

In re Bay-Delta: CEQA Decision Adds Certainty to Water Planning

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In the mid-twentieth century, California built a hydraulic empire—dams and levees, aqueducts and pumps—all meant to move water from the parts of the state that have it to the parts of the state that need it.¹ At the center of this empire lies the largest estuary on the West Coast. The Bay-Delta forms in the western Central Valley, at a point where the Sacramento and San Joaquin rivers come together, and then flows onward to the San Francisco Bay and the Pacific.² The Bay-Delta exports almost six million acre-feet of water per year. Those exports provide drinking water to at least two-thirds of California homes and irrigation to more than seven million acres.³

Since the Gold Rush, the Bay-Delta has endured much: from the flushing of its tributaries with mud and debris by hydraulic miners⁴ to the dredging of waterways and draining of marshes by engineers.⁵ But as the decades wore on, as pumping stations pushed water to rich fields and booming cities, and as California grew to become the most populous state in the country,⁶ the Bay-

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1. See *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161, 166–67 (Cal. Ct. App. 1986); see also ELLEN HANAK, *WATER FOR GROWTH: CALIFORNIA'S NEW FRONTIER* (2005); NORRIS HUNDLEY, JR., *THE GREAT THIRST* (2001).

2. HUNDLEY, *supra* note 1, at 4–5; see also CALFED BAY-DELTA PROGRAM, EXECUTIVE SUMMARY OF THE FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT / ENVIRONMENTAL IMPACT REPORT ES-1 (2000).

3. See *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings (Bay-Delta II)*, 184 P.3d 709, 715 (Cal. 2008).

4. See *Woodruff v. N. Bloomfield Gravel Mining Co.*, 18 F. 753 (D. Cal. 1884); *People v. Gold Run Ditch & Mining Co.*, 4 P. 1152 (Cal. 1884); see also HUNDLEY, *supra* note 1, at 75–79.

5. See Martin D. Mitchell, *Land and Water Policies in the Sacramento-San Joaquin Delta*, 84 GEOGRAPHICAL REV. 411 (1994).

6. Lee Green, *Infinite Ingress*, L.A. TIMES MAG., Jan. 25, 2004, at 12.

Delta wilted.⁷ Water quality worsened.⁸ Populations of some native species dwindled.⁹ Levees threatened to collapse and flood Sacramento and surrounding cities.¹⁰ In 1992 Governor Pete Wilson declared the Bay-Delta broken.¹¹

Two years later, in an effort to repair the damage, the eighteen state and federal agencies¹² that regulate the Bay-Delta formed CALFED—a consortium charged with creating a collaborative thirty-year plan for the troubled estuary.¹³ In 2000, CALFED issued that plan: a high-level blueprint for restoring the ecological health of the Bay-Delta and improving its water management.¹⁴ Agricultural interests from the northern Central Valley soon challenged the plan¹⁵ under the California Environmental Quality Act (“CEQA”),¹⁶ which provides those who oppose projects for environmental or other reasons with legal means to attack them.¹⁷ The resulting litigation dragged on for eight years

7. See, e.g., JAY LUND ET AL, PUBLIC POLICY INSTITUTE OF CALIFORNIA, ENVISIONING FUTURES FOR THE SACRAMENTO-SAN JOAQUIN DELTA, at v (2007) (“The Delta is widely perceived to be in crisis in several ways.”).

8. See, e.g., *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings (Bay-Delta I)*, 34 Cal. Rptr. 3d 696, 707 (Cal. Ct. App. 2005) (“Tests conducted during the 1980’s and early 1990’s revealed high levels of selenium, bromide salts, Diazinon (a popular residential pesticide), and other wastes that have been added to the Delta by industrial discharge, drainage runoff, and saltwater intrusion.”).

9. LUND, *supra* note 7, at 61 (“Invasive species have come to pose expensive challenges to many of the services provided by the Delta. . . . In addition, recent sharp declines in native species, particularly the delta smelt, indicate the need for attention to biological issues.”).

10. See, e.g., Central Valley Flood Protection Act of 2008, CAL. WATER CODE § 9600 *et seq.* (Deering 2008); PUBLIC POLICY INSTITUTE OF CALIFORNIA, JUST THE FACTS: FLOOD CONTROL (2008); HUNDLEY, *supra* note 1, at 393–98; Jia-Rui Chong, *Delta Quake Risk High for State’s Water System*, L.A. TIMES, Mar. 21, 2009, at A11.

11. See Virginia Ellis, *Wilson Tries to Navigate a Compromise on Water Policy*, L.A. TIMES, Apr. 7, 1992, at A3.

12. The state agencies include the Delta Protection Commission, Department of Fish and Game, California Environmental Protection Agency, Department of Food and Agriculture, Resources Agency, Department of Water Resources, Central Valley Flood Protection Board, and the State Water Resources Control Board. The federal agencies include the United States Army Corps of Engineers, Bureau of Land Management, Bureau of Reclamation, Environmental Protection Agency, United States Fish and Wildlife Service, United States Forest Service, United States Geological Survey, National Marine Fisheries Service, Natural Resources Conservation Service, and the Western Area Power Administration. See *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings (Bay-Delta II)*, 184 P.3d 709, 717 n.3 (Cal. 2008).

13. See CALFED BAY-DELTA PROGRAM, *supra* note 2, at ES-1 to ES-2.

14. See *Bay-Delta II*, 184 P.3d at 714, 719–20; see also HUNDLEY, *supra* note 1, at 398–425.

15. See *Bay-Delta II*, 184 P.3d at 720–21.

16. CAL. PUB. RES. CODE § 21000, *et seq.* (Deering 2008).

17. See, e.g., Editorial, *Stimulus, Keep It Green*, MERCED SUN-STAR, Dec. 5, 2008, at B3 (“CEQA has a long history of litigious abuse by various interest groups, including unions that want to extract favorable labor terms for certain projects.”); Peter Nicholas & Robert Salladay, *Developers See Opportunity at Gov.’s Table*, L.A. TIMES, May 15, 2005, at A1 (“CEQA has been a focus of debate virtually from the day it was passed. Environmentalists contend it has proved an invaluable tool, allowing them to defeat plans for toxic waste incinerators near residential areas. . . . Business groups counter that the law can be a hindrance to economic growth.”); Lisa

and culminated in *In re Bay-Delta Programmatic Environmental Impact Report Consolidated Proceedings* (“*Bay-Delta*”).¹⁸ The unanimous California Supreme Court decision upheld the CALFED plan and, in doing so, added certainty to California’s increasingly uncertain water planning process.

CEQA requires public agencies to prepare environmental impact reports (“EIRs”) for all projects that could significantly affect¹⁹ the environment. An EIR serves as an “environmental ‘alarm bell’” and a “document of accountability.”²⁰ It must define project purposes and discuss feasible alternative projects that can potentially reduce the environmental impact while achieving most project objectives.²¹ CEQA establishes “no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR.”²² Agencies must rely on the “rule of reason” when determining which alternatives to include.²³ This hazy standard has, over the years, allowed project opponents to attack EIRs for not including the full range of alternatives CEQA requires.²⁴

In *Bay-Delta*, CALFED agencies used an extensive administrative process to determine which alternatives to consider.²⁵ This process lasted five years and

Mascaro, *Environmentalists Tout Land-Use Law’s Successes*, L.A. DAILY NEWS, Mar. 15, 2005, at N4 (“Using CEQA, opponents have successfully fought off industrial facilities near neighborhoods, oil drilling off the coast and housing in open space But developers and some political leaders in Sacramento have been increasingly arguing that the law is being abused by NIMBYs who can file a lawsuit and halt a development.”).

18. *Bay-Delta II*, 184 P.3d at 709.

19. See CAL. PUB. RES. CODE § 21061 (Deering 2008) (defining “environmental impact report”); CAL. PUB. RES. CODE § 21065 (Deering 2008) (defining “project”); CAL. PUB. RES. CODE § 21082.2 (Deering 2008) (explaining the method an agency must follow when determining the significance of an effect).

20. *Sierra Club v. State Bd. of Forestry*, 876 P.2d 505, 514 (Cal. 1994).

21. CAL. PUB. RES. CODE § 21001(g) (Deering 2008) (declaring one legislative purpose of CEQA to be requiring agencies “to consider alternatives to proposed actions affecting the environment”); CAL. PUB. RES. CODE § 21002 (Deering 2008) (“The Legislature further finds and declares that in the event specific economic, social, or other conditions make infeasible such project alternatives or such mitigation measures, individual projects may be approved in spite of one or more significant effects thereof.”); CAL. PUB. RES. CODE § 21002.1(a) (Deering 2008) (“The purpose of an environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the project, and to indicate the manner in which those significant effects can be mitigated or avoided.”); CAL. CODE REGS. tit. 14, § 15126.6 (2009) (“An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project”).

22. *Citizens of Goleta Valley v. Bd. of Supervisors*, 801 P.2d 1161, 1168 (Cal. 1990).

23. See CAL. CODE REGS. tit. 14, § 15126.6 (2009).

24. See, e.g., *Sequoyah Hills Homeowners Ass’n v. City of Oakland*, 29 Cal. Rptr. 2d 182 (Cal. Ct. App. 1993) (challenging the EIR for a residential project for not discussing a lower-density alternative); *Save Our Residential Env’t v. City of West Hollywood*, 12 Cal. Rptr. 2d 308 (Cal. Ct. App. 1992) (challenging a senior center EIR for not considering off-site alternatives); *Al Larson Boat Shop, Inc. v. Bd. of Harbor Comm’rs*, 22 Cal. Rptr. 2d 618 (Cal. Ct. App. 1990) (attacking a master plan for the Port of Long Beach for not considering alternative landfill sites).

25. See *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (*Bay-Delta II*), 184 P.3d 709, 718–20 (Cal. 2008).

included several rounds of public input.²⁶ Through the process, CALFED agencies identified the project's purpose as: "to develop and implement a long-term comprehensive plan that will restore ecological health and improve water management for beneficial uses of the Bay-Delta system."²⁷ And the agencies identified four objectives the plan would have to meet to achieve that purpose: restoring the ecosystem, ensuring adequate water supplies, improving water quality, and strengthening levees.²⁸

In 2000, CALFED agencies issued the final project EIR.²⁹ It included four alternatives that varied only in the ways they would have stored and conveyed water.³⁰ Interest groups—including the Regional Council of Rural Counties, the California Farm Bureau Federation, the Central Delta Water Agency, the South Delta Water Agency, and several farmers—challenged the EIR.³¹ They argued it violated CEQA because it did not include alternatives that would have reduced the amount of water exported from the Bay-Delta.³² CALFED defended that it could not achieve its purpose unless it satisfied all four project purposes and a reduced exports alternative would not satisfy the water supply objective.

The Sacramento Superior Court upheld the EIR. The challengers then appealed to the Third District Court of Appeal, which reversed the trial court and found the EIR invalid. The court explained that CEQA requires agencies to consider all feasible alternatives and an alternative like reduced exports may be feasible even if it "would impede to some degree the attainment of the project objectives."³³

The California Supreme Court—motivated in part, perhaps, by the Third District's controversial argument that CALFED agencies should not have assumed California must provide water to satisfy the demands of a growing population³⁴—granted review. It reversed the appellate decision and held that CALFED agencies did not err by excluding the reduced exports alternative.³⁵

26. *See id.* at 718–20.

27. CALFED BAY-DELTA PROGRAM, *supra* note 2, at ES-3.

28. *See id.* at ES-5; *Bay-Delta II*, 184 P.3d at 718.

29. *Bay-Delta II*, 184 P.3d at 720.

30. CALFED BAY-DELTA PROGRAM, *supra* note 2, at ES-7.

31. *See In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings (Bay-Delta I)*, 34 Cal. Rptr. 3d 696, 705, 725–28 (Cal. Ct. App. 2005).

32. *Id.* at 726–28.

33. *Id.* at 772 (quoting CAL. CODE REGS., tit. 14, § 15126.6 (2009)).

34. *See id.* at 774 ("Population growth is not an immutable fact of life. . . . Inflow of new residents to California continues to exceed outflow because conditions in the State are conducive to population growth. One aspect of these conditions is the availability of water. However, as the State reaches the limit of available water and must seek other sources such as desalination, water will become more expensive to obtain and California's appeal will lessen."). For popular reaction to the decision, *see, e.g.*, Editorial, *A Watershed Ruling*, L.A. TIMES, Nov. 19, 2005, at B18 ("The court ruling may be heresy to the water engineers. In fact, it's the new reality."); *CalFed Plan Trashed*, CONTRA COSTA TIMES, Oct. 17, 2005, at F4; *Water Plan Might Need Review*, L.A. DAILY NEWS, Oct. 16, 2005, at SC1.

35. *See In re Bay-Delta Programmatic Environmental Impact Report Coordinated*

The court explained that agencies cannot disregard alternatives merely because those alternatives would not achieve all project objectives.³⁶ But agencies *can* disregard alternatives that would not achieve project purposes.³⁷ If a project must satisfy all objectives to achieve its purpose, the court implied, agencies may then disregard alternatives that do not satisfy all project objectives.³⁸ To illustrate this logic, the court pointed to earlier cases holding that an oceanfront resort and a waterfront aquarium would not achieve their primary purposes if moved inland and that, as a result, the EIRs for those projects did not need to consider alternative inland locations.³⁹

The court then applied these EIR alternative rules to CALFED. It found CALFED agencies had carefully identified project objectives and, from the start, had said it could not achieve its purpose unless it met all objectives.⁴⁰ CALFED agencies had originally discussed a reduced exports alternative and had submitted that alternative for public comment but had ultimately concluded the alternative would not meet all objectives.⁴¹ A sizable administrative record provided evidence of the deliberateness with which CALFED agencies had considered and winnowed potential alternatives.⁴² The court concluded CALFED had appropriately applied the rule of reason when it decided not to include the reduced exports alternative in its EIR.

The *Bay-Delta* decision added certainty to the increasingly uncertain process of water planning. Much of this uncertainty has resulted from climate change and ecological problems. California designed its water system around historic hydraulic patterns which, because of climate change, no longer provide a reliable guide to the future.⁴³ The Department of Water Resources predicts that in the next century there will be more erratic precipitation patterns and more frequent droughts.⁴⁴ At the same time, the precipitation that does fall will increasingly come in the form of rain rather than snow. The Sierra snowpack acts as a natural reservoir, melting and releasing water at the times of the year when water demand is greatest, and more rainfall will accelerate the release of water into the California water system.⁴⁵ That acceleration could worsen water quality and lead to flooding and other complications.⁴⁶

Proceedings (*Bay-Delta II*), 184 P.3d 709, 714–15 (Cal. 2008).

36. *See id.* at 724.

37. *See id.*

38. *See id.*

39. *See id.* at 724–25.

40. *See id.* at 723–25.

41. *See id.*

42. *See id.* at 725.

43. *See* DEPARTMENT OF WATER RESOURCES, MANAGING AN UNCERTAIN FUTURE: CLIMATE CHANGE ADAPTATION STRATEGIES FOR CALIFORNIA'S WATER 4 (2008).

44. *See id.* at 5.

45. *See id.* at 4.

46. *See id.* at 5–6.

Another threat to water supplies comes from mounting ecological problems. Contaminants and overdraft have compromised aquifers,⁴⁷ and the Bay-Delta is in such peril that the director of the Department of Water Resources has described it as being “on the brink of collapse.”⁴⁸ Native plant and animal species—including some indicator species—face extinction.⁴⁹ In 2007, a federal judge in Fresno ordered water managers to cut pumping by as much as a third to protect the delta smelt, an endangered inch-long fish whose condition reflects the overall health of the ecosystem. In 2008, the same judge held that state and federal agencies would have to adjust their Bay-Delta operations to protect the endangered Chinook salmon and wild steelhead trout.⁵⁰

The state has tried to incorporate the uncertainty related to climate change and ecological problems into its planning.⁵¹ But in California, water planning is an intricate process,⁵² and an abrupt and unanticipated reduction in water supplies could upend it. The process begins with the California Water Plan—a “strategic plan for managing and developing water resources” that the Department of Water Resources releases every five years.⁵³ Planners at regional and local levels depend on the California Water Plan when preparing their own plans.⁵⁴ The Urban Water Management Planning Act,⁵⁵ for instance, requires all but the smallest water districts⁵⁶ to prepare Urban Water Management Plans (“UWMPs”).⁵⁷ UWMPs must identify and quantify existing

47. See, e.g., LITTLE HOOVER COMMISSION, CLEANER WATER: IMPROVING PERFORMANCE AND OUTCOMES AT THE STATE WATER BOARDS 23 (2009) (“Perchlorate, used in rocket fuel in the last half of the 20th century, has contaminated water in Sacramento County and Southern California, mostly in areas formerly used by the United States Department of Defense and the National Aeronautics and Space Administration.”); NATURAL RES. DEF. COUNCIL, CALIFORNIA’S CONTAMINATED GROUNDWATER: IS THE STATE MINDING THE STORE? (2001), <http://www.nrdc.org/water/pollution/ccg/execsum.asp> (“According to questionable State Water Resources Control Board data, more than one third of the areal extent of groundwater assessed in California is so polluted that it cannot fully support at least one of its intended uses, and at least 40 percent is either impaired by pollution or threatened with impairment.”).

48. Eric Bailey, *Study Backing More Water for Southland is Thrown Out*, L.A. TIMES, Apr. 17, 2008, at B4.

49. CALFED BAY-DELTA PROGRAM, *supra* note 2, at ES-1 (2000).

50. See *Pac. Coast Fed’n of Fishermen’s Ass’ns v. Gutierrez*, No. 1:06-CV-00245 OWW GSA, 2008 U.S. Dist. LEXIS 75944 (E.D. Cal. Jul. 18, 2008).

51. See DEPARTMENT OF WATER RESOURCES, CALIFORNIA WATER PLAN UPDATE 2009: INTEGRATED WATER MANAGERMENTS 11 (2009).

52. For background on the water planning process and its links to land use planning, see Jamey Volker, Note, *Water Supplies Finally Take Center Stage in the Land Use Planning Arena*, 35 *ECOLOGY L.Q.* 573 (2008); Ryan Waterman, Comment, *Addressing California’s Uncertain Water Future by Coordinating Long-Term Land Use and Water Planning: Is a Water Element in the General Plan the Next Step?*, 31 *ECOLOGY L.Q.* 117 (2004).

53. DEPARTMENT OF WATER RESOURCES, CALIFORNIA WATER PLAN UPDATE 2009: INTEGRATED WATER MANAGERMENTS 1–12 (2009).

54. See *id.* at 10 (“The California Water Plan and its updates have been important sources of information for water planners since 1957.”).

55. CAL. WATER CODE § 10610 *et seq.* (Deering 2008).

56. See CAL. WATER CODE § 10617 (Deering 2008) (defining “urban water supplier”).

57. CAL. WATER CODE § 10620 (Deering 2008).

and planned water sources and describe the reliability of those sources.⁵⁸

UWMPs, in turn, serve as the basis for water supply assessments and water supply verifications⁵⁹—documents that local governments must prepare before approving large developments and must demonstrate enough water to serve those developments.⁶⁰

A sharp and sudden reduction in water supplies could effectively invalidate planning documents that had expected supplies to remain at a particular level. The 2007 delta smelt decision⁶¹ forced Los Angeles County and an Inland Empire water district to halt certain projects because they could no longer reasonably guarantee water for those projects.⁶² The city of San Diego, meanwhile, put a moratorium on all new large developments.⁶³

Admittedly, CALFED had lost much of its relevance by the time the California Supreme Court decided *Bay-Delta*.⁶⁴ In September 2006, Governor Arnold Schwarzenegger issued Executive Order S-17-06.⁶⁵ It established the Delta Vision Blue Ribbon Task Force and assigned the task force much the same role that had previously fallen to CALFED—“develop[ing] a durable vision for sustainable management of the Delta.” In 2008, the task force issued a report⁶⁶ that defined goals for the ecosystem and set forth a plan for achieving them.⁶⁷

Still, a California Supreme Court holding that CALFED had to consider reduced export alternatives could have had an effect similar to that of the smelt decision. It could have raised doubts about future water supplies and the

58. CAL. WATER CODE § 10631 (Deering 2008).

59. See DEPARTMENT OF WATER RESOURCES, GUIDEBOOK TO ASSIST WATER SUPPLIERS IN THE PREPARATION OF A 2005 URBAN WATER MANAGEMENT PLAN, at iv (2005).

60. See CAL. GOV'T CODE § 66473.7 (Deering 2008); CAL. WATER CODE § 10631 (Deering 2008).

61. *Natural Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322 (E.D. Cal. 2007).

62. See Letter from William T. Fujioka, Chief Executive Officer, Los Angeles County, to the Board of Supervisors, Los Angeles County, on Waterworks District No. 40, Antelope Valley Approval of Water Supply Assessment Indicating Inability to Assure Adequate Water Supply for Downtown Lancaster Specific Plan (Nov. 13, 2007); Deborah Schoch, *Enforcing Recent Water Laws May Throttle State's Growth*, L.A. TIMES, Jan. 14, 2008, at B1; Karen Maeshiro, *Water Lack Could Halt Building*, L.A. DAILY NEWS, Oct. 14, 2007, at N7.

63. Memorandum from Michael Aguirre, City Attorney, San Diego, to the Mayor and City Councilmembers, San Diego, on the Recent California Court Ruling Implicating Bay-Delta-Water Supply Reliability 8 (Sept. 17, 2007).

64. Glen Martin, *Judge Orders State: Stop Killing Delta Fish*, S.F. CHRON., Mar. 24, 2007, at A1 (“many delta problems . . . underscored the general failure of CalFed”); LUND, *supra* note 7, at vi (“[T]he framework known as CALFED—a stakeholder-driven process established in the mid-1990s to mediate conflict and to ‘fix’ the problems of the Delta—is facing a crisis of confidence.”).

65. California Executive Order S-17-06, Sept. 28, 2006, available at <http://gov.ca.gov/executive-order/4525>.

66. DELTA VISION BLUE RIBBON TASK FORCE, FINAL REPORT (2008), available at <http://deltavision.ca.gov>.

67. See, e.g., Posting of Barry Nelson to Switchboard, <http://switchboard.nrcd.org/> (Feb. 2, 2009, 10:33 PST).

reliability of UWMPs and the California Water Plan. It could have complicated the ability of water providers to contract for suddenly uncertain water supplies.⁶⁸ And, if it allowed the controversial no-growth language from the Third District decision to stand, it could have exposed agencies planning water infrastructure projects to legal challenges if they did not consider alternative no-growth projects.⁶⁹ These legal challenges could have contributed to still greater uncertainty.⁷⁰

It is also possible, though, that *Bay-Delta* did not reduce uncertainty but rather quietly shift it to a new battlefield. The decision was unanimous; not a single justice wrote to warn of the environmental harm that would come. That consensus may be attributable to a paragraph in which the court warned that endangered species laws would ultimately require CALFED agencies to subordinate water exports to “environmental conditions.”⁷¹ The court explained that the agencies had based their plan “on the theory, as yet unproven,” that they could restore the Bay-Delta while increasing or at least maintaining exports. “If practical experience demonstrates that theory is unsound, Bay-Delta water exports may need to be capped or reduced.”⁷²

The court did not cite to any endangered species cases, but by the time it heard oral arguments in *Bay-Delta*, the Eastern District of California had already issued the delta smelt decision.⁷³ That decision had received much media attention.⁷⁴ The justices likely knew of it, and they likely knew their

68. For the impact of the “paper water” doctrine on water contracts and water planning, see *California Oak Found. v. City of Santa Clarita*, 35 Cal. Rptr. 3d 434 (Cal. Ct. App. 2005); *Santa Clarita Org. for Planning the Env’t v. County of Los Angeles*, 131 Cal. Rptr. 2d 186 (Cal. Ct. App. 2003); *Planning & Conservation League v. Dep’t of Water Res.*, 100 Cal. Rptr. 2d 173 (Cal. Ct. App. 2000).

69. Petition for Review at 6, *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings (Bay-Delta II)*, 184 P.3d 709 (Cal. 2008) (Nos. C044267 & C044577).

70. Planning statutes generally require local governments to accommodate growth and provide essential services. See, e.g., CAL. GOV’T CODE § 65584 (Deering 2008) (requiring local governments to facilitate the development of housing to accommodate housing growth); CAL. WATER CODE § 10610.2 (Deering 2008) (requiring water suppliers to “provide assistance to water agencies in carrying out their long-term resource planning responsibilities to ensure adequate water supplies to meet existing and future demands for water.”); CAL. WATER CODE § 22075 (Deering 2008) (empowering irrigation districts to “do any act necessary to furnish sufficient water in the district for any beneficial use”); CAL. WATER CODE § 31020 (Deering 2008) (empowering county water districts to “do any act necessary to furnish sufficient water in the district for any present or future beneficial use”); see also *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990) (“Withholding available water from land zoned exclusively for residential use might interfere with the landowners’ reasonable investment-backed expectations by preventing all practical use of that land.”).

71. See *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings (Bay-Delta II)*, 184 P.3d 709, 726 (Cal. 2008).

72. *Id.*

73. *Natural Res. Def. Council v. Kempthorne*, 506 F. Supp. 2d 322 (E.D. Cal. 2007).

74. See, e.g., Eric Bailey, *Water Exports May be Cut to Save Tiny Fish*, L.A. TIMES, Dec. 15, 2007, at B7; Eric Bailey, *A Big Fish in Water Politics: Tougher Protections for Diminutive Delta Smelt Could Cut Exports*, L.A. TIMES, Sept. 14, 2007, at A12; Peter Fimrite, *Big Water Cuts*

decision would shift future litigation from the CEQA arena to the Endangered Species Act. It could be that future litigants will bring more suits under that statute. So while the Bay-Delta decision could add some certainty to the water planning process by shutting off at least one litigation valve, much uncertainty will remain. Californians have long disputed water rights, and in coming years, as demand increases and supply decreases, those disputes will continue. In fact, they may even worsen.⁷⁵

Loom to Save Fish, S.F. CHRON., Sept. 1, 2007, at A1.

75. See ROBERT GLENNON, UNQUENCHABLE: AMERICA'S WATER CRISIS AND WHAT TO DO ABOUT IT (2009).

