

**IMPLEMENTATION OF THE
WATER QUALITY CONTROL POLICY FOR DEVELOPING CALIFORNIA'S
CLEAN WATER ACT SECTION 303(d) LIST**

Water quality objectives should be interpreted properly.

Vernalis EC Objective

Time Period	Value
April 1 – August 31	30-day running average of 0.7 dS/m
September 1 – March 30	30-day running average of 1.0 dS/m

Determination of compliance with an objective expressed as a running average begins on the last day of the averaging period. The averaging period commences with the first day of the time period for the applicable objective. If the objective is not met on the last day of the averaging period, all days in the averaging period are considered out of compliance.

(2006 Bay-Delta Plan, p13 fn2)

“State Water Board staff working on the listing policy interpreted the Bay-Delta Plan's 30-day running average for April 1 to include the previous 29 days (in March).”

(Letter from Tam Doduc (January 17, 2007).)

Data Evaluation

Regional boards and the State Board must actively solicit, assemble, and consider all readily available data and information.

(Listing Policy Section 6.1)

For the Lower San Joaquin River at Vernalis, only data from 1986 through 1998 was evaluated.

If compliance up to 2005 had been considered, Section 4.2 of the Listing Policy would have required de-listing.

San Joaquin River at Vernalis Electrical Conductivity, Exceedances from 1986-2005

CY	Jan	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec	Total	Year Type
1986														W
1987						27	31	31					89	C
1988					8	30	31	31					100	C
1989	13	28	22	30	24	22	31	31					201	C
1990	25	28	18	30	31	30	31	31					224	C
1991	7	28	31	30	20	27	31	31					205	C
1992			12	30	1	24	31	31					129	C
1993			17				21	9					47	W
1994						23	31	31					85	C
1995														W
1996														W
1997														W
1998														W
1999														AN
2000														AN
2001														D
2002														D
2003														BN
2004														D
2005														W
Total	45	84	100	120	84	23	238	226	0	0	0	0	1,080	

Section 4.2 Analysis

- 7305 days
- 1,740 exceedances required for listing
- 1080 exceedances occurred (14.7%)

DE-LISTING REQUIRED

“Your contention is based on 10 years of data, years in which water was not critically short. Given the variability of climate and water supply in California, it is appropriate to take a longer term view which includes the critically water-short years of 1987-1992. In these dry years, the EC water quality objective was often not met under either interpretation of the appropriate averaging period in April. When another dry period occurs, the problem is likely to recur. According to the Listing Policy, the Lower San Joaquin River should remain on the List.”

(Letter from Tam Doduc (January 17, 2007).)

Listings and de-listings must be based on substantial evidence.

- Facts
- Reasonable assumptions based on facts
- Expert opinions supported by facts

Most important –

It is not “substantial evidence” if it is not relevant.

(Listing Policy Functional Equivalent Document, p[B-19].)

Substantial evidence is not:

- Speculation
- Argument
- Unfounded conclusions
- Narrative
- Clearly inaccurate or erroneous evidence
- Evidence of social or economic impacts that do not cause or contribute to, or are not caused by, physical impacts on the environment.

“Your contention is based on 10 years of data, years in which water was not critically short.”

The Listing Policy permits the use of all data, regardless of age, but only if:

- The data represents current conditions; and
- The water segment has not changed over time.

Lower San Joaquin River Basin conditions have changed significantly since 1995 as a result of:

- 1995 Bay-Delta Plan, WRO 95-06, and D-1641
- Grasslands Bypass Project
- New Melones Interim Plan of Operations
- Fishery flow requirements

Regulatory and operational changes were not refuted, debated, or considered

Since 1995, the Vernalis EC Objective
has been met 100% of the time.

There has never been an exceedance.

“Given the variability of climate and water supply in California, it is appropriate to take a longer term view which includes the critically water-short years of 1987-1992.”

Why stop at 1998?

Why not consider all data, as required by the Listing Policy?

Considering all data, up through 2005, would have required de-listing.

“In these dry years, the EC water quality objective was often not met under either interpretation of the appropriate averaging period in April.”

Are hydrologic conditions the same?

NO!

Hydrologic conditions have changed.

Data for 1987-1992 is not relevant.

It is not substantial evidence.

- Modeling is the only tool available to tell us what would have happened under historic conditions with current regulations and operations.
- CALSIM II, the most advanced modeling available, shows that EC at Vernalis can always be met.
- Nobody has suggested a better model.

The water right permits for the CVP require 100% compliance with the Vernalis EC Objective, but the Listing Policy does not.

- The USBR is required by the CVPIA, Reclamation Act of 1902, and its permit terms and conditions to meet the Vernalis EC Objective.
- Absent proof that the USBR cannot comply with its obligations, there is no “reasonable scientific certainty,” let alone any issue of material fact, that the Vernalis EC Objective will not be met at any time in the foreseeable future.

(Central Delta Water Agency v. United States Bureau of Reclamation (2006) 452 F.3d 1021)

“When another dry period occurs, the problem is likely to recur.”

How likely?

When?

This would only be true if conditions were the same.

THEY ARE NOT.

No data supports this.

It is speculation! There are no supporting facts!

It is not substantial evidence.

Other “Evidence” Supporting Listing

Increase in mean annual EC over 75 years.

- Mean annual EC is not the objective.
- The Listing Policy requires evidence of trends of declining water quality and impacts to beneficial uses.
- There was no evidence of impacted agricultural beneficial uses in the Lower San Joaquin River Basin.

Exceedances of Vernalis EC Objective.

- Only cited compliance from 1985 through 1998.
- Only cited compliance in Critical years before 1995.
- Data up through 2005 was not considered.
- Data representing current conditions was not considered.

It was not substantial evidence.

Elevated Upstream Salinity

- The Vernalis EC Objective only applies to the Southern Delta
- There are no upstream EC objectives

Listing based on upstream EC, without objectives, or based on incorrect application of the Vernalis EC Objective, is a new or different water quality objective adopted without a basin plan amendment.

Conclusion

The Listing Policy is a sound policy, but only if properly implemented, consistent with the Clean Water Act, Porter-Cologne Water Quality Control Act, water quality control plans, and regional boards.

As demonstrated in the adoption of the 2006 §303(d) List, this has not occurred.