

Panel Discussion – Governance Reform
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Over the last 20 years, CSPA and Deltakeeper have spent hundreds of days in formal hearings before both state and regional boards – both in the water rights and water quality arenas. We routinely comment on virtually every major wastewater discharge permit issued by the Regional Board and have participated in numerous basin planning and policy proceedings as well as TMDL and “stakeholder processes.

We have frequently sued both the State and Central Valley Boards – often successfully. We presently have upwards of 50 appeals of Regional Board actions pending before the State Board. In recent months, the State Board has remanded or proposed to remand 5 permits back to the Regional Board with direction to comply with basic regulatory requirements.

Our relationship with the Boards has changed over the last several years. Through the 1990s, we frequently supported Regional Board actions before the State Board and courts – as discharger’s appealed decisions. Under the present administration, there has been a 180-degree shift. We’re now appealing Board decisions and the regulated community is supporting them. The regulations have remained the same.

It’s well documented that the Boards have failed to do their jobs. The aquatic ecosystems of the Central Valley are hemorrhaging. There is a water management crisis. Seriously impaired waters are being further degraded. The problems facing the Boards are long-standing and they’re getting worse.

These failures have generated a blizzard of proposals to restructure the water boards.

There are a number of structural reforms that potentially could be beneficial. These include:

1. Separation of the quasi-legislative and judicial functions of the Boards and/or an independent appeals board.
2. Separation of the water rights and water quality responsibilities.
3. Efforts to ensure better oversight, transparency and accountability.
4. For example, creating an independent “Inspector General” similar to those in federal agencies.

But structural changes are not magic bullets – simply rearranging deck chairs won’t magically solve major long-existing problems like the over allocation of water or epidemic pollution.

There are underlying issues that must be addressed before we can expect progress from structural changes. In fact, modifying the waterboards without resolving these underlying issues only creates the illusion of progress where little exists.

Some of these underlying problems include:

1. First; the waterboards lack critical resources necessary to conduct basic business.
 - a. The Central Valley Board has 12% of the staff necessary to regulate stormwater discharges and 10% of those needed for water quality certifications.
 - b. The NPDES section has been so decimated that wastewater permits are now outsourced to an east-coast contractor that prepares boilerplate permits that fail to comply with fundamental regulatory requirements. The necessity to get permits out the door overrides legal requirements or environmental protection.
 - c. State Board water rights staff has been reduced to levels that cannot ensure compliance with the Water Code or conduct urgently needed evidentiary hearings.
 - d. Attrition without replacement is costing the waterboards critical expertise and irreplaceable institutional knowledge.
 - e. Structural changes will accomplish little if the waterboards are not provided sufficient resources to fulfill their mandated responsibilities.

2. Second; a refusal to accept the reality of limits and carrying capacity prevents the waterboards from making hard decisions. In other words, they can't say NO!
 - a. Despite 7 decades of warnings that the basins were over-appropriated, the State Water Board has passed out 245 MAF of water rights (not counting the more senior riparian and pre-14 rights) for a system that has an annual unimpaired runoff of 29 MAF.
 - b. As fisheries and water quality collapse in the Delta, the State Board cannot bring itself to strengthen the standards in D-1641.
 - c. Despite clear prohibitions, the Regional Board routinely allows dischargers to increase the mass loading of impairing constituents to waterways and groundwater identified as impaired by those constituents.
 - d. Structural changes by themselves will not provide decision makers the courage to enforce the Water Code or Porter-Cologne. If there is no assimilative capacity for a pollutant, you can't allow more to be discharged. In a drought, junior water rights for surplus water simply can't be met.

3. Third; the absence of adequate funding and willpower is leading the waterboards to turn to stakeholder processes in lieu of regulatory enforcement.

- a. The waterboards hope that “stakeholders” can achieve a consensus that will solve the problem, save resources and relieve them of the necessity of making hard choices.
 - b. Unfortunately, the reality is that stakeholder processes inevitably require greater resources and have a dismal track record. Neither Board can point to a single successful stakeholder process. Not one that that has resulted in quantifiable improvements in water quality or environmental conditions.
 - c. The blunt fact is that degraded conditions exist for a reason. Responsible parties are not willing to pin the tail on their own donkey in the absence of regulatory certainty. Every stakeholder process we’ve been involved with has turned out to be a rabbit hole of delay and denial.
 - d. There are no easy win-win solutions. You can’t print water or assimilative capacity. A straight regulatory proceeding is the quickest, most economical and most effective method of achieving progress and securing compliance with the law.
4. Fourth; the improper influence by special interests is increasing.
- a. All administrations seek to ensure that agencies reflect their philosophies and carry out their decisions but the Schwarzenegger administration has raised this to an art form.
 - b. In my 25 years of experience in State and Regional Board proceedings, I’ve never before seen the magnitude of involvement on behalf of the Governor’s office and special interests in the Board’s regulatory activities.
 - c. Most proposals for reforming the water boards include suggestions to relax of ex parte rules. This would be a disaster – these rules exist to preclude improper tampering in deliberative proceedings. Without them, the playing field becomes more tilted.

To reiterate: structural reforms of the waterboards are needed. We should consider:

- 1. Separating the legislative and judicial functions of the waterboards or creating an independent appeals board.
- 2. Separating the waterboards water rights and water quality responsibilities.
- 3. Instituting measures to increase transparency and accountability, and
- 4. Establishing an independent Inspector General with the responsibility and sufficient staff to oversee waterboards activities.

However, these measures will accomplish little if not accompanied by:

- 1. Adequate funding and staffing,
- 2. An awareness and resolve that the limits of our water mandate hard decisions and painful choices.

3. The awareness that regulatory responsibility cannot be deferred to voluntary groups, and
4. A commitment to conducting business in the sunlight rather than the backroom.

California's track record for accepting limitations and making painful choices has not been good. Our future depends upon that changing.