

LAND USE & NATURAL RESOURCES

CLIENT ALERT

NOVEMBER 5, 2009

IT'S NOT JUST ABOUT WATER: LAND USE AND OTHER PROVISIONS IN THE CALIFORNIA DELTA WATER BILLS

Early yesterday morning, the California state legislature passed a sweeping package of bills aimed at resolving both water supply problems and the environmental plight of the Sacramento-San Joaquin Bay Delta. The bills put water supply and the Delta environment on an equal legal footing, establishing those principles as the State's two fundamental and co-equal goals for the Delta.

The bills, however, are not just about water, and not just about the Delta. Within the Delta, the bills establish a new land use regime, setting up a Delta Stewardship Council that will develop a Delta Plan. Local project approvals will need to be consistent with this plan (with an interim "grandfather" exception for some projects), and third parties will be able to appeal consistency determinations to the Delta Stewardship Council. On a statewide basis, the bills include new measures governing urban and agricultural water conservation and statewide monitoring of groundwater use. The bills do not expressly authorize a new canal around the Delta, but they do establish new provisions relative to the Bay Delta Conservation Plan, which may pave the way for such a canal. These bills, now being sent to the Governor for signature, include:

- **SBX7 1** – makes comprehensive changes to the governance of the Delta, including revisions to the composition of the existing Delta Protection Commission; the establishment of a Sacramento-San Joaquin Delta Conservancy to promote environmental restoration and the economic well-being of the Delta; and the creation of a new state agency, the Delta Stewardship Council, with plan consistency jurisdiction over land use projects in the Delta area. This bill also includes provisions relative to the Bay Delta Conservation Plan, which will include an endangered species permitting process and is viewed as the mechanism by which a Delta canal could be approved.
- **SBX7 2** – authorizes the issuance of \$11.14 billion dollars in bonds for the development of a program to fund a variety of water conservation and efficiency projects. This bond measure will be submitted to the voters at the November 2, 2010 statewide general election.
- **SBX7 6** – establishes a new groundwater monitoring program to more regularly and systematically monitor groundwater throughout the state. Local entities must register with the state for groundwater monitoring by January 1, 2011, and begin monitoring by January 1, 2012.
- **SBX7 7** – requires a 20 percent reduction in urban per capita water use by 2020, and at least a 10 percent reduction by 2015. Urban retail water suppliers must adopt consistent water use targets by 2011. Agricultural water suppliers must implement efficient water management practices by July 2012, and prepare an agricultural water management plan that meets specified requirements by December 2012.
- **SBX7 8** – clarifies the types of water diversions for which record keeping is required, and revises requirements relating to the contents of statements of diversion and use. The bill also imposes civil liability for the failure to file a required diversion and use statement for a diversion or use that occurs after January 1, 2009, the tampering with water measuring devices, or the making of a material misstatement in connection with the filing of a diversion and use statement.

Each of these bills is significant, but three in particular have broad implications. In many ways, **SBX7 1** is the centerpiece of the bill package because of its scope and its creation of a new land use regulatory regime in the Delta. **SBX7 1** includes the following provisions that relate to land use projects in the Delta:

- The establishment of the Delta Stewardship Council, which must prepare and adopt a Delta Plan by January 1, 2012. The Delta Plan will be a comprehensive, long-term management plan for the Delta, and local land use approvals within

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the Delta (and also the Suisun Marsh) must be consistent with the plan once it is adopted. The Delta zones that are subject to the Council's jurisdiction include a secondary zone of substantial land surrounding the Delta.

- Any local agency planning to undertake a project (including the familiar CEQA categories of projects – agency projects, agency-funded projects, or agency-approved projects) must prepare detailed findings establishing the project's consistency with the Delta Plan, and submit those findings to the Council for review. Any party who believes the project is not consistent with the Plan may file an appeal with the Council. This suggests that consistency appeals to the Delta Stewardship Council will become part of the strategy for those opposing development projects, similar to the use of California Coastal Commission appeals in the Coastal Zone.
- The bill includes a grandfather provision, pursuant to which projects in the Delta “secondary zone” are not required to be consistent with the Plan if the notice of determination for the project (the final CEQA notice of project approval) is filed before the Delta Plan becomes effective.

SBX7 6 also has statewide implications. This bill touches on the nettlesome area of groundwater regulation in the state. **SBX7 6** establishes a groundwater monitoring program that authorizes certain public agencies to assume responsibility for monitoring and reporting on groundwater elevations in basins and subbasins identified by the Department of Water Resources. The intent behind the bill is to ensure that this monitoring and reporting is done more regularly and systematically. The Department will assume groundwater monitoring functions for those basins and subbasins for which no public agency has agreed to step forward for monitoring and reporting. In some cases, counties and other public agencies that do not assume groundwater monitoring responsibilities will not be eligible for any state water grants or loans.

Finally, **SBX7 7** sets forth water conservation targets and policies that will undoubtedly affect every Californian. It does so by targeting both urban and agricultural uses of water, as follows:

- The state must achieve a 20 percent reduction in urban per capita water use by December 31, 2020.
- The state must make incremental progress toward the 20 percent goal by reducing per capita urban water use by at least 10 percent on or before December 31, 2015.
- Urban retail water suppliers must develop consistent water use targets, and include those targets in their urban water management plans.
- Agricultural water suppliers must implement a variety of water conservation and management practices by July 31, 2012, including quantity-based pricing and incentive pricing to achieve more efficient use.
- Agricultural water suppliers must prepare and adopt an agricultural water management plan, including a description of water supplies, water uses, and water accounting, and an analysis of the effect of climate change on future water supplies. Such agricultural water management plans are exempt from CEQA's environmental impact review requirements (which may substantially expedite the adoption of such plans and reduce the amount of litigation over such plans).

The package of water bills now on Governor Schwarzenegger's desk is historic and far-reaching. Some of the bills apply statewide, so project proponents and public agencies will need to become familiar with the water conservation and groundwater monitoring provisions. Within the Delta, including the substantial secondary zone surrounding the Delta, the land use entitlement process for many projects will now have a new layer, and a new avenue for the legal appeals that are so often a part of the process in California.

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