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**File No.:** 16-0553

**Agenda Date:** 4/25/2017

**Item No.:** 7.2.

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## BOARD AGENDA MEMORANDUM

### SUBJECT:

Recommended Position on State Legislation: AB 574 (Quirk) Potable Reuse, AB 791 (Frazier) SWP & CVP: New Conveyance Facility, AB 792 (Frazier) Delta Plan: Certification of Consistency, AB 793 (Frazier) Delta: financing, AB 968 (Rubio) Urban Retail Water Use: Water Efficiency Targets, AB 1489 (Brough) Architects Practice Act, AB 1654 (Rubio) Urban Water Shortage: Contingency Plans, and Other Legislation Which May Require Urgent Consideration for a Position by the Board.

### RECOMMENDATION:

- A. Adopt a position of "Support" on: AB 574 (Quirk) Potable Reuse;
- B. Adopt a position of "Oppose" on: AB 791 (Frazier) SWP & CVP: new conveyance facility;
- C. Adopt a position of "Oppose" on: AB 792 (Frazier) Delta Plan: certification of consistency;
- D. Adopt a position of "Oppose" on: AB 793 (Frazier) Delta: financing;
- E. Adopt a position of "Support" on: AB 968 (Rubio) Urban Retail Water Use: water efficiency targets;
- F. Adopt a position of "Oppose" on: AB 1489 (Brough) Architects Practice; and
- G. Adopt a position of "Support" on: AB 1654 (Rubio) Urban Water Shortage: contingency plans.

### SUMMARY:

**AB 574 (Quirk) Potable Reuse. (A-03/23/17)**

**Position Recommendation: Support**

**Priority Recommendation: 2**

AB 574 would amend California law regarding the potable reuse of recycled water by changing regulatory definitions to clarify where in the process the recycled water is being added to the water sources used. Specifically, this legislation removes the existing statutory terms of "direct potable reuse," "indirect potable reuse for groundwater recharge," and "surface water augmentation," replacing them with the following:

- 1) Groundwater augmentation;

- 2) Reservoir augmentation;
- 3) Raw water augmentation; and
- 4) Treated water augmentation.

The bill would require the State Water Resources Control Board (State Water Board) to establish a framework for the regulation of potable reuse projects by June 1, 2018. The State Water Board would be required to take into consideration the recommendations made in the report provided to the legislature on December 30, 2016, "Investigation on the Feasibility of Developing Uniform Water Recycling Criteria for Direct Potable Reuse," which found that the creation of direct potable reuse regulations is feasible.

Finally, the bill would require the adoption of uniform water recycling criteria for potable reuse through raw water augmentation, by December 31, 2021, and would allow the State Water Board to extend this date if the research recommended in the feasibility report has not been completed.

#### *Importance to the District*

The District has set a goal of increasing recycled water production to 10 percent of total water use in Santa Clara County by the year 2025, equal to almost 40,000 acre feet per year. However, prompted by the recent drought conditions, the District Board directed staff to explore development of up to 45,000 acre feet per year of purified water on an expedited schedule. The target of 40,000 acre feet per year includes both recycled and purified water.

The District's 2017 draft Water Supply Master Plan incorporates 24,000 acre-feet per year of potable reuse water and 32,000 acre-feet per year of non-potable reuse water as part of the baseline water supply system.

The District is partnering with Palo Alto, Mountain View, and San Francisco Public Utilities Commission and Bay Area Water Supply and Conservation Agencies to explore non-potable and potable reuse opportunities.

The District is also currently developing a countywide recycled and purified water master plan to identify additional opportunities and prioritize opportunities on a countywide basis.

AB 574 provides an opportunity to clarify the definitions for several distinct types of potable reuse projects and advances the regulatory process by requiring the State Water Board to develop a plan to regulate potable reuse projects.

As the District moves forward with the Expedited Recycled and Purified Water Program, there may be an opportunity to develop some of the projects for potable reuse. The expedient creation of regulations to cover all types of potable reuse projects is in the best interest of the District and the residents of Santa Clara County that depend on a clean, affordable, and secure source of water.

Staff recommends the District Board adopt a position of "Support" on AB 574.

*Pros*

- Clarifies various terminology used to define potable reuse projects.
- Advances planning for potable reuse regulations by the State Water Board.

*Cons*

- Requires the State Water Board to expend considerable resources.
- The bill allows the State Water Board until 2021 to complete the regulations which is a considerable amount of time.

**AB 791 (Frazier) Sacramento-San Joaquin Delta: State Water Project and federal Central Valley Project: new conveyance facility. (A-3/21/17)****Position Recommendation: Oppose****Priority Recommendation: 3**

AB 791 (Frazier) would amend the Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act) to impose prerequisites on the state and on water contractors before beginning the construction a new Delta water conveyance facility, commonly known as the "California WaterFix." The Delta Reform Act requires the entities that contract to receive water from the State Water Project (SWP) and the federal Central Valley Project (CVP) to make arrangements or to enter contracts to pay certain costs related to the construction, operation, and maintenance of a new Delta conveyance facility, and to pay the costs of the full mitigation of the loss of property tax or assessments levied for land used in the construction, location, mitigation, or operation of the facility. AB 791 would require the lead agency under the California Environmental Quality Act (CEQA), likely the California Department of Water Resources, to provide a "breakdown of costs for each water contractor entering into a contract" and to provide what "benefits each contractor will receive based on the proportion the contractor has financed of the new Delta conveyance facility." This water-contractor-specific information would have to be provided to numerous agencies before a water contractor could enter any contracts to meet the Delta Reform Act requirements described above.

These additional requirements would have the effect of delaying the construction of a new Delta conveyance facility, perhaps by several years, for purposes already addressed under current law. California Water Code Section 85089 already requires that contracts or other arrangements to pay for a new Delta conveyance must be in place before the start of construction. Under current law, each water contractor, such as the District, would determine the costs and benefits to its ratepayers or members based on its own analyses of the financial risks and benefits for the agency's particular circumstances. Each participating agency's governing board has numerous incentives to take a careful and studied approach to assessing the costs and benefits of a new Delta conveyance. The Department of Water Resources, the state entity most likely to be the lead agency and therefore charged with the responsibility to assess each water contractors costs and benefits, currently does not have the expertise needed to forecast agency-specific risks for the numerous water contractors

that might possibly participate in the project.

In December 2016, the Department of Water Resources and the U.S. Bureau of Reclamation released the final Environmental Impact Report/Environmental Impact Statement (EIR/EIS) for the WaterFix. After more than a decade of rigorous scientific analysis and public discussion, the document supports the construction of improvements to the existing water delivery system in the Delta to improve the water supply reliability of the State Water Project and Central Valley Project. The State is addressing numerous comments on the document that have been submitted by various stakeholders, and is working to satisfy other requirements, including both the federal Endangered Species Act and California Endangered Species Act, as well as a permit from the State Water Resources Control Board. State and federal agencies, the water contractors, and environmental advocates have sought to balance the co-equal goals set forth in the Delta Reform Act of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem.

### *Importance to the District*

AB 791 would delay the public decision making process regarding a new Delta conveyance, without adding any measurable public benefit. Santa Clara County relies on imported water to meet, on average, 55 percent of its water needs, with 40 percent conveyed through the Delta by the State Water Project and the federal Central Valley Project, and 15 percent diverted upstream of the Delta by the San Francisco Public Utilities Commission's Hetch Hetchy Water and Power System.

The District's imported water supplies are at risk from several factors including increased salinity intrusion due to climate change and sea level rise, and seismic threats to the fragile Delta levee system. In addition, the Delta ecosystem no longer supports healthy populations of several native fish species which has resulted in increased regulatory restrictions on SWP and CVP operations to protect fish and water quality.

The District has not yet decided on whether or not to participate in the California WaterFix. In the coming months, staff anticipates that agreements will be negotiated between state and federal agencies and potential participating water agencies. At its March 14, 2017 meeting, the Board reviewed principles to guide the District's participation in these upcoming discussions and negotiations. The CEO is executing an agreement with a consultant who has expertise negotiating agreements involving multiple public agencies participating in multi-billion dollar projects. The District's goal is to achieve the best possible terms for the Board's consideration as to whether the District should participate in the WaterFix.

The delays proposed by AB 791 are not prudent given requirements in existing law and the extensive analyses of costs and benefits underway by water agencies that would potentially participate in the WaterFix.

Staff recommends that the Board adopt a position of "Oppose" on AB 791.

*Pros*

- None.

*Cons*

- Additional requirements on the Department of Water Resources could cause a years-long delay of a decision on whether or not to move forward with a new Delta conveyance.
- A delayed decision on a new Delta conveyance could increase the costs of any future project, be it the WaterFix or some other alternative, and could delay delivery of the environmental and operational benefits of any future project.
- The Department of Water Resources lacks the expertise necessary to evaluate the costs and benefits particular to each water contractor that may potentially participate in a new Delta conveyance.

**AB 792 (Frazier) Sacramento-San Joaquin Delta: Delta Plan: certification of consistency. (A-3/28/17)**

**Position Recommendation: Oppose**

**Priority Recommendation: 3**

AB 792 (Frazier) would amend the Sacramento-San Joaquin Delta Reform Act of 2009 (Delta Reform Act) to prohibit the Delta Stewardship Council from issuing a certification of consistency with the Delta Plan for a covered action under the Act until the State Water Resources Control Board (State Water Board) has completed its update of the 2006 Bay-Delta Water Quality Control Plan. The Delta Reform Act created the Delta Stewardship Council to adopt and implement a comprehensive management plan for the Delta, known as the Delta Plan. The Act requires a state or local public agency that proposes to undertake a covered action, such as the construction of a new Delta conveyance, to prepare and submit to the Council a written certification of consistency with the Delta Plan before undertaking that action. AB 792 would require the Council to affirmatively issue a certification of consistency with the Delta Plan before construction of a new Delta conveyance or any covered action in the Delta or the Suisun Marsh could begin and further prohibits the Council from issuing the certification until the State Water Board adopts an update to the 2006 Bay-Delta Water Quality Control Plan (WQCP).

The State Water Board update of the WQCP is now underway and includes flow objectives for priority tributaries to the Delta to protect beneficial uses in the Bay-Delta watershed. The process is divided into 4 phases. Phase 1 involves updating San Joaquin River flow and south Delta water quality requirements included in the 2006 WQCP. Phase 2 involves numerous changes to the WQCP to protect beneficial uses not addressed in Phase 1 (Delta outflows, Sacramento River inflows, Suisun Marsh salinity, Delta Cross Channel Gate closure, export limits, and reverse flows). Phase 3 involves

changes to water rights and other measures to implement Phases 1 and 2. Phase 4 involves developing and implementing flow objectives for priority Delta tributaries outside of the WQCP updates. AB 792 proposes that the State Water Board complete all 4 phases of the WQCP before the Delta Stewardship Council may issue a certification of consistency, a de facto permit, for the proposed new Delta conveyance, commonly known as the California WaterFix, and other covered actions.

Under existing law, the coordinated operations of the State Water Project (SWP) and the federal Central Valley Project (CVP) are subject to the State Water Board's permitting authority through the WaterFix's change in the point of diversion of water from the south Delta to points north of the Delta. Current law already prohibits construction of the WaterFix until the Water Board approves of the change in the point of diversion. The Water Board also has authority to require the SWP, CVP, and others in the Bay-Delta watershed to meet any revised WQCP objectives. Opponents to AB 792 have argued that waiting for the State Water Board to complete the WQCP is not necessary considering the Water Board's broad authority under existing law.

#### *Importance to the District*

The District has not yet decided on whether or not to participate in the California WaterFix. In the coming months, staff anticipates that agreements will be negotiated between state and federal agencies and potential participating water agencies. At its March 14, 2017 meeting, the Board reviewed principles to guide the District's participation in these upcoming discussions and negotiations. The CEO is executing an agreement with a consultant who has expertise negotiating agreements involving multiple public agencies participating in multi-billion dollar projects. The District's goal is to achieve the best possible terms for the Board's consideration as to whether the District should participate in the WaterFix.

The delays proposed by AB 792 are not prudent given requirements in existing law prohibiting the commencement of construction of the WaterFix until the State Water Board approves of changes in the point of diversion of water. The extensive authority of the State Water Board to implement the Bay-Delta WQCP makes unnecessary the bill's delay of construction until the WQCP is completed.

Staff recommends that the Board adopt a position of "Oppose" on AB 792.

#### *Pros*

- None.

#### *Cons*

- Transforms the Delta Stewardship Council into an additional permitting agency for the California Water Fix and every covered action in the Delta or the Suisun Marsh.
- Delays a decision on the construction of a new Delta conveyance until the State Water

Board completes the Bay-Delta WQCP, a process that could take years.

- A delayed decision on a new Delta conveyance could increase the costs of any future project, be it the WaterFix or some other alternative, and could delay delivery of the environmental and operational benefits of any future project.

**AB 793 (Frazier) Sacramento-San Joaquin Delta: financing. (A-3/27/17)****Position Recommendation: Oppose****Priority Recommendation: 3**

AB 793 (Frazier) seeks to establish a state policy that “the existing state of the Sacramento-San Joaquin Delta is recognized and defined as an integral component of California’s water infrastructure.” It would state that “the maintenance and repair of the Delta are eligible for the same forms of financing as other water collection and treatment infrastructure” and would limit the maintenance and repair activities eligible for this financing to specified cleanup and abatement-related restoration and conservation activities.

The existing state of the Delta is largely defined by the current configuration of levees, originally constructed 80 to 100 years ago, to reclaim swamp and flood plains for farming and other uses. The Delta is vital to the State Water Project (SWP) and the federal Central Valley Project (CVP), and together these systems supply water for tens of millions of Californians and for the state’s agriculture sector. However, declaring the Delta an integral component of water infrastructure for financing purposes as AB 793 proposes, suggests the author intends to access funding from water contractors for Delta projects that may not have a direct nexus to the water supply systems.

In December 2016, the Delta Protection Commission released a draft report titled, “Delta Flood Risk Management Assessment District Feasibility Study,” in which a “Delta user fee” was proposed to pay for Delta flood control improvements. While the author has not identified what financing is available to water collection or water treatment infrastructure that is not available for the maintenance and repair of the Delta, the bill may be intended to implement the proposals of the Commission’s draft report. While the report underscores the “beneficiary pays” principle, the language in AB 793 is open to interpretation on that point and could lead to water contractors’ ratepayers and members unfairly paying for the maintenance and repair of Delta levees with no corresponding benefits for water customers.

*Importance to the District*

Santa Clara County relies on imported water to meet, on average, 55 percent of its water needs, with 40 percent conveyed through the Delta by the State Water Project and the federal Central Valley Project, and 15 percent diverted upstream of the Delta by the San Francisco Public Utilities Commission’s Hetch Hetchy Water and Power System. AB 793 could impact the cost of the 40 percent of the county’s water supply that is conveyed through the Delta.

Most favorable for District ratepayers would be discretionary allocations of cost based on incremental benefits received. Vague statutory language in AB 793 could result in costs assigned to the District that do not benefit District ratepayers. The Legislature has incorporated into numerous state water programs and projects the principle that the costs of projects should be paid by those who benefit from them. This “beneficiary pays” funding principle would require a clearly defined subset of the state’s population to pay project costs (for example, individual water users receiving deliveries from a water project), instead of the public as a whole. In the case of the maintenance and repair of Delta levees, some projects provide direct benefit to water ratepayers, while others provide benefits to a different subset of the state’s population, (for example agriculture interests whose fields are protected by a flood control project).

The Delta Stewardship Council estimated in 2015 that the cost to provide necessary improvements to Delta levees range from \$1 billion to \$3 billion. Given the significant costs that could in some portion be allocated to the District, taking a firm position in support of maintaining the “beneficiary pays” principle and guarding against vague definitions of benefits that erode that principle, is in the interests of District ratepayers.

Staff recommends that the Board adopt a position of “Oppose” on AB 793.

#### *Pros*

- Seeks to fund the maintenance and repair of Delta levees, some of which may provide benefit to the State Water Project and federal Central Valley Project.

#### *Cons*

- Vague statutory language in AB 793 could result in costs assigned to the District that do not benefit District ratepayers.
- Overly broad definitions of “benefits” assigned to water contractor ratepayers and members erodes the “beneficiary pays” principle that has been the foundation of state water infrastructure financing.
- May result in a requirement for water contractors to fund maintenance of private levees that do not benefit the state and federal water supply systems.

### **AB 968 (Rubio) Urban retail water use: water efficiency targets. (A-03/28/17)**

**Position Recommendation: Support**

**Priority Recommendation: 2**

AB 968 (Rubio) would require the California Department of Water Resources (DWR) to submit to the Legislature by December 31, 2018, a report that states preliminary water efficiency targets for 2025 for each of the state’s hydrologic regions with per capita daily water use targets based on specified factors. This report would be compiled from consultations with urban retail water suppliers



representing each of the state's hydrologic regions, as well as industrial water users, institutional water users, and business community representatives, amongst others.

On May 9, 2016, Governor Brown issued Executive Order B-37-16 entitled, "Making Water Conservation a California Way of Life." The Order includes a range of actions directed to state agencies to address various water management topics. One of these directives requires DWR to work with the State Water Resources Control Board (State Water Board) to develop new water use targets that build on existing state law requirements that the state achieve a 20% reduction in urban water use by 2020 (SB x7-7 of 2009.) The Governor's order specifies that these water use targets are to be customized to the unique conditions of each water agency, shall generate more statewide water conservation than existing requirements, and shall be based on strengthened standards for indoor use, outdoor irrigation, commercial, industrial and institutional water use, as well as water lost through leaks.

Existing law requires the state to achieve a 20% reduction in urban per capita water use on or before December 31, 2020, and to make incremental progress toward that state target by reducing urban per capita water use by at least 10% on or before December 31, 2015.

### *Importance to the District*

The District already has made water conservation a way of life through its daily operations. Although the District is a wholesale water supplier and is not legally required to meet the 20% by 2020 conservation requirements established in 2009 by SB1 X7, the District is well on its way to exceed the goal. The District's 2012 Water Supply and Infrastructure Master Plan "Ensure Sustainability" strategy calls for an increase in conservation, from 63,000 acre-feet per year to 99,000 acre-feet.

AB 968 would require the DWR to write a report that would recommend regional water efficiency targets for 2025. These targets would provide the District and the water retailers in Santa Clara County a realistic goal that is based on climate, population density, and outdoor water use, among other considerations. A regional target that considers those aspects provides a more appropriate and achievable goal than a statewide water efficiency goal that doesn't account for local circumstances.

Staff recommends the Board adopt a position of "Support" on AB 968.

### *Pros*

- Strengthens water use efficiency, water supply reliability, and the sustainable management of the state's water resources.
- Creates a local and regional based approach to achieving water use efficiency, instead of setting a statewide mandatory water conservation target.

### *Cons*

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- Creates state budgetary impacts, as DWR likely would need increased funding to complete the report.

**AB 1489 (Brough) Architects Practice Act. (I-02/17/17)**

**Position Recommendation:** Oppose

**Priority Recommendation:** 3

Currently under California Business and Professions Code § 5536.25, a licensed architect who signs and stamps plans, specifications, reports, or documents, and other materials is responsible for damage caused by subsequent changes to or uses of permitted plans, specifications, reports, or documents, except when the subsequent changes or uses are not authorized or approved in writing by the licensed architect who originally signed the plans, specifications, reports, or documents.

AB 1489 is applicable to state and local government agencies and would make changes to the law such that a licensed architect would not be responsible for damage caused by construction deviating from a permitted set of plans, specifications, reports, or documents.

Additionally, when an architect and a client enter into a contract for the provision of construction observation services related to the signing and stamping of plans, specifications, reports, or documents, the Business and Professions Code currently defines “construction observation services” as “periodic observation of completed work to determine general compliance” and further limits construction observation services to “not mean the superintendence of construction processes, site condition, operations, equipment, or personnel, or the maintenance of a safe place to work or any safety in, on, or about the site.”

This bill also would specify that “construction observation services” does not mean the inspection of a site, nor determining nor defining the means or methods of construction processes.

The practical effect is such that if plans or the other listed materials contain an error that is caught and addressed during construction, architects are immune from liability.

*Importance to the District*

The District’s reliance on architects is well established, and that relationship is grounded upon the District not bearing liability for when certain damages result during construction. Shifting an architect’s portion of liability for their work away from the architect onto the client and onto other parties engaged in the work, would increase the District’s exposure to liability for any prospective damage caused during construction.

Staff recommends that the Board adopt a position of “Oppose” on AB 1489.

*Pros*

- None.

*Cons*

- Prospectively increases the District's liability for harm caused during construction by an architect's plans, specifications, reports, or documents.
- Eliminates an architect's liability for damages before litigating whether the damages were attributable to the architect.

**AB 1654 (Rubio) Urban water shortage contingency plans. (A-03/28/17)**

**Position Recommendation: Support**

**Priority Recommendation: 2**

AB 1654 (Rubio) amends the Urban Water Management Planning Act to require water suppliers to report annually on the status of their water supplies and to implement appropriate responses in the event of a water shortage.

On May 9, 2016, Governor Brown issued Executive Order B-37-16 entitled, "Making Water Conservation a California Way of Life." The Order includes a range of actions directed to state agencies to address various water management topics. One of these directives requires the California Department of Water Resources (DWR) to update the requirements for urban water shortage contingency plans, to include adequate actions to respond to droughts lasting at least five years, as well as more frequent and severe periods of drought. Urban water supply agencies are currently required to prepare and submit plans to address three year droughts to DWR every five years, as part of their Urban Water Management Plan (UWMP).

Under AB 1654, water suppliers would report annually to DWR on the status of their water supplies for that year and whether supplies will be adequate to meet projected customer demand. If supplies are not adequate to meet demand, the water supplier would be required to implement the appropriate responses as described in their water shortage contingency analysis.

AB 1654 also would prohibit a water supplier from being required to reduce its use or reliance on any water supply available beyond the steps specified in its water shortage contingency analysis, protecting water suppliers' and their customers.

This bill would enhance existing urban water management planning requirements and strengthen urban retail water suppliers' ("water suppliers") abilities to plan and prepare for future droughts. The bill also would strengthen existing reporting and drought response requirements related to water shortage contingency analyses.

*Importance to the District*

The District currently submits an urban water management plan every five years. AB 1654 creates a new requirement to submit a water shortage contingency analysis on an annual basis. The water shortage contingency analysis would provide information on the availability of water sources and the projected demand for that year. If the demands are not higher than the

availability of water, no further actions would be needed.

AB 1654 is intended to provide a tool to address droughts in a coherent manner, providing clarity for planning by water providers. The bill would help ensure that the Governor and the State Water Resources Control Board have a statutory path for drought response that would avoid regulatory water conservation requirements that are unforeseen by water agencies. The experience over the last two years of emergency water conservation regulation has left many water providers with extreme budgetary pressures as their revenues from water sales have dropped. Creating a water shortage analysis tool would require water agencies to plan for droughts while also providing the assurance that the required drought response would be appropriate for their local circumstances.

Staff recommends the Board adopt a position of “Support” on AB 1654.

*Pros*

- Ensures that urban water suppliers certify how an emergency water supply has been established to increase supply reliability during times of shortage and certify the status of that supply is during periods without shortage.
- Prohibits, during a drought, the District from being required by the state to take additional actions beyond those specified in its water shortage contingency analysis in the UWMP.

*Cons*

- Increased District cost for staff time to meet the new UWMP reporting requirements.

**FINANCIAL IMPACT:**

There is no financial impact associated with this item.

**CEQA:**

The recommended action does not constitute a project under CEQA because it does not have a potential for resulting in direct or reasonably foreseeable indirect physical change in the environment.

**ATTACHMENTS:**

None.

**UNCLASSIFIED MANAGER:**

Rick Callender, 408-630-2017