

Delta Vision

## **Context Memorandum: Institutional Governance Affecting Delta Water Management**

This context memorandum provides critical information about the institutional governance 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](mailto: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, 5<sup>th</sup> 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.

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

## 1 *Section 1. General Polic*

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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 twisted interplay of governing structure and regulations that complicate coordinated and effective Delta water management.

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; (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 incongruencies 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 water rights be protected in light of competing public demands for alternative water uses and the need for water conveyance through the Delta?

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

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

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## 2 *Section 2. Water Rights*

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4 A water right in California is a usufructuary right meaning that a water right holder  
5 has the right to use water but not a right to the *corpus* of the water.<sup>1</sup> Other states, such  
6 as Texas, have more expansive property rights in water. The use of water supplies in  
7 California is derived from either a right to divert water or a contract entitlement. This  
8 section describes the ability to use water under these legal mechanisms.

9

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

21

22 **Riparian Rights.** Riparian rights confer upon the owner of land contiguous to the  
23 watercourse the right to a reasonable and beneficial use of water on his land. The water  
24 right is considered part of the land itself and the water need not be regularly used in  
25 order for the right to exist. Riparian landowners share the water supply in their  
26 watershed. No riparian has a priority right over another riparian water user and no  
27 riparian is entitled to more water than another riparian. The correlative nature of the  
28 right requires all riparians to communally reduce their uses in times of scarcity in order to  
29 ensure some water use for all. Each riparian right is superior to any appropriative right  
30 (regardless of the appropriator's pre-1914 status) in that appropriators must curtail  
31 usage in times of short supply before any riparian is required to curtail usage.

32

33 **Appropriative Rights.** The doctrine of prior appropriation is a system of allocation  
34 that confers the best right to the person who first puts the water to beneficial use –  
35 generally characterized as “first in time, first in right.” There are generally two types of  
36 appropriative rights in California – those rights arising before 1914 and those rights  
37 arising after 1914. “Pre-1914 rights” are not subject to the jurisdiction of the State Water

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<sup>1</sup> Legally, “corpus” is the property for which a trustee is responsible. In this case, the State of California is responsible for all water in the state and grants the right to use water to various entities. This idea provides a segue into the discussion of the Public Trust Doctrine later in this document

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

1 Resources Control Board. In other words, none of the SWRCB's application and  
2 permitting requirements are applicable to pre-1914 water rights. Pre-1914 rights are  
3 subject to the jurisdiction of the courts. Post-1914 rights are subject to the SWRCB's  
4 application, permitting, and licensing requirements.

5

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

13

14 Area of Origin. A whole body of water rights law – mostly untested – is the area of  
15 origin, county of origin, watershed of origin, and Delta protection statutes. These laws  
16 were developed to retain the priority to subsequent appropriative uses within an area,  
17 county, or watershed, as against out-of-basin permitted appropriations. Specifically,  
18 they were enacted to protect local water users from out of basin appropriations from the  
19 Central Valley Project and State Water Project. Thus, area of origin rights consist of a  
20 priority right to satisfy present uses, as well as a priority right to satisfy future beneficial  
21 uses within a specifically identified geographic area.

22

23 The Delta Protection Act grants area of origin protection to the Delta. Specifically,  
24 the Act declares as a policy of the state “that no person, corporation or public or private  
25 agency or the State or the United States should divert water from the channels of the  
26 Sacramento-San Joaquin Delta to which the users within said Delta are entitled.<sup>2</sup> This  
27 statute has never been addressed in a court and there are ambiguities within the body of  
28 law that will require resolution.

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<sup>2</sup> Water Code sections 12201 and 12203.

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

1           **The Public Trust Doctrine.** The Public Trust Doctrine obligates the state to  
2 preserve “trust resources” for current and future generations. This relatively recent  
3 doctrine is a judicially superimposed right upon the California system of water rights.  
4 The Public Trust Doctrine requires the state to take the public trust into account in the  
5 planning and allocation of water resources and to protect public trust uses where  
6 feasible and consistent with the public interest. The key issue here is that holders of  
7 valid appropriative rights have no vested rights that are barred from reconsideration of  
8 the diversion’s propriety under the Public Trust Doctrine. Accordingly, the public trust  
9 doctrine provides some means for the State to reconsider existing water rights for trust  
10 purposes.

11  
12           **Groundwater rights.** In California, groundwater is not regulated under a statewide  
13 permit system. Property owners with land overlying groundwater can simply drill wells  
14 and extract water for use on the overlying land. Much like riparian water users, the  
15 overlying users have shared water rights. The correlative nature of the right requires all  
16 overlying users to communally reduce their uses in times of scarcity in order to ensure  
17 some water use for all. Under this doctrine, there are no junior or senior overlying users  
18 who gain priority by pumping first or pumping more.

19  
20           If there are groundwater supplies in a basin that are surplus to the overlying owners’  
21 needs, then this water is available for appropriation by non-overlying users for use on  
22 non-overlying lands. Most public water purveyors that use groundwater utilize the  
23 appropriative right. Here, the hydrology of the basin is the determining factor. If the  
24 appropriation of groundwater for the non-overlying use will not cause the basin to  
25 become overdrafted or injure other users of water, then an appropriation of groundwater  
26 for use on non-overlying property is allowed. Groundwater overdraft is defined as the  
27 condition of a groundwater basin or subbasin in which the amount of water withdrawn by  
28 pumping exceeds the amount of water that recharges the basin over a period of years,  
29 during which the water supply conditions approximate average conditions (DWR 1998).  
30 Overdraft can be characterized by groundwater levels that decline over a period of years  
31 and never fully recover, even in wet years.

32  
33           **Contract rights.** Aside from rights to divert surface water under the regulatory  
34 scheme described above, entitlements to surface water supplies can be obtained  
35 through contracting with entities that have state granted appropriative rights. Two  
36 entities – the Bureau of Reclamation through the Federal Central Valley Project (CVP)  
37 and the California Department of Water Resources through the State Water Project  
38 (SWP) – hold water rights that are delivered to end users through contracts. The CVP  
39 and SWP contractors’ water rights are derived from amounts specified in the contracts  
40 and the annual allocations that are based upon statewide hydrology and joint operations  
41 of the CVP and SWP projects. More often than not, the water allocations to each

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

1 contractor in a normal year are below the water supplies identified in the contracts.  
2 Accordingly, these water supplies may significantly vary on a year to year basis, and  
3 hence, may potentially be unreliable.

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

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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 that  
11 are briefly described in this section.

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

State Law
California Statutes
<ul style="list-style-type: none"><li>• California Environmental Quality Act (CEQA)</li><li>• California Endangered Species Act (CESA)</li><li>• Delta Protection Act (DPA)</li><li>• Water Quality Control Act</li><li>• California Safe Drinking Water Act</li><li>• Natural Community Conservation Planning Act</li><li>• California Wild and Scenic Rivers Act</li></ul>

14  
15 **Federal law.** Federal law has a myriad of classifications. Two of these  
16 classifications are discussed below: the United States Constitution and federal statutes.  
17 From these laws, numerous agencies are both empowered and constrained in their  
18 oversight, governance and regulatory abilities that shape Delta water management and  
19 use.

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

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

1 Supremacy Clause in Article VI of the United States Constitution prohibits States from  
2 enacting legislation that is different than, or frustrates the purposes of, Federal statutes.

3

4 U.S. Constitution: Fifth and Fourteenth Amendments. The Fifth Amendment of the  
5 United States Constitution requires just compensation be paid for private property taken  
6 for public use. The Fifth Amendment directly applies to takings by the Federal  
7 government and is applicable to takings by State and local governments via the  
8 Fourteenth Amendment. Takings can be characterized as either a permanent physical  
9 occupation or a regulatory taking. Recent court decisions could impact Delta water  
10 management if enforcement of environmental laws results in diversion restrictions for  
11 which the water right holder must be compensated consistent with the holding in *Tulare*  
12 *Lake Basin Water Storage Dist. v. U.S.*, 49 Fed. Cl. 313 (2003). In *Tulare Lake*, the  
13 court held that water use restrictions resulting used as mitigation under the Federal  
14 Endangered Species Act constituted compensable takings under the Fifth Amendment.

15

16 In other cases, like the recently decided *Stockton East Water District* case, the  
17 *Klamath Irrigation Districts* case, and the *Casitas Municipal Water District* case,<sup>3</sup> the  
18 Federal Claims Courts have denied takings claims related to water supply reductions  
19 caused by Endangered Species Act compliance. In short, this is an unsettled area of  
20 law.

21

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

29

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

37

38 For actions of federal agencies, consultation with the Department of Interior  
39 (commonly referred to as a Section 7 Consultation) is required to insure that any

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<sup>3</sup> Citations omitted  
Water Governance

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

1 action authorized, funded, or carried out by the agency is not likely to jeopardize  
 2 the continued existence of any endangered or threatened species or result in the  
 3 destruction or adverse modification of critical habitat.

4  
 5 The listing of threatened and endangered species present in the Delta,  
 6 including the delta smelt and winter-run Chinook salmon, pursuant to the ESA,  
 7 significantly affects actions by all water users. Most notably, the Delta has been  
 8 designated as a critical habitat for the Delta Smelt and winter-run Chinook  
 9 salmon. The following table is a list of the species included under ESA as  
 10 threatened or endangered that can impact water management and use in the  
 11 Delta.

12

Species Listed as Threatened or Endangered	
<b>Invertebrates</b>	<b>Plants</b>
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)
<b>Fish</b>	slender Orcutt grass (T)
green sturgeon (T)	Sacramento Orcutt grass (E)
delta smelt (T)	Solano grass (Crampton's tuctoria) (E)
Central Valley steelhead (T)	<b>Mammals</b>
Central Valley spring-run chinook salmon (T)	salt marsh harvest mouse (E)
winter-run chinook salmon, Sacramento River (E)	riparian brush rabbit (E)
<b>Amphibians</b>	San Joaquin kit fox (E)
California tiger salamander, central population (T)	<b>Birds</b>
California red-legged frog (T)	bald eagle (T)
<b>Reptiles</b>	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)	

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

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

1            National Environmental Policy Act (NEPA) [42 U.S.C. §§ 4321 to 4370f]. NEPA  
2 directs federal agencies to prepare an environmental impact statement (EIS) for all  
3 major federal actions that may have a significant effect on the environment. It states that  
4 it is the goal of the federal government to use all practicable means, consistent with  
5 other considerations of national policy, to protect and enhance the quality of the  
6 environment. It is a procedural law requiring all federal agencies to consider the  
7 environmental impacts of their proposed actions during the planning and decision-  
8 making processes. An EIS includes the environmental impacts of the proposed action,  
9 any adverse environmental effects which cannot be avoided should the proposal be  
10 implemented, alternatives to the proposed action, the relationship between local short-  
11 term uses of man's environment and the maintenance and enhancement of long-term  
12 productivity, and any irreversible and irretrievable commitments of resources which  
13 would be involved in the proposed action should it be implemented. NEPA does not  
14 generally require federal agencies to adopt mitigation measures or alternatives provided  
15 in the EIS.

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

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

- 35  
36            • The project must be a Federal project specifically authorized by Congress;  
37            • An EIS must be prepared pursuant to NEPA;  
38            • The EIS must consider the guidelines developed under section 404(b)(1);  
39            • The EIS must be submitted to Congress before the actual discharge of dredged  
40            or fill material in connection with the construction of the project; and

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

- 1           • The EIS must be submitted to Congress prior to either the authorization of the  
2           project or the appropriation of funds for the project.

3           The Safe Drinking Water Act (SDWA) [42 U.S.C. §§ 300f to 300j-26]. The SDWA  
4           directs the EPA to set maximum levels of primary and secondary contaminants in  
5           drinking water supplied by public water systems serving at least 25 individuals. The  
6           SDWA can affect the actions of State and Federal agencies even though the SDWA  
7           does not directly regulate water quality in the Delta. Because water in the Delta is used  
8           by public water systems, water quality in the Delta must be maintained so treatment to  
9           SDWA standards is practicable.

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

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

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

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

1 areas, including easements across public lands; and carrying out other necessary  
2 measures.

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

11  
12 The CVP was most recently reauthorized in 1992 with the enactment of the Central  
13 Valley Project Improvement Act (the “CVPIA”). The CVPIA modified the CVP’s  
14 purposes. After the CVPIA, the CVP is to be used “first, for river regulation,  
15 improvement of navigation, and flood control; second for irrigation and domestic uses  
16 and fish and wildlife mitigation, protection and restoration purposes; and third for power  
17 and fish and wildlife enhancement.”<sup>4</sup> Another important provision of CVPIA was Section  
18 3406(b)(2) that authorized and directed the Secretary of the Interior to “dedicate and  
19 manage annually 800,000 acre-feet of Central Valley Project yield . . .” for various  
20 environmental purposes. This is commonly referred to as “b(2) water.”

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

33  
34 **State Statutes.** *Introductory text to be written.*

35  
36 California Environmental Quality Act (CEQA) [Public Resources Code § 21000 et  
37 seq.]. CEQA applies to discretionary government actions defined as projects. A project  
38 is defined a whole action which has the potential for resulting in a direct physical change

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<sup>4</sup> 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.”

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

1 to the environment or a reasonably foreseeable indirect physical change to the  
2 environment. CEQA compliance is required for any proposed actions by state agencies  
3 that would change water management in the Delta. CEQA requires an Initial Study of  
4 the environmental impacts of the project. If the Initial Study determines that the project,  
5 without mitigation, may have a significant effect on the environment, an Environmental  
6 Impact Report should be prepared; otherwise an agency may prepare a Negative  
7 Declaration or Mitigated Negative Declaration.

8  
9 CEQA provides that certain findings are considered significant, including a  
10 substantial reduction in the habitat of a fish or wildlife species; causing a fish or wildlife  
11 population to drop below self-sustaining levels; threatening to eliminate a plant or animal  
12 community; substantially reducing the number or restricting the range of an endangered,  
13 rare or threatened species.

14  
15 California Endangered Species Act (CESA) [Fish and Game Code §§ 2050 et seq.]  
16 The California Endangered Species Act is similar to the federal ESA. Listing decisions  
17 are made by the California Department of Fish and Game (DFG). All State lead  
18 agencies are required to consult with DFG about projects that impact State listed  
19 species. DFG is required to render an opinion as to whether the proposed project  
20 jeopardizes a listed species and to offer alternatives to avoid jeopardy. State agencies  
21 must adopt reasonable alternatives unless there are overriding social or economic  
22 conditions that make such alternatives infeasible. For projects causing incidental take of  
23 a listed species, DFG is required to specify reasonable and prudent measures to  
24 minimize the taking. Any take of a listed species that results from activities that are  
25 carried out in compliance with these measures is not prohibited. Many California  
26 species are both federally listed and State listed (see table below). CESA directs DFG  
27 to coordinate with the USFWS and NMFS in the consultation process so that consistent  
28 and compatible opinions or findings can be adopted by both federal and State agencies.

29  
30 An example of the issues involved in coordinating efforts under CESA and the  
31 federal ESA, is illustrated in the recent efforts of DWR and DFG to comply with an  
32 Alameda County Superior Court order to stop the SWP's Delta export operations within  
33 60 days unless the state complies with environmental laws designed to protect  
34 endangered fish. The court ruled that the DWR was in violation of the CESA because it  
35 never received state permits to take listed species. Rather than apply for a state permit,  
36 DWR has asked DFG to endorse federal permits that provide allowance for the taking of  
37 the listed species.

38  
39 The complication in this proposed action is that the State's legal standard of CESA  
40 considers any taking as a jeopardy to the listed species, whereas the current federal  
41 permit is based more upon protecting the species from becoming extinct (i.e. the federal

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

1 permit allows more fish to be taken). Furthermore, the federal permit to allow take at the  
2 Delta pumps is being rewritten as a result of legal challenges.  
3 Delta Protection Act of 1992 [Public Resources Code § 29700 et seq.]. In  
4 September of 1992, the California Legislature declared that the Sacramento-San  
5 Joaquin Delta, consisting of approximately 738,000 acres, is a natural resource of  
6 statewide, national, and international significance, containing irreplaceable resources  
7 and that it is the policy of the State to recognize, preserve, and protect those resources  
8 for the use and enjoyment of current and future generations. Accordingly, the  
9 Legislature modified the Delta Protection Act of 1959 to better achieve these objectives.  
10 The Act includes mandates for the designation of primary and secondary zones within  
11 the legal Delta, creation of a Delta Protection Commission, and completion of a Land  
12 Use and Resource Management Plan for the Primary Zone. The Act has recently been  
13 relied upon to address land-use planning issues in Yolo County but has not been used to  
14 address water management issues in the Delta.

15  
16 Porter-Cologne Water Quality Control Act [Water Code § 13000 et seq.]. This Act is  
17 California's comprehensive water quality control law and is a complete regulatory  
18 program designed to protect water quality and beneficial uses of the State's water. The  
19 Act requires the adoption of water quality control plans by the State's nine Regional  
20 Water Quality Control Boards for watersheds within their regions. These plans are  
21 nominally reviewed and updated triennially, and their adoption is subject to the approval  
22 of the SWRCB and ultimately the federal EPA. Moreover, pursuant to Porter-Cologne,  
23 these basin plans shall become part of the California Water Plan<sup>5</sup>, when such plans have  
24 been reported to the Legislature (Section 13141, California Water Code).

25  
26 The legally defined Delta is subject to the jurisdiction of both the San Francisco Bay  
27 Regional Board and the Central Valley Regional Board. Actions and planning from  
28 these boards require coordination.

29  
30 California Safe Drinking Water Act [Water Code §  
31 116270 et seq.]. In 1976, California enacted its own  
32 Safe Drinking Water Act, requiring the Department of  
33 Health Services (DHS) to regulate drinking water,  
34 including: setting and enforcing federal and State  
35 drinking water standards; administering water quality  
36 testing programs; and administering permits for public  
37 water system operations. In 1989, significant

<b>Delta Source Water Constituents of Concern</b>
Bromide
Total organic carbon
Chloride
Nutrients
Total dissolved solids
Pathogens
Turbidity

<sup>5</sup> Existing water quality basin plans prepared by the SWRCB 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.

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

1 amendments to the California act incorporated the new federal safe drinking water act  
2 requirements into California law, gave DHS discretion to set more stringent maximum  
3 contaminant levels (MCLs) for constituents of concern, and recommended public health  
4 goals for contaminants.

5  
6 Natural Community Conservation Planning Act [Fish and Game Code § 2800 et  
7 seq.]. Adopted in 1991, California's Natural Community Conservation Planning Act  
8 establishes a program to identify the habitat needs of species before they become listed  
9 as threatened or endangered, and to develop appropriate voluntary conservation  
10 methods compatible with development and growth. Participants in the program develop  
11 plans to protect certain habitat and will ultimately enter into agreements with DFG to  
12 ensure that the plans will be carried out. Plans must be created so that they are  
13 consistent with endangered species laws.

14  
15 California Wild and Scenic Rivers Act [Public Resources Code § 5093.50 et seq.] In  
16 1972, the Legislature passed the California Wild and Scenic Rivers Act, declaring that  
17 specified rivers possess extraordinary scenic, recreational, fishery, or wildlife values, and  
18 should be preserved in a free flowing state for the benefit of the people of California.  
19 The Act declared that such use of the rivers would be the highest and most beneficial  
20 use within the meaning of Article X, Section 2 of the California Constitution. The act  
21 prohibits construction of any dam, reservoir, diversion, or other water impoundment on a  
22 designated river. Diversions needed to supply domestic water to residents of counties  
23 through which the river flows may be authorized, if the Secretary for Resources  
24 determines that the diversion will not adversely affect the river's free-flowing character.  
25 The major difference between the national and State acts is that if a river is designated  
26 wild and scenic under the State act, the Federal Energy Regulatory Commission (FERC)  
27 can still issue a license to build a dam on that river, thus overriding the State system.

28  
29 **Defining Familiar Regulatory Actions.** The task of implementing federal and state  
30 laws is given to the executive agencies within government. The executive agencies, or  
31 implementing agencies, develop plans and programs to meet the requirements of  
32 enacted law. The following is a partial list of the regulations and regulatory actions that  
33 have legal significance in Delta water management and use.

34  
35 The 1995 Regional Water Quality Control Plan. The 1995 Plan consisted of  
36 establishment, for the waters within a specified area, of the beneficial uses to be  
37 protected, water quality objectives, and a program of implementation. Components in  
38 the 1995 Plan included: (1) carry out provisions of the reasonable use doctrine (Cal.  
39 Const. Art. X, §2; Wat. Code §§100, 275, and 1050); (2) protect public trust resources  
40 (See National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 189 Cal.Rptr.  
41 346); and (3) carry out statutory principles pertaining to water rights (Wat. Code §§183,

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

1 1243, 1243.5, 1251, 1253, and 1256-1258). The 1995 Plan addresses the interrelated  
2 fields of water quality and water supply and plans for their coordination.  
3 SWRCB Decision 1641. SWRCB D-1641 is part of the implementation of the 1995  
4 Bay-Delta Water Quality Control Plan (1995 Plan). Specifically, D-1641 amends certain  
5 water rights by assigning responsibilities to the persons or entities holding those rights to  
6 help meet the objectives of the 1995 Plan.

7  
8 D-1641 began the process of implementing the 1995 Plan. D-1641 does the  
9 following things:

10

- 11 1. Accepts the contributions that settlement agreements have to meet the 1995  
12 Plan objectives
- 13 2. Continues interim responsibility for those flow objectives for DWR and  
14 Reclamation
- 15 3. Approves the change in point of diversion of the CVP and SWP in the Southern  
16 Delta
- 17 4. Approves changes in the place of use of CVP water
- 18 5. Recognizes VAMP and approves the water rights changes needed to conduct  
19 VAMP
- 20 6. Recognizes a number of agreements between entities involved in Delta water  
21 issues

22

23 X2. Pursuant to the ESA, the U.S. Fish and Wildlife Service (FWS) listed the Delta  
24 Smelt as a threatened species in 1993. In 1994, FWS issued a biological opinion (BO)  
25 designating portions of the Delta as critical habitat for the Delta Smelt. Coordinated  
26 efforts between FWS and the EPA resulted in the water quality standards in the Delta  
27 commonly referred to as "X2." Water quality standards were set by the EPA pursuant to  
28 Section 303 of the CWA in its final ruling issued on January 24, 1995. X2 refers to the  
29 requirement that a salinity level front of two parts per thousand or less be maintained at  
30 particular monitoring locations within the Delta during certain times between the  
31 February through June period depending on the amount of precipitation. The location of  
32 X2 corresponds with the mixing zone of fresh and salt water. The location of X2 within  
33 Suisun Bay during the February through June period is thought to be directly and/or  
34 indirectly related to the reproductive success and survival of the early life stages for a  
35 number of estuarine species, including Delta Smelt. Additional details on X2 can be  
36 found in Chapter 9 of the Environmental Water Account Draft EIS/EIR (July 2003).

37

38 CVPIA B(2) Actions. Implementation of the Central Valley Project Improvement Act  
39 (CVPIA) affects water management in the Delta. As described above, the CVPIA  
40 changed the relative priorities of various CVP purposes elevating fish and wildlife

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

1 protection as equal to water supply for agricultural and urban uses. In addition, CVPIA  
2 dedicated 800,000 acre-feet of CVP yield annually, referred to as “b(2) water,” for the  
3 purpose of implementing the fish, wildlife, and habitat restoration purposes and  
4 measures and to assist the State of California to protect the waters of the Bay-Delta  
5 Estuary. The CVPIA also committed water to wildlife refuges south of the Delta and  
6 promoted water transfers to help meet project purposes.

7

8 The following is an excerpt from the CALFED Operations Coordination Group’s  
9 summary of 2006 b(2) operations

10 ([http://www.woco.water.ca.gov/calfedops/notes/2006/dec/final\\_wy06\\_b2\\_actions.pdf](http://www.woco.water.ca.gov/calfedops/notes/2006/dec/final_wy06_b2_actions.pdf)):

11

- 12 • Closed **Delta cross channel** gates December 3, 2005 to protect emigrating  
13 juvenile salmonids from the Sacramento basin, including listed Chinook salmon  
14 and steelhead.
- 15 • Maintained the **Sacramento River** at approximately 5,000 cfs in December to  
16 maintain habitat conditions for Chinook salmon and steelhead
- 17 • Reduced **Delta exports** to approximately 6,000 cfs (combined) from April 26 –  
18 May 2, 2006 to protect emigrating juvenile San Joaquin basin salmon.
- 19 • Reduced **Delta exports** May 3 – June 2, 2006 to protect juvenile Chinook  
20 salmon, delta smelt and conduct the VAMP experiment, which examines the  
21 relationship between Vernalis flows, export levels, and survival of emigrating  
22 juvenile San Joaquin basin salmon.
- 23 • Maintained a reduced **Delta export** level of 6,000 cfs (combined) from June 3 -  
24 21 to help protect emigrating juvenile San Joaquin basin salmon.

25

26 Overall, the operations group noted that due to the wet conditions in Water  
27 Year 2006 only 422,000 AF of (b)(2) water was used for fish actions, and  
28 approximately 195,000 AF was banked in Shasta Reservoir. The remaining  
29 183,000 AF was made available for other CVP project purposes.

30

31 VAMP. The Vernalis Adaptive Management Plan (VAMP) is an outgrowth of D-  
32 1641. VAMP is a large-scale experimental management program designed to protect  
33 juvenile Chinook salmon migrating from the San Joaquin River through the  
34 Sacramento-San Joaquin Delta. VAMP is also a scientific experiment to determine how  
35 salmon survival rates change in response to alterations in San Joaquin River flows and  
36 SWP and CVP exports with the installation of the Head of Old River Barrier. VAMP  
37 correlates average outflows at Vernalis with Average SWP and CVP exports from the  
38 Delta.

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

1  
2 A summary of VAMP experimental test conditions over the past six years is  
3 below:

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

4  
5 Biological Opinion on the Long-term CVP and SWP OCAP. In October of 2004, the  
6 NMFS issued a biological opinion (BO) for the State and federal operations under  
7 OCAP. This BO superseded any previous BO issued for OCAP. The issuance of a BO,  
8 as required under ESA Section 7 consultation, sets forth allowances for incidental take  
9 of protected species, as well as establishes non-discretionary actions to minimize any  
10 take. The October 2004 BO is well over 200 pages and is based upon a Biological  
11 Assessment provided by Reclamation and DWR earlier the same year. Illustrative  
12 excerpts from the conditions of the BO are provided below:

13  
14 Reclamation and DWR have proposed to operate CVP and SWP  
15 facilities in accordance with either plans, agreements, or specific  
16 criteria outlined in this biological opinion. Total upstream plus  
17 Delta losses above the current baseline, due to the proposed  
18 action, are estimated at 7 percent for Sacramento River winter-run  
19 Chinook salmon, 10 percent for Central Valley springrun Chinook  
20 salmon, and 18 percent for Central Valley steelhead in all but  
21 critically dry water year conditions. (p. 211)

22 In the accompanying formal biological opinion, NOAA Fisheries  
23 has determined that the anticipated level of take associate with  
24 proposed project operations is not likely to result in jeopardy to the  
25 continued existence of Sacramento River winter-run Chinook  
26 salmon, Central Valley spring-run Chinook salmon, or Central  
27 Valley steelhead. (p. 212)

28 NOAA Fisheries believes the following reasonable and prudent  
29 measures are necessary and appropriate to minimize take of  
30 Sacramento River winter-run Chinook salmon, Central Valley  
31 spring-run Chinook salmon, and Central Valley steelhead [*which is*  
32 *followed by approximately 26 pages of non-discretionary*  
33 *measures listed in the BO*]. (p. 212).

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

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

11  
12            DWR has been operating the SWP consistent with the provision of the Monterey  
13 Amendment since 1996. However, a lawsuit filed in December 1995 challenged the  
14 adequacy of the 1995 Monterey Agreement EIR. In 2000, the court held that the EIR  
15 failed to adequately analyze the impacts of deleting Article 18(b) (the provision for  
16 reallocation of water among contractors in the event of a defined permanent water  
17 shortage) and directed that a new EIR be prepared. The court held the lack of an  
18 environmental analysis of eliminating Article 18(b) deprived public agencies and the  
19 public of information essential to understanding the environmental consequences of the  
20 provision's elimination, including the potential effect on land use planning decisions.  
21 DWR is expecting a Draft EIR in the summer of 2007.

22  
23            The Bay Delta Conservation Plan. The Bay Delta Conservation Plan (BDCP) is  
24 intended to be a conservation plan prepared to meet the requirements of the ESA,  
25 CESA, and the NCCPA.<sup>6</sup> The goal of the Plan is to provide for the conservation and  
26 management of aquatic species and regulatory assurances related to water supply  
27 reliability and water quality for the Delta. The BDCP is intended to result in take permits  
28 from state and federal agencies for BDCP covered activities (e.g. water operations,  
29 storage, conveyances, and management in the Delta). The Plan may also provide the  
30 basis of Section 7 and Section 10 ESA compliance. The goal of the BDCP is to provide  
31 for the conservation of "covered species" including both listed and non-listed species.

32  
33            **Institutional framework**. As evident by the figure below, a large number of  
34 institutions play a key role in the enforcement of the aforementioned laws that implicate  
35 the management and use of water in the Delta.

36  
37            Federal government. Federal agencies are charged with execution of federal  
38 mandates and regulations. Some federal agencies have duties to carry out certain

---

<sup>6</sup> The NCCPA is the Natural Community Conservation Planning Act described in section 3.2.  
*Water Governance*

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

1 actions, projects and programs, while others are purely regulatory in nature. Actions and  
2 projects often require coordination between multiple agencies.

3

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

13

14 Local jurisdictions (cities and counties). Numerous cities and counties adjacent to  
15 the Delta divert water directly from the Delta for their water supplies and therefore have  
16 a direct interest in its management. In addition to laws and regulations affecting  
17 management of water supplies, land use within some areas is regulated by the Delta  
18 Protection Act. Cities outside of the Delta region, such as cities in southern California,  
19 receive their water supplies from the Delta through contracts for water from the State  
20 Water Project and Central Valley Project.

21

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

INTERESTED PARTIES																									
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State Courts																									

1            Water purveyors/Water users/Special districts. Numerous water purveyors, water  
2 users and special districts have an interest in management of water supplies in and  
3 through the Delta. The various forms of water districts that provide water to urban  
4 customers, irrigation districts that supply water to agricultural users, utility districts and  
5 conservation districts are all formed for different purposes that are frequently at odds.  
6 Many are local to the Delta while others receive water through the State Water Project  
7 and Central Valley Project.

8  
9            Other interested parties. Other interested parties that do not receive water from the  
10 Delta or otherwise have a governance role in its management can exert significant  
11 political and legal pressure on management of water supplies in and through the Delta.  
12 Environmental protection, support of local economies, preservation of recreational uses  
13 and promotion of local economies are some of the objectives of these entities.

14  
15            Courts. Federal and State courts also exercise jurisdiction of Delta water  
16 management and use. The Federal courts generally address issues of federal law and  
17 federal water contracts while the state courts generally address issues of state law. The  
18 federal courts jurisdiction over interpretations of the various federal statutes and  
19 constitutional provisions are important considerations in Delta planning. Similarly, the  
20 state court interpretations of state law issues – particularly as applied to water rights and

# Context Memorandum: Water Governance

Iteration 1: April 27, 2007

1 water planning – may also be major components in the overall management of Delta  
2 water supplies.

3

4 **Conflicts in regulatory systems.** The fundamental concern in water management  
5 and use in the Delta is the interplay of law and regulations among local, regional, state,  
6 and federal agencies. This interplay manifests through incompatible laws enacted by  
7 different government entities. The interplay also develops in the management of land  
8 use, environmental, and water resources within a single government entity or among  
9 agencies at the same level of government.

10

11 Federal supremacy in law. Governance in the United States is based on a system  
12 under which federal and state governments are granted specific powers. The United  
13 States Constitution both limits and empowers the Federal government, while the  
14 remaining powers not delegated to the federal government or prohibited by it are  
15 reserved to state governments. Under this arrangement, it is often necessary to decide  
16 whether the federal or state government has power over a particular subject matter  
17 when federal and state regulatory schemes do not further similar objectives. This issue  
18 could arise when federal environmental regulations conflict with property rights. For  
19 example, what happens when regulations under the Endangered Species Act require  
20 that a holder of a pre-1914 water right to curtail water diversions to protect the habitat of  
21 a listed species? Does the federal government’s power to regulate waters of the United  
22 States trump California’s water rights scheme, or does it constitute a taking under the  
23 Fifth Amendment requiring the federal government to compensate for the loss of use of  
24 the water? This is but one example of potential issues involving federal and state  
25 powers.

26

27 **Incongruity in implementing law and regulations.** Government laws and  
28 regulations affecting management of water supplies which are executed and enforced by  
29 governmental agencies can often “frustrate the purpose” of other agencies. Agencies  
30 may be working separately to further similar objectives but may not be coordinating to  
31 ensure that their methods do not conflict. Many laws and regulations also have  
32 provisions that require one agency to halt the project or action of another through  
33 consultation processes. Further, the development of regulations by the numerous  
34 agencies can also be done without consultation from other interested parties, often  
35 leading to additional and/or conflicting standards.

36

## 37 *Section 4. References*

38 *To be developed.*