
NOTE

WATER JUSTICE DELAYED IS JUSTICE DENIED: AN EXAMINATION OF THE CALIFORNIA STATE WATER RESOURCES CONTROL BOARD'S MANDATORY CONSOLIDATION AUTHORITY

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INTRODUCTION

In his 2019 State of the State Address, California Governor Gavin Newsom relayed:

Just this morning, more than a million Californians woke up without clean water to bathe in or drink Some poorer communities, like those I visited recently in Stanislaus County, are paying more for undrinkable water than Beverly Hills pays for its pristine water There are literally hundreds of water systems across the state contaminated by lead, arsenic, or uranium.¹

Newsom's observations reflect the ongoing struggles of California's small water systems, particularly those located in Central Valley²

¹ *Transcript and Analysis: State of the State 2019*, CAPRADIO (Feb. 12, 2019), <https://www.capradio.org/articles/2019/02/12/text-and-analysis-state-of-the-state-2019>.

² California's Central Valley is 20,000 square mile agricultural region that produces one-quarter of the United States' food supply, particularly grains, fruits

counties like Stanislaus County, to provide safe and reliable drinking water to poor communities and communities of color.³

As a response to this crisis and as part of California's state policy of realizing the human right to water, in 2015 the state legislature granted the State Water Resources Control Board (State Water Board) the novel authority to require small, failing water systems that consistently fail to provide safe and reliable drinking water to consolidate with nearby functioning systems.⁴ This mandatory consolidation authority is one tool in California's developing set of authorities and state-funded programs designed to facilitate water system consolidation in disadvantaged communities and severely disadvantaged communities, defined as communities with a median household income (MHI) that is below 80 percent and 60 percent of the statewide MHI, respectively.⁵

Since 2017, at least eighty-five community and school water systems have voluntarily consolidated with neighboring water systems without state intervention.⁶ Approximately 56 percent of systems that voluntarily consolidated served disadvantaged

and vegetables, and nuts. *See California's Central Valley*, U.S. GEOLOGICAL SURV., <https://ca.water.usgs.gov/projects/central-valley/about-central-valley.html> (last visited Sept. 25, 2021).

³ See CAPRADIO, *supra* note 1; LARRY LAI, UCLA LUSKIN CTR. FOR INNOVATION, ADOPTING COUNTY POLICIES WHICH LIMIT PUBLIC WATER SYSTEM SPRAWL AND PROMOTE SMALL SYSTEM CONSOLIDATION 2 (2017).

⁴ See S.B. 88, § 3, 2015–2016 Leg., Reg. Sess. (Cal. 2015); *see also* CAL. HEALTH & SAFETY CODE § 116682 (West 2022) (codifying the State Water Board's mandatory consolidation authority).

⁵ *See* CAL. HEALTH & SAFETY CODE § 116275; *DAC Mapping Tool*, CAL. DEP'T OF WATER RES., <https://gis.water.ca.gov/app/dacs> (last visited Feb. 4, 2022).

⁶ The analysis of voluntary consolidations in this article is based on the State Water Board's 2017–2021 voluntary consolidation dataset. In the dataset, community water systems are designated Type "C" and SDWIS Code "Residential Area," while school water systems are designated Type "NTNC" and SDWIS Code "School." To find the total number of community and school water systems that have voluntarily consolidated with neighboring water systems since 2017, I combined the State Water Board data from 2017–2021 into a single spreadsheet, sorted the dataset by Type and SDWIS Code, and tallied the total number of schools and community water systems. *See SAFER Engagement Unit Data: Consolidation Data*, CAL. STATE WATER RES. CONTROL BD., https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/dashboard.html (last visited April 4, 2021) [hereinafter *SAFER Engagement Unit Data*].

communities.⁷ Mandatory consolidation authority is intended as a legislative safety valve: when systems are unwilling to voluntarily negotiate consolidation with a disadvantaged community, the State Water Board has the power to force a water system that provides safe drinking water (the receiving system) to consolidate with a failing water system that serves a disadvantaged community (the subsumed system).⁸ However, the State Water Board's track record of mandatory consolidation projects indicates that it has not effectively implemented this authority to ensure that disadvantaged communities served by failing water systems get expedited access to safe drinking water through mandatory consolidation. Available data suggests that in the six years since the State Water Board was granted mandatory consolidation authority, it has issued twenty mandatory consolidation letters to water systems but has completed only two mandatory consolidation projects⁹ in disadvantaged communities to date.¹⁰

This Note analyzes the reasons for the long delays between when the State Water Board initiates the mandatory consolidation process in disadvantaged communities and when they finally obtain

⁷ To calculate this statistic, I compiled the State Water Board's data on voluntary water system consolidations from 2017–2021 and mapped the water systems using the California Department of Water Resources' Disadvantaged Community Mapping Tool to see if the subsumed water system was located in a census tract that qualifies as a disadvantaged, according to the 2018 census data. See *SAFER Engagement Unit Data*, *supra* note 6; CAL. DEP'T OF WATER RES., DAC Mapping Tool, https://www.waterboards.ca.gov/drinking_water/certlic/drinking-water/dashboard.html (last visited Oct. 1, 2021). I assumed that water systems located on the edge of census tracts that qualify as disadvantaged include in their service areas a disadvantaged community.

⁸ See CAL. HEALTH & SAFETY CODE § 116682(a)–(d) (West 2022).

⁹ In this Note, the term “mandatory consolidation projects” refers to instances where the State Water Board has issued a letter to two water systems notifying them that they have six months to agree to consolidate or the Board will initiate its statutory authority to force a consolidation, regardless of whether the systems later agreed to negotiate a voluntary agreement to avoid receiving a mandatory consolidation order.

¹⁰ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, CAL. STATE WATER RES. CONTROL BD., https://www.waterboards.ca.gov/drinking_water/programs/compliance (Nov. 4, 2021) (listing completed, active, and discontinued mandatory consolidation projects) [hereinafter *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*]; *infra* Appendix A.

access to safe and reliable drinking water. It suggests that there are economic, social, political, and structural explanations for the delays. It also proposes administrative, legislative, and funding reforms that the state could implement to expedite disadvantaged communities' access to safe drinking water through mandatory consolidation.

Part I of this Note provides background on the mandatory consolidation process, including the public policy rationale behind water system consolidation, the regulatory framework that governs California's public water systems, and the purpose and substance of the mandatory consolidation statute. Part II provides an overview of the mandatory consolidation projects that the State Water Board has initiated since obtaining authority to do so in 2015. Part III probes the various factors that may be driving consolidation project delays, including underlying economic, social, and political tensions as well as structural flaws embedded in the mandatory consolidation statute. Part IV identifies administrative, legislative, and funding reforms to remove barriers to consolidation as a mechanism for improving safe and reliable drinking water access in disadvantaged communities. Finally, Part V summarizes these findings and highlights the importance of refining the implementation of the mandatory consolidation statute, Health and Safety Code (H&SC) § 116682, as California advances its commitment to pursuing water system consolidation as a solution to systemic drinking water issues in disadvantaged communities.

I. BACKGROUND

This Part explores the empirical and policy basis for consolidation as a tool to solve water system failures, provides background on California's drinking water regulatory framework, and explores state initiatives to promote consolidation. It also provides a comprehensive analysis of the State Water Board's mandatory consolidation authority under H&SC § 116682, and its related authority to appoint a water system administrator under H&SC § 116686. Next, it describes key sources of state funding for consolidation projects that benefit disadvantaged communities.

A. The Need for Small Water System Consolidation

The U.S. water sector faces growing challenges in supplying communities with affordable, reliable, and safe drinking water as

water infrastructure ages, climate change increases the frequency of water shortages and degrades water quality, and wealth inequalities continue to rise.¹¹ Public water system¹² fragmentation is a particular concern: EPA has estimated there are 155,693 public water systems in the United States, including approximately 49,471 community water systems,¹³ which provide water to residential populations year-round.¹⁴ Small public water systems are proliferating, and 81.3 percent of community water systems across the United States serve fewer than 3,300 people, while 54.5 percent serve fewer than 500 people.¹⁵ Mirroring this national trend, California alone had 7,400

¹¹ See U.S. WATER ALL. & UNIV. OF N.C. SCH. OF GOV'T, ENV'T FIN. CTR., STRENGTHENING UTILITIES THROUGH CONSOLIDATION 4 (2019); Maura Allaire et al., *National Trends in Drinking Water Quality Violations*, 115 PROC. NAT'L ACAD. SCI. U.S., 2078, 2079 (2018) ("In 2015, 9% of CWSs in our study sample violated health-based water quality standards, affecting nearly 21 million people."); Aris Georgakakos et al., *Chapter 3: Water Resources in CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT* 69, 74, 78 (Jerry M. Melillo, Terese Richmond, & Gary W. Yohe eds., 2014).

¹² Per the EPA definition, a "public water system" may be publicly or privately owned and "provides water for human consumption through pipes or other constructed conveyances to at least 15 service connections or serves an average of at least 25 people for at least 60 days a year." *Information about Public Water Systems*, EPA, <https://www.epa.gov/dwreginfo/information-about-public-water-systems> (Nov. 10, 2021).

¹³ This data was retrieved from EPA's public water system database, SDWIS Federal Reports Search, using "Community water system" as the PWS type under "Water System Characteristics" in the advanced search function. *See Water System Summary*, EPA, <https://ordspub.epa.gov/ords/sfdw/f?p=108:21:::RP,RIR::> (last visited Nov. 26, 2021).

¹⁴ See EPA, *supra* note 12.

¹⁵ See EPA ENV'T FIN. ADVISORY BD., FINANCING STRATEGIES TO PROMOTE SYSTEM REGIONALIZATION 2 (2019).

public water systems as of 2020,¹⁶ 92 percent of which served fewer than 1,000 connections.¹⁷

Many small water systems lack the technical, managerial, and financial capacity to provide safe drinking water on a sustained basis, and struggle to comply with state and federal Safe Drinking Water Act (SDWA) standards.¹⁸ One underlying cause of the higher rates of SDWA violations and service unreliability among small water systems compared to larger water systems is the relative difficulty of obtaining financing for necessary but expensive water infrastructure investments for small systems.¹⁹ EPA's most recent Drinking Water Infrastructure Needs Survey and Assessment estimates that over the next twenty years, the nation's drinking water utilities will require \$472.6 billion²⁰ invested in their infrastructure to ensure access to safe drinking water and to promote community economic vitality.²¹ The investment needed according to population

¹⁶ In California, a community water system is defined as “a public water system that serves at least 15 service connections used by yearlong residents or regularly serves at least 25 yearlong residents of the area served by the system.” *California Water Boards’ Annual Performance Report - Fiscal Year 2019-20: Regulate: Public Water Systems*, CAL. STATE WATER RES. CONTROL BD., https://www.waterboards.ca.gov/about_us/performance_report_1920/regulate/251_drinking_water.html (Sept. 14, 2020). SWRCB’s latest Annual Performance Report for Fiscal Year 2019–20 reports that there are 7,400 total active public water systems in California and 2,882 active community water systems. *See id.*

¹⁷ See *Drinking Water Partnerships and Consolidation*, CAL. STATE WATER RES. CONTROL BD., https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/waterpartnership.html (Apr. 19, 2021) [hereinafter *Drinking Water Partnerships and Consolidation*].

¹⁸ See *id.*; see also MIN-YANG A. LEE & JOHN B. BRADEN, CONSOLIDATION AS A REGULATORY COMPLIANCE STRATEGY: SMALL DRINKING WATER SYSTEMS AND THE SAFE DRINKING WATER ACT 5 (2007), <http://ageconsearch.umn.edu/bitstream/9772/1/sp07le03.pdf>.

¹⁹ See MADELYN GLICKFELD ET AL., UCLA LUSKIN CTR. FOR INNOVATION, THE HUMAN RIGHT TO WATER IN POOR COMMUNITIES OF COLOR: URBAN DISADVANTAGED COMMUNITY WATER SYSTEMS IN SOUTHERN LOS ANGELES COUNTY 2–3 (2021).

²⁰ The \$472.6 billion estimate is based on January 2015 dollars. See EPA OFF. OF WATER, DRINKING WATER INFRASTRUCTURE NEEDS SURVEY AND ASSESSMENT, SIXTH REPORT TO CONGRESS 9, 13 (2015).

²¹ See *id.* at 9. The massive investments needed in source water, pipe, water treatment plant, and water storage projects are projected to create local jobs, which

served is over two and a half times greater for small community water systems than for large community water systems.²² Many small water systems lack the financial reserves or customer base to support investments in infrastructure replacement, upgrade, or maintenance.²³

In California, infrastructure and resource gaps are compounded in low-income communities and communities of color, resulting in inequitable exposure to unsafe drinking water in these communities.²⁴ This inequitable exposure is an environmental injustice²⁵ that occurs in the state's rural and urban areas.²⁶

In rural areas, water injustice is particularly prevalent within low-income, unincorporated communities in the Central Valley,

the Department of Commerce's Bureau of Economic Analysis predicts will have compounding national economic benefits. *See id.* at 15.

²² *See id.* at 13 (Exhibit 1.1). According to EPA's estimate of total national 20-year need in January 2015 dollars, large community water systems need \$174.4 billion in investments and serve 141.7 million people, while small community water systems need \$74.4 billion in investments and serve 23.4 million people. These figures represent a needed investment of \$1,271 per person served for large water systems versus \$3,179 per person served for small water systems. *Id.*

²³ *See GLICKFELD ET AL., supra* note 19, at 2.

²⁴ *See generally*, Carolina L. Balzacs & Isha Ray, *The Drinking Water Disparities Framework: On the Origins and Persistence of Inequities in Exposure*, 104 AM. J. PUB. HEALTH, 603, 603–04 (2014). *See JONATHAN LONDON ET AL., THE STRUGGLE FOR WATER JUSTICE IN CALIFORNIA'S SAN JOAQUIN VALLEY* 8 (2018).

²⁵ *See generally* Juliana Maantay, *Mapping Environmental Injustices: Pitfalls and Potential of Geographic Information Systems in Assessing Environmental Health and Equity*, 110 ENV'T HEALTH PERSPS. 161, 161 (2002) (defining environmental injustice as “the disproportionate exposure of communities of color and the poor to pollution, and its concomitant effects on health and environment, as well as the unequal environmental protection and environmental quality provided through laws, regulations, governmental programs, enforcement, and policies.”). *See ALISHA DEEN ET AL., ENV'T JUST. COAL. FOR WATER, THIRSTY FOR JUSTICE: A PEOPLE'S BLUEPRINT FOR CALIFORNIA WATER* 7 (2005) (describing California low-income communities' and communities of color's lack of access to safe and affordable water as an environmental injustice that has resulted from environmental discrimination).

²⁶ *See, e.g.*, LONDON ET AL., *supra* note 24, at 10–11; GLICKFELD ET AL., *supra* note 19, at 4; Jose A. Del Real, *The Crisis Lurking in Californians' Taps: How 1,000 Water Systems May Be at Risk*, N.Y. TIMES (July 24, 2019), <https://www.nytimes.com/2019/07/24/us/the-crisis-lurking-in-californianstaps-how-1000-water-systems-may-be-at-risk.html> (describing brown drinking water contaminated with manganese from the Sativa water system in Los Angeles County).

which are often served by small water systems that rely on ground-water.²⁷ Groundwater in these areas is susceptible to pollution from fertilizers, animal manure, and industry, in addition to contamination from naturally occurring toxic elements.²⁸ The State Water Board has estimated that one million people in more than three hundred rural communities and schools rely on small, ageing water systems and private wells, most of which are contaminated.²⁹ Prevalent contaminants include nitrates, uranium, and carcinogens like 1,2,3-Trichloropropene and arsenic.³⁰ Studies have also shown that the Central Valley's low-income residents and residents of color experience disproportionately high levels of exposure to nitrate and arsenic in drinking water.³¹ High nitrate exposure has been linked to methemoglobinemia, or "blue baby syndrome," developmental effects in children, and cancer, while high arsenic exposure has been linked to lung, bladder, skin, and kidney cancers.³²

²⁷ See LONDON ET AL., *supra* note 24, at 8, 14.

²⁸ See *id.* at 8; Jose A. Del Real, *They Grow the Nation's Food, but They Can't Drink the Water*, N.Y. TIMES (May 21, 2019), <https://www.nytimes.com/2019/05/21/us/california-central-valley-tainted-water.html>.

²⁹ See CAL. STATE WATER RES. CONTROL BD., FACT SHEET: SB 200 CLOSES FUNDING GAP TO PROVIDE ALL CALIFORNIANS WITH ACCESS TO SAFE AND AFFORDABLE DRINKING WATER (July 24, 2019), https://www.waterboards.ca.gov/publications_forms/publications/factsheets/docs/SADWF%20Fact%20Sheet%20updated%20dft%20fnl%207.24.19.pdf.

³⁰ See *id.*

³¹ A study by the Environmental Integrity Project examining EPA data from 2014–15 found that "95 community water systems in the state, serving more than 55,000 people, are still providing water with illegal levels of arsenic." Exposures to excessive arsenic in drinking water were concentrated in poor and Latino or African American communities, with a cluster of exposures in the San Joaquin Valley. See ENV'T INTEGRITY PROJECT, ARSENIC IN CALIFORNIA DRINKING WATER 1 (2016); see also Balazs et al., *Environmental Justice Implications of Arsenic Contamination in California's San Joaquin Valley: A Cross-Sectional, Cluster-Design Examining Exposure and Compliance in Community Drinking Water Systems*, 11 ENV'T HEALTH, no. 11, 2012, at 8 [hereinafter Balazs, *Arsenic Contamination*]. Balazs et al. found that the small water systems in the San Joaquin Valley that served higher percentages of Latino residents provided water with higher nitrate contamination levels. See Balazs et al., *Social Disparities in Nitrate-Contaminated Drinking Water in California's San Joaquin Valley*, 119 ENV'T HEALTH PERSPS. 1272, 1276 (2011) [hereinafter Balazs, *Nitrate Contamination*].

³² See Balazs, *Nitrate Contamination*, *supra* note 31, at 1272–73; Balazs, *Arsenic Contamination*, *supra* note 31, at 2.

In California's urban areas, such as Los Angeles, disadvantaged communities and severely disadvantaged communities are clustered together and tend to be served by small, ageing water systems.³³ These systems face significant but different challenges than isolated rural systems, such as the accumulation of pollutants like manganese at high concentrations due to inadequately maintained pipe distribution systems.³⁴ Manganese is a "secondary contaminant" that does not trigger health-based drinking water standard violations, but it can make water unacceptable to drink because it causes discoloration and offensive odors when present in high concentrations.³⁵ Urban disadvantaged communities are also often located in industrial areas and may be exposed to toxic industrial by-products, such as chemicals leached from underground storage tanks.³⁶

Water system consolidation is an emerging tool to address the inefficiencies and inequities embedded in California's fractured water sector, and in the nation's water sector as a whole. Academics, nonprofits, and state and federal regulators have identified small system consolidation with nearby, greater-capacity systems as a mechanism for increasing economies of scale, reducing SDWA monitoring and compliance costs, and enhancing water systems' ability to efficiently provide safe and affordable drinking water.³⁷ In this context, "consolidation" refers to the transfer of ownership from one or more water systems to another existing water system or a newly created entity, which may be publicly or privately owned.³⁸

The State Water Board, which has regulated California's public water systems and enforced water quality standards since 2014, has promoted water system consolidation as a valuable tool for

³³ See GLICKFELD ET AL., *supra* note 19, at 1, 30.

³⁴ See GLICKFELD ET AL., *supra* note 19, at 26; Jose A. Del Real et al., *supra* note 26; DEEN ET AL., *supra* note 25, at 16.

³⁵ See GREGORY PIECE & KYRA GMOSER-DASKALAKIS, UCLA LUSKIN CTR. FOR INNOVATION, COMMUNITY WATER SYSTEMS IN LOS ANGELES COUNTY: A PERFORMANCE POLICY GUIDE 20 (2020); see, e.g., Jose A. Del Real et al., *supra* note 26.

³⁶ See DEEN ET AL., *supra* note 25, at 16.

³⁷ See generally LAI, *supra* note 3, at 2; see also U.S. WATER ALL. & UNIV. N.C. SCH. OF GOV'T, *supra* note 11, at 4–5; EPA ENV'T FIN. ADVISORY BD., *supra* note 14, at 3.

³⁸ See U.S. WATER ALL. & UNIV. N.C. SCH. OF GOV'T, *supra* note 11, at 4.

advancing its goal of securing a reliable, safe drinking water supply for residents currently served by unreliable or unregulated systems.³⁹ The State Water Board has also promoted consolidation as a means of fulfilling California’s Human Right to Water Act, passed in 2012, which recognizes the universal right to “safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.”⁴⁰ In addition to promoting the voluntary consolidation of struggling small water systems with better functioning, larger systems, the State Water Board has the unique authority to order mandatory consolidation in specified circumstances, explored in detail in Part I.C.

B. California’s Regulatory Authority Over Public Water Systems

The degree of regulatory oversight over water utilities in California varies according to the type of water system. Private wells are not subject to state water quality regulation, beyond initial well testing and permitting.⁴¹ All water systems with fifteen or more service connections are subject to water quality oversight by the State Water Board’s Division of Drinking Water (DDW), the authority tasked with implementing the federal SDWA and state drinking water laws.⁴² In this role, the DDW enforces state and federally set Maximum Contaminant Levels (MCLs), oversees water system permitting, which is required for systems with at least fifteen service connections, and sets water source monitoring and reporting requirements.⁴³ The DDW also coordinates with counties that have developed their own regulatory permits for water systems with

³⁹ See *Drinking Water Partnerships and Consolidation*, *supra* note 17; *Transfer of Drinking Water Programs*, CAL. STATE WATER RES. CONTROL BD., https://www.waterboards.ca.gov/drinking_water/programs/DW_PreJuly2014.html (Oct. 20, 2020).

⁴⁰ See A.B. 685, 2012 Leg. Sess. (Cal. 2012) (enacted); CAL. WATER CODE § 106.3(a) (West 2013).

⁴¹ See Nathaniel Logar et al., *Ensuring Safe Drinking Water in Los Angeles County’s Small Water Systems*, 32 TULANE ENV’T L.J. 205, 213 (2019).

⁴² See GLICKFELD ET AL., *supra* note 19, at 5. California previously delegated authority to regulate public water systems to the State Department of Public Health (DPH), but in 2014, the state transferred regulatory authority to the State Water Board Division of Drinking Water to ensure coordination between drinking water programs and other water quality programs. See CAL. STATE WATER RES. CONTROL BD., *supra* note 39.

⁴³ See GLICKFELD ET AL., *supra* note 19, at 5.

fewer than fifteen service connections, known as “state small water systems.”⁴⁴ The DDW administers the State Water Board’s mandatory consolidation authority and is the body responsible for issuing consolidation orders to water systems that consistently fail to provide safe drinking water.⁴⁵

The State Water Board’s Division of Financial Assistance administers grant and loan programs for financing water infrastructure, including state appropriations that reserve funds to assist disadvantaged and severely disadvantaged communities that lack access to safe drinking water, such as the Safe and Affordable Drinking Water Act (SB 200), discussed in Part I.E.⁴⁶

The California Public Utilities Commission (CPUC) is responsible for ensuring that the state’s ninety private, investor-owned utilities deliver safe, clean, and reliable water to their customers at reasonable rates, and thus has some overlapping authority with that of the State Water Board.⁴⁷ In light of their overlapping jurisdiction over public water systems’ water quality, CPUC and the State Water Board have established a Memorandum of Understanding that the agencies will share information to ensure SDWA compliance and will assist each other in efforts to consolidate unsustainable water systems.⁴⁸ CPUC’s 2010 Water Action Plan, which sets forth the agency’s policy objectives for the regulation of investor-owned

⁴⁴ See *id.* Specifically, the California Safe Drinking Water Act defines “state small water system” as “a system for the provision of piped water to the public for human consumption that serves at least five, but not more than 14, service connections and does not regularly serve drinking water to more than an average of 25 individuals daily for more than 60 days out of the year.” CAL. HEALTH & SAFETY CODE § 116275 (n).

⁴⁵ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10.

⁴⁶ GLICKFELD ET AL., *supra*, note 19, at 6; see also S.B. 200, 2019–20 Leg., Reg. Sess. (Cal. 2019) (enacted).

⁴⁷ See Water Division, CAL. PUB. UTIL. COMM’N, <https://www.cpuc.ca.gov/about-cpuc/divisions/water-division> (last visited Jan. 1, 2022); see also CAL. PUB. UTIL. COMM’N., 2021 ANNUAL REPORT 29 (2021).

⁴⁸ See Memorandum of Understanding between the State Water Resources Control Board and the California Public Utilities Commission Regarding the Regulation of Public Water Systems, 1–3 (Dec. 9, 2020), [https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/news-and-outreach/documents/news-of-fice/mous/12920-signed-mou-between-cpuc-and-swrcb.pdf?sc_lang=en&hash=9E9654130F6F54CDAC0E3751845F896D](https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/news-and-outreach/documents/news-office/mous/12920-signed-mou-between-cpuc-and-swrcb.pdf?sc_lang=en&hash=9E9654130F6F54CDAC0E3751845F896D).

water utilities, includes the objective of “provid[ing] incentives for the acquisition or operation of small water [companies].”⁴⁹ In accordance with this objective, in 2019, CPUC authorized and completed three consolidations of small water companies with larger water utilities to achieve economies of scale.⁵⁰ In its 2019 Annual Report, CPUC stated that it will continue to facilitate consolidation of small water utilities in coordination with the State Water Board.⁵¹

C. California’s Mandatory Consolidation Authority

1. Purpose and Legislative History

California became the first state in the nation to recognize the human right to water in 2012, when the state legislature passed Assembly Bill 685.⁵² This bill amended Section 106.3 of the Water Code to declare that it is the policy of California that “every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.”⁵³ The amended Water Code also specifically directs the State Water Board to “consider this policy when revising, adopting, or establishing policies, regulations, and grant criteria” when the basic water needs outlined in the human right to water are implicated.⁵⁴ In line with this directive, the State Water Board has recognized the consolidation of small and disadvantaged water systems as one key means of ensuring access to safe and affordable drinking water.⁵⁵

⁴⁹ See CAL. PUB. UTIL. COMM’N, 2010 WATER ACTION PLAN (2010).

⁵⁰ See CAL. PUB. UTIL. COMM’N, 2019 ANNUAL REPORT 62 (2019).

⁵¹ See *id.* at 99.

⁵² See A.B. 685, 2012 Leg., Reg. Sess. (Cal. 2012).

⁵³ See *id.*; CAL. WATER CODE § 106.3(a) (West 2022).

⁵⁴ *Id.* § 106.3(b) (“All relevant state agencies, including the department, the state board, and the State Department of Public Health, shall consider this state policy when revising, adopting, or establishing policies, regulations, and grant criteria when those policies, regulations, and criteria are pertinent to the uses of water described in this section.”).

⁵⁵ The State Water Board’s 2021 Drinking Water Needs Assessment found that consolidation was the best modeled long-term solution for over half of failing water systems on the Human Right to Water list. See CAL. WATER RES. CONTROL BD., 2021 DRINKING WATER NEEDS ASSESSMENT: INFORMING THE 2021-22 SAFE & AFFORDABLE DRINKING WATER FUND EXPENDITURE PLAN 16, 74 (2021) [hereinafter 2021 DRINKING WATER NEEDS ASSESSMENT]. The State Water Board will

While the State Water Board's policy of encouraging voluntary consolidation is in part an extension of its duty to promote the human right to water, the agency's authority to order the consolidation of failing water systems⁵⁶ was separately authorized in 2015. This authority was included as part of a 2015 Drought Trailer Bill (SB 88) as one of several drought response measures adopted during California's drought state of emergency from 2014 to 2017.⁵⁷ The severe drought brought significant media attention to the many small water systems that were unable to provide safe or reliable drinking water to disadvantaged communities, putting public pressure on the legislature to take action to fulfill its commitment to realizing the human right to water.⁵⁸ SB 88 also appropriated \$10 million for drought relief efforts and expanded local enforcement authority to issue penalties for violations of water conservation requirements.⁵⁹ In a recent development, the Governor signed SB 403 in September 2021, expanding the State Water Board's mandatory consolidation authority to encompass ordering water systems that serve a disadvantaged community that are "at risk" of failing to consolidate with a receiving system.⁶⁰ While this new authority is beyond the scope of this Note, its implications in light of the State Water Board's implementation of its existing mandatory consolidation authority are briefly discussed in Part V.

use the results of this assessment to prioritize future Safe and Affordable Drinking Water Fund expenditures on drinking water solutions. *See id.* at 133.

⁵⁶ See CAL. HEALTH & SAFETY CODE § 116682 (a)(1)(B) (West 2022).

⁵⁷ See S.B. 88, 2015–16 Leg. (Cal. 2015); SENATE RULES COMM., S.B. 88 SENATE FLOOR ANALYSIS (June 19, 2015), https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB88#; see also *California Drought*, USGS CAL. WATER SCI. CTR., <https://ca.water.usgs.gov/california-drought/california-drought-comparisons.html> (last visited April 21, 2021).

⁵⁸ See Ryan J. Mahoney, *The State Water Resources Control Board's Mandatory Consolidation Authority: Recommendations for Modification and Improvement*, 50 UNIV. PAC. L. REV. 33, 39–40 (2018).

⁵⁹ SENATE RULES COMM., *supra* note 57.

⁶⁰ See S.B. 403, 2021–22 Leg. (Cal. 2021) (Governor signed). S.B. 403 amends Health & Safety Code § 116682 to allow the State Water Board to order consolidation where a public water system or a state small water system that serves a disadvantaged community is an "at-risk" system or where a disadvantaged community is reliant on an "at-risk" domestic well. *Id.* § 2.

2. Mandatory Consolidation Process

H&SC § 116682 authorizes the State Water Board to require public water systems that serve a disadvantaged community and consistently fail to provide an adequate supply of safe drinking water to consolidate with or obtain service from a receiving public water system.⁶¹ The State Water Board can also order consolidation in a disadvantaged community that is substantially “reliant on a domestic well that consistently fails to provide an adequate supply of safe drinking water.”⁶² As noted above, the Water Code defines a “disadvantaged community” as a community with an annual MHI that is less than 80 percent of statewide MHI.⁶³

Mandatory consolidation is the last resort in a process designed to encourage water systems to voluntarily consolidate, if the State Water Board determines that consolidation is an appropriate and feasible solution to address recurring water system issues.⁶⁴ Before even broaching consolidation, the State Water Board may provide technical assistance to water systems that have “chronic water quality failures” or unreliable water supplies to analyze the problem and recommend a course of action to achieve compliance with SDWA standards.⁶⁵ If the water system fails to make progress on achieving compliance after receiving technical assistance, the State Water Board may initiate discussions with the failing water system and adjacent public water systems to facilitate voluntary consolidation.⁶⁶ These preliminary discussions examine several factors, including: “(1) the capacity of a neighboring system to supply water to the affected community; (2) the geographical separation of the two systems; (3) the cost of required infrastructure improvements; (4) the costs and benefits to both systems; and (5) access to financing for

⁶¹ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10.

⁶² See CAL. HEALTH & SAFETY CODE § 116682 (a)(1)(B) (West 2022).

⁶³ See CAL. WATER CODE § 79505.5(a) (West 2022); CAL. HEALTH & SAFETY CODE § 116681(f) (West 2022).

⁶⁴ See CAL. HEALTH & SAFETY CODE § 116682(a), (b), (d) (West 2022).

⁶⁵ See CAL. STATE WATER RES. CONTROL BD., FREQUENTLY ASKED QUESTIONS ON MANDATORY CONSOLIDATION OR EXTENSION OF SERVICE FOR WATER SYSTEMS 2 (Nov. 7, 2016), https://www.waterboards.ca.gov/drinking_water/programs/compliance/docs/2021/rfaq-mandatory-consolidation.pdf [hereinafter FAQs].

⁶⁶ See *id.*

the consolidated entity.”⁶⁷ Additionally, the State Water Board must consult with and consider input from the relevant local agency formation commission (LAFCO),⁶⁸ the body of local government with jurisdiction over land use planning in the area, and all public water systems within the potentially receiving water system’s distribution network.⁶⁹

If voluntary consolidation has not been negotiated in what the State Water Board determines is a reasonable time period, the agency may initiate mandatory consolidation proceedings pursuant to H&SC § 116682.⁷⁰ In this case, the State Water Board sends a mandatory consolidation letter to the consistently failing water system and to the water system the State Water Board has identified to receive the failing system, notifying both systems of the deadline that is has established for the consolidation to occur, which must be no less than six months.⁷¹ The State Water Board must also hold a public meeting in which attendees must have the chance to present

⁶⁷ See *id.*

⁶⁸ LAFCOs are state-authorized regional service planning agencies located in all of California’s 58 counties. They are responsible for coordinating and approving changes to local government boundaries. LAFCOs periodically review the sphere of influence for all cities and special districts and conduct Municipal Service Reviews to ensure that local governments in each county provide services efficiently to the benefit of area residents, without contributing to urban sprawl. See CAL. ASS’N OF LAFCOS, WHAT IS LAFCO? AN INTRODUCTION TO LOCAL AGENCY FORMATION COMMISSIONS (2015), <https://calafco.org/sites/default/files/resources/What%20is%20LAFCO%20Brochure%2007-15%20v10web.pdf>; *What are Municipal Service Reviews?*, CAL. ASS’N OF LAFCOS, <https://calafco.org/lafco-law/faq/what-are-municipal-service-reviews> (last visited Feb. 14, 2022).

⁶⁹ See CAL. HEALTH & SAFETY CODE § 116682(b)(3), (5), (6) (West 2022).

⁷⁰ See FAQs, *supra* note 65.

⁷¹ Under Health & Safety Code Section 116682(b)(7)(A), the State Water Board must establish “reasonable deadline of no less than six months, unless a shorter period is justified” for voluntary consolidation, but in practice, the State Water Board has established a policy of setting a six-month deadline for voluntary consolidation deadline, at least on paper. See, e.g., Letter from Michelle F. Frederick, P.E., Supervising Water Res. Control Eng’r, Safe and Affordable Drinking Water Section, State Water Res. Control Bd., Div. of Drinking Water, to Sage Smith Taylor, President, Six Acres Water Company (Nov. 2, 2020), https://www.waterboards.ca.gov/drinking_water/programs/compliance/docs/2020/sixacres_clover_consolnotice.pdf (notifying Six Acres Water Company that it has six months to negotiate a voluntary consolidation with the City of Cloverdale).

oral and written comments.⁷² The State Water Board must provide the opportunity for the public to submit comments during a thirty-day notice period and for an additional week after the public meeting is held.⁷³ The State Water Board is required to “make reasonable efforts to provide a 30-day notice of the meeting to . . . all affected local government agencies . . . drinking water service providers,” and the “ratepayers, renters, and property owners [who would] receive water service through service extension or in the area of the subsumed water system.”⁷⁴

In addition to notifying the public that it has initiated consolidation proceedings and providing the opportunity for public comment, the State Water Board must also provide technical assistance to the potentially receiving and potentially subsumed water systems to create a mutually beneficial consolidation financing arrangement.⁷⁵ The State Water Board has discretion to extend the voluntary consolidation period beyond the deadline it has set if either of the water systems, CPUC, or the LAFCO with authority over the potentially subsumed water system establishes good cause for an extension.⁷⁶

If consolidation or other means of providing an adequate supply of safe drinking water has not voluntarily occurred within six months after the affected water systems receive the consolidation letter or before the extended deadline established by the State Water Board, H&SC § 116682(d) requires the State Water Board to make certain findings before ordering mandatory consolidation or extension of service. Specifically, the State Water Board must find that:

- The potentially subsumed system has “consistently failed” or is “at risk” of consistently failing to provide an “adequate supply of safe drinking water”;
- “Reasonable efforts” to achieve a voluntary consolidation or extension of service agreement were made;

⁷² See CAL. HEALTH & SAFETY CODE § 116682(b)(9)(A) (West 2022).

⁷³ See *id.* § 116682(b)(9)(A)–(B).

⁷⁴ See CAL. HEALTH & SAFETY CODE § 116682(b)(9)(A) (West 2022). The thirty-day public notice must include: (1) “information about water quality concerns in the area,” (2) “relevant information about the health effects of water contaminants,” and (3) “information about opportunities for consolidation or extension of service to address water quality issues.” *Id.*

⁷⁵ See *id.* § 116682(b)(7)(B).

⁷⁶ See *id.* § 116682(b)(7)(C).

- Consolidating, or extending service, is appropriate and technically and economically feasible;
- There is no ongoing LAFCO process likely to rectify the issue in a reasonably timely manner;
- Water rights and water contract concerns have been adequately addressed;
- Consolidating or extending service is an efficient and cost-effective means for providing an adequate supply of safe drinking water; and
- The proposed interconnection between the water systems will have a capacity that is restricted to certain uses, including service to the subsumed system's customers and service to disadvantaged communities residing along the service line that links the receiving water system to the subsumed water system. The capacity of the proposed interconnection needed to accomplish the consolidation is limited to serving current customers of the subsumed water system.⁷⁷

The State Water Board must also hold a second public meeting concerning mandatory consolidation, which has similar requirements to the initial public meeting, including a thirty-day notice period, the opportunity for attendees to present oral and written comments, and the chance for public comment.⁷⁸ Additionally, the State Water Board must make “reasonable efforts” to ensure that the water systems being consolidated are informed about progress on the consolidation process on a regular basis.⁷⁹

3. Financial Compensation and Liability Conditions

H&SC § 116682(e) requires the State Water Board to compensate a receiving water system that it has ordered to consolidate with a failing water system for any lost capacity that has resulted from the consolidation.⁸⁰ The State Water Board may either cover lost capacity by paying for the capacity charge component of the system’s water rates, or it may supply the system with additional capacity.⁸¹ If the subsumed water system is privately owned, the State

⁷⁷ See *id.* § 116682(d).

⁷⁸ See *id.* § 116682(c)(2)(A)–(D).

⁷⁹ See *id.* § 116682(c)(3).

⁸⁰ See *id.* § 116682(e)(1).

⁸¹ See *id.* The State Water Board is also responsible for compensating the receiving water system for any legal fees or LAFCO fees incurred through the consolidation project. See *id.* § 116682(e)(1)–(2).

Water Board must compensate the owner for the system's fair market value.⁸²

SB 88 also includes provisions, codified at H&SC § 111684, that relieve receiving water systems from liability for claims brought against the subsumed water system.⁸³ This liability relief applies to all water systems that consolidate, whether they do so voluntarily or whether the State Water Board invokes its mandatory consolidation authority.⁸⁴

D. Authority to Appoint an Administrator

As of 2018, the State Water Board also has authority under H&SC § 116686 to appoint and fund an administrator to provide services to a public water system that consistently fails to provide an adequate supply of safe drinking water.⁸⁵ The administrator program is flexible, and an administrator may be appointed to provide any combination of "administrative, technical, operational, legal, or managerial services" to a designated water system, or to exercise "full management and control of all aspects" of the designated water system (full-scope administrator).⁸⁶ An administrator may also assist a water system with the steps needed to pursue consolidation.⁸⁷

E. State Funding for Consolidation

The state has designated funding and administrative support for consolidation and other forms of assistance through the Safe and

⁸² See *id.* § 116682(e)(3).

⁸³ Receiving water systems cannot be held liable for claims related to the operation of or water supplied by the subsumed water system until the consolidation infrastructure fully connects the systems, and the water supplied by the consolidated system meets drinking water standards. See S.B. 88, § 4, 2015–16 Leg. (Cal. 2015) (enacted); CAL. HEALTH & SAFETY CODE § 116684 (b)–(d) (West 2022).

⁸⁴ See *id.* § 116684(a).

⁸⁵ See *id.* §§ 116686, 116769(c)(2) ("the fund expenditure plan shall prioritize . . . the consolidation or extension of service, when feasible, and administrative and managerial contracts or grants entered into pursuant to Section 116686 where applicable.").

⁸⁶ See *id.* § 116686(a)(1)(A)–(C) (describing the services an administrator may provide to designated water systems.); CAL. STATE WATER RES. CONTROL BD. DIV. OF DRINKING WATER, ADMINISTRATOR POLICY FREQUENTLY ASKED QUESTIONS (FAQs), https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/docs/administrator_faq.pdf (last visited Feb. 16, 2022).

⁸⁷ See *id.* § 116686 (a)(1)(A)(i).

Affordable Drinking Water Fund, authorized by SB 200 in 2019.⁸⁸ SB 200 allocates up to \$130 million per year through 2030⁸⁹ to develop solutions for small public water systems that are in violation or at risk of being in violation of drinking water standards, including consolidation.⁹⁰ The State Water Board prioritizes projects for funding if they benefit disadvantaged and severely disadvantaged communities.⁹¹ California Drinking Water State Revolving Fund (DWSRF) loans and grants are also available to public water systems to finance consolidation.⁹² The State Water Board's DWSRF Intended Use Plan states that the Board will "prioritize funding to systems experiencing serious drinking water public health issues . . .

⁸⁸ See *Safe and Affordable Funding for Equity and Resilience*, CAL. STATE WATER RES. CONTROL BD., https://www.waterboards.ca.gov/water_issues/programs/grants_loans/sustainable_water_solutions/safer.html (Oct. 25, 2021); S.B. 200, 2019 Leg. (Cal. 2019).

⁸⁹ SB 200 allocates 5% of the annual proceeds of California's Greenhouse Gas Reduction Fund, which collects cap-and-trade proceeds, to the Safe and Affordable Drinking Water Fund. This percentage of cap-and-trade proceeds is estimated at \$130 million per year. See S.B. 200, 2019 Leg. (Cal. 2019); *Safe & Affordable Drinking Water Fund Passed in California*, NAT'L DRINKING WATER ALL. (July 24, 2019), <https://www.drinkingwateralliance.org/single-post/2019/07/24/safe-affordable-drinking-water-fund-passed-in-california>; *About California Climate Investments*, CAL. CLIMATE INVS., <https://www.caclimateinvestments.ca.gov/about-cci> (last visited Feb. 16, 2022).

⁹⁰ See S.B. 200, 2019 Leg. § 2 (Cal. 2019); CAL. STATE WATER RES. CONTROL BD., DRAFT FINAL POLICY FOR DEVELOPING THE FUND EXPENDITURE PLAN FOR THE SAFE AND AFFORDABLE DRINKING WATER FUND 3–4 (2020) [hereinafter DRAFT FINAL POLICY].

⁹¹ See DRAFT FINAL POLICY, *supra* note 90, at 14; CAL. STATE WATER RES. CONTROL BD., DIV. OF FIN. ANALYSIS, DRAFT STATE OF CALIFORNIA FY 2021-22 FUND EXPENDITURE PLAN: SAFE AND AFFORDABLE DRINKING WATER FUND 8 (2021) [hereinafter FY 2021-22 FUND EXPENDITURE PLAN].

⁹² The DWSRF program funds the consolidation of "privately-owned water systems that serve small [disadvantaged communities]," projects that are eligible for 100 percent grant and principal forgiveness funding. Additionally, according to the State Water Board's DWSRF Intended Use Plan, this funding may be available for any improvements of the receiving water system's infrastructure that are necessary to accommodate consolidation. See CAL. STATE WATER RES. CONTROL BD., DIV. OF FIN. ASSISTANCE, STATE OF CALIFORNIA DRINKING WATER STATE REVOLVING FUNDS AND THE WATER QUALITY, SUPPLY, AND INFRASTRUCTURE IMPROVEMENT ACT OF 2014 (PROPOSITION 1) AND THE CALIFORNIA DROUGHT, WATER, PARKS, CLIMATE, COASTAL PROTECTION, AND OUTDOORS ACCESS FOR ALL ACT OF 2018 (PROPOSITION 68) INTENDED USE PLAN, STATE FISCAL YEAR 2021-22, at 2, 9 (2021) [hereinafter DWSRF INTENDED USE PLAN].

and consolidation projects,” which presumably would apply to the water systems involved in mandatory consolidation, because they consistently fail or are at risk of consistently failing to meet drinking water standards.⁹³ Grant funding is also available to small disadvantaged communities through Proposition 1⁹⁴ and Proposition 68,⁹⁵ which fund the Small Community Grant Drinking Water program.⁹⁶ The State Water Board’s Division of Financial Assistance jointly administers funds to small disadvantaged communities from the DWSRF and the Small Community Grant Drinking Water program.⁹⁷ Altogether, the State Water Board has estimated that \$306 million of grant and principal forgiveness funding will be available to fund drinking water projects in fiscal year 2021–2022, including projects in small disadvantaged communities.⁹⁸ Additional funding for water system consolidation is also available through the sale of state bonds through Proposition 84.⁹⁹

In addition to funds from the grant and loan programs discussed above, the State Water Board Division of Financial Assistance also administers zero-interest incentive loans to water systems that consolidate with a small, disadvantaged water system.¹⁰⁰ The water

⁹³ See *id.*; CAL. HEALTH & SAFETY CODE § 116682(a)(1)(A) (West 2022).

⁹⁴ Proposition 1, the Water Quality, Supply, and Infrastructure Improvement Act of 2014 (A.B. 1471) authorizes \$7.545 billion in general obligation bonds for water infrastructure projects and water protection projects. Proposition 1, codified at Water Code Section 79724, allocates \$260 million for public water system drinking water grants and loans for infrastructure improvements. See A.B. 1471, 2013–2014 Leg. (Cal. 2014); CAL. WATER CODE § 79724 (West 2022).

⁹⁵ Proposition 68, the California Drought, Water, Parks, Climate, Coastal Protection, and Outdoor Access for All Act of 2018 (S.B. 5) authorizes \$4 billion in general obligation bonds for water projects. See S.B. 5, 2017–2018 Leg. (Cal. 2018). Proposition 68 § 80140 allocates \$220 million for drinking water and clean water grants and loans for public water system infrastructure improvements, including improvements to provide safe and reliable drinking water.) See *id.*

⁹⁶ See DWSRF INTENDED USE PLAN, *supra* note 92, at 4, 29.

⁹⁷ See *id.* at 39.

⁹⁸ See *id.* at 4.

⁹⁹ See *Proposition 84 Overview*, CAL. NAT. RES. AGENCY, <https://bondaccountability.resources.ca.gov/p84.aspx> (last visited Oct. 2, 2021); FAQs, *supra* note 65.

¹⁰⁰ See *Funding and Incentives for Consolidation and Regionalization Projects*, CAL. STATE WATER RES. CONTROL BD., https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/fundingincentives.html (Aug. 28, 2018).

system is permitted to use this loan, which may be up to \$10 million, for any water system infrastructure project that it desires.¹⁰¹

II. MANDATORY CONSOLIDATION IN PRACTICE

This Part provides an overview of water systems that have been prompted by the State Water Board to initiate the mandatory consolidation process beginning in 2015, when the Board obtained the legislative authority to order consolidation, through August 2021.¹⁰² It then describes each consolidation project in more detail, organized according to where the systems are in the mandatory consolidation process. A chart summarizing available information about these water systems' characteristics, water quality or reliability issues, and where they are in the mandatory consolidation process is included in Appendix A.

A. Overview of Mandatory Consolidations To Date

Overall, the State Water Board has sent mandatory consolidation letters to twenty water systems.¹⁰³ The State Water Board discontinued mandatory consolidation initiatives in two communities that it had sent letters to after later finding that the communities did not qualify because they were not disadvantaged.¹⁰⁴ Sixteen of the communities involved in mandatory consolidation initiatives that were not discontinued are located in counties within California's

¹⁰¹ See *id.*

¹⁰² See S.B. 88, § 3, 2015–2016 Leg. (Cal. 2015); CAL. HEALTH & SAFETY CODE § 116682 (West 2022); *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10.

¹⁰³ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; *infra* Appendix A.

¹⁰⁴ The two discontinued projects were the mandatory consolidation of Black Rascal Water Company with the City of Merced, and the mandatory consolidation of Lakeside School with the City of Bakersfield. See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; *infra* Appendix A; Letter from Carl L. Carlucci, P.E., Supervising Sanitary Eng'r, Cent. Cal. Section, S. Cal. Branch, Drinking Water Field Operations, to Bd. of Dir., Black Rascal Water Co. (Sept. 22, 2016) (on file with the California State Water Resources Control Board); Letter from Carl L. Carlucci, P.E., Supervising Sanitary Eng'r, Cent. Cal. Section, S. Cal. Branch, Drinking Water Field Operations, to Art Chianello, Water Res. Manager, City of Bakersfield Water Sys. No 1510031 (June 15, 2016) (on file with the California State Water Resources Control Board).

rural Central Valley.¹⁰⁵ Two failing water systems that received mandatory consolidation letters have completed the consolidation process with neighboring utilities, one of which received a mandatory consolidation order, the other of which consolidated voluntarily after receiving a mandatory consolidation letter.¹⁰⁶ Nine failing water systems and neighboring utilities agreed to voluntarily consolidate after receiving mandatory consolidation letters to avoid being forced to consolidate, but they have not yet consolidated.¹⁰⁷ Seven failing water systems and neighboring utilities received a mandatory consolidation letter and have not agreed to voluntarily consolidate, three of which the State Board ultimately ordered to consolidate, though none of these consolidation projects are complete.¹⁰⁸

Several active mandatory consolidation projects were initiated by the State Water Board four or five years ago, but remain uncompleted.¹⁰⁹ Only 11 percent of eligible disadvantaged communities that received letters initiating mandatory consolidation now have long-term access to safe drinking water as a result of the mandatory consolidation process.¹¹⁰ These statistics suggest that the State Water Board's use of its mandatory consolidation authority has not resulted in disadvantaged communities' timely access to safe drinking

¹⁰⁵ Sixteen of the water systems involved in mandatory consolidation are located in either Kern, Tulare, Madera, Stanislaus, or Merced counties, all of which are located in the Central Valley. See LONDON ET AL., *supra* note 24, at 11–12 (listing the Northern, Central, and Southern counties within the Central Valley); *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; *infra* Appendix A.

¹⁰⁶ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; *infra* Appendix A.

¹⁰⁷ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; *infra* Appendix A.

¹⁰⁸ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; *infra* Appendix A.

¹⁰⁹ South Kern Mutual Water Company and Old River Mutual Company received mandatory consolidation letters in 2016, and Desert Breeze Mobile Home and East Orosi Community Services District received mandatory consolidation letters in 2018, but have yet to complete consolidation. See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; *infra* Appendix A.

¹¹⁰ Only two out of eighteen disadvantaged communities that received mandatory consolidation letters have actually completed consolidation projects to date, a completion statistic of 11%. See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; *infra* Appendix A.

water in fulfillment of the human right to water in the vast majority of cases. The underlying economic, political, and procedural causes of this failure are discussed in Part III.

B. Completed Projects

The State Water Board has completed two mandatory consolidation projects since 2015.¹¹¹ The consolidation of Pratt Mutual Water Company with the City of Tulare in 2016 was the first time the State Water Board exercised its new mandatory consolidation authority, and the first mandatory consolidation project that the Board completed.¹¹² Pratt Mutual Water Company had provided the primarily Latino community of 1,500 people in the unincorporated community of Matheny Tract with water that exceeded the MCL for arsenic, prompting the state to issue a compliance order in 2010.¹¹³ Shortly afterwards, Pratt Mutual began consolidation negotiations with the nearby City of Tulare, and \$4.9 million of Proposition 84 funding was secured to extend water service from the city to Matheny Tract.¹¹⁴ However, Tulare reneged on the consolidation agreement and filed litigation against Pratt Mutual to invalidate the contract.¹¹⁵ In 2015, the State Water Board used its newly granted mandatory consolidation authority to intervene.¹¹⁶ Compared to subsequent projects, this first mandatory consolidation project was accomplished quickly: the State Water Board sent both water systems a mandatory consolidation letter in August 2015, a mandatory consolidation order in March 2016 when a voluntary agreement could not be reached, and by May 2016, the disadvantaged, unincorporated community of Matheny Tract was connected to safe

¹¹¹ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; *infra* Appendix A.

¹¹² See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; *infra* Appendix A.

¹¹³ See CAL. STATE WATER RES. CONTROL BD., PRATT MUTUAL WATER COMPANY (Oct. 18, 2016), https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/documents/partnership_success/pratt_mutual.pdf [hereinafter PRATT MUTUAL WATER COMPANY]; LAI, *supra* note 3, at 5.

¹¹⁴ See LAI, *supra* note 3, at 5; LONDON ET AL., *supra* note 24, at 48; PRATT MUTUAL WATER COMPANY, *supra* note 113.

¹¹⁵ See LONDON ET AL., *supra* note 24, at 48.

¹¹⁶ See LAI, *supra* note 3, at 5.

drinking water from Tulare.¹¹⁷ This early success proves that, as the legislature intended, the mandatory consolidation process can result in expedited, sustainable relief for communities that had previously experienced a long-term water crisis. Unfortunately, this success has proven the exception rather than the rule in mandatory consolidation projects, as shown by the experiences of disadvantaged communities involved in subsequent projects.

The only other mandatory consolidation project that the State Water Board has completed to date was the consolidation of Ceres West Mobile Home Park with the City of Ceres in 2020.¹¹⁸ The Ceres West Mobile Home Park water system had been providing the severely disadvantaged community in its service area with water that exceeded the MCL for arsenic since 2006.¹¹⁹ The system had also failed to address a compliance order issued by the Stanislaus County Department of Environmental Resources requiring it to comply with state drinking water standards for arsenic.¹²⁰ Prior to initiating the mandatory consolidation process, the State Water Board DDW was involved in negotiations where it encouraged the City to absorb the mobile home park system, even issuing a “pre-

¹¹⁷ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; *infra* Appendix A; PRATT MUTUAL WATER COMPANY, *supra* note 113; Luis Hernandez, *Matheny Tract Connects to Tulare Water System*, VISALIA TIMES DELTA (May 31, 2016), <https://www.visaliatimesdelta.com/story/news/local/2016/06/01/matheny-tract-connects-tulare-water-system/85228212>.

¹¹⁸ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10.

¹¹⁹ See CAL. STATE WATER RES. CONTROL BD., CERES WEST MOBILE HOME PARK (Aug. 31, 2020), https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/docs/ceres_story_acc.pdf [hereinafter CERES WEST MOBILE HOME PARK]; Letter from Bhupinder S. Sahota, P.E., Senior Sanitary Eng'r, Stockton District, N. Cal. Branch Drinking Water Field Operations, to Ken Mattson, KS Mattson Partners LP (June 13, 2016), https://www.waterboards.ca.gov/drinking_water/programs/compliance/docs/ceres_west_consolidation_recommendation_06_13_16.pdf. According to data from the Environmental Working Group (EWG) from 2012–17, water provided by the Ceres Mobile Home Park contained 19 ppb of arsenic, 9 ppb over the legal limit and 4,750 times above EWG's Health Guideline. Arsenic is a known carcinogen. *Ceres West Mobile Home Park*, ENV'T WORKING GRP., <https://www.ewg.org/tapwater/system.php?pws=CA5000077> (last visited Nov. 15, 2021) (click on “Details” under “Arsenic” for information regarding carcinogeneity).

¹²⁰ See CERES WEST MOBILE HOME PARK, *supra* note 119.

consolidation” letter in June 2016 that it was considering exercising its mandatory consolidation authority if a voluntary agreement was not reached.¹²¹ While the mobile home park system was willing to consolidate, and even prepared a feasibility study finding that consolidation was a cost-effective, sustainable solution for the mobile home park community, the City essentially dismissed the idea, tabling the warning letter and voting not to provide water to Ceres Mobile Home Park in July 2017.¹²² Shortly afterwards, the State Water Board issued a mandatory consolidation letter to the City, pressuring it to voluntarily consolidate or be forced to consolidate.¹²³ After a public meeting and a public hearing in 2018, the City eventually agreed to consolidate voluntarily with the mobile home park system when its private owner agreed to fund the project.¹²⁴ The terms of the consolidation agreement took over a year to negotiate, and construction of the water main connecting the mobile home park to the City did not begin until February 2020.¹²⁵ Construction of the connection itself took less than three months to complete, but the mobile home park did not begin receiving water from the City until August 2020 due to COVID-19 delays.¹²⁶

C. Active Projects: Parties Agreed to Voluntarily Consolidate

The State Water Board has issued mandatory consolidation letters to nine failing water systems that afterwards resolved to consolidate with neighboring utilities, though none of these projects have been completed.¹²⁷ Five failing water systems in this category, Kern Mobile Estates, LLC (Lucky 18), 60th Street Association Water System, First Mutual Water System, Rosamond Mobile Home Park,

¹²¹ See CERES WEST MOBILE HOME PARK, *supra* note 119; Letter from Bhupinder S. Sahota to Ken Mattson, *supra* note 119.

¹²² See CERES WEST MOBILE HOME PARK, *supra* note 119; Letter from Richard L. Hinrichs, P.E., Chief, N. Cal. Section, Drinking Water Field Operations Branch, to Toby Wells, P.E., City Manager, Ceres (Aug. 23, 2017), https://www.waterboards.ca.gov/drinking_water/programs/compliance/docs/pre_consolidation_letter_ceres_08_23_17.pdf.

¹²³ *See id.*

¹²⁴ See CERES WEST MOBILE HOME PARK, *supra* note 120.

¹²⁵ *See id.*

¹²⁶ *See id.*

¹²⁷ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10.

and Rosamond School Water System, have negotiated to voluntarily consolidate with the Rosamond Community Service District as part of a regional consolidation project involving eight disadvantaged water systems in Kern County.¹²⁸ These systems were providing water that exceeded the MCL for either arsenic or uranium.¹²⁹ The State Water Board issued a mandatory consolidation letter to Rosamond Community Services District (CSD) in December 2017, notifying the District that if it failed to voluntarily consolidate with these nearby systems, it would initiate a mandatory consolidation order.¹³⁰ The State Water Board held a public meeting and a public hearing in 2018, in which the systems and the District agreed to voluntarily consolidate, but to date, the regional consolidation project has not been completed.¹³¹

The remaining four sets of water systems that agreed to voluntarily consolidate after receiving a mandatory consolidation letter from the State Water Board include Yosemite High School with Hillview Water Company, Madera County Maintenance District #19 Parkwood with the City of Madera, Soultz Mutual Water Company with the City of Tulare, and North Fork Elementary School with MD #8 North Fork Water System.¹³² The State Water Board issued mandatory consolidation letters to these systems between 2015 and 2017, and state records indicate that none of the consolidation projects involving these systems have been completed.¹³³ Mandatory consolidation procedures are explicitly designed to facilitate a voluntary consolidation agreement between water systems, even after the State Board has initiated the mandatory consolidation

¹²⁸ See *id.*; Letter from Carl L. Carlucci, P.E., Supervising Sanitary Eng'r, Cent. Cal. Section, S. Cal. Branch Drinking Water Field Operations, to Ron Smith, Gen. Manager, Rosamond Cnty. Servs. Dist. (Dec. 15, 2017), https://www.waterboards.ca.gov/drinking_water/programs/compliance/docs/rosamond_csd_6-month_mandatory_consolidation_ltr_12.15.17.pdf; *Bond Accountability, Project: Rosamond CSD – Arsenic Regional Consolidation Project*, CAL. NAT. RES. AGENCY, <https://bondaccountability.resources.ca.gov/Project.aspx?ProjectPK=30581&PropositionPK=48> (last visited Sept. 23, 2021).

¹²⁹ See Letter from Carl L. Carlucci, *supra* note 128.

¹³⁰ See *id.*

¹³¹ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10.

¹³² See *id.*

¹³³ See *id.*

process.¹³⁴ However, the fact that nine out of ten total sets of systems that agreed to consolidate voluntarily after receiving a mandatory consolidation letter from the State Water Board have yet to consolidate four to six years later¹³⁵ brings into question the efficacy of this process design. Further discussion of the procedural shortcomings of California's mandatory consolidation authority can be found in Part III.B.

D. Active Projects: The State Water Board Ordered Parties to Consolidate

There are seven sets of water systems that have not negotiated a voluntary consolidation agreement after receiving a mandatory consolidation letter from the State Water Board.¹³⁶ The systems that received letters recently, between February 2020 and August 2021, have not yet received mandatory consolidation orders, and thus far have been unable to negotiate consolidation agreements with the city and county systems that the State Water Board identified as consolidation partners.¹³⁷ These recent projects include the consolidations of Tooleville Mutual Non-Profit Water Association with the City of Exeter, Six Acres Water Company with the City of Cloverdale, and West Water Company with Sonoma County CSA 41-Fitch.¹³⁸ Recently, the State Water Board has initiated the process of appointing an administrator to Six Acres Water Company and to West Water Company using its authority under H&SC § 116686.¹³⁹

¹³⁴ See discussion *supra* Part I.C.2.

¹³⁵ Ceres West Mobile Home Park and the City of Ceres are the only systems that received mandatory consolidation letters, agreed to voluntarily consolidate, and actually completed the consolidation. See CERES WEST MOBILE HOME PARK, *supra* note 120; discussion *supra* Part II.B.

¹³⁶ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10.

¹³⁷ See *id.*

¹³⁸ See *id.*

¹³⁹ See CAL. HEALTH & SAFETY CODE § 116686 (West 2022); CAL. STATE WATER RES. CONTROL BD., NOTICE OF PUBLIC MEETING: IDENTIFICATION OF AN ADMINISTRATOR & CONSOLIDATION FOR SIX ACRES WATER COMPANY WITH THE CITY OF CLOVERDALE (June 29, 2021); CAL. STATE WATER RES. CONTROL BD., NOTICE OF PUBLIC MEETING: CONSOLIDATION OF WEST WATER COMPANY PUBLIC WATER SYSTEM WITH THE SONOMA COUNTY CSA 41 – FITCH MOUNTAIN.

The administrators will take over management of the systems in the interim to assist with consolidation negotiations.¹⁴⁰

In 2018, Desert Breeze Mobile Home received a mandatory consolidation letter urging it to consolidate with Rosamond CSD due to the system's high uranium levels, and while the systems have participated in a public meeting and a public hearing, they have been unable to negotiate voluntary consolidation but have also not received a mandatory consolidation order.¹⁴¹ East Orosi CSD and Orosi Public Utility District also received mandatory consolidation letters in 2018, and after failing to negotiate a voluntary consolidation agreement, were issued a mandatory consolidation order in fall 2020.¹⁴² The State Water Board has initiated the process of appointing East Orosi CSD an administrator to take managerial control of the system and to facilitate consolidation as a long-term solution to high levels of nitrate in the well that supplies water to the system.¹⁴³

The earliest active mandatory consolidation projects where the parties failed to negotiate a voluntary agreement date back to 2016, when South Kern Mutual Water Company and Old River Mutual Water Company received mandatory consolidation letters urging them to consolidate with the City of Bakersfield due to uranium contamination.¹⁴⁴ The State Water Board had sent the systems a pre-consolidation letter in 2015 encouraging the consolidation project, and also hosted a meeting between the City and the systems in early

¹⁴⁰ See CAL. HEALTH & SAFETY CODE § 116686 (West 2022).

¹⁴¹ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; Letter from Carl L. Carlucci, P.E., Supervising Sanitary Eng'r, Cent. Cal. Section, S. Cal. Branch, Drinking Water Field Operations, to Daniel Epstein, Owner, Desert Breeze Mobile Home Ests. (Apr. 6, 2018) (on file with the California State Water Resources Control Board).

¹⁴² See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10.

¹⁴³ See CAL. WATER BDS., EAST OROSI CSD PUBLIC MEETING (Apr. 7, 2021), https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/docs/notices/eorosi_pmslides.pdf.

¹⁴⁴ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; Letter from Carl L. Carlucci, Supervising Sanitary Eng'r, Cent. Cal. Section, S. Cal. Branch, Drinking Water Field Operations, to Art Chianello, Water Res. Manager, City of Bakersfield (Nov. 15, 2016) (on file with the California State Water Resources Control Board); Letter from Carl L. Carlucci, Supervising Sanitary Eng'r, Cent. Cal. Section, S. Cal. Branch, Drinking Water Field Operations, to Kylie Moore, Accts. Manager, Old River Mut. Water Co. (June 15, 2016) (on file with the California State Water Resources Control Board).

2016, to no avail.¹⁴⁵ After public meetings and hearings, the systems received Mandatory Consolidation Orders in late 2018. In October 2018, the City petitioned the State Water Board to reconsider these orders, and to date, the mutual water company systems' connection to the City of Bakersfield has still not been constructed.¹⁴⁶ In September 2021, the State Water Board held a public meeting to discuss the potential administrator it has identified to take over management of South Kern and Old River Mutual Water Companies because the systems lack a full board to negotiate consolidation.¹⁴⁷

III. UNDERLYING CAUSES OF MANDATORY CONSOLIDATION DELAYS

This Part explores several theories that point to why the vast majority of the State Water Board's mandatory consolidation projects have not been completed, despite the state's commitment to ensuring the human right to water in disadvantaged communities by

¹⁴⁵ See Letter from Carl L. Carlucci, Supervising Sanitary Eng'r, Cent. Cal. Section, S. Cal. Branch, Drinking Water Field Operations, to Art Chianello, Water Res. Manager, City of Bakersfield (Nov. 15, 2016) (on file with the California State Water Resources Control Board); Letter from Carl L. Carlucci, Supervising Sanitary Eng'r, Cent. Cal. Section, S. Cal. Branch, Drinking Water Field Operations, to Kylie Moore, Accts. Manager, Old River Mut. Water Co. (June 15, 2016) (on file with the California State Water Resources Control Board).

¹⁴⁶ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; *In re: the State Water Resources Control Board Division of Drinking Water Order No. 03_12_18R_003 for Mandatory Consolidation*, City of Bakersfield's Petition for Reconsideration of Order No. 03-12-18R-003 for Mandatory Consolidation and Points and Authorities in Support of Petition (Oct. 29, 2018). In its petition regarding the Old River Mutual Water Company, the City of Bakersfield challenged the State Water Board's mandatory consolidation order on the basis that the State Water Board had failed to prove that the Company qualified for mandatory consolidation, and that the State Water Board had not properly followed the procedural requirements of H&SC § 116686. See Petition for Reconsideration of Order No. 03-12-18R-003, *supra*, § V.

¹⁴⁷ See CAL. STATE WATER RES. CONTROL BD., NOTICE OF PUBLIC MEETING: IDENTIFICATION OF A POTENTIAL ADMINISTRATOR FOR OLD RIVER MUTUAL WATER COMPANY & SOUTH KERN MUTUAL WATER COMPANY (Sept. 21, 2021); Letter from Michelle F. Frederick, P.E., Supervising Water Res. Control Bd., Div. of Drinking Water, to Michael Salazar, S. Kern Mutual Water Co. (Sept. 9, 2020), https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/docs/notices/sokern_admin_notice.pdf.

finding long-term solutions for failing, small water systems.¹⁴⁸ First, it explores economic, social, and political dynamics between water systems involved in mandatory consolidation and between state and local agencies that may be impeding consolidation progress. It posits that receiving water systems in larger communities view small disadvantaged communities as a financial liability, and are thus unwilling to cooperate with the State Water Board's consolidation efforts.¹⁴⁹ Further, as a result of historic disinvestment and marginalization, these disadvantaged communities lack the political clout to negotiate consolidation without more aggressive state intervention.¹⁵⁰ Next, it argues that the State Water Board may be hesitant to order and enforce consolidation because it is wary of intruding into local jurisdictional areas.¹⁵¹ Finally, it examines structural elements of the mandatory consolidation statute that impede progress and exacerbate these other underlying barriers, such as the lack of a firm deadline for project completion.¹⁵²

A. Underlying Economic, Social, and Political Dynamics Are Causing Delays

1. Dynamics Between Water Systems and Communities Involved in Mandatory Consolidation

Municipal water systems and other publicly-owned water systems may resist consolidation because leaders do not believe that it is their social or moral responsibility to build infrastructure for and provide service to their neighbors in smaller outlying communities. To that point, participants in a water system manager and stakeholder workshop held by the U.C. Berkeley School of Law's Center for Law, Energy & the Environment in 2018 reported that "receiving systems and their residents often perceive a small system's non-compliance as 'someone else's problem,' and . . . the receiving

¹⁴⁸ See generally *About the SAFER Program*, CAL. STATE WATER RES. CONTROL BD., <https://www.waterboards.ca.gov/safer/background.html> (Jan. 6, 2022).

¹⁴⁹ See *infra* Part III.A.

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

¹⁵² See *infra* Part III.B.

community may believe it should not have to ‘subsidize others’ who did not take care of or invest in their water system.”¹⁵³

Contradicting this attitude, many disadvantaged communities are in need of consolidation with a larger system that provides safe drinking water as a result of local governments’ historic underinvestment in and marginalization of low-income communities of color, particularly those in rural areas.¹⁵⁴ 89 percent of disadvantaged communities in which the State Water Board has initiated mandatory consolidation are unincorporated communities located in the San Joaquin Valley.¹⁵⁵ A seminal study of such communities by the U.C. Davis Center for Regional Change (“the U.C. Davis study”) found that city and county general plans from the 1960s and 1970s prioritized the development of urban areas and the preservation of prime agricultural land at the expense of investment in low-income, unincorporated communities.¹⁵⁶ Because they lie outside of city boundaries, disadvantaged unincorporated communities lack representation in city government and have significantly diminished economic and political power to lobby local governments to invest in extending public water service to outlying areas.¹⁵⁷ The chronic safe drinking water access barriers that disadvantaged communities involved in mandatory consolidation face is one dimension of a wider national environmental justice issue. The water systems that serve the low-income, primarily Latino communities in the San Joaquin Valley are disproportionately out of compliance with drinking water standards.¹⁵⁸ National studies have also shown that water

¹⁵³ See BERKELEY L. CTR. FOR L., ENERGY & THE ENV’T, LEARNING FROM CALIFORNIA’S EXPERIENCE WITH SMALL WATER SYSTEM CONSOLIDATIONS: A WORKSHOP SYNTHESIS 13 (2018).

¹⁵⁴ See *id.* at 3, 7.

¹⁵⁵ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; *infra* Appendix A.

¹⁵⁶ See LONDON ET AL., *supra* note 24, at 10–12.

¹⁵⁷ See LONDON ET AL., *supra* note 24, at 8. See generally, Cristina Gomez-Vidal & Anu Manchikanti Gomez, *Invisible and Unequal: Unincorporated Community Status as a Structural Determinant of Health*, 285:114292 SOC. SCI. & MED. 1–2 (2021) (“Residents of unincorporated areas typically do not have their own local . . . government. This lack of representation leads to political exclusion and diminished access to resources, especially for low-income communities of color.”).

¹⁵⁸ See Patricia Leigh Brown, *The Flint of California*, POLITICO (May 25, 2016), <https://www.politico.com/agenda/story/2016/05/is-clean-drinking-water->

systems that serve communities of color and low-income communities are strongly correlated with higher incidences of health-based SDWA violations, in addition to decreased water service affordability and higher water service shutoff rates.¹⁵⁹ Recognizing these parallels, the media outlet *Politico* dubbed Matheny Tract, the first disadvantaged community to be involved in a mandatory consolidation project, “The Flint of California.”¹⁶⁰

In theory, the State Water Board’s mandatory consolidation powers are designed to overcome these environmental injustices. The Board has a legislative mandate to fulfill the human right to water for all Californians,¹⁶¹ the authority to force a water system to supply safe drinking water to a disadvantaged community, and an arsenal of state grant and loan incentives to fund the infrastructure needed to do so.¹⁶² In fact, the state is responsible for fully funding the infrastructure costs associated with connecting disadvantaged communities to a water system that provides safe and reliable drinking water.¹⁶³ However, in practice, even after State Water Board intervention through initiating the mandatory consolidation process and offering financial incentives, local government-run water systems have resisted building the infrastructure necessary to connect

a-right-000129; LONDON ET AL., *supra* note 24, at 30 (finding that while Hispanics make up about 49% of the total population of the San Joaquin Valley, they represent about 68% of residents in disadvantaged unincorporated communities); *see also* Balasz, *Arsenic Contamination*, *supra* note 31, at 1 (finding that community water systems serving higher proportions of socio-economically disadvantaged communities were more likely to have an arsenic MCL violation, and that those communities “face disproportionate arsenic exposures”).

¹⁵⁹ See Kristin Dobbin et al., *When Decentralization Fails: Governance and Inequity in California’s Drinking Water System*, WESTERN POLIT. SCI. ASS’N 1 (2019) (unpublished mini-conference paper), http://www.wpsanet.org/papers/docs/Dobbin&Fencl_WPSAdraft_uploaded040819.pdf; *see also* DIGDEEP & U.S. WATER ALL., CLOSING THE WATER ACCESS GAP IN THE UNITED STATES 8 (2019).

¹⁶⁰ See Brown, *supra* note 158.

¹⁶¹ See A.B. 685, 2011–2012 Leg. (2012); *see also* CAL. WATER CODE § 106.3(a) (West 2022).

¹⁶² See *supra* Parts I.C and I.E.

¹⁶³ See CAL. HEALTH & SAFETY. CODE § 116682 (e)(1); discussion *supra* Part I.C.

disadvantaged unincorporated communities to a functioning water system.¹⁶⁴

One explanation for this resistance is that, despite state funding for infrastructure costs, the functioning, larger water systems that the State Water Board has identified as receiving systems still perceive the small, disadvantaged communities that they are being told to absorb as a financial and legal liability. This perception motivates water system managers, local elected officials, and existing water system customers to resist the State Water Board's efforts to negotiate voluntary consolidation, creating delays.

Larger communities may resist water system consolidation with small, disadvantaged communities that they believe will be unable to afford their water bills after consolidation.¹⁶⁵ In some cases, very small water systems may be charging artificially low rates because they have not made capital expenditures on infrastructure improvements and maintenance due to a lack of technical, managerial, and financial capacity.¹⁶⁶ Rates may become unaffordable for low-income members of disadvantaged communities post-consolidation because the larger water system charges rates that reflect the capital expenditures it has made to maintain compliance with drinking water regulations.¹⁶⁷

¹⁶⁴ See, e.g., Ryan Jensen, *Solution Identified for East Orosi After 10 Years of Unsafe Water*, VALLEY VOICE (Apr. 23, 2019), <https://www.ourvalleyvoice.com/2019/04/23/solution-identified-for-east-orosi-after-10-years-of-unsafe-water>.

¹⁶⁵ See LAI, *supra* note 3, at 27–28 (noting that larger water systems may be unwilling to absorb smaller systems because there is no guarantee that customers that are subsumed from the smaller system will be able to pay their water bills); see, e.g., Nadra Nittle, *300 California Communities Can't Drink From the Tap. Will More Money Make a Difference?*, CIVIL EATS (July 29, 2019), <https://civileats.com/2019/07/29/will-californias-new-water-fund-bring-safe-tap-water-to-farm-country> (“Over the years, efforts to get larger communities to merge or consolidate their water systems with smaller communities have failed, mainly because the members of the former fear they will have to cover the cost of improving water infrastructure for the latter. In some cases, residents from small, low-income communities simply cannot afford the higher water rates likely to come with consolidation.”).

¹⁶⁶ See *Drinking Water Partnerships and Consolidation*, CAL. STATE WATER RES. CONTROL BD., https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/waterpartnership.html (last visited Sept. 28, 2021); BERKELEY L. CTR. FOR L., ENERGY & THE ENV'T, *supra*, note 153, at 3, 12.

¹⁶⁷ See *id.*

Receiving water systems' concerns about potentially losing revenue due to water bill nonpayment after consolidation is exacerbated when the larger community has its own financial troubles. As an example, for years the Orosi Public Utilities District has been uncooperative with efforts to consolidate the water system with the neighboring East Orosi CSD, which has chronically violated drinking water standards for nitrates and coliform bacteria since 2003.¹⁶⁸ The State Water Board initiated the mandatory consolidation process between the two systems in July 2018, but the public meeting between the systems that followed the mandatory consolidation letter was unproductive, as were subsequent attempts at negotiating a voluntary agreement.¹⁶⁹ East Orosi residents, who have been receiving bottled water through a state grant in the interim, often in insufficient quantities,¹⁷⁰ expressed frustrations at the long delays in the consolidation process.¹⁷¹ In 2020, the State Water Board issued a mandatory consolidation order with an unoptimistic deadline of December 2024 for the consolidation project to be completed.¹⁷²

Orosi and East Orosi both have median household incomes that qualify them as severely disadvantaged communities; however, Orosi has a poverty rate of 21.6 percent, while East Orosi has more than double that rate, with 46 percent of people living below the poverty line.¹⁷³ In an interview the *New York Times*, Camille Pannu,

¹⁶⁸ See Jensen, *supra* note 164.

¹⁶⁹ See *id.*

¹⁷⁰ See Del Real, *supra* note 28.

¹⁷¹ See Jensen, *supra* note 164.

¹⁷² East Orosi is also in the process of being assigned an administrator under the State Water Board's Administrator Program. The Tulare County Board of Supervisors took first steps to become East Orosi's administrator in June 2021. See Joshua Yeager, *East Orosi One Step Closer to Clean Water as Tulare County Moves to Become Administrator*, VISALIA TIMES-DELTA (June 23, 2021), <https://www.visaliatimesdelta.com/story/news/2021/06/23/east-orosi-one-step-closer-clean-water-tulare-county-moves-become-administrator/7718274002>; *Water System Administrator: General Information*, CAL. STATE WATER RES. CONTROL BD., https://www.waterboards.ca.gov/drinking_water/certlic/drinking-water/administrator.html (last visited Oct. 1, 2021) [hereinafter *Water System Administrator*].

¹⁷³ According to the Census Bureau's 5-Year Estimates for 2015–2019, Orosi had an MHI of \$40,677, while East Orosi had an MHI of \$42,292, both of which are less than 60% of the 2019 statewide MHI of \$75,235, qualifying them as severely disadvantaged communities. See *QuickFacts, Orosi CDP, California*, U.S.

Director of the Aoki Water Justice Clinic at U.C. Davis, observed, “Because Orosi has clean water, they don’t want to take on rate payers from East Orosi who they think are so poor they’ll skip out on their bills Unfortunately, you have poor people versus poorer people.”¹⁷⁴

The accompanying costs and liabilities that may flow from consolidation with unincorporated communities are another source of financial concern for receiving systems and communities. In several mandatory consolidation cases, cities have been hesitant to extend service to disadvantaged communities that have not been annexed into the municipal service area.¹⁷⁵ For example, the City of Exeter justified its resistance to absorbing the Tooleville water system in part because the Exeter City Council would lack jurisdiction to collect on delinquent water bills or enforce groundwater sustainability requirements in Tooleville.¹⁷⁶ While the straightforward solution to this jurisdictional issue would be for the city to annex the unincorporated community prior to consolidation, cities may be resistant to allocate taxpayer funds to cover costs that accompany annexation.¹⁷⁷ The City of Bakersfield, for example, declined to annex the disadvantaged communities served by the Old River and South Kern Mutual Water Companies unless the State Water Board not

CENSUS BUREAU, [https://www.census.gov/quickfacts/orosicdpcaifornia](https://www.census.gov/quickfacts/orosicdpcalifornia) (last visited Nov. 10, 2021); East Orosi CDP, California, U.S. CENSUS BUREAU, <https://data.census.gov/cedsci/profile?g=1600000US0620942> (last visited Nov. 10, 2021); *State Water Board Drinking Water and Wastewater Median Household Income*, CAL. STATE WATER RES. CONTROL BD. (2021) (on file with author).

¹⁷⁴ Del Real, *supra* note 28.

¹⁷⁵ See Ben Irwin, *Tooleville Wells Nearly Run Dry, State Begins Consolidation with Exeter*, SUN GAZETTE (Aug. 25, 2021), <https://thesungazette.com/article/news/2021/08/25/tooleville-wells-nearly-run-dry-state-begins-consolidation-with-exeter>; Letter from Alan Tandy, Bakersfield City Manager, to Carl L. Carlucci, P.E., Supervising Sanitary Eng’r, State Water Res. Control Bd., Div. of Drinking Water, (Feb. 10, 2017) (on file with author) (Re: Old River Mutual Water Company Consolidation); Letter from Alan Tandy, Bakersfield City Manager, to Carl L. Carlucci, P.E., Supervising Sanitary Eng’r, State Water Res. Control Bd., Div. of Drinking Water, Re: South Kern Mutual Water System Consolidation (Feb. 10, 2017) (on file with author); Letter from Art Chianello, P.E., Water Res. Manager, City of Bakersfield, to Carl L. Carlucci, P.E., Supervising Sanitary Eng’r, State Water Res. Control Bd., Div. of Drinking Water (May 4, 2017) (on file with author).

¹⁷⁶ See Irwin, *supra* note 175.

¹⁷⁷ See, e.g., Letter from Art Chianello to Carl L. Carlucci, *supra* note 175.

only funded the necessary water infrastructure for consolidation but also provided funding for bringing the neighborhoods' street and pedestrian infrastructure up to city code and Americans with Disability Act standards.¹⁷⁸

A municipality or town may also resist consolidating with a small, unincorporated community because it is surrounded by many such communities, and agreeing to extend water service to one could ultimately result in financial responsibility to consolidate with several others. This was one argument that the Ceres City Council made to justify its resistance to approving consolidation with Ceres West Mobile Home Park, despite multiple State Water Board attempts to facilitate a voluntary agreement.¹⁷⁹ Ceres West Mobile Home Park provided its 161 severely disadvantaged mobile home park residents in the San Joaquin Valley with well water contaminated with arsenic and 1,2,3-Trichloropropane, an industrial chemical and probable human carcinogen.¹⁸⁰ The mobile home park's owner approached the City Council twice, in 2016 and in 2017, seeking approval to install a three-thousand-foot-long water line that would connect the park to the municipal water system, and both times the City Council refused.¹⁸¹ After the State Water Board issued a mandatory consolidation letter, the voluntary agreement between the water systems took over one year and a half to complete, with the mobile home park owner taking full financial responsibility for funding the infrastructure that would connect the systems.¹⁸² Construction of the water main itself took only three months to complete.¹⁸³ Local news coverage of the city's resistance to consolidate reported that one Ceres city councilman "expressed fears that the

¹⁷⁸ See Letters from Alan Tandy to Carl L. Carlucci & Letter from Art Chianello to Carl L. Carlucci, *supra* note 175.

¹⁷⁹ See Jeff Benziger, *City Forced to Pipe Water to Outside Park*, CERES COURIER (Sept. 26, 2018), <https://www.cerescourier.com/news/local/city-forced-pipe-water-outside-park>; see also CERES WEST MOBILE HOME PARK, *supra* note 120.

¹⁸⁰ See 1,2,3,-Trichloropropane (1,2,3-TCP), CAL. STATE WATER RES. CONTROL BD., https://www.waterboards.ca.gov/drinking_water/certlic/drinking-water/123TCP.html (Sept. 29, 2020); CERES WEST MOBILE HOME PARK, *supra* note 120.

¹⁸¹ See Benziger, *supra* note 179.

¹⁸² See CERES WEST MOBILE HOME PARK, *supra* note 120.

¹⁸³ See *id.*

forced water connection could set a precedent which will result in a flood of similar requests from rural mobile home parks surrounding Ceres which may be experiencing water quality problems.”¹⁸⁴ Though the State Water Board had initially offered the city a zero-interest loan to fund the water main project,¹⁸⁵ the City of Ceres may fear that there will be insufficient or unreliable state funding to pay for a flood of other consolidation requests, leaving the City financially responsible.

These “opening the floodgates” arguments are not unfounded. The U.C. Davis study found that there are 222 clusters of disadvantaged, unincorporated communities in the San Joaquin Valley.¹⁸⁶ 86 percent of these clusters are within three miles of a nearby community water system that supplies safe drinking water, and 67 percent of these clusters are less than five hundred feet away.¹⁸⁷ The prospect of opening the door to becoming responsible for supplying many outlying communities with water service may incentivize cities to be uncooperative with consolidation requests.

2. State-Local Political Dynamics

Another potential explanation for project delays is that the State Water Board is unwilling to use its mandatory consolidation aggressively¹⁸⁸ because to do so would disrupt the state-local government balance of power. In California, water system governance is highly decentralized. While the State Water Board is responsible for ensuring that public water systems comply with the SDWA and state drinking water standards, water systems are governed under a patchwork of regulatory frameworks.¹⁸⁹ All but one of the water systems that the State Water Board has identified to receive a disadvantaged community through the mandatory consolidation process are either municipal utilities or special districts, like public

¹⁸⁴ Benziger, *supra* note 179.

¹⁸⁵ *See id.*

¹⁸⁶ *See* LONDON ET AL., *supra* note 24, at 41.

¹⁸⁷ *See id.*

¹⁸⁸ Some scholars have criticized the State Water Board for being hesitant to wield its mandatory consolidation authority. *See, e.g.*, Logar et al., *supra* note 41, at 234; BERKELEY L. CTR. FOR L., ENERGY & THE ENV’T, *supra*, note 153, at 14.

¹⁸⁹ *See* GLICKFELD ET AL., *supra* note 19, at 5; Henry McCann & Gregory Pierce, UCLA LUSKIN CTR. FOR INNOVATION, LOS ANGELES COUNTY COMMUNITY WATER SYSTEMS: ATLAS AND POLICY GUIDE 10 (2015).

utility districts or community services districts.¹⁹⁰ City regulations govern municipal utilities, which are formed under municipal codes, while special districts are regulated under the California Water Code and are managed by local governmental entities or by independent local governing boards.¹⁹¹ The State Water Board may be hesitant to use its mandatory consolidation powers aggressively because to do so would interfere with local governments' jurisdiction over water utilities. The Board may also be hesitant to arbitrate highly localized city-county jurisdictional issues that may arise when a disadvantaged unincorporated community under county jurisdiction is seeking consolidation with a municipal utility.¹⁹²

This political explanation is consistent with the State Water Board's reluctance to force publicly-owned utilities to change how they operate in other areas of utility regulation, despite broader state commitments. For example, in April 2020, in response to the COVID-19 crisis, Governor Newsom declared a statewide water service shutoff moratorium and required the reconnection of residential services that had been discontinued due to nonpayment, in fulfillment of the state commitment to realizing the human right to water.¹⁹³ In part, the order required the State Water Board to establish best practices to address water shutoffs.¹⁹⁴ In response, the State Water Board established a *voluntary* reporting process for pandemic-era water shutoffs, and as a result of low utility participation,

¹⁹⁰ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; *infra* Appendix A.

¹⁹¹ See Logar et al., *supra* note 41, at 4, 211.

¹⁹² For example, the City of Exeter objected to receiving a mandatory consolidation letter from the State Water Board to consolidate with the unincorporated community of Tooleville because Tooleville is outside of the city's sphere of influence, and the communities are separated by county roadways. See Irwin, *supra* note 175. As a result, Exeter would need to coordinate with Tulare County to get the permits necessary to dig up county roads and build infrastructure connecting the two systems. Tulare County Supervisor Larry Micari has expressed reluctance to broker a solution, saying that the consolidation issue is largely a matter to be worked out between Tooleville and the City of Exeter's governing agencies. See *id.*

¹⁹³ See Cal. Exec. Order No. N-42-20 (April 2, 2020); Joan Leary Matthews & Larry Levine, *Data Show Millions at Risk of Water Shutoffs During COVID-19*, NAT. RES. DEF. COUNCIL (May 7, 2020), <https://www.nrdc.org/experts/larry-levine/data-show-millions-risk-water-shutoffs-during-covid-19>.

¹⁹⁴ See *id.*

collected very incomplete data about which utilities were not complying with the moratorium.¹⁹⁵

B. Structural Components of H&SC § 116682 Are Causing Delays

The mandatory consolidation statute's lack of clear or mandatory timelines for consolidation project completion creates opportunities for the economic, social, and political factors discussed in Part III.A to come into play. Additionally, the procedural redundancies introduced by the Administrator Program¹⁹⁶ are further contributing to the slow pace of consolidation project completion.

While on paper the State Water Board's standard practice is to set a deadline of six months for the parties to form a voluntary consolidation agreement before it mandates consolidation,¹⁹⁷ the Board has the statutory discretion to set longer deadlines and is not obligated to order consolidation after a certain time period has lapsed.¹⁹⁸

Somewhat misleadingly, the State Water Board refers to the mandatory consolidation letters that it sends to water systems as “6-

¹⁹⁵ See CAL. STATE WATER RES. CONTROL BD., STATE OF CALIFORNIA COVID-19 WATER SHUTOFF REPORT (May 7, 2020), <https://watershut-off.covid19.ca.gov>; Tracy Quinn, *California Must Ensure Water Access During COVID-19 Pandemic*, CAL. MATTERS: MY TURN (Sept. 1, 2020), <https://calmatters.org/commentary/my-turn/2020/09/california-must-ensure-water-access-during-covid-19-pandemic> (noting that the State Water Board's voluntary survey on COVID-19 impacts on water systems received responses from only 238 out of California's 2,900 water utilities); Joan Leary Matthews & Larry Levine, *Data Show Millions at Risk of Water Shutoffs During COVID-19*, NAT. RES. DEF. COUNCIL (May 7, 2020), <https://www.nrdc.org/experts/larry-levine/data-show-millions-risk-water-shutoffs-during-covid-19>.

¹⁹⁶ See *Water System Administrator*, *supra* note 172; *supra*, Part I.D.

¹⁹⁷ See, e.g., Letter from Carl L. Carlucci, P.E., Supervising Sanitary Eng'r, Central Cal. Section, S. Cal. Branch Drinking Water Field Operations, to Bill Cox, Bd. Pres., First Mutual Water Co. (Dec. 15, 2017) https://www.waterboards.ca.gov/drinking_water/programs/compliance/docs/first_mutual_wc_mandatory_letter.pdf (directing First Mutual Water Company to negotiate consolidation with Rosamond Community Services District within six months); see also *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10 (noting that the recipients of mandatory consolidation letters from the State Water Board have “up to six months from the date the letter is issued to voluntarily consolidate with, or receive extension of service from, a public water system.”).

¹⁹⁸ See CAL. HEALTH & SAFETY CODE § 116682 (b)(7)(A) (West 2022).

Month Consolidation Letters,”¹⁹⁹ but the actual language of H&SC § 116682 directs the Board to “establish a reasonable deadline of no less than six months, unless a shorter period is justified” for the water systems to reach a voluntary consolidation agreement.²⁰⁰ The State Water Board may also extend the deadline for voluntary consolidation upon a showing of “good cause” at the request of either the potentially receiving or subsumed water system, the LAFCO that has jurisdiction over the potentially subsumed water system, or CPUC.²⁰¹ This extension provision creates many opportunities for a prolonged process because it allows any of the major stakeholders involved in the consolidation process to request a deadline delay. Additionally, before issuing a mandatory consolidation order, which is also discretionary, the State Water Board must find that “reasonable efforts to negotiate consolidation or extension of service were made.”²⁰² This language gives the State Water Board significant discretion to delay ordering consolidation because, in its estimation, further voluntary negotiation efforts *could* still be made.²⁰³

H&SC § 116682 also does not specify any procedural recourse for disadvantaged communities seeking consolidation if the State Water Board fails to order mandatory consolidation when the deadline set for a voluntary agreement has passed.²⁰⁴ Nor does it require the State Water Board to actually complete a mandatory consolidation project within a certain timeframe after it has issued a mandatory consolidation order.²⁰⁵ Further, the statute does not require the State Water Board to set a deadline for consolidation project completion if the water systems agreed to consolidate voluntarily after receiving a mandatory consolidation letter.²⁰⁶ Nine out of the ten water systems that resolved to consolidate voluntarily after receiving a mandatory consolidation letter have not yet consolidated, and

¹⁹⁹ *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10 (mandatory consolidation project status charts refer to mandatory consolidation letters as 6-Month Consolidation Letters).

²⁰⁰ See CAL. HEALTH & SAFETY CODE § 116682 (b)(7)(A) (West 2022).

²⁰¹ See *id.* § 116682(b)(7)(C).

²⁰² *Id.* § 116682(d)(2).

²⁰³ See *id.*

²⁰⁴ See *id.* § 116682.

²⁰⁵ See *id.*

²⁰⁶ See *id.*

the disadvantaged communities involved have no statutory recourse to trigger a timeline for completion.²⁰⁷

The lack of legislated timelines for consolidation project completion has been particularly problematic as the State Water Board has begun to use its new statutory authority to appoint a qualified administrator to take over control of failing water systems under H&SC § 116686, which further delays the consolidation process.²⁰⁸ In the context of water systems involved in mandatory consolidations, administrators are tasked with facilitating consolidation, including through receiving project grants and funding, making expenditures related to consolidation, and entering into contracts on behalf of the designated water system.²⁰⁹ But before the State Water Board can appoint an administrator, it must identify qualified candidates, notify the community, provide the opportunity for public comment, and hold a public meeting concerning the potential administrator.²¹⁰ Additionally, once appointed, the administrator essentially starts the mandatory consolidation process from square one by preparing a “Post Administrator Drinking Water Service Plan” that evaluates the failing water system’s needs and the feasibility of consolidation.²¹¹ This plan is due within one year of the administrator’s appointment, which may be several years after the failing water system was issued a mandatory consolidation order.²¹² For example, the State Water Board ordered South Kern Mutual Water Company and Old River Mutual Water Company to consolidate with the City of Bakersfield in September 2018, but the consolidation has yet to

²⁰⁷ See *id.*; *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10; *infra* Appendix A.

²⁰⁸ CAL. HEALTH & SAFETY CODE § 116686 (West 2022). Thus far, the State Water Board has initiated the process of assigning an administrator to five failing water systems that it has involved in the mandatory consolidation process: South Kern Mutual Water Company, Old River Mutual Water Company, Six Acres Water Company, East Orosi Community Services District, and West Water Company. See *Water System Administrator*, *supra* note 172; CAL. STATE WATER RES. CONTROL BD., *supra* note 10.

²⁰⁹ See CAL. HEALTH & SAFETY CODE §§ 116682 (f), 116686 (a)(1)(C), (d) (West 2022); see, e.g., CAL. WATER BDS., *supra* note 142.

²¹⁰ See CAL. HEALTH & SAFETY CODE § 116686(g) (West 2022); CAL. STATE WATER RES. CONTROL. BD., ADMINISTRATOR POLICY HANDBOOK 3–4 (2019).

²¹¹ See CAL. STATE WATER RES. CONTROL BD., DIV. OF DRINKING WATER, ADMINISTRATOR POLICY FREQUENTLY ASKED QUESTIONS (FAQ) 6.

²¹² See *id.* at 7.

be completed.²¹³ In September, 2021, the State Water Board hosted a public meeting notifying the disadvantaged communities involved that a potential administrator had been identified to take over the failing systems and to develop a long-term drinking water solution.²¹⁴ Thus far, the State Water Board has not actually appointed any administrators to water systems involved in the mandatory consolidation process, though it has proposed qualified candidates, leaving disadvantaged communities in limbo until the appointment is finalized.²¹⁵

IV. SOLUTIONS TO REMOVE BARRIERS TO MANDATORY CONSOLIDATION

This Part explores potential administrative, legislative, and funding solutions to mitigate the barriers to efficient completion of mandatory consolidation projects in disadvantaged communities. It argues that the State Water Board should more proactively enforce its existing mandatory consolidation authority and should also coordinate with local government land-use planning efforts to extend public services to disadvantaged, unincorporated communities to reverse decades of government disinvestment.²¹⁶ Next, it proposes that the Legislature amend the mandatory consolidation statute to both incorporate enforceable deadlines for consolidation project completion and provide procedural recourse for disadvantaged communities in which voluntary negotiations have gone nowhere.²¹⁷ It also recommends that the State Water Board explicitly set aside

²¹³ See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10.

²¹⁴ See *Water System Administrator*, *supra* note 172; CAL. STATE WATER RES. CONTROL BD., Notice of Public Meeting, https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/docs/notices/oldriver_skern_pmeng.pdf (last visited Feb. 18, 2022).

²¹⁵ See *Water System Administrator*, *supra* note 172. The State Water Board has appointed only one administrator for any water system, the California Rural Water Association to the North Edwards Water District, and is currently seeking applicants to join the pool of qualified administrator candidates. See *Water System Administrator: Information for Potential Administrators*, CAL. STATE WATER RES. CONTROL BD., https://www.waterboards.ca.gov/drinking_water/certlic/drinking-water/future-administrator.html (Nov. 19, 2021).

²¹⁶ See *infra* Part IV.A.

²¹⁷ See *infra* Part IV.B.

SAFER program funding to complete mandatory consolidation projects.²¹⁸ Finally, it suggests that the implementation of a statewide low-income rate assistance program would address receiving water systems' fears about taking on ratepayers that will be unable to afford their water bills post-consolidation.²¹⁹

A. *Administrative Solutions*

1. Enforce Mandatory Consolidation Orders

The State Water Board should enforce its statutory authority to mandate consolidation when water systems have failed to reach a voluntary agreement by the deadline. This administrative solution would expedite a permanent solution for the failing water systems discussed in Part II.D.

The State Water Board has the authority under the H&SC to enforce mandatory consolidation orders through issuing civil penalties and compliance orders.²²⁰ Instead of mandating consolidation and enforcing that mandate, the State Water Board has begun punting its responsibility over water systems that have been unable to negotiate consolidation after receiving a mandatory consolidation letter by creating a new bureaucratic process: the Administrator Program.²²¹ For example, the State Water Board sent Old River Mutual Water Company and the City of Bakersfield a mandatory consolidation order in 2018.²²² Two years later, the State Water Board notified Old River Mutual Company that it "d[id] not have a full Board to support negotiation and consolidation efforts with the City of Bakersfield" and therefore would be appointing an administrator to take over responsibility for negotiating consolidation.²²³ Instead of

²¹⁸ See *infra* Part IV.C.

²¹⁹ See *id.*

²²⁰ See CAL. HEALTH & SAFETY CODE §§ 116650, 116655 (West 2022); FAQs, *supra* note 65.

²²¹ See generally *Water System Administrator*, *supra* note 172.

²²² See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, *supra* note 10.

²²³ See Letter from Michelle F. Frederick, P.E., Supervising Water Res. Control Bd. Eng'r, to Kylie Francis, Old River Mutual Water Co. (Sept. 9, 2020), https://www.waterboards.ca.gov/drinking_water/certlic/drinkingwater/docs/notices/oldriver_admin_notice.pdf (notifying the Old River Mutual Water Company

initiating a new round of negotiation with a party that is clearly unwilling to consolidate, the State Water Board should dedicate an attorney from its Office of Enforcement to bring enforcement actions against water systems that have failed to comply with mandatory consolidation orders.²²⁴ If mandatory consolidation orders are not enforced, unwilling water systems have an incentive to continue to delay or obstruct negotiations. Issuing compliance orders and civil penalties would prove that the State Water Board is serious about obtaining timely relief for disadvantaged communities that lack safe and sustainable drinking water service. Timely and consistent enforcement would also be consistent with the State Water Board's Water Quality Enforcement Policy, which requires the integration of environmental justice considerations into enforcement, and which promotes pursuing enforcement in furtherance of the Human Right to Water.²²⁵ Setting this precedent might also incentivize water systems that have received mandatory consolidation letters and that are in the negotiation stage to be more cooperative earlier on to avoid litigation and potential fines.

2. Coordinate Consolidation Efforts with County Land Use Planning

As discussed in Part III.A, jurisdictional disputes between counties, cities, and state agencies can impede consolidation efforts that involve disadvantaged unincorporated communities. To address this underlying issue, the State Water Board and other state stakeholders should coordinate with and support county-level planning initiatives to address infrastructure needs in disadvantaged, unincorporated communities. Senate Bill 244, the Planning for Disadvantaged Community Act, requires local agencies to update their general plans to identify adjacent disadvantaged, unincorporated communities, analyze their infrastructure needs, including water and sewer needs, consider evaluating options to extend local service

that the State Water Board has initiated the first step of designating an administrator for the system).

²²⁴ See *Office of Enforcement*, CAL. STATE WATER RES. CONTROL BD. (Feb. 24, 2021), https://www.waterboards.ca.gov/water_issues/programs/enforcement.

²²⁵ See CAL. STATE WATER RES. CONTROL BD., WATER QUALITY ENFORCEMENT POLICY 4 (2017); CAL. STATE WATER RES. CONTROL BD. RES. NO. 2016-0010 (requiring the State Water Board to “Adopt[] the human right to water as a core value and adop[t] the realization of the human right to water as a top priority for the Water Boards.”).

to those communities, and develop an implementation plan.²²⁶ While counties and cities have begun identifying and assessing the needs of disadvantaged, unincorporated communities in their jurisdiction, the development of implementation plans is still in progress.²²⁷ State-local coordination is essential because there is such significant overlap between the State Water Board's consolidation efforts in disadvantaged communities and local governments' land use planning with regard to disadvantaged, unincorporated communities.²²⁸ Additionally, as this Note has shown and as other scholars have observed, state-level consolidation policies can have only limited success without local agency-level support.²²⁹ The State Water Board should support local agencies' planning activities to identify solutions to extend water service and other public services to disadvantaged, unincorporated communities. Increased state and local agency communication about consolidation tools and funding sources and joint planning would likely reduce jurisdictional tensions and get local agency buy-in to extend public services to disadvantaged, unincorporated communities that lack access to safe drinking water.

B. *Legislative Solutions*

1. Amend H&SC § 116682 Timelines

Legislative reform to ensure that the State Water Board orders mandatory consolidation after a hard deadline for voluntary consolidation has passed would reduce delays in communities facing imminent drinking water needs. As discussed in Part I.C, H&SC § 116682 requires the State Water Board to provide technical assistance to water systems to negotiate voluntary consolidation, to consult with all stakeholders involved, to determine that consolidation is feasible and cost-effective, and to hold two public meetings

²²⁶ See S.B. 244, 2011–2012 Leg. (Cal. 2011); see LONDON ET AL., *supra* note 24, at 42.

²²⁷ See S.B. 244, 2011–2012 Leg. (Cal. 2011); see LONDON ET AL., *supra* note 24, at 42.

²²⁸ See *infra* Appendix A.

²²⁹ See LAI, *supra* note 3, at 7 (arguing that “without the involvement of local governments and agencies, the effects of state-level policies are very limited in consolidation projects”).

before issuing a mandatory consolidation order.²³⁰ These requirements ensure that consolidation truly is the best solution for the disadvantaged community involved before the state mandates consolidation, and are necessary steps to ensure that the public is informed about the process. Given these procedural safeguards and the administrative costs required to implement this process, the statute should incorporate an explicit deadline that triggers a mandatory consolidation order after the State Water Board has initiated the mandatory consolidation process and voluntary negotiations have failed. A legislated timeline that puts a cap on the allowable period for voluntary negotiations would allow disadvantaged communities to hold the State Water Board accountable for implementing consolidation within a defined timeline. Additionally, the statute would be strengthened if the state legislature incorporates more specific and narrow criteria for what constitutes “good cause” for stakeholders to request an extension of the deadline for voluntary consolidation.²³¹

2. Give Communities Recourse to Re-Initiate Mandatory Consolidation

The Legislature should also consider amending H&SC § 116682 to incorporate a secondary set of procedures for water systems that agreed to voluntarily negotiate consolidation after receiving a mandatory consolidation letter but have not yet finalized an agreement or begun the consolidation project after significant time has passed. This reform would help address the delays felt by communities discussed in Part II.C.

While the statute does not preclude the State Water Board from re-initiating mandatory consolidation proceedings if water systems that have agreed to negotiate voluntarily are taking a long time to actually form the agreement, in practice it has not done so, essentially giving water systems a free pass to indefinitely delay project completion.²³² The Legislature could incorporate a process that would allow members of a disadvantaged community to petition the State Water Board to order mandatory consolidation if voluntary negotiations have failed to produce an actual consolidation

²³⁰ See CAL. HEALTH & SAFETY CODE § 116682(a)–(d) (West 2022).

²³¹ See *id.* § 116682(b)(8)(C).

²³² See *infra* Part III.B.

implementation plan after a certain amount of time has passed. This procedural safeguard would ensure that disadvantaged communities have an avenue to put pressure on the State Water Board to use its authority to ensure that water systems are following through on their promise to consolidate.

C. Funding Solutions

1. Prioritize Funding for Completing Mandatory Consolidation Projects

As discussed in Part I.D, there are several state grant and loan options for consolidation projects that prioritize projects in small, disadvantaged communities. In particular, the Safe and Affordable Drinking Water Fund that finances the SAFER Program provides an important funding source for consolidations that involve small, failing water systems that serve disadvantaged communities, like those engaged in the mandatory consolidation process.²³³ In addition to this dedicated state funding, in 2021, federal COVID-19 relief funding and state General Fund appropriations for water infrastructure projects increased complementary funding available for SAFER Program projects to \$2.1 billion, at least \$1.1 billion of which can be used to finance capital projects.²³⁴ In future fund expenditure plans for the SAFER Program, the State Water Board should more explicitly prioritize funding to complete mandatory consolidation projects in disadvantaged communities that have not yet received long-term solutions. While there are many important competing uses for this funding, including providing technical assistance to at-risk water systems and planning efforts for long-term solutions,²³⁵ basic fairness demands that disadvantaged communities facing water crises should be able to rely on a funding commitment from the state, and one that includes immediately available funds, after it initiates the mandatory consolidation process. A prioritized funding source and streamlined funding application procedures for mandatory consolidation infrastructure and administrative

²³³ See generally *Safe and Affordable Funding for Equity and Resilience*, CAL. STATE WATER RES. CONTROL BD. (Oct. 25, 2021), https://www.waterboards.ca.gov/water_issues/programs/grants_loans/sustainable_water_solutions/safer.html.

²³⁴ See FY 2021-22 FUND EXPENDITURE PLAN, *supra* note 91, at 9.

²³⁵ See *id.* at 8.

costs, either through the Safe and Affordable Drinking Water Fund or complementary sources of funding,²³⁶ would mitigate delays by eliminating the need to identify a funding source or set of sources for each mandatory consolidation project.

2. Implement Statewide Low-Income Rate Assistance

The implementation of an effective, statewide Low-Income Rate Assistance (LIRA) program would ensure that low-income customers are able to pay post-consolidation rates. Such a program would reduce the resistance of receiving water systems that are concerned about the financial risk of taking on low-income ratepayers that may be unable to pay their water bills, discussed in Part III.A.²³⁷ It would also help secure the human right to water by ensuring that water is affordable for all customers post-consolidation and would provide a safety net for many low-income populations in California for whom water rates are unaffordable or will be unaffordable in the future due to rising water rates.²³⁸ Currently, only about half of California residents are served by community water systems that offer some kind of rate assistance program, many of which are not comprehensive and have limited funding.²³⁹ The State Water Board has estimated that less than one-fifth of low-income community water system customers receive LIRA benefits.²⁴⁰

Assembly Bill 401, the Low-Income Water Rate Assistance Act, directed the State Water Board to prepare a plan for a statewide LIRA program by 2018.²⁴¹ In 2020, the State Water Board and the UCLA Luskin Center for Innovation published the final report recommending funding and implementation options for a statewide

²³⁶ See *id.* at ES-2 (listing complementary sources of funding for water infrastructure and related projects in small, disadvantaged communities).

²³⁷ See *infra* Part III.A.

²³⁸ See CAL. STATE WATER RES. CONTROL BD. & UCLA LUSKIN CTR. FOR INNOVATION, RECOMMENDATIONS FOR IMPLEMENTATION OF A STATEWIDE LOW-INCOME WATER RATE ASSISTANCE PROGRAM 6–8 (2020) (noting that promoting community-level water affordability and access to water and sanitation for the marginalized members of society are important to realizing the Human Right to Water).

²³⁹ See *id.* at 8.

²⁴⁰ See *id.*

²⁴¹ See *id.* at 6; A.B. 401, 2015–16 Leg. (Cal. 2015).

LIRA program.²⁴² A comprehensive LIRA program would incorporate discount rates on the basis of financial need, feature easy enrollment, and be available to renters who don't directly pay their water bills.²⁴³ The State Water Board's proposed plan is promising in that it includes three tiers of benefits based on need and includes benefit options both for low-income households that pay their water bills directly and for households that do not directly receive their water bills (about 60 percent of low-income households in California).²⁴⁴ The plan also recommends that the LIRA program be financed through a progressive tax or surcharge, such as taxes on bottled water, a personal income tax, or a water use surcharge.²⁴⁵ If adopted by the Legislature, this plan would be a crucial step in advancing the human right to water for low-income ratepayers in California.

CONCLUSION

Water system consolidation is an emerging regulatory tool that California and states across the nation are increasingly using to address the drinking water quality and reliability issues that many small, unsustainable water systems face. These solutions are particularly crucial for the low-income communities and communities of color that disproportionately lack access to safe and affordable drinking water. California has made important steps to address these inequities by legislating the human right to water, and by developing regulatory tools and funding sources to facilitate long-term drinking water solutions in disadvantaged communities, including consolidation with neighboring water systems that provide safe drinking water. California's unique mandatory consolidation authority gives the State Water Board the power to force a functioning water system to consolidate with a failing water system that provides unsafe or unreliable drinking water to a disadvantaged community. While this is a potentially powerful tool to ensure that marginalized communities have a path to obtain a sustainable source of safe drinking water, the

²⁴² See generally CAL. STATE WATER RES. CONTROL BD. & UCLA LUSKIN CTR. FOR INNOVATION, *supra* note 238.

²⁴³ See GLICKFELD ET AL., *supra* note 19, at 65.

²⁴⁴ See CAL. STATE WATER RES. CONTROL BD. & UCLA LUSKIN CTR. FOR INNOVATION, *supra* note 238, at 26–27, 31.

²⁴⁵ See *id.* at 48–49.

State Water Board has been unable or reluctant to realize its full potential. Thus far, the State Water Board's use of its authority to order consolidation has resulted in long-term relief for only two disadvantaged communities, out of eighteen communities in which the State Water Board has initiated mandatory consolidation proceedings.

This Note posits that functioning, publicly-run water systems are resistant to absorbing systems that serve disadvantaged communities because they view these communities as an unwanted financial burden. Decades of local government disinvestment in low-income, rural areas has resulted in dire water infrastructure needs in these communities. However, the State Water Board has been unwilling to force local government authorities to take responsibility for repairing the damage that their past discriminatory land use policies have caused. Current incentives for voluntary consolidation, such as significant state funding to cover the capital costs of consolidation and the existence of zero-interest incentive loans for systems that consolidate with very few strings attached, have been insufficient to overcome these barriers. The long delays that many disadvantaged communities involved in the mandatory consolidation process have experienced are likely a symptom of these underlying economic, social, and political dynamics, and structural features of the mandatory consolidation process create additional opportunities for stakeholders that oppose consolidation to further impede the process.

Adjustments to the administrative, legislative, and funding components of the mandatory consolidation process would remove barriers to consolidation as a mechanism for improving safe and reliable drinking water access in disadvantaged communities. Administrative solutions include increased State Water Board enforcement of its authority to mandate consolidation and enhanced coordination between state and local agencies that regulate water systems and that oversee infrastructure investments. Legislative amendments to H&SC § 116682 requiring the State Water Board to adhere to a stricter timeline for mandating consolidation when voluntary negotiations are fruitless would also likely expedite relief for disadvantaged communities. Dedicated state funding for completing mandatory consolidation projects would reduce administrative delays and would advance the human right to water by prioritizing long-term solutions in disadvantaged communities that have suffered years of water injustice. Additionally, implementing a comprehensive,

statewide LIRA program would provide an important safety net to ensure that low-income ratepayers can afford their water bills post-consolidation and allay receiving water systems' fears that they might lose revenue by absorbing new, low-income customers.

In its most recent statewide Drinking Water Needs Assessment, the State Water Board found that at least 326 community water systems and K-12 public school water systems are failing—meaning they are out of compliance or consistently fall short of meeting primary drinking water standards.²⁴⁶ It also found that an additional 617 water systems are at risk of failing.²⁴⁷ When the State Water Board modeled potential solutions, it determined that consolidation was the best modeled solution for 61 failing systems and 145 systems at risk of failing.²⁴⁸ These findings are particularly significant given the Legislature's recent expansion of the State Water Board's mandatory consolidation authority to include at risk water systems.²⁴⁹ Given the growing role that consolidation is likely to play in state drinking water policy and the State Water Board's expanding consolidation authority,²⁵⁰ now is the time to refine the structure and implementation of California's mandatory consolidation authority to ensure that it can be effectively wielded as a tool for water justice.

²⁴⁶ See 2021 DRINKING WATER NEEDS ASSESSMENT, *supra* note 55, at 36, 39, 46.

²⁴⁷ See *id.* at 46.

²⁴⁸ See *id.* at 74, 84.

²⁴⁹ See S.B. 403, 2021–22 Leg. (Cal. 2021) (Governor signed).

²⁵⁰ See *id.*

APPENDIX A

Table 1: Water Systems Involved in the Mandatory Consolidation Process 2015–2021²⁵¹

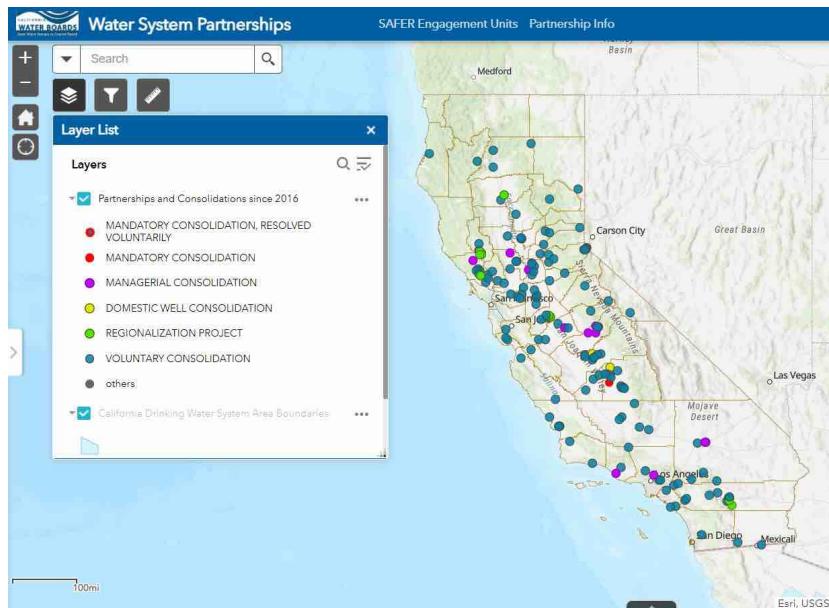
Water System	Status	Pop. Served	Receiving Water System	Violations	Mandatory Consolidation Letter Date	Mandatory Consolidation Order Date
Desert Breeze Mobile Home (Kern County)	Mandatory Consolidation - Active	82	Rosamond CSD	Exceeds MCLs for uranium	4/6/18	
South Kern Mutual Water Company (Kern County)	Mandatory Consolidation - Active	32	City of Bakersfield	Exceeds MCLs for uranium	11/15/16	9/27/18
Old River Mutual Water Company (Kern County)	Mandatory Consolidation - Active	48	City of Bakersfield	Exceeds MCLs for uranium	06/15/16	09/27/18
Six Acres Water Company (Sonoma County)	Mandatory Consolidation - Active	66	City of Cloverdale	No SWRC Domestic Water Supply Permit, failure to investigate and test groundwater from Well 02	11/2/20	
West Water Company (Sonoma County)	Mandatory Consolidation - Active	40	Sonoma County CSA 41-Fitch	Inadequate storage capacity, deteriorating well casing, E.coli detected	2/10/20	
Tooleville Mutual Non-Profit Water Association (Tulare County)	Mandatory Consolidation - Active	340	City of Exeter	Unreliable water service, inadequate water pressure, potential water shortage, limited	8/23/21	

²⁵¹ The mandatory consolidation timelines, status, and receiving system information in this table were compiled from the State Water Board's mandatory consolidation website. See *Mandatory Consolidation or Extension of Service for Disadvantaged Communities*, CAL. STATE WATER RES. CONTROL BD., https://www.waterboards.ca.gov/drinking_water/programs/compliance (Nov. 4, 2021). The population served and water quality, supply, and permit violation data were retrieved for each water system using the State Water Board's Drinking Water Systems with Violations Tool. See *Drinking Water Systems with Violations Tool*, CAL. STATE WATER RES. CONTROL BD., https://www.waterboards.ca.gov/safer/dw_systems_violations_tool.html (Feb. 3, 2021).

				TMF ca-pacity		
East Orosi CSD (Tulare County)	Mandatory Consolidation - Active	932	Orosi Public Utility District	Exceeds MCLs for nitrate	7/13/18	10/27/20
60th Street Assoc. Water System (Kern County)	Mandatory Consolidation - Active, Parties Agreed to Voluntarily Consolidate	39	Rosamond CSD	Exceeds MCLs for arsenic	12/15/17	
First Mutual Water Company (Kern County)	Mandatory Consolidation - Active, Parties Agreed to Voluntarily Consolidate	35	Rosamond CSD	Exceeds MCLs for arsenic	12/15/17	
Rosamond Mobile Home Park (Kern County)	Mandatory Consolidation - Active, Parties Agreed to Voluntarily Consolidate	175	Rosamond CSD	Exceeds MCLs for uranium	12/15/17	
Rosamond School Water System (Kern County)	Mandatory Consolidation - Active, Parties Agreed to Voluntarily Consolidate	940	Rosamond CSD	Exceeds MCLs for arsenic	12/15/17	
Kern Mobile Estates (Lucky 18) (Kern County)	Mandatory Consolidation - Active, Parties Agreed to Voluntarily Consolidate	73	Rosamond CSD	Exceeds MCLs for arsenic	12/15/17	
Yosemite High School (Madera County)	Mandatory Consolidation - Active, Parties Agreed to Voluntarily Consolidate	862	Hillview Water Company	Exceeds MCLs for uranium	10/24/17	
Madera County Maintenance District #19 Parkwood (Madera County)	Mandatory Consolidation - Active, Parties Agreed to Voluntarily Consolidate	1637	City of Madera	Manganese exceeds secondary drinking water standards, insufficient water supply	6/15/16	
North Fork Elementary School (Madera County)	Mandatory Consolidation - Active, Parties Agreed to Voluntarily Consolidate	350	Madera County Maintenance District 8A - North Fork (MD8A)	Exceeds MCLs for arsenic	11/16/17	

Soults Mutual Water Company (Tulare County)	Mandatory Consolidation - Active, Parties Agreed to Voluntarily Consolidate	120	City of Tulare	Exceeds MCLs for nitrate	8/18/15	
Ceres West Mobile Home Park (Stanislaus County)	Mandatory Consolidation - Complete	160	City of Ceres	Exceeds MCLs for arsenic and 1,2,3-TCP	8/23/17	
Pratt Mutual Water Company (Tulare County)	Mandatory Consolidation - Complete	1500	City of Tulare	Exceeds MCLs for arsenic	8/15/15	3/29/16
Black Rascal Water Company (Merced County)	Mandatory Consolidation Ceased - Not DAC	367	City of Merced	N/A	9/22/16	
Lakeside School (Merced County)	Mandatory Consolidation Ceased - Not DAC	800	City of Bakersfield	N/A	6/15/16	

APPENDIX B

1. Map of Completed Water System Consolidations 2016–2021²⁵²

²⁵² This image was retrieved from the State Water Board's Water System Partnerships GIS map, which shows completed voluntary and mandatory consolidation projects and regionalization projects since 2016. See *Water System Partnerships*, CAL. STATE WATER RES. BD., <https://gispublic.waterboards.ca.gov/portal/apps/webappviewer/index.html?id=fabf64fbe50343219a5d34765eb7daad> (last visited Nov. 2, 2021).

2. Map of Mandatory Consolidation Projects 2017–2021²⁵³



²⁵³ This map was created using the physical address of each water system serving a disadvantaged community that was involved in the mandatory consolidation process, which were retrieved from the State Water Board's SDWIS Water System Search. The physical addresses were uploaded onto a map using ArcGIS Online and are displayed according to consolidation project status. See CAL. STATE WATER RES. CONTROL BD., *supra* note 10; *California Water Systems Search Parameters*, CAL. STATE WATER RES. CONTROL BD., <https://sdwis.waterboards.ca.gov/PDWW/index.jsp> (last visited Nov. 11, 2021).

