Advocates for Wild, Healthy Oceans

Formerly the Center for Marine Conservation
Pacific Regional Office
116 New Montgomery Street
Suite 810
San Francisco, CA 94105

415.979.0900 Telephone
415.979.0901 Facsimile
www.oceanconservancy.org

Testimony of The Ocean Conservancy

Linda Sheehan, Pacific Region Director

Before the California Performance Review Commission
Fresno, California
September 17, 2004

The Ocean Conservancy appreciates the opportunity provide testimony on the California Performance Review (CPR) Report (Report). These comments will address broad themes related to water quality; we will be submitting additional, more comprehensive comments later.

We agree that efficiencies can and should be realized in state government, and that such efficiencies can translate into improved water quality at lower cost. However, because the Report provides only cursory (if any) analysis of its proposals, and because the Report's authors failed to seek broad-based stakeholder and public input into the development and review of the Report, many of its conclusions must be viewed as only a beginning of what needs to be a more comprehensive dialogue on how to improve state government. The first rule in assessing changes to current environmental management operations should be "do no harm." Many of the environmental recommendations, however, impede progress on environmental goals, increase costs, and reduce public access to decisionmaking processes, thereby reducing accountability to the public.

The CPR Report's "Prescription for Change" states that the elements "essential to fixing California state government" include serving the people of California, making access to government easier for Californians, making government more accountable, saving taxpayer dollars, and organizing efforts to achieve state goals. However, much needs to be done before CPR can realize these laudable objectives. Key concerns include the following:

- **Access** – The Commission has been underserved by the severely limited public participation process involved in both the development and public review of the Report, which has presented the Commission with essentially a one-sided analysis of the articulated problems. Moreover, the lack of broad outreach, if not corrected soon, will impact implementation of the final measures, as we are all partners in implementation, most particularly the public that will pay for it. Finally, many of the specific water-related proposals in the Report significantly reduce public access to government agencies and decisionmakers, contrary to the stated objectives of the Report.
- **Achieving the state's goals** – Many of the significant policy proposals are not supported by basic analysis of the purported problems at issue, and most fail to identify a reasonable range of alternatives that might solve the stated problems. As a result, a number of the recommendations fail to improve the state's progress towards meeting water quality and other goals, and some actually conflict with efficient implementation of the Governor's Action Plan for California's Environment.[1] Moreover, several of the reorganization proposals simply move around, rather than solve, bureaucratic obstacles. In some cases, such as with regard to the elimination of the State Lands Commission, these recommendations attempt to align incompatible functions in a way that reduces the state's ability to meet its goals and mandates.
- **Accountability** – Tied to the reduction in access is the reduction in accountability of state decisionmakers to the public that they serve. One key example is the recommendation to move water quality and water rights decisionmaking from a public forum subject to Open Meeting laws to unelected, exempt officers who are not subject to such public scrutiny. This undermines, rather than improves, accountability to the public who this Report is supposed to serve.
- **Saving taxpayer dollars** – As the LAO found in its review of the Report, there has been little analysis of the suite of costs associated with each of the proposals, and indeed some of the proposals actually appear to cost more than operating under the status quo.

We address in more detail below how some of the Report's water quality-related recommendations implement, and more significantly impede implementation of, each of these key CPR objectives.

ACCESS

Development and Review of the CPR Report

As noted above, the development of the CPR Report essentially excluded many key stakeholders, particularly environmental and public health groups, resulting in a far less robust analysis of problems and solutions than would otherwise have occurred.

---

[1] Governor Schwarzenegger, "Action Plan for California's Environment" (Sept. 2003), http://www.joinarnold.com/en/attachment/09-21-Environment-Policy-Briefing.Final.pdf.

This deficiency has been exacerbated by the fact that the review process has to date seriously limited the ability of such groups, and members of the public interested in environmental issues, to provide personal testimony to the Commission on the Report.

The number of hearings allowing testimony on environmental issues has simply not been sufficient for a document of this size and magnitude. Numerous environmental NGO representatives were turned away at hearings accessible to them and told that they should travel to Fresno to present their comments. It is an understatement to say that Fresno is not accessible for many people who would like to provide testimony; as a result, input on the document for such people has been essentially limited to Web-based comments on a prescribed form. At a minimum, all interested members of the public should have been able to testify on any issue at a local hearing. As a result of the closed nature of the development and hearing process, the CPR Report has already violated its own "essential element" of government accessibility and service by severely curtailing meaningful public input into the document and its recommendations.

Not only will the lack of broad-based input result in a relatively one-sided picture of the Report's recommendations, it also will impact implementation of the final adopted measures. Environmental and public health groups are active stakeholders in the implementation of most of the programs affected by the Report, and, more importantly, the public must pay for those recommendations. All Californians deserve a careful and robust analysis of the problems and solutions associated with effective state government; limiting access to the Report will not achieve that goal.

Recommendations of the CPR Report

Access issues are unfortunately not limited to the development and review of the Report. Several of the Report's recommendations significantly reduce public access to decisionmaking, reducing public accountability and impacting the ability of agencies to achieve their missions. Public access and transparency in action are vital to keep the people's trust, particularly with respect to water, which is a public resource held and managed in trust for the people of California. Environmental protection has always been an open, public process with respect to such issues; the Report aims to change that process and make it far less accessible.

For example, the proposals to eliminate the State Lands Commission and the State and Regional Water Boards will severely curtail public access to decisionmaking processes affecting publicly owned resources. Ensuring clean water for drinking, recreation and other uses, and ensuring proper management of the state's tidelands and other trust lands, are and should be key missions for the state of California. Eliminating public access at the local level, and concentrating power in Sacramento, will make the government less, not more, accountable to the public. It will also result in slower, not faster, progress towards the Governor's stated goals in his Action Plan of safeguarding our coastline and ensuring that "[o]ur streams, rivers, lakes and bays [are] better protected . . . ."

A different example of the impacts of limited and selected access is found in Recommendation #30 ("Streamline Activities of the San Francisco Bay Conservation and Development Commission"). This recommendation was inserted essentially whole cloth from a letter by one specific interest group (the Bay Planning Coalition), with no input from the affected agency or stakeholder groups. A minimal amount of outreach to the agency and stakeholder groups would have uncovered the fact that the allegations in the letter were not necessarily supported by the facts and that the agency at issue was working closely with the regulated community to address the stated issues. The CPR Report must reflect input from a broader suite of knowledgeable stakeholders than simply members of the regulated community that are fortunate enough to have a higher level of access, or risk making uninformed decisions that unnecessarily degrade the environment and increase costs to the taxpayer.

ACHIEVING THE STATE'S GOALS

Reorganization Proposals

The LAO found in its review of the Report that "reorganizations should be undertaken only when (1) there is a clearly defined problem with the existing system and (2) there is a convincing reason to believe that the new system will address the problem and, more generally, enable the state to provide services more efficiently and effectively."[2] The LAO continued that a problem with the CPR Report is the fact that the reorganization proposals often lack sufficient detail to evaluate whether a proposed consolidation would improve state government.[3] The LAO posited that, of those problems actually identified, "[m]any . . . could be solved with simpler solutions . . . such as improved leadership, policy changes, better coordination between departments, interagency agreements, and cross-departmental training . . . ."[4] In other words, the Report not only fails to support its findings that the proposed reorganizations will improve water quality and efficiency, it also fails to address the question of whether other, less costly and disruptive solutions might meet that same goal.

The proposed elimination of the State and Regional Water Boards is a particularly clear example of this problem. The State and Regional Boards' water quality mission, as set forth in the Porter-Cologne Water Quality Act, is 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."[5] The SWRCB's water rights function similarly is guided by principles stated in California's Constitution that water is to be used reasonably.[6] Determining what is "reasonable" necessarily requires a careful

---

[2] LAO, "An Initial Assessment of the California Performance Review," p. 8 (Aug. 27, 2004) ("LAO Report").
[3] *Id.*
[4] *Id.* at 9.
[5] Water Code § 13000.
[6] Cal. Const., art. X, § 2.

attention to the fact that water is subject to the public trust doctrine and is an essential resource to be maintained for current and future Californians. A public process, conducted by a Board of experts in the field, implements these mandates far more effectively than the proposed, essentially closed-door reorganization.

Again applying the rule of "do no harm," it is important to look at some of the State and Regional Boards' accomplishments under the present system. These include national leadership in developing controls on stormwater discharge and discharge from agricultural and silvicultural operations, first-in-the-nation conditions placed on water rights permits requiring releases from dams to protect in-stream values, first-in-the-nation comprehensive use of administrative fines, and decisions on at least 100,000 adjudicative matters in a public forum that have resulted in few cases moving to the court system for resolution. Elimination of the public process, which enhances buy-in and so improves implementation, will reverse these trends and hurt California's ability to act as a leader on water issues. In recommending the proposed draconian reorganization proposal, the CPR Report throws the baby out with the bathwater and fails to achieve the state's goal of ensuring our waters are clean. Instead, the Report should contain a more thorough analysis of other alternatives for examining perceived coordination and other issues, and addressing them in a way that ensure the state does no harm to its environmental values.[7]

Rather than improve the state's ability to provide a healthy, adequate supply of clean water to Californians, the proposed bifurcation of the State Water Board's water quality (to the Department of Environmental Protection) and water rights/planning (to the Department of Natural Resources and Infrastructure Department) responsibilities similarly creates higher bureaucratic hurdles in the way of achieving this goal. The CPR Report concludes, without any supporting documentation or analysis, that water rights and water quality issues are separate issues that should be dealt with separately. The Report ignores the fact that the State Water Board was created in 1967 based on a recognition that water supply and water quality are inseparable in California.[8] Studies preceding the creation of the present system amply demonstrated this point. Several subsequent attempts to separate the water rights functions from the water quality functions have been quickly rejected.

One key example of the intertwined relationship between water supply and water quality is found in the San Francisco Bay-Delta Estuary. Water quality protection in this area is vital to the success of California's massive water transfer system. Maintenance of water quality in the Bay-Delta estuary is necessarily "flow dependent." Separating the dual needs of ensuring adequate water supplies and water quality merely adds an unnecessary layer of bureaucracy to a system working to integrate and coordinate management of this resource under CALFED. Indeed, the LAO specifically found that

---

[7] LAO Report at 9.
[8] *See United States v. State Water Resources Control Board* ("Racanelli Decision"), 182 Cal.App.3d 82, 227 Cal.Rptr. 161 (1986) (clearly articulating the close relationship between water quality and water rights).

moving CALFED to the new Infrastructure Department appears to be a case in which CPR "joined functions that are not particularly compatible."[9]

Other examples of the need to keep decisions relating to water rights and water quality integrated include management of the Salton Sea (where the State Water Board used its water rights authority to help protect the quality of a water body that the Governor has called an "inland water gem"), Mono Lake (where the Board used its water rights authority to protect the environmental values of this critical Sierra Nevada watershed), and the Klamath River (where water rights and water quality matters are being actively debated in a public forum being held in this important northern watershed). In short, the current structure of public oversight by experienced Water Boards is essential to retaining the balance of environmental and water rights concerns need to ensure that Californians enjoy a clean, adequate water supply.

Just as combining water rights and water quality functions in one agency leads to better decisions overall, combining drinking water management (currently at DHS) with water management by the State and Regional Boards could have the benefit of ensuring that the water agencies focus more on public health than they currently do. This is based on the assumption that the integration is done properly (*i.e.*, with public health and drinking water protection clearly incorporated as a key mission of the reorganized agency). For instance, drinking water quality and drinking water source protection should be considered in the development of watershed management plans.

Of course, one potential impediment to achieving clean water (including clean drinking water) is Recommendation #10, which redraws the boundaries of the regional water quality control boards away from watersheds. Ignoring the role that watersheds play in defining water supply and quality will add significant inefficiencies to efforts to provide clean water to the public. It also would directly contradict Governor Schwarzenegger's Action Plan for California's Environment, in which he calls on the Resources Agency and Cal-EPA to "overhaul their recent 'California Watershed Management MOU' . . . to an action plan" that will clean up endangered watersheds and better protect the state's waterways.

On the opposite end of the spectrum of coordinating related functions for the greater good is the proposal to eliminate the State Lands Commission and spread its activities among myriad divisions of various agencies. Like the Water Boards, the State Lands Commission oversees public trust resources, including tidelands and the beds of nontidal navigable waters, for the benefit of the public. As the LAO articulated, "[t]he splintering of existing departments . . . could create new coordination problems."[10] This proposal will result in such problems.

---

[9] *See* LAO Report at 17 ("By moving the [CALFED Bay-Delta Program oversight authority] from the current Resources Agency to the new Infrastructure Department, the CPR could shift the program's focus towards water infrastructure issues and away from other resources issues. Such a shift would represent a significant policy choice for the Legislature.").
[10] *Id*.

The California Legislature created the California State Lands Commission in 1938 and placed at its helm the Lieutenant Governor and State Controller, both statewide elected officials, and the Director of Finance, an appointee of the Governor. The Commission manages and protects the state's school and sovereign lands (*i.e*. the beds of all naturally navigable rivers, lakes, and streams, as well as the state's tide and submerged lands along the state's more than 1,100 miles of coastline). The 1930's discovery of corruption and fraudulent practices in management of the oil, gas and other mineral resources belonging to the state led the Legislature to establish the Commission as an independent entity with a membership of accountable, elected officials to prevent future abuse. Since its inception, the Commission has fulfilled its mandate by managing thousands of revenue-generating leases on public trust lands, generating in excess of $7 billion, while protecting the resources of the state. In managing California's lands, the Commission applies the public trust doctrine, which ensures that these lands are used for water-oriented commerce, navigation, and fisheries, water-oriented recreation, and preservation of land in a natural state. Implementation of the public trust doctrine requires careful balancing of competing uses to ensure that the public trust lands best meet the needs of the citizens of the state.

In light of the above, the proposed elimination of the State Lands Commission would, among other things:

- eliminate the currently open and effective system of decision making concerning public trust lands, which is focused on ensuring that such decisions are responsive to the needs of Californians;
- relegate such decisions to non-elected staff, reducing public accountability and reinstating the flawed management system that existed prior to the creation of the Commission; and
- inexplicably <u>create</u> inefficiencies by cutting up and dispersing programs, thereby eliminating more streamlined "one-stop shopping" and requiring redundant development of public trust expertise in several agencies, which will lead to inconsistent administration of the complex public trust doctrine.

The proposal to eliminate the State Lands Commission and distribute its functions will thus undermine, rather than advance, the Commission's mission to protect and manage in trust the state's tidelands and other trust lands.

<u>Other Recommendations</u>

Recommendation #6 ("Consolidate Funding Programs for Clean Water Infrastructure") on its face appears to be a sound idea; coordination of funding sources usually makes it easier for applicants to seek needed funds. However, while there may be some economies of scale in combining administration of the two funds, it must be recognized that the funding agency (U.S. EPA) has different requirements for their administration, which may reduce these economies of scale. But more importantly, in its zeal to achieve surface efficiency, the Report fails to keep in mind who needs

assistance and whether the recommendations provide needed services in an efficient way.

For example, the pressure to leverage funds to increase the dollar amount of loans (as articulated in the Recommendation) likely would be accompanied by pressure to maximize loan repayments, which runs counter to the need to have more set-asides to provide basic managerial and technical assistance and source water protection incentives to more small water systems. In other words, the drive to maximize "efficiency" needs to be balanced with the need to take on more complex – and potentially less "efficient" – projects to help the people who need it most, such as rural water systems contaminated by nitrates and arsenic. The Report needs to better address the impacts of its recommendations to ensure that the state meets its mandate and duty to ensure that all California communities – not just those serviced by larger water systems – get the help they need to provide clean water, even if the costs associated with doing so do not fit into an efficiency mold.

Also, the Recommendation should address the fact that the SWRCB currently has one of the most inefficient processes in the state for administrating grants; combining the SWRCB and DHS processes may serve to the detriment of drinking water grants unless these core inefficiencies are addressed. The Report appears to support this idea, but further details are needed.

Finally, with respect to achieving the state's goal of ensuring a safe, adequate supply of water for all Californians to drink, recreate in, and otherwise use, the CPR Report missed a significant opportunity to take a hard look at groundwater. Leadership on this significant resource is critically needed; we recommend that the Commission ensure that the final Report contains environmentally protective recommendations with regard to taking inventory of, managing overdrafting of, and preventing pollution of our limited groundwater resources.

ACCOUNTABILITY

As described above, many of the Report's recommendations, particularly with respect to reorganization, significantly reduce or eliminate the ability of the public to weigh in on local environmental issues that impact their health and livelihoods. This is particularly obvious in the proposals associated with the State and Regional Water Boards. Exempt officers operating in a departmental structure will be less accountable to protecting the water resources of the state, since the public process would be minimized. California's waters belong to the people, and the current Board system appropriately allows meaningful public input on water issues. The State's Open Meeting Laws, under which the Water Boards operate, ensure that the Boards are accountable to the public protecting the state's valuable water resources. Decision making by unelected, exempt officers who are not subject to the Open Meeting Laws does not ensure such accountability.

In addition to hiding water quality and water rights decisions behind closed doors, the proposed reorganizations would eliminate the power of local boards to provide additional accountability on management of local water resources. The state has been a leader on numerous water issues due to the voice of local stakeholders; two noteworthy examples are the standards set to reduce beach trash in Los Angeles, and the program established to control agricultural runoff along California's world-renowned Central Coast. Transparent, open public processes are essential to ensure that the public feels that its concerns about local waters have been heard, and to design efficient solutions that are tailored to local conditions. The CPR should not work to undermine the basic public right to clean water.

Similar accountability concerns arise as a result of the recommendation to eliminate the State Lands Commission. Eliminating the currently open and effective system of decision making concerning public trust lands and handing those decisions to non-elected staff will reduce public accountability over decisions that affect the public's lands. This should not be the result of a performance review process that ostensibly seeks to increase public accountability and service.

SAVING TAXPAYER DOLLARS

Greater efficiencies can and should be realized in state government, and such efficiencies can translate into improved water quality at lower cost. However, the LAO has found, and we agree, that many of the Report's identified net cost savings are not supported by analysis and/or are overstated (because the savings were inflated and/or the costs associated with the proposals were understated).[11] Bifurcating the water rights and water quality functions of the State Water Board, and chopping up the functions of the State Lands Commission, are two examples of recommendations that failed to address the full costs associated with the proposals. If there actually are not significantly increased efficiencies, we need to question whether the state's limited resources would be better spent making significant changes. In addition, the lack of complete analysis means that in some areas, important categories of cost savings were missed.

We recommend that the Commission act first on the relatively simple, "low-hanging fruit" issues that all agree need to be addressed. These could include simplifying the process for interagency work authorizations (Recommendation #17) and improving database management and e-governance (Recommendation #26). However, even these recommendations fail to comprehensively address potential and available cost savings and efficiencies.

For example, we agree with Recommendation #17 ("Simplify Process for Interagency Work Authorizations"), which calls on the state to streamline interagency contracting procedures. But a closer look at the issue reveals that the Recommendation ignores the high costs of services (often far higher than the private

[11] LAO Report at 3.

sector) charged by the contracting agency as a result of "captive contracting." Making the inter-agency agreement process easier without fixing associated contracting problems will only exacerbate institutionalized waste.

Recommendation #26 ("Improving Database Management and e-Government Systems") calls for long-overdue reforms and upgrades to the state's information technology systems, including the proposed automated license system for the Department of Fish and Game, and the much-needed development of standards and protocols for data sharing and exchange. We strongly support these types of efforts. However, this recommendation too can go further. The Report should strongly recommend that the state develop critically needed information about the status and trends of our environmental resources, information that is woefully inadequate and that may or may not result from simply standardizing technology and protocols. Focusing only on "how" to get data, without prioritizing what data are important, may not get the public and decisionmakers the information they need. The success of environmental agencies should be measured based on the health of the resources they protect, information that the public has a "right to know." The design and focus of information technology systems must take these types of end products into account, and the Report must highlight their importance. For example, even though both the regulated and environmental communities have for years worked together in support of a statewide surface water ambient monitoring program, the state's monitoring program is still weak and barely funded, and those limited funds that exist have been shifted to other activities. Without clear leadership, such information systems, which a wide range of stakeholders feel are needed and valuable, will not be developed.

Another example of the need for more comprehensive cost accounting is found in Recommendation #25 ("Streamline and Eliminate Duplicative Reporting for the Environmental and Resources Agencies"). The analysis assumed without documentation that there were no costs associated with eliminating the listed reports. That conclusion is questionable given the fact that no one asked the range of stakeholders who might read the reports whether they were useful, saved money, increased agency accountability, etc. Given that the costs of preparing the listed reports are minimal, a more careful look should be made at the costs avoided by the preparation of the reports (*e.g.*, auditing reports, air program analyses, etc.)

Finally, the CPR also fails to examine the full range of potential costs of eliminating the State and Regional Water Boards. Only a very small percentage of the Water Boards' thousands of decisions are appealed to the courts (40 appellate cases out of at least 100,000 adjudicative decisions in the last 34 years). The current "winnowing" process, which starts at the local level and provides for appeals to the State Board before a move to the court system, has saved the state a considerable amount over the years in litigation costs.

By contrast, the proposed Department structure, which is modeled on the federal EPA system, will result in many more cases ending up in court. Aside from the costs associated with delays in dealing with the clogged court system and the lack of water

expertise of the judges, the costs of handling appeals through the judicial system would be substantial. For example, the Attorney General's Office handles Water Board litigation at a billing rate of approximately $120 per hour. If just 50 extra cases went into the judicial system (both superior and appellate courts) each year, and if the Attorney General's Office spent 100 hours on each case, the annual cost would be $600,000. The expenses of the court itself would likely be at least that much, meaning an annual cost running easily over one million dollars. This is likely an understatement, given the years of experience at the federal level from which we can learn. The CPR analysis failed to account for these and other potentially significant costs associated with this allegedly cost-saving proposal. The Report needs to address the criticisms of the LAO[12] with respect to performing a full cost accounting of this and other proposals if the public, who is served by these agencies, is to see any real benefits.

[12] *See* LAO Report at 6-7 (finding that "the CPR scored savings that are uncertain or overstated," "costs cannot be determined because "many of the proposals [are] note fully developed," and "offsetting costs [are] not consistently recognized").