

LEGISLATIVE DEVELOPMENTS

STILL WAITING FOR A FEDERAL RESPONSE TO THE DROUGHT IN CALIFORNIA: A LEGISLATIVE UPDATE

For a third year, U.S. Congressional leaders are attempting to formulate a response to California's drought. Currently, two major drought-related bills are pending in the 114th Congress and each takes a very different approach to addressing drought-related impacts.

The first bill is House of Representatives Bill 2898, the Western Water and American Food Security Act of 2015, introduced by Representative David Valadao and co-sponsored by every Republican Representative from California and Democrat Jim Costa of the San Joaquin Valley (HR 2898). The second is Senate Bill 2533, introduced by Senator Dianne Feinstein and entitled the California Long-Term Provisions for Water Supply and Short-Term Provisions for Emergency Drought Relief Act (S 2533).

Each bill seeks to increase water supply reliability, although through substantially different methods. Key points of difference include whether the scope of federal Endangered Species Act (ESA) protections in the Sacramento-San Joaquin Delta (Delta) should be reduced to allow for more pumping south of the Delta and whether funds should be used to increase water storage or encourage water use efficiency.

Background

As California enters its fifth year of unprecedented drought, Congress continues to formulate its response. To date, Congress has taken no action in response to the ongoing crisis. In 2014 and 2015, a deal between Republican and Democratic approaches was close, but ultimately illusive.

The House of Representatives passed HR 2898 on July 16, 2015, and the legislation has remained pending corresponding action in the Senate ever since. In the Senate, multiple bills have been introduced yet none have passed out of the chamber. (S 2533 was introduced by Senator Feinstein in lieu of her prior bill, S 1894, the California Emergency Drought Relief Act of 2015. S 2533 represents Sen. Feinstein's third proposal in as many years to address California's drought.) The Senate's current effort is S 2533, and was introduced by Senator Diane Feinstein on February 10, 2016.

House Resolution 2898: The Western Water and American Food Security Act

David Valadao introduced HR 2898, the Western Water and American Food Security Act, on June 25, 2015. Notably, the bill revises regulatory standards for managing Central Valley Project (CVP) and State Water Project (SWP) conveyances under the ESA. Specifically, the bill directs that the CVP be operated to maximize Delta export pumping rates while avoiding only "negative impact on the long term survival" of protected species. This term is defined as "to reduce appreciably the likelihood of the survival of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species." Thus, the protection standard under this bill is lower than the current no-jeopardy standard under the ESA.

The bill also alters current ESA procedures by requiring use of updated data to determine incidental take levels, water export restrictions, and other conservation measures contained in the smelt and salmonid Biological Opinions. The goal is to increase water exports without causing a "significant negative impact on the long-term survival of certain species listed as threatened or endangered." H.R. 2898 further establishes operational criteria for Old & Middle River (OMR) flows in the Delta under the smelt and salmonid Biological Opinions. With regard to storage, the bill establishes deadlines for Interior to complete and submit to Congress water storage feasibility studies concerning specified dams and reservoirs under the Calfed Bay-Delta Authorization Act. Among other things, HR 2898 further provides for: 1) temporary barriers or operable gates in the Delta to be designed so that formal consultations under the ESA are not necessary; 2) adoption of a 1:1 inflow to export ratio from the Delta under specified conditions; 3) approval of all water transfers through the Delta the from April 1 to November 30 if the transfers comply with California law; 4) a nonnative predator fish removal program in the Stanislaus River by Oakdale and South San Joaquin Irrigation District; 5) the repeal of the San Joaquin River Restoration Settlement Act and related settlement; 6) expansion

of the CVP's authorized service area to include the Kettleman City Community Services District; and 7) transfer of New Melones to local agencies.

Senate Bill 2533: The California Long-Term Provisions for Water Supply and Short-Term Provisions for Emergency Drought Relief Act

On February 20, 2016, Senator Dianne Feinstein introduced S 2533 with the stated goal of increasing water supplies. S 2533, the bill directs the Secretaries of Interior and Commerce to provide the most water possible through the CVP/SWP within the confines of existing law and the Salmonid and Delta Smelt Biological Opinions (BiOps)—in other words, unlike HR 2898, under S 2533 the current environmental framework remains unaltered.

Specifically, under S 2533, the Interior and Commerce Departments must—until the drought is declared over or September 30, 2017, whichever is later—take certain actions designed to alleviate drought conditions including: 1) using the “best scientific and commercial data available to implement, continuously evaluate, and refine or amend, as appropriate, the reasonable and prudent alternative described in the smelt biological opinion”; 2) conducting real-time monitoring of fish species relative to Delta conditions in order to identify opportunities to increase water pumping without violating the ESA or the BiOps; 3) completing studies on the location, abundance and distribution of Delta smelt and determining methods to minimize the effects of CVP/SWP operations on the Delta smelt; 4) managing OMR flows to maximize CVP/SWP water supplies while still operating in accordance with the BiOps; 5) requiring, if OMR reverse flows are required to be less than 5,000 cubic feet per second (cfs) for compliance with the BiOps, documentation in writing that uses real-time conditions relevant to the flow rates as well as an explanation in writing that takes into account whether any alternative measures could have a lesser impact on supply; 6) reviewing whether the current method for calculating OMR reverse flow is warranted, and implement any potentially revised flow number.

Interior and Commerce are also tasked with certain projects and operations further designed to maximize the quantity of water to CVP and SWP contractors, including:

- Implementation of a pilot project to test the ability to open the Delta cross-channel gates to the maximum extent practicable;
- Installation of a deflection barrier at Georgiana Slough and the Delta cross-channel gate;
- Implementation of turbidity control strategies that ‘may allow for increased water deliveries while avoiding jeopardy’;
- Adoption of a 1:1 inflow-to-export ratio for the increment of increased flow from water transfers in April and May, unless the determination is made in writing that the ratio will cause additional adverse effects on any salmonid;
- Expansion of the transfer window to between April 1 and November 30;
- Issuance of permits within 60 days after a completed application is received for temporary barriers, operable gates, and water transfer requests that improve water quantity and quality for south of Delta CVP/SWP contractors; and
- Continuing to vary averaging periods of the maximum percent of Delta export-inflow ratios.

Interior is also directed to confer with the California Department of Fish and Wildlife (CDFW) regarding implementation of any potential changes to the smelt or salmonid BiOps. If the CDFW determines that SWP operations are inconsistent with California law, or requires take authorization in a manner that reduces water supply to the SWP in comparison to supply available under the Biological Opinions, and CVP yield is greater than it otherwise would have been as a result, that additional yield must be made available to SWP contractors to offset any reduction in water supply. Importantly, S 2533 also mandates that Interior and Commerce shall take no action that:

...diminishes, impairs, or otherwise affects in any manner any water rights or water rights priorities under applicable law.

Regarding storage, the bill authorizes \$600 million and mandates the completion of previously approved feasibility studies for Temperance Flat, Los Vaqueros, Sites, and San Luis reservoirs. Reclamation is also directed to coordinate with local water districts in the Stanislaus River Basin to identify the quantity of water storage for purposes including conservation programs, conjunctive use projects, and water transfers. The bill further provides funding for desalinization, water recycling, waste water use, and water re-use.

S 2533 is pending in the Senate Energy and Natural Resources Committee, and no vote on the bill has occurred.

Conclusion and Implications

The current Senate bill addresses impacts of the drought in broad fashion and includes directives and funding to maximize water deliveries within the existing environmental framework, provide funding for storage projects, increase water efficiencies, and increase water recycling. The House bill, on the other hand, seeks to modify CVP operations to maximize water supply and water exports from the Delta by modifying the current ESA standard to a more flexible one regarding species protection.

While all sides express a desire to provide a comprehensive federal response to the ongoing drought, it remains to be seen whether the widely acknowledged need for action can overcome deep differences in preferred response methods. Indeed, Sen. Feinstein

recently advised that S 2533 is “probably the hardest bill I’ve worked on in my 23 years in the Senate.” (<http://www.sacbee.com/news/state/california/water-and-drought/article59643916.html>.)

S 2533 was referred to Senate Energy and Natural Resources Committee on February 20, 2016, but a hearing has not been set. In the House, HR 2898 has been passed and is awaiting reconciliation with any effort passed by the full Senate body. For its part however, the Obama administration has explained that it “strongly opposes” the House bill because it:

...directs operations inconsistent with the Endangered Species Act, thereby resulting in conditions that could be detrimental to the Delta fish and other species listed under [federal/state] endangered species laws. Executive Office of the President, Office of Management and Budget, Statement of Administration Policy, HR 2898 – Western Water and American Food Security Act of 2015. July 14, 2015; https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/saphr2898r_20150714.pdf

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