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# California's New Water Legislation: A Bucket of Reform or But a Drop?

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As the California Court of Appeal observed after wading through thirty years of litigation concerning water rights and water quality in the Sacramento-San Joaquin inland Delta, “The history of California is written on its waters.” *State Water Resources Control Bd. Cases*, 136 Cal. App. 4th 674, 687 (Ct. App. 2006). If that is true, the package of water legislation passed by California’s legislature in a seventh extraordinary session late last year is the next chapter. The question is, will this legislation resolve California’s infamous water wars and mark the end of that history, or is it just prologue to new rounds of conflict over the state’s most precious resource?

The precipitation that falls during California’s short rainy season has been stretched by a vast network of dams, levees, canals, pumps, and diversion works to provide water for a population of 37 million and climbing, as well as for farms that grow nearly half of the nation’s fruits, nuts, and vegetables. These waterworks were built out of concern—at least initially—not of water scarcity, but to remedy “seasonal and geographic maldistribution” of water, since more than two-thirds of the state’s precipitation falls in the north in the winter and spring, while the south demands nearly 80 percent of the water through summer and fall. *United States v. State Water Resources Control Bd.*, 182 Cal. App. 3d 82, 98 (Ct. App. 1986). This system is currently operated to channel a constant supply of fresh water from the Sacramento River draining from the north, and the San Joaquin River draining from the east, across a thousand square miles of canals and waterways in the Delta to the export pumps at the Delta’s southern end. Those pumps export water more than 700 miles south via the manmade California Aqueduct and Delta-Mendota Canal.

The network of dams, levees, canals, pumps, and diversion works has transformed the state’s natural environment, carving the seasonal marshland of the Sacramento-San Joaquin Delta into developed islands, and watering the dryer regions of the state for farms and cities. But this system is in crisis as California’s once-abundant native fisheries are collapsing, the Delta’s aging levees are vulnerable to earthquakes, and climate change is expected to make matters worse. Added to these complexities, the federal and state water projects are again being operated to respond to a multitude of lawsuits filed to enforce the federal Endangered Species Act and other federal and state environmental laws.

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Enter the “comprehensive” water legislation of 2009, intended to be a major step towards resolving endless rounds of litigation and answering the ultimate question of how to protect the Delta and make the best use of its water supplies. While the reform package left intact California’s basic water rights regime—including the constitutional and common law principles of reasonable and beneficial use, prior appropriation, and the public trust doctrine—the package set in place a new governance structure and a series of other measures meant to help achieve the “co-equal goals” of statewide water reliability and Delta ecosystem restoration. Although the legislation’s authors took great pains to avoid the debate directly, the reform package is nevertheless laying the groundwork and setting the parameters for another physical solution to the state’s water problems—new approaches to levee stability and floodplain management in the Delta and an alternative conveyance system (e.g., a “peripheral canal”) for transporting water *through* or *around* the Delta for export south.

California’s constitution commands that “the water resources of the State be put to beneficial use to the fullest extent of which they are capable . . . and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare.” CAL. CONST. art. X, § 2. The reasonable use requirement of the California constitution embodies the principal “that no one can have a protectable interest in the unreasonable use of water, and that holders of water rights must use water reasonably and beneficially.” *City of Barstow v. Mojave Water Agency*, 5 P.3d 853, 864 (Cal. 2000). But what is a reasonable use can change over time and depends on the circumstances of each case and on the other uses to which the water may be put. See *Joslin v. Marin Mun. Water Dist.*, 429 P.2d 889, 895-96 (Cal. 1967) (holding that the use of water to carry and deposit sand, gravel, and rock for commercial, rather than public, purposes is unreasonable as a matter of law).

California is one of a handful of states to adopt a dual or hybrid system of water rights that recognizes both appropriative and riparian (or overlying) rights to surface waters and groundwater. Riparian rights were inherited from the English common law and derive from the contiguity of property to a body of water, and those rights are generally limited to the amount of water that can be put to reasonable and beneficial use on those lands. Appropriative water rights, on the other hand, grew from the customs of California’s early gold miners and may be asserted for lands that are nonriparian. Appropriative rights are based on the priority of diversion—first in time,

first in right—and the amount of water that the appropriator has historically put to reasonable and beneficial use.

This dual system was originally recognized by the courts, but California in 1913 established a permitting system to govern appropriative surface water rights. Today, the authority for administering California's post-1914 appropriative water rights system has been consolidated in the California State Water Resources Control Board (State Board). The state's groundwater, riparian, and pre-1914 appropriative rights, however, are still governed largely by the courts. Consequently, unless adjudicated, those water rights are not monitored or controlled by the state.

In conjunction with its authority to administer the state's water rights system, the State Board is also responsible for setting statewide water-quality objectives for the protection of a broad range of beneficial uses, including municipal, industrial, agricultural, power, and fish and wildlife uses. This mandate has led the State Board to adopt Delta outflow objectives to protect fish and to keep saline water away from municipal and agricultural diversions—including the massive pumps in the southern Delta that export water to the Central Valley and southern California.

Beyond the State Board's constitutional and statutory powers to administer the state's appropriative rights system for the "public welfare," the State Board must also consider the common law public trust doctrine in making its water rights and water-quality decisions. Upon its admission to the Union, California, like the other states, acquired title to the state's tidelands, submerged lands, and lands underlying inland navigable waters as trustee for the benefit of the people. As trustee, the state must administer those lands consistent with public trust purposes. Trust purposes were traditionally confined to navigation, commerce, and fisheries, but later held to include recreation and preservation of trust lands in their natural state.

In its landmark 1983 decision delineating the City of Los Angeles's rights to divert tributary waters from Mono Lake, the California Supreme Court extended the public trust to include the water itself. *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983). The court also, for the first time, held that the State Board has an "affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible." *Id.* at 728. When making water rights decisions, the State Board must therefore "take . . . into account" instream public trust uses and to preserve those uses "so far as consistent with the public interest." *Id.* The court did not dictate whether the State Board must favor one trust purpose over others, and also acknowledged the State Board's discretion to favor the interests of the appropriator if "the benefit gained is worth the price" to public trust uses. *Id.*

### ***The Delta System and Rising Discord***

There is no place in California that has seen so much conflict over water as the Sacramento/San Joaquin Delta, and for good reason. From atop Mount Diablo in spring 1772, European explorers first saw the Delta as a giant inland lake formed

by floods from snowmelts in the Sierra Nevada, Cascade, and Klamath ranges. By summer, the great rivers of the state slowed or even reversed, causing saltwater from the ocean to intrude inland and rendering the Delta unfavorable for year-round agriculture or settlement.

The Sacramento and San Joaquin rivers have since been tamed by a network of dams, dikes, levees, and diversions that capture water during the wet season for release, diversion, and export when it is dry. The Delta is the hub of that system. The State Board permitted the federally owned and operated Central Valley Project (CVP) to regulate and transport the waters of the Sacramento and San Joaquin rivers to the Central Valley. The State Board also permitted the state-run State Water Project (SWP) that stores and conveys water primarily from the Feather River (a major tributary to the Sacramento), through the Delta, and on to southern California. Close to 30 percent of the Delta's historic flows are now diverted upstream for consumptive uses before reaching the Delta, while about 15 percent is channeled across the Delta to the massive CVP and SWP export pumps and aqueducts. Almost all of the rest—more than 22 million acre-feet, and just over half of the average natural annual flow—passes through the Delta, into San Francisco Bay, and out to sea.

Conflicts over water have historically played out along geographic lines, primarily between the northern and southern regions of the state. The permits to appropriate water for use in the central valley and southern California are generally junior to the appropriative rights perfected earlier by the farms and cities in the north. But, with twice as many people in the south and with both state and federal governments deeply invested in the CVP and SWP, the central valley and southern California laid claim to or contracted for significant exports from the Delta. This conflict erupted in 1982 when a referendum was placed before the state's voters on whether to approve a "peripheral canal" around the Delta that would connect the export pumps directly to the Sacramento River. The referendum went down in inglorious defeat as nearly 90 percent of voters in northern California voted "no."

The peripheral canal began its comeback, however, in the early 1990s as the debate shifted from questions about uneven distribution between cities and farms and north and south, to issues surrounding the adverse environmental effects of these waterworks on the state's ecology. The state and federal water projects, along with a host of smaller water projects and developments, had changed the life cycle of the Delta's native fish forever. The upstream dams disrupt fish passage and alter water flow cycles. The export pumps also can reverse flows in and around the Delta so that water flows towards the pumps rather than to the ocean. Those pumps entrain and kill significant numbers of juvenile and adult fish. In 1989, the federal and state fish and wildlife agencies began listing the Delta's native fish species—including Chinook salmon, Delta smelt, and steelhead—as threatened or endangered under the federal Endangered Species Act (ESA). In response to new concerns about unlawful "take" of listed fish species under the ESA, the state suffered significant temporary reductions of its export

pumps in 1992 and 1993 to prevent entrainment.

In conjunction with the species listings, Congress in 1992 enacted the Central Valley Project Improvement Act (CVPIA), which broadened the purposes and management of the federal CVP to include the protection of fish, wildlife, and associated habitats in the Central Valley and Trinity River basins and the Bay-Delta Estuary. Like the legislative package passed by the California legislature this past fall, the CVPIA sought to restore a “reasonable balance among competing demands for use of Central Valley Project water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors.” Pub. L. No. 102-575, § 3402(f), 106 Stat. 4706 (1992). Finally, adding to the numerous agencies and competing regulatory demands on the Delta, in 1993 a federal court ordered the U.S. Environmental Protection Agency (EPA) to set water-quality standards and flow criteria for the Delta after the state refused to do so.

In response to the mounting and competing pressures over endangered species, CVP operations, and water-quality standards, the key state and federal agencies negotiated and signed the landmark Bay-Delta Accord with the environmental community and urban and agricultural water users. Under the title “CALFED,” the state and federal agencies together embarked on a multi-year effort to develop a program in the Delta to address water quality, endangered species, and certainty and predictability in the state’s water supplies. That effort culminated in the CALFED Bay-Delta Program and 2000 Record of Decision, which itself has been subjected to years of litigation. Despite all of these efforts, however, the Delta continued to see a decline in smelt and salmon populations and the addition of new species to the list of endangered or threatened species (e.g., North American green sturgeon). Some water users, however, were still experiencing shortages in their contracts as implementation of the CVPIA and the ESA reduced their supplies even in normal or above normal water years. On top of it all, the state was increasingly concerned over seismic activity in the Delta and the risks and liability associated with catastrophic levee failure of the kind resulting from Hurricane Katrina. It seemed that the conflicts over water use could not be quelled through the CALFED Program and efforts to implement the CVPIA.

These conflicts reached crisis levels in 2007 when Judge Oliver Wanger of the U.S. District Court began issuing a series of rulings that operations of the CVP and SWP were jeopardizing Delta smelt and salmonids in violation of the ESA. Judge Wanger ordered the federal resource agencies to develop a new operations schedule for the pumps to reduce or halt water exports during key periods of time when the species are at greatest risk. *Natural Res. Def. Council v. Kempthorne*, No. 1:05-cv-01207 (E.D. Ca. Dec. 14, 2007) (interim remedial order). These restrictions, coming in the midst of a three-year drought and a deep economic recession, raised the prospect—perhaps for the first time in California’s history—that the state faced a true water shortage, with not enough to go around for the state’s people, farms, and fish. In the months that followed, a multitude of additional lawsuits were filed on all sides and

the courts became increasingly involved in day-to-day operations of the state and federal projects. California was losing control over its water.

### *The 2009 California Water Legislation*

In response to mounting pressures from the California Legislature and the series of lawsuits and adverse rulings, Governor Schwarzenegger in late 2007 commissioned a blue ribbon task force to provide a series of recommendations concerning the Delta ecosystem and its water supply. The Delta Vision Task Force developed a series of recommendations on sustainable management of the Delta, its legal status, governance, new facilities for conveyance and storage, and land use and floodplain management. The Task Force concluded that the foundation for policymaking on California’s water resources must emanate from the longstanding state constitutional principles of “reasonable use” and “public trust,” and the Task Force recommendations ultimately formed the backbone for weeks and months of late-night and weekend-long negotiations between state legislators and representatives from some of the disparate interests, each with a stake in the Delta. Those negotiations culminated in a hodgepodge of bills devoted to water that were passed and signed into law during an extended session of the California legislature in November 2009: Senate Bill 7th Extraordinary Session (SBX7) 1 (governance), SBX7 2 (water bond), SBX7 6 (groundwater monitoring), SBX7 7 (conservation), and SBX7 8 (reporting and enforcement). 2010 CAL. ADV. LEGIS. SERV. 1G to 5G.

The legislative package sought to institute a number of key reforms. Under SBX7 2, the state’s voters may be asked in November 2010 to approve an \$11 billion bond package to fund new storage, infrastructure, groundwater remediation, water recycling, and other water projects around the state—a key financial component to ensuring that other elements of the legislative package can be implemented as envisioned.

SBX7 6 establishes the state’s first plan to monitor groundwater levels and use. SBX7 7 sets specific targets for reducing urban water use statewide—10 percent by 2015 and 20 percent by 2020—and requires municipalities to submit a plan to achieve these reductions by the end of 2010. Although devoid of any specific numeric goals or mandates for agriculture, SBX7 7 requires agricultural water suppliers to monitor water usage and adopt efficient water management practices, including water pricing that increases with demand. While seemingly modest, these are the first efforts to reduce water consumption across all users on a statewide level.

SBX7 8 appropriates new funds to support a host of additional enforcement staff at the State Board and imposes new penalties and expanded reporting requirements for riparian and pre-1914 appropriative surface rights holders. Previously, there were no penalties or other consequences for failing to file statements of use, and some diversions were exempt. Now, the exemptions have been pared down or eliminated altogether, and diverters who fail to file statements of use may be subject to significant civil penalties administratively imposed by the State

Board. These reforms do not provide the State Board with additional regulatory powers, but together they will empower the State Board and others to help monitor and eventually enforce the state's water laws more effectively. Indeed, even before the legislative package was approved, the State Board had initiated enforcement proceedings against certain riparian and pre-1914 water rights holders under the State Board's existing powers. Those proceedings have already survived an initial court challenge. *Central Delta Water Agency v. State Water Resources Control Bd.*, Sacramento Co. Sup. Ct. Case No. 34-2010-80000520 (May 4, 2010, order denying a petition filed by water users to enjoin the State Board's enforcement proceedings).

The central components of the new legislation, however, are those institutional and regulatory reforms in SBX7 1 focused on achieving the "co-equal goals" of "providing a more reliable water supply for California" and "protecting, restoring, and enhancing the Delta ecosystem." SBX7 1 sets forth (1) changes in Delta governance, (2) new requirements for the ongoing development of a conservation planning strategy for the Delta, and (3) a new mandate that the State Board develop and publish public trust flow criteria for the Delta.

### Changes to Water Management and Delta Governance

There are over two-hundred federal, state, and local agencies that have authority in the Delta, often with "competing demands" and disparate authority. COMMITTEE ON WATER, PARKS, & WILDLIFE, BILL ANALYSIS: SB 1 X7, available at [http://info.sen.ca.gov/pub/09-10/bill/sen/sb\\_0001-0050/sbx7\\_1\\_cfa\\_20091104\\_035148\\_asm\\_floor.html](http://info.sen.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx7_1_cfa_20091104_035148_asm_floor.html) [hereinafter BILL ANALYSIS]. Some have argued that this disparate authority and lack of central governance has contributed to the collapse of the Delta. *Id.* at 20. Indeed, the lack of coherent agency coordination and competing regulatory commands under the federal Clean Water Act (CWA) and Endangered Species Act (ESA) led the state and federal agencies to form CALFED in the early 1990s and, later, the California Bay-Delta Authority—an organization comprised of state and federal agency representatives, among others, responsible for overseeing the implementation of the CALFED Bay-Delta Program. *California Bay-Delta Authority Act*, CAL. WATER CODE §§ 79400, *et seq.* (2003). But the Bay-Delta Authority, according to the 2009 legislative analysis, "lacked the authority to resolve conflicts among agencies and set a unified direction." BILL ANALYSIS at 20. "CALFED agencies degenerated into interagency conflict and could not respond adequately to the mounting evidence of crisis, even to complete the Legislature's requirement to develop a short-term response to stabilize the Delta ecosystem." *Id.* To address the lack of a coherent governance structure with adequate authority, the Governor's Blue Ribbon Task Force recommended that the state establish an "independent body with authority to achieve the co-equal goals of ecosystem revitalization and adequate water supply for California—while also recognizing the importance of the Delta as a unique and valued area." *Id.*

SBX7 1 instituted a number of institutional and governance reforms included in the Task Force recommendations. First and foremost, it created the Delta Stewardship Council (Council)—a new independent state agency with regulatory and land-use authority in the Sacramento/San Joaquin Delta and Suisun Marsh. CAL. WATER CODE §§ 85000–85350. The Council succeeds the Bay-Delta Authority and is designed to "provide some coherence to how the State manages important water and environmental resources in the Delta." BILL ANALYSIS at 20. It is the first of its kind in California to require land-use decision making to be integrated with the management of water in the Delta.

The Council will be responsible for ensuring that various plans and projects throughout the Delta adhere to the co-equal goals of providing a more reliable water supply for California and "protecting, restoring, and enhancing the Delta ecosystem." CAL. PUB. RES. CODE § 29702(a). The Council's first task will be to develop interim recommendations for early actions, projects, and programs in the Delta in furtherance of these goals. The Council must develop and adopt a comprehensive, long-term management plan for the Delta—the so-called "Delta Plan"—by January 1, 2012. Once the Delta Plan is in place, all "covered actions" in the Delta and Suisun Marsh must be consistent with the Plan. Agencies subject to the new consistency requirement must submit a written certification to the Council. Those certifications may be subject to an administrative appeal and a hearing before the Council. In this way, the Council is empowered to develop and enforce a "coherent and sustainable long-term state policy for the Delta." BILL ANALYSIS at 20.

In addition to the new Stewardship Council and Delta Plan, SBX7 1 instituted three new public entities and reconstituted another. It created a new Delta Conservancy to serve as the primary state agency to implement ecosystem restoration in the Delta and to support efforts that "advance environmental protection and economic well-being of Delta residents." CAL. PUB. RES. CODE §§ 32300, *et seq.* Although it has no independent regulatory functions, the new agency has the power to "[a]ssist local entities in the implementation of their habitat conservation plans (HCPs) and natural community conservation plans (NCCPs)." *Id.* § 32301(i)(10).

Another subdivision of SBX7 1 requires the State Board, in consultation with the Stewardship Council, to appoint a special watermaster for the Delta. CAL. WATER CODE § 85230(a). The Delta watermaster will exercise the Board's authority to monitor and enforce Board orders and the terms and conditions of Board permits and licenses. *Id.* § 85230(b). SBX7 1 also creates a new Delta Independent Science Board, which replaces the previous CALFED science program and science board, to provide "oversight of the scientific research, monitoring, and assessment programs that support adaptive management of the Delta . . ." *Id.* § 85280. The mission will be to provide the "best possible unbiased scientific information to inform water and environmental decisionmaking in the Delta." *Id.* § 85280(b)(4).

Finally, SBX7 1 reconstituted the long-standing Delta

Protection Commission with a new governance structure, as well as expanded responsibilities and authorities. CAL. PUB. RES. CODE §§ 29072, *et seq.* For example, the Commission is now tasked with issuing recommendations to the Stewardship Council on “methods of preserving the Delta.” *Id.* § 29703.5. The Commission must develop an economic sustainability plan for the Delta, and it may facilitate implementation of joint habitat restoration and enhancement plans. Lastly, the Commission is required to “prepare and submit to the Legislature recommendations regarding the potential expansion of or change to the primary zone of the Delta.” *Id.* § 29773.5.

As significant as these new governance reforms are, they have done little to upset the current framework and State Board primacy over water rights and water quality in and around the Delta. For example, except for ecosystem projects that may be recommended by the Council to help achieve the legislation’s co-equal goals, the Council is not authorized to set or enforce instream flows or enforce the Delta Plan beyond the legal boundaries of the Delta. Consequently, upstream diversions and other actions outside the Delta are beyond the Council’s purview. Likewise, the Council and other Delta agencies have little power to influence or enforce those laws with the greatest power to restore the Delta ecosystem—namely the ESA, CWA, and the public trust doctrine. The new Delta watermaster will have authority to enforce the State Board’s orders and permit and license conditions, but those are still developed and issued by the Board in the first instance. Consequently, regulatory authority over the Delta and California water remains fractured, if not more so under this new legislation.

### **Raising the Bar on the Bay-Delta Conservation Plan**

Even before the package of water bills was introduced last year, the California Department of Water Resources, U.S. Bureau of Reclamation, and other key state and federal agencies began to develop a Bay-Delta Conservation Plan (BDCP) to promote recovery of endangered, threatened, and sensitive fish and wildlife species and their habitats in the Sacramento-San Joaquin Delta while simultaneously protecting regional water supplies. The BDCP is evaluating a number of conservation strategies, as well as better ways to move water through or around the Delta. Ultimately, the BDCP will seek an incidental take permit for ongoing operations of the State Water Project and Central Valley Project under the conservation planning provisions of the federal ESA. SBX7 1 requires that the state BDCP agencies also seek coverage under equivalent provisions under California law—the Natural Communities Conservation Planning Act (NCCPA). CAL. WATER CODE §§ 85320-85321. This new legislative mandate is meant to raise the level of protection for listed species in the Delta.

Federal Habitat Conservation Plans (HCPs) and state Natural Community Conservation Plans (NCCPs) are typically prepared when large-scale development activities or regional planning conflicts with the needs of threatened or endangered species, and project proponents and public agencies need to

obtain incidental take authorization. These area- and site-specific conservation plans are designed to aid in the protection or recovery of listed species and address unforeseen circumstances or changes in circumstances through adaptive management. In exchange, development can proceed with greater certainty. In the context of water rights, a conservation plan helps provide assurances that water can be diverted in the future without fear of significant new restrictions or costs imposed by state or federal fish and wildlife agencies. But there are significant differences in state and federal requirements that often lead local project proponents to abandon coverage under the state NCCPA.

Under the federal ESA, the U.S. Fish and Wildlife Service or NOAA Fisheries can approve an HCP and issue an incidental take permit for one or more covered species provided that the impacts of take are minimized and mitigated to the maximum extent practicable; there is adequate funding to implement the plan; and the taking will not appreciably reduce the likelihood of survival and recovery of the species. 16 U.S.C. § 1539(a). Much like under the federal ESA, the California Department of Fish & Game (CDFG) may authorize the take of candidate and listed species (as well as unlisted species) whose conservation and management is provided for in an NCCP. CAL. FISH & GAME CODE §§ 2800-2835. NCCPs, however, are broader in scope, take additional steps, and require CDFG to make arguably more rigorous biological findings before approving an NCCP. For example, CDFG and plan proponents must obtain independent scientific input on conservation strategies and goals, reserve design, and management principles; the plan must include provisions for adaptive management, meet the biological needs of the covered species, and aid in the recovery of the species; and the plan must provide for a system of landscape or ecosystem-scale conservation that protects the ecological integrity of large habitat blocks, ecosystem function, and biological diversity. *Id.* § 2820. The NCCP is referred to as the “gold standard” of ecosystem recovery. BILL ANALYSIS at 22.

SBX7 1 mandates that, in order to be eligible for state funding, the BDCP must comply with the NCCPA and evaluate a “reasonable range of flow criteria, rates of diversion, and other operational criteria” and a “reasonable range of Delta conveyance alternatives, including through-Delta, dual conveyance, and isolated conveyance alternatives” (e.g., a peripheral canal). CAL. WATER CODE §§ 84320(b)(2)(A)-(B). And if the BDCP is ultimately approved as a regional conservation plan under both the federal and state acts, the Stewardship Council must incorporate the BDCP in its Delta Plan. Here again California offers a carrot to those participating in the BDCP—greater assurances in water supply—but in a framework that integrates land use, instream flows, and contemplated changes in water conveyance and management.

### **Setting Public Trust Flow Criteria for the Delta**

To adopt an alternative water conveyance system and implement those elements of the Delta Plan and BDCP pertaining to water management, the State Board will need to

undertake further administrative proceedings to review water rights and set new water-quality standards in the Delta. As part of those proceedings, the State Board must also weigh the effects of those proceedings on in-stream public trust resources in line with the California Supreme Court's decision in *National Audubon Society*. In anticipation of those proceedings, and to inform the process of developing a preferred alternative for water conveyance, SBX7 1 directs the State Board to "develop new flow criteria for the Delta ecosystem necessary to protect public trust resources." CAL. WATER CODE § 85086(c) (1). These flow criteria are intended to "reflect a landmark concept of the state exercising its public trust authority to ask—FIRST—what the Delta needs, before completing plans for fundamental change to the nature of the Delta, as envisioned by the Bay-Delta Conservation Plan." BILL ANALYSIS at 16. Thus, the flow criteria should set the parameters for water management and for any diversions or operations in the Delta associated with the chosen conveyance alternative.

In the process to develop flow criteria, the State Board must identify the "volume, quality, and timing of water necessary for the Delta ecosystem under different conditions." CAL. WATER CODE § 85086(c)(1). The State Board is focusing this process on crafting "Delta outflows"—in other words, how much water should pass through the Delta and out to sea at different times of the year and under various hydrologic conditions (i.e., in a dry, normal, or wet water year). The State Board is directed to rely on the "best available science" as well as on the work it has already done to establish water-quality objectives for the protection of beneficial uses. CAL. WATER CODE § 85086(c)(1). These criteria are to be developed through a nine-month, nonadversarial "informational proceeding." *Id.* And if, as part of the Delta Plan and BDCP, the State Board initiates new water rights proceedings to approve an alternative conveyance system and associated changes in the points of diversion for the CVP and SWP, the State Board must include "appropriate" Delta flow criteria that are "informed" by the flow criteria developed pursuant to the new legislation. CAL. WATER CODE § 85086(c)(2).

The State Board took the first step in developing these flow criteria and released its draft flow criteria report on July 20, 2010. State Water Resources Control Board, *Draft Report on Development of Flow Criteria for the Sacramento-San Joaquin Ecosystem* (July 20, 2010), [www.waterboards.ca.gov/water-rights/water\\_issues/programs/bay\\_delta/deltaflow/draft\\_report.shtml](http://www.waterboards.ca.gov/water-rights/water_issues/programs/bay_delta/deltaflow/draft_report.shtml). The flow criteria report, if ultimately adopted by the State Board, foreshadows major changes in the Delta. For starters, the report emphasizes that much more water needs to flow through the Delta in order to "preserve the attributes of a natural variable system to which native fish species are adapted." *Id.* at 5. Satisfying the outflows outlined in the report could reduce Delta diversions by half.

Given the likely importance of the flow criteria to future decision making, the process to develop them is attracting significant attention. Environmental groups are generally arguing that upstream diversions—including diversions from the Delta's many tributaries—constitute the biggest threat to the Delta environment, and they urge that more water should be devoted

to fish. The downstate customers of the state and federal water projects are emphasizing the importance of improving Delta water quality, rather than simply increasing water quantities, pointing to evidence that "other stressors," such as water pollution, invasive species, and loss of habitat, are causing adverse effects. In-Delta users seem wary of the whole process, concerned both about devoting more water to the environment at the expense of their supplies and about additional scrutiny that might be paid to the operations and discharges of local wastewater treatment facilities, industry, and agriculture.

Whatever public trust flow criteria are ultimately adopted, this process is a necessary and groundbreaking approach for resolving current water conflicts—at least in theory. If this process can identify the amount of water needed for the environment, then it may reveal whether the co-equal goals can be achieved through current flows, or whether the Delta will require more painful compromises between the environment and people.

There are, however, a number of potential pitfalls in this approach. For example, SBX7 1 appears to equate protection of public trust resources with protection of the Delta ecosystem, but it does not appear to contemplate that some public trust resources may actually compete with the Delta ecosystem. Under the public trust doctrine, the State Board is not compelled to favor one public trust resource, such as preserving the ecosystem in its natural state, over others, such as other fisheries, commerce, navigation, and recreation. In this manner, it is entirely conceivable that upstream whitewater runs and the recreational fishery for striped bass—a nonnative fish species—could be given priority over other public trust resources. Indeed, the California Department of Fish and Game has identified fifteen fish species for consideration and protection in the flow criteria proceeding, including nonlisted and nonnative species such as striped bass. Thus, by setting public trust flow criteria, the State Board may actually create undue conflicts, rather than resolve them.

The State Board will also have a fundamentally difficult time devising public trust flow criteria that also serve the co-equal goal of "ecosystem restoration," because that goal is more mirage than environmental oasis. The legislation defines "restoration" as "the application of ecological principles to restore a degraded or fragmented ecosystem and return it to a condition in which its biological and structural components achieve a close approximation of its natural potential, taking into consideration the physical changes that have occurred in the past and the future impact of climate change and sea level rise." CAL. WATER CODE § 85066. While this standard creates some ambiguity about the level to which the flow criteria must achieve a natural, restored condition in the Delta, to actually do so would require the unthinkable: dismantling two centuries worth of waterworks, abandoning cities and farms in the Delta and across the state, and letting California's rivers once again run their wandering and unpredictable courses to the sea. The July 20, 2010, draft flow criteria released by the State Board would essentially do just that—the flow criteria suggest flow rates that would cut in half all water diversions and consumptive uses from the Delta.

Even so, the criteria contain an important limitation—they are not, as the legislation deems, “predecisional.” This means, ostensibly, that the public trust flow criteria developed by the State Board will be immune from legal challenge and are not determinative of future water rights or water-quality proceedings. While the flow criteria may have no immediate force of law, the State Board’s prescribed flows for the Delta may ultimately become *fait accompli* as the environmental community and state and federal regulatory agencies seek to enforce the criteria more broadly. But as the California Supreme Court posited in the *National Audubon* decision, the State Board can ultimately favor the interests of the appropriator over public trust resources if it finds that “the benefit gained is worth the price.”

### *The Next Chapter*

California’s legislative package of 2009 was born out of necessity, and to avoid the mounting conflicts over endangered species, water quality, floodplain management, and urban and agricultural water needs throughout the state. The legislative package did not significantly alter California’s water rights

regime. Still, it has put into place for the first time a system of agencies and authorities to integrate land-use, water-quality, and water-supply decisions in the Delta. The Delta Stewardship Council and State Board now have additional tools for identifying the environmental values and beneficial uses that can be served by the state’s water and on devising strategies to protect them. Rather than instituting a paradigm shift in water rights, California’s strategy focuses on restoring the Delta ecosystem through regional and statewide efforts, and sets the table for a physical solution—a peripheral canal or other alternative conveyance system that can better manage the conflicts between people and the environment.

While California’s water legislation may only amount to modest reform, its new agencies and authorities have a tremendous opportunity to build on existing efforts and help develop a comprehensive conservation plan to improve the Delta and its ecology. If they can do so without sacrificing water-supply reliability, then California will have achieved the legislation’s co-equal goals of growth that is environmentally sustainable. Such success would undoubtedly set a precedent as to how others might resolve conflicts over scarce and precious natural resources. 🌳