Legal Issues: San Francisco Bay, Sacramento-San Joaquin River Delta and Estuary

Stuart L. Somach

Follow this and additional works at: http://scholar.law.colorado.edu/water-quality-control-integrating-beneficial-use-and-environmental-protection

Part of the Administrative Law Commons, Agriculture Law Commons, Animal Law Commons, Aquaculture and Fisheries Commons, Dispute Resolution and Arbitration Commons, Environmental Health and Protection Commons, Environmental Law Commons, Environmental Monitoring Commons, Environmental Policy Commons, Forest Management Commons, Jurisdiction Commons, Legislation Commons, Litigation Commons, Natural Resources Law Commons, Natural Resources Management and Policy Commons, President/Executive Department Commons, Property Law and Real Estate Commons, Soil Science Commons, State and Local Government Law Commons, Water Law Commons, and the Water Resource Management Commons

Citation Information

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.

Reproduced with permission of the Getches-Wilkinson Center for Natural Resources, Energy, and the Environment (formerly the Natural Resources Law Center) at the University of Colorado Law School.
LEGAL ISSUES: SAN FRANCISCO BAY, SACRAMENTO-
SAN JOAQUIN RIVER DELTA AND ESTUARY

Panel Presentation
View of Respondent

Stuart L. Somach
Attorney-Shareholder
McDonough, Holland & Allen
555 Capitol Mall, Suite 950
Sacramento, CA 95814

Water Quality Control: Integrating Beneficial Use
and Environmental Protection

Natural Resources Law Center
University of Colorado School of Law
June 1-3, 1988
IV. Federal Preemption
A. Central Valley Project Yield
B. Agricultural Water Service
C. Municipal Water Service
D. Power
E. Groundwater
F. Recreation, Fish and Wildlife
G. Economic and Social
H. Central Valley Project Revenue Loss

* This outline has been adopted from the Memorandum submitted by the Central Valley Project Water Association to the California State Water Resources Control Board in the Phase I hearings related to the San Francisco Bay, Sacramento-San Joaquin River Delta and Estuary. Attached is a reproduction of the relevant pages from that Memorandum with pages renumbered to correspond to the page numbers in this outline.
IV. Fish and Wildlife Coordination Act

V. Public Law No. 99-546

A. The COA

1. Section 101 - Project Operation
   (a) Federal Preemption
   (b) In Conjunction with the State of California Water Project
   (c) State Water Quality Standards

2. Contra Costa Canal

3. Section 104

B. Suisun Marsh

VI. Endangered Species

A. The Federal Endangered Species Act

B. The California Endangered Species Act

VII. The Public Trust Doctrine
I. Introduction

The development of the Water Quality Control Plan in the Phase I proceedings related to the San Francisco Bay, Sacramento-San Joaquin River Delta and Estuary is a complex matter, from both a factual and legal perspective. This paper contains a discussion of the controlling legal principles.

II. The Role of the District Court Decision

In undertaking the development of a Water Quality Control Plan for the San Francisco Bay and Sacramento-San Joaquin River Delta and associated estuary (hereinafter "Bay-Delta"), the State Water Resources Control Board (hereinafter "Board" or "SWRCB") must follow strictly the governing guidelines established by the District Court in United States v. State Water Resources Control Board, supra, 182 Cal.App.3d 82. In that opinion the Court reviewed D-1485, as well as the "Water Quality Control Plan, Sacramento-San Joaquin River and Suisun Marsh" (hereinafter referred to as the "D-1485 Plan"), and found that the Board had "failed to carry out properly its water quality planning obligations." (182 Cal.App.3d, supra, at p. 120.) The Court, however, declined to remand D-1485 to the Board since it was aware that the Board intended to conduct hearings to establish new and revised objectives in the near
future. The Court admonished that the Board follow the dictates of the Court's decision in the new hearings. The Court stated: "[W]e would expect the renewed proceedings to be conducted in light of the principles and views expressed in this opinion." (182 Cal.App.3d, supra, at p. 120.)

Three of the basic legal principles dealt with in Racanelli are derived from the Congress' and the Legislature's mandates with respect to the protection of water quality, and are particularly important. While consideration of these factors will undoubtedly make the Board's evaluation more difficult, their consideration is essential for a legally proper and defensible water quality control plan.

First, in the development of the revised water quality control plan, the Board must look at and consider all factors which contribute to water quality, including both point and non-point sources of pollution. Second, the Board's duty is not to establish water quality objectives at the highest level of protection; rather, the Board must formulate objectives which are reasonable, considering all demands being made and to be made on those waters and the total values involved. Third, water rights and legal concepts associated with water rights have nothing to do with the development of the water quality control plan. Consideration of water rights and associated concepts, in developing the water quality control plan, is impermissible.

Each of these factors is discussed in more detail below.
A. The Board Must Look at and Consider All Factors Which Affect Water Quality, with the Control of Point Source Discharges of Pollutants the Primary Target of Board Concern

As noted in the District Court's decision, the area of water quality regulation and control is dominated by federal legislation that either preempts state regulation or, when it allows for state regulation, requires that it be at least as stringent as that which exists in the federal acts. (33 U.S.C. § 1370.) The Federal Water Pollution Control Act (hereinafter "FWPCA"), (33 U.S.C. §§ 1251-1376), was originally enacted in 1948. This initial enactment generally deferred to the states with respect to the control of water quality. In 1972, however, the FWPCA was substantially amended. The amendments recognized that the legislation's prior approach of state primacy had, for various reasons, proven ineffective. Congress instead adopted a nationwide approach focused upon the elimination of pollutants.

Water quality control mandated under the FWPCA includes two areas of control: (1) the achievement of effluent limitations on point sources of pollution, and (2) the achievement of acceptable water quality standards. The term "effluent limitation" means "any restriction established by a State ... on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters ...." (33 U.S.C. § 1362(11).) The term "point sources" means "any discernible, confined and discrete conveyance ... from which pollutants are
or may be discharged. This term does not include return flows from irrigated agriculture." (33 U.S.C. § 1362(14).)

Effluent limitations on point sources that do not provide "protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced population of shellfish, fish and wildlife, and allow recreation activities in and on the water" affected must be reasonably modified to allow for maintenance of water quality for these purposes. (33 U.S.C. § 1312(a).)

The discharge of pollutants into a navigable body of water from a point source is restricted. The requirement of National Pollutant Discharge Elimination System (hereinafter "NPDES") permits for discharges is a means of achieving and enforcing effluent limitations in receiving waters. (33 U.S.C. § 1342.) The NPDES obligates point source discharges of pollutants to meet applicable effluent limitations. It is unlawful under the FWPCA to discharge pollutants over an established effluent limitation. (33 U.S.C. § 1319.) As noted above, effluent limitations are to be established to protect the water resources. (33 U.S.C. § 1312(a).) This obligation is separate

---

1 The FWPCA provides that "[t]he Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administration directly or indirectly, require any State to require such a permit. (33 U.S.C. § 1342(1); see 33 U.S.C. § 1362(14) (the term "point source" does not include return flows from irrigated agriculture).) The FWPCA, however, allows state regulation to be more stringent than regulation under federal law. (33 U.S.C. § 1370.) The State of California, of course, in certain instances regulates agricultural return flows as well as non-point sources of pollution. (See 23 Cal. Admin. Code §§ 2205 et seq.)
from the obligation to meet "standards" that apply to "pollutants" generally. (Id.)

Thus, in relevant part, the 1972 amendments focused upon the prohibition of any discharge of pollutants from a point source without first obtaining, and complying with, a permit issued by the relevant entity. In this case the entity charged with the regulation of pollutant discharges is the State of California. (See 33 U.S.C. §§ 1311, 1342; 182 Cal.App.3d at pp. 107-108; see also EPA v. State Water Resources Control Board (1976) 426 U.S. 200, 204-208.) This absolute prohibition on the discharge of pollutants from point sources without permit, and the relevant state regulation in this field, are important elements in the Board's current inquiry. Indeed, given the federal mandates, the Board must start its inquiry with respect to the protection of beneficial uses here, before it proceeds to investigate other areas of pollution.

In addition to the effluent limitation aspects of water quality control, the states also have responsibilities with respect to pollutants in water that are not associated with discharges from point sources. (33 U.S.C. §§ 1311(b)(1)(C), 1313.) The goal here is to identify water in which control of pollutant discharges from point sources is alone inadequate to meet water quality standards. The standards themselves are retained as a supplement to the point source discharge limitations. (33 U.S.C. § 1313; see 182 Cal.App.3d 108.) It is this latter inquiry, and the need to supplement the protections afforded through discharge limitation, which allows the Board to

B. The Formulation of "Reasonable" Standards

As noted in Racanelli, the control of salinity (which is only one aspect of the Water Quality Control Plan) is not part of the permitting system. Rather, salinity is dealt with generally within the requirement that the states engage in "a continuing planning process" and identify those waters within its boundaries for which the discharge restrictions (discussed above) are inadequate to achieve the water quality standards. In this context, the federal act requires that the states formulate water quality standards, through a basin planning process, to provide for protection from non-point sources of pollution, including all man-induced or man-made alterations of the chemical, physical, biological and radiological integrity of water. (33 U.S.C. §§ 1281, 1288.) Included in this area is the control of saltwater intrusion. (182 Cal.App.3d, supra, at pp. 108-109.)
The Porter-Cologne Water Quality Control Act (hereinafter sometimes referred to as "P-CWQCA), Water Code sections 13000 et seq. is the State of California's statutory framework for controlling water quality. The Act contemplates a joint effort between the local Regional Water Quality Control Boards and the SWRCB. Formulation of water quality control plans for specific regions in the State is a primary function of the Regional Boards. These plans form the basis of the water quality objectives of the State. While the Regional Boards have been delegated authority to formulate and adopt plans for all areas within their respective regions, these plans do not become effective until approved by the SWRCB. (Wat. Code §§ 13240, 13245.) The SWRCB may adopt plans which amend or supersede any regional water quality control plan. (Wat. Code § 13170; see 182 Cal.App.3d, supra, at p. 109.)

The Board, in developing the instant Water Quality Control Plan, must confine its analysis within certain statutory mandates. The Water Code is specific in its definition of a water quality control plan:

"'Water quality control plan' consists of a designation or establishment for the waters within a specified area of (1) beneficial uses to be protected, (2) water quality objectives, and (3) a program of implementation needed for achieving water quality objectives." (Wat. Code § 13050(j); see 182 Cal.App.3d, supra, at p. 119.)

The term "beneficial uses" is defined to include, but is not limited to:

"[D]omestic, municipal, agricultural and industrial supply; power generation; recreation; aesthetic
enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources or preserves." (Wat. Code § 13050(f).)

The term "water quality objectives" means:

"[T]he limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area." (Wat. Code § 13050(h).)

And the elements of the program of implementation are also spelled out clearly in the Code:

"The program of implementation for achieving water quality objectives shall include, but not be limited to:

"(a) A description of the nature of actions which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private.

"(b) A time schedule for the actions to be taken.

"(c) A description of surveillance to be undertaken to determine compliance with objectives." (Wat. Code § 13242; see 182 Cal.App.3d, supra, at p. 119.)

A key teaching in the District Court's decision is that the objectives that are to be established by the Board must be "reasonable." The term "reasonable," although not defined within the Act, is referred to throughout the P-CWQCA and in the Racanelli decision.2

The Legislature, in its policy statement regarding the need to protect the quality of the water resource, found that:

---

2 As will be discussed below, the term "reasonable" may have a different definition than that provided by water rights case law. The determination of reasonableness, in the water quality context, may require the application of certain specified factors, found in the P-CWQCA, to the factual situation presented in the planning process.
"[A]ctivities and factors which may affect the quality of the waters of the state shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Emphasis added.) (Wat. Code § 13000; see 182 Cal.App.3d, supra, at p. 109.)

This is very similar to Congress' direction to the states that when they adopt new water quality standards, those standards shall be established taking into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial and other purposes, and also their use and value for navigation. (33 U.S.C. § 1313(c)(2); see 182 Cal.App.3d, supra, at p. 120.)

Thus, while the Board is charged with the establishment of water quality objectives for the Bay-Delta, those objectives are not to be set without regard to the impact such objectives would have on other uses of water. Rather, the Legislature and Congress have limited the authority to establish objectives at "the highest quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved." (Wat. Code § 13000; emphasis added.)

Racanelli referred to this crucial aspect of the Board's authority at several points, at one time referring to the Board's need to take a "global perspective" in fulfilling its

---

3 The FWPCA speaks in terms of the establishment of "standards" while the P-CWQCA utilizes the term "objectives." These terms are legally synonymous for the purpose of the Board's actions. The term "objectives" is used herein when referring to the Board's P-CWQCA obligations.
water quality planning obligations. (182 Cal.App.3d, supra, at p. 119.)

This requirement is consistent with the enunciated state water quality control policy, which requires that water quality principles and guidelines be "consistent with the state goal of providing a decent home and suitable living environment for every Californian." (Wat. Code § 13142.) "Every Californian" includes, of course, those living outside of the area covered by the Bay-Delta objectives. Moreover, in establishing standards, the Board must consider "the effect of its actions ... on the California Water Plan [Wat. Code §§ 10004 et seq.] ... and on any other general or coordinated governmental plan looking toward the development, utilization or conservation of the waters of the state." (Wat. Code § 13145; emphasis added.)

Finally, the Legislature specifically recognized that in establishing water quality objectives, it was possible for the quality of water to be changed to some degree "without unreasonably affecting beneficial uses." (Wat. Code § 13241.) The Legislature, therefore, enumerated certain factors that must be considered by the Board in determining what reasonable protections should be. These factors are:

"(a) Past, present, and probable future beneficial uses of water.

"(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

"(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.
"(d) Economic considerations.

"(e) The need for developing housing within the region." (Wat. Code § 13241.)

C. Water Rights Have No Role in Water Quality Planning.

In some respects, the most significant conclusion in the Racanelli decision is that the Board's water rights functions have no role in the water quality planning process. The Board's function in developing a water quality plan is to protect beneficial uses, not water rights. (182 Cal.App.3d, supra, at pp. 117-118.) Indeed, "enforcing rights of water rights holders [is] a task mainly left to the courts." (Id. at p. 104; emphasis in original.) The water quality and water rights functions are separate and have no necessary relationship, one to the other. The Court stated:

"We think the procedure followed - combining the water quality and water rights functions in a single proceeding - was unwise. The Legislature issued no mandate that the combined functions be performed in a single proceeding." (182 Cal.App.3d, supra, at p. 119.)

This determination is crucial in two respects. First, as the Court noted, a water quality planning process analysis focused upon the protection of water rights is fundamentally defective. (182 Cal.App.3d, supra, at p. 116.) The goal is to protect beneficial uses, not water rights. Second, a water quality planning process which limits its analysis to specific water rights (the two water projects) is too narrow. The water quality planning process must look to all possible impacts on water quality including, in this case, "upstream diverters or
polluters." (182 Cal.App.3d, supra, at p. 118.) The Board's water quality obligations are much broader than its water rights obligations, both in purpose and scope. (Id. at p. 122.)

Conceptually, the separation of beneficial uses from water rights may be the most difficult aspect of the Racanelli decision to grasp. Nonetheless, it is essential that the Board understand the concept, not only as it applies to beneficial instream use (not normally associated with a water right) but also as it applies to consumptive uses (which are associated with water rights). As the Court noted and the applicable statutory language appears to support, the Legislature has ripped the concept of "beneficial uses" from its water rights origin, allowing it to stand on its own. That is, the Legislature has mandated the reasonable protection of beneficial uses of water, and the terms "reasonable" and "beneficial" have different meanings in the water quality planning process than they do in the water rights context. Obviously they cannot have totally different meanings, but there are subtle differences, related to the context in which are used, that should be noted.

First, as noted above, the P-CWQCA itself defines the "beneficial uses" that are to be protected in the development of the plan. These uses include, but are not limited to, domestic, municipal, agricultural and industrial uses of water; use of water for power generation and navigation; the use of water for recreation, aesthetic enjoyment, fish, wildlife and associated uses.
Second, while the term "reasonable" is not defined in the Act, it is used numerous times, and the Legislature has provided numerous examples of how the Board is to determine and then balance the reasonableness of any set of water quality objectives. This last point is important. In the water rights context, reasonableness is viewed from the perspective of the use of the water right, i.e., a determination of whether a use of water is reasonable in light of competing uses of water. In the water quality context, the question is whether the objective is reasonable, given the competing uses of water. These two inquiries are not the same.

The types of things that the Board must look at in determining whether a given objective is reasonable differ from the water rights context. In a water rights analysis, one looks at the reasonableness of a particular water right vis-a-vis other specific water rights. In the water quality context one looks at the reasonableness of an objective, in a "global" manner. One must look at the impact of a water quality objective on "all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible." (Wat. Code § 13000; emphasis added.) The objectives must be reasonable from a state-wide perspective (Wat. Code § 13142), taking into consideration the California Water Plan (Wat. Code § 13145).

In this context, the P-CWQCA recognizes that water quality can be changed without unreasonably affecting a beneficial use.
In other words, it is reasonable in establishing a water quality objective to affect a beneficial use if doing so takes into account and preserves the ability to provide water for other beneficial uses of water. (Wat. Code § 13241.)

D. Summary of Analysis

The foregoing analysis is perhaps best understood by way of an example. In developing its Water Quality Control Plan, the Board must first identify beneficial uses to be protected. (See Wat. Code § 13050(j)(1).) For the purposes of this example, we will focus on the broad range of instream environmental beneficial uses. Pursuant to its responsibilities under the FWPCA and the P-CWQCA, the Board, after identifying the beneficial uses to be protected, must then develop water quality objectives to protect beneficial uses. (See Wat. Code § 13050(j)(2).) The first aspect of the Board's activities associated with the development of water quality objectives is to determine the impacts of pollution from point sources, and then establish effluent limitations on the discharge of those pollutants. These effluent limitation levels must insure the protection of public waters for, among other things, these instream environmental uses. (See 33 U.S.C. § 1312(a).) It is important to note that the requirements imposed on the Board, with respect to these pollutants, are absolute. The goal is the total elimination of pollution from point sources, nothing less. (See 33 U.S.C. § 1251(a).) This aspect of the Board's
activities will result in the first level of water quality objective established by the Board.

The Board must next consider, in light of the point source pollutant objectives, whether additional objectives are necessary to protect beneficial uses. These additional objectives are secondary and supplement the point source discharge objectives. (See 33 U.S.C. § 1313; see also 182 Cal.App.3d 108.) For the purposes of this example, we will assume that further protection is needed.4

In establishing this supplemental protection, the Board is constrained and must limit objectives for this purpose to "the highest water quality which is reasonable considering all demands being made and to be made on those waters and the total values involved ...." (Wat. Code § 13000.) The objectives cannot be established without regard to the impact that those objectives will have on other beneficial uses.

The Legislature has provided the Board with directions on how this determination is to be made. The operative term used within the P-CWQCA is that the secondary objectives must be "reasonable." The term "reasonable" was borrowed from the water rights field, but is applied in a slightly different manner in the water quality context.

In the water rights context, the term "reasonable" is viewed in various ways. One only has a right to the reasonable

---

4 It is important to note, however, that the additional protection must be necessary to safeguard against other than point sources of pollution, such as salinity intrusion. It is never appropriate to protect against point source discharges of pollutants except through control at the source.
beneficial use of water. If a use of water is not reasonable or beneficial, then no right to that use exists. The determination of reasonableness depends upon the facts and circumstances in a given situation.

The question of reasonable use in water rights is most often viewed from the perspective of whether a given exercise of an existing right is reasonable in light of the impacts upon others who have or would like to have a water right. In this situation the use and method of use of the competing water rights are viewed and a determination made based upon this limited analysis.

The question of reasonableness, in water rights, can also be viewed in a larger context. The use of water for agriculture is by statute a beneficial use of water. The use or method of use of that water, in a given situation, may, however, be determined to be unreasonable. Flood irrigation, for example, may be a perfectly reasonable method of diversion in the northeastern counties of the state, while it may be unreasonable, in certain circumstances, in the San Joaquin Valley. This use of the term "reasonable" is still a very focused view of the water use question, but a broader view than was used in the first example.

In contrast to the two examples above, the use and meaning of the term "reasonable" in the water quality context is very broad. First, one is no longer interested in the individual's use of water, i.e., the use of water by flood irrigation for agriculture versus the use of water by sprinklers for
agriculture. Rather, the focus is on the collective use of water, i.e., the use of water for agriculture versus the use of water for some other purpose. Second, the reasonableness of the collective use of water for any one purpose is viewed not only against the needs of water for other collective uses, but also against the relative value of the use to society as a whole. While the public interest has an important role in the water rights context, it is the primary focus in the water quality field. Finally, the focus of the inquiry, while heavily based upon an investigation of the uses of water, is to establish an objective to protect a use. In this final context, an objective can be reasonable even though it does not fully protect a use.

In arriving at supplemental objectives, the Board must, therefore, make sure that its objectives are reasonable. Let us, for the purposes of this example, consider objectives that would require outflow, in addition to what is required pursuant to D-1485, in the range of 6,000,000 acre feet annually. The broad effect of meeting these flows on other beneficial uses of Delta water would need to be evaluated before these objectives could be adopted. This analysis, however, is not the specific farm-by-farm, city-by-city analysis that would be required in the water rights context.

The Board must first look at the competing uses of water and determine if they are reasonable. Again, this view is not the limited view of reasonableness that is undertaken in the water rights context, but rather is a determination of the collective reasonableness of the use. The Board must then look
at the effect meeting the objectives will have on the competing uses of water. This analysis looks to the total environmental, social and economic effects that meeting the objectives will have on local areas, the state, the nation and internationally. (See Wat. Code §§ 13000, 13142, 13145 and 13241.)

Returning to the example, the Board would look at the outflow required to meet the objective and determine its effect (to choose one of the more beneficial uses that must be considered) on municipal uses of water. Assuming meeting the objective would result in a reduction of water available for municipal use, the Board would then have to determine what that reduction will mean in real terms. That is, will the reduction in water for this purpose cause a shortage of drinking water, a redistribution or reduction in populations, an economic downturn in the state economy, and will this have consequent effects outside the state? Assuming it will (and in the example, there is no question that the flows would have grave impacts on all other beneficial uses), the Board will need to balance those factors against the consequences of developing a reduced objective to protect the instream beneficial uses. The consequences are again viewed from the broad perspective, considering local, state, national and international impacts.

Once the supplemental objectives are developed, the Board must establish a Program of Implementation. (Wat. Code § 13050(j)(3).) The Program of Implementation describes the means by which the objectives are to be met. In the context of the primary pollution related objectives, this must be through
source control. However, in the case of the supplemental objectives, the means by which objectives are met are varied, and, indeed, there is no requirement that they actually be met if the most reasonable (as opposed to the easiest) means for doing so are not within the Board's power. Among the ways that the objectives can be met are through adjustment to water rights, the construction of physical facilities and other types of non-flow related options which may be achieved through agreements between affected parties.

The result of all of the above should be a Water Quality Control Plan which protects all beneficial uses without destroying the economic and social structure of California.

III. Federal Preemption

As the Board analyzes the testimony and evidence introduced during the Phase I hearings, it must recognize the limitations on its actions imposed by preemptive federal law. As noted above, for example, the FWPCA, to a certain degree, constrains the State's ability to act generally in the area of water quality control.

Other congressional actions also must be considered. Chief among these are the various authorizing and related statutory provisions dealing with the CVP. The CVFWA recognizes that in most respects it is premature for the Board to deal with specific questions related to preemption, since, until objectives are established, it likely will be impossible to determine whether the Board's action is inconsistent with
congressional authorizations. The most logical times for this issue to be fully addressed are during the Phase II and Phase III hearing processes.

It may, however, be appropriate to at least consider this issue at various points throughout the process, including at the time that the draft Water Quality Control Plan objectives are developed. In this context, the Board should consider, to the extent that the evidence already presented allows:

1. Evidence which demonstrates how the CVP operates to meet its authorized purposes;

2. Evidence of what is required to meet the objectives to be imposed in the plan;

3. Evidence which demonstrates the effect, if any, that the plan objectives will have on the operation of the CVP to meet its authorized purposes.

As will be described below, the CVPWA does not believe that the law or facts in this case support an increase in Delta outflow over that required in D-1485 for the reasonable protection of beneficial uses in the Bay-Delta. However, and to the extent that the Board considers such increased flows, evidence has been introduced, and can be reviewed by the Board, to demonstrate generally the impact that increased Delta outflow will have on the following:

A. Central Valley Project Yield:

An increase in Delta outflow requirements will decrease project yield.
B. **Agricultural Water Service:**

Reduction in project yield may result in a reduction of water service to specific acreage within the congressionally authorized CVP service area.

C. **Municipal Water Service:**

Reduction in project yield may result in a reduction of water service to municipal and industrial customers within the congressionally authorized CVP service area.

D. **Power:**

The change in CVP operation which may be caused by meeting objectives which require more Delta outflow than required under D-1485 will result in a loss of dependable capacity.

E. **Groundwater:**

A reduction in CVP water available within the authorized CVP agricultural service area will result in an increase of use of already overdrafted groundwater basins in the San Joaquin Valley.

R. **Recreation, Fish and Wildlife:**

An increase in Delta outflow, over that required by D-1485 could result in lower levels in CVP reservoirs, diminishing the current recreational values of those reservoirs. Increased Delta outflow, over that required by D-1485, could result in
less flows available for fish and wildlife protection in the upstream and export areas.

G. Economic and Social:

A reduction in CVP water availability within the congressionally authorized CVP service area could have a significant adverse effect upon the people who live in those areas and in other areas of the state.

H. Central Valley Project Revenue Loss:

Loss of CVP yield that would be caused by meeting objectives above those contained in D-1485 would result in a loss of water service contract revenues and power revenues.

As noted above, not all of these considerations, as they relate to the CVP and the question of federal preemption, can be dealt with during the current phase of the Board's work. However, the issues outlined above must be analyzed by the Board in the context of its development of objectives to provide a reasonable level of protection to Bay-Delta beneficial uses.

IV. Fish and Wildlife Coordination Act

In developing the program for implementation, which is an integral part of the water quality control plan, the Board should consider the provisions of the Fish and Wildlife Coordination Act (16 U.S.C. §§ 661 et seq.). That Act requires any department or agency of the United States, or any public or private agency under federal permit or license, to consult with
the United States Fish and Wildlife Service (hereinafter "USFWS"), and, in California, the Department of Fish and Game (hereinafter "DF&G"), prior to the construction of water-related facilities. The purpose of this consultation is to insure that the facilities are examined and constructed with an eye toward preventing the loss of fish and wildlife resources. (See 16 U.S.C. § 662(a).) The Act further provides that reports and recommendations of the Secretary of Interior on how possible harm or damage to the wildlife resources can be avoided or mitigated shall become an integral part of the feasibility documents prepared for the water project, and that they must be submitted to Congress along with the other feasibility studies. (See 16 U.S.C. § 662(b).) The Act also provides that water and land developed through these projects be made available, consistent with the primary purpose of the project, for fish and wildlife purposes. (See 16 U.S.C. § 663.)

A cost benefit analysis of the wildlife features of the project goes to Congress. (See 16 U.S.C. § 662(f).) The additional costs for the construction or installation and maintenance of wildlife conservation measures is to become an integral part of project costs. (16 U.S.C. § 662(d).) The provisions of the Fish and Wildlife Coordination Act apply to those projects which were less than sixty percent completed at the time of the enactment of the Fish and Wildlife Coordination Act. (16 U.S.C. § 662(g).) Date of enactment for the purposes of the relevant limitations was probably August 12, 1958. (See Historical Note, West's U.S. Codes Ann., § 662, p. 459.) With
respect to projects that were authorized but not yet constructed at the time the Act was enacted, Congress provided for the modification of those projects to account for the wildlife resource considerations. (See 16 U.S.C. § 662(c).)

The CVP has undergone review, pursuant to the extensive provisions of the Fish and Wildlife Coordination Act. In developing its Program of Implementation, the SWRCB should remember that the many various fish hatcheries, wildlife refuges, and fishery releases were constituted, developed, and are being made as mitigation measures for CVP construction and operation, pursuant to congressionally defined obligations. The Board should give legal and policy consideration to the appropriateness of second-guessing, in the context of the instant process, requirements imposed by Congress on its own project.

V. Public Law No. 99-546

In developing its draft Water Quality control Plan, the Board must consider the provisions of Public Law No. 99-546, October 27, 1986, which, among other things, authorized the United States to execute (1) the "Agreement Between the United States of America and the Department of Water Resources of the State of California for the Coordinated Operation of the Central Valley Project and the State Water Project" (hereinafter "COA") and (2) the Suisun Marsh Preservation Agreement.
A. The COA

Title I of Public Law No. 99-546 deals with the COA. The relevant sections of Public Law No. 99-546, for the Board's current inquiry, are Sections 101 and 104.

1. Section 101 - Project Operation

Section 101 amends section 2 of the Act of August 26, 1937 by the addition of language which authorizes and directs the Secretary of the Interior to operate the CVP, in conjunction with the SWP, in conformity with state water quality control standards for the San Francisco Bay/Sacramento-San Joaquin Delta and Estuary so long as the Secretary determines that those standards are consistent with congressional directives applicable to the CVP.

(a) Federal Preemption

In California v. United States (1978) 438 U.S. 645, the United States Supreme Court stated that the SWRCB could impose terms and conditions on water rights permits issued to the United States, so long as those terms and conditions were not inconsistent with the congressional authorization of the CVP. The Ninth Circuit Court of Appeals, elaborating on the standard set by the Supreme Court, stated that the proper inquiry into the consistency of terms and conditions imposed by the SWRCB is an inquiry into congressional intent as that term is traditionally used. "Section 8 of the 1902 Reclamation Act requires only that state water law will apply unless the
contrary is intended by Congress." United States v. California (9th Cir. 1982) 694 F.2d 1171, 1176.

In general, a state statute or regulation is preempted by a federal rule to the extent it conflicts with a federal statute (Maryland v. Louisiana (1981) 451 U.S. 725, 747) or where it stands as an obstacle to the accomplishment and objectives of Congress (Perez v. Campbell (1971) 402 U.S. 637, 649 quoting Hines v. Davidowitz (1941) 312 U.S. 52, 67). In a situation such as potentially could exist with the CVP, an SWRCB term or condition which clashes with expressed or clearly implied congressional intention or which works at cross-purposes with an important federal interest served by the congressional scheme, is preempted. Where this happens, the state-imposed term and condition must fall. United States v. California, supra, 694 F.2d at p. 1177.

The language of Section 101 of the Act was derived from this basic legal premise. Indeed, Congress expressly noted that it was aware of relevant decisional law, as did the drafters of the COA, including California v. United States. (See H.R. Rep. No. 99-257, 99th Cong., 1st Sess., pp. 6, 7-8; COA Article 11(d).)

(b) In Conjunction with the State of California Water Project

For the most part, as noted above, it is premature to deal with the preemption issue at this juncture. However, Section 101 itself contains a congressional directive which the
Board must consider as it develops the Water Quality Control Plan. While the legislation authorizes and directs the Secretary of Interior to operate the CVP to meet water quality standards set by the SWRCB, assuming those standards are consistent with congressional authorization of the CVP, it also directs that the CVP will be so operated only "in conjunction with the State of California Water Project." To the extent that, and for whatever reasons, the SWP does not meet standards imposed by the SWRCB, the CVP may not be required to meet those standards alone. Such a requirement would be inconsistent with congressional authorization of the CVP. Indeed, the House Report provides that the phrase "in conjunction with the State of California Water Project" was included to make it clear that the responsibility to meet water quality standards is premised on a shared effort by the federal and state projects, as delineated in the COA. The Committee did not expect the effort to fall entirely on one project. (H.R. Rep. No. 99-257, supra, at p. 9.)

(c) State Water Quality Standards

With regard to the consistency with federal law of water quality standards established after the date of the
legislation, Congress intended that the nature of either project's obligation not change from what Congress understood those obligations to be. The House Report indicates that the obligation of the CVP is a shared responsibility with the SWP and that it is the respective obligation of each of the projects to maintain state water quality standards pursuant to the methodology established to develop the sharing formula found in Article 6 of the COA. The House Report then provides that the technical methodology from which Article 6 was derived is found in a document entitled "Technical Report and Determination of Annual Water Supply for Central Valley Project and State Water Project" dated March 1984. (H.R. Rep. No. 99-257, supra, at pp. 10-11.) In that technical document it is clear that the obligations that are being dealt with by the state and federal projects in the development of the COA are mitigation obligations; that is, the projects are to mitigate any damage to the Bay-Delta due to their operations and no more. So long as the SWRCB imposes mitigation requirements on the projects, no preemption problem necessarily arises. However, any attempt by the Board to impose enhancement criteria on the projects for the

---

5 The D-1485 proceedings, as well as the earlier proceedings on water quality, were confined to the Sacramento-San Joaquin Delta Suisun Marsh and Estuary. Congress, however, anticipated that the SWRCB, in its continuing endeavor to set water quality standards, would expand its regulations to San Francisco Bay. While the COA does not address Bay standards, the authorizing legislation authorizes and directs the Secretary of Interior to meet state water quality standards for the San Francisco Bay/Sacramento-San Joaquin Delta and Estuary. The inclusion of San Francisco Bay in the authorization was intentional and if standards for the Bay are established, they must be met, assuming, of course, that they are reasonably imposed, consistent with the congressional directives respecting the CVP, and they are met in conjunction with the SWP.
Bay-Delta clearly would run at cross purposes with the COA endorsed and authorized by Congress in Public Law No. 99-546.

2. Contra Costa Canal

The provisions of Public Law No. 99-546 dealing with the Contra Costa Canal are not found in the COA except to the extent that the COA [Exhibit A] cross-references the water quality standards imposed by the SWRCB in water rights Decision 1485 for the Contra Costa Canal intake. This section of Public Law No. 99-546 provides that the CVP, in conjunction with the SWP, is to be operated so that water supplies at the intake of the Contra Costa Canal are of a quality equal to the water quality standards contained in D-1485, except under specified conditions. The stated intent of this section of Public Law No. 99-546 is to insure that the quality of water at the intake of the Contra Costa Canal is of a quality equal to or better than the municipal and industrial water quality standards contained in SWRCB Decision 1485. (H.R. Rep. No. 99-257, supra, at p. 10.)

This provision of Public Law No. 99-546 is qualified in three significant ways. First, the obligation must be met in conjunction with the SWP. To the extent that the SWP does not operate to meet the objectives, the CVP need not and, indeed, cannot meet the objectives. Second, if the Secretary of Interior at any time determines that meeting the standards is inconsistent with the congressional authorization of the project, then the standards need not be met. If it were
determined, based upon the facts and circumstances that might exist at a given time, that meeting the standards would be unreasonable, then meeting those standards would also be inconsistent with congressional authorization. Third, the standards need not be met in situations where a drought emergency is declared by the Governor of California.

D-1485 contains objectives for the Contra Costa Canal which include, in addition to the year-around 250 mg/l requirement for domestic purposes, a 150 mg/l chloride requirement for industrial purposes. Specific to the instant discussion is the question of whether Public Law No. 99-546 obligates the Board to set objectives at the Contra Costa Canal equal to or better than those established in D-1485. The answer to that question is no.

As described elsewhere, the CVPWA believes that the 150 mg/l objective should be eliminated as part of the Water Quality Control Plan. It is simply unreasonable to provide freshwater outflow for that purpose when the same end can be achieved in a less expensive, more efficient manner through physical facilities. A determination that that is, in fact, the case would mandate the elimination of the objective. If the objective is eliminated, the SWP would not have to meet the objective and, as a consequence, neither would the CVP, since the CVP need only meet objectives "in conjunction with the SWP." Moreover, meeting objectives that were deemed unreasonable by the Board would also be inconsistent with the CVP authorization.
3. **Section 104**

Section 104 of Public Law No. 99-546 provides that the Secretary of Interior may not contract for delivery of more than 75 percent of the firm annual yield from the CVP until one year after the Secretary has transmitted to Congress a feasibility report and recommendations for a refuge water supply within the Central Valley Basin, California. The Senate Report indicates that the purpose for this provision was to address concerns by fish and wildlife interests that, with authorization and implementation of the COA, all available water supplies would be subject to long-term contracts, without consideration of refuge needs. The Senate Report specifically notes that the purpose of the amendment was not to reserve water for refuge needs in the sense of creating a legal reservation. Rather, the purpose of the provision was to solely insure that, should the Secretary recommend that additional water be utilized for fish and wildlife refuge purposes, the available water supply would not have been previously committed to CVP contractual, consumptive needs. *(See Sen. Rep. No. 99-256, 2d Sess., reprinted in 1986 U.S. Code Cong. & Admin. News, at pp. 5096, 5104.)* Suggestions by parties during the hearings that there was a reservation of water to be used for refuges are incorrect.

B. **Suisun Marsh**

Public Law No. 99-546 requires the CVP to operate in compliance with existing water quality standards or any future water quality standards established by the SWRCB so long as
those standards are not inconsistent with congressional
directives applicable to the project. As a consequence,
Congress recognized that, upon enactment of Public Law
No. 99-546, the CVP would be operated in compliance with water
quality standards that were set forth in Exhibit A of the COA.

The final legislation which comprises Public Law No. 99-546
includes within it authorization for the United States to
execute the Suisun Marsh Preservation Agreement. Execution of
that agreement shifts the Suisun Marsh obligation from the
D-1485/COA forum into a separate and distinct area governed by
the Suisun Marsh Preservation Agreement and Title II of Public
Law No. 99-546.6

Title II of Public Law No. 99-546, which authorized the
Suisun Marsh Preservation Agreement (hereinafter "SMPA") was
intended to address fully the water quality needs of Suisun
Marsh. Congress recognized that without the SMPA and the
construction of facilities authorized in Pub.L. No. 99-546,
existing D-1485 standards might require extensive releases of

---

6 The enactment of Title II of Public Law No. 99-546 in most respects
makes prior state and federal statements on the Marsh irrelevant. It is
worth noting, however, that Congress specifically recognized that the so-
called D-1485 permanent Suisun Marsh water quality objectives were never
included within the Exhibit A objectives with which it authorized the USBR
to comply. Rather, Congress, in authorizing the USBR to meet water quality
standards related to the Marsh, only authorized the USBR to meet the
interim Marsh standards included within Exhibit A to the COA. Indeed, the
House Report makes it clear that Congress did not intend for Public Law
No. 99-546 to impose the permanent Suisun Marsh standards on the CVP.
(H.R. No. 99-257, supra, at p. 8.) The House Report, of course,
accompanies H.R. 3113 which did not include Title II. As a consequence,
the House Report does not discuss the SMPA.
SWP and CVP water which, in the case of the CVP, would reduce, unreasonably, CVP yield.

D-1485 itself recognizes this fact, and it is within that decision that the rationale for dealing with water quality objectives for Suisun Marsh, through physical facilities, originates. In D-1485, the Board found that "[f]ull protection of Suisun Marsh now could be accomplished only by requiring up to 2 million acre-feet of freshwater outflow in dry and critical years in addition to that required to meet other standards." (D-1485 at p. 14.) The Board concluded that "[t]his requirement would result in a one-third reduction in combined firm exportable yield of State and federal Projects." (Ibid.) As a result (and due to the 1976-77 drought experience) the Board noted that in spite of the requirement of "full protection" for the Marsh:

"This decision [i.e., D-1485] balances the limitations of available water supplies against the mitigation responsibility of the projects. This balance is based upon the constitutional mandate ... 'that the water resources of the State be put to beneficial use to the fullest extent of which they are capable ...' and that unreasonable use and unreasonable diversion be prevented (Article 10, Section 2, California Constitution)." (D-1485 at p. 14.)

The Board could have added, as authority for its ultimate decision, the provision of Water Code section 13000 which limits the Board's obligation to establish water quality objectives to the highest water quality reasonably attainable. Objectives set so high as to result in a one-third reduction in the combined firm yield of the SWP and CVP is per se unreasonable, and does
not equate to the definition of "full protection" implied in the P-CWQCA or in the applicable case law.

In order to provide the proper level of protection, in light of other uses of the water involved, the Board imposed interim objectives until such time as identified parties could develop alternative water supplies through the construction of physical facilities for the Marsh. The Board noted that "[s]uch alternative supplies appear to represent a feasible and reasonable method for protection of the Marsh and mitigation of the adverse impacts of the projects." (D-1485 at p. 14.)

The SMPA was developed in direct response to D-1485 and to provide "full protection" to the Marsh. (See SMPA, Recitals (a), (c)-(f).) As noted above, Congress, in authorizing the execution of the Agreement believed and intended that it meet the United States Marsh obligations. For example, Congressman Fazio, the Representative within whose district the Marsh lies, indicated that the SMPA was important because it provided for the construction of the physical facilities necessary to protect the Marsh. (See 131 Cong. Rec. H7304 (daily ed. September 9, 1985) (Statement of Rep. Fazio).) The Senate Report provides:

"Absent the agreement and construction of the facilities, achievement of water quality standards could require the release of up to 2 million acre-feet of water (1.2 million acre-feet from the CVP) during dry years. Such releases would reduce the additional CVP yield made available by the COA by at least 750,000 acre feet. To fully address the water quality needs of the Delta and Suisun Marsh requires implementation of both the COA and the Suisun Marsh Preservation Agreement." (Sen. Rep. No. 99-256, supra, at p. 7, emphasis added.)
Accordingly, the SMPA and its authorizing legislation preclude any action by the Board to impose obligations on the CVP greater than those created by the SMPA.

VI. Endangered Species

A. The Federal Endangered Species Act

From time to time throughout the Phase I hearings reference has been made to the Board's alleged obligations under the Federal Endangered Species Act (hereinafter "FESA") (16 U.S.C. §§ 1531 et seq.). As a matter of law, the Board has no obligation under the FESA, other than to avoid acts prohibited by Section 9 of that Act (16 U.S.C. § 1538).⁷

In enacting the FESA, Congress determined that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purpose of this chapter." (16 U.S.C. § 1531(c)(1).) Section 7 of the FESA (16 U.S.C. § 1536) requires all federal agencies to consult with the Secretary⁸ to insure that federal actions are "not likely to jeopardize the continued existence of any endangered species or threatened

---

⁷ Section 9 of the FESA prohibits certain actions. The SWRCB's actions in the instant case, the establishment of water quality objectives, is not and, indeed, by definition, cannot be the type of activity prohibited by the Act. (See 16 U.S.C. § 1538(a)(1)-(2).) This does not mean that the operation of water facilities cannot come under the prohibition of Section 9. That, however, is a question distinct from the issue here.

⁸ The term "Secretary" means the Secretary of Interior or Secretary of Commerce, depending upon the species involved. (16 U.S.C. § 1532(15).)
species ... unless such agency has been granted an exemption for such action ...." (16 U.S.C. § 1536(a)(2); see Fish and Game Code § 2095.) The FESA is directed, in the first instance, toward the actions of federal departments or agencies, and the consultation requirements of the Act are solely directed toward those departments and agencies. There are no provisions within the FESA requiring state consultation with the Secretary.

Except as provided in certain sections of the Act related to funding and critical habitat questions (see, e.g., 16 U.S.C. §§ 1531(a)(5), (c)(2), 1536(a)(2) and 1542(c)), the state role, as it involves the FESA, is limited to the provisions of Section 6 of that Act (16 U.S.C. § 1535). The provisions of Section 6 are limited and have no application to the instant proceedings.

Section 6 of the FESA provides that the Secretary, in carrying out its responsibilities under the Act, will cooperate "to the maximum extent practicable" with the State. (16 U.S.C. § 1535(a).) That cooperation shall include consultation with the states concerned before acquiring any land or water, or interest therein, for the purpose of conserving endangered species. (Ibid.)

Section 6 also provides that the Secretary may enter into management and other cooperative agreements with the states. (16 U.S.C. § 1535(b), (c).) These agreements, in essence, are intended to allow the federal agencies to assist with the implementation of state programs, and provide for the allocation of funds for this purpose. (16 U.S.C. § 1535(d).) Actions
taken by the Secretary under these agreements must be reviewed at least once a year. (16 U.S.C. § 1535(e).)

Section 6 clearly preempts any state law with respect to importation or exportation of, or interstate or freight commerce in, endangered species or threatened species, although it does not void any state law which is at least consistent with or more stringent than the provisions of the FESA. (16 U.S.C. § 1535(f).) Finally, Section 6 allows some relaxation of the prohibitions found at 16 United States Code sections 1533(d) and 1538(a)(1)(B) within a state that is a part to a cooperative agreement pursuant to 16 United States Code section 1535(c). (16 U.S.C. § 1535(g).)

In reality, the only provision of the FESA which has any relevance to the instant case is found in Section 2 of the Act. (16 U.S.C. § 1531.) There Congress declared that it was Congress' policy that "Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species." (16 U.S.C. § 1531(c)(2).) This finding was a recognition of state primacy in the area of water resources planning, as well as a recognition of the unique role that water plays in the socio-economic health of communities in the West.

B. The California Endangered Species Act

The SWRCB must comply with the provisions of the California Endangered Species Act (hereinafter "CESA"), Fish and Game Code sections 2050 et seq. However, if the Board fulfills its

-37-
obligations under the P-CWQCA, including its Phase II obligation to prepare an Environmental Impact Report (hereinafter "EIR"), it will have, by necessity, also fulfilled its obligation under the CESA.

Fish and Game Code sections 2051 through 2055 provide that it is State policy to conserve, protect, resolve and enhance endangered species and threatened species, and their habitat, because of their ecological, educational, historical, recreational, aesthetic, economic and scientific value to the people of California; and that all state agencies, boards and commissions must join in this effort.

While these sections provide that it is State policy to conserve endangered and threatened species, this policy is tempered with a requirement that it be imposed in a "reasonable" fashion. For example, while the CESA would require the development of "reasonable and prudent alternatives" to a project9 which would jeopardize the continued existence of any endangered or threatened species, it allows individual projects to proceed if "economic, social or other conditions make infeasible such [reasonable and prudent] alternatives ... [so long as] appropriate mitigation and enhancement measures are provided." (Fish & G. Code § 2054; see Fish & G. Code § 2053.10

9 The term "project" means a project as defined in the California Environmental Quality Act (hereinafter "CEQA"). (Pub. Resources Code §§ 21000 et seq., Fish & G. Code § 2064.)

10 "The Legislature further finds and declares that it is the policy of the state that state agencies should not approve projects as proposed which would jeopardize the continued

Footnote continued on next page.
This is identical to the Board's obligation under the P-CWQCA to develop water quality objectives which will attain the highest water quality which is reasonable to protect beneficial uses. (See Wat. Code § 13000.) Among the beneficial uses that are listed in the P-CWQCA are the preservation and enhancement of fish, wildlife and other aquatic resources or preserves, which would include endangered and threatened species, and their associated habitat. (See Wat. Code § 13050(f).)

The substantive application of the CESA is somewhat different than the application of the FESA. The CESA is closely tied to the provisions of the California Environmental Quality Act (hereinafter "CEQA"), Public Resources Code sections 21000 et seq., and compliance with CEQA further insures the Board's compliance with the CESA. Since compliance with CEQA is an integral part of the P-CWQCA process, there simply is no way that the Board, in acting pursuant to the P-CWQCA, can violate existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of those species, if there are reasonable and prudent alternatives available consistent with conserving the species or its habitat which would prevent jeopardy.

"Furthermore, it is the policy of this state and the intent of the Legislature that reasonable and prudent alternatives shall be developed by the department, together with the project proponent and the state lead agency, consistent with conserving the species, while at the same time maintaining the project purpose to the greatest extent possible." (Fish & G. Code § 2053, emphasis added.)

"The Legislature further finds and declares that, in the event specific economic, social, or other conditions make infeasible such alternatives, individual projects may be approved if appropriate mitigation and enhancement measures are provided." (Fish & G. Code § 2054, emphasis added.)
the provisions of CESA. Moreover, and significant to the instant process, substantive compliance with the CESA is a Phase II matter, not a Phase I matter, although CESA issues must be considered as part of Phase I.

The CESA defines the term "state lead agency" as the state agency, board, or commission which is a lead agency under CEQA. (Fish & G. Code § 2065.) In the instant case, the SWRCB is clearly the state lead agency for this "project," which is defined under CEQA as the final water quality control plan. (See Fish & G. Code § 2064 and Pub. Resources Code § 21065.)

The state lead agency must consult with the DF&G in the development of the water quality control plan. (Pub. Resources Code § 21104.2.) During that consultation (which will take place during Phase II), the DF&G shall issue a written finding regarding "jeopardy." This finding also must include the DF&G's determination of whether a proposed project will result in any "taking" of endangered or threatened species. (Fish & G. Code § 2090.) If jeopardy is found, the DF&G must determine and specify to the state lead agency "reasonable and prudent alternatives" consistent with conserving the species which would prevent jeopardy. (Fish & G. Code § 2091.)

11 The term "jeopardy" means that a proposed project would jeopardize the continued existence of any endangered species or threatened species or result in the destruction of essential habitat. (See Fish & G. Code § 2090.)

12 As noted above, in the discussion of the FESA, the Board's action with respect to the development of a water quality control plan cannot result in a taking.
Significant to the instant process, Fish and Game Code section 2092 provides a specific mechanism for applying the reasonable and prudent alternative criteria, assuming a finding of jeopardy. Fish and Game Code section 2092 reads as follows:

"(a) Notwithstanding Section 21081 of the Public Resources Code, if, after consulting with the department pursuant to Section 2090, jeopardy is found, the state lead agency shall require reasonable and prudent alternatives consistent with conserving the species which would prevent jeopardy.

"(b) If specific economic, social, or other conditions make infeasible the alternatives prescribed in subdivision (a), except as provided in subdivision (c), the state lead agency may approve a project when jeopardy is found, if both of the following conditions are met:

"(1) The state lead agency requires reasonable mitigation and enhancement measures as are necessary and appropriate to minimize the adverse impacts of the project upon the endangered species or threatened species, or habitat essential to the continued existence of the species, including, but not limited to, live propagation, transplantation, and habitat acquisition, restoration, and improvement.

"(2) The state lead agency finds all of the following:

"(A) The benefits of the project as proposed clearly outweigh the benefits of the project were it to be carried out with the reasonable and prudent alternatives consistent with conserving the species which would prevent jeopardy.

"(B) An irreversible or irretrievable commitment made after initiation of consultation required pursuant to Section 2090, of resources to the project, which has the effect of foreclosing the opportunity for formulating and implementing reasonable and prudent alternatives consistent with conserving the species which prevent jeopardy, has not been made.

"(c) A state lead agency shall not approve a project which would likely result in the extinction of any endangered species or threatened species. The state lead agency shall base its determination on the best existing scientific information."
As stated above, this is the type of determination that must be made to properly protect fish and wildlife beneficial uses, including endangered species, under P-CWQCA.

At this phase of the proceedings, however, the only provision of the CESA that is relevant procedurally is the provision of Fish and Game Code section 2093. This provision allows for early consultation. Under the circumstances that exist in the instant process, the DF&G presentations during the Phase I hearings should constitute this early consultation.\(^\text{13}\)

It is now up to the Board to consider the DF&G comments in order to develop objectives that will provide the highest reasonable water quality considering all demands being made and to be made of those waters and the total values involved.

VII. The Public Trust Doctrine

The Public Trust Doctrine has little, if any, application to the Phase I considerations of the Board. While the public trust does identify beneficial uses that must be considered and protected by the Board in the development of the water quality control plan, its main importance, from the Board's perspective, is as a significant limitation on water rights. As Racanelli noted, "the state's navigable waters are subject to a public

\[^{13}\text{The Board should be aware that the CDF&G's participation in this process as a party may affect its ability to act as a neutral scientific agency as is required under the CESA. Moreover, the Board must be careful in accepting any DF&G overture toward additional "consultation" to avoid ex parte and other improper contacts. The actions of the State of California are subject to the fundamental constraints imposed by the "due process" requirements of the United States Constitution.}\]
trust and that the state, as trustee, has a duty to preserve this trust property from harmful diversions by water rights holders." (182 Cal.App.3d at p. 106.) The doctrine provides a significant enforcement tool should the Board determine it is necessary to reallocate water to protect trust purposes.14 (Id. at pp. 149-152.)

In Marks v. Whitney (1971) 6 Cal.3d 251, the California Supreme Court stated that the public trust is intended to protect navigation, fisheries and commerce (the traditional trust purpose), as well as the "right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state and to use the bottom of the navigable waters for anchoring, standing and other purposes." (6 Cal.3d at p. 259.) The California Supreme Court's subsequent decision in National Audubon Society v. Superior Court (1983) 33 Cal.3d 419, 437, established and confirmed that the trust extended to protect "navigable waters from harm caused by diversions ...." (Id. at p. 437.)

The duty to protect public trust uses of water is no different from the duty to protect beneficial uses pursuant to the P-CWQCA. Indeed, the term "beneficial uses" is defined in the P-CWQCA to include "recreation; aesthetic enjoyment; navigation; and preservation and enhancement of fish, wildlife, and other aquatic resources and preserves." (Wat. Code

14 While the trust's existence cannot be questioned, the proper method for its application to any particular water rights has not yet been determined. The application of the doctrine may constitute a taking under the United States Constitution.
Moreover, the determination of the level of protection to be afforded public trust uses is identical to the determination of the level of protection that is to be afforded beneficial uses under the P-CWQCA. In both situations, the level of protection is "the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved ...." (Wat. Code § 13000.)

In *Audubon* the Supreme Court reached the following conclusions with respect to how this level of protection was to be determined. These conclusions included: (1) the realization that the appropriation of water for non-trust uses may unavoidably harm the trust uses, but that this harm is justified when one considers that the population and economy of the state depend upon the appropriation of vast quantities of waters for uses unrelated to instream trust values (33 Cal.App.3d, *supra*, at p. 446); (2) the realization that "[t]he state has an affirmative duty to take the public trust into account in the planning and allocation of water resources, and to protect public trust uses whenever feasible ...." (*Ibid.*, emphasis added. *See generally* 33 Cal.3d, *supra*, at pp. 445-448.)