

Hearings could set new course for Delta

State agency that has been criticized for inaction begins task of considering human, environmental needs

Mike Taugher, Bay Area News Group, 3-19-10

Hearings beginning today are one of the first steps to be taken under sweeping water reform laws meant to strike a new balance in the Delta — proceedings that could help determine how water is divided between the environment and people.

Specifically, the State Water Resources Control Board today begins sorting out how much water must flow through the Delta to preserve its "public trust" values. The question, which returns to direction a state appeals court set in the 1980s that was never followed, could be answered in a number of ways.

"It could be the launching point for something very significant, or, depending on how it works out, it could be much ado about nothing," said Richard Frank, executive director of the Center for Law, Energy & the Environment at UC Berkeley's School of Law.

Does the state board need to look only at how much water flows from the Delta into the Bay, or does it also need to look upstream, at the rivers that feed into the Delta?

Does it need to put specific numbers on flows or will a range do? Even vaguer would be descriptive language instead of numbers.

And how will the findings be put into action?

In any case, the standards adopted by the board will not be enforceable. They are meant to guide decisions in the Bay Delta Conservation Plan — a fast-moving drive backed by Gov. Arnold Schwarzenegger to increase water supply reliability and get compliance with endangered species laws. Under consideration is a canal, tunnels or pipelines to move Sacramento River water south, bypassing the Delta.

The Legislature told the state board to weigh in on how much water a healthy estuary needs before decisions are made about how much water is available for cities and farms.

"A lot of people don't want to know the answer," said Assemblyman Jared Huffman, chairman of the Water, Parks and Wildlife Committee and a big backer of reforms.

"The state board is not known for its political courage," said the Democrat from San Rafael. "There are those who are trying to reinterpret what we passed just a couple of months ago."

Huffman singled out water board member Arthur Baggett for urging his colleague to examine only how much water must flow out of the Delta, not how much must flow into it.

That's an important distinction because it could cast scrutiny on upstream operations, like those of the East Bay Municipal Utility District. EBMUD, the East Bay's largest water utility, was, among water agencies, the reforms harshest critic.

Baggett says that with an August deadline, the state board does not have time to evaluate Delta tributaries.

"We're not going to be down to that level of detail," Baggett said. "I don't see any way we can."

In the conflict between water supplies and the Delta environment, the 800-pound gorillas are two pumping stations that deliver water from the southern Delta.

The pumps, one federal and one state-owned, irrigate San Joaquin Valley farms and provide about one-third of Southern California's water and much of the Bay Area's.

If flows through the Delta to the Bay are to increase, water project customers will be among the first to see supply reductions. That's why the hearing could be politically difficult.

The pumps have killed tens of millions of fish over the decades, and as pumping rates increased, fish populations declined. Beginning with the turn of the new century, pumping has hit record levels and fish populations plummeted.

One species, Delta smelt, is especially close to extinction, but other salmon runs, steelhead and green sturgeon are also threatened or endangered. The salmon run that supported a commercial fishery since the Gold Rush was closed for the first time in history the past two years because of low numbers.

For many environmentalists, fishermen and others, that proves that too much water has been drained from the Delta for it to survive.

But there's more to the story.

Pollution from sewage treatment plants has increased, pesticides that replaced notoriously harmful organophosphates might be more problematic for aquatic life than was thought and exotic species, including a voracious clam from Asia, are spreading.

Water agencies that rely on the big pumps argue that their water diversions are not causing the Delta's decline.

Regulators and the public, they say, should more thoroughly scrutinize other factors. In particular, if pollution is harming the fish, they say it should be cleaned up before they are asked to slow their pumps to dilute it.

The Delta "needs less pollution, not more flow," said Dan Nelson, executive director of the San Luis & Delta-Mendota Water Authority, which represents mostly San Joaquin Valley farm districts.

So far, researchers and regulators contend, generally, that all those factors are taking a toll on the Delta. Still, they say, pumping rates and other tools of water managers play a key role, not just through direct actions like sucking fish into the pumps but also indirectly, by altering habitat in ways that allow clams, for example, to thrive.

But the south Delta pumps are not the only drains on the Delta.

Withdrawals from the watershed, whether they are upstream, from within the Delta itself or from the big pumps, all take water away from an ecosystem that depends on water flows.

As part of rebalancing water supply needs and Delta health, lawmakers in November told the state board to determine how much water, or flow, is needed to protect "public trust" resources such as fish and wildlife.

The idea is to set flow conditions that would not merely prevent fish from going extinct but actually lead to a healthy estuary.

The obligation to protect public trust resources has roots in the laws of ancient Rome, but a state Supreme Court decision in the 1980s concerning Mono Lake and Los Angeles' water supply reinvigorated the doctrine.

A few years later, a state appeals court, in tossing out the state board's plans in the Delta, ruled the state board had the unquestioned authority to protect public trust resources in the Delta. But the board never did.

This week's hearings could fulfill the promise of those rulings, said Frank, the director of the Environment and Energy Center at UC Berkeley's Boalt Hall School of Law.

The rulings do not mean public trust resources must be protected at all costs — only that they be considered and balanced against other public interests, like the public interest in having a water supply.

The hearings beginning today in Sacramento will not resolve the balancing question; they are meant only to provide information about how much flow will keep the Delta healthy.