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The Little Hoover Commission hearing on Water Governance
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Introduction

Any solutions to almost all of the significant water problems of California require substantial changes in the ways that the state regulates the water it helps to provide to its residents, businesses, industry and agriculture. The same point is true when developing appropriate solution to the vexing problems that face the Delta ecosystem. The status quo, with more than 200 federal, state and local government agencies having some responsibility for 'the Delta' and 'water' has proven to be totally unworkable.

Arguments over water, and who gets to decide what, are as old as the state, and illustrated by some common statements: "it's my water"; "my side should run the water governance system"; "my region is the most important in the state"; "the ecosystem comes first"; 'water for farms, businesses and people come first"……..the list is endless.

The history of battles about California's water and ecosystem show the political dominance of water development and human uses from our founding as a state in 1850, and continuing to about World War II. From that point on, an emerging national and state emphasis on environmental protection --- what is now called protection of the ecosystem --- has emerged as a very high priority of our society.[1]

For most of the modern history of California, major water projects have generated immense controversy. Approval of the federal Central Valley Project by California voters in 1933 was by a slim margin; and it was a similar narrow margin to approve construction of the State Water Project in 1960. Ironically, only the voters' rejection of the Peripheral Canal in 1982, by a 63% to 37% margin, was substantial.

California has been in political and governmental stalemate over water and the Delta policy for almost 50 years; defeat of the Peripheral Canal was just another example of the continuing deadlock.

The Delta Vision Task Force strongly believes that the political stalemate over a more reliable water supply for California, and improvements in the Delta ecosystem is unlikely to be broken by repeating the battles of the last 50 years. It is time to put behind us the trench warfare, where everyone waits for either water developers, or the environmental community, to 'win' the battle and roll over the other side. Privately, most of the water

warriors of California know that an accommodation has to be reached, but many are fearful of saying anything that deviates from dogmatic and historic positions.

There are signs that the battleground is slowing changing. Let's start with some facts.

I. The problems of water supply and usage in California, and the role of the Delta ecosystem, are driven by some basic facts[2]:

- California's supply of water is static; it is not growing.
- Despite successes in some coastal urban areas, state wide per capita urban water use remains at 1970s' levels in California. Because of population growth, overall demands for water are increasing. We are starting to talk seriously about conserving water, but not yet doing much actual conservation.
- California has over-promised its surface water supplies, has no state wide policies regarding ground water use and has weak enforcement of existing public decisions, topics developed further below.
- The Delta ecosystem, by almost any measure, is in serious decline and threatened by catastrophic failure from earthquake, floods, sea level rise, global warming, land subsidence, and urban development. These ecosystem threats equally endanger the current Delta water export system.
- Improving the Delta ecosystem is a legally required condition for improving the water delivery system in California.
- Urbanization pressure will continue to grow in the Delta over the long term. Urban development threatens both a reliable water supply system for the state, and improvement in the Delta ecosystem.
- The current system of governance is incapable of planning, developing, and implementing any substantial new policy to provide reliable water supplies for Californians or protect the Delta ecosystem.

II. The Governor's Delta Vision process. Is it any different than all the other studies?[3]

The Governor's process was established in 2006[4], and attempts to bring together several legislative studies, and the internal review of agencies and departments of the State. It also established the Delta Vision Blue Ribbon Task Force, and asked the Task Force members to make their 'independent' recommendations through a Delta Vision[5] document and a separate Strategic Plan[6].

The ultimate recommendations of the Task Force represent the first comprehensive approach to water and ecosystem, an approach that calls for simultaneous actions in a variety of areas. Equally important, the Task Force recognized that statewide actions involving every region, every citizens and every government agency are called for in order to move ahead.

III. The Delta Vision Task Force Strategic Plan:

A. **Seven (7) goals drive the policy recommendations:**

Delta Vision Strategic Plan Goals

- Make the co-equal goals of water supply reliability and ecosystem restoration the foundation of Delta and water policymaking.
- Recognize and enhance the unique cultural, recreational, and agricultural values of the California Delta as an evolving place, an action critical to achieving the co-equal goals.
- Restore the Delta ecosystem as the heart of a healthy estuary.
- Promote statewide water conservation, efficiency, and sustainable use.
- Build facilities to improve the existing water conveyance system and expand statewide storage, and operate both to achieve the co-equal goals.
- Reduce risks to people, property, and state interests in the Delta by effective emergency preparedness, appropriate land uses, and strategic levee investments.
- Establish a new governance structure with the authority, responsibility, accountability, science support, and secure funding to achieve these goals.

B. **The Governor's Delta Vision Cabinet Committee approved the Strategic Plan and approved virtually all of the recommendation.**

After submission of the Strategic Plan recommendations, the Governor's Cabinet Committee held a number of information hearings and adopted its suggestions of how to implement the Strategic Plan[7].

To the surprise of virtually no one, the Cabinet Committee agreed that major governance changes should be made in the way that California handles its water supply and improvements in the Delta ecosystem --- but decided they needed more time before recommending a particular form of governance!

Largely unnoticed in the fuss over the Cabinet Committee punting on governance was their agreement to all 7 Goals, 20 of the 22 Strategies more than half of the Action Items, and 9 of 10 Short Term actions --- all recommended by the Task Force.

A detailed matrix, itemizing the numerous recommendations of the Task Force, and summarize the positions taken by the Cabinet Committee is being presented separately to the Little Hoover Commission.[8]

C. **Interest groups have signed on the general goals recommended by the Task Force, but carefully hedge their bets by saying that the items they really care about (e.g., a canal, more dams, improvements to the ecosystem, etc.) should be done before the other items.**

The following groups have endorsed these goals directly, or endorsed the Cabinet Committee recommendations, which included all of these goals:

- The Association of California Water Agencies (ACWA)
- NRDC and The Bay Institute
- The Metropolitan Water District of Southern California
- The Bay Area Council
- The Nature Conservancy
- Ducks Unlimited
- Los Angeles Area Chamber of Commerce
- Environmental Defense Fund
- The Contra Costa Council

D. **The California legislature is considering a large number of bills in 2009-10 that deal with the Delta ecosystem and water system reliability; a significant number reflect the work of the Task Force.**

A list of individual bills is beyond the scope of this statement, but SB 12 (Simitian), SB 293 (Pavley) and AB 39 (Huffman) appear likely to be the most comprehensive expression of the Task Force recommendations. The Huffman bill is in skeleton form at this point, but directly focused on our recommendations.

IV. **The Task Force Governance recommendations**.

The Delta Vision Task Force accepted a concept advanced by important interest groups working through our Stakeholder Committee. Our recommendations are for the following:

A. An independent governance body, the California Delta Ecosystem and Water Council (CDEW) should be appointed by the Governor and confirmed by the State Senate for set terms. This body will assume whatever state functions remain from the CalFED process and have clear authority to impose fees on all water diverts, either upstream or downstream, and to utilize revenue bonds as well. The member should not be appointed based on region, political views or interest group affiliation.

B. The governing body should be responsible for adopting a Delta Ecosystem and Water Plan (the Plan), which must be followed by state agencies.

C. In developing the plan, the Council shall "Make the co-equal goals of water supply reliability and ecosystem restoration the foundation of Delta and water policymaking".

D. The Council shall be authorized to determine the consistency or conformity of state agency action with the Plan.

E. An independent Science and Engineering Board shall be created to build on an impressive CalFED science effort, and provide ongoing information needed to meet the objectives of the Strategic Plan.

F. As part of the effort, the existing Delta Protection Council shall be given expanded authority in the secondary zone of the Delta.

G. To implement ecosystem plans in the Delta, a Delta Conservancy should be established, with a strong presence of local representatives.

Some additional questions and issues are essential to any resolution of the water and ecosystem problems of California. Here are three examples, all tied to governance:

- ✓ Should there be a new *Water Utility for California*, designed to operate the State Water Project?

  The Task Force is interested in that idea, but notes that it must also comply with the terms of the Delta Ecosystem and Water Plan, and have members who represent the public, not interests.

- ✓ How can we get the federal government involved in this process?

  Some have suggested that the state should wait for the federal government to decide what they want to do with the Central Valley Project, or wait until they agree with each and every step that should be taken to achieve Delta Vision. The Task Force specifically rejected that approach.

  The Task Force believes that the outline suggested above: a new, independent governance body; development of a Plan; required state agency consistency with the Plan; right of the new agency to determine consistence may lead to positive federal involvement. We were impressed with the history of the federal Coastal Zone Management Act, which directed federal agencies to give deference to state decision-making on ocean policies in state waters. Although this is not state control over federal agencies, nor does it mean all federal monies are spent in accord with state decision, but it has ensured a relatively positive joint planning effort which is worth emulating if at all possible. The federal decision followed impressive voter and legislative actions to protect ocean waters of the state and the lands adjacent to that water.

- ✓ How do water rights fit into this discussion?

  Immediately before completion of our Strategic Plan, the State Water Resources Control Board sent us a 4-page summary of what they knew about 'water rights' in the Delta watershed, that portion of the state which historically drained into the Delta.[9]

  The summary by the Water Board is startling! The total sum of all 6,300 water rights exceeds the average annual flow of the Delta watershed by a

factor of 8.4 times that amount! The sum total exceeds the highest recorded annual flow in the Delta watershed by a factor of 3 times![10]

There is, of course, some double counting in this calculation, and state law does not permit the water board to collect, or demand and enforce the collection of information, if required. Full details are in the report and footnote 10, below.

If 'water rights' mean that the water right holder is entitled to the sum total of the 'right', it is hard to avoid the conclusion that California has promised to deliver far more water than nature provides.

No new dams or new conveyance facilities can make up a gap that large. Scholars suggest that 'water rights' may be a way of allocating a static supply of water. Whatever the correct interpretation, the 'promises' clearly exceed the supply, which explains our persistent hectoring on the need to get serious about conservation and water system efficiency in California.

I hope this has been helpful and I look forward to your question.

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[1] *The Great Thirst: Californians and Water, 1770s-1990s* (1992) Norris Hundley, Jr., University of California Press, Berkeley, California. This book is part of a vast collection of books, reports, studies and arguments about California water and the ecosystem. It is a very good place to start for general background and contextual discussion.

[2] *Really Short DV Strategic Plan Slides* separately distributed to the Commission.

[3] *Delta Vision Blue Ribbon Task Force*, Reports, studies, testimony and letters accumulated during the 20 months of Task Force activity can be found at the Delta Vision Task Force state web site, www.deltavision.ca.gov. After completion of its work, the Task Force reconstituted itself as the Delta Vision Foundation, and information on our current activities can be found at www.deltavisionfoundation.org.

[4] *Executive Order S-17-06*, September 28, 2006, by Governor Arnold Schwarzenegger, http://gov.ca.gov/executive-order/4525/.

[5] *Delta Vision Task Force vision document*, January 17, 2008, http://www.deltavision.ca.gov/BlueRibbonTaskForce/FinalVision/Delta_Vision_Final.pdf.

[6] *Delta Vision Task Force Strategic Plan*, October 2008, http://www.deltavision.ca.gov/StrategicPlanningProcess/StaffDraft/Delta_Vision_Strategic_Plan_standard_resolution.pdf.

[7] *Delta Vision Committee Implementation Report*, December 31, 2008, http://www.deltavision.ca.gov/DV_Committee/Jan2009/08-1231_Delta_Vision_Committee_Implementation_Report.pdf.

[8] *Comparison of Action Recommendations in Task Force Strategic Plan with Recommendations in the Committee Implementation Plan*, January 13, 2009, prepared by Delta Vision Foundation and separately distributed to the Little Hoover Commission, http://www.deltavisionfoundation.org/Comparison_between_Strategic_Plan_and_Committee_Report.pdf.

[9] *Water Rights within the Bay/Delta Watershed*, September 26, 2008, State Water Resources Control Board, copy separately provided to the Little Hoover Commission, p. 3.

[10] Ibid., pp. 3-4.

The mean annual unimpaired or full natural flow in the Delta Watershed between 1921 and 2003 was 29 million acre-feet per annum (AFA), with a maximum of 73 million AFA 9/26/08 in 1983. Unimpaired flow is flow that would be expected in the Delta watershed in the absence of storage and other human developments.

In contrast, the total face value of the approximately 6,300 active water right permits and licenses within the Delta managed by the State Water Board, including the already assigned portion of state filings, is approximately 245 million AFA. There are 100 rights with a face value of 500,000 AFA, or more that account for 84% of the total face value of the water rights within the Delta watershed. The Central Valley Project and State Water Project hold 75 permits and licenses within the Delta watershed that account for 53% of the total face value of the water rights within the watershed. The total face value of the unassigned portion of state filings for consumptive use (excluding state filings for the beneficial use of power) within the Delta watershed is approximately 60 million AFA. This does not mean that this 60 million AFA is hydrologically available for appropriation. Prior to assignment of a state filing, the State Water Board will require that an applicant provide evidence that water is available to support the assignment. Clearly, actual use must be only a small fraction of the face value of these water rights, particularly since face value does not include pre-1914 and riparian water rights. There are three primary reasons why the face value of water rights is greater than actual diversions:

1. When approving a water right application, the State Water Board has to find that water is available for appropriation for the project being proposed. In making that determination, the State Water Board looks at both the demand characteristics associated with the proposed use and the likelihood that supply will be adequate to supply that demand. The State Water Board is required to maximize the beneficial use of water. Historically, the State Water Board has approved permits for agricultural projects if water is available in 50 percent of years, under the condition that water cannot be diverted in years in which there is insufficient supply to satisfy prior vested rights.

2. Water rights are issued based on the maximum rate of diversion (for direct diversion projects) and the maximum annual diversion to storage (for reservoirs and other impoundments). For large storage projects, the maximum annual diversion to storage generally only occurs in the year in which the project initially fills. Most modern water rights include a bypass condition which can limit diversion amounts below the "face value" amount in many years. Some water rights include a condition that limits the amount of water that can be diverted in combination with other water rights. This information is difficult to capture in a database format.

3. Some projects are covered by multiple rights for the same molecules of water. The State Water Board's regulations require that separate water rights be obtained for non-consumptive and consumptive uses of water. Large multi-use reservoirs will have at least two permits as a result, one that allows consumptive uses like recreation at and below the reservoir and one that allows consumptive uses such as municipal and irrigation uses. Similarly, the same molecule of water may be diverted several times by several different

water right holders as it works its way down a river. If the water is not consumptively used, or lost to deep groundwater recharge, it likely returns to a river and is rediverted downstream.

Actual use under existing water rights is clearly a better metric to compare with unimpaired flows than is face value but the State Water Board has limited information on actual use. Comprehensive review and synthesis of the State Water Board's paper files would however provide only a crude estimate of actual historic and current use because of gaps in reporting and unreliability of the data already collected. Finally, there is a linkage between water availability in many surface waters and groundwater pumping but the State Water Board has no information on percolating groundwater pumping in the Delta watershed.