

Delta Vision

Context Memorandum: Delta Water Management Governance Structure

This context memorandum provides critical information about the governance structure that affects Delta water management (water governance) to support policy making. As they are developed, the context memos will create a common understanding and language about the critical factors in establishing a Delta Vision.

This is an iterative process and this document represents the beginning of a dialogue with you about how best to understand water governance and to inform recommendations by the Delta Vision Blue Ribbon Task Force. You have two weeks to submit comments that may be incorporated into the next iteration.

You may submit your comments in two ways: either online at dv_context@calwater.ca.gov or by mail. If you are using mail, please send your comments to: Delta Vision Context Memo: Water Governance, 650 Capitol Mall, 5th Floor, Sacramento, CA 95814.

Your attributed comment will be posted on the Delta Vision web site (<http://www.deltavision.ca.gov>). Please cite page and line number with specific comments; general comments may be keyed to sections.

Your participation in this iterative process is valuable and important and is greatly appreciated. Thank you for your comments.

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1 *Section 1. General Policy*

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The purpose of this context memorandum is to provide a succinct report on the laws, directives, and overall governance structure that drive the operations and management of water supplies used in or conveyed through the Delta.

The Delta water management governance structure is a complex network of interacting laws and agencies each with overlapping goals and mandates. In some cases, the laws and agencies that shape Delta water management are directed at general Delta protection while other laws and agencies are directed at protecting resources within, or services dependent upon, the Delta. The goals and objectives of these laws and agencies are not always aligned and the result is a complicated interplay of governing structure and regulations.

This context memorandum: (1) describes the water rights laws applicable to Delta water management; (2) outlines the federal and state statutes applicable to water management in the Delta; (3) summarizes implementing agency responsibilities; (4) identifies the implementing agencies regulatory actions that impact Delta water management; and (5) identifies the policy implications of conflict in law and regulatory implementation.

The following fundamental policy questions frame the key issues embodied in this context memo:

- How do governing agencies meet their legal mandates regarding specific resources in the context of multiple demands for the same resources?
- How can local, state, regional, and federal law be reconciled to best meet the water management needs of the Delta?
- How can incongruities in the implementation of laws and regulations as well as planning mechanisms among land use, water, and environmental agencies – even at the same level of government – be reconciled to meet the water management needs of the Delta?
- How can competing public demands for alternative water uses and the desire for water conveyance through the Delta be reconciled, if at all, with the existing water rights framework?

In short, Delta water governance may need to be re-assessed to meet the public objective of sustainable management of the Delta.

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1 Section 2. Summary of Law and Institutions

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The following tables, explained in more detail elsewhere in this memo, illustrate the complexity of interacting laws and agencies that overlap in the Delta.

Federal Law	
U.S. Constitution	
<ul style="list-style-type: none"> • Commerce and Supremacy Clauses • Fifth and Fourteenth Amendments 	
Federal Statutes	
<ul style="list-style-type: none"> • National Environmental Policy Act (NEPA) • Endangered Species Act (ESA) • Clean Water Act (CWA) • Safe Drinking Water Act (SDWA) • Administrative Procedures Act (APA) • Migratory Bird Treaty Act • Fish and Wildlife Coordination Act • Central Valley Project Improvement Act (CVPIA) • National Wild and Scenic Rivers Act 	

State Law	
State Constitution	
<ul style="list-style-type: none"> • Article X, Section 2 	
California Statutes	
<ul style="list-style-type: none"> • California Environmental Quality Act (CEQA) • California Endangered Species Act (CESA) • Delta Protection Act of 1959 • Delta Protection Act of 1992(DPA) • Suisun Marsh Preservation Act • Water Quality Control Act • California Safe Drinking Water Act • Natural Community Conservation Planning Act • California Wild and Scenic Rivers Act 	

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INSTITUTIONS AND AGENCIES with DELTA INTERESTS																																												
FEDERAL GOVERNMENT Bureau of Reclamation (BOR) Federal Emergency Management Agency (FEMA) National Marine Fisheries Service (NMFS) Army Corps of Engineers (USACE) USDA - National Resources Conservation Service Coast Guard National Oceanic & Atmospheric Administration (NOAA)		Department of Defense Fish and Wildlife Services (USFWS) Geological Services (USGS) Department of Homeland Security Department of Transportation (DOT) Environmental Protection Agency (EPA) Federal Energy Regulatory Commission (FERC)																																										
STATE GOVERNMENT Department of Boating and Waterways Business, Transportation and Housing Agency California Bay-Delta Authority CALTRANS Department of Fish and Game Department of Food and Agriculture Department of Water Resources Delta Protection Commission Department of Conservation Office of Emergency Management		Office of Planning and Research San Francisco Bay Conservation & Development Commission State Coastal Conservancy State Insurance Commission State Lands Commission State Parks and Recreation State Reclamation Board State Water Resources Control Board California Environmental Protection Agency																																										
WATER PURVEYORS / WATER USERS / SPECIAL DISTRICTS City, County & Regional Water Districts & Agencies Flood Control Agencies Irrigation Districts Utility Districts Water Conservation Districts Water Contractors		COURTS Federal Courts State Courts																																										
		LOCAL JURISDICTIONS <table border="1"> <thead> <tr> <th colspan="2">Local Cities</th> <th>Cities outside of Delta</th> </tr> </thead> <tbody> <tr> <td>Bethel Island</td> <td>Brentwood</td> <td>Bay Area Cities</td> </tr> <tr> <td>Clarksburg</td> <td>Courtland</td> <td>Central Valley Cities</td> </tr> <tr> <td>Franklin</td> <td>Freeport</td> <td>Los Angeles Basin Cities</td> </tr> <tr> <td>Hood</td> <td>Isleton</td> <td>Sacramento Valley Cities</td> </tr> <tr> <td>Lathrop</td> <td>Lodi</td> <td></td> </tr> <tr> <td>Locke</td> <td>Manteca</td> <td></td> </tr> <tr> <td>Oakley</td> <td>Orwood</td> <td></td> </tr> <tr> <td>Rio Vista</td> <td>Ryde</td> <td></td> </tr> <tr> <td>Stockton</td> <td>Tracy</td> <td></td> </tr> <tr> <td>Thornton</td> <td>Walnut Grove</td> <td></td> </tr> </tbody> </table> <table border="1"> <thead> <tr> <th colspan="2">Counties</th> </tr> </thead> <tbody> <tr> <td>Alameda</td> <td>San Joaquin</td> </tr> <tr> <td>Contra Costa</td> <td>Solano</td> </tr> <tr> <td>Sacramento</td> <td>Yolo</td> </tr> </tbody> </table>		Local Cities		Cities outside of Delta	Bethel Island	Brentwood	Bay Area Cities	Clarksburg	Courtland	Central Valley Cities	Franklin	Freeport	Los Angeles Basin Cities	Hood	Isleton	Sacramento Valley Cities	Lathrop	Lodi		Locke	Manteca		Oakley	Orwood		Rio Vista	Ryde		Stockton	Tracy		Thornton	Walnut Grove		Counties		Alameda	San Joaquin	Contra Costa	Solano	Sacramento	Yolo
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		OTHER INTERESTED PARTIES Chambers of Commerce Conservation Leagues Environmental Justice Groups Farmers Farm Bureaus Hunters/Fishers Labor Unions Land Trusts Local Residents Flood Control Associations Agricultural Commissions																																										
		Ports Public Health Groups Recreational Users Sportsman's Organizations Scientific & Educational Organizations Tourism Industries Utility Companies / Providers Wildlife Conservation Groups Suisun Resources Conservation District Governmental / County Associations Water Quality Control Boards																																										

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1 *Section 3. Water Rights*

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3 A water right in California provides that a water right holder has a right to use water
4 but not a right to the ownership of the water itself.¹ Other states, such as Texas, have
5 more expansive property rights in water. The use of water supplies in California is
6 derived from either a right to divert water or a contract entitlement. This section
7 describes the ability to use water under these legal mechanisms.

8

9 California water law is complex, borrowing principles from century-old mining
10 customs, Roman law, English common law, judicial and administrative decisions,
11 statutes, and local ordinances. Adding to the complexity, California recognizes several
12 categories of water rights, each relating to various characteristics of land and water.
13 Surface water rights are generally classified as riparian, appropriative, or contract rights,
14 while water rights for underground waters are generally classified as overlying or
15 appropriative.² The type of right that attaches to a water source is important, particularly
16 in light of the regulatory structure linked to the different rights and the existing demands
17 for agriculture, municipal and industrial uses, and the environment. All water rights are
18 further limited by Article X, Section 2 of the California Constitution which requires that,
19 among other principles, that water be beneficially and reasonably used.

20

21 **Riparian Rights.** Riparian rights confer upon the owner of land contiguous to the
22 watercourse the right to a reasonable use of water for beneficial purposes on their land.
23 The water right is considered part of the land itself and the water need not be regularly
24 used in order for the right to exist. Riparian landowners share the water supply in their
25 watershed. With some exceptions, riparian rights are correlative with other riparian
26 rights on the same water source. The correlative nature of the right requires all riparians
27 to proportionally reduce their uses in times of scarcity in order to ensure some water use
28 for all. In most cases, riparian rights are superior to appropriative rights from the same
29 source, so that all appropriators must cease usage in times of short supply before any
30 riparian is required to curtail usage.

31

32 **Appropriative Rights.** The doctrine of prior appropriation is a system of allocation
33 that confers the best right to the person who first puts the water to beneficial use –
34 generally characterized as “first in time, first in right.” There are generally two types of
35 appropriative rights in California – those rights arising before 1914 and those rights

¹ Water rights are considered “usufructuary.” Water Code section 102 provides, “All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law.”

² This list does not show all types of water rights in California. Other types of rights including pueblo Federal Reserved rights, and prescriptive rights may exist but are not discussed here.

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1 arising after 1914. “Pre-1914 rights” are not subject to the permitting authority of the
2 State Water Resources Control Board. In other words, none of the SWRCB’s
3 application and permitting requirements are applicable to pre-1914 water rights. Pre-
4 1914 rights are subject to the jurisdiction of the courts.³ Post-1914 rights are subject to
5 the SWRCB’s application, permitting, and licensing requirements.

6
7 **Water Code Section 1485.** Water Code Section 1485 provides that a city that
8 disposes wastewater into the San Joaquin River may divert an amount of water up to the
9 amount of the wastewater released. A precedent was recently set by the City of
10 Stockton for the diversion of water from the San Joaquin River pursuant to section 1485
11 of the California Water Code. This type of diversion can only apply to wastewater
12 disposed of in the San Joaquin River as there are no other provisions in the water code
13 for this type of arrangement.

14
15 **Area of Origin.** A body of water rights law includes the area of origin, county of
16 origin, watershed of origin, and Delta protection statutes. These laws were developed to
17 retain the priority to subsequent appropriative uses within an area, county, or watershed,
18 as against out-of-basin permitted appropriations. Specifically, they were enacted to
19 protect local water users from appropriations by the Central Valley Project and State
20 Water Project for use in areas outside the area of origin or the areas immediately
21 adjacent to the areas of origin. Thus, area of origin statutes consist of a priority right to
22 satisfy current uses, as well as a prospective priority right to satisfy future beneficial uses
23 within a specifically identified geographic area.⁴

24
25 The Delta Protection Act incorporates the area of origin protection to the Delta.
26 Specifically, the Act declares as a policy of the state “that no person, corporation or
27 public or private agency or the State or the United States should divert water from the
28 channels of the Sacramento-San Joaquin Delta to which the users within said Delta are
29 entitled.”⁵

30
31 **The Public Trust Doctrine.** The Public Trust Doctrine obligates the state to protect
32 public trust resources. The Public Trust Doctrine requires the state to take the public
33 trust into account in the planning and allocation of water resources and to protect public
34 trust uses where feasible and consistent with the public interest. The key issue here is
35 that holders of valid appropriative rights have no vested rights that are barred from

³ The SWRCB has some jurisdiction over these rights as well with respect to enforcement and statutory determination of rights.

⁴ The area of origin statutes are addressed in the *State Water Resources Control Board Cases* (2006) 136 Cal.App.4th 674.

⁵ Water Code sections 12201 and 12203.

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1 reconsideration of the diversion's propriety under the Public Trust Doctrine. Accordingly,
2 the public trust doctrine provides authority for the State to reconsider existing water
3 rights for trust purposes.⁶

4
5 **Groundwater rights.** In California, groundwater that is not flowing in a known and
6 definite channel is not regulated under a statewide permit system. Property owners with
7 land overlying groundwater can simply drill wells and extract water for use on the
8 overlying land. Much like riparian water users, the overlying users have shared water
9 rights. The correlative nature of the right requires all overlying users to proportionally
10 reduce their uses in times of scarcity in order to ensure some water use for all. Under
11 this doctrine, there are no junior or senior overlying users who gain priority by pumping
12 first or pumping more.

13
14 If there are groundwater supplies in a basin that are surplus to the overlying owners'
15 needs, then this water is available for appropriation by non-overlying users for use on
16 non-overlying lands. Most public water purveyors that use groundwater utilize the
17 appropriative right. Here, the hydrology of the basin is an important factor. If the
18 appropriation of groundwater for the non-overlying use will not cause the basin to
19 become overdrafted or injure other users of water, then an appropriation of groundwater
20 for use on non-overlying property is allowed. If the groundwater is flowing in a known
21 and definite underground channel, a permit to appropriate the water is required from the
22 State Water Resources Control Board.⁷

23
24 **Contract rights.** Aside from rights to divert surface water under the regulatory
25 scheme described above, entitlements to surface water supplies can be obtained
26 through contracting with entities that have state granted appropriative rights. Two
27 entities – the Bureau of Reclamation through the Federal Central Valley Project (CVP)
28 and the California Department of Water Resources through the State Water Project
29 (SWP) – hold water rights and deliver water to end users through contracts. The CVP
30 and SWP contractors' have contractual rights as specified in the contracts. Under the
31 contracts, the annual water allocations are based upon statewide hydrology and joint
32 operations of the CVP and SWP projects. More often than not, the water allocations to
33 each contractor in a normal year are less than the maximum water supplies identified in

⁶ The Public Trust Doctrine is recognized and analyzed in *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.

⁷ Groundwater overdraft is defined as the condition of a groundwater basin or subbasin in which the amount of water withdrawn by pumping exceeds the amount of water that recharges the basin over a period of years, during which the water supply conditions approximate average conditions (DWR 1998). Overdraft can be characterized by groundwater levels that decline over a period of years and never fully recover, even in wet years.

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1 the contracts. Accordingly, these water supplies may vary significantly on a year to year
2 basis.

3 4 *Section 4. Constitutional and Statutory Law Affecting Delta Water* 5 *Management*

6
7 Further complicating Delta water supply management are numerous Federal and
8 State laws and regulations which affect water use in the Delta and water conveyance
9 through the Delta . These laws implicate Delta water supply management by creating
10 new needs and uses for the scarce resource. The following table lists these laws, which
11 are briefly described in this section.

Federal Law	State Law
U.S. Constitution <ul style="list-style-type: none">• Commerce and Supremacy Clauses• Fifth and Fourteenth Amendments Federal Statutes <ul style="list-style-type: none">• National Environmental Policy Act (NEPA)• Endangered Species Act (ESA)• Clean Water Act (CWA)• Safe Drinking Water Act (SDWA)• Administrative Procedures Act (APA)• Migratory Bird Treaty Act• Fish and Wildlife Coordination Act• Central Valley Project Improvement Act (CVPIA)• National Wild and Scenic Rivers Act	State Constitution <ul style="list-style-type: none">• Article X, Section 2 California Statutes <ul style="list-style-type: none">• California Environmental Quality Act (CEQA)• California Endangered Species Act (CESA)• Delta Protection Act of 1959• Delta Protection Act of 1992(DPA)• Suisun Marsh Preservation Act• Water Quality Control Act• California Safe Drinking Water Act• Natural Community Conservation Planning Act• California Wild and Scenic Rivers Act

12
13 **Federal law.** Federal law includes the United States Constitution and federal
14 statutes. These laws both empower and constrain federal agencies in their oversight,
15 governance and regulatory abilities to shape Delta water management and use.

16
17 U.S. Constitution: Commerce and Supremacy Clauses. Commonly known as the
18 Commerce Clause, Article I, Section 8, of the United States Constitution states that
19 “Congress shall have Power . . . To regulate Commerce . . . among the several States . .
20 . . .” Many Federal environmental statutes derive their authority to regulate private and
21 State government actions from the Commerce Clause, which has generally been
22 interpreted to give the Federal government broad power over activities that affect
23 interstate commerce. Without express authority from Congress or an indication that
24 Congress did not intend to occupy the field of a particular regulatory area, the
25 Supremacy Clause in Article VI of the United States Constitution prohibits States from
26 enacting legislation that is different than, or frustrates the purposes of, Federal statutes.

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1 U.S. Constitution: Fifth and Fourteenth Amendments. The Fifth Amendment of the
2 United States Constitution requires just compensation be paid for private property taken
3 for public use. The Fifth Amendment directly applies to takings by the Federal
4 government and is applicable to takings by State and local governments via the
5 Fourteenth Amendment. Takings can be characterized as either a permanent physical
6 occupation or a regulatory taking. Decisions by the federal Court of Claims could impact
7 Delta water management if enforcement of environmental laws results in diversion
8 restrictions for which the water right holder must be compensated. In *Tulare Lake Basin*
9 *Water Storage Dist. v. U.S.*, 49 Fed. Cl. 313 (2003) the court held that water use
10 restrictions resulting from mitigation under the Federal Endangered Species Act
11 constituted compensable takings under the Fifth Amendment. Other Court of Claims
12 opinions, however, including the recently decided *Stockton East Water District* case, the
13 *Klamath Irrigation Districts* case, and the *Casitas Municipal Water District* case,⁸ have
14 denied takings claims related to water supply reductions caused by Endangered Species
15 Act compliance. Furthermore, the *Casitas* opinion declines to follow the holding of the
16 *Tulare* opinion. In short, this is an unsettled area of law.

17
18 **Federal Statutes.** The Federal government's authority to regulate activities in the
19 Delta is derived from two predominant sources: (1) the Federal government's ability to
20 regulate the actions of its own agencies; and (2) the Federal government's ability to
21 regulate private and State behavior under the Commerce and Supremacy Clauses of the
22 United States Constitution. Most environmental statutes enacted by Congress regulate
23 behavior of private persons and State governments as well as activities of Federal
24 agencies.

25
26 Endangered Species Act (ESA) [16 U.S.C. §§ 1531 to 1544]. The purpose of the
27 Endangered Species Act (ESA) is to conserve the ecosystems upon which endangered
28 species and threatened species depend and to provide a program for the conservation
29 of such endangered species and threatened species. The Department of Interior is
30 required to list species as threatened or endangered based upon certain criteria. At the
31 time that a species is listed, and to the maximum extent prudent and determinable, the
32 Department of Interior must designate a critical habitat for the listed species.

33 For actions of federal agencies, consultation with the Department of Interior (commonly
34 referred to as a Section 7 Consultation) is required to insure that any action authorized,
35 funded, or carried out by the agency is not likely to jeopardize the continued existence of
36 any endangered or threatened species or result in the destruction or adverse
37 modification of critical habitat.

⁸ Citations omitted
Water Governance

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1 The listing of threatened and endangered species present in the Delta, including
 2 the delta smelt and winter-run Chinook salmon, pursuant to the ESA, significantly affects
 3 actions by all water users. Most notably, the Delta has been designated as a critical
 4 habitat for the Delta Smelt and winter-run Chinook salmon. The following table, though
 5 not exhaustive, is a list of the species included under ESA as threatened or endangered
 6 that can impact water management and use in the Delta.⁹ Additional species continue
 7 to be petitioned for listing, including most recently, the petition to list polar bears as a
 8 threatened species. This particular listing may implicate a proposed Delta Vision's affect
 9 on greenhouse gas emissions.

Species Listed as Threatened or Endangered	
Invertebrates	Plants
Lange's metalmark butterfly (E)	large-flowered fiddleneck (E)
Conservancy fairy shrimp (E)	succulent (fleshy) owl's-clover (T)
longhorn fairy shrimp (E)	soft bird's-beak (E)
vernal pool fairy shrimp (T)	Contra Costa wallflower (E)
valley elderberry longhorn beetle (T)	Contra Costa goldfields (E)
delta green ground beetle (T)	Colusa grass (T)
vernal pool tadpole shrimp (E)	Antioch Dunes evening-primrose (E)
Fish	slender Orcutt grass (T)
green sturgeon (T)	Sacramento Orcutt grass (E)
delta smelt (T)	Solano grass (Crampton's tuctoria) (E)
Central Valley steelhead (T)	Mammals
Central Valley spring-run chinook salmon (T)	salt marsh harvest mouse (E)
winter-run chinook salmon, Sacramento River (E)	riparian brush rabbit (E)
Amphibians	San Joaquin kit fox (E)
California tiger salamander, central population (T)	Birds
California red-legged frog (T)	bald eagle (T)
Reptiles	California clapper rail (E)
Alameda whipsnake [=striped racer] (T)	California least tern (E)
giant garter snake (T)	
Species with Critical Habitat Proposed or Designated in the Delta	
Alameda whipsnake	Contra Costa wallflower
Antioch Dunes evening-primrose	delta green ground beetle
CA tiger salamander, central population	delta smelt
California red-legged frog	large-flowered fiddleneck
Central Valley fall/late fall-run chinook	longhorn fairy shrimp
Central Valley spring-run chinook	Solano grass (Crampton's tuctoria)
Central Valley steelhead	Suisun thistle
Colusa grass	vernal pool fairy shrimp
Conservancy fairy shrimp	vernal pool tadpole shrimp
Contra Costa goldfields	winter-run chinook salmon
Candidate Species	
Central Valley fall/late fall-run chinook salmon (C)	

E – Listed as endangered under the federal or state Endangered Species Acts
 T – Listed as threatened under the federal or state Endangered Species Acts

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National Environmental Policy Act (NEPA) [42 U.S.C. §§ 4321 to 4370f]. NEPA directs federal agencies to prepare an environmental impact statement (EIS) for all major federal actions that may have a significant effect on the environment. It states that it is

⁹ This table was derived from data from the Sacramento Office of the Fish and Wildlife Service
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1 the goal of the federal government to use all practicable means, consistent with other
2 considerations of national policy, to protect and enhance the quality of the environment.
3 It is a procedural law requiring all federal agencies to consider the environmental
4 impacts of their proposed actions during the planning and decision-making processes.
5 An EIS includes the environmental impacts of the proposed action, any adverse
6 environmental effects which cannot be avoided should the proposal be implemented,
7 alternatives to the proposed action, the relationship between local short-term uses of
8 man's environment and the maintenance and enhancement of long-term productivity,
9 and any irreversible and irretrievable commitments of resources which would be involved
10 in the proposed action should it be implemented. NEPA does not generally require
11 federal agencies to adopt mitigation measures or alternatives provided in the EIS.

12 The Clean Water Act (CWA) [33 U.S.C. §§ 1251 to 1387]. The purpose of the CWA is
13 the restoration and maintenance of chemical, physical and biological integrity of the
14 nation's waters. The CWA prohibits the discharge of any pollutant to navigable waters
15 from any point source without a permit. The CWA uses a combination of technology-
16 based and ambient water quality-based approaches to regulate the discharges of
17 pollutants into navigable waters. The CWA also allows states to promulgate more
18 stringent standards than those set by the EPA. Regulation under the CWA has
19 numerous implications to the Delta.

20 Section 404 of the Clean Water Act requires that a permit must be obtained from the
21 United States Army Corps of Engineers (the "Corps") before any dredged or fill material
22 is discharged into the waters of the United States. The guidelines for complying with
23 Section 404(b)(1) were developed by the United States Environmental Protection
24 Agency (the "EPA"). These guidelines require, among other things, that an alternatives
25 analysis be performed and that the selected project be the Least Environmentally
26 Damaging Practicable Alternative (the "LEDPA"). Section 404(r) of the Clean Water Act
27 provides an exception to the requirement that a Section 404 Permit must be obtained.
28 The availability of this exception requires that the following criteria be satisfied:

- 29 • The project must be a Federal project specifically authorized by Congress;
- 30 • An EIS must be prepared pursuant to NEPA;
- 31 • The EIS must consider the guidelines developed under section 404(b)(1);
- 32 • The EIS must be submitted to Congress before the actual discharge of dredged
33 or fill material in connection with the construction of the project; and
- 34 • The EIS must be submitted to Congress prior to either the authorization of the
35 project or the appropriation of funds for the project.

36 The Safe Drinking Water Act (SDWA) [42 U.S.C. §§ 300f to 300j-26]. The SDWA
37 directs the EPA to set maximum levels of primary and secondary contaminants in

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1 drinking water supplied by public water systems serving at least 25 individuals. The
2 SDWA can affect the actions of State and Federal agencies even though the SDWA
3 does not directly regulate water quality in the Delta. Because water in the Delta is used
4 by public water systems, water quality in the Delta must be maintained so treatment to
5 SDWA standards is practicable.

6
7 Administrative Procedure Act (APA) [5 U.S.C. §§ 551 to 559, 701 to 706]. The
8 Administrative Procedure Act (APA) of 1946 governs the way in which administrative
9 agencies of the United States federal government may propose and establish
10 regulations. The APA also sets up a process for federal courts to directly review agency
11 decisions. As such, it is an important source of authority within federal administrative
12 law. The APA applies to both independent agencies and executive department agencies,
13 and their subdivisions.

14
15 Migratory Bird Treaty Act [16 U.S.C. §§ 703 to 712]. This act implements various
16 treaties for the protection of migratory birds and prohibits the “taking” (broadly defined) of
17 birds protected by those treaties without a permit. The Secretary of the Interior
18 determines conditions under which a taking may occur, and criminal penalties are
19 provided for unlawfully taking or transporting protected birds. Liability imposed by this
20 act was one of several factors leading to the decision to close the San Luis Drain and
21 Kesterson Reservoir.

22
23 Fish and Wildlife Coordination Act [16 U.S.C. §§ 661 to 667e]. The Fish and Wildlife
24 Coordination Act expresses congressional policy to protect the quality of the aquatic
25 environment as it affects the conservation, improvement, and enjoyment of fish and
26 wildlife resources. Under this act, any federal agency that proposes to control or modify
27 any body of water, or to issue a permit allowing control or modification of a body of
28 water, must first consult with the USFWS and with the head of the agency exercising
29 administration over the wildlife resources of the state where construction will occur, with
30 a view to the conservation of wildlife resources. This act works independently of the
31 Endangered Species Act but its purposes are similar: to recognize the contribution of
32 wildlife resources to the nation and to coordinate water-resource development programs
33 with wildlife conservation and rehabilitation. Specifically, the Secretary of the Interior is
34 authorized to provide assistance to, and cooperate with federal, state, and public or
35 private agencies and organizations in: developing, protecting, rearing and stocking all
36 species of wildlife and their habitat; controlling losses from disease or other causes;
37 minimizing damages from overabundant species; providing public shooting and fishing
38 areas, including easements across public lands; and carrying out other necessary
39 measures.

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1 Reclamation Act of 1902 [Pub. L. No. 57-161, 32 Stat. 388]. On June 17, 1902,
2 Congress passed the Reclamation Act to “[a]ppropriat[e] the receipts from the sale and
3 disposal of public lands in certain States and Territories to the construction of irrigation
4 works for the reclamation of arid lands.” The Reclamation Act and its progeny
5 established the authority for financing of the Central Valley Project (CVP).¹⁰ This body
6 of law (collectively called “Reclamation Law”) defined the purposes of Reclamation
7 projects, uses for Reclamation water, and provisions for repayment of Federal
8 investment.

9
10 The CVP was most recently reauthorized in 1992 with the enactment of the Central
11 Valley Project Improvement Act (the “CVPIA”). The CVPIA modified the CVP’s
12 purposes. After the CVPIA, the CVP is to be used “first, for river regulation,
13 improvement of navigation, and flood control; second for irrigation and domestic uses
14 and fish and wildlife mitigation, protection and restoration purposes; and third for power
15 and fish and wildlife enhancement.”¹¹ Another important provision of CVPIA was
16 Section 3406(b)(2) that authorized and directed the Secretary of the Interior to “dedicate
17 and manage annually 800,000 acre-feet of Central Valley Project yield . . .” for various
18 environmental purposes. This is commonly referred to as “b(2) water.”

19
20 Magnuson-Stevens Fishery Conservation and Management Act (MSA) [16 U.S.C. §
21 1801 et seq.]. The Magnuson-Stevens Fishery Conservation and Management Act
22 (MSA) governs the conservation and management of ocean fishing. It establishes
23 exclusive U.S. management authority over all fishing within the exclusive economic
24 zone, all anadromous fish throughout their migratory range except when in a foreign
25 nation’s waters and all fish on the Continental Shelf. The Act also establishes eight
26 Regional Fishery Management Councils responsible for the preparation of fishery
27 management plans to achieve the optimum yield from U.S. fisheries in their regions.
28 The MSA requires Federal agencies to consult with the Secretary of Commerce
29 regarding any action or proposed action authorized, funded, or undertaken by the
30 agency that may adversely affect Essential Fish Habitat (EFH).

31
32 **State Law.**¹² Numerous statutes implicate water management in the Delta. The
33 Water Code captures many of those statutes but other authorities, such as the California

¹⁰ The Swampland Act of 1850 was a primary piece of legislation enabling reclamation of the Delta as well. This law ceded federal swamplands to the states to encourage their reclamation. California received 2,192,506 acres, including 500,000 acres within the Delta. Acquisitions were limited at first to 320 acres but then doubled to 640 acres. The limits were repealed in 1868. (Envisioning Futures, PPIC, 2007).

¹¹ The 1937 Rivers and Harbors Act specified that the dams and reservoirs of the CVP “shall be used, first, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses; and, third, for power.”

¹² Article X, Section 2 of the California Constitution is addressed in an earlier section of this Document
Water Governance

Context Memorandum: Delta Water Management Governance Structure

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1 Environmental Quality Act and the California Endangered Species Act also assert
2 influence over water supplies. These statutes, among others, are described in this
3 section.

4
5 California Environmental Quality Act (CEQA) [Public Resources Code § 21000 et
6 seq.]. CEQA applies to discretionary government actions defined as projects. A project
7 is defined a whole action which has the potential for resulting in a direct physical change
8 to the environment or a reasonably foreseeable indirect physical change to the
9 environment. CEQA compliance is required for any proposed actions by state agencies
10 that would change water management in the Delta. CEQA requires an Initial Study of
11 the environmental impacts of the project. If the Initial Study determines that the project,
12 without mitigation, may have a significant effect on the environment, an Environmental
13 Impact Report should be prepared; otherwise an agency may prepare a Negative
14 Declaration or Mitigated Negative Declaration.

15
16 CEQA provides that certain findings are considered significant, including a
17 substantial reduction in the habitat of a fish or wildlife species; causing a fish or wildlife
18 population to drop below self-sustaining levels; threatening to eliminate a plant or animal
19 community; substantially reducing the number or restricting the range of an endangered,
20 rare or threatened species.

21
22 California Endangered Species Act [Fish and Game Code §§ 2050 et seq.]. The
23 California Endangered Species Act (CESA) is similar to the federal ESA. A listing may
24 be initiated upon petition by an individual, organization or DFG to the Fish and Game
25 Commission (Commission). Listing decisions are ultimately made by the Commission
26 based upon scientific analysis provided by DFG staff. The Commission considers the
27 following factors when reviewing a listing request: (1) present or threatened modification
28 or destruction of habitat; (2) competition; (3) predation; (4) disease; (5) overexploitation
29 by collectors; or (6) other natural occurrences or human-related activities. Ultimately,
30 the Commission may list a species as rare, threatened or endangered.

31
32 Incidental Take. All State lead agencies are required to consult with DFG about
33 projects that impact State listed species. DFG is required to render an opinion as to
34 whether the proposed project jeopardizes a listed species and to offer alternatives to
35 avoid jeopardy. State agencies must adopt reasonable alternatives unless there are
36 overriding social or economic conditions that make such alternatives infeasible. DFG
37 may permit an individual, organization, state agency, research institution, or other
38 eligible entity to “take” threatened or endangered species in a manner that is incidental
39 to an otherwise lawful activity. For projects causing incidental take of a listed species,
40 DFG is required to specify reasonable and prudent measures to minimize the taking.

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1 Any take of a listed species that results from activities that are carried out in compliance
2 with these measures is not prohibited.

3
4 Consistency Determinations. Many California species are both federally listed and
5 State listed (see previous table). CESA directs DFG to coordinate with the USFWS and
6 NMFS in the consultation process so that consistent and compatible opinions or findings
7 can be adopted by both federal and State agencies. An example of the issues involved
8 in coordinating efforts under CESA and the ESA is illustrated in the recent efforts of
9 DWR and DFG to comply with an Alameda County Superior Court order to stop the
10 SWP Delta export operations within 60 days unless the state complies with
11 environmental laws designed to protect endangered fish. The court ruled that the DWR
12 was in violation of the CESA because it never received state permits to take listed
13 species. Rather than apply for a state permit, DWR has asked DFG to endorse federal
14 permits that would allow DWR to take the listed species. DFG may grant “consistency
15 determinations” for species that are listed under both federal Endangered Species Act
16 and CESA.

17
18 The complication in this proposed action is that the State’s legal standard of
19 CESA considers any taking as a jeopardy to the listed species, whereas the current
20 federal permit is based more upon protecting the species from becoming extinct (i.e. the
21 federal permit allows more fish to be taken). Furthermore, the federal permit to allow
22 take at the Delta pumps is being rewritten as a result of legal challenges.

23
24 Suisun Marsh Preservation Act (Public Resources Code § 29000 et seq.) The
25 SMPA directed the San Francisco Bay Conservation and Development Commission
26 (BCDC) and the Department of Fish and Game to “preserve the integrity and assure
27 continued wildlife use” of Suisun Marsh. The Act required the BCDC to develop a plan
28 to preserve and protect Suisun Marsh from urban encroachment. In 1977, the State
29 adopted the plan and appointed the BCDC as the state agency with regulatory
30 jurisdiction over Suisun Marsh. The Act states that land within Suisun Marsh should be
31 acquired for public use or resource management if it is suitable for restoration or tidal
32 managed marsh.

33
34 Delta Protection Act of 1959 [Water Code § 12220 et seq.] In 1959, in response to
35 the development of the Central Valley Project and State Water Project, the legislature
36 enacted the Delta Protection Act (DPA). The DPA included two important provisions that
37 remain relevant to Delta water management: (1) the legal definition of the Delta; and (2)
38 protection of the in-Delta users from exports from the Delta.

39

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1 Delta Protection Act of 1992 [Public Resources Code § 29700 et seq.]. In
2 September of 1992, the California Legislature declared that the Sacramento-San
3 Joaquin Delta, consisting of approximately 738,000 acres, is a natural resource of
4 statewide, national, and international significance, containing irreplaceable resources
5 and that it is the policy of the State to recognize, preserve, and protect those resources
6 for the use and enjoyment of current and future generations. Accordingly, the
7 Legislature enacted these sections to better achieve these objectives. The Act includes
8 mandates for the designation of primary and secondary zones within the legal Delta,
9 creation of a Delta Protection Commission, and completion of a Land Use and Resource
10 Management Plan for the Primary Zone. The Act has recently been relied upon to
11 address land-use planning issues in Yolo County but has not been used to address
12 water management issues in the Delta.

13
14 Regulation of Water Rights Under the Water Code. The Water Code provisions
15 regulating water rights are derived primarily from the Water Commission Act of 1913.
16 The Water Code requires permits for all appropriations of water commencing after the
17 Act took effect in 1914. When the appropriation is complete, the State Water Board
18 issues a license confirming that the appropriative right has vested. Both the Department
19 of Water Resources and the United States Bureau of Reclamation hold water right
20 permits for their respective State Water Project and federal Central Valley Project. Their
21 water right permits include terms and conditions regulating the diversion, rediversion,
22 places of use, and purposes of use of water that flows into the Delta and is exported
23 from the Delta by the two Projects. The State Water Board retains continuing authority
24 to review and update the permits to respond to changing conditions in the Delta and to
25 implement flow-dependent water quality objectives in the Water Quality Control Plan for
26 the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. Most recently, the State
27 Water Board amended the permits by order of Water Right Decision D-1641.¹³

28
29 Porter-Cologne Water Quality Control Act [Water Code § 13000 et seq.]. This Act is
30 California's comprehensive water quality control law and is a complete regulatory
31 program designed to protect water quality and beneficial uses of the State's water. The
32 Act requires the adoption of water quality control plans by the State's nine Regional
33 Water Quality Control Boards for watersheds within their regions. These plans are
34 reviewed and updated triennially, and their adoption is subject to the approval of the
35 State Water Board and ultimately the federal EPA. Moreover, pursuant to Porter-

¹³ D-1641 is discussed later in this document.
Water Governance

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1 Cologne, these basin plans shall become part of the California Water Plan¹⁴, when such
2 plans have been reported to the Legislature (Section 13141, California Water Code).

3
4 The legally defined Delta is subject to the jurisdiction of both the San Francisco Bay
5 Regional Board and the Central Valley Regional Board. Actions and planning from
6 these boards require coordination.

7
8 California Safe Drinking Water Act [Water Code §
9 116270 et seq.] In 1976, California enacted its own
10 Safe Drinking Water Act, requiring the Department of
11 Health Services (DHS) to regulate drinking water,
12 including: setting and enforcing federal and State
13 drinking water standards; administering water quality
14 testing programs; and administering permits for public
15 water system operations. In 1989, significant
16 amendments to the California act incorporated the new
17 federal safe drinking water act requirements into
18 California law, gave DHS discretion to set more stringent maximum contaminant levels
19 (MCLs) for constituents of concern, and recommended public health goals for
20 contaminants.

Delta Source Water Constituents of Concern for Drinking Water
Bromide
Total organic carbon
Chloride
Nutrients
Total dissolved solids
Pathogens
Turbidity

21
22 Natural Community Conservation Planning Act [Fish and Game Code § 2800 et
23 seq.] Adopted in 1991, California's Natural Community Conservation Planning Act
24 establishes a program to identify the habitat needs of species before they become listed
25 as threatened or endangered, and to develop appropriate voluntary conservation
26 methods compatible with development and growth. Participants in the program develop
27 plans to protect certain habitat and will ultimately enter into agreements with DFG to
28 ensure that the plans will be carried out. Plans must be created so that they are
29 consistent with endangered species laws.

30
31 California Wild and Scenic Rivers Act [Public Resources Code § 5093.50 et seq.] In
32 1972, the Legislature passed the California Wild and Scenic Rivers Act, declaring that
33 specified rivers possess extraordinary scenic, recreational, fishery, or wildlife values, and
34 should be preserved in a free flowing state for the benefit of the people of California.
35 The Act declared that such use of the rivers would be the highest and most beneficial
36 use within the meaning of Article X, Section 2 of the California Constitution. The act

¹⁴ Existing water quality basin plans prepared by the State Water Board and RWQCB will eventually become part of the California Water Plan. In the future, those basin plans along with other water quality reports will be integrated regionally into the Water Plan's water portfolios.

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1 prohibits construction of any dam, reservoir, diversion, or other water impoundment on a
2 designated river. Diversions needed to supply domestic water to residents of counties
3 through which the river flows may be authorized, if the Secretary for Resources
4 determines that the diversion will not adversely affect the river's free-flowing character.
5 The major difference between the national and State acts is that if a river is designated
6 wild and scenic under the State act, the Federal Energy Regulatory Commission (FERC)
7 can still issue a license to build a dam on that river, thus overriding the State system.

8
9 **Defining Familiar Regulatory Actions.** The task of implementing federal and state
10 laws is given to the executive agencies within government. The executive agencies, or
11 implementing agencies, develop plans and programs to meet the requirements of
12 enacted law. The following is a partial list of the regulations and regulatory actions that
13 have legal significance in Delta water management and use.

14
15 The 1995 Regional Water Quality Control Plan. The 1995 Plan consisted of
16 establishment, for the waters within a specified area, of the beneficial uses to be
17 protected, of designated beneficial uses of the water, water quality objectives to protect
18 the beneficial uses, and a program of implementation. The 1995 Plan addresses the
19 interrelated fields of water quality and water supply and plans for their coordination. The
20 Bay-Delta Plan was updated in 2006.

21
22 SWRCB Decision 1641. SWRCB D-1641 implements the 1995 Bay-Delta Water
23 Quality Control Plan (1995 Plan). Specifically, D-1641 amends certain water rights by
24 assigning responsibilities to the persons or entities holding those rights to meet the
25 objectives of the 1995 Plan.

26
27 D-1641 began the process of implementing the 1995 Plan. D-1641 does the
28 following things:

- 29
30 1. Accepts the contributions that settlement agreements have to meet the 1995
31 Plan objectives
32 2. Continues interim responsibility for those flow objectives for DWR and
33 Reclamation
34 3. Approves the change in point of diversion of the CVP and SWP in the Southern
35 Delta
36 4. Approves changes in the place of use of CVP water
37 5. Recognizes VAMP and approves the water rights changes needed to conduct
38 VAMP

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1 6. Recognizes a number of agreements between entities involved in Delta water
2 issues

3 VAMP. The Vernalis Adaptive Management Plan (VAMP) is recognized and
4 accommodated in D-1641. VAMP is a large-scale experimental management program
5 designed to protect juvenile Chinook salmon migrating from the San Joaquin River
6 through the Sacramento-San Joaquin Delta. VAMP is a scientific experiment to
7 determine how salmon survival rates change in response to alterations in San Joaquin
8 River flows and SWP and CVP exports with the installation of the Head of Old River
9 Barrier. VAMP correlates average outflows at Vernalis with Average SWP and CVP
10 exports from the Delta.

11 A summary of VAMP experimental test conditions over the past six years is below:
12

13

Year	VAMP Period	Average Vernalis Flow (cfs)	Average SWP/CVP Exports (cfs)
2000	4/15-5/15	5,869	2,155
2001	4/20 – 5/20	4,220	1,420
2002	4/15-5/15	3,300	1,430
2003	4/15-5/15	3,235	1,446
2004	4/15-5/15	3,155	1,331
2005	5/1-5/31	10,390	2,986

14

15 CVPIA B(2) Actions. Implementation of the Central Valley Project Improvement Act
16 (CVPIA) affects water management in the Delta. As described above, the CVPIA
17 changed the relative priorities of various CVP purposes elevating fish and wildlife
18 protection as equal to water supply for agricultural and urban uses. In addition, CVPIA
19 dedicated 800,000 acre-feet of CVP yield annually, referred to as “b(2) water,” for the
20 purpose of implementing the fish, wildlife, and habitat restoration purposes and
21 measures and to assist the State of California to protect the waters of the Bay-Delta
22 Estuary. The CVPIA also committed water to wildlife refuges south of the Delta and
23 promoted water transfers to help meet project purposes.

24

25 The following is an excerpt from the CALFED Operations Coordination Group’s
26 summary of 2006 b(2) operations:¹⁵

27

- 28 • Closed Delta cross channel gates December 3, 2005 to protect emigrating
29 juvenile salmonids from the Sacramento basin, including listed Chinook salmon
30 and steelhead.

¹⁵ This summary was obtained from the following web site:
http://www.woco.water.ca.gov/calfedops/notes/2006/dec/final_wy06_b2_actions.pdf
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- 1 • Maintained the Sacramento River at approximately 5,000 cfs in December to
2 maintain habitat conditions for Chinook salmon and steelhead
- 3 • Reduced Delta exports to approximately 6,000 cfs (combined) from April 26 –
4 May 2, 2006 to protect emigrating juvenile San Joaquin basin salmon.
- 5 • Reduced Delta exports May 3 – June 2, 2006 to protect juvenile Chinook salmon,
6 delta smelt and conduct the VAMP experiment, which examines the relationship
7 between Vernalis flows, export levels, and survival of emigrating juvenile San
8 Joaquin basin salmon.
- 9 • Maintained a reduced Delta export level of 6,000 cfs (combined) from June 3 - 21
10 to help protect emigrating juvenile San Joaquin basin salmon.

11 Overall, the operations group noted that due to the wet conditions in Water Year
12 2006 only 422,000 AF of (b)(2) water was used for fish actions, and approximately
13 195,000 AF was banked in Shasta Reservoir. The remaining 183,000 AF was made
14 available for other CVP project purposes.

15 Biological Opinion on the Long-term CVP and SWP OCAP. In October of 2004, the
16 NMFS issued a biological opinion (BO) for the State and federal operations under
17 OCAP. This BO superseded any previous BO issued for OCAP. The issuance of a BO,
18 as required under ESA Section 7 consultation, sets forth allowances for incidental take
19 of protected species, as well as establishes non-discretionary actions to minimize any
20 take. The October 2004 BO is well over 200 pages and is based upon a Biological
21 Assessment provided by Reclamation and DWR earlier the same year. Illustrative
22 excerpts from the conditions of the BO are provided below:

23
24 Reclamation and DWR have proposed to operate CVP and SWP
25 facilities in accordance with either plans, agreements, or specific
26 criteria outlined in this biological opinion. Total upstream plus
27 Delta losses above the current baseline, due to the proposed
28 action, are estimated at 7 percent for Sacramento River winter-run
29 Chinook salmon, 10 percent for Central Valley springrun Chinook
30 salmon, and 18 percent for Central Valley steelhead in all but
31 critically dry water year conditions. (p. 211)

32 In the accompanying formal biological opinion, NOAA Fisheries
33 has determined that the anticipated level of take associate with
34 proposed project operations is not likely to result in jeopardy to the
35 continued existence of Sacramento River winter-run Chinook
36 salmon, Central Valley spring-run Chinook salmon, or Central
37 Valley steelhead. (p. 212)

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1 NOAA Fisheries believes the following reasonable and prudent
2 measures are necessary and appropriate to minimize take of
3 Sacramento River winter-run Chinook salmon, Central Valley
4 spring-run Chinook salmon, and Central Valley steelhead [*which is*
5 *followed by approximately 26 pages of non-discretionary*
6 *measures listed in the BO*]. (p. 212).
7

8 Monterey Agreement. In 1994, DWR and certain representatives of the SWP
9 contractors agreed to a set of principles, known as the Monterey Agreement, to settle
10 long-term water allocation disputes, and to establish a new water management strategy
11 for the SWP. The disputes focused on the phrasing of Article 18 of the SWP contracts,
12 which addresses the allocation of shortages in water supply, and particularly under what
13 circumstances the initial reductions to agricultural use should be imposed prior to
14 reducing allocations to urban contractors. The Monterey Agreement resolved the
15 allocation controversy by proposing contract revisions to eliminate initial agricultural use
16 cutbacks and specifying that all project water was to be in proportion to contract
17 amounts.
18

19 DWR has been operating the SWP consistent with the provision of the Monterey
20 Amendment since 1996. However, a lawsuit filed in December 1995 challenged the
21 adequacy of the 1995 Monterey Agreement EIR. In 2000, the court held that the EIR
22 failed to adequately analyze the impacts of deleting Article 18(b) (the provision for
23 reallocation of water among contractors in the event of a defined permanent water
24 shortage) and directed that a new EIR be prepared. The court held the lack of an
25 environmental analysis of eliminating Article 18(b) deprived public agencies and the
26 public of information essential to understanding the environmental consequences of the
27 provision's elimination, including the potential effect on land use planning decisions.
28 DWR is expecting a Draft EIR in the summer of 2007.
29

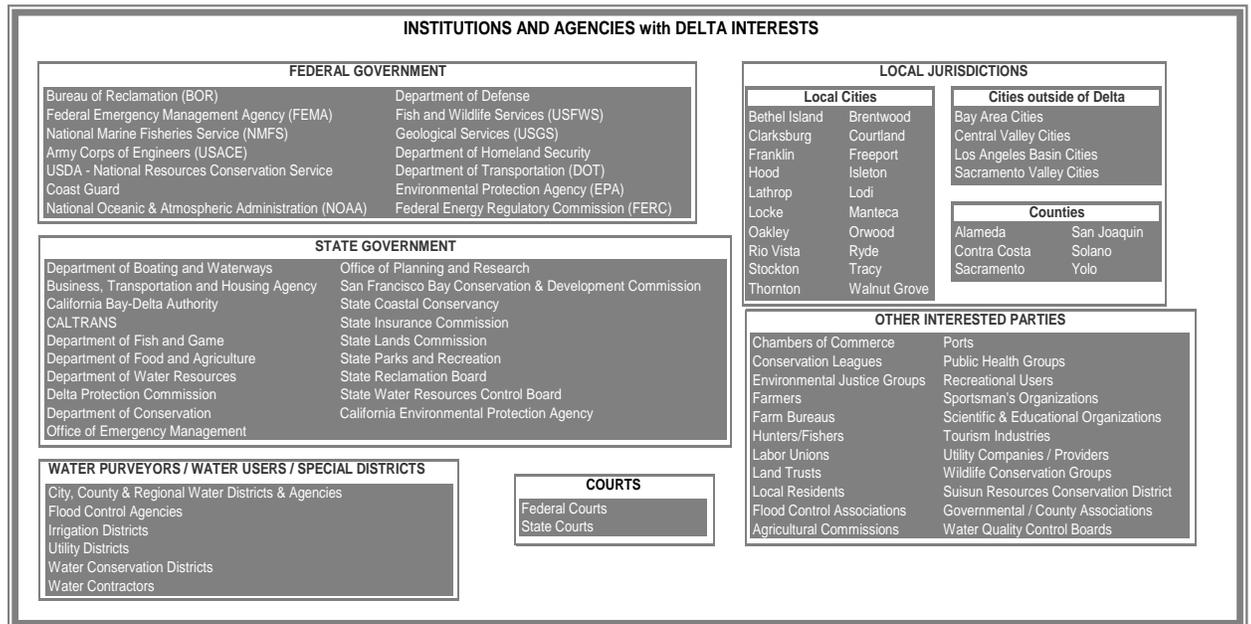
30 The Bay Delta Conservation Plan. The Bay Delta Conservation Plan (BDCP) is
31 intended to be a conservation plan prepared to meet the requirements of the ESA,
32 CESA, and the NCCPA.¹⁶ The goal of the Plan is to provide for the conservation and
33 management of aquatic species and regulatory assurances related to water supply
34 reliability and water quality for the Delta. The BDCP is intended to result in take permits
35 from state and federal agencies for BDCP covered activities (e.g. water operations,
36 storage, conveyances, and management in the Delta). The Plan may also provide the
37 basis of Section 7 and Section 10 ESA compliance. The goal of the BDCP is to provide
38 for the conservation of "covered species" including both listed and non-listed species.

¹⁶ The NCCPA is the Natural Community Conservation Planning Act described in section 3.2.
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- 1 **Institutional Framework.** As evident by the figure below, a large number of
- 2 institutions play a key role in the enforcement of the aforementioned laws that implicate
- 3 the management and use of water in the Delta.
- 4



- 5 **Federal government.** Federal agencies are charged with execution of federal
- 6 mandates and regulations. Some federal agencies have duties to carry out certain
- 7 actions, projects and programs, while others are purely regulatory in nature. Actions and
- 8 projects often require coordination between multiple agencies.
- 9

- 10 **State government.** As illustrated in the figure above, numerous State entities affect
- 11 Delta management. Many of those listed play a significant role in management of water
- 12 supplies including the Department of Water Resources, Bay-Delta Authority, Department
- 13 of Fish and Game, State Water Resources Control Board, State Reclamation Board,
- 14 California Environmental Protection Agency, Delta Protection Commission and
- 15 Department of Boating and Waterways. Coordination between numerous State
- 16 agencies is often required for actions, programs and projects that affect management of
- 17 the Delta. In addition, State agencies are often required to consult with federal agencies
- 18 to ensure compliance with federal regulations.
- 19

- 20 **Local jurisdictions (cities and counties).** Numerous cities and counties adjacent to
- 21 the Delta divert water directly from the Delta for their water supplies and therefore have
- 22 a direct interest in its management. In addition to laws and regulations affecting
- 23 management of water supplies, land use is governed by local jurisdictions' general plans
- 24 and zoning, and within some areas is regulated by the Delta Protection Act and the

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1 Suisun Marsh Preservation Act. Cities and counties outside of the Delta region, such as
2 cities in southern California, receive their water supplies from the Delta through contracts
3 for water from the State Water Project and Central Valley Project or through transfer
4 agreements.

5
6 Water purveyors/Water users/Special districts. Numerous water purveyors, water
7 users and special districts have an interest in management of water supplies in and
8 through the Delta. The various forms of water districts that provide water to urban
9 customers, irrigation districts that supply water to agricultural users, utility districts and
10 conservation districts are all formed for different purposes that may conflict. Many are
11 local to the Delta while others receive water through the State Water Project and Central
12 Valley Project.

13
14 Other interested parties. Other interested parties that do not receive water from the
15 Delta or otherwise have a governance role in its management can exert significant
16 political and legal pressure on management of water supplies in and through the Delta.
17 Environmental protection, support of local economies, preservation of recreational uses
18 and promotion of local economies are some of the objectives of these entities.

19
20 Courts. Federal and State courts also exercise jurisdiction of Delta water
21 management and use. The Federal courts generally address issues of federal law and
22 federal water contracts while the state courts generally address issues of state law. The
23 federal courts jurisdiction over interpretations of the various federal statutes and
24 constitutional provisions are important considerations in Delta planning. Similarly, the
25 state court interpretations of state law issues – particularly as applied to water rights and
26 water planning – may also be major components in the overall management of Delta
27 water supplies.

28
29 **Conflicts in regulatory systems.** The fundamental concern in water management
30 and use in the Delta is the interplay of law and regulations among local, regional, state,
31 and federal agencies. This interplay manifests through seemingly conflicting laws
32 enacted by different government entities. The interplay also develops in the
33 management of land use, environmental, and water resources within a single
34 government entity or among agencies at the same level of government.

35
36 Federal Supremacy, Sovereign Immunity, and State Authority over Federally-Held
37 Water Rights. Governance in the United States is based on a system under which
38 federal and state governments are granted specific powers. The United States
39 Constitution and federal statutes both limit and empower the Federal government, while
40 the remaining powers not delegated to the federal government or prohibited by it are

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1 reserved to state governments. It is sometimes necessary to decide whether the federal
2 or state government has power over a particular subject matter when federal and state
3 regulatory schemes seem to conflict. Under section 8 of the 1902 Reclamation Act,
4 water rights held by agencies of the United States are subject to regulation under state
5 water right laws, except to the extent that a state requirement directly conflicts with a
6 clear Congressional directive.¹⁷ However, under the federal Endangered Species Act, a
7 holder of a pre-1914 water right may be required to curtail water diversions to protect the
8 habitat of a listed species. Does the federal government's power to protect endangered
9 species trump California's water rights scheme, or can both regulatory schemes coexist?

10

11 **Incongruity in implementing law and regulations.** Government laws and
12 regulations affecting management of water supplies which are executed and enforced by
13 governmental agencies sometimes regulate other agencies. Further, agencies
14 regulating the same subject matter need to coordinate to ensure that their methods do
15 not conflict.

16

17 ***Section 5. References***

18 *To be developed.*

¹⁷ *California v. United States* (1978) 438 U.S. 645.
Water Governance