

Minutes of Friday, September 9, 2022
North Delta Water Agency Special Board of Directors Meeting
Voluntary Agreements
Via Teleconference

Call to Order

Vice Chairman Mello called the informational special board of directors meeting on Voluntary Agreements on Bay Delta Plan Update to order at 1:07 p.m. on Friday, September 9, 2022. A quorum was determined at that time. Those present:

Directors

Steve Mello, Division 1
Justin van Loben Sels, Division 2
Jack Kuechler, Division 3
Mark van Loben Sels, Division 4

Staff

Melinda Terry, Manager
Kevin O'Brien, Downey Brand
Austin Cho, Downey Brand
Gary Kienlen, MBK Engineers

Absent

Tom Slater, Division 5

Others

Michael George
Lindsay Kammerer
Osha Meserve
Lou Bigoni

Presentation by Kevin O'Brien

Bay-Delta Plan Process

Last major update of the Bay-Delta Water Quality Control Plan was in 1995 and resulted in the adoption of Decision 1641 (D-1641). Current update was initiated in 2006. In 2018, the State Water Resources Control Board (SWRCB) adopted Substitute Environmental Document (SED) for the Lower San Joaquin River (SJR) that established 40% unimpaired flow objectives and allows increased salinity levels in the South Delta. On July 15, 2022, the SWRCB released a Notice of Preparation for Rulemaking to allocate water rights responsibilities for meeting flows in the Lower San Joaquin River watershed, which could include alternative with non-flow measures in voluntary agreements (VA), in lieu of an adjudicative water right proceeding.

SWRCB is still preparing the SED for the Sacramento River and tributaries. Completion and release is not expected for another 2-3 years, but we do anticipate it will also recognize VAs with non-flow measures as an alternative to be incorporated into the final decision.

Voluntary Agreements

In 2017, Governor Jerry Brown initiated a stakeholder process to develop a VA for the Bay-Delta Plan update, led by the Directors of DWR and CDFW. This effort continued under Governor Newsom, spearheaded by the Secretaries of CalEPA and the Natural Resources Agency, and a planning agreement between DWR and CDFW was executed in 2019. In March 2022, several water user agencies signed a non-binding VA Framework MOU that includes a Term Sheet and Appendices to guide development of a VA that includes, flow objectives, non-flow measures (habitat restoration), funding, and governance structure for implementation. VAs will become effective upon completion of environmental review (EIR) and execution of final binding agreements. Framework proposes an 8-year implementation program, concurrent with new Incidental Take Permit (ITP) and Biological Opinions (BiOps).

Flow objectives include: new flow contributions additive to the 1967-1991 baseline; an additional 100,000 af to Sacramento River outflow in dry, above normal, and below normal water year types; with most flows Jan-June with increases in April-May for dry, below normal, and above normal years; and State will acquire 65,000 af in all water year types. Additional water needed for increased flows will come from water purchases, fallowing crops, and new storage projects.

More than a hundred thousand acres of habitat restoration in the Sacramento Valley and 5,227.5 acres of tidal wetland and associated floodplain in the North Delta arc and Suisun Marsh. According to the map, only a small portion is within NDWA boundaries.

State, federal, and local funding sources to implement the VA is currently estimated to total nearly \$2.6 billion. MOU parties are currently working on additional agreements to implement projects, which will each require environmental analysis. The SWRCB will conduct environmental analysis of VA as an alternative to their unimpaired flows objectives. VA participants will be protected from providing any additional flows to maintain Bay-Delta water quality objectives for at least 8 years and the SWRCB will prevent diversion of flows provided by VA for other purposes.

Water users in the watershed that are not parties to the VA could be subject to regulatory limitations on water use pursuant to rulemaking by the SWRCB. NDWA would be considered a non-covered party if it does not sign onto VA or reach some other settlement agreement.

1981 Contract and 1998 MOU

The 1981 Contract between NDWA and DWR for the assurance of a dependable water supply of suitable quality establishes obligations for DWR to: 1) operate the SWP to meet Bay-Delta water quality objectives of 1981 Contract, whichever is better (Art. 2(a)(i); 2) assure that water of specified quality shall be in Delta channels for reasonable and beneficial use within the Agency, and agrees not to disturb or challenge those diversions (Art. 8(a)(i); 3) furnish water from SWP storage not otherwise available under respective water rights of water users (Art. 8(a)(ii); 4) and shall affirmatively defend the use of SWP stored water to meet 1981 Contract salinity criteria as a reasonable and beneficial use (Art. 8(d)).

The 1998 MOU between NDWA and DWR memorializes the joint understanding of DWR's obligation under the 1981 Contract to provide any additional flows from the SWP in order to meet any obligation of water users within NDWA to assist in achieving updated Bay-Delta Plan flow or salinity objectives. The parties further agreed that the Contract payments made by the Agency to DWR constitutes full and adequate consideration for the obligation of DWR to provide any additional flows in updated Bay-Delta Plan. The 1998 MOU is only specific to obligation of water users within the Agency to implement water quality objectives contained in the 1995 Bay-Delta Plan (D-1641). Therefore, once the Bay-Delta Plan is updated again, then a new MOU will need to be executed with DWR. The 1998 MOU was adopted into Decision 1641 and upheld by the courts afterwards. The Agency should consider whether it will submit an updated MOU as a VA for 300,000 acres in NDWA or can such an MOU be incorporated into the aforementioned Framework VA.

Questions and Comments

Osha Meserve pointed out the State has recently exempted CEQA for habitat restoration and approved a general order to streamline SWRCB permitting of habitat restoration, so the acres of habitat proposed in NDWA should be concerning, especially since there's 1,200 more acres proposed in the current Framework VA than in prior 2018 version. She suggested considering addressing this significant amount of habitat acres and the Delta tunnel project as new issues

when considering adopting a new MOU with DWR on the Bay-Delta Plan update. She also suggested incorporating good neighbor policies as one option, and offered to work with the Agency on other proposals to add to a Bay-Delta Plan MOU with DWR.

Meeting adjourned at 2:48 p.m.

Respectfully submitted by Melinda Terry