

Calif. Water Bill Puts Enviro Settlements In Question

By **Erin Coe**

Law360, San Diego (March 08, 2012, 11:11 PM ET) -- A bill seeking to bring more water to farms and communities in California's San Joaquin Valley is drawing concerns that it could undermine settlements resolving environmental litigation and allow for the federal government to override a state's allocation of water rights, according to experts.

The Republican-sponsored Sacramento-San Joaquin Valley Water Reliability Act, H.R. 1837, which is proceeding to the U.S. Senate after passing the U.S. House of Representatives largely along party lines last week, proposes to restore water flows through the California State Water Project and federal Central Valley Project networks to what they were under a 1994 federal-state agreement called the Bay-Delta Accord.

H.R. 1897 would also effectively overturn subsequent environmental policy, including 2009 regulations designed to protect the endangered Delta smelt, as well as a 2006 settlement to an 18-year environmental suit that resulted in water being used to restore historic salmon runs in the San Joaquin River rather than for irrigation.

In addition to putting state water rights at risk, critics say, the measure threatens to undermine public confidence in litigation settlements because of the proposed repeal of the 2006 agreement, which is only likely to intensify disputes between water contractors and environmental groups.

"Water contractors have buyers' remorse several years after agreeing to the settlement, and now they are seeking a better deal through Congress," said Richard Frank, director of University of California, Davis, School of Law's California Environmental Law and Policy Center.

"If the bill passes, the San Joaquin River settlement would be blown up and parties would be back at square one, but it wouldn't end litigation over the river," Frank said. "If Congress nullifies or overrules the settlement, the broader message would be that settlements are not worth the paper they are written on."

However, plaintiffs fighting for Endangered Species Act protections for the river are likely to face an uphill battle if Congress approves the bill and carves out portions of the act that previously applied in the state, as they would no longer be able to rely on those portions of the law, according to Jeffer Mangels Butler & Mitchell LLP partner Jon Welner.

"Litigants would have to work around the provisions of the statute, but I'm fairly confident that there would be substantial litigation over ways to challenge the legislation," he said.

Marjorie Mulhall, associate legislative counsel for Earthjustice, noted that if the bill eliminates the San Joaquin River restoration deal, it would be tough for many stakeholders in the Bay Delta to reach agreements in the future.

Although the bill targets California specifically, the measure should alarm other western states

that have the same system of water rights and allocation, according to environmental groups.

"Essentially the federal bill would preempt California's state water law and jumble how California water law currently operates," Mulhall said. "The fact that the federal government would interfere with one state's system should be a major concern to all other western states as well."

The sweeping measure proposes for the first time in history to permit the federal government to preempt the ability of the state to implement the Endangered Species Act, water quality standards and water rights to protect ecosystems, habitats and fisheries, according to Cynthia Koehler, the California water legislative director for the Environmental Defense Fund.

"It is extraordinary to have the federal government involving itself in water rights and endangered species issues when the water rights area is confined to the state," she said. "It's very threatening to state sovereignty around water and the management of natural resources."

The measure includes a provision stating that it will not serve as precedent for other states, but allowing the federal government to enter the area of water rights is highly unusual and makes people nervous, according to Welner.

"Although the bill says it won't serve as precedent, if it's done here, it could be done elsewhere," he said.

After the bill passed the House, its sponsor Rep. Devin Nunes, R-Calif., said in statement that he hoped that the Senate would pass the bill in order to help restore property rights and end the control by "radicals" over California's water supply.

The 2009 federal regulations to protect the Delta smelt led to a diversion of more than 300 billion gallons of water away from San Joaquin Valley farmers, cost thousands of farm workers their jobs and inflicted up to 40 percent unemployment in certain communities, House Natural Resources Committee Chairman Doc Hastings, R-Wash., a bill supporter, has said.

The fight over the bill shows how tensions have grown and will continue to build over the Endangered Species Act, according to Jason Shogren, department chair of University of Wyoming's natural resource conservation and management.

"Over time, people have come to realize how restrictive the Endangered Species Act is in terms of economic development and what it implies on how people can use the land," he said. "California has its work cut out for it. It has a big economy and lots of people and at the same time, it has a lot of species. The conflicts are going to continue to exist; they are not going to go away."

Many experts think the bill will have a tough time getting through the Senate. Both U.S. senators from California, Democrats Barbara Boxer and Dianne Feinstein, have said they oppose the bill. And even if it did pass, the Obama administration has vowed to veto it.

"This bill is more political theater than substantive policy," Frank said. "I don't think it's going to pass."

While the bill demonstrates the Republican strength in the House, it is widely perceived as a water grab by agricultural interests over others' interests, including commercial users, environmental groups and other agricultural users, and as a disruption to the consensus reached after 18 years of litigation, according to Welner.

"This bill is really a political act and not a realistic attempt to change water policy," he said.

Although the measure in its current form was unlikely to be signed into law, Koehler worried that pieces of the legislation might pass in some way.

"The Environmental Defense Fund is hoping that it will not proceed in any meaningful way," she said. "This bill is very unfortunate. It's counterproductive as opposed to moving complicated problems to solutions."

--Additional reporting by Steven Melendez. Editing by Jocelyn Allison and Andrew Park.

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