



ENVIRONMENTAL DEFENSE

finding the ways that work

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Water Governance at 10,000 Feet: Who Is In Charge of Water?

At the broadest level, governance of California's water is straightforward: all water in California's navigable streams is "owned" by the state and consumptive use, at least after 1914, is regulated by water right permits issued by the State Water Resources Control Board. In the 19th century, the U.S. Supreme Court ruled that rights in the beds of navigable waterways were held in trust by the English Crown, and following the American Revolution, the individual states succeeded to this interest.¹

The State Board is the designated agency trustee for virtually all surface water use. It is responsible for enforcing the constitutional requirement that water use is reasonable, and for the prohibition against waste. The State Board is also the agency responsible for protecting the health of our streams, wetlands, bays and marshes and preserving the State's "public trust" in these resources. This trust has been defined by the state Supreme Court as an affirmative duty to "protect the people's common heritage" in fisheries and other water related natural resources.²

Governance from this perspective is clear. The State Board decides who can divert water, how much, and when and whether the use is reasonable, and in doing so it is required to protect public trust resources such as fish and wildlife. So what is the "water governance" issue that this Commission, the State Legislature and so many others are struggling with?

Water Governance at 5,000 Feet: Who Moves Water Around?

While the State Board issues water right permits, most of the water in the state is under the direct control of those permittees, and its movement and distribution is in essence governed by water rights holders themselves. Exports from the state and federal water projects combined represent roughly 15% of California's overall water supply, about 6 million acre-feet on average out of the 40 million consumed annually by farms and cities.³ While holding State Water Board permits that historically contained certain restrictions, these projects are operated – governed – by the Department of Water Resources and the Bureau of Reclamation. The governing documents are the coordinated operating

¹ See *Arnold v. Mundy*, 6 N.J.L. 1 (1821), *Martin v. Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842).

² *National Audubon Society v Superior Court*, 658 P.2d709 (Cal. 1983).

³ Dept. of Water Resources, Bulletin 160. See also, EDF's On The Waterfront blog.

agreements between the projects. The contracts for water delivery between these agencies and their contractors are the other key governance documents. Professor Lund makes an important point in his testimony about the fundamentally decentralized nature of authority for water in California. We agree with him as well that a great deal of the innovation and creativity in thinking about how to use water is now occurring at the local level.

Water Governance at 3,000 Feet: Who Decides When There is Conflict?

As you are aware, notwithstanding the Board's authority, water right permits issued for to the State Water Project, the Central Valley Project and myriad other urban water and irrigation districts, did not always ensure sufficient water supplies or operational rules to protect the State's fishery and habitat resources. As the Delta Vision Task Force has noted, water rights permits have been issued far in excess of reasonably available water supplies in the Central Valley watershed.

California's water problems are similar to water conflicts around the country; water development over the last century was built and operated with little thought for environmental implications, resulting in substantial damage and ultimately threatening the continued existence of various fish, wildlife and plant species.

As a result, for the last four decades California has been in the uncomfortable process of trying to merge its water rights and distribution system with an overlay of later-developed environmental laws. Water quality standards, reclamation law reforms, endangered species requirements all represent modifications of one kind or another to how the agencies -- accustomed to being the governing bodies for water distribution in this state -- are able to run their projects and do their jobs.

As for the question above -- who decides? -- the answer is an amalgam representing the messy nature of this after-the-fact merger. The project operators decide, but increasingly they do so alongside fisheries and water quality agencies that have not had a traditional role in governing water systems but do have critical roles in regulating and protecting fisheries and other natural resources. When environmental harm goes beyond what the legal system is willing to tolerate, we have the situation the federal and state projects are in today which is that for all practical purposes, key decisions about how to operate pieces of our water system to comply with the law are being made by the courts.

Water Governance at 1,000 Feet: What Are We Trying To Govern? Or, What Governance Problem Are We Trying to Fix?

Over the last few decades many processes, including the prior effort of this Commission, have devoted themselves to the question of governance in the water arena. We respectfully suggest that governance of the water system, or even a new facility, is not the key issue. The key is how to implement a lasting solution to the conflict described above.

In our view, there are two distinct issues from a governing perspective:

1. What governance structure will best develop a plan most likely to lead to restoration of a healthy and sustainable ecosystem, and hopefully a fishing industry, while also supporting a thriving and productive agricultural sector?
2. What governance structure is most likely to carry out such a plan successfully?

Putting aside the first question for now, most parties recognize that any solution to the conflicts discussed above must involve a large number of state, federal, regional and local agencies pulling together in the same direction. It must involve as well a large number of moving parts, inter-connected promises and expectations of performance, as well as a massive amount of money. It is how to “govern” this effort that EDF believes is the most salient question before this Commission.

The Delta Vision Task Force has gone some distance down this road, and we urge you to examine their work carefully. We concur with their conclusion that, as far as the Bay-Delta Estuary itself is concerned, there are a large number of overlapping agencies with jurisdictional claims and no one entity is “in charge.”⁴

Complicating the task of “fixing water governance,” is the absence of consensus about which governance problem California should be trying to fix. Here are at least three overlapping views of the governance issue:

1. The Delta Vision Task Force defined the governance problem as a need to focus on the Delta geographically, and put someone in charge of the region’s water, ecosystem and local economic development issues in a systemic way.
2. For many in the water user community, fixing governance means alleviating the role of environmental restrictions and courts in connection with the operations of the state and federal projects. Water users, relevant agencies and other interested parties have undertaken a large planning effort intended to result in long-term species take permits under endangered species laws in exchange for a substantial restoration program intended to recover fish and other species that are currently struggling. In this context, “governance” refers to how that Habitat Conservation Plan/Natural Communities Conservation Plan will be implemented over time to best insure that water supply is as reliable as possible.
3. Alternatively, many in the environmental community view “governance” as a structure of agency authorities and enforceable requirements making it reasonably likely that sustainable ecosystem restoration targets will be met and that water supply operations will be reformed to prevent future conflicts.

Thus, the particular water governance structure that one advocates will have a great deal to do with the problem that one is trying to solve.

⁴ Delta Vision Strategic Plan at 7.

Water Governance on the Ground (But Hopefully Not in the Weeds): The Key Issues.

As discussed in the Delta Vision Strategic Plan and other analyses, the Calfed effort fell short of expectations in large part because:

“[T]hose in charge had no authority to ensure its implementation, those that were implementing it had no accountability, and, in the end, there was no money.”⁵

Below is a list of the key issues that we believe are essential to any effective governance reform involving California’s water system and the health and sustainability of related fisheries and ecosystems:

1. **Scope.** What is the appropriate scope of governance reform? What should be the appropriate geographic scope of the region appropriate for governance reform and what is the operational scope? Should governance reform address only the state and federal projects or should it include other water users? Should it be geographically limited to the Delta? Reasonable people can differ on the answers to these questions; the most critical need is clarity.
2. **Leadership.** Many commentators, and notably this Commission, have talked about the role of leadership in developing and implementing water solutions. We concur with these views but note that there is no feasible way to legislate good leadership. Whatever governance structure is adopted is likely at some point be led by capable and less capable individuals.
3. **Ecosystem Performance.** The key governance task in our view is to craft a structure that is likely to perform key tasks with success. This will require clear, quantified, non-subjective and ultimately enforceable performance measures for ecosystem targets and objectives.
4. **Water Supply Performance.** While there are many factors at play in the ecological problems of Central Valley and Delta fisheries, conflict with the major water projects remains a major focus. A number of parties are exploring the potential benefits of moving responsibility for water project operations to an Independent Water System Operator, or a Water Master, or a Special Master in order to give this key role both a more neutral position and to raise confidence that water project operations will be managed not only for water supply but also to ensure that the environmental restoration and recovery targets are met.
5. **Authority.** Because of the large number of moving parts involved, we concur with the Delta Vision Task Force’s view that implementation of any Delta water/ecosystem solution will require the coordinated efforts of many agencies and that an oversight and coordinating Council of some sort could be useful. However, to be effective this Council must have authority to ensure that performance measures are met in a timely fashion and to take action on behalf of jeopardized ecosystems if and when they are not.

⁵ Delta Vision Strategic Plan at 129.

6. Accountability. The Delta Vision Task Force envisioned the development of an overarching plan, encompassing the BDCP among other plans.⁶ The Task Force also proposed using the consistency features of the Coastal Zone Management Act as the primary implementing tool -- to “ensure that proposed actions by any state agency are consistent with the [Plan]” and to “address any inconsistencies by federal agencies.”⁷ We believe the consistency review option is interesting, although may have some problems and limitations as others have pointed out.

At least as important, as avoiding inconsistent projects, is *what affirmative authority* a Council should have to ensure that the plan is actually and fully implemented? In keeping with Delta Vision’s astute observation that “those in charge had no authority to ensure its implementation, and those that were implementing it had no authority,” we believe that a new Council should be in a position to hold implementing agencies accountable for ensuring that performance measures are being met and that projects are being implemented. Tools that could be used in this regard include but are not limited to:

- a. Requirement for periodic reporting to the Council on progress by implementing agencies;
- b. Budget recommendation authority that would enable the Council to advise the implementing agencies, and state legislature, on resources needed to carry out implementation actions within the purview of individual agencies;
- c. Findings authority that would require the Council to make periodic findings with regard to success in meeting performance measures and the reasons therefore.

7. Funding. To be effective, a governance structure must have the financial support needed for implementation. A combination of fees and others sources must be established to ensure that programs and projects are actually implemented.

8. Enforcement and Data Collection. Many of the existing agencies have been hampered in their ability to perform by funding and staff limitations. A rejuvenated State Board with resources to monitor water use and conservation would be a substantial benefit. In addition, it could be extremely beneficial to establish a corps of Administrative Law Judges (ALJs) within the State Board to deal exclusively with water rights issues.

Thank you very much for the opportunity to testify before you today. I am happy to answer any questions you might have.

⁶ Delta Vision Strategic Plan at 130.

⁷ Delta Vision Strategic Plan at 122, 137-138.