



**To:** RCRC Board of Directors  
**From:** Mary-Ann Warmerdam, Senior Legislative Advocate  
Arthur Wylene, Government Affairs Counsel  
**Date:** January 14, 2019  
**Re:** Water Issues Update

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### **Summary**

This memo provides an update on a number of issues involving California water policy at the state and federal levels.

### **Background**

With the advent of the Newsom Administration, the focus over the past month has been on what, if any, priorities the new Governor will identify; and, if or how will they differ from the course that has been set during the Brown Administration. Governor Newsom has suggested that he is not inclined to abandon plans for the “twin tunnels” or the California WaterFix project, albeit he plans to proceed in a less ambitious way, narrowing the project to a single tunnel. Governor Newsom has also been quoted as saying “doing nothing is not an option.....the status quo is not helping the salmon.”

### **Issue**

The projects and/or issues that have been the subject of discussion over the past several months continue to proceed as discussed below:

- **Bay-Delta Water Quality Plan** – In early July 2018, the State Water Resources Control Board (SWRCB) released the third, and what was anticipated to be the final, draft of the Bay-Delta Water Quality Control Plan update for the Lower San Joaquin River and Southern Delta, and an accompanying Substitute Environmental Document (SED). If adopted as drafted, the plan update proposed an increase in instream flow requirements, thereby effectively reducing the amount of water available for agriculture and municipal uses. The release of this draft was the culmination of a nine-year process during which the SWRCB studied and analyzed options, conducted public outreach, including public hearings in affected areas, and reviewed more than 1,400 comment letters.

The SWRCB began consideration of the final draft plan in August 2018, including two days of additional public testimony. Numerous water stakeholders expressed concerns about the draft update, including representatives of other agencies in the Brown Administration, and requested that final action be deferred

pending further discussion. The changes, if any, resulting from those discussions continued to remain in flux.

The course changed late on November 6, 2018 when Governor Brown and Governor-elect Newsom sent a letter to SWRCB Chair Felicia Marcus requesting a postponement of final action until the December 12, 2018 SWRCB meeting to allow for further development of Voluntary Stewardship Agreements. RCRC testified in support of the request for postponement; and had previously submitted comments (Attachment 1).

At the December 2018 meeting, after much discussion and several amendments by Board Members from the dais, the SWRCB adopted amendments to the Bay-Delta Water Quality Plan that largely left intact the increased flow criteria, albeit with some revisions, namely: (1) the amendments are not self-implementing; and (2) that the SWRCB staff was directed to work with the California Natural Resources Agency in completing a Delta watershed-wide agreement. Furthermore, there was specific instruction to include potential amendments to implement Voluntary Stewardship Agreements (VSAs) relating to the Tuolumne River, as an alternative for a future, comprehensive Bay-Delta Plan update due to be presented to the SWRCB for consideration as early as possible after December 1, 2019. These two criteria give some opportunity for additional VSAs to be developed as an alternative to the SWRCB's December 2018 actions.

Subsequent to this action, several water agencies, including the San Francisco Public Utilities Commission, commenced legal proceedings against the SWRCB's action. This legal action was not unexpected given the jeopardy to the water supplies of the San Joaquin River tributaries. As an aside, it should be noted that Governor Newsom reiterated his desire to see the needs of the Bay-Delta Water Quality Plan be met through the adoption of VSAs, not only for the San Joaquin River tributaries, but also for the similar conversations that will soon be commenced with Sacramento River water users.

**Sustainable Groundwater Management Act** – On January 4, 2019, the Department of Water Resources (DWR) announced final basin prioritization for the majority of groundwater basins in the state, as required by the Sustainable Groundwater Management Act (SGMA). For most basins, the results are a confirmation of prioritizations established in 2015 and finalized in 2016. However, fifty-nine basins remain under review with final prioritization expected in late Spring 2019.

SGMA requires local agencies throughout the state to sustainably manage groundwater basins. Basins identified as high or medium-priority are required to adopt groundwater sustainability plans beginning in 2020, with sustainability to be achieved by 2040.

**Siskiyou County Groundwater Litigation** – In 2009, the Environmental Law Foundation sued Siskiyou County and the SWRCB alleging that both agencies have an obligation under the “public trust doctrine” to consider the potential adverse impact of groundwater extraction upon navigable surface waterways

whenever well permits are issued. Last month, the Third District Court of Appeal issued an opinion largely agreeing with the Environmental Law Foundation, and concluding that (1) the common law “public trust doctrine” applies to groundwater extractions that may harm a navigable waterway; (2) the enactment of SGMA did not override the common law obligations and protections afforded by the “public trust doctrine;” and (3), the SWRCB, as well as the County, has an obligation to ensure that the “public trust doctrine” is properly applied with regard to such groundwater extractions permitted by the County. The court declined to opine further regarding what, precisely, the “public trust doctrine” may require – and what restrictions it may place – when counties issue well permits, leaving those details for future cases. The California Supreme Court denied review in this case on November 28, 2018, and this decision is thus final. Nonetheless, full implications of the decision remain undetermined at this time.

**California WaterFix** – The State Water Resources Control Board has completed the second, evidentiary-phase of the hearing process addressing the requests by the state and federal water projects to change their points of diversion.

However, an unexpected “twist” occurred in Fall 2018, when the staff of the Delta Stewardship Council released recommended findings that the WaterFix project is inconsistent with the Delta Plan, and that the Department of Water Resources (DWR) had filed its certification of consistency before it was “*ready to demonstrate consistency with the Delta Plan.*”

Further complicating the future of this project is the uncertainty that comes with a change in Administration. While Governor Newsom has been sympathetic to a more sustainable conveyance system through the Bay-Delta, he has also suggested a “twin tunnel” approach may be too ambitious, and perhaps, a single tunnel is more appropriate. Given that his recently-released 2019-20 proposed Budget did not call out funding for the project, it suggests that DWR may be reviewing the project in light of Governor Newsom’s reservations.

**Background:** The Department of Water Resources (DWR) filed a consistency determination with the Delta Stewardship Council that the California WaterFix project was consistent with the Delta Plan. That consistency determination was then appealed by nine parties. In October 2018, a public hearing was held where evidence was presented by both sides. Subsequent to that, Delta Stewardship Council staff issued a draft determination that not enough evidence existed in the record to support DWR’s determination that the California WaterFix was consistent with the Delta Plan, and staff recommended that the Delta Stewardship Council remand the matter back to the Department of Water Resources.

Specifically, Delta Stewardship Council staff found that the DWR failed to demonstrate consistency with aspects of Delta Plan policies with respect to using Best Available Science, reducing reliance on the Delta, Delta flow objectives, respecting local land use when siting facilities or restoration, and in the detailed findings of overall consistency.

The Delta Stewardship Council held a workshop on the matter in mid-November 2018 at which several members expressed support for staff's recommendations, and urged DWR to withdraw the consistency determination before the Delta Stewardship Council's final hearing. The Delta Stewardship Council will accept public comment on the proposal until January 14, 2019, with a final Public Hearing on January 24-25, 2019 to receive public comments on and consider the adoption of findings regarding the appeals of the California WaterFix Certification.

**Staff Recommendation**

Information only. RCRC staff will continue to engage on these issues as necessary to ensure the policy concerns of RCRC member counties are addressed.

**Attachment**

- RCRC Comment Letter – Proposed Revisions to Bay-Delta Plan (Date August 20, 2018)