

Delaying the \$11 Billion Water Bond: What Does it Mean for the Delta?

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On August 10, 2010, Governor Schwarzenegger signed AB 1265, removing the \$11 billion bond measure passed as part of the “comprehensive” water package in 2009 from the November 2010 ballot, delaying the bond vote until 2012. In addition to many other projects that would be funded by the Bond, \$2.25 billion in appropriations were identified for Delta sustainability, including funding for activities contemplated by the Bay Delta Conservation Plan (BDCP) and implementation of other projects consistent with the Delta Legislation enacted last year. While there has been much discussion of the affordability of the Bond and the likelihood of its passage, there has not been a great deal of discussion of the potential implications of delaying the Bond. In particular, a delay in the Bond will likely have implications for the BDCP and may result in legislative authorization for “fees” to pay for Delta restoration.

Background

In November 2009, the California Legislature enacted five bills intended to promote a comprehensive solution to State water supply reliability and ecosystem restoration in the Sacramento-San Joaquin River Delta. Among the five bills was the Safe, Clean, and Reliable Drinking Water Supply Act of 2010 (Bond). That bill authorizes the issuance of \$11,140,000,000 in bonds for various water-related projects throughout the State, including \$2.25 billion in funding for “Delta Sustainability.” (Wat. Code, § 79730 et seq.) The bill was conditioned, however, on approval at the November 2, 2010 general election. AB 1265, enacted on August 10, 2010, removes the Bond from the November 2, 2010 ballot and places it on the general election ballot for November 6, 2012.

Much of the \$2.25 billion in the Bond was likely going to provide the necessary funding for what is thought to be the “public portion” of the costs of implementing the BDCP. The Bond specifies that \$1.5 billion of the Bond funds be allocated to projects to protect and enhance sustainability of the Delta ecosystem, including projects for the development and implementation of the BDCP. (See Wat. Code, § 79731(b)(1).) Given that substantial funds contained in the Water Bond are set aside for Delta sustainability, and specifically the BDCP, the delay of the Water Bond raises a question about the future of funding for restoration and other activities contemplated by the BDCP.

The BDCP as a Habitat Conservation Plan

The BDCP, under development for the past few years, would be a multispecies Habitat Conservation Plan (HCP) as authorized by Section 10 of the federal Endangered Species Act (ESA). Section 10 of the ESA allows the issuance of permits for “incidental take” of threatened and endangered species based on an approved HCP. If approved and implemented, the BDCP will provide broad habitat restoration and ecosystem conservation in the Delta to allow certain federal, state and local agencies to conduct activities in the Delta, including operation of the State Water Project (SWP) and Central Valley Project (CVP), and allow for the construction of any proposed alternative conveyance structure that might otherwise conflict with current laws pertaining to endangered and threatened species. The HCP may also serve as a Natural Communities Conservation Plan (NCCP) under California State law.

HCPs cannot be approved without identification of secured funding sources for activities contemplated by the HCP. In particular, an HCP must ensure that there is adequate funding and specify the sources of funding available to implement the HCP’s steps to minimize and mitigate impacts to its covered species. (16 U.S.C. §§ 1539(a)(2)(A), (B).) Thus, an HCP must detail the funding sources that will be available to implement any proposed mitigation program. For large-scale HCPs, funding issues become complex because of the geographic scope of the area and because the number and scope of the activities contemplated typically require substantial budgets. Where perpetual funding is required to implement any mitigation measures, the HCP must establish programs or mechanisms to generate those funds. Importantly, an applicant for a permit cannot rely on the speculative future actions of others to fund activities related to an HCP. (Southwest Center for Biological Diversity v. Bartel (S.D. Cal. 2006) 470 F.Supp. 2d 1118, 1155, citing National Wildlife Federation v. Babbitt (E.D. Cal. 2000) 128 F.Supp. 2d 1274, 1294-1295, and Sierra Club v. Babbitt (S.D. Ala. 1998) 15 F.Supp. 1274, 1280-1282.)

The lack of adequate funding to ensure implementation of mitigation and other conditions of an HCP can be a fatal flaw and, in fact, the lack of adequate funding and appropriate funding assurances has resulted in the invalidation of HCPs. Courts have been cautious when considering the source of funds identified for the acquisition of property and for long-term mitigation management associated with HCPs. While there is no requirement that an applicant acquire all land required for an HCP up-front, or that there be some form of permanent endowment funded prior to the issuance of the incidental take permit, an HCP must include a funding plan that outlines mandatory funding measures and provides for potential future adjustments to account for increased costs. (Southwest Center for Biological Diversity v. Bartel, supra, 470 F.Supp. 2d at p. 1156.)

For example, the City of Sacramento’s HCP for the Natomas area was invalidated due, in part, to inadequate funding assurances. (National Wildlife Federation v. Babbitt, supra, 128 F.Supp. 2d 1274.) There, the HCP’s funding mechanism depended on continuous infusion of new “developable” land to providing funding for mitigation for past

development. The problem inherent in this funding scheme was that the mitigation fees imposed on land under development might not be sufficient to purchase the required mitigation lands, leaving the burden of covering the potential cost increases on future development. If lands were developed too rapidly, there might not be any lands left to which an increased fee could apply. Thus, the HCP lacked adequate assurances that the City of Sacramento would mitigate the effects of urban development occurring within its permit area.

Further complicating the matter, the City of Sacramento had rejected the United States Fish & Wildlife Service's (USFWS) proposed change to the HCP, that the City of Sacramento would simply "ensure" funding would be available. Instead, the City of Sacramento created a funding scheme that was "projected" to be adequate, without any assurances. (*National Wildlife Federation v. Babbitt*, supra, 128 F.Supp. 2d at p. 1294.) The court found that this proposed funding scheme frustrated the ESA's requirement that funding for mitigation be ensured.

The City of San Diego prepared an HCP that met a similar fate. (*Southwest Center for Biological Diversity v. Bartel*, supra, 470 F.Supp. 2d 1118.) There the City prepared an HCP that needed funding for two categories of expenses. First, the City needed funds to acquire land for the preserve contemplated by the plan. Second, the City needed funds to administer the plan for the life of the incidental take permit. The City's proposed source of funding relied on future actions, consisting of future regional plans with other local jurisdictions, raising the sales tax, or issuing bonds, which would require voter approval.

The uncertainty over guaranteed funding was evident in the administrative record, which revealed that the City could not guarantee that funds for the purchase of lands in the preserve would be available beyond those obtained through the mitigation process. While the City promised to use its "best efforts" to implement the financing and land acquisition components of the plan, the court nonetheless found that the City's unwillingness to ensure funding for the plan was fatal. The court found that the proposed funding source was unreliable and speculative and that the USFWS could not rationally conclude that the City would "ensure adequate funding" as contemplated by the ESA.

For the Water Bond and the BDCP, the question is what impact the Bond delay will have on the development and approval of the BDCP. Without question, the delay of the Bond presents challenges to the BDCP. The Draft BDCP is currently scheduled for release in November 2010, with a final version expected in early 2012 — well ahead of the November 2012 vote on the Bond. As such, and as currently scheduled, the BDCP cannot rely on the Water Bond alone as funding for restoration activities contemplated by the BDCP, at least not if the BDCP remains on its current schedule.

Other Potential Sources of Funding for the BDCP

The delay in the Bond vote and, frankly, the uncertainty of the ultimate fate of the Bond, results in a quandary for the BDCP, and calls into question the ability to complete the activities contemplated by the recently enacted water package. There has been a move

afoot for some time to identify other sources of funding, not only for some Delta restoration activities, but also to fund long-term Delta governance.

There is a bill currently under consideration, AB 2092 (Huffman), that seeks to identify those that benefit from, or cause a negative impact to, the Delta, including all water users and dischargers in the larger Delta watershed, those benefitting from Delta flood protection, those who benefit from Delta recreation, and commercial fishing interests. Under AB 2092, the Delta Stewardship Council would make recommendations regarding fees, but could not adopt fees without express legislative authorization. The purpose of this exercise is to identify potential funding sources, under a “beneficiary pays” principle, for implementing the “Delta Plan.” The Delta Plan, a component of the water package, is currently being developed by the Delta Stewardship Council. If successful, the BDCP will become part of the Delta Plan. Many have expressed concern about parties not participating in the BDCP being otherwise required to provide financial and other support to make the BDCP a success. AB 2092, as currently drafted, perpetuates those concerns.

In addition to these concerns, the legitimacy of user fees imposed on water rights is still in question. In 2003, much of the financial support for the State Water Resources Control Board’s Division of Water Rights shifted from General Fund revenue to fees imposed on appropriative water rights issued by the State. Those fees were the subject of litigation that is still pending before the California Supreme Court. Without a decision from the California Supreme Court on this question, relying on user fees imposed on water rights throughout the Delta watershed could be a fatal flaw in a financing mechanism for Delta restoration.

Conclusion and Implications

Delaying the Bond until November 2012 presents some challenges for the BDCP and for Delta restoration generally. Given the legislative directive to manage towards the coequal goals of providing a more reliable water supply for California and protecting, restoring, and enhancing the Delta ecosystem, it is almost certain that there will need to be some funding mechanism identified to move forward with Delta restoration. The concern is that parties outside of the BDCP will be burdened with the cost of paying for Delta restoration, restoration that many see as the responsibility of those who move water through (or around) the Delta and those who are more directly responsible for the physical modification of the Delta. The delay of the Water Bond is certainly not the end of the road — and it might just be one of the many forks in the road to solving the Delta’s problems.

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