flow Criteria:** This bill – like SB 68 – requires SWRCB to exercise its public trust authority to develop new "flow criteria" to inform planning decisions for the Delta Plan. Recent changes have added some additional specificity as to the purpose of these flow criteria and the process for SWRCB to develop them. Specifically, the new language accomplishes two things: 1) focuses this effort on informing planning decisions for the Delta Plan and the Bay Delta Conservation Plan; and, 2) specifies the procedure for SWRCB to develop the flow criteria, relying on an "informational proceeding," not a regulatory proceeding. Savings clauses also were expanded to ensure protection for water rights.
- **Watermaster Authority:** This bill specifies the scope of the Delta Watermaster's authority as applying to diversions in the Delta and board orders that apply to conditions in the Delta. This further specification is consistent with the original definition of the "Delta Watermaster." It ensures that the Watermaster has authority over both in-Delta water diversions and water project operations outside the Delta where SWRCB has conditioned the water right permits based on conditions in the Delta. The CVP permits for New Melones Reservoir, for example, are conditioned on compliance with certain Delta water quality requirements, leading to reservoir releases to dilute salinity in the San Joaquin River.

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