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A New Dawn for the Sacramento-San Joaquin Delta? Assessing the 2009 California Delta/Water Legislation

Richard M. Frank[*]

INTRODUCTION

The California legislature's major, substantive achievement of 2009 was the passage of a five-bill package designed to address the multiple ills that have befallen the California Delta[1] and compromised statewide water policy. The bills were signed into law with great fanfare by California Governor Arnold Schwarzenegger last November.

This Article focuses on three related topics: (1) the legal, scientific and political developments that gave rise to this important and controversial legislation; (2) the key features of each of the five bills; and (3) the extent to which the legislation represents sound environmental policy and the likelihood that its broad objectives will be realized.

THE IMPETUS FOR THE 2009 LEGISLATION

In hindsight, it was a "perfect storm" of political and environmental forces that gave rise to—and, some would argue, were essential to securing passage of—the five, interrelated bills collectively known as the 2009 "Delta Legislation." The key drivers of the legislative package are briefly summarized below:

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1. The California Delta marks the confluence of the Sacramento and San Joaquin Rivers, and represents the eastern portion of the largest estuary system (i.e., mixture of fresh and sea water environments) on the West Coast of North and South America. Once a vast tidal marsh, the Delta presently consists of a complex system of channels and reclaimed islands. The Delta, which extends approximately 24 miles from east to west and 48 miles from north to south, drains a vast watershed encompassing 45% of California's land area. Left undisturbed, those waters flow naturally through the Delta, out the Golden Gate and into the Pacific Ocean.

- Continued, scientifically documented declines in Delta fisheries. The Delta Smelt, an important "indicator species" of the Delta's overall ecological health, continued to slide toward extinction. Moreover, severe declines in the Delta's salmon population provided another sign of crisis in the Delta ecosystem.
- The "plateauing" of the CALFED process. The CALFED Bay-Delta Program began in the 1980s with unprecedented collaboration on Delta issues between state and federal policy makers. That program undoubtedly achieved some significant successes, especially in its early years. More recently, however, most observers believe the CALFED Program has stalled, in major part due to the failure of the George W. Bush administration to actively support it.
- The influential research findings of the Public Policy Institute of California (PPIC). Two influential, Delta-related publications by the non-partisan PPIC, in 2007 and 2008, marshaled the relevant scientific and engineering research and offered nonpartisan policy recommendations that proved quite influential to state political leaders.[2]
- Three successive years of drought led to cutbacks in water deliveries from the state and federal water projects. California's long-term drought conditions provided a sense of urgency to the legislature's Delta- and water-related deliberations.
- The findings and recommendations of the Governor's Delta Vision Blue Ribbon Task Force. In 2006, Governor Schwarzenegger created a seven-member Delta Vision Blue Ribbon Task Force to provide independent recommendations to his administration and the legislature regarding Delta-related issues. The Task Force issued its findings and recommendations in two reports, in 2007[3] and 2008.[4] The Task Force's conclusions attracted surprisingly broad and bipartisan support among Sacramento political leaders and Delta stakeholders alike. Many of the Task Force recommendations formed the policy underpinnings of the Delta Legislation that ultimately was enacted.
- Increased litigation and regulatory activity over the effect of state and federal water projects on threatened and endangered fish species. With documented declines in Delta fisheries, California's massive state and federal water projects came under heightened scrutiny for their deleterious effects on fish species and the Delta ecosystem generally.

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2. *See* JAY LUND ET AL., PUB. POLICY INST. OF CAL., ENVISIONING FUTURES FOR THE SACRAMENTO-SAN JOAQUIN DELTA (2007), *available at* http://www.ppic.org/content/pubs/report/R_207JLR.pdf; JAY LUND ET AL., PUB. POLICY INST. OF CAL., COMPARING FUTURES FOR THE SACRAMENTO-SAN JOAQUIN DELTA (2008), *available at* http://www.ppic.org/content/pubs/report/R_708EHR.pdf.

3. DELTA VISION BLUE RIBBON TASK FORCE, OUR VISION FOR THE CALIFORNIA DELTA (2007), *available at* http://deltavision.ca.gov/BlueRibbonTaskForce/FinalVision/Delta_Vision_Final.pdf.

4. DELTA VISION BLUE RIBBON TASK FORCE, DELTA VISION STRATEGIC PLAN (2008), *available at* http://deltavision.ca.gov/StrategicPlanningProcess/StaffDraft/Delta_Vision_Strategic_Plan_standard_resolution.pdf.

Several lawsuits were filed against project operators under the federal and California Endangered Species Acts; in some cases, those lawsuits led to court-ordered reductions in water deliveries from the projects. In 2006, state officials convened a lengthy set of negotiations known as the Bay Delta Conservation Planning Process, designed to curb the litigation and achieve an informal resolution to these endangered species issues. Those negotiations remain ongoing, and concern over that process prompted legislators' interest in a statutory solution.

- Political dysfunction in Sacramento and the perceived need for a "success story." Protracted political gridlock in California in 2009 over a deficit-ridden state budget and other issues led to widespread dissatisfaction among the media and general public with both the legislature and the Schwarzenegger administration. By summer 2009, political leaders from both branches of state government seemingly were desperate to achieve a policy breakthrough and accomplishment of some sort. The related, pressing issues of the Delta and state water policy provided them with that opportunity, and they embraced it.

THE 2009 DELTA LEGISLATION—A SUMMARY

From the commencement of the California legislature's 2009 session last January, legislative leaders were focused on the California Delta and the looming, statewide water crisis. State Senate and Assembly policy committees held a series of informational hearings early in the year, and numerous Delta and water bills were introduced by legislators of both parties. Newly elected Senate President Pro Tem Darrell Steinberg, Chairwoman Fran Pavley of the Senate Natural Resources and Water Committee, State Senator Joe Simitian and Chairman Jared Huffman of the Assembly Water, Parks and Wildlife Committee all placed the Delta and water at the top of their policy agendas. Each of these legislators was directly involved in legislative working groups and other processes that led to the ultimate legislation.

As the months passed, however, California's political leaders became increasingly focused on the state's growing fiscal crisis and the need to fashion a state budget for the 2009–10 fiscal year in the face of multi-billion dollar deficits. By late spring, the legislature and the Schwarzenegger administration were consumed with protracted budget negotiations, and policy legislation understandably got shunted to the sidelines. The legislature and Governor failed to reach a budget accord until mid-August 2009, and only thereafter were able to shift attention back to Delta and water issues. Despite frenetic efforts in the waning days of the legislative session, California's political leaders were unable to achieve closure on Delta and water legislation—despite a desperate, late-night session on the last day of the regular 2009 legislative session, September 11, 2009.

Legislative leaders supported Governor Schwarzenegger's calling of a special legislative session in the fall of 2009, specifically to consider legislation

to "fix" the Delta and address myriad California water-related concerns. At different times during the special session, proposed legislation alternately took the form of a single, "omnibus" Delta bill and a package of individual bills introduced by various legislators. Eventually, consensus emerged around the latter formula. In early November, following yet another all-night session, the legislature narrowly passed a package of five bills dealing with the California Delta and state water reform. Governor Schwarzenegger signed all five, and four of the bills took effect on February 4, 2010; the fifth is subject to approval by California voters in the November 2010 general election.

Below is a summary of the key features of each of the five bills that, collectively, constitute the 2009 Delta Legislation:

SBX7 1 (Simitian/Steinberg)[5]

SBX7 1, dealing primarily with Delta governance issues, is the substantive centerpiece of the five-bill package. The bill is a legislative reaction to the generally accepted view that the pre-existing system of Delta governance was dysfunctional, overly decentralized, and redundant. (For example, over 200 federal, state, and local agencies claim jurisdiction over Delta issues.) Among the most important components of SBX7 1 are:

- Adoption of most of the broad policy recommendations made by the Governor's Delta Vision Blue Ribbon Task Force, and, most importantly, that the State's overarching objective for the Delta is to "[a]chieve the two coequal goals of providing a more reliable water supply for California, and protecting, restoring and enhancing the Delta ecosystem."[6]
- Creation of a new, overarching state Delta Stewardship Council (DSC), the centerpiece of the Delta Legislation's new governance structure.
    - The DSC consists of seven members, four appointed by the Governor, one each by the Senate Rules Committee and the Speaker of the Assembly, and the final member being the Chair of the Delta Protection Commission.
    - DSC's principal, short-term mandate is to adopt, by January 2012, a comprehensive Delta Plan, consisting of strategies and actions designed to achieve the legislation's broad, co-equal goals for the Delta.

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5. While the text of SBX7 1 is not yet available in Session Laws, it can be found at State of California, Office of Legislative Counsel, Official California Legislative Information, SBX7 1, http://leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx7_1_bill_20091112_chaptered.pdf (last visited Feb. 22, 2010).

6. CAL. PUB. RES. CODE § 29702(a) (Deering 2010). Other key policies first articulated by the Delta Vision Blue Ribbon Task Force and expressly incorporated in SB7X 1 are found throughout the legislation, most prominently in the new CAL. WATER CODE §§ 85001, 85020–85023 (Deering 2010). For example, section 85023 provides that "[t]he longstanding constitutional principle of reasonable use and the public trust doctrine shall be the foundation of state water management policy and are particularly important and applicable to the Delta."

  - After adoption of the Delta Plan, California state and local government agencies must certify that their "covered actions" affecting the Delta are consistent with the DSC's Delta Plan; the DSC is empowered to take and decide appeals from "any person" who claims that a proposed covered action is inconsistent with the Delta Plan.[7] If the DSC determines that such a state or local government "covered action" is not consistent with the Delta Plan, the matter is remanded to that governmental entity; the DSC's inconsistency finding does not necessarily void the action.
- Significant revisions to the composition and duties of the Delta Protection Commission (DPC), a regional land-use planning body originally created in 1992. SBX7 1 reduces the number of DPC commissioners and increases the influence of local government interests on the DPC.
- Creation of a new, thirteen-member Sacramento-San Joaquin Delta Conservancy, whose principal role is to serve as "a primary state agency to implement ecosystem restoration in the Delta,"[8] but also is empowered to address Delta economic and cultural issues.
- Creation of a new "Delta Watermaster," appointed by the State Water Resources Control Board in consultation with the DSC, to "exercise the board's authority to provide timely monitoring and enforcement of board orders and license and permit terms and conditions" involving the Delta.[9]
- Numerous "Early Actions" for the Delta, most prominently the creation of a Delta Independent Science Board to oversee the research, monitoring, and assessment programs that support adaptive management of the Delta through periodic review of Delta programs and a mandate to the State Water Resources Control Board to "develop new flow criteria for the Delta ecosystem necessary to protect public trust resources" by fall 2010.[10]

SBX7 2 (Cogdill)[11]

If SBX7 1 is the policy centerpiece of the Delta Legislation, SBX7 2 is the fiscal fulcrum. The latter bill, titled the "Safe, Clean and Reliable Drinking

7. CAL. WATER CODE § 85225.10(a) (Deering 2010). Critically, however, the definition of "covered action" excludes any "regulatory action of a state agency," *id.* § 85057.5(b)(1), thus creating a major potential loophole in the DSC's consistency review authority.

8. CAL. PUB. RES. CODE § 32322(a).

9. CAL. WATER CODE § 85230(b).

10. *Id.* §§ 85080, 85086(c)(1).

11. While the text of SBX7 2 is not yet available in Session Laws, it can be found at State of California, Office of Legislative Counsel, Official California Legislative Information, SBX7 2, http://leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx7_2_bill_20091109_chaptered.pdf (last visited Feb. 22, 2010).

Water Supply Act of 2010," authorizes an $11.14 billion general obligation bond act designed to fund a wide array of drought relief, water supply reliability, Delta ecosystem restoration, state water system reliability, water conservation, watershed and groundwater protection, water quality, and water recycling programs.

SBX7 2 becomes operative only if a majority of California voters approve the bond measure in the November 2, 2010 general election. Originally, the Delta Legislation's substantive components were expressly contingent upon voter enactment of the bond measure. Critically, the substantive and fiscal bills were "de-coupled" in the course of last fall's legislative negotiations, and the former are not conditioned on voter passage of SBX7 2.

Several aspects of SBX7 2 proved controversial in the legislative debate over the measure and will be a crucial part of the campaign leading up to the November 2 election. First, numerous taxpayer groups and public finance experts question whether the fiscally challenged State of California can afford to assume the considerable amount of public debt proposed by SBX7 2. Second, the single largest component of SBX7 2's expenditures—$3 billion—is devoted to help finance "statewide water system operational improvement." These new or expanded water storage projects are anathema to many environmentalists, who believe that if they are justified at all, new water storage projects should be fully funded on a "user pays" basis by the agricultural or municipal interests standing to benefit directly from them, rather than at least partially subsidized by the general public as is proposed under SBX7 2.

Another largely overlooked feature of the bond act is a provision that allows "nongovernmental partners," including private water interests throughout California, to become co-owners, -managers, and -operators of bond-financed surface storage projects on a "cost share participation or equity participation" basis.[12] This raises—in some quarters, at least—fundamental questions about potential privatization of state water resources and related facilities. Finally, SBX7 2 served as the financial lubricant necessary to secure critical votes for the Delta Legislation as a whole: the bond act is replete with a veritable "Christmas tree" of public works projects benefiting legislative districts throughout the state, many of which are well outside the Delta watershed. Those projects—most of which hold environmental appeal in the abstract—were added to SBX7 2 in a successful effort to entice reluctant state legislators to vote for the five-bill package, though the nexus of many of the projects to the Delta is tenuous at best.

Notably, the bond act contains *no* express funding for construction of or mitigation for a California "peripheral canal," a proposed project that is discussed in more detail below.

12. CAL. WATER CODE § 79749.

SBX7 6 (Steinberg/Pavley)[13]

SBX7 6, along with SBX7 8 (discussed below), focuses on reforms to statewide water policy. Both bills emerged as perhaps the most modest components of the Delta Legislation. While the original scope of SBX7 6, embraced by the legislature's Democratic leadership, would have brought major reforms to California's system of water rights monitoring and enforcement, it foundered in the legislature's final negotiations last fall. Much of the substantive content of the original bill was gutted, because a majority of legislators did not support it. Without substantial amendments, SBX7 6 might have signified the death knell for the entire legislative package.

Specifically, SBX7 6 addresses groundwater resources in California, which, unlike rights to surface waters, are largely unregulated under state law.[14] Even more remarkable is the current lack of monitoring and reporting requirements for groundwater users.

Reflecting a series of legislative compromises, the final version of SBX7 6 requires that elevation levels of groundwater basins—though not volumetric amounts of groundwater extracted—"be regularly and systematically monitored locally" and reported no later than January 1, 2012.[15] While the legislation empowers a wide variety of local agencies and special districts to assume responsibility for monitoring and reporting elevations from individual groundwater basins, SBX7 6 directs the state Department of Water Resources (DWR) to perform the groundwater elevation monitoring function if no such local agency or special district volunteers to do so. The bill also gives DWR the responsibility to collect, aggregate, and report the groundwater elevation monitoring data generated under the legislation, as part of DWR's ongoing water planning responsibilities.

SBX7 6 specifies that individual property owners—such as groundwater pumpers—are not required by the legislation to compile or report groundwater monitoring information or to permit government officials to enter their property for the same purposes.

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13. While the text of SBX7 6 is not yet available in Session Laws, it can be found at State of California, Office of Legislative Counsel, Official California Legislative Information, SBX7 6, http://leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx7_6_bill_20091106_chaptered.pdf (last visited Feb. 22, 2010).

14. California is the only state in the Western United States that does not regulate groundwater extraction and use. Felicity Barringer, *Rising Calls to Regulate California Groundwater*, N.Y. TIMES, May 13, 2009, *available at* http://www.nytimes.com/2009/05/14/science/earth/14aquifer.html?_r=3&hp.

15. State of California, Office of Legislative Counsel, *supra* note 13.

SBX7 7 (Steinberg)[16]

The focus of SBX7 7 is statewide water conservation policy. Most water districts, conservation groups, and water experts agree that, in the short term at least, water conservation represents the most feasible, least expensive, and most expeditious means of making California's finite water supplies satisfy ever-growing public demand.

SBX7 7 partially codifies Governor Schwarzenegger's previous directive that California achieve a 20 percent reduction in per capita water use by the end of 2020. The bill sets an interim, 10 percent reduction target of 2015. Critically, however, while the Governor's policy dealt with statewide, per capita water use, SBX7 7 imposes those numerical limits solely on *urban* per capita water use.

The primary sanction for urban water districts' failure to meet these water conservation targets is their ineligibility, beginning in 2016, to receive state water grants and loans until they achieve the applicable conservation standards.

While California's agricultural sector was subject to the same, numerical water conservation standards under earlier iterations of the bill, the final version of SBX7 7 imposes no such quantitative water consumption limits on California's agricultural water users. Instead, the legislation requires agricultural users to adopt and report "efficient water management practices," as well as "agricultural water management plans" (both terms defined in the bill). Failure to do so on a timely basis would result in the disqualification of agricultural water users for state water grants and loans.

SBX7 8 (Steinberg)[17]

The final component of the Delta Legislation, SBX7 8, enacts modest revisions to California's system of water rights. Like SBX7 6, SBX7 8 originally contained more ambitious water law reforms, particularly as it affected the water rights enforcement authority of the State Water Resources Control Board (SWRCB). But those provisions were eliminated from the bill in eleventh-hour legislative negotiations.

As enacted, SBX7 8 expands somewhat the obligation of diverters of California surface waters to report those diversions to the SWRCB, primarily by removing earlier reporting exemptions for in-Delta diverters. The bill also imposes civil penalties on covered water diverters who fail to file such diversion reports and those who tamper with water measuring devices.

16. While the text of SBX7 7 is not yet available in Session Laws, it can be found at State of California, Office of Legislative Counsel, Official California Legislative Information, SBX7 7, http://leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx7_7_bill_20091110_chaptered.pdf (last visited Feb. 22, 2010).

17. While the text of SBX7 8 is not yet available in Session Laws, it can be found at State of California, Office of Legislative Counsel, Official California Legislative Information, SBX7 8, http://leginfo.ca.gov/pub/09-10/bill/sen/sb_0001-0050/sbx7_8_bill_20091106_chaptered.pdf (last visited Feb. 22, 2010).

(Previously, no statutory penalties existed for failure to report surface water diversions to the SWRCB; as a result, the level of non-reporting statewide has been variously estimated at 25 to 50 percent.)

The bill also appropriates $546 million from Propositions 1E and 84 for various Delta ecosystem and state water supply reliability purposes.

During debate over the Delta Legislation, there was considerable focus upon the current deficiencies in SWRCB's enforcement of state water rights. Proposals to grant the SWRCB more substantive enforcement authority were largely unavailing, but proponents of a more aggressive SWRCB enforcement effort were successful in one sense: SBX7 8 authorizes twenty-five new staff positions to augment the SWRCB's water rights enforcement resources.

ASSESSING THE DELTA LEGISLATION: A CRITIQUE AND SOME PREDICTIONS

The debate over the 2009 Delta Legislation was vigorous, intense, and protracted. It split conventional political alliances, pitting water districts against one another, dividing the environmental community, and fostering dissent among California's agricultural water users as well. At the end of the process, no political leader or stakeholder took the position that the legislation that ultimately emerged was perfect, or that it will assure a permanent "fix" for either the Delta or California's overall water supply system.

Rather, the question is whether the Delta Legislation represents substantial progress toward addressing the Delta's multifaceted environmental challenges and improving the reliability of state water supplies.

Some aspects of the legislation are worthy of praise. Remarkably, virtually all of the policy recommendations advanced by the Governor's Delta Vision Task Force found their way into the final Delta Legislation. The notion that Delta ecosystem restoration and preservation of a reliable supply for California are co-equal, overarching goals is especially noteworthy, as is the new law's explicit reaffirmation of the public trust and reasonable use doctrines as foundations of statewide water policy. The commitment to meaningful, statewide water conservation efforts and the creation of a new regulatory and planning structure for the Delta are also worthwhile—indeed, overdue—reforms.

Other aspects of the Delta Legislation are disappointing, however. One critically important proposal that eventually was jettisoned would have limited major new development projects in flood-prone areas of the California Delta. Legislative efforts that would have made significant reforms to a state water rights system generally considered to be dysfunctional and ineffective became another casualty of legislative negotiations. Limits on the DSC's "consistency review" of other state agencies' regulatory actions seem ill-advised, and likely to constrain the DSC's ability to bring strong leadership to Delta resource issues. The DSC's ability to ensure that the decisions of other state agencies are consistent with the DSC-approved Delta Plan seems critical to the success of the legislation's contemplated governance reforms. Finally, prospects for voter

passage of the Water Bond created by SBX7 2 are uncertain at best; how Delta ecosystem restoration and contemplated water projects will be financed if that measure is rejected at the polls in November is very much an open question.

And, silently hanging over the Delta Legislation debate like Banquo's Ghost is the specter of the long-debated peripheral canal, also referred to in various quarters as an "alternate conveyance" or "isolated facility." Governor Schwarzenegger and the Republican legislative leadership were originally committed to Delta legislation that would have authorized a canal project to transport Sacramento River water around the Delta to the San Joaquin Valley and Southern California. But it became apparent early in the 2009 session that the legislature would not approve such a measure. Accordingly, no explicit reference to a peripheral canal appears anywhere in the final Delta Legislation. Instead, there is an implicit assumption among at least some legislators and stakeholders that the DSC will have to address and presumably decide this contentious issue as part of its important new duties.

To a considerable degree, the ultimate success or failure of the Delta Legislation will depend on the skill and political savvy of those charged with implementing it. The quality of the seven appointees to the DSC is a critical variable, as is the extent to which the new Delta Conservancy will be able to achieve the Delta ecosystem restoration and cultural preservation goals the legislation contemplates. It is also uncertain whether existing, key government agencies such as the SWRCB will have the political will to achieve the statewide water reforms suggested in the new legislation.

The 2009 Delta Legislation unquestionably represents the most comprehensive attempt by state political leaders in half a century to preserve the Delta and reform overall California water policy. Only time will tell whether that attempt will prove successful.