In early November 2009, the California Legislature passed five bills that will dramatically affect management and use of the state’s water resources. Together these bills are the most significant water legislation in California in decades. They were driven by the decline of environmental health in the Sacramento–San Joaquin River Delta and a third consecutive year of extremely dry conditions.

Within the past five years, the decline of several fish species in the delta—including the delta smelt, salmon, and steelhead trout—has prompted extensive litigation under the federal Endangered Species Act and resulted in court orders that significantly restrict the movement of water from northern California through the delta to agricultural and urban users in central and southern California. These restrictions have caused a “regulatory drought” that, combined with an extended dry period in the state and reduced Colorado River flows, have dramatically affected California’s economy. The failure of existing institutions to adequately solve the significant and complex environmental and water supply problems of the delta and the state has fostered a broad-based movement for reform among agricultural interests, urban water suppliers, the business community, and environmental advocates.

The new legislation

• includes the issuance of a statewide bond for $11.14 billion to fund water storage, conveyance, and conservation projects in the delta and other areas of California;

• mandates that California cities achieve a 20% reduction in urban per capita water use statewide;

• encourages agricultural water efficiency improvements;

• requires increased monitoring and reporting of groundwater elevations and surface water diversions.

These provisions will have significant statewide effects on both public and private entities that participate in the water industry.

This article focuses on the implications for water suppliers of three of the new bills: SB7x6, which authorizes local governments to implement groundwater monitoring programs; SB7x7, which mandates conservation and efficiency programs; and SB7x8, which requires that all people who divert or store water from surface streams or water bodies report those diversions to the state. These bills, which went into effect January 1, are not tied to voter approval of the $11.14 billion bond measure and have been signed by Governor Schwarzenegger.

The California legislation may prove instructive for other states in the region that are also facing increased supply constraints because of drought, climate change, and increased demand. Though the bills expressly provide protections for vested water rights, they increase the burdens on rights holders to maintain and preserve those rights. In addition, certain language in the bills may send a signal that a consideration of what constitutes a reasonable use of water will likely include
an analysis of the efficiency of a given use. California’s move toward increased oversight, though moderate, may provide a template or precedent for similar expansions of state oversight in other states.

SB7X6—GROUNDWATER

This bill establishes a groundwater monitoring program under which an entity designated by the California Department of Water Resources (DWR) will monitor groundwater elevations and report any elevations to the DWR. Entities eligible to assume responsibility for groundwater monitoring include court-appointed watermasters, groundwater management agencies, water replenishment districts, local agencies that manage all or part of a groundwater basin, counties, and voluntary cooperative groundwater monitoring associations established by contract, joint powers agreement, memorandum of understanding, or other approved form of agreement.

The groundwater monitoring program is groundbreaking in that it represents the first effort to study and monitor the impact of groundwater use on a statewide scale. Historically, there has been considerable resistance to state efforts to quantify groundwater use because of concerns that quantification represented the first step in statewide regulation. Groundwater in California has a different legal status than surface water. Unlike appropriations of surface water (post 1914), which are regulated by the State Water Resources Control Board, the use of percolating groundwater is not regulated by the control board or any other state agency. Local regulations may apply, as in the case of adjudicated groundwater basins, under groundwater management plans, local districts, cities, and counties.

The new law does not change this existing policy of leaving groundwater management to local agencies. It, however, does create a publicly available database of the effects of local use on groundwater basins. Presumably this information may motivate local regulatory action if it reveals that a groundwater basin is in overdraft, but no such mandate is included in the bill.

SB7X7—WATER CONSERVATION

This bill requires that California achieve a 20% reduction in urban per capita water use by Dec. 31, 2020, with an interim reduction goal of 10% on or before Dec. 31, 2015. As soon as 2010, when urban retail water suppliers file their next urban water management plans, those suppliers must develop the baseline daily per capita water use and the water use targets necessary to meet these reduction goals. Retailers who do not comply with the water conservation requirements will not be eligible for state grants or loans.

The urban goals do not represent a reduction in overall use and therefore should not threaten any water rights held by the affected agencies. Furthermore, the bill expressly provides that California Water Code Section 2011, which protects water rights when water conservation measures have been implemented, applies to any conservation measures taken under this bill.

A key issue in implementing any conservation program is cost. Costly conservation measures reduce demand, reversing the normal economic model in which improvements in efficiency increase profits. As a result, agencies will be forced to increase rates to compensate for both decreased demand and investments in efficiency. The bill provides for rate review by the California Public Utilities Commission in the case of regulated utilities and allows for recovery of all costs incurred in implementing the required conservation measures.

This bill also encourages more efficient use of water by agricultural water suppliers. Under the bill, agricultural water suppliers must implement efficient management practices such as effective measurement of deliveries and pricing structures based on quantities delivered as well as improving water use on problematic land, facilitating use of recycled water, financing capital improvements for irrigation systems, and implementing incentivized pricing structures that promote more efficient water use at the farm level.

The bill resurrects the concept of the agricultural water management plan (AWMP), which is analogous to an urban plan and requires that agricultural water suppliers prepare and adopt a plan before Dec. 31, 2012,
and update the plan for 2015 and every five years thereafter. An AWMP must contain information regarding the supplier’s service area, terrain and soils, climate, delivery measurements, rules and regulations, shortage allocation policies, quantity and quality of supplies, water uses within the service area, drainage, water accounting, and reliability. In addition, the AWMP must include a report on the efficiency management practices that the supplier has implemented under this bill and the efficiency improvements that have resulted from that implementation. Failure to adopt an AWMP will render an agricultural water supplier ineligible to receive water grants or loans from the state.

DWR, in consultation with the Agricultural Water Management Council, academic experts, and other stakeholders, will use the information acquired from AWMPs and agricultural water suppliers to develop a methodology for quantifying the efficiency of agricultural water use.

**SB7X8—DIVERSION REPORTING**

This bill requires that all people who divert or store surface water report those diversions to the state on an annual basis starting in 2009. Commencing in 2012, all diverters must measure the amount of water diverted using best available technologies and include the measured amount of monthly diversions in all annual reports.

Annual statements of diversion and use have been required under the water code since 1965; however, the failure to do so previously carried no civil liability. The only liability for failing to file a statement of diversion and use was that it made documentation of an existing riparian or pre-1914 water right more difficult to establish and tolled the statute of limitations with respect to the claim of a prescriptive right. In a significant change, this bill applies civil penalties to the failure to report water diversions.

It is expected that increased data from the new reporting requirement will lead to better water rights enforcement and greater certainty in watershed planning. It also means that water users must now affirmatively demonstrate that they are putting their water right to beneficial and reasonable use or risk forfeiture.

**CONCLUSION**

California’s recent efforts to reform the way water resources are managed in the state demonstrates that the state government is finally acknowledging that the existing institutions are inadequate in the face of continuing supply constraints and demand expansion. Many questions remain. Do these bills represent the end of cooperation among the traditionally antagonistic interest groups, or will more reforms emerge? How will the burdens of the new laws affect taxpayers generally, individual water users, and water supply entities? Will California’s experiment with reform gain traction in other states? Is this the beginning of a shift away from the property right in water to a more heavily regulated resource? The provisions in the recent bills will not solve California’s water supply problems, though it is hoped they will provide some tools that will enable more effective actions in the future.

—Aaron Baker is an associate in Brownstein’s Santa Barbara, Calif., office and a member of the Natural Resources Group.

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**About Brownstein Hyatt Farber Schreck**

Founded in 1968, the law firm of Brownstein Hyatt Farber Schreck practices in the areas of real estate, natural resources, public policy, corporate law, and litigation. Although the firm has played an integral role in water issues for the past decade, its recent merger with the California firm of Hatch & Parent has made it a dominant US law firm in the area of water law and policy. For more information about the firm’s water group, contact Mark Mathews at mmathews@bhfs.com or (303) 223-1179 or Stephanie Osler Hastings at shastings@bhfs.com or (805) 882-1412. To visit the firm’s website, go to www.bhfs.com.