



To: RCRC Board of Directors
From: Mary-Ann Warmerdam, Senior Legislative Advocate
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Date: March 11, 2019
Re: Water Issues Update

Summary

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

Background

The Newsom Administration has largely continued on a steady path, consistent with pre-inaugural indications, with respect to “rural issues,” including those related to water policy. Notable in the early weeks are the appointments Governor Newsom has made: naming Joaquin Esquivel as chair of the State Water Resources Control Board (SWRCB); replacing former Chair, Felicia Marcus, with Laurel Firestone, who prior to her appointment represented the Community Water Center, based in Visalia; and naming former California Department of Food and Agriculture (CDFA) Secretary Bill Lyons as a “Senior Advisor on Agriculture,” as part of the Governor’s Office and key staff.

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

Issue

Bay-Delta Water Quality Plan – To recap: In 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 culminated 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. This request was further emphasized when, on November 6, 2018, then Governor Brown and Governor-elect Newsom sent a letter to the SWRCB Chair requesting a postponement of final action until the December 12, 2018 Board meeting to allow for further development of Voluntary Stewardship Agreements. As noted in previous memos, RCRC testified in support of the request for postponement.

At the December 2018 meeting, after much discussion and several amendments by SWRCB Members off of the dais, the Board adopted amendments to the Bay Delta Water Quality Plan that largely left intact the increased flow criteria albeit with some revisions, namely: (1) that the SWRCB staff will work with the California Natural Resources Agency in completing a Delta watershed-wide agreement, including potential amendments to implement agreements relating to the Tuolumne River, as an alternatives for a future, comprehensive Bay-Delta Plan update due to be presented to the Board for consideration as early as possible after December 1, 2019; and (2) the Plan amendments are not self-implementing. Additional regulatory action will be required. These two criteria give some opportunity for additional Voluntary Stewardship Agreements (VSAs) to be developed as an alternative to the SWRCB's December 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 in his budget briefing did reiterate 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.

On March 1, 2019, the Departments of Water Resources (DWR) and Fish & Wildlife (DFW) submitted documents to the SWRCB outlining the potential VSAs and, while not finalized, reflect progress since December 2018 to flesh-out the previously submitted framework. Also notable was the cover letter signed by 44 individuals representing water users, conservation groups, and state as well as federal agencies. The letter expressed commitment to further analysis and work to reach voluntary agreements that can serve as an alternative path to implementing the Bay-Delta Plan's objectives. While it was acknowledged that more work needs to be done, overall, there is a renewed sense of optimism that VSAs will provide an alternative to the Board's original draft proposal.

Sustainable Groundwater Management Act (SGMA) – In January 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. While the first plans are not due until January 2020, there are some early indications that the Groundwater Sustainability Agencies (GSAs) are not making uniform progress in developing their plans. This should be cause for some concern given that those GSAs that fail to develop plans are opening up the opportunity for the SWRCB to come in and manage the basin on behalf of the state's interest in the aquifers being managed sustainably.

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. In October, the Third District Court of Appeal issued an opinion largely agreeing with the Environmental Law Foundation, and concluding the (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, the full implications of the decision remain undetermined at this time.

California WaterFix – The SWRCB 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 this past fall, when the staff of the Delta Stewardship Council released recommended findings that the WaterFix project is inconsistent with the Delta Plan, and that the 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 Governor Newsom’s conceptual proposal supporting a single tunnel configuration. In light of this, on March 1, 2019, DWR and the Bureau of Reclamation requested the SWRCB to temporarily place the petition for a change in point of diversion in abeyance and issue a temporary 60-day stay on all WaterFix proceedings.

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.