

April 15, 2020

Attention: Imported Water Committee

Bay-Delta Update (Information)

Purpose

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

Executive Summary

- Several developments have taken place that could impact State Water Project (SWP) yield and the proposed Bay-Delta project since staff's last report in November.
- In January 2020, the State released a draft Water Resilience Portfolio, which may be coupled with potential bond funding for proposed projects, including ecosystem restoration.
- Also in January, the Department of Water Resources (DWR) released a Notice of Preparation of an Environmental Impact Report (EIR) for the proposed single-tunnel Bay-Delta fix.
- DWR and SWP contractors are negotiating amendments to SWP supply contracts that would outline the allocation of costs and benefits of the single-tunnel Bay-Delta fix, since the Agreement in Principle (AIP) reached in the now defunct California WaterFix project is no longer valid.
- The Water Authority continues to monitor the stakeholder process to find opportunities to advocate for the proper allocation of Bay-Delta project costs and benefits.
- Proposed updates to SWP and Central Valley Project (CVP) operations by the federal and state governments may have impacts on SWP exports, and litigation over these proposed changes has stalled progress on voluntary agreements to implement water quality and habitat improvements in the Bay-Delta.
- These issues will continue to evolve, and their outcomes will impact SWP operations and yields as well as San Diego household water bills.

Background

At its July 2019 Board meeting, the Water Authority supported Governor Newsom's water resilience portfolio approach, including a single-tunnel Bay-Delta project and integrated multi-benefit solutions that address water supply availability and environmental health. The support for the single-tunnel project is conditioned upon project costs being allocated fairly to supply charges. The Water Authority's Bay-Delta Policy Principles and Legislative Policy Guidelines were updated to reflect this position.

Discussion

This report provides an update on recent developments affecting Bay-Delta policies and SWP operations.

Water Resilience Portfolio

In April 2019, Governor Newsom issued Executive Order N-10-19 directing the development of a diverse statewide water supply portfolio with regional, multi-benefit projects that meet “the needs of California’s communities, economy, and environment through the 21st century.” In January 2020, the Newsom administration released a draft Water Resilience Portfolio for public comment, featuring over 100 actions to preserve and diversify water supplies, manage and restore environmental health, integrate water management across regions, and prepare for potential threats and emergencies, such as climate change and seismic risk.¹ The draft portfolio includes actions that would improve access to clean and safe drinking water, potentially implement voluntary agreements to achieve water quality and habitat improvements in the Bay-Delta, and improve the statewide water conveyance system. The draft also highlights the need for additional, innovative, and streamlined funding mechanisms for regional water infrastructure improvements beyond the focus of the State Water Project to help the state meet more of its water management needs. The Newsom administration and both houses of the state legislature are working to propose a climate resilience bond to place on the November 2020 ballot that will contain billions of dollars for these types of projects, though progress on the bond may stall given complications due to the novel coronavirus (COVID-19) pandemic.

Bay-Delta Project

In January 2020, DWR released a Notice of Preparation for an EIR for the single-tunnel Bay-Delta project.² Public comments were accepted through April 17, 2020. A component of the Water Resilience Portfolio, the proposed Bay-Delta project would include a tunnel with the ability to convey up to 6,000 cubic feet per second, new intake facilities that would provide an alternate diversion point north of the Bay-Delta, and new reaches that would connect the project with existing SWP facilities and, potentially, the CVP for exports. Depending on public comments, DWR will also potentially evaluate project alternatives with capacity between 3,000 and 7,500 cubic feet per second.

In the Notice of Preparation, DWR states that its “underlying, or fundamental, purpose in proposing the project is to develop new diversion and conveyance facilities in the Delta necessary to restore and protect the reliability of State Water Project (SWP) water deliveries and, potentially, Central Valley Project (CVP) water deliveries south of Delta, consistent with the State’s Water Resilience Portfolio.” This highlights the importance of the project for conservation of water supply in the Delta for the SWP system.

The Delta Conveyance Design and Construction Authority (DCA), a Joint Powers Authority originally formed for California WaterFix (WaterFix), continues to assist DWR with engineering planning activities to support the environmental review of the single-tunnel project. In February, technical experts brought in by the DCA determined that one of the proposed tunnel alignments—

¹ The draft 2020 Water Resilience Portfolio can be found here: <http://waterresilience.ca.gov/wp-content/uploads/2020/01/California-Water-Resilience-Portfolio-2019-Final2.pdf>

² The Notice of Preparation can be found here: https://water.ca.gov/-/media/DWR-Website/Web-Pages/Programs/Delta-Conveyance/Delta_Conveyance_Project_NOP_20200115_508.pdf?la=en&hash=74B80DAAE5B9C4BC2EB0619B6A252011F72D1087

the Central Corridor, which was the preferred alignment for WaterFix—would be “logistically impractical,” but the alignment will still be evaluated in the environmental analysis. The Metropolitan Water District of Southern California (MWD) currently owns several islands along the Central Corridor; if the islands are not needed for the project, MWD could use the land for other purposes, such as carbon sequestration, or sell the islands. The Delta Conveyance Finance Authority, originally formed to issue bonds to finance WaterFix, has continued to meet on an as-needed basis to complete administrative actions since the shift in direction to a single-tunnel project. The Finance Authority’s Executive Director worked with legal counsel, DWR, and SWP contractors to develop a revised Joint Powers Authority agreement that updates the role the Finance Authority will play in the as-yet-undefined Bay-Delta fix, including through potential treasury management for the DCA.

While funding for the Finance Authority is driven by its member agencies, the DCA is currently funded through DWR. In July 2018, the MWD Board approved up to \$86 million in advance funding to the DCA for WaterFix to fund pre-construction expenses, subject to reimbursement when DWR issued its first bonds for the project. MWD had provided \$41.5 million through May 2019 but asked that DWR return the unspent remainder of the funding given that WaterFix will not be built. MWD received \$34.4 million from DWR in December 2019.

SWP Contract Negotiations

With Newsom’s single tunnel direction, DWR and the SWP contractors scrapped the AIP reached to allocate WaterFix costs through the SWP supply contracts. From July to November 2019, DWR and the SWP contractors renegotiated proposed amendments to the contracts to account for and allocate the costs and benefits of the single-tunnel Bay-Delta fix between participating agencies. The AIP for WaterFix required the participation of all south-of-Delta contractors but allowed those who do not wish to pay for the project to transfer or exchange their cost share with other contractors via adjustments to their contractual rights to Table A supplies. By contrast, the new negotiations centered around an “opt-in” approach, where contractors could elect to pay into the project to receive water rights and use available project capacity based on their “contracted proportionate share.” The parties reached a tentative AIP in November 2019.

After a poll among the contractors, DWR determined that there was not enough support for the AIP to implement any resulting contract amendment, as 12 of the 29 contractors indicated they would not approve the AIP. Some contractors were concerned about increased carryover losses resulting from Bay-Delta project water storage in San Luis Reservoir. In December 2019, DWR issued a new offer which greatly simplified the AIP and proposed an alternate “opt-out” approach. If a contractor chose to opt out of the project in whole or in part, they would receive a proportional credit for project costs in exchange for waiving their rights to water supply benefits resulting from the facilities. Contractors rejected this offer and returned to negotiate a counteroffer among themselves over the next several months.

On March 18, 2020, negotiations resumed between DWR and the contractors and focused on the contractors’ counteroffer which would allow SWP contractors to opt out of 100 percent of either their Municipal & Industrial or Agricultural Table A amount, or both, in exchange for forgoing costs and benefits of the project. Contractors can also elect to assume costs and benefits in addition

to their proportional Table A supply amount. The five North-of-Delta water agencies and six other contractors have already elected to opt out of the project, amounting to a total of 6.47 percent of Table A supply contracts.

The Water Authority continues to prioritize the appropriate characterization of the Bay-Delta fix as a supply project, consistent with the historical characterization of similar projects and the Water Authority's Bay-Delta Policy Principles. In the abandoned 2018 WaterFix AIP, DWR and the contractors adopted new language regarding the project's purpose with no explanation for the change:

“The purpose of the Delta Conveyance Facilities is water conservation and/or transportation.”

The contractors attempted to add this language into the AIP for the single-tunnel project in September 2019, but DWR immediately removed the language in its counteroffer and it remained out of the negotiations through the first tentative AIP in November. Unfortunately, the March 2020 offer from the SWP contractors proposes the same language which, if adopted by DWR, would allow individual contractors to designate the project as “conservation and/or transportation” at their own discretion. Apart from misrepresenting the purpose of the Bay-Delta fix, this language could disincentivize water agencies from implementing projects that would support the State's policy of reducing reliance on the Bay-Delta. If MWD allocates project costs on transportation charges, as its 2018 budget document states it would “functionalize” the project, it would also uniquely and disproportionately disadvantage Water Authority ratepayers in comparison to other member agencies because of the Exchange Agreement in which MWD wheels the Water Authority's independent Colorado River water. A 2018 Water Authority cost analysis estimated that WaterFix costs to ratepayers in its service area could increase more than twelvefold if MWD allocates costs to transportation, compared with MWD allocating costs on supply. The Water Authority submitted a comment letter to DWR on March 20, 2020.³

Once the two parties reach a final AIP, contractors will bring the document to their respective boards for consideration and approval. DWR has indicated it hopes to gain the approval of contractor boards by June 2020. DWR will then prepare an EIR, which will identify and analyze impacts of the AIP and alternatives to mitigate those impacts. The California Environmental Quality Act and permitting processes are expected to last two to three years, and when complete, DWR and the contractors will opt whether to certify the EIR and sign a contract amendment based on the AIP.

SWP and CVP Operations

In October 2019, the National Marine Fisheries Service and U.S. Fish and Wildlife Service issued biological opinions evaluating the coordinated long-term operations of the SWP and CVP under the federal Endangered Species Act. In line with an October 2018 memorandum from President Trump that called for “streamlining western water infrastructure regulatory processes and removing

³ General Manager Kerl's March 20, 2020 letter to DWR can be found here: <https://mwdprograms.sdcwa.org/wp-content/uploads/2020-03-20-WA-Comment-to-DWR-re-SWP-Contract-Amendment-DWR-Sixth-Offer.pdf>

unnecessary burdens,” these opinions would increase operational flexibility and maximize water deliveries from the Bay-Delta. The Bureau of Reclamation (Bureau) issued an Environmental Impact Statement for the operations in December 2019, in accordance with the National Environmental Policy Act, that proposed to adopt the biological opinions. On February 19, 2020, the Bureau issued a final Record of Decision, adopting the biological opinions and approving the new operating procedures, which went into effect April 1. The same day, President Trump signed a presidential memorandum suggesting the federal government would look for additional ways “to make deliveries of water more reliable and bountiful.”

The day after the Bureau’s adoption of the biological opinions, the California Natural Resources Agency, the California Environmental Protection Agency, and California Attorney General Becerra filed suit against a variety of federal officials and agencies, alleging violation of the Endangered Species Act, National Environmental Policy Act, and the Administrative Procedure Act. The state seeks to block the biological opinions from going into effect, alleging they reduce protections for listed species and were adopted without adequate consideration of environmental impacts. The lawsuit cites prior analysis done by numerous agencies indicating that operations would jeopardize listed species and that the analysis performed by the Bureau was insufficient, among other allegations.

The Natural Resources Defense Council, Golden State Salmon Association, and other organizations had also filed a legal challenge against the biological opinions in December 2019. On March 3, the State Water Contractors filed a motion to intervene as a defendant in the case in support of the biological opinions and the Bureau’s Environmental Impact Statement. Apart from being mentioned by name in the motion, MWD staff reported during its March committee meetings that MWD “did some of the legwork...on preparing that motion.” During its April committee meetings, MWD’s Assistant General Manager reported that MWD’s representative on the State Water Contractors Board of Directors relies on existing MWD Board policies and direction to cast its votes, but did not describe the process it follows with regard to litigation decisions.

Separately, DWR’s 2009 Incidental Take Permit (ITP) for the SWP for California Endangered Species Act (CESA)-listed longfin smelt was set to expire at the end of 2019 but received an extension until a new ITP could be issued. Historically, DWR has sought a consistency determination from the California Department of Fish and Wildlife finding that the federal biological opinions comply with CESA and applied the federal rules to SWP operations. In 2019, DWR sought a new ITP that would provide authorization for SWP operations under CESA without relying on the federal process over concerns that the federal rules would not provide enough environmental protection. DWR released a draft EIR in November 2019 and certified a final EIR on March 27, 2020 that identified certain operational changes to the SWP which are intended to be more stringent than those resulting from the biological opinions. The California Department of Fish and Wildlife issued a new ITP on March 31, authorizing the new SWP operations with incidental take coverage for the longfin smelt and three federally listed species until 2030.

DWR’s new operating rules are expected to result in increased SWP pumping in wet years, which could lead to increased entrainment when compared with conditions under the 2008 and

2009 biological opinions. Several non-governmental organizations have criticized the state's new rules, arguing they would worsen conditions for endangered fish despite being more stringent than the federally proposed rules. On the other hand, both the State Water Contractors and MWD released statements criticizing the new rules for their restrictions on SWP exports. The state's rules places limits on SWP pumping during excess flow events, while the federal rules do not contain similar limits for the CVP. At its April Board meeting, through a 52.65 percent vote, the MWD Board authorized litigation against the State to challenge the new EIR and ITP.

Voluntary Agreements

Since December 2018, the State Water Resources Control Board has been working to update its Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary (Bay-Delta Plan). At the same time, the California Natural Resources Agency is negotiating 15-year voluntary agreements with water agencies and non-governmental conservation organizations to update and implement the goals of the Bay-Delta Plan without relying solely on regulation of unimpaired flows. The Directors of DWR and the California Department of Fish and Wildlife first proposed a framework for the agreements in December 2018 and followed up with a planning agreement and detailed project description in March 2019. In September 2019, Governor Newsom vetoed Senate Bill 1— passed by the California legislature to keep certain environmental protections in place despite federal rollbacks—in the hopes of ensuring that federal parties would move forward with the voluntary agreement negotiations.

In February 2020, Governor Newsom released an updated framework for the voluntary agreements, which called for 815,000 to 912,000 acre-feet of new flows for the environment above existing conditions (long-term average annual flows, including those required by Water Rights Decision 1641 and the 2008 and 2009 biological opinions) made up of dedicated flows and water purchases. The proposal would also include restoration for over 60,000 acres of habitat, a science program, and a goal to double salmon populations by 2050. Funding for the agreements would come from the federal government (\$740 million), state government (\$2.2 billion), and charges to water users (\$2.3 billion). On deliveries, CVP and SWP contractors would be charged \$8 per acre-foot for future water purchases and \$2 per acre-foot for science and governance projects. CVP Settlement Contractors, who have water rights that predated the CVP, would also contribute \$5 per acre-foot for water purchases and \$2 per acre-foot for science and governance projects.

The agreements are being refined and undergoing scientific peer review and environmental review. Should the State Water Resources Control Board accept the agreements, they would become the program of implementation for the Bay-Delta Plan and could be implemented in 2020. However, the State's litigation against the federal government over the biological opinions has put pressure on the negotiations, leading to a stall in progress. Some CVP contractors such as the Westlands Water District had threatened to walk away from the discussions entirely if the state

sued.⁴ MWD staff has reported that the voluntary agreements are on hold until the state and federal governments can reach a solution.

California Aqueduct Subsidence

Subsidence caused by climate change and unsustainable farming practices leading to the overdraft of groundwater has significantly damaged portions of the California Aqueduct. Subsidence reduces flow capacity, decreases reliability, and increases the cost of water delivery, operations, and maintenance. DWR is undergoing a program to address subsidence, which is expected to result in several hundred million dollars in additional SWP costs in the next three to five years and at least \$1 billion in the long term. These costs will be largely borne by SWP Contractors and could result in increased transportation charges at MWD.

Next Steps

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

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⁴ See “Newsom seeks peace with Trump in California water wars. Enviro are ready to fight” in *The Sacramento Bee* on February 5, 2020: <https://www.sacbee.com/news/local/environment/article239967733.html>