

**Authority and Effectiveness of the State Water
Resources Control Board**

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INTRODUCTION

This report addresses issues related to the effectiveness of the California State Water Resources Control Board (“State Board” or “Board”) in carrying out its roles and responsibilities, with particular reference to the Sacramento-San Joaquin San Francisco Bay-Delta (“Delta”).¹

Section 1 presents an overview and evaluation of the authority and responsibility of the State Board. Section 2 describes actions of the State Board over many years in connection with the Delta, and in summary form, the Mono Lake basin and the Yuba River. Based on the preceding sections, Section 3 evaluates the effectiveness of the Board with particular reference to the Delta and sets forth some observations related to the Board’s authority and effectiveness.

SUMMARY

The State Board has broad authority with regard to the surface waters of the state. The Board is charged with granting permits for the appropriation of water through the issuance of water rights permits, developing or approving plans to protect water quality, and enforcing the requirements of its water rights permits. In issuing water rights permits, the Board relies on principles of the state Constitution, statutes, and judicial opinions that provide for reasonable and beneficial use and protection of public trust resources, and prohibit waste and unreasonable use. The Board establishes Delta water quality standards in a water quality control plan and conditions the water rights permits of the two largest diverters affecting the Delta, the federal Central Valley Project (“CVP”) and California’s State Water Project (“SWP”), to meet the standards. The Board’s water quality control plans are required to meet the requirements of the federal Clean Water Act and are subject to approval of the federal Environmental Protection Agency (“EPA”).

The State Board has made decisions and taken actions regarding the Delta over a period of several decades. Many of its major actions have resulted in litigation; much of this litigation has required the Board to revisit its initial actions. Notably, the Board’s 1978 simultaneous adoption of a water quality control plan for the Delta and a water rights decision amending the CVP and SWP permits was criticized in a judicial decision that provided comprehensive direction to the Board. A subsequent attempt by the Board to adopt a more protective water quality control plan was abandoned in 1993, in response to gubernatorial direction citing restrictions on Delta activities anticipated from the listing of the Delta smelt as threatened under the federal Endangered Species Act.

Faced with a ruling by EPA that the water quality standards for the Delta were inadequate and consequent action by EPA to adopt and implement Delta water quality standards, the Board in December 1994 released a new draft water quality control plan reflecting a consensus developed in the CALFED process among a broad range of stakeholders. Shortly thereafter, the

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Board adopted the plan and set out on a process to revise the CVP and SWP permits in accordance with the plan. The Board issued a water rights decision revising the projects' permits in late 1999. The decision was the subject of litigation that resulted in a 2006 appellate ruling upholding major aspects of the Board's action. It was a period of thirty years, during which the Board conducted several separate proceedings, from the time the State Board began its actions to amend the CVP and SWP water rights permits to the appellate court decision upholding the Board's 1999 decision.

In the Mono Lake basin, diversions by the City of Los Angeles under water right permits resulted in a continuing decline in the levels of Mono Lake. In 1983, the California Supreme Court ruled that the State Board had the power to reopen and amend the City's permits in order to protect public trust resources. In the face of inaction by the State Board following that ruling, significant litigation and active intervention by the courts ensued. The Board began a process to review the City's Mono Lake basin permits in 1989, and in 1994, eleven years after the Supreme Court decision, issued its decision amending the City's permits in consideration of public trust values. The Board's 1994 action was consistent with judicial rulings that had considered the appropriate level for Mono Lake and was not challenged in court, and it was based on comprehensive scientific and technical information developed in the Board's environmental review process.

In the case of the Yuba River, fishery groups filed a complaint with the State Board in 1988 claiming that Board permits did not provide adequate protection for fish. The Board did not schedule hearings to consider the issue until 1992, and then allowed the hearings to lapse for seven years. It was not until 2001 that a final decision was made, and even then it was tied up in litigation for several more years. The issue was ultimately resolved in March 2008, twenty years after the initial complaint was filed, when the Board issued an order modifying water rights permits that was based on an agreement reached by affected parties outside the Board process.

The following conclusions may be drawn from the Board's actions summarized above:

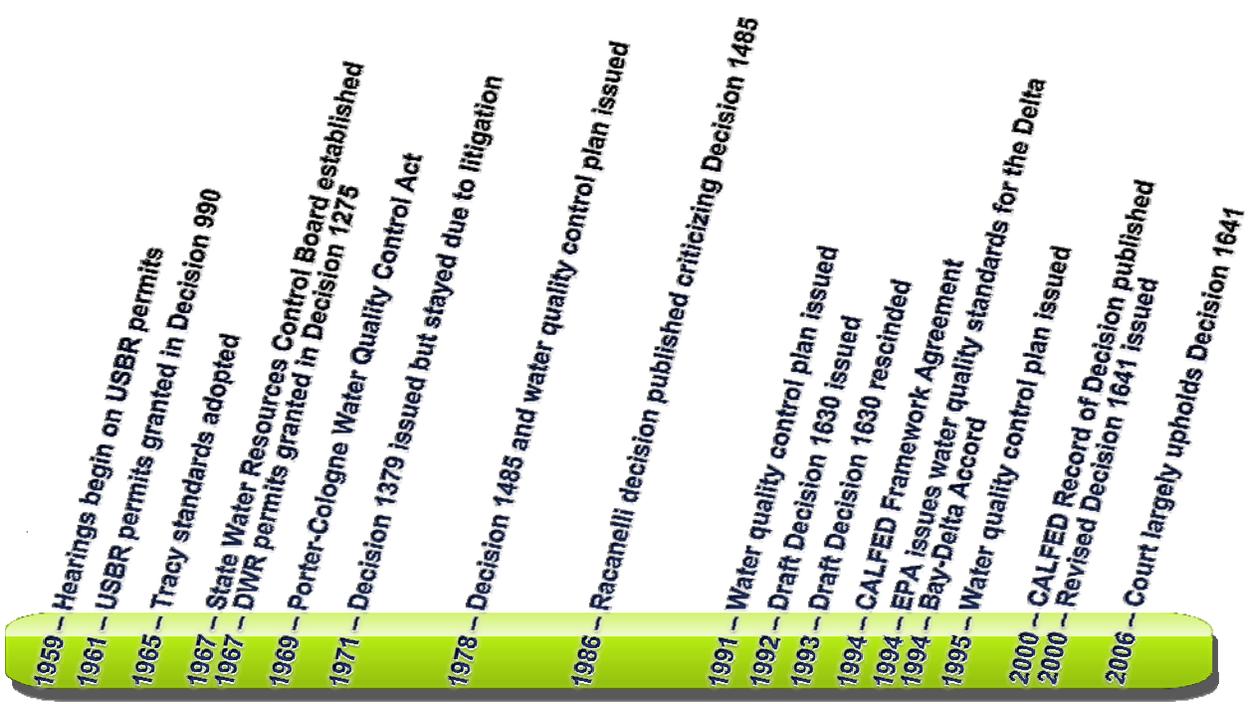
- In all three cases, the Board was extremely slow in acting (see timelines below). While there may be several reasons for the Board's failure to act in anything approaching an expeditious manner, the result has been the prolonged absence of adequate protection for threatened resources.
- When the Board has taken effective action, this has tended to be the result of consensus reached by parties outside the Board's processes.
- The Board does not have adequate authority to comprehensively and effectively address the Delta. The Board's authority has been adequate to allow it to satisfactorily address the Mono Lake basin and the Yuba River; this is not the case with the Delta. Measured by several indicators, including the precipitous decline of listed species and the pervasive risk to essential infrastructure, the Delta is widely considered to be in a state of crisis.

Numerous factors make the Board's task in addressing the Delta a difficult one. Perhaps foremost is the great magnitude and complexity of the issues the Delta presents. Other relevant factors are the involvement of entrenched and powerful interest groups; very broad and non-specific standards that leave large discretion to the Board; the political nature of the Board; scientific uncertainty; and inadequate staffing and insufficient funding.

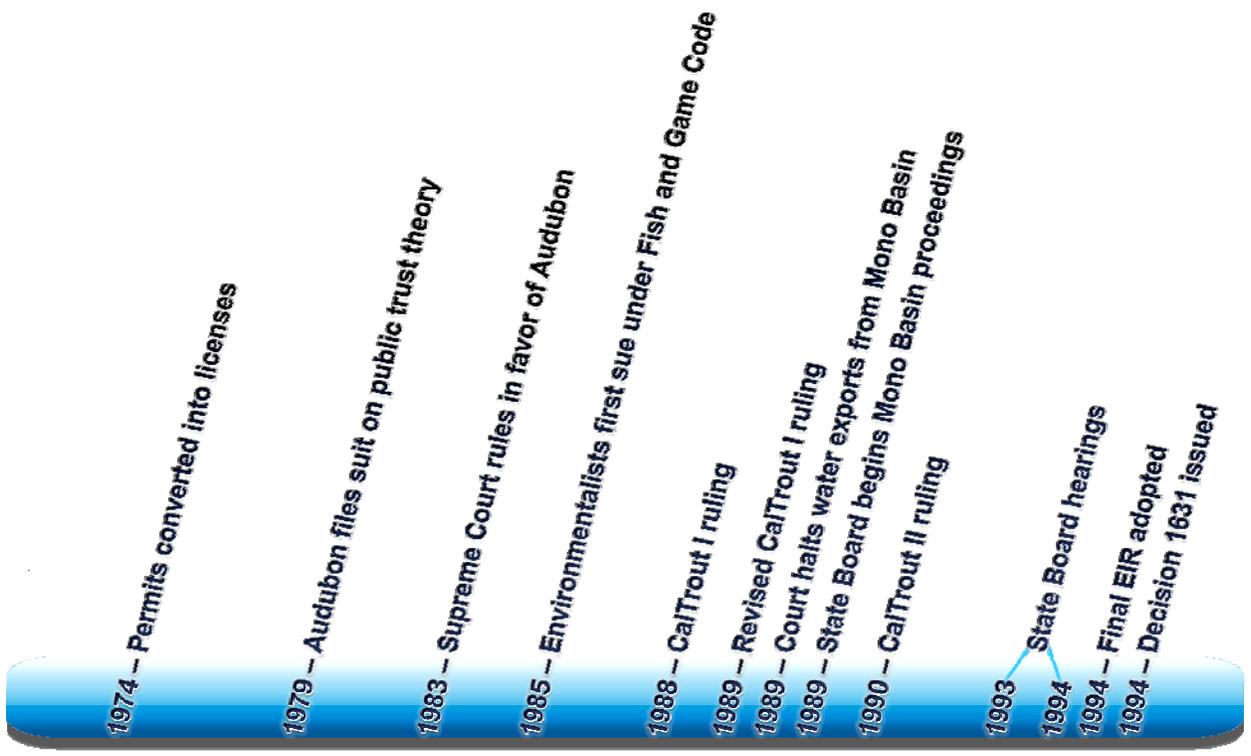
The problems facing the Delta are the result of factors not wholly within the Board's purview, including issues related to the condition of levees, adjoining land uses, and governance. In addition, the state and federal resource agencies charged with the protection of endangered species have responsibility for conditions in the Delta as they affect Delta fish species. In light of these complexities, appropriate consideration is being given to a new and comprehensive governance structure to address the Delta. Assuming that such a structure would leave intact the Board's authority, careful analysis will be essential to assure effective coordination between the new entity and Board and to guarantee consistency between Board actions and those of the new entity.

Based on our review, we believe the following measures that could improve the performance of the Board should be considered:

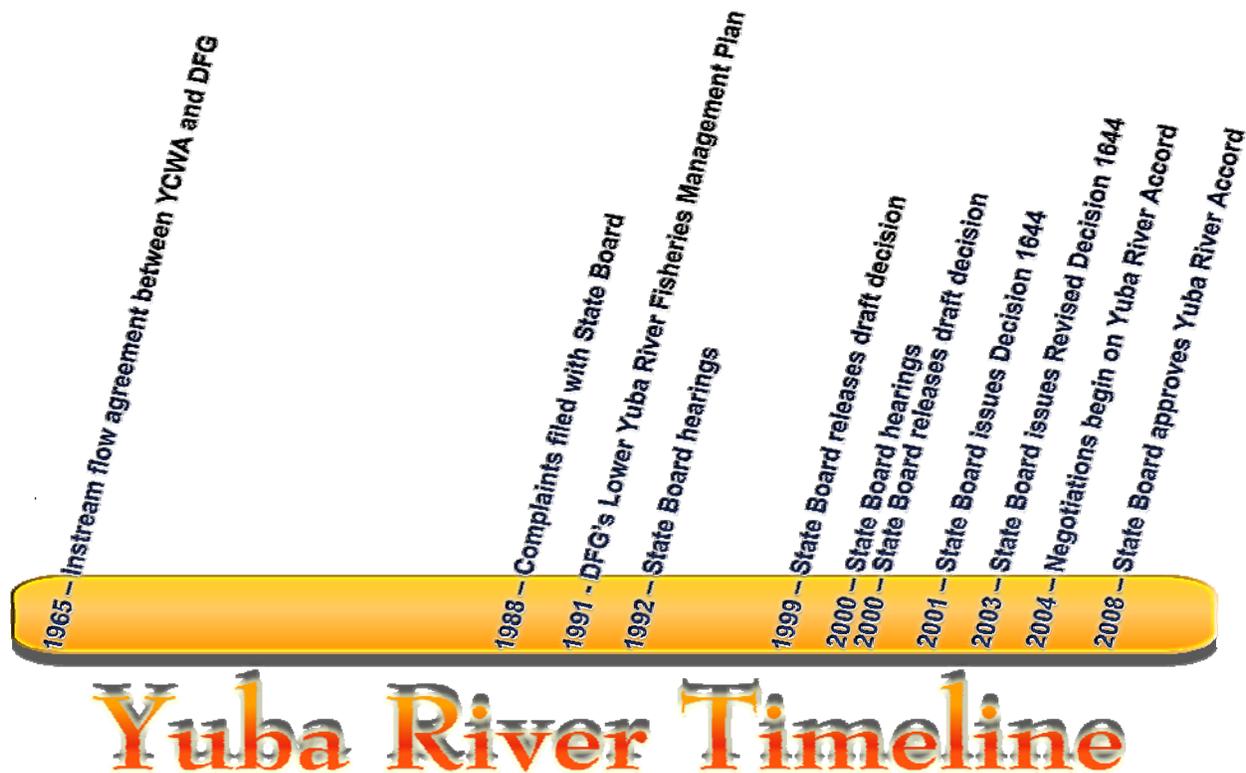
- increased coordination among the State Board and the resource agencies;
- strong leadership by the State Board and high level staff that includes a willingness to provide clear and expeditious direction on even the most controversial and intransigent issues;
- increased use of interim orders to be effective during the pendency of lengthy and delay-prone proceedings;
- participation by State Board staff in discussions among interested parties that could result in agreement on issues or approaches to issues before the Board;
- a strong process coordinated with other agencies to provide the best scientific and technical information;
- delegation of specific issues to hearing officers; and
- enhanced staffing and funding, particularly for water rights monitoring and enforcement activities.



Delta Timeline



Mono Basin Timeline



I. STATE BOARD AUTHORITY

The State Water Resources Control Board was established in 1967 to exercise "the adjudicatory and regulatory functions of the state in the field of water resources." Water Code § 174.² The Legislature expressly intended to integrate the water rights functions of the state with the water quality/pollution functions of the state.³ (Before the creation of the State Board, water rights were managed by the State Water Rights Board and water quality was overseen by a separate entity, the State Water Quality Control Board.) Two years later, in 1969, the Legislature enacted California's comprehensive water quality scheme, the Porter-Cologne Water Quality Control Act. Water Code § 13000 et seq. This statute clarified that the State Board and the regional boards were the principal state agencies with primary authority over water quality.⁴

The State Board is situated within the California Environmental Protection Agency. The Board itself consists of five members appointed by the Governor, subject to confirmation by the state Senate. § 172. The Governor appoints the chair of the Board from among its members. §

² All references are to the Water Code unless otherwise indicated. State Board regulations are available at Division 3 of Title 23 of the California Code of Regulations.

³ California law pertaining to water rights and water quality is contained in the California Constitution, state statutes, and judicial decisions. This report assumes that the reader already possesses a basic understanding of California water law and therefore does not attempt to summarize the complexities of this subject.

⁴ This memorandum does not describe in detail other important water agencies in the state, such as the Department of Water Resources ("DWR"), the nine Regional Water Quality Control Boards ("regional boards"), the Central Valley Flood Protection Board (formerly known as Reclamation Board), or CALFED.

182. Board members serve four-year terms. Four of the five members must have certain qualifications: one must be an attorney, two must be engineers, and one must be an expert in water quality. § 175. The State Board also has an extensive staff, headed by an Executive Director. The work of the Board is divided among the Division of Water Rights, the Division of Water Quality, the Division of Financial Assistance, the Division of Administrative Services, and the Division of Information Technology.

The State Board is directed to take all appropriate actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in California. § 275. This is consistent with Article X, Section 2 of the California Constitution, which sets forth the fundamental doctrine of reasonable and beneficial use. The Board may make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties under the Water Code. § 1058.

The State Board has broad authority to "hold any hearings and conduct any investigations in any part of the state necessary to carry out the powers vested in it." § 183.⁵ "Any hearing or investigation by the board may be conducted by any member upon authorization of the board, and he shall have the powers granted to the board by this section, but any final action of the board shall be taken by a majority of all the members of the board, at a meeting duly called and held." *Id.* Evidentiary aspects of these hearings are governed by Water Code §§ 1075-1106. The Board can order witnesses to appear and testify. The rules of evidence applicable in state courts do not apply to State Board hearings. Gov. Code § 11513; 23 Cal. Code Regs. § 648.5.1.

Water Rights

A primary function of the State Board is to administer a permitting and licensing system for appropriative water rights.⁶ § 1200 et seq. The Board has permitting authority over surface streams and subterranean streams flowing through known and definite channels, but not over percolating groundwater. In administering the appropriative rights system, the State Board considers several factors in addition to temporal priority, including:

- The requirement that all water must be put to reasonable and beneficial use - Article X, section 2 of the California Constitution.
- Area of origin protections - §§ 1215-1222.
- The amounts of water required for recreation and the preservation and enhancement of fish and wildlife resources - §§ 1243, 1257.5; see also Fish and Game Code § 5937.
- The public interest - § 1255.
- The public trust. *National Audubon Society v. Superior Court* (1983) 33 Cal.3d 419.

⁵ The State Board could take better advantage of this general power to investigate in order to strengthen its water diversion monitoring.

⁶ This administrative process was initiated in 1914. Thus, pre-1914 appropriative rights are not subject to the permit and license system. Like pre-1914 appropriators, riparian users do not follow this process either. Rather, they file statements of diversion pursuant to Water Code § 5100 et seq. However, there are no penalties applicable to those who fail to file statements of diversion, and the State Board does not have adequate resources or records to identify all diverters.

The permitting process is defined by the Water Code. Applications to appropriate water must comply with the standards for application content found in §§ 1260-66. After receiving a complete application, the Board issues a notice of application to the applicant and the local district attorney and board of supervisors. §§ 1300-04. Applications pertaining to large quantities of water additionally require the newspaper publication of this notice. §§ 1310-1317. For smaller quantities, the notice must be posted locally and mailed to known interested persons. §§ 1320-24. The State Board must comply with the California Environmental Quality Act (“CEQA”), issuing mitigated negative declarations for projects with less-than-significant impacts and environmental impact reports for larger projects.⁷

Interested persons may file timely protests to applications. §§ 1330-35. The State Board holds hearings or conducts field investigations for protested applications. §§ 1345-53. The Board may grant a permit to appropriate water, or reject the application, after the hearing. § 1350. The State Board may impose conditions on the permits it issues, § 1391, and may reserve jurisdiction to amend these conditions, § 1394.⁸ Also, the Board may issue temporary urgency permits, with individual Board members making the initial decision *ex parte*. §§ 1425-42. Permits are replaced with licenses once the State Board concludes that the terms of the permit have been met. § 1610.

The State Board oversees changes in water use and transfers of water rights under Water Code section 1700 et seq. The basic principle is that changes and transfers are permissible so long as they do not harm other legal water uses or unreasonably affect beneficial instream uses. §§ 1702, 1706, 1725. The process for approving changes and transfers is similar to that for approving initial permits.

The State Board can adjudicate all rights (appropriative, riparian, and otherwise) in entire stream systems at once. §§ 2500-2868. When appropriately petitioned to conduct a stream system adjudication, the Board notifies all interested parties that they are required to file proof of all claims, or forfeit their rights. The Board conducts field investigations, reviews the claims, hears objections, and finally adopts an order establishing the water rights in the stream system. The Board's order is submitted to a court for further review, and the court issues a decree finalizing the water rights determinations.

The State Board has a variety of enforcement mechanisms regarding water rights. Water rights can be enforced via cease and desist orders issued by the Board to stop the unlawful diversion of water or the violation of a Board order. § 1831. The State Board may issue a cease and desist order only after providing the violator with 20 days notice and the opportunity to be heard. § 1834. If a cease and desist order is insufficient to remedy the violations, the Board can seek a court injunction and civil liability. § 1845. Anyone using water illegally is subject to

⁷ Although the State Board's water quality planning program and instream beneficial use program are “certified regulatory programs” exempt from certain technical requirements of CEQA, see 14 Cal. Code Regs § 15251, the Board's water rights permitting program is not one of these certified regulatory programs, and therefore must undergo standard CEQA analysis.

⁸ The State Board has reserved jurisdiction in permits issued for the State Water Project and the Central Valley Project, authorizing modification of the permits as necessary. *United States v. State Water Resources Control Bd.* (1986) 182 Cal.App.3d 82, 127.

punishment by the State Board (administrative civil liability pursuant to the § 1055 process) or via the courts (pursuant to § 1052). The State Board may serve as a referee for a water rights suit brought in either a state or a federal court. § 2000 et seq.

The State Board has water rights permitting jurisdiction over federal and state agencies, in addition to private water users and local water agencies. DWR (which runs the State Water Project) and the United States Bureau of Reclamation (which runs the Central Valley Project) must file applications for permits to appropriate water like all other appropriators.⁹ As for federal agencies such as the Bureau of Reclamation, the United States Supreme Court has held that they are subject to state control in the realm of water rights, so long as the state controls are not inconsistent with clear congressional directives respecting the project. *California v. United States*, 438 U.S. 645 (1978). Under this landmark ruling, the State Board, as the state agency with authority to regulate water rights, has broad authority over federal water projects in California.

Water Quality Planning and Regulation

The State and regional boards implement the Porter-Cologne Water Quality Control Act, codified at Water Code § 13000 et seq., as well as portions of the federal Clean Water Act. The Porter-Cologne Act is California's comprehensive water quality statute. It divides responsibilities among the State and regional boards. The main federal water quality law, formally known as the Federal Water Pollution Control Act but referred to as "the Clean Water Act" ever since it was substantially amended in the 1970s, is set forth at 33 U.S.C. §§ 1251 et seq. As relevant here, the most significant section of the Clean Water Act is Section 303, which requires states to set water quality standards for their navigable water bodies, subject to federal review and approval. 33 U.S.C. § 1313. The water quality standards must include the designated uses of the particular water body, and the water quality criteria necessary to allow those designated uses. *Id.*

The State Board formulates a variety of state policies for water quality control. § 13140. The process for adopting a state policy for water quality control entails a minimum of 60 days notice of a public hearing to any affected regional boards and 60 days notice to the public in a regional publication, although in practice the process takes much longer. The regional boards have until 20 days before the hearing to submit written recommendations. § 13147.

The State Board is the state water pollution control agency for federal Clean Water Act purposes, such as the Section 303 water quality standards described above. § 13160. Thus, it exercises delegated federal powers and coordinates the implementation of several federal programs. For example, the State Board develops guidelines for listing and delisting impaired waters and implementing the total maximum daily load ("TMDL") program pursuant to Section 303(d) of the Clean Water Act. TMDLs are normally developed by regional boards, and then approved by the State Board and State Office of Administrative Law before being submitted for EPA approval. Also, the State Board and regional boards cooperate in developing biennial Clean Water Act Section 305(b) reports on surface water quality statewide.

⁹ Additional statutory provisions apply to DWR. § 10500 et seq.

The State Board is required to annually determine state needs for water quality research and recommend projects to be conducted. § 13161. It also coordinates water-quality-related investigations of state agencies. § 13163. With the assistance of regional boards, the State Board provides a statewide water quality information program. § 13166. It also provides water quality information to the public on its website. § 13167.

Regional boards usually develop water quality control plans for final approval by the State Board. §§ 13245-46. However, the State Board may adopt water quality control plans in the first instance for certain waters.¹⁰ Such plans, when adopted, supersede any regional water quality control plans for the same waters to the extent of any conflict. § 13170. The State Board adopts the California Ocean Plan, a water quality control plan for ocean waters. § 13170.2. In conjunction with other agencies, the State Board implements coastal monitoring programs targeting fish, mussels and other shellfish. § 13177-77.5.

The State Board regulates waste disposal sites (including hazardous waste and mining waste) as they pertain to the protection of water quality. § 13172; 23 Cal. Code Regs. 2510-2601 ("subchapter 15 regulations"). It also regulates onsite sewage treatment systems. § 13291. Jointly with the Department of Toxic Substances Control, it sets policies for those involved in investigating or cleaning up after hazardous discharges. § 13307.

Water Quality Permitting

One of the ways that water quality plans are implemented is through permitting of discharges to water bodies. Although regional boards have primary responsibility for regulating waste dischargers, the State Board has some functions in the issuance of state-level "waste discharge requirements" and federal-level NPDES permits.¹¹ For instance, both the State Board and regional boards can prescribe general waste discharge requirements for entire categories of dischargers. § 13263. When in the public interest, the boards can issue conditional waivers of waste discharge requirements, such as for agricultural activities. They are both authorized to issue NPDES stormwater permits to cities and industries. § 13383.5. Also, both kinds of entities can investigate sources of pollution, and impose administrative civil liability for violations of discharge rules. §§ 13267, 13261.

One important role of the State Board is to grant "certifications" that federal actions will not reduce water quality below applicable standards. § 13160; see also § 401 of the federal Clean Water Act. 33 U.S.C. § 1341. Regional boards can also grant Clean Water Act § 401 certifications.

As for enforcement, the State and regional boards can issue cleanup and abatement orders to anyone discharging waste in violation of a board order, although the State Board's role largely consists of providing guidance to the regional boards with respect to their cleanup and abatement

¹⁰ For example, the State Board has adopted several water quality control plans for the Delta. See discussion below on the history of the Delta proceedings.

¹¹ The National Pollutant Discharge Eliminations System (NPDES) protects the quality of waters of the United States by requiring permits for all pollution discharges from point sources, i.e., discrete conveyances such as pipes or man-made ditches. In most cases, the NPDES permitting program is administered by the various states.

order process. § 13304; State Board Resolution 92-49, “Policies and Procedures for Investigation and Cleanup and Abatement of Discharges under Water Code Section 13304.” Generally, the regional board instructs the discharger to develop a phased site investigation in order to determine the nature and extent of the pollution. Written workplans are often helpful. The phases generally consist of (1) preliminary site assessment, (2) soil and water investigation, (3) proposal and selection of cleanup and abatement action, (4) implementation, and (5) monitoring.

Continuing violations provide the basis for the boards to assess civil penalties. § 13308. Administrative civil liability can be imposed after issuance of a complaint and a hearing pursuant to Water Code § 13323, taking into account the factors listed in § 13327. After the time for judicial review has expired, the State Board can seek a court judgment to collect the penalty. § 13328. Minor violations can be dealt with separately. § 13399. Several categories of orders require notice and a period of at least 30 days for public comment. § 13167.5.

The State Board also licenses operators of wastewater treatment facilities. § 13625 et seq.; 23 Cal. Code Regs. 3670 - 3719.19.

Groundwater

The State Board has far less authority over groundwater diversions than it does over surface water diversions, though it does have substantial authority over ground water quality. Most of the Board’s authority for water quality control planning, regulation of waste discharges, and water quality enforcement applies to all waters of the state, which include groundwater. § 13050(e). The authority of the Board includes:

- The right to file a court action to restrict groundwater pumping, or to impose physical solutions, or both, to the extent necessary to prevent destruction of or irreparable injury to the quality of such water. §§ 2100-02.
- Taking the lead with respect to groundwater quality monitoring. Water Code § 10780 et seq. requires the State Board to work together with other agencies on this task.
- Limited authority to protect groundwater under the federal Safe Drinking Water Act. § 13169.

Underground Storage Tanks

The State Board oversees California’s underground storage tank program and enters into contracts with local agencies to supervise cleanups. The Board licenses tank testers, funds cleanup efforts, and investigates violations of applicable laws and regulations. See Health & Safety Code §§ 25280-25299.206.

Supervising Regional Boards

One of the State Board's most significant functions is the supervision and coordination of the nine regional boards. The State Board adopts general procedures for the formulation, adoption and implementation by regional boards of water quality control plans. § 13164. After regional boards develop plans for their respective basins, the plans must be approved by the State Board. The State Board also controls the budgets of the regional boards and provides guidance on matters of procedure. §§ 13168, 13292.

An important mechanism for supervising the regional boards is the petition procedure authorized by Water Code § 13320. See also 23 Cal. Code Regs. 2050-68. The petition procedure can be initiated by "any aggrieved person" or by the State Board itself on its own motion. This gives the State Board broad authority to review and overrule any action or failure to act by a regional board.

Financial Assistance

The Division of Financial Assistance administers the implementation of the State Board's financial assistance programs for local agencies, which include loan and grant funding for construction of municipal sewage and water recycling facilities, remediation for underground storage tank releases, watershed protection projects, and nonpoint source pollution control projects. § 13400 et seq.

Task Forces and Other Ad Hoc Programs

The State Board also coordinates or participates in a wide variety of subject-specific inter-agency task forces and advisory groups. See, e.g., §§ 12949.6 (saline water conversion task force). Some of these are mandated by the Legislature while others are discretionary internal initiatives. Information about many of the Board's current projects that fall into this category can be found in the "Programs" section of the Board's website, http://www.swrcb.ca.gov/water_issues/programs/.

Endangered Species

Although the State Board has no direct responsibility for the protection of species listed under the federal and California Endangered Species Acts ("endangered species"), there are several ways in which the legal regime governing endangered species intersects with the State Board's authority. For instance, when the State and regional boards are establishing water quality plans and granting waste discharge requirements, they must take account of the designated "beneficial uses" for a particular water body, which may include the protection of endangered species. If EPA finds that the state's water quality criteria are insufficient to protect endangered species, it may use Clean Water Act Section 303 authority to set its own criteria.¹²

The federal agencies and the state agency (U.S. Fish and Wildlife Service, National Marine Fisheries Service, and the California Department of Fish and Game, together "resource

¹² EPA did just that in 1994 in regard to the Delta.

agencies”) charged with the protection of endangered species also have significant authority that may, and in the case of the Delta does, affect the same entities and uses of water that are subject to State Board authority. Under both the federal and California Endangered Species Acts (“ESA”), “take” of endangered species is prohibited without authorization or exemption from the resource agencies. The resource agencies thus have the ability independently to impose restrictions on entities subject to regulation by the State Board. Also, under Section 7 of the federal ESA all federal agencies must consult with the federal resource agencies regarding the effects of their actions on listed species.¹³ In recognition of the overlapping responsibilities the resource agencies and the Board exercise with regard to endangered species, the resource agencies frequently testify in proceedings before the Board, and the Board gives thorough consideration to their testimony.

II. STATE BOARD ACTIONS

In this section we describe actions by the State Board with regard to three areas: the Delta, Mono Lake, and the Yuba River. Consistent with the focus of the Delta Vision Task Force, our description of the Board’s Delta actions goes into considerable detail. The descriptions of the Mono Lake and Yuba proceedings are more summary in nature and were chosen to provide additional useful perspectives on the Board’s processes.¹⁴

A. The Delta

Decision 990

We begin in 1959, when the State Water Rights Board (“SWR Board,” a predecessor of the modern Board) commenced evidentiary hearings on the United States Bureau of Reclamation’s (“USBR”) applications for permits to appropriate water from the Sacramento River and the Delta for the CVP.¹⁵ The SWR Board received 73 protests from other water interests asserting that various terms and conditions should be imposed on the USBR’s permits. The hearings lasted a total of 75 days, taking place over the course of nearly a year. In Decision 990, issued in 1961, the SWR Board granted the permits. Although the SWR Board recognized the problem of salinity intrusion into the Delta, it did not attach any specific water quality standards as terms and conditions of the CVP permits. Instead, the SWR Board reserved

¹³ The Fish and Wildlife Service and the National Marine Fisheries Service have imposed restrictions on the operation of the CVP through the Section 7 consultation process.

¹⁴ The Delta and Mono Lake have figured very prominently in the environmental history of California over the last decades and are the subject of numerous writings, many of which we have consulted. A small selection includes: Jay Lund, et al., “Envisioning Futures for the Sacramento-San Joaquin Delta,” Public Policy Institute of California, 2007; Alf Brandt, “*United States v. State Water Resources Control Board: A Comprehensive Approach to Water Policy in California*,” 14 Ecology L. Quarterly 713 (1987); Brian Gray, “The Modern Era in California Water Law,” 45 Hastings L. J. 249 (1994); John Krautkraemer and Carl Boronkay, “What the Bay/Delta Proceedings Reveal about the State Water Resources Control Board’s Powers and Procedures,” 1. Cal. Water L. and Policy 3 (1990); John Hart, *Storm Over Mono: the Mono Lake Battle and the California Water Future*, University of California Press, 1996; Norris Hundley, *The Great Thirst: Californians and Water, 1770s – 1990s*, University of California Press, 1992; and Michael C. Blumm, “Mono Lake and the Evolving Public Trust in Western Water,” 37 Arizona Law Review 701 (1995).

¹⁵ Other permits for the CVP were issued pursuant to Decision 893 (in 1958), Decision 1020 (in 1961), Decision 1250 (in 1966), Decision 1308 (in 1968), Decision 1356 (in 1970), and Permit Order 124 (in 1959).

jurisdiction to impose such requirements later, allowing USBR, the state, and water users in the Delta an opportunity to reach agreement on Delta salinity control in the interim.

Time spent in permit process: 2 years

Initial Water Quality Standards

Water quality standards for the Delta, known as “the Tracy standards,” were first formulated in November of 1965, through the combined efforts of DWR, USBR, the Sacramento River and Delta Water Association, and the San Joaquin Water Rights Committee.¹⁶ Then on June 14, 1967, the State Water Quality Control Board (another predecessor of the modern Board) approved a water quality control policy for the Delta that was initially developed by the Central Valley Regional Water Quality Control Board. This policy was submitted to the Secretary of the Interior as proposed federal water pollution control standards. However, the Federal Water Pollution Control Administration (in the Department of the Interior) found that the standards did not adequately protect municipal, industrial, agricultural, and fishery uses, and proposed improved standards. In 1968, the Board (newly created by the amalgamation of the State Water Rights Board and the State Water Quality Control Board) responded with Resolution 68-17, which supplemented the 1967 policy. The Resolution did not contain certain salinity objectives that had been recommended by the Federal Water Pollution Control Administration, but the Board committed to adopting additional salinity objectives when more information became available. The Secretary of the Interior approved the new policy in January 1969.¹⁷

Time spent adopting water quality standards: 2 years.

Decision 1275

Meanwhile, water rights proceedings were underway. In May 1967, the SWR Board issued Decision 1275 (“D 1275”), which approved DWR’s applications for permits to appropriate water from the Feather River and the Delta to operate the SWP. These applications had been filed at various times: 1927, 1951, and 1957. Over one hundred individuals, associations, corporations, and public agencies filed protests to the applications, questioning both the availability of unappropriated water and the terms and conditions that should be imposed on DWR permits to protect water quality.

The SWR Board issued D 1275 following 40 days of hearings in 1966 and 1967.¹⁸ In D 1275, the SWR Board found that the problem of salinity incursion into the Delta remained similar to those problems that existed when Decision 990 was issued in 1961.¹⁹ The SWR Board noted that “both federal and state agencies are conducting extensive studies regarding the problem of water quality in the San Francisco Bay and the Delta for the purpose of determining what standards of water quality should be maintained and recommending how this is to be

¹⁶ See the Racanelli decision, *infra* note 36, at 110. See also Alf Brandt, “*United States v. State Water Resources Control Board: A Comprehensive Approach to Water Policy in California*,” 14 Ecology L. Quarterly 713, 722 (1987).

¹⁷ See Decision 1379, Resolution 68-17, and the 1995 Bay-Delta Plan.

¹⁸ See Decision 1379 at p. 2.

¹⁹ Decision 1275 at p. 17.

accomplished.” Because it lacked “sufficient information ... to finally determine the terms and conditions regarding water quality in the Delta which will reasonably protect vested rights without resulting in waste of water,” the SWR Board reserved jurisdiction to impose terms and conditions on the SWP permits for salinity control. In the interim, the SWR Board limited DWR’s diversion and storage of water from April 1 through June 30 in certain circumstances and conditioned the permits on compliance with the Tracy standards mentioned above. The SWR Board also reserved jurisdiction to coordinate DWR’s permits with USBR’s permits, and to formulate terms and conditions protective of fish and wildlife. In November of the same year, the SWR Board granted DWR’s petition for reconsideration and added summer months to the dates DWR was entitled to divert water from the Delta.²⁰

Time spent in active permitting process: 2 years.

Decision 1379

The State Board as presently constituted initiated hearings in July 1969 for the presentation of evidence and argument on the terms and conditions that should be imposed on CVP and SWP permits in the exercise of the jurisdiction reserved in previous decisions. The hearings continued intermittently until October 1970. In 1971, the Board issued Decision 1379 (“D 1379”) establishing new water quality objectives for both the CVP and the SWP. D 1379 also identified the need for continuing study before other criteria would be developed, and ordered a progress report on those studies by August 1, 1973. The Board also indicated its intent to reopen the proceedings to refine the standards in seven years. In September 1971, eight petitions for reconsideration were filed. The Board denied the petitions but did make some clarifications to D 1379.

Significantly, D 1379 was never effective to supersede earlier decisions, because it was stayed in October 1971 as a result of litigation that was originally filed by the Central Valley East Side Project Association and the Kern County Water Agency.²¹ The litigation challenged the Board’s authority to impose conditions on permits held by a federal agency.²² Because a court order stayed D 1379, the requirements of D 1275 remained in effect.

Time spent adopting water quality standards that were never implemented: 2 years.

Basin 5B Plan

On December 20, 1972, following enactment by Congress of the modern Clean Water Act,²³ the Board held a public hearing regarding proposed salinity objectives for the Delta.²⁴ Thereafter, the Board adopted Resolution 73-16, adopting a water quality control plan that

²⁰ Decision 1291.

²¹ See Decision 1485 at p. 4.

²² See the Racanelli decision, *infra* note 23, at 110. The issue of the Board’s permitting authority over federal agencies was decided in *California v. United States*, 438 U.S. 645 (1978), discussed below.

²³ Federal Water Pollution Control Amendments of 1972, codified at 33 U.S.C. § 1251 et seq.

²⁴ One scholar believes this action spurred the Board to conduct its long-awaited evaluation of the effects of the CVP and SWP on Delta water quality. Brian Gray, “The Modern Era in California Water Law,” 45 *Hastings L. J.* 249, 259 (1994).

supplemented the existing water quality control policy. At about the same time, the regional water quality control boards formulated plans for the 16 designated ‘basins’ of the state. The Basin 5B Plan, setting water quality objectives for the Delta, and the Basin 2 Plan, setting objectives for the San Francisco Bay Basin, were approved by the Board in 1975.²⁵ In approving the Basin 5B Plan, the Board indicated its intention to reconvene hearings no later than July 1, 1978, for the purpose of receiving further evidence relating to salinity control and protection of fish and wildlife.²⁶ The Board and various state water interests began gearing up for the most significant event in the history of Delta regulation up to that date: the adoption of the 1978 water quality plan, which would supersede the basin plans, and the water rights decision to implement it.

Decision 1485 and 1978 Water Quality Control Plan

As stated by the Board, it undertook for the first time “a proceeding, under its full water right and water quality authority, to develop a single comprehensive set of water quality standards to protect beneficial uses of the waters of the Sacramento-San Joaquin Delta.”²⁷ The proceeding was styled as “a consolidated hearing pursuant to both the water quality control and water right authority of the Board” that would result in amending permits and adopting a water quality control plan.²⁸ The proceeding began on April 29, 1976 with a preliminary hearing on the evidentiary scope of the proceeding.²⁹ The Board conducted 32 days of evidentiary hearings, lasting almost one year, from November 1976 to October 1977.

A draft plan and draft Environmental Impact Report (“EIR”) covering both the water quality plan and the water rights decision were issued for public review on March 15, 1978. The Board held a public hearing on the draft plan and draft EIR on May 30, 1978. The record was open until June 15 for comments. Over 40 parties submitted comments on the draft plan and draft EIR. The commenters included USBR, DWR, federal and state water service contractors, Delta water agencies, municipal and industrial users in Contra Costa County, fish and wildlife interests, and environmental groups.³⁰ On the same day in August 1978 the Board adopted the final 1978 Water Quality Control Plan for the Sacramento-San Joaquin Delta and Suisun Marsh, and issued Water Rights Decision 1485 (“D 1485”).³¹ The 1978 Plan set new water quality standards to protect fish and wildlife as well as agricultural, municipal, and industrial uses of Delta waters. The Board stated its intent to review (but not necessarily revise) the water quality standards at least once every three years (the triennial review required by federal Clean Water Act Section 303(c)). The 1978 Plan was intended to remain in effect for 10 years with new hearings to be scheduled in 1986 to reevaluate the Delta objectives.

D 1485 amended the water rights permits of DWR and USBR for the SWP and CVP respectively to require the projects to meet the water quality standards established in the 1978 Plan. DWR and USBR were to meet the standards by releasing water from storage or curtailing

²⁵ Resolution No. 75-80.

²⁶ Resolution No. 75-80.

²⁷ Resolution No. 78-43.

²⁸ Decision 1485 at p. 5.

²⁹ See Decision 1485 at p. 4.

³⁰ See Decision 1485 at pp. 7-8.

³¹ Resolution No. 78-43.

diversions when necessary to augment the flow of water into the Delta. The decision exercised the jurisdiction reserved in earlier decisions to establish or revise terms and conditions for salinity control, for the protection of fish and wildlife, and to coordinate the terms of the various permits for the two projects. The Board cited two statutory mandates, both subject to the overriding constitutional provision that all use of water must be reasonable: (1) protection of vested water rights; and (2) protection of the public interest.³² The fundamental approach the Board took was to seek the achievement of “without-project” conditions: it was trying to generate, through the water rights decision, levels of water quality in the Delta that were at least as good as those that would have existed had the CVP and SWP never been constructed. On October 1, 1978, the Board denied petitions for reconsideration of its decision.³³

The issuance of D 1485 resulted in a flood of litigation.³⁴ The United States alleged in federal court that D 1485 was inconsistent with Congressional authorization of the CVP and thus preempted, but lost that suit.³⁵ Numerous petitions for writ of mandate were filed in state court challenging the State Board actions and were coordinated before a single Superior Court judge.³⁶ In the interest of efficiency for appellate review, the trial court ordered briefing of key legal issues and did not review the Board’s factual determinations. The trial court upheld the Board’s actions in most ways but did find certain legal errors. Nearly all of the parties to the coordinated proceedings appealed.

In 1986, the court of appeals issued a lengthy decision, widely known as “the Racanelli decision” after the judge who authored it.³⁷ This decision is considered a landmark in California water law based on its comprehensiveness and legal significance. The court largely upheld the 1978 Plan and D 1485, affirming the State Board’s broad powers over water quality and water rights. Significantly, the court confirmed that the Board has the dynamic power to determine which water uses are most reasonable at any given time.³⁸

The court also found several errors. First, the Board had wrongly sought to exercise its water quality role to protect senior water rights; however, it should have been seeking to protect “beneficial uses.”³⁹ Second, the Board followed an unwise procedure by combining its water

³² Decision 1485 at p. 9.

³³ See *United States v. California*, 529 F.Supp. 303, 310 (E.D. Cal. 1982).

³⁴ Decision 1485 also provoked USBR and DWR to protest subsequent water rights applications in the Delta watershed because they believed new diversions at certain times would force them to release more CVP and SWP water to meet the new water quality standards. See Water Right Decision 1594 at p. 8. As an interim solution, the Board adopted Standard Water Right Permit Term 91 on March 25, 1980, and has included Term 91 in nearly all new or amended permits and licenses since 1985, although the Board regulates certain minor water diverters differently. See *Phelps v. State Water Resources Control Board*, 157 Cal.App.4th 89, 95 (2008) and Decision 1594 at p. 27. Term 91 prohibits permittees from diverting water when stored CVP or SWP is being released to comply with Delta water quality standards.

³⁵ *United States v. California*, 529 F.Supp. 303 (E.D. Cal. 1982). Not to be confused with *California v. United States*, 438 U.S. 645 (1978), described above in the section on State Board authority, where the Supreme Court held that Boards could impose terms and conditions on federal water permits so long as the terms and conditions were not inconsistent with clear Congressional directives.

³⁶ *United States v. State Water Resources Control Board*, 182 Cal.App.3d 82, 111 (1986).

³⁷ *United States v. State Water Resource Control Board*, 182 Cal.App.3d 82 (1986). The authors’ research has so far not revealed why eight years passed between the Board’s actions and the publication of the appellate decision.

³⁸ *Id.* at 130-32.

³⁹ *Id.* at 116.

quality planning and water rights allocation functions in a single proceeding. What the Board should have done was first to set water quality standards, and then begin a separate water rights proceeding to implement those standards. By combining the two into one proceeding, the Board limited the water quality standards to those that could be enforced only against USBR's CVP and DWR's SWP, rather than setting standards that could also be enforced against upstream users and senior appropriators.⁴⁰ Also, the Board need not have limited itself to requiring the CVP and the SWP to produce water quality equivalent to "without-project" standards – "the Board was authorized to impose upon the projects water quality standards at whatever level of protection the Board found reasonable, whether 'without project' or greater."⁴¹ "In short, the Board compromised its important water quality role by defining its scope too narrowly in terms of enforceable water rights."⁴²

Although the court found errors in both the 1978 Plan and D 1485, it recognized that remand to the Board would serve no practical purpose in light of the Board's intentions to initiate hearings that same year to develop updated water quality standards. Thus the court simply directed that the Board develop its new standards in light of the holdings of the court decision. The court did not realize at the time that its hesitance to overturn D 1485 meant that D 1485 would remain in effect until Decision 1641 was adopted, over 20 years later.

Time between adoption of Basin 5B Plan and adoption of 1978 Plan: 5 years.

Time spent revising permits and water quality standards: 2 years.

Time spent litigating D 1485 and 1978 Plan: 8 years.

1991 Water Quality Control Plan

The late 1980s and early 1990s saw a drought in California and a number of complex interactions between the state and federal governments with respect to the Delta, with various government agencies simultaneously trying to claim power and disclaim responsibility over the Delta.

On July 7, 1987, informed by the Racanelli decision, the State Board began proceedings to reexamine water quality objectives for salinity, dissolved oxygen, and temperature for the Bay-Delta Estuary and consider how water rights permits would be modified to meet the new objectives.⁴³ The Board held 60 days of evidentiary hearings, which concluded on August 23,

⁴⁰ The courts have subsequently clarified that while this combined approach was unwise because of the constrained view of the Board's water quality authority it produced, it is not impermissible to conduct the two kinds of proceedings contemporaneously. *State Water Resources Control Bd. Cases*, 136 Cal.App.4th 674, 729, n. 21 (2006).

⁴¹ *Id.* at 141.

⁴² *Id.* at 120.

⁴³ John Krautkraemer of the Environmental Defense Fund, writing in an insightful article in October 1990, described the proceedings. "What the Bay/Delta Proceedings Reveal about the State Water Resources Control Board's Powers and Procedures," 1 Cal. Water L. and Policy 3 (1990). Krautkraemer notes that an initial draft plan released in 1988 called for significantly increased flows during spring months to protect Delta fisheries, but that heavy political pressure by agricultural and urban water users caused the Board to withdraw this plan without holding any hearings. In Krautkraemer's view, almost twenty years ago, the Board's Bay/Delta proceedings "have been characterized by extraordinary procrastination."

1990.⁴⁴ Another draft Water Quality Control Plan for Salinity was issued for public review on January 18, 1991. The Board held a public hearing on the plan on March 11, 1991.

In May 1991, the Board adopted the final 1991 Water Quality Control Plan for Salinity after revising it in consideration of public comments.⁴⁵ Again the Board stated its intent to review the water quality standards at least once every three years, consistent with Clean Water Act requirements.⁴⁶ The 1991 Plan was submitted to EPA for approval, but EPA found it insufficiently protective. By letter on September 3, 1991, EPA stated that certain fish and wildlife objectives were disapproved because of their failure to protect estuarine habitat and other fish and wildlife beneficial uses. As required under federal law when a state does not adopt changes in standards recommended by EPA upon notification of approval or disapproval of a state's standards,⁴⁷ EPA initiated promulgation of its own water quality standards for the Bay-Delta Estuary.

*Time spent developing water quality standards that were never approved by the EPA: 4 years.
Time since last water quality standard revision: 13 years.*

Draft Decision 1630

In April 1992, California Governor Pete Wilson announced a comprehensive water management policy for California that placed special emphasis on solving the problems of the Bay-Delta. This policy charged the Board with establishing interim standards for the Delta.⁴⁸ As part of the policy, Wilson announced that he would appoint a Bay-Delta Oversight Council.⁴⁹ In December 1992, Wilson established the Bay-Delta Oversight Council and the Water Policy Council, to be chaired by the Secretary of the Resources Agency, and to be comprised of the heads of eight other state agencies, including the Directors of the Department of Fish and Game and the Department of Water Resources, and the Chair of the State Water Resources Control Board. The role of the Water Policy Council was to “provide for coordination and information exchange among member agencies, boards, and departments necessary for the continued development and implementation of various components of the State's long-term, comprehensive water management policy and program.” The Bay-Delta Oversight Council consisted of 22 appointed members, and it was charged with developing a comprehensive program to protect and enhance the Bay-Delta. Although this council originally included urban, agricultural, and environmental interests, the environmentalists withdrew from the process in April 1993 in protest of the Governor’s pending concessions to agricultural users, and in anticipation of the development of the CALFED partnership.

Notice was given on May 8, 1992 that the State Board would be considering an interim public trust-oriented water rights decision that would enforce the 1991 Plan and make DWR and USBR jointly responsible for protecting public trust resources in the Delta. Public hearings were

⁴⁴ See Resolution No. 91-34.

⁴⁵ Resolution 91-34.

⁴⁶ No EIR was prepared because the 1991 Plan functioned as a substitute document under a certified regulatory program. See Section 21080.5 of the Public Resources Code.

⁴⁷ See Section 303(c) of the Clean Water Act, 33 U.S.C. § 1313(c).

⁴⁸ See 3 Cal. Water L. and Policy Rptr. 150 (1993).

⁴⁹ See CALFED Framework Agreement.

held over 14 days that summer. EPA participated in those hearings, rather than proposing federal standards right away, in the hope that the hearings would result in standards acceptable from the federal perspective.⁵⁰

In December 1992, the Board made available its Draft Water Rights Decision 1630 (“D 1630”). On January 12, 1993, at the request of USBR and DWR, the Board extended the public comment period to February 16, 1993. The stated purpose of draft D 1630 was to halt the decline and begin improvement of public trust resources in the Delta for a five-year interim period while long-term standards were being developed. The decision would have, among other actions: (1) limited CVP and DWP diversions to protect fish and improve water supply reliability; (2) increased limits on water exports from the Delta during dry times of the year; (3) required conservation from urban and agricultural users; and (4) established a mitigation fund to further protect public trust resources. The Board claimed that the decision was categorically exempt from CEQA under several separate exemptions.⁵¹ EPA submitted comments in January 1993 stating that draft D 1630 was insufficient to bring the Board into compliance with the Clean Water Act.⁵²

On a letter dated April 1, 1993, Governor Wilson directed the State Board to rescind draft D 1630, terminate the water rights proceedings that led to the proposed decision, and focus on the development of permanent standards for the Delta.⁵³ The Governor’s instructions followed the listing by the U.S. Fish and Wildlife Service of the Delta smelt as a threatened species under the Endangered Species Act on March 1, 1993, and a public workshop held by the Board on March 22 regarding the effects of listing of endangered species on Delta water supplies. The Governor blamed the federal government for threatening “federal action that will so undermine essential elements of our comprehensive water policy as to make impossible its implementation.”⁵⁴

Time spent on draft water rights decision that was never finalized: 1 year.

Federal Involvement

Meanwhile, federal agencies were becoming more active with respect to the Delta. On September 10, 1993, the USBR signed an agreement with three other federal agencies creating the Federal Ecosystem Directorate (FED, sometimes referred to as Club Fed) to coordinate federal resource protection and management decisions regarding the Bay-Delta.⁵⁵ On December

⁵⁰ 59 Fed.Reg. 810, 812 (1994).

⁵¹ Draft Decision 1630 at p. 89.

⁵² See 59 Fed.Reg. 810, 812 (1994).

⁵³ Letter from Wilson to John Caffrey, Acting Chair of the Board, reprinted in 3 Cal. Water L. and Policy Rptr. 152 (1993).

⁵⁴ Contemporary commentators perceived a political chain of events in which the Governor started feeling a great deal of pressure from opposing interests regarding draft Decision 1630 (agricultural and urban advocates who feared “environmental overkill” versus environmentalists who saw the draft decision as a step in the right direction) and thus seized the opportunity provided by the Delta smelt listing to shift the pressure from himself to the federal government. “Governor Asks State Water Resources Control Board to Abandon D-1630 Interim Measures and Concentrate on Permanent Delta Standards,” 3 Cal. Water L. and Policy Rptr. 150 (1993), citing Dan Walter’s column in the March 18, 1993 edition of the Sacramento Bee.

⁵⁵ See CALFED Framework Agreement.

15, 1993, the FED announced a series of coordinated actions and proposals to protect Delta fish and wildlife, including EPA's proposed water quality standards and United States Fish and Wildlife Service ("USFWS") and National Marine Fisheries Service ("NMFS") actions to protect ESA-listed fish species. EPA published its draft standards in the Federal Register in January 1994.⁵⁶ Although EPA had found the D 1630 standards incomplete, it nonetheless incorporated several facets of D 1630 into its draft standards. Final standards were to become effective on December 14, 1994, but they were superseded ten months later by EPA's approval of the Board's 1995 Plan, discussed below.

In June 1994, the state Water Policy Council and the FED entered into memorandum of agreement known as the Framework Agreement "to establish a comprehensive program for coordination and communication between the Council and the [Directorate] with respect to environmental protection and water supply dependability" in the Bay-Delta. This program of state and federal cooperation as it developed over time is known as CALFED.

1995 Bay-Delta Plan

Meanwhile, on March 25, 1994, the State Board commenced a proceeding to revise the water quality objectives for the Bay-Delta and to develop a draft plan to be released in December 1994. During the six public workshops and three staff workshops held between April and October, the Board encouraged interested parties to develop alternatives for revising the objectives.

Eventually, various representatives of the state and federal governments and certain urban, agricultural, and environmental interests reached agreement on recommendations to the Board for the revised objectives. This agreement is embodied in a document entitled "Principles for Agreement on Bay-Delta Standards between the State of California and the Federal Government," signed on December 15, 1994. This document is commonly referred to as the "Bay-Delta Accord." In the Bay-Delta Accord, EPA committed to withdrawing federal standards for the Delta if and when the Board adopted a final plan consistent with the Bay-Delta Accord. The California Resources Agency committed the Board to quickly finalizing its plan and immediately initiating water rights proceedings to implement the plan. The USBR and DWR soon agreed to meet the water quality standards included in the Bay-Delta Accord.

The same day the Bay-Delta Accord was signed, the Board released the first draft of its new water quality control plan for the Bay-Delta, integrating some of the elements of the Bay-Delta Accord. A notice of public hearing was issued on January 3, 1995, a draft environmental report was released on January 24, 1995, a public hearing was held on February 23, 1995, and the comment period for the plan and environmental report closed on March 10, 1995. The plan and report were revised in response to public comments. The final 1995 Bay-Delta Plan was adopted in May 1995 (Resolution 95-24). The 1995 Plan contained an entirely new set of water quality objectives for fish and wildlife. The Board indicated its intent to start a water rights

⁵⁶ 59 Fed.Reg. 810 (1994). See Brian E. Gray, "The Modern Era in California Water Law," 45 Hastings L. J. 249, 251 (1994).

proceeding and produce a decision by June 1998. In September 1995, the Environmental Protection Agency approved the 1995 Bay-Delta Plan.

Time spent adopting water quality standards: 1 year (including time from stakeholder consensus on plan (Accord) to Board adoption).

Decision 1641

With a water rights decision not expected until 1998, the USBR and DWR filed a joint petition with the Board to change their permit conditions to conform to the fish and wildlife standards set forth in the Bay-Delta Accord. The Board agreed and on June 8, 1995, issued Order 95-6 temporarily amending the permit terms. This order implemented the 1995 Plan on an interim basis in anticipation of the promised comprehensive water rights hearing.

On December 2, 1997,⁵⁷ the Board gave notice of a comprehensive water rights hearing to commence on March 9, 1998. The Board planned to allocate responsibility for implementing the flow-dependent objectives of the 1995 Bay-Delta Plan among DWR, USBR, and numerous other water rights holders in the region. A revised notice was issued on May 6, 1998, indicating the Board's intent to receive evidence regarding the San Joaquin River Agreement, described below. The revised notice divided the hearing into phases, with Phase 1 covering the issue of whether Order 95-6 should be extended. After three days of hearings, and the submission of written comments, the Board issued Order 98-09, which extended by one year the 1995 Plan-compliant permit conditions imposed by Order 95-6. The Board received two petitions for reconsideration of Order 98-09. These were denied in Order 99-002.

Meanwhile, users of San Joaquin River water objected to certain standards set in the 1995 Plan and began to negotiate among themselves a fishery management plan known as the Vernalis Adaptive Management Plan. Eventually these water users signed the San Joaquin River Agreement, a commitment to helping one another implement the Vernalis Adaptive Management Plan. They presented their plan to the Board, and the Board eventually adopted parts of the San Joaquin River Agreement in Decision 1641 ("D 1641"), even though this approach did not satisfy the water quality objectives of the 1995 Plan.

D 1641 was preceded by an extensive public hearing and environmental review process. The State Board prepared two EIRs, one regarding implementation of D 1641 and one regarding a USBR petition to change its permits. The Board divided the public hearing into eight phases. The hearing convened on July 1, 1998, and continued off and on until July 6, 1999. On December 29, 1999, the Board certified the final implementation EIR and issued D 1641. On March 15, 2000, following the filing of various petitions for reconsideration, the Board issued its order denying petitions for reconsideration and amending D 1641 and issued the revised decision that we refer to as D 1641. The water rights proceeding also dealt with two other long-standing issues: first, a petition filed by USBR and DWR in 1995 to use each other's points of diversion in the southern Delta (the joint points of diversion petition), which had its origin in a similar petition filed by USBR in 1981; and second, a petition filed by USBR in 1985 (and thereafter amended) to change the places of use and conform the purposes of use in many of its CVP

⁵⁷ See Order 98-09.

permits (the change petition). Phase 6 addressed the joint points of diversion petition and phase 7 the change petition. The Board eventually granted the joint points of diversion petition and granted in part and denied in part the change petition.

On August 28, 2000, CALFED published its Programmatic Record of Decision (“ROD”), the culmination of an extensive NEPA/CEQA process for evaluating alternatives for the Bay-Delta.⁵⁸ The ROD sets forth a 30-year program to improve the Bay-Delta ecosystem, water supply reliability, drinking water quality, and the Delta levees. The ROD formally replaced the Bay-Delta Accord as CALFED’s principle roadmap for action. Following issuance of the ROD, the California legislature authorized the creation of the Bay-Delta Authority, a state agency designed to coordinate the CALFED effort.⁵⁹

Following final action by the State Board on D 1641, eleven petitions for writ of mandamus were filed as challenges to both the decision and to its accompanying EIRs. Ruling on eight coordinated cases with multiple parties involved in each case, Sacramento Superior Court Judge Candee issued his statement of decision, upholding D 1641 with two exceptions. He ruled that the adoption of the San Joaquin River Agreement/ Vernalis Adaptive Management Plan was invalid, and that the Board could not impose certain mitigation requirements on a water district in exchange for approving a change in place of use.

Eight appeals and three cross-appeals were filed in seven of the cases. Some of the appeals focused on D 1641’s allocation of much of the responsibility for meeting flow-dependent water quality objectives to CVP and SWP.

In an exhaustive 2006 opinion the appellate court addressed numerous legal challenges to the terms of D 1641, and largely upheld the decision.⁶⁰ The court affirmed the trial court in concluding that the Board was not entitled to implement alternate flow objectives agreed to by various interested parties (San Joaquin River Agreement) in lieu of the flow objectives actually provided for in the 1995 Plan. The court also concluded that the Board failed to adequately implement certain salinity objectives in the 1995 Plan and failed to implement the minimum flows necessary to achieve the narrative objective for salmon protection in the 1995 Plan. The court disagreed with the trial court’s finding of error with respect to the Board’s ability to impose mitigation requirements on a water district. The court also rejected numerous legal challenges, such as to the impartiality of the Board, which the trial court had also rejected.

Time spent in active permitting decision: 3 years.

Time since last major water rights decision: 22 years.

Time spent litigating D 1641: 6 years.

⁵⁸ On June 5, 2008, the California Supreme Court issued a decision upholding the state-prepared EIR on the ROD. *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, 43 Cal.4th 1183 (2008).

⁵⁹ Despite the initial promise of the CALFED effort, it has failed to provide the comprehensive solution to the Bay-Delta issues that was hoped for. The creation and efforts of Delta Vision are in substantial part a response to the failure of CALFED to accomplish these tasks.

⁶⁰ *State Water Resource Control Bd. Cases*, 136 Cal.App.4th 674 (Cal. Ct. App. 2006).

2006 Water Quality Control Plan

In 2004 and 2005 the State Board held workshops on a new Bay-Delta Water Quality Control Plan.⁶¹ Hearings on the draft plan were held in November 2006. The plan was adopted soon thereafter, in December 2006.⁶² The plan identifies beneficial uses, establishes water quality objectives, and sets forth an implementation plan. The plan also identifies a number of “emerging issues” that are to be addressed in the Delta Vision process: pelagic organism decline, climate change, Delta and Central Valley salinity, and San Joaquin River flows.⁶³

B. Mono Basin Proceedings

In 1934, the City of Los Angeles and the City of Los Angeles Department of Water and Power (collectively, “Los Angeles”) filed applications with the State Board’s predecessor agency for permits to appropriate water from streams in Mono Basin, the area surrounding Mono Lake. In 1940, Los Angeles received permits to divert substantial amounts of water from four streams that discharged into Mono Lake (Lee Vining Creek, Walker Creek, Parker Creek, and Rush Creek). Los Angeles developed the diversion project and received licenses confirming its rights in 1974. Even though public attention was beginning to focus on the Mono Basin in the early 1970s, no protests were filed contesting the conversion of the permits to licenses, and the State Board itself did no fresh analysis, viewing the conversion from permit to license as an automatic process.⁶⁴ Los Angeles continued to import large amounts of water from the Mono Basin until the late 1980s.

The first significant legal development was the California Supreme Court’s landmark public trust decision in *National Audubon Society v. Superior Court of Alpine County*.⁶⁵ Audubon and other environmental groups filed suit in 1979 to enjoin Los Angeles’s diversions on the theory that the shores, beds, and waters of Mono Lake were protected by the public trust, and were being irreparably harmed by decreasing water levels in the lake. California cross-complained against the plaintiffs, arguing that they should have taken their grievances first to the State Board instead of the courts.⁶⁶ On November 9, 1981, the Superior Court judge agreed that the plaintiffs should have first gone to the State Board, and also ruled that the public trust doctrine was insufficient to affect Los Angeles’ licenses.⁶⁷ The plaintiffs then persuaded the California Supreme Court to take their appeal directly. The Supreme Court ruled that “before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.”⁶⁸ Moreover, “the public trust imposes a duty of continuing supervision the state is not confined by past allocation decisions which may be

⁶¹ See Resolution No. 2006-0098.

⁶² *Id.*

⁶³ See 2006 Plan at p. 5.

⁶⁴ See John Hart, *Storm Over Mono: the Mono Lake Battle and the California Water Future*, University of California Press, 1996, at p. 60.

⁶⁵ *National Audubon Society v. Superior Court of Alpine County*, 33 Cal.3d 419 (1983).

⁶⁶ *Id.* at p. 89.

⁶⁷ *Id.* at p. 98.

⁶⁸ *National Audubon Society v. Superior Court of Alpine County*, 33 Cal.3d 419, 426 (1983).

incorrect in light of current knowledge.”⁶⁹ Finally, the plaintiffs did not need to go to the State Board first, because the courts had concurrent jurisdiction with the Board over plaintiffs’ claims. Los Angeles sought review of the decision in the U.S. Supreme Court, but that court refused to hear the case.⁷⁰

Despite the great expansion of State Board purview wrought by the *National Audubon* decision, little changed on the ground.⁷¹ Faced with Board inaction, beginning in 1985 environmental groups switched to a new legal tactic, suing under provisions of the Fish and Game Code.

In the case known as “*CalTrout I*,” Audubon and the Mono Lake Committee joined with fishery group California Trout, Inc. in a claim that the Los Angeles licenses violated California Fish and Game Code sections 5946 and 5937. Section 5937 mandates that dam owners must allow sufficient water at all times to pass through the dam “to keep in good condition any fish” existing below the dam. Section 5946 requires that all licenses to appropriate water in Mono and Inyo Counties be conditioned on full compliance with section 5937. On May 23, 1988, the Third District Court of Appeal ordered the State Board to revoke the licenses and issue new ones in compliance with the Fish and Game Code. In response to a petition from the City of Los Angeles, the court granted a rehearing. In a revised ruling on January 26, 1989, the court softened its stance and required that the license be modified to require the necessary streamflows, rather than revoked.⁷²

Meanwhile, Judge Finney of the El Dorado Superior Court was considering injunctions that would stop Los Angeles’s diversions from Mono Basin. The court granted a temporary restraining order on June 15, 1989 that ended the city’s exports from Mono Basin.⁷³ This order was later converted into a further injunction that prohibited any diversions until the lake levels rose to 6,377 feet above sea level. On August 29, 1989, the court directed the State Board to review Los Angeles’s Mono Basin water rights and finally perform the balancing of interests called for under the public trust doctrine in the 1983 Supreme Court decision.⁷⁴

In the spring of 1989, the State Board announced its intention to examine how the Mono Basin licenses should be modified to accommodate both the public trust doctrine enunciated in *National Audubon* and the more recent judicial holdings on the Fish and Game Code requirements. The action began to shift from the courts to the Board as it began a lengthy Environmental Impact Report process to examine a variety of possible management plans for the lake and its feeder streams. The Board relied heavily on the CEQA process to chart a path forward with respect to Mono Lake. On September 11, 1989, the Board held a public hearing to

⁶⁹ *Id.* at 447.

⁷⁰ *City of Los Angeles Department of Water & Power v. National Audubon Society*, 464 U.S. 977 (1983).

⁷¹ One authoritative commentator wrote in the early 1990s that the reappraisal and modification of Los Angeles diversions from Mono Lake “has been interminably slow in coming.” Norris Hundley, *The Great Thirst: Californians and Water, 1770s – 1990s*, University of California Press, 1992, p. 338. Another commenter noted that the State Board did not change its practices in relation to Mono Lake or make any effort to adjust to the new public trust regime. Hart at p. 108.

⁷² *California Trout, Inc. v. State Water Resources Control Board*, 207 Cal.App.3d 585 (Cal. Ct. App. 1989).

⁷³ *Id.* at p. 135.

⁷⁴ *Id.* at p. 131.

receive comments on the scope of the Board's Mono Lake proceedings.⁷⁵ On September 29, 1989, upon motion of the Board, the El Dorado Superior Court stayed the litigation it was overseeing, pending the Board's review. (The court's injunction against exports from the Mono Basin remained in place and was extended by the court in April 1991.) On October 10, 1989, the State Board established five technical advisory groups to assist in identifying issues to include in the EIR.

Time from Audubon decision to commencement of State Board consideration of public trust: 6 years.

After the appellate court issued its decision in *CalTrout I*, the State Board proposed a judgment allowing it to delay imposition of the section 5937 conditions pending studies to determine the required release rates. The Board wished to combine these streamflow studies with existing proceedings to determine the public trust protections required by the 1983 *National Audubon* decision. The Board contended that until a comprehensive analysis was complete, it had no authority to impose interim requirements on the Los Angeles licenses. The State Board planned to comply with *CalTrout I*'s command to modify Los Angeles's licenses at the end of this comprehensive multi-year process. In July 1989, a Sacramento County Superior Court judge agreed to the delay.⁷⁶ The trial court also refused plaintiffs' request for interim injunctive relief. The effect of following such an approach would have been to maintain the status quo in the Mono Basin creeks for years to come. The environmental groups found this delay unacceptable, and appealed the trial court judgment to the Third District Court of Appeal.

In a February 1990 decision known as "*CalTrout II*," the appellate court again sided aggressively with the plaintiffs, ordering the trial court to require the Board to immediately attach the conditions to the city's licenses, and directing the trial court to itself determine and impose interim release rates pending a final determination by the board.⁷⁷ The appellate court instructed the trial court to pay close attention to the recommendations of the Department of Fish and Game in setting these interim rates. According to the appellate court, there was no reason to delay action while comprehensive studies were conducted. "An administrative agency has no discretion to engage in unjustified, unreasonable delay in the implementation of statutory commands."⁷⁸ The court compared the Board's approach to starvation while calculating the perfect well-balanced diet. "It is undeniable that a well-balanced diet is preferable to an unbalanced diet. But starvation is hardly justified by a delayed feeding, however nutritious. No water means no compliance with section 5946; imprecise compliance is immeasurably superior to no compliance."⁷⁹ The State Board amended the licenses in April 1990 and the trial court set interim flow levels for the tributary streams in June 1990.

Meanwhile, the EIR process continued. The Notice of Preparation was issued on January 4, 1990. Jones and Stokes Associates, Incorporated, was selected as the primary contractor in

⁷⁵ Decision 1631 at 13.

⁷⁶ Hart at p. 139.

⁷⁷ *California Trout, Inc. v. Superior Court of Sacramento County*, 218 Cal.App.3d 187 (1990).

⁷⁸ *Id.* at 203.

⁷⁹ *Id.* at 207.

June 1990. The State Board made preliminary decisions that resulted in the EIR taking an expansive approach where it could have been narrower.⁸⁰ Years passed.

In 1993 the State Board finally geared up for the final stages of its Mono Basin decision. Following a prehearing conference on April 19, 1993, the Board issued a hearing notice on June 30, 1993 regarding amendment of Los Angeles's Mono Basin licenses. The hearing notice stated that interested parties were welcome to submit evidence or non-evidentiary policy statements. The State Board held three days of hearings to receive the policy statements in Los Angeles, Mammoth Lakes, and Sacramento. There were extensive evidentiary hearings as well. These evidentiary hearings were projected to last for 21 days, but ended up lasting 43 days and stretching into February 1994. More than 125 witnesses testified and over 1000 exhibits were submitted.⁸¹ Formal legal briefing was submitted as well.

On May 26, 1993, a three volume, 1400 page draft EIR was distributed. The EIR was based on extensive original research providing the State Board and the public with vast amounts of information about the effects of water diversion on the Mono Basin. The EIR also explored a wide variety of alternative solutions to Mono Basin's problems. The Board received many comments on the EIR. The Final EIR was published on September 16, 1994.⁸²

The State Board issued its long-awaited Decision 1631 on September 28, 1994, amending the licenses of the City of Los Angeles. The order considered the environmental needs of the basin, the costs of cutting the city's water supply (millions of dollars per year), and potential *adverse* effects of allowing the lake levels to rise. The Board concluded that amendments to the licenses, though costly to Los Angeles, were feasible. The order amended the licenses to set instream flow requirements for the protection of fish in each of the four tributaries. The order also established water diversion criteria to protect wildlife and other public trust resources in the Mono Basin. The water diversion criteria: (1) prohibited any diversion of water from the basin until the water level in the lake reaches 6,377 feet above sea level,⁸³ and (2) restricted Mono Basin exports in a manner designed to result in rising lake levels such that the lake reaches 6,391 feet above sea level in 20 years. (If that goal is not met by 2014, the Board intends to hold new hearings.) The order also required Los Angeles to propose plans for restoring stream and waterfowl habitat conditions.

Time from Audubon decision to issuance of D 1631: 11 years.

No party sought reconsideration or judicial review of Decision 1631. The main piece left hanging was the stream and waterfowl habitat restoration plans, which were eventually addressed in Order 98-05.

Los Angeles developed its restoration proposals in consultation with a variety of state agencies and environmental groups. The city submitted plans to the State Board in February

⁸⁰ Hart at p. 137.

⁸¹ Michael C. Blumm, "Mono Lake and the Evolving Public Trust in Western Water," 37 Arizona Law Review 701, 717 (1995).

⁸² Hart at p. 171.

⁸³ This is the same lake level specified by Judge Finney of the El Dorado Superior Court in 1989.

1996, after circulating them for public review and responding to comments. The Board initially posted a deadline of April 1996 for public comments to the Board, but several times postponed that deadline after the state agencies and environmental groups asked for more time to resolve their differences with Los Angeles. Disagreements were not fully resolved and the Board held six days of evidentiary hearings in January and February 1997. In early 1997 the Board held hearings on Los Angeles's proposed restoration plans. These hearings were halted when most of the parties announced that they had come to a conceptual agreement, and a month later a settlement agreement signed by most of the parties was presented to the Board. Hearings were then held regarding the settlement. Final legal briefs were submitted in July 1997, and the Board in September 1998 issued Order 98-05 approving the stream restoration plans agreed to by the interested parties and contained in the proposal submitted to the Board. Because the waterfowl habitat restoration was more controversial, the State Board did a more independent analysis of that approach. In response to petitions for reconsideration, the Board slightly revised Order 98-05 in Order 98-07 a few months later.

C. Yuba River Proceedings

The largest holder of water rights on the Yuba River is the Yuba County Water Agency ("YCWA"). Its permits authorize YCWA to divert and sell water for irrigation, municipal use, fish and wildlife protection, and hydropower. Fishery enhancement measures, including instream-flow requirements, were specified in a 1965 agreement between YCWA and the California Department of Fish and Game ("DFG").⁸⁴

In 1988, a coalition of fishery groups ("the United Groups") filed a complaint with the State Board. The complaint contended that the instream-flow requirements in the YCWA water rights permits and the fish screening facilities at major diversions on the lower Yuba River did not provide an adequate level of protection for fish.⁸⁵ The Board deferred action on the complaint until after it received DFG's Lower Yuba River Fisheries Management Plan in May of 1991.⁸⁶

After receipt of the DFG plan, the State Board scheduled hearings to begin on November 13, 1991, to consider the issues raised in the United Groups' complaint and the DFG recommendations.⁸⁷ The hearings were postponed as the result of a lawsuit filed by YCWA in federal court seeking to enjoin the Board from considering revisions to water temperature and instream-flow requirements specified in YCWA's water rights permits.⁸⁸ Following the court's denial of YCWA's request for a preliminary injunction, the Board held 14 days of hearings in 1992 to receive evidence on fishery and water rights issues in the Yuba River.⁸⁹ The hearings

⁸⁴ See Ryan S. Bezerra and Yvonne M. West, "Submerged in the Yuba River: the State Water Resources Control Board's Prioritization of the Governor's Commission's Proposals," 36 *McGeorge L. Rev.* 331, 341 (2005).

⁸⁵ See Order WR 2003-0016.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

involved the receipt of testimony and other evidence from 15 parties and the presentation of non-evidentiary policy statements.⁹⁰

Over the next seven years, the State Board prepared several internal staff analyses and draft decisions, but took no public actions.⁹¹ The result of the delay was that the 1965 YCWA-DFG agreement remained the only protection applicable to the Yuba river ecosystem for forty years.

It was not until February 10, 1999, that the State Board released a draft decision increasing the instream flows and other protections for fish in the Yuba River, and scheduled further hearings to receive new evidence.⁹² These hearings were postponed at the request of YCWA and DFG in order to provide them an opportunity to develop a settlement proposal.⁹³ However YCWA and DFG were unable to reach agreement and the Board began 13 days of hearings on February 22, 2000 to address topics including minimum flow and water temperature requirements.⁹⁴

The State Board distributed a draft water rights decision on November 7, 2000.⁹⁵ The Board received numerous public comments on the draft decision, both in writing and at two public workshops.⁹⁶ In response to these comments, the Board reduced the instream flow requirements of the draft decision and deferred their effective date until 2006. The stated reason for this deferral was to accommodate the California energy crisis by giving YCWA operational flexibility with respect to its hydropower projects.⁹⁷

On March 1, 2001, the State Board adopted Decision 1644 (“D 1644”), which the Board slightly revised two months later in Order 2001-08.

Time between filing of complaint and D 1644: 13 years.

Several lawsuits were filed by a range of interests challenging D 1644 as revised by Order 2001-08.⁹⁸ The Yuba County Superior Court directed the State Board to reconsider its decision in light of new evidence pertaining to fisheries, water use, and the California energy supply situations.⁹⁹ The Board held further hearings in accordance with this instruction in June 2003, and concluded in Order 2003-0016 that the additional evidence did not support major

⁹⁰ See Final Notice of Public Hearing, available at http://www.waterrights.ca.gov/hearings/yuba_final_notice_july_1999.htm.

⁹¹ See Order WR 2003-0016. The reasons for this delay are unclear, although one scholar reports that the delay was viewed by State Board personnel as caused by external political pressure, likely the Governor’s Office. Harrison C. Dunning, “California Instream Flow Protection Law: Then and Now,” 36 McGeorge L. Rev. 363, 390, n. 212 (2005).

⁹² See Order WR 2003-0016.

⁹³ *Id.*

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ See Order WR 2008-14.

⁹⁸ See Order WR 2003-0016.

⁹⁹ *Id.*

revisions.¹⁰⁰ The Board instead made minor revisions and issued Revised D 1644. Revised D 1644 imposed higher instream-flows on YCWA than its permits previously required, and justified these increased flows on the basis of the public trust doctrine.

Five separate lawsuits, filed in Yuba County Superior Court but consolidated in San Joaquin County Superior Court, followed the issuance of Revised D 1644. The instream flow protection controversy initiated in 1988 thus was still unresolved in 2004. The parties then decided to pursue a settlement agreement that came to be known as the Yuba River Accord. The lawsuits were stayed in anticipation of the settlement.

The State Board did not take the lead role with respect to the Yuba River Accord, or involve itself with the negotiations. Rather, the parties to the litigation and the state and federal fisheries agencies led the way. The purpose of the Yuba River Accord was to resolve instream flow issues associated with the YCWA dams and reservoirs on the Yuba River in a way that enhances the fisheries and local water supply reliability, while providing revenues for local flood control and water supply projects, water for the CALFED program to use to restore Bay-Delta fisheries, and improvements in statewide water supply.¹⁰¹ The Yuba River Accord includes a fisheries agreement, a water purchase agreement, and a conjunctive use agreement.¹⁰² YCWA and the United States Bureau of Reclamation, respectively, served as the lead agencies for the state and federal environmental analyses of the Yuba River Accord.¹⁰³ The Yuba River Accord was implemented on a pilot program basis in 2006. A final EIR/EIS was released in October 2007.

On March 18, 2008, the State Board issued Order 2008-14 approving the final version of the Yuba River Accord and modifying the YCWA permits accordingly.¹⁰⁴ To date, no litigation has been filed challenging the Board's action.

Time from filing of complaint to issuance of Order 2008-14, based on consensus of parties: 20 years.

III. EVALUATION OF BOARD EFFECTIVENESS

A. Past Action Summary

The descriptions of the State Board's actions with regard to the Delta, Mono Basin and the Yuba River demonstrate that the Board did not act expeditiously or, in the absence of substantial consensus from affected interests, effectively in exercising its authority.¹⁰⁵ We set

¹⁰⁰ *Id.*

¹⁰¹ Federal Register, June 20, 2005 (Volume 70, Number 117), pages 35452-53.

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ Order WR 2008-14.

¹⁰⁵ A further situation in which State Board action is long overdue is the lower American River. In 1990, the State Board stated its conclusion that "the existing flow requirements do not provide an adequate level of protection to the uses in the lower American River," and set forth a work plan to modify relevant water right permits. Work Plan – Review of Water Rights on the American River, August 1990. To date, the Board has taken no action to address the lower American River, while discussions have continued over several years among interested parties seeking to

forth here in very summary form observations based on the description of the Board's actions that are relevant to our evaluation.

Delta

The Board has been addressing the Delta for decades. Its proceedings and actions have generally taken years, with exceptions sometimes arising in cases where it was acting on a consensus brought to it from interested parties.

The Board has had to revisit several of its actions because its initial actions were not approved by EPA, were invalidated by the courts or were otherwise found to be inadequate. This has contributed substantially to the time the Board has spent seeking to address Delta water rights and water quality issues.

Virtually every significant action the Board has taken that was not based on consensus has resulted in litigation brought by numerous parties. These legal challenges have generally been decided at the appellate level and have taken years to resolve. Legal rulings have sometimes delayed or prevented implementation of Board actions and, as noted immediately above, frequently required the Board to revisit its actions.

Mono Lake

The Board was extremely slow in responding in any meaningful way to the California Supreme Court's decision setting forth its powers and duties under the public trust doctrine.

The Board's decision amending the water rights permits of the City of Los Angeles (D 1631) followed years of attention and study of the relevant issues by interested parties and the courts, as well as in the comprehensive and credible EIR process carried out by the Board.

The fact that D 1631 was not challenged in the courts largely reflects the strong technical basis for the decision, as set out above.

Yuba River

Twenty years elapsed between the filing of a complaint with the State Board addressing the adequacy of fishery protections on the Yuba River and effective action by the Board to modify the applicable water rights permits to provide increased fishery protections.

The State Board's ultimate action was the result of agreements negotiated among interested parties and brought to the Board for ratification and adoption.

The Board's actions appear to have ended, at least for the time being, the conflicts regarding Mono Lake and the Yuba River. Water levels are rising in Mono Lake, and requirements the Board adopted for the Yuba River, reflecting as they do the concurrence of

reach agreement on modifications to D 893, the 1958 decision on the water rights of the U.S. Bureau of Reclamation that establishes the existing flow requirements.

DFG, may be expected to be adequate to meet public trust, fishery, and other considerations the Board is charged with protecting.

B. Effectiveness in Relation to the Delta

Range of Difficult Issues

The situation with regard to the Delta presents a dramatically different picture. It is widely acknowledged that the Delta is in crisis. The very opening heading in a significant and useful report issued in 2007 by the Public Policy Institute of California (“PPIC”) reads “California’s Delta Crisis.”¹⁰⁶ The PPIC report identifies three dimensions to the crisis: levees, the health of Delta fish species, and institutions. The second of these, the health of Delta fish species, is affected by the water rights and water quality authority of the State Board. The PPIC report states that the federally listed Delta smelt “risks extinction if a solution is not quickly found.”¹⁰⁷

The critical state of the fishery cannot by any means be attributed solely to action or inaction by the State Board. The U.S. Fish and Wildlife Service, the National Marine Fisheries Service, and the California Department of Fish and Game have responsibilities and authority relating to Delta fish species.¹⁰⁸ In addition, factors beyond the control of the State Board, some of which may be unknown, may also play a role in the decline of the species.

Turning to the performance of the State Board itself regarding the Delta, several relevant factors may be identified. First, the difficulty, complexity and conflict inherent in the issues confronting the Board cannot be overstated. Conflict over water issues affecting the Delta goes back to the 1800s. The export of water from northern to southern California by the state and federal water projects, and the importance of the exported water to millions of residents and the state’s economy, have made issues regarding the Delta among the most important facing the state. The often conflicting interests – agricultural, municipal and industrial, environmental and fishery – affected by and involved in Delta decisions are able to bring very substantial resources to bear in connection with actions by the State Board. These resources include technical and scientific information (frequently conflicting depending on the source) as well as legal expertise both before the Board and in the substantial litigation that has taken place with regard to Delta actions.

A further obstacle facing the State Board is the very broad nature of the factors it must consider. Standards of public trust, reasonable and beneficial use, and waste and unreasonable use are not determinable by readily available yardsticks, and consequently leave strongly contested issues to the discretion of the Board.

¹⁰⁶ Public Policy Institute of California, “Envisioning Futures for the Sacramento-San Joaquin Delta,” p. v, February 2007.

¹⁰⁷ *Id.* The critical condition of the Delta smelt has resulted in judicially ordered operational provisions applicable to the CVP and SWP pending completion of a new biological opinion by the USFWS. *Natural Resource Defense Council v. Kempthorne*, E.D. Cal., Case No. 05-cv-01207 OWW LGO.

¹⁰⁸ The relation of the State Board and the resource agencies is discussed under a separate heading.

Another factor is the political nature of the Board itself. Its members are appointed by the Governor and are responsive to gubernatorial direction.¹⁰⁹ Although the Water Code prescribes that Board members shall have technical expertise, and the Board may be perceived as primarily a technical body, the importance of the decisions it makes and the broad discretion it possesses virtually guarantee that its decisions will be strongly influenced by political considerations.¹¹⁰

In exercising its discretionary power in a political environment, the Board must also deal with technical issues of extraordinary complexity. The data and science that the Board must consider in relation to Delta issues are not static and are rarely, if ever, clear cut, thus leaving to the Board the difficult task of making decisions in the face of conflicting and incomplete scientific and technical information.¹¹¹

A corollary of the complex technical issues the Board must address is the process the Board must follow before making its decisions and taking actions. In order to receive and consider evidence, and to develop policies and draft decisions, the Board must hold numerous public proceedings, including workshops and hearings. The need for Board staff and the public to prepare for these proceedings contributes to the inordinate delays found in many Board decisions.

Finally, the Board has inadequate staff and funding resources to provide it the analyses and information that would enable it to act in anything approaching an expeditious fashion. This lack of resources limits the ability of the Board to independently address scientific and technical issues and to act in shorter time frames. The Board's financial and staffing resources are, of course, determined by the Legislature and the Governor.

Adequacy of Board Authority

As set out in Section I, the State Board has broad powers to address issues related to water quality and the appropriation of the state's surface waters. The Board's water quality plans must provide for the protection of beneficial uses, and appropriative permits must be consistent with and implement applicable water quality plans. In issuing appropriative permits, the State Board has the authority and responsibility to consider reasonable and beneficial use, the public trust, protection of fish and wildlife resources and the public interest.

The State Board also has broad enforcement authority with regard to water rights and water diversions, including the ability to issue cease and desist orders in the event of unauthorized diversions. Primary authority to address violations of waste discharge

¹⁰⁹ Governor Wilson's direction to the Board in 1993 that it withdraw draft D 1630 is a prominent example of the exercise of gubernatorial control.

¹¹⁰ An attorney for the Environmental Defense Fund writing in 1990 wrote that the State Board's Bay/Delta proceedings "have been characterized by extraordinary procrastination," and identified several factors similar to those set out in the text. John Krautkraemer, "What the Bay/Delta Proceedings Reveal about the State Water Resources Control Board's Powers and Procedures," 1 Cal. Water L. and Policy 3 (1990).

¹¹¹ It is our understanding that the Board does not have complete, up-to-date information regarding the amounts of water being diverted from the Delta, nor does it have the resources or a readily available process to obtain this information.

requirements rests with the regional boards, and the State Board's role is one of review and oversight. Apart from the statutory scope of the Board's enforcement authority, effective enforcement depends on the ability to obtain complete and accurate information. While the Board has specific statutory authority to require detailed water quality monitoring (see Water Code §§ 13267 and 13383), its authority to monitor water rights and water diversions exists only at the general level (see Water Code § 183).

The Board's broad regulatory and enforcement authority summarized above, while adequate to address issues related to the state's surface waters in most areas, is not adequate to comprehensively address the complex issues of the Delta.

There is no doubt that discharges and diversions subject to the authority of the State Board have considerable influence on the Delta. These include not only the actions of the federal CVP and California's SWP, but the full range of discharges and diversions, permitted and otherwise, in the Delta and its watershed.

However, other factors that do not fall within the Board's authority also come into play and must be addressed in any comprehensive approach to the Delta. These include land use,¹¹² levees and other infrastructure, and planning that encompasses issue beyond water diversions and water quality. Research that extends to all factors that influence the Delta and the development and funding of potential projects to address Delta issues do not fall easily within the Board's jurisdiction.

In addition, as described above, the State Board has been very slow to take action, its actions have been challenged and have failed to resolve many critical issues, and it has frequently acted only on the basis of consensus reached by parties outside the Board process and brought to the Board for action.

For these reasons, and in light of the crisis facing the Delta, consideration is being given to a governance structure that would serve to address the Delta in a comprehensive manner.¹¹³ We assume that a governance structure would leave in place the State Board's existing authority, so that the relation of the State Board to a new governance entity would need to be carefully developed and articulated. Among other things, it would be of critical importance that the State Board, in carrying out its water quality planning and water rights, would act consistently with any plans or directives that would be developed by any governance entity with broad responsibility over the Delta.

C. Potential Improvements

In light of the difficult issues the Board must address in connection with the Delta, it is unlikely that any simple solutions exist that would dramatically increase its effectiveness. However, we offer some suggestions in this regard.

¹¹² The State and regional boards have limited abilities to affect land use practices through conditions in storm water permits, but this authority is insufficient to address the significant impacts that inappropriate land uses have on Delta water quality.

¹¹³ See Delta Vision Strategic Plan, Preliminary Staff Draft, June 18, 2008, pp. 14 et seq.

Increased coordination among the Board and the resource agencies (USFWS, NMFS, and DFG) would benefit the Board, the agencies, and regulated entities. Although the Board and the resource agencies operate under different statutory authority, and in the case of USFWS and NMFS for a different sovereign, the several agencies face many overlapping issues. Close coordination, within the constraints of state and federal law, can lead to the development of more robust and consistent scientific and technical information and more expeditious decision-making, and can minimize the potential for inconsistent or conflicting requirements.

Consensus among parties should not be a substitute for the exercise by the Board of its paramount decision-making authority. Awaiting a consensus to emerge can increase the time needed to complete Board proceedings, and consensus agreements negotiated by interested parties may not reflect the full and adequate consideration of all the issues and standards the Board must address.¹¹⁴ The Board should give priority to providing early and clear direction on the issues before it, even on difficult and intransigent issues. This would benefit the parties in developing their positions, and facilitate expeditious decision-making by the Board.

One mechanism to provide clear and expeditious direction is through interim relief. The State Board should consider more often the exercise of its authority to issue interim orders, such as Decision 1630, while years-long and delay-prone proceedings are pending. This would tend to eliminate incentives for parties to delay Board action and result in effective action in a more timely manner.

Short of seeking to foster consensus on large Delta issues, a result that seems unlikely in any event, the Board, through its staff and under the direction of the Board itself, could play a helpful role in working informally with interested parties. Since the Board acts in a quasi-adjudicatory fashion in connection with water rights determinations, it is constrained in its ability to engage in *ex parte* activities. However, Board staff may be free to participate impartially in discussions with parties, in a manner that does not compromise the decision-making power of the Board, to negotiate approaches to and potential agreement on issues that will come before the Board. The Board's willingness to encourage and involve its staff in such discussions could serve to coordinate the focus of the parties with concerns and goals of the Board and consequently to result in a more efficient and timely process before the Board.

Board decisions must be based on scientific and technical information. A vigorous and inclusive process to develop and put before the Board the best scientific and technical

¹¹⁴ Marc Reisner has expressed a very dim view of consensus as an approach to dealing with western water issues. "What has hamstrung efforts to inaugurate a modern water era in the arid West?... This is less a set of laws or rules than an idea, a concept, that, in my view, has been taken to an almost ludicrous extreme. Its name is consensus. To get anywhere with anything these days all God's children must find a consensus.... There is a simple little problem with consensus: it is hardly ever achievable in a lasting sense.... And especially (double-emphasis here), if you define consensus as a virtually unanimous agreement.... One result of this is that we abdicate our ability to make something happen whenever an outspoken, insistent minority does not want it. Another, more pernicious result is that we waste tons of money on solutions everyone can buy into but that achieve little." Marc Reisner, "The New Water Agenda: Restoration, Deconstruction, and the Limits to Consensus," 20 J. of Land, Res., & Env. L. 1, 10 (2000).

information will benefit the Board and interests affected by its decisions. Scientific and technical consensus is not a likely outcome in relation to Delta issues, but an open, thorough and sound scientific process will help focus the Board's decision-making and strengthen the credibility of its decisions. The development of scientific and technical information with other agencies with Delta responsibilities can provide enhanced resources to address scientific issues and lead to a common understanding of the state of knowledge.

The use of hearing officers to report to the Board on specified issues could serve to expedite the Board process. The Board could delegate to a hearing officer the task of hearing evidence and preparing recommendations to the Board on designated issues, leaving to the Board itself the decisions on the issues, but relieving it of the time-consuming task of conducting hearings to receive evidence.

The State Board has broad enforcement powers to address issues of waste, reasonable use, and unauthorized diversion. However, an effective enforcement program cannot be carried out without substantial resources and a strong commitment on the part of the Board. To our knowledge, the benefits to the Delta of enhanced enforcement have not been quantified, and it may be that they cannot be quantified in advanced of the expenditure of some resources. That being said, enhanced enforcement could be expected to promote resource protection, equity to lawful water users, and institutional credibility.

Increased staffing and funding levels would assist the Board in carrying out its responsibilities in a more expeditious manner. The Board and public are aware of this obvious fact, and as we have noted above, Board funding and staffing levels are determined by the Governor and the Legislature. Nevertheless, we identify the issue here as one that merits consideration.