

Agenda Item: 8
Meeting Date: June 8, 2005

JOINT MEETING WITH BAY-DELTA PUBLIC ADVISORY COMMITTEE

DIRECTOR'S REPORT

This report includes updates about: A) the need to defer a discussion about Program Plans until the August meeting; B) Administration-sponsored legislation; and C) CALFED litigation.

A. Draft Program Plans

The Program Plans were scheduled for Authority consideration in June; however, funding for some programs and projects is uncertain because of differences between the budget proposals from the Governor and the Legislature. In addition, the agencies are reviewing their near-term priorities in light of the potential for decreased funding. Therefore, consideration of the draft Program Plans will occur in August once the funding is more certain and agencies can plan their activities for the upcoming year. The Bay-Delta Public Advisory Committee (BDPAC) subcommittees will be reviewing the Plans through July to make a recommendation to BDPAC in August.

B. Legislation

For the first time, the Administration is sponsoring legislation on behalf of the Authority. The two bills before the Legislature are:

AB 1244 (Wolk) – a Federal conformity measure that, in part, eliminates a provision that the Authority would sunset absent Federal reauthorization. That Federal reauthorization was provided by Congress via HR 2828 last year. This bill is awaiting action from the full Assembly. It passed the Assembly Appropriations Committee, 13-5, the Assembly Water, Parks and Wildlife Committee (12-0) and the Assembly Governmental Organization Committee (10-4).

SB 866 (Kehoe) – a water use measurement and reporting proposal authorized by the Authority on April 8, 2004, that seeks to improve and streamline reporting of water use by urban and agricultural water users. This bill is on hold in the Senate Natural Resources and Water Committee.

Other bills of note include:

SB 113 (Machado), which seeks to codify a definition of “beneficiary pays,” a key principle in CALFED Program operations, in State law. This bill is awaiting action from the full Senate. It passed the Senate Appropriations Committee (7-6) and the Senate Natural Resources and Water Committee (7-3).

SB 200 (Machado), which seeks to create a Delta Conservancy. This bill is set for hearing May 26 in the Senate Appropriations Committee. It passed the Senate Natural Resources and Water Committee (9-1).

SB 350 (Machado), to create the San Joaquin River Fund in the State Treasury, which may be used to facilitate implementation of the settlement of the pending lawsuit over Central Valley Project ecosystem restoration efforts. This bill is set for hearing May 26 in the Senate Appropriations Committee. It passed the Senate Natural Resources and Water Committee (7-4).

SB 820 (Kuehl), which the author has been working diligently on to “strengthen water conservation policy; reduce uncertainty about the use and abundance of water resources; and strengthen and integrate water planning and management efforts.” This bill is set for hearing May 26 in the Senate Appropriations Committee. It passed the Senate Natural Resources and Water Committee 7-3.

AB 1245 (Wolk), which seeks to establish the Environmental Water Account in the State Treasury. This bill is on the Assembly Appropriations Committee suspense file. It passed the Assembly Water, Parks and Wildlife Committee (10-1).

AB 797 (Wolk), which would affect Delta Protection Commission governance (spot bill). This bill is on the Assembly Appropriations Committee suspense file. It passed the Assembly Natural Resources Committee (7-3) and the Assembly Committee on Local Government (5-1).

C. Litigation

1. Federal case

Laub v. Babbitt, et al., U.S. District Court, Fresno

Plaintiffs: The California Farm Bureau Federation (Farm Bureau) and several individual farmers.

Defendants: All Federal and State agencies participating in the CALFED Program. The State agencies named in the Farm Bureau’s latest complaint are sued via their executive officers: Governor Schwarzenegger; Michael Chrisman, The Resources Agency (Resources); Terry Tamminen, Environmental Protection Agency (CalEPA); Celeste Cantu, State Water Resources Control Board (SWRCB); Lester Snow, Department of Water Resources (DWR); Ryan Broddrick, Department of Fish and Game (DFG); Peter Rabbon, The Reclamation Board (Rec. Brd.); Margit Aramburu, Delta Protection Commission; Darryl Young, Department of Conservation (DOC); Will Travis, Bay Conservation and Development Commission (BCDC); Sandra Shewry, Department of Health Services (DHS); and A.G. Kawamura, Department of Food and Agriculture (CDFA).

Summary of Case: The Farm Bureau filed this case in September 2000. It alleges that the CALFED Programmatic Environmental Impact Statement/Environmental Impact Report (EIS/EIR) violates National Environmental Policy Act (NEPA) and the Administrative Procedures Act. The Farm Bureau seeks an injunction against all State and Federal actions to implement the Record of Decision (ROD) until an adequate EIS/EIR is prepared. The State defendants are apparently being sued under the theory that the Program is a joint, Federal-State partnership that requires NEPA compliance under Federal law; and, therefore, the Federal Government must comply with NEPA for all State projects, as well as Federal projects.

Current Status: The case is pending in the Federal district court. The district court dismissed an earlier version of the complaint as premature in August 2001. The Court of Appeals reversed that decision in September 2003. The district court will hear the merits of the case on cross motions for summary judgment on the issue of whether the Federal defendants violated NEPA. The State defendants have also raised several jurisdictional defenses, but the parties have agreed to postpone any discovery or adjudication of those issues until a remedies phase, if needed. The plaintiffs and the Federal defendants have filed their cross-motions for summary judgment. The State defendants are in the process of preparing an opposition brief to the plaintiffs' motion; the brief is due on June 24, 2005. Reply briefs are due on or before July 25, 2005. The hearing is scheduled for September 6, 2005.

2. State court cases

Laub v. Davis, et al., Court of Appeal, Third Appellate District (Sacramento)

Appellants/Plaintiffs: The California Farm Bureau Federation and several individual farmers.

Respondents/Defendants: The Resources Agency, Secretary of Resources; CalEPA, CalEPA Secretary.

Summary of Case: The Farm Bureau filed this case in State court after the Federal district court dismissed a California Environmental Quality Act (CEQA) claim that had been part of their original NEPA lawsuit (described above). Defendants won all issues in the trial court and the Farm Bureau appealed. The Farm Bureau alleges that the CALFED Programmatic EIS/EIR violates CEQA and seeks an injunction of all Program activities until the alleged CEQA violations are cured. This case has been coordinated in Sacramento Superior Court with *Regional Council of Rural Counties* (below).

Current Status: The State defendants won on all issues at trial. The case is now on appeal, and the parties' briefing was completed on May 11, 2004. In June 2004, The Nature Conservancy was permitted to file an amicus curiae brief supporting the EIS/EIR. The Farm Bureau's response was filed on July 16, 2004.

Regional Council of Rural Counties v. State, et al., Court of Appeal, Third Appellate District (Sacramento)

Petitioners: Regional Council of Rural Counties, Central Delta Water Agency, South Delta Water Agency, and individual farmers.

Defendants: State of California; The Resources Agency, Secretary of Resources; CalEPA, CalEPA Secretary; (plus real parties in interest: Department of Water Resources, DWR Director; Department of Fish and Game, DFG Director; Patrick Wright [as Director of the CALFED Bay-Delta - Program], and numerous Federal agencies and officers).

Summary of Case: The complaint alleges that the CALFED EIS/EIR violates CEQA and that the Project would harm the Delta. They also contended that the ROD is illegal under several water law theories. This case was coordinated in Sacramento Superior Court with *Laub v. Davis* (above), and the two cases have been consolidated on appeal.

Current Status: The State defendants won on all issues at trial. The case is now on appeal and briefing was completed on May 11, 2004.

California Farm Bureau Federation v. Mike Chrisman, et al. Sacramento Superior Court

Petitioners: California Farm Bureau Federation.

Defendants: The following State agencies were sued in addition to those directors and secretaries in their official capacities: Resources (Michael Chrisman); CalEPA (Terry Tamminen); CDFA (A.G. Kawamura); DWR (Lester Snow), DFG (Loris "Ryan" Broddrick); DHS (Sandra Shewry); California Bay-Delta Authority (Patrick Wright).

Summary of Case: On April 16, 2004, the Farm Bureau filed this CEQA action challenging the adoption of a Final EIS/EIR covering operation of the Environmental Water Account (EWA) through 2007, the end of the first stage of implementation of the CALFED Program. The Farm Bureau alleges the EIS/EIR does not adequately address "agricultural resources" when analyzing impacts, alternatives, mitigation, and other issues regarding operations of the EWA. A large number of State agencies were named in addition to the State agencies actually involved in the EWA, DWR and DFG.

Current Status: The administrative record was fully lodged as of October 7, 2004; and an answer was filed on behalf of DWR and Lester Snow on November 5, 2004. Both parties filed their statement of issues. The State agencies (other than DWR) filed Answers on February 2, 2005.

In light of the recent intervention of the Metropolitan Water District of Southern California and State Water Contractors and a request of Petitioner, California Farm Bureau Federation, to continue the current hearing and briefing schedules, the parties stipulated that the current hearing date of July 1, 2005 be continued to October 7, 2005. The Farm Bureau's opening brief will be due on or before June 3, 2005; the State Respondents and Intervenors' briefs will be due on or before August 5, 2005; and the Farm Bureau's reply brief will be due on or before September 2, 2005.