

STATE WATER BOARD
BOARD MEETING MINUTES
January 13, 2006

Copies of the resolutions and water quality order can be obtained by calling (916) 341-5602 or downloading from our [website](#).

CALL TO ORDER

Tam M. Doduc, Chair called the meeting to order on January 13, 2006 at 10:06 am in the Coastal Hearing Room, 1001 I Street, Sacramento, California.

BOARD MEMBERS PRESENT

Tam M. Doduc, Arthur G. Baggett, Jr., Richard Katz, and Gerald D. Secundy

BOARD MEMBERS ABSENT

None

STAFF PRESENT

Beth Jines, Acting Deputy Director
Tom Howard, Deputy Director
Bill Rukeyser, Office of Public Affairs
Liz Kanter, Office of Public Affairs
Chris Davis, Office of Public Affairs
Betsy Jennings, Office of Chief Counsel
Anne Hartridge, Office of Chief Counsel
Alex Mayer, Office of Chief Counsel
Ken Harris, Division of Water Quality
Lisa Babcock, Division of Water Quality

Danny Merkley, Division of Water Quality

James Giannopoulos, Division of Water Quality
Rik Rasmussen, Division of Water Quality

Michael Lauffer, Office of Chief Counsel
Selica Potter, Acting Clerk to the Board
Carmencita Sannebeck, Asst. Clerk to the Board
Barbara Evoy, Division of Financial Assistance
Shahla Farahnak, Division of Financial Assistance
Erin Ragazzi, Division of Financial Assistance
Leslie Laudon, Division of Financial Assistance
Ken Coulter, Division of Financial Assistance
Darrin Polhemus, Division of Financial Assistance
Esteban Almanza, Division of Administrative Services
Angela Schroeter, Division of Water Quality

PUBLIC FORUM

Mike Lewis, Western Fiberglass: Mr. Lewis addressed the Board to present his concerns regarding a potential problem with AB 2481. He is concerned that the improper wording contained in the code might bring confusion and potential lawsuits to owner/operators, distributors, design firms and manufactures of underground storage tank systems.

MINUTES

Motion: Member Katz moved to adopt the November 16, 2005 minutes.

Seconded by: Member Baggett

MOTION CARRIED

Aye: Board Chair Doduc
Vice Chair Secundy

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Member Katz

Member Baggett

No: None

INFORMATIONAL ITEM – EXECUTIVE DIRECTOR’S REPORT

1. Executive Director Report

Due to the absence of the Executive Director, the item was not presented.

FINANCIAL ASSISTANCE

2. Consideration of resolution adopting the Proposition 50 Dairy Water Quality Grant Program recommended projects list

Leslie Laudon, Division of Financial Assistance (DFA): Ms. Laudon began her presentation of the item by stating it was continued from the January 4 board meeting in order to give the public additional time to review and comment. At the January 4 meeting, a representative for one of the applicants, Western United Resource Development, Inc. requested additional time to review the submitted applications. Electronic copies of the nine proposals that are recommended for funding were sent by e-mail on or before January 6 to individuals requesting them. Copies of the Panel’s scores and comments were also sent by e-mail on January 9 to interested parties.

At the January 4 meeting the representative of Western United expressed concern related to the role that the California Department of Food and Agriculture (CDFA) played in the Dairy Program. Staff discussed concerns with Western United after the Board meeting. Western United suggested that CDFA might have compromised the grant selection process by submitting their own application and consequently being taken off the Selection Panel. They were concerned that CDFA’s role was inconsistent with the requirements and intent of the legislation that created this program.

As required by legislation, staff consulted with CDFA in development of the Program. CDFA, along with other stakeholders, was fully involved in development of the Program Guidelines that were adopted by the Board in June 2005. These Guidelines allow other State agencies to apply for grants under the program. The Guidelines also identify CDFA as one of several agencies that would be invited to join the Selection Panel. However, when CDFA submitted an application, it was decided it would be a conflict of interest to have them sit on the Selection Panel.

Sections 5 and 6 of the Guidelines describe the proposal evaluation and Selection Panel process. Section 5 states that proposals will be ranked by the Selection Panel in accordance with criteria contained in Table 5. Section 6C states that the Selection Panel will review the proposals and generate a ranked list that the Panel recommends for funding.

The Guidelines established the criteria that the Panel would follow in ranking proposals. The Guidelines did not provide extra credit or consideration for projects in the particular regions, nor did any stakeholder suggest such a provision during development of the Guidelines. The Guidelines provided the Panel with the option to consider geographic distribution in the ranking.

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However, the Panel did not identify any arguments based on geography except that proposals with activities that could be transferred to other parts of California were more valuable than proposals that were only relevant to a limited geographic area. Finally, the Guidelines did not specify that receipt of previous funding would penalize applicants that previously used state funds to update its Dairy Ordinances.

The Selection Panel reviewed the 16 eligible proposals and identified proposals that were and were not recommended for funding. The Panel then discussed all of the projects recommended for funding using the Table 5 criteria and the preliminary scoring numbers both reflected as an average and as individual scores. The Panel reached consensus on the ranking of the top three proposals.

The Panel did not agree on scores of individual criteria or ranking for the remaining six proposals. The Panel, after extensive discussion of the projects and the ranking criteria, unanimously decided to use a majority voting procedure to rank the remaining proposals. The Panel did not go back and revise the numeric scores of any of the proposals to reflect the discussions and the vote.

All nine top proposals are worthy of funding but there is only \$5 million available. Panel members were fully satisfied by the final ranking, and agreed it was the best recommendation they could make. Staff recommends the Board adopt the recommendation of the Panel members, as they debated these issues carefully and are the most knowledgeable with regard to the projects.

The DFA received six timely comment letters and one late letter, which has not been included in the record. Two comment letters received, from applicants that were recommended to receive funds, supported the process and the recommendations. The other letters were from applicants or their supporters that are on the recommended funding list, but are not ranked high enough to receive funding.

Three commenters objected because the final ranking did not reflect the averaged initial scores of the individual reviewers. Commenters contend that the Selection Panel did not follow the Guidelines.

Commenters were also concerned about the geographic distribution of funds. Two commenters suggested that additional credit should have been given for projects within the Santa Ana Region due to the stringent water quality requirements with which they must comply. Another commenter objected because the funding distribution does not reflect the counties with the greatest dairy activity. One commenter objected to Merced County being funded when it has received previous Water Board funds, and other more needy counties were not previously funded.

Motion: Member Katz moved to adopt the proposed resolution.

Seconded by: Vice Chair Secundy

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MOTION CARRIED ([Resolution 2006-0005](#))

Aye: Board Chair Doduc
Vice Chair Secundy
Member Katz
Member Baggett

No: None

Commenters

Paul Martin, Western United Dairymen
Kevin Abernathy, California Dairy Campaign
Mike Blankinship, California Dairy Campaign
Kristen Hughes, Sustainable Conservation
Jeff Palsgaard, Merced County

WATER QUALITY

3. Consideration of a resolution approving an amendment to the Water Quality Control Plan for the Los Angeles Region incorporating a total maximum daily load (TMDL) for toxic pollutants in Marina del Rey Harbor

(Chief Counsel Michael Lauffer recused himself from proceedings on this item because he had advised the regional water board when this matter was before it.)

Glenda Marsh, Division of Water Quality: Ms. Marsh presented the item to the Board by saying the above amendment establishes a Total Maximum Daily Load to address water quality impairments in Marina del Rey Harbor resulting from excessive levels of toxic pollutants in the sediment. The pollutants include: copper, lead, zinc, PCBs and chlordane.

The State Water Board received five timely comment letters. These comments have been summarized, responded to, and provided to the Board. Many of these comments were the same as comments submitted for the regional board's consideration prior to adopting the TMDL. Responses by regional board staff, made at the time of the regional board's adoption, are already included in the administrative record.

Staff is not proposing any changes to the State Water Board's resolution or the Basin Plan amendment itself.

Ms. Marsh continued stating that the Legal Office staff and the Los Angeles Region are available to address any questions that may arise.

Motion: Vice Chair Secundy moved to adopt the proposed resolution.

Seconded by: Member Katz

MOTION CARRIED ([Resolution 2006-0006](#))

Aye: Board Chair Doduc

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Vice Chair Secundy
Member Katz
Member Baggett

No: None

Commenters

David Smith, U.S. Environmental Protection Agency
Donna Chen, City of Los Angeles
Ivan Karnezsk, California Department of Transportation (Caltrans)
Kirsten James, Heal the Bay
Carrie Douangsitthi, Los Angeles County Department of Public Works

WATER RIGHTS

4. Consideration of a proposed order following a hearing on draft cease and desist order No. 262.31-18 and administrative civil liability complaint No. 262.5-40 against the Lake Arrowhead Community Services District

(Vice-Chair Secundy did not vote and recused himself from proceedings on this item because he has a residence in the Lake Arrowhead area and only returned to the Board meeting after this matter was disposed of.)

Victoria Whitney, Division of Water Rights (DWR): Ms. Whitney began by stating the item was prepared following a hearing held by the State Water Board on a draft Cease and Desist Order (CDO) and an Administrative Liability Complaint that was originally issued against Lake Arrowhead Community Services District. The proposed order upholds the draft CDO, which orders the District to reduce its withdrawals from Lake Arrowhead and imposes a fine of \$112,000.

The Board's hearing team reviewed the comments received and suggested a number of revisions that are summarized in a transmittal letter sent and shown in the revised draft order dated January 12.

The Board received comments from eight parties. It was obvious to the hearing team from the comments that parts of the order caused confusion. As a result, the revised draft order reorganized some of the text, made clarifications and minor changes to represent the positions of the various hearing participants. The draft order also clarified certain matters raised by the two parties and the other hearing participants in their comments.

- Arrowhead Lake Association
- State Water Resources Control Board
- Mojave Water Agency
- Lake Arrowhead Community Services District
- Lake Arrowhead Country Club
- Department of Fish and Game
- Marjorie Mikels

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- Ted Heyck

The draft order concludes that Lake Arrowhead Community Services District does have a pre-1914 right to some, but not all of the water it has diverted during the past several years. The draft order also summarizes the law that applies to pre-1914 water rights.

The Prosecution Team argued in its comments that the proposed order was overly generous in quantifying a pre-1914 right is difficult, given the uncertainties that exist as to what occurred almost 100 years ago. The hearing team concurred that the limitation expressed in the draft order is generous; however, it recommends the Board concur with the amounts listed in the order for a number of reasons.

First, the purpose in this case of quantifying the right is to determine whether it appropriate for the Board to uphold proposed enforcement actions for illegal diversion of water. The purpose is not to adjudicate the right like the Board would do if were conducting a statutory adjudication. The hearing team believes that 1,566 acre-feet per year is the upper measure of the District's pre-1914 right and that the Board should make a conservative estimate in order to be certain that the enforcement action it issues, if it votes to do so, is conservative. Conservative, in this case being that any error is in favor of the District. Hearing team acknowledges that in a statutory adjudication, the Board and the courts might be more restrictive.

Second, in the Meridian Case, the courts directed that notices of appropriation were to be construed liberally.

Third, the State has provided clear policy direction in regard to domestic and municipal uses. Section 1254 of the Water Code states, "That in acting on applications to appropriate water, the board shall be guided by the policy that domestic is the highest use." Further the Water Code is full of directives that give preference to municipal uses. The revised draft order includes citations to the applicable sections.

The Prosecution Team further argued that the amount of time the draft order allows for development of the right is too long as to be reasonable. The Prosecution Team argued that time period is 90 years. In fact, it is 76 years—from 1905 to 1981, when the maximum use contemplated under the plan of development occurred. The Legislature directs the Board in setting development schedules for post-1914 rights to provide additional time to develop municipal uses in recognition of the long period that a City grows and because it recognized that to do otherwise would be to encourage the waste of water.

The Prosecution Team provided specific suggestions on changes that should be made to the assumptions used to quantify the limit of the right. For instance in one case, the Prosecution Team argued that the draft order bases use at the Lake Arrowhead Country Club on an 18-hole golf course, when only a nine-hole course existed. In fact, the calculation was based on a statement made in 1965 regarding use in 1946 before the golf course was expanded.

The hearing team recognized that the quantification of Lake Arrowhead's rights is a factual determination subject to the policy direction of the Board, but recommends that the Board adopt the revised order for the reasons stated above.

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Below are the comments the hearing team rejected in revising the draft order:

- **It was proposed that the district be allowed to divert the 1,566 AFA over a long-term average.**
 - *Staff does not agree with this proposal. For permits and licenses, the Division allows some averaging; depending on the type of use, but the averaging period does not exceed 30 days. It certainly would not include a 10-year period.*
- **It was proposed that the Monthly Reservoir Operation Reports required by the order be eliminated.**
 - *Staff does not agree with this proposal. These reports are needed so that the Board can tell how much water is withdrawn using a mass balance equation.*
- **LACSD did not agree with the ACL and feels that it exercised reasonable diligence in producing information during the investigation.**
 - *Ms. Whitney personally does not agree with this comment. The proposed Order flatly rejects LACSD's legal theory, and instead computes the measure of the right based on the Doctrine of Progressive Development.*
- **It was proposed that three additional historical milestones be added to Figure 1 on Page 6 of the Draft Order.**
 - *Staff has revised Figure 1 to show the March 14, 1924 date for the Railroad Commission Decision No. 13267 and the March 24, 1924 Ordinance 228. There was no relevance in this hearing to the completion of Papoose Dam in 1978, which therefore was not added to the timeline.*
- **It was proposed that the section of the draft order that discussed Water Code section 1706 be significantly shortened.**
 - *The hearing team believes this section is important because the District used far in excess of the 1566 acre-feet per year that the order quantifies as its right. This section of the draft order explains why the LACSD in this case did not convert the larger non-consumptive use pre-1914 right that was developed for recreation purposes into a consumptive right for municipal purposes. Had it been allowed, such a conversion would have provided a basis of right for the amount of water diverted in excess of 1566 acre-feet per year.*

The Prosecution Team, as well as the Department of Fish and Game, asks you to consider this issue a policy matter. Staff believes it is not a policy issue, but a point of law.

However, staff recognizes the Prosecution Team's concern regarding ongoing litigation in the El Dorado Irrigation District matter. In that litigation, no one is claiming the conversion of a pre-1914 right. The issue in that case is whether Term 91 applies to a permit issued by the Board. Further, Ms. Whitney believes it would be very difficult for EID to successfully claim a converted pre-1914 right in that case, as there is ample evidence that consumptive uses downstream in the Delta were impaired early in the 20th Century. Staff believes Decision 1635

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reached its conclusions for that reason. Therefore, staff recommends an additional change, which is not indicated in the printed copy of the revised draft that is before you, the change primarily to prevent people from misinterpreting the Board's intent in the two orders in the future. The change recommends adding to the proposed revised order before you a citation to D 1635.

Staff is also recommending two other minor changes to that page. The first change is in the first full paragraph on page 14 at the phrase, "but cited only Montana and Oregon cases to argue that increased consumption..." Rather than "consumption," it should say, "consumptive uses." Lastly, in the footnote at the bottom of the page we deleted the first part of the paragraph that refers to problems people have defining what a use is. However, staff neglected to delete a reference to the same issue in the second paragraph of the footnote. Staff recommends taking out the phrase in the first sentence of the second paragraph of the footnote that says "eliminate the problem of defining "use" and changing the next word "requiring" to "required" so that the sentence reads, "For post-1914 water rights, the State Water Board and its predecessors have required separate water rights for consumptive and non-consumptive uses of water."

With those three minor changes to page 14, staff recommends that you adopt the revised draft order that is before you.

In closing, Ms. Whitney thanked both the prosecution team and the hearing team of the Water Rights Division for their hard work in getting this issue before you. On behalf of the entire Division, and in the event that this is your last Board meeting, Mr. Katz, we'd like to express our appreciation for your efforts as our hearing officer in this case and for your overall leadership and wish you our best in your future endeavors. Thank you.

Motion: Member Katz moved to adopt the proposed resolution.

Seconded by: Member Baggett

MOTION CARRIED ([Water Rights Order 2006-0001](#))

Aye: Board Chair Doduc

Member Katz

Member Baggett

Absent: Vice-Chair Secundy

Commenters

Eric Garner, Sanitation Districts of Los Angeles County (LACSD)

Maryanne Dickerson, Sanitation Districts of Los Angeles County (LACSD)

Rob Donlan, Lake Arrowhead Country Club (LACC)

Bill Brunick, Mojave Water Agency (MWA)

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Tina Cannon, California Department of Fish and Game

Dana Heinrich, Prosecution Team

ADJOURNED

The Board meeting adjourned at 12:10 pm