



1-1-1988

Overview of California Water Rights and Water Quality Law

William R. Attwater

State Water Resources Control Board

James Markle

State Water Resources Control Board

Follow this and additional works at: <https://scholarlycommons.pacific.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

William R. Attwater & James Markle, *Overview of California Water Rights and Water Quality Law*, 19 PAC. L. J. 957 (1988).

Available at: <https://scholarlycommons.pacific.edu/mlr/vol19/iss4/3>

This Article is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in McGeorge Law Review by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

Overview of California Water Rights and Water Quality Law

William R. Attwater* and James Markle**

CONTENTS

Part One — Water Rights in California	959
I. INTRODUCTION	959
A. Beginnings	960
B. The World Rushes In	961
II. THE PROPRIETARY ERA	962
A. Appropriative Rights	962
1. A Period of Development	964
2. Doctrine of Relation	964
3. Changes in Exercise of Appropriative Rights ..	965
4. Use of Natural Channels for Conveyance	965
5. 1872 Civil Code Provisions	966
6. Statutory Forfeiture of Appropriative Rights ..	967
7. Reasonableness of Use and Diversion of Water	967
8. Federal Land Laws	968
B. Prescriptive Rights	969

* B.S., Civil Engineering, University of Utah (1961); J.D., University of Washington (1965). William Attwater has been the Chief Counsel for the State Water Resources Control Board since 1974.

** B.S., Purdue University (1955); J.D., Hastings College of Law (1964). James Markle is Senior Staff Attorney responsible for the legal support of the State Board's water rights program.

The views expressed in this article are those of the authors and do not necessarily reflect the views of the State Water Resources Control Board, its individual members, or other members of the Administration. The authors wish to thank staff attorneys Dan Frink, Betsy Jeanings, Barbara Leidigh, Andrew Sawyer, and Sheila Vassey for their assistance and comments, and Fran Vitulli for her editorial help.

C.	Pueblo Rights	969
D.	Riparianism Vindicated	969
III.	THE ERA OF TRANSITION	971
A.	The Permit System	972
B.	System-Wide Stream Adjudication	973
C.	Attempt to Sunset Unexercised Riparian Rights	974
D.	The Federal Presence: The Camel's Nose Under the State Water Rights Law Tent	975
1.	The 1902 Reclamation Act	975
2.	The Federal Power Act	976
3.	The Federal Reserved Water Right	977
4.	The End of the Era: <i>Herminghaus</i>	978
IV.	THE MODERN ERA: RULE OF REASONABLENESS AND PUBLIC INTEREST	979
A.	The 1928 Constitutional Amendment	979
B.	Amendments to the Water Code Requiring Consid- eration of the Public Interest	979
C.	The California Environmental Quality Act	980
V.	WHERE WE STAND TODAY; RECENT DEVELOPMENTS	981
A.	Riparian Rights	982
B.	Modern Appropriative Rights	983
C.	Standard of Judicial Review	983
D.	Water Rights Enforcement	983
E.	The Rule of Reasonableness Revisited	984
F.	<i>Imperial Irrigation District Case</i>	985
G.	Temporary Urgency Permits	985
VI.	FEDERAL-STATE RELATIONS	985
A.	<i>California v. United States</i>	985
B.	Federal Reserved Rights Revisited	987
C.	The Public Trust Doctrine	988
D.	The Decision in the Delta Water Cases	988
VII.	SOME PENDING ISSUES	990
A.	Federal Power Act Preemption	990
B.	The American River	992
	Part Two — Development and Structure of Water Quality Control in California	994
	I. PORTER-COLOGNE WATER QUALITY CONTROL ACT	996
	A. Planning	998
	B. Waste Discharge Requirements and NPDES Permits	1001

C. NPDES Permits	1003
D. State Water Resources Control Board	1005
E. State Board Review of Regional Board Action	1007
F. Enforcement	1009
II. THE GROWING EDGE OF THE LAW — REGULATION OF HAZARDOUS WASTE	1012
A. Permitting and Enforcement	1013
B. Underground Tanks	1016
C. Underground Injection of Toxic Waste	1017
D. Toxic Pits Act	1017
E. Proposition 65	1020
F. Agricultural Regulation Generally	1023
III. STATUTORY INTERFACE OF WATER QUALITY AND WATER RIGHTS	1025
A. Kesterson	1025
B. Imperial Irrigation District	1026
C. Mono Lake	1027
D. Sacramento — San Joaquin Delta	1028

INTRODUCTION

The purpose of this article is to provide a survey of the complex and often confusing field of water law in California. Water law in this state is dynamic and growing. It will continue to change as new legislation is forged and judicial decisions are rendered.

For ease of understanding, we have broken down the subject of water law into two parts. The first part of this article will survey the development of water rights law. The second part of the article focuses primarily on the current state of water quality law including the growing area of the water quality-toxics interface.¹

PART ONE—WATER RIGHTS IN CALIFORNIA

I. INTRODUCTION

California's system of water rights is often referred to as a "dual system." This is a reference to the two leading doctrinal bases of rights to the use of surface waters: riparian water rights and appro-

1. Persons reading this article should be warned that there is no text (excluding case books) on water rights law that reflects the current state of the law.

priative water rights.² In reality a number of other doctrinal bases support rights to water use, including use of ground water. These other doctrines are of great importance to the use of water by millions of Californians. Thus, a more accurate descriptive term for California's system of water rights is that it is a "plural system." The story of California water rights law is the story of the development of these doctrines, the tensions among them, and the emergence of the concept of a public interest in how water is used.

As in all areas of law, the California law of water rights has been in a state of continuous development since its beginnings. During about the past two decades, however, the *rate* of development of water rights law in California³ has been especially noteworthy. This is likely the result of the increasing demand placed upon a finite resource by California's sustained growth in population and agricultural production,⁴ coupled with an enduring, spirited concern over instream beneficial uses of water.⁵ Developments in the California law of water rights during these recent decades will receive emphasis in this paper.⁶

A. Beginnings

It is customary to commence an account of California's water rights law with a reference to the contribution made by the miners. These were the thousands who flocked to the western slope of the Sierra Nevada when word spread of James Marshall's discovery of gold on January 24, 1848, in the millrace of John Sutter's sawmill on the South Fork of the American River.

Even before the goldrush, California had been influenced by European cultures. Persons of European ancestry had established religious

2. See generally, 1 W. HUTCHINS, *WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES* 157 (1971).

3. This paper will treat the meaning of the term "water rights law" to include laws and policies which control allocation of water supplies, whether expressed by legislatures, courts, or administrative agencies. It will include federal laws and policies which impact on water supply allocation in California.

4. See California Department of Water Resources, *California Water: Looking to the Future* (Bulletin 160-87), Nov., 1987.

5. "Water flowing unregulated down a stream is doing work. We should not think of it as being wasted or unused. Engineers have traditionally considered only man-regulated or managed water as water being put to use. The question becomes: 'What are the wisest uses in the best interest of mankind?'" H. HANSEN, *Design of Reservoirs*, *HANDBOOK OF DAM ENGINEERING* 658 (A. Golze ed. 1977).

6. Several of these developments receive detailed treatment in other articles in this Symposium issue. They will nevertheless be mentioned herein so that they may be seen in context.

missions along the Pacific shore as far north as Sonoma, while California was ruled by Spain and later by Mexico. Other Europeans received grants of land from the ruling government, both along the coast and in the interior. In addition, nearly 3,000 overland emigrants arrived in California between 1841 and 1848. "Frontiersmen, farmers, they were the kind of people who had moved America westward from Virginia to the Missouri River."⁷ Finally, during the decade of the 1840s the religious missions became secularized and much of their holdings passed into private ownership. Two—Los Angeles and San Diego—were viewed as having been founded as "pueblos," political subdivisions of the civil government.⁸ The pre-goldrush settlers, both of farms and ranches and of missions and pueblos, dealt with the problem of seasonal aridity by locating near streams and springs.⁹

On February 2, 1848, the United States and Mexico signed a treaty ending a war between the two countries whose major battlefields did not include what is now California. By the Treaty of Guadalupe-Hidalgo, Mexico ceded California to the United States.¹⁰ The Treaty confirmed titles to property granted by the former Spanish and Mexican ruling governments whether the grantee was Californio or Yankee.¹¹ California's pre-Gold Rush era contained the seeds of two water right legal doctrines under which a great deal of water use is enjoyed today: the riparian and pueblo rights.

B. *The World Rushes In*

The attempt by Sutter and Marshall to suppress news of Marshall's discovery failed. Even in this pre-telegraph era, the word spread rapidly eastward. The ensuing massive migration is well known. Within a year of the discovery, the New York *Herald* characterized the result as "this general and overwhelming spirit of emigration" and wondered whether it would lead to "a depopulation of the old States for the new republic on the shores of the Pacific."¹²

7. J.S. HOLLIDAY, *THE WORLD RUSHED IN* (1981).

8. See, e.g., *Feliz v. Los Angeles*, 58 Cal. 73 (1881); *San Diego v. Cuyamaca Water Co.*, 209 Cal. 105, 287 P. 475 (1930).

9. D.R. LITTLEFIELD, *Water Rights during the California Goldrush*, in XIV W. HISTORICAL Q., No. 4, (Western Historical Association, Logan, Utah, 1983).

10. Treaty of Guadalupe-Hidalgo, Feb. 2, 1948, United States-Mexico, art. v. Coincidentally, the Treaty was signed within 10 days of Marshall's discovery of gold at Sutter's mill. There is no evidence that either Marshall or Sutter knew of the signing of the Treaty, nor is there any evidence that the signatories in Mexico City knew of the discovery in remote Northern California.

11. *Id.*

12. J.S. HOLLIDAY, *supra* note 7.

Unlike their predecessor rancheros and farmers, the new wave of emigrants began to settle away from naturally existing water supplies.¹³ Nevertheless, water was necessary to support their mining operations and domestic needs even though the places of use were not on lands contiguous to a watercourse. It therefore followed that water had to be diverted and moved from the streams and conveyed to the place of need. This practice found acceptance in the mining community even when the place of need was not upon land contiguous to the source stream. Although the miners were not concerned about the niceties of riparian water rights doctrine, they were not lawless. When the supply of water in the source stream was insufficient to satisfy all demands upon it, these settlers observed the same custom that they applied to rights of possession of the mining claims themselves: first in time, first in right. That meant that an earlier diverter (appropriator) could continue to take water for beneficial use while a later diverter had to discontinue some or all of his diversion because of insufficient supply in a common source stream. When this custom was recognized and enforced by the law courts, the legal doctrine of water rights by priority of appropriation (or simply "appropriative rights") was born.

II. THE PROPRIETARY ERA

A. *Appropriative Rights*

For many decades following statehood in 1850, California's water rights law was almost exclusively decisional law. The chief contribution of early legislative activity was doctrinal ambiguity. Shortly before California's entry into the Union, the legislature adopted the common law of England as the rule of decision in the state courts.¹⁴ The common law was thought to include the doctrine of riparian water rights. A year later, the legislature accepted "customs, usages or regulations established and in force at the bar, or diggings" as the formal basis for dispute-resolution in mining areas.¹⁵ As we have seen, the custom in the diggings was that rights to the use of water depended upon priority of appropriation. Although neither of these legislative enactments addressed water rights *per se*, both were to play

13. D.R. LITTLEFIELD, *supra* note 9.

14. 1850 Cal. Stat. ch. 95, at 219.

15. 1851 Cal. Stat. ch. 5, sec. 621, at 51,149.

a role in the development of the law of water rights through judicial decision.

Not surprisingly, the early decisions arose from water conflicts in the mining regions. The two earliest decisions—*Eddy v. Simpson*¹⁶ and *Irwin v. Shaw*¹⁷—arose in Nevada County, then California's most populous county.¹⁸

Eddy considered water right issues which remain important today. The court held that a water right is a right of use rather than a right in the corpus of water.¹⁹ Reasoning from that principle, the court held that the defendant could not reclaim water brought by him from a different watershed after it had left his possession—the modern doctrine of abandonment. However, the greatest significance of *Eddy* in terms of basic California water rights doctrine lies in a disposition of the case that the court did *not* make. Neither of the parties in *Eddy* was a riparian proprietor. Both were companies engaged in the business of purveying water to miners. In a pure riparian system, the court might have dismissed the action on the basis that both parties were without right as mere trespassers. Instead, the court recognized and protected plaintiff's right to use the foreign water abandoned by defendant. Nowhere in the decision does the term "prior appropriation" or any variant thereof appear. Nevertheless, the court protected plaintiffs' right, recognizing that "the foundation of the plaintiffs' right was their first possession."²⁰

Two years later, the California Supreme Court in *Irwin* affixed a label to this doctrine and articulated its fundamental priority characteristic. Unlike either of the parties in *Eddy*, the defendant in *Irwin* made some claim to riparian status, since, for mining purposes, his lands were situated along the bank of the stream. Plaintiffs claimed their interest as owners of a canal constructed for the purpose of conveying water to miners without regard to the riparian status of their claims. The court held that defendant's claim of riparian status was fatally defective. The defect lay in the fact that the riparian water right doctrine protected the individual rights of landed proprietors upon the stream. Defendant had no title to his streamside lands; title

16. 3 Cal. 249 (1853).

17. 5 Cal. 140 (1855).

18. D.R. LITTLEFIELD, *supra* note 9.

19. *Eddy*, 3 Cal. at 252. The court stated: "It is laid down by our law writers, that the right of property in water is *usufructuary*, and consists not so much of the fluid itself as the advantage if its use." *Id.* (emphasis in the original).

20. *Id.*

lay either in the State or in the United States. Therefore, defendant was not a landed proprietor within riparian doctrine. Both parties were thus on equal footing insofar as proprietary claims to land were concerned. Plaintiff had one advantage over defendant. Plaintiff had commenced his diversion from the stream before defendant took up the streamside land and began to divert. It was upon this fact of priority that the case turned. The court noted that the political and social conditions in the mining regions were unsettled, but that, nevertheless, some principles had become so firmly fixed as to be looked upon as having the force and effect of *res judicata*:

Among these the most important are the rights of miners to be protected in the possession of their selected localities, and the rights of those who, by *prior appropriation*, have taken the waters from their natural beds, and by costly artificial works have conducted them for miles over mountains and ravines, to supply the necessities of gold diggers, and without which the most important interests of the mineral region would remain without development.²¹

Priority of appropriation, the court added, was to be decided by the maxim "first in time, first in right."²²

1. *A Period of Development*

During the last half of the nineteenth century and into the first decade of this century, following the *Eddy* and *Irwin* decisions, the doctrine of prior appropriation was developed as the courts worked out the characteristics of the appropriative right. Although the administration of these characteristics has changed since the last century, the principles and doctrines themselves remain in effect. In addition, both the state legislature and the Congress enacted statutes which affected initiation and exercise of water rights.

2. *Doctrine of Relation*

In a water rights system where temporal priority is the key to the right, it is obviously important to establish the point in time at which priority of the right to use water vests. From among several possibilities, the court chose the date upon which the appropriator took the first substantial act to effect the appropriation.²³

21. *Irwin*, 5 Cal. at 146 (emphasis added).

22. In *Irwin*, the court used the law Latin expression: *qui prior est in tempore potior est in jure*. *Id.* at 147.

23. *Kelly v. Natoma Water Co.*, 6 Cal. 105, 108 (1856).

The closely related question of the quantity of the right also arose. Typically, an appropriator does not immediately upon completion of diversion and distribution works put to beneficial use the full amount of water he ultimately intended to use. Instead, there is usually a period during which the enterprise is developed and the amount of water use increases. The courts held that the quantity of the right extended to the amount actually placed to beneficial use, but was limited by the amount initially contemplated for use.²⁴ The priority of the diversion would be fixed by the appropriator's first substantial act to effect the appropriation. A major condition was placed upon the power of an appropriator to develop use over time while retaining, as to the full quantity of water ultimately used, the early priority represented by the date of initiating the appropriation. This condition was that the appropriator's enterprise be pursued with due diligence commensurate with the magnitude of the project.²⁵ What constitutes due diligence is a question of fact. Taken together, these principles are called the "doctrine of relation."

3. *Changes in Exercise of Appropriative Rights*

Holders of appropriative rights may wish to make changes in the manner in which they exercise their rights. For example, an appropriator may decide that diversion from the source can be made more efficient by moving the diversion works, or that domestic use would make more economic sense than an existing irrigation use. The courts held that change in point of diversion, place of use, or purpose of use was permissible in connection with exercise of an existing right, so long as others are not injured by the change.²⁶

The importance of this principle is that the priority and quantity of an existing appropriative right may be preserved notwithstanding a change in the manner of its exercise—so long as the no injury condition is met. The alternative would have been to regard such a change as an attempt to initiate a new right. At best, such a result would have meant loss of priority and reimposition of the requirement that the new right be diligently proved up.

24. See, e.g., *Senior v. Anderson*, 115 Cal. 496, 503-04, 47 P. 454, 456 (1896).

25. *Id.* See also CAL. WATER CODE § 1396 (Deerings 1977). The due diligence condition undoubtedly reflected the prevalent populist, anti-speculation views of westerners. The natural resources of the west were available for the use of the people, but not for acquisition of rights for speculation.

26. See, e.g., *Ramelli v. Irish*, 96 Cal. 214, 217 (1892). See also CAL. WATER CODE § 1706 (Deerings 1977).

4. Use of Natural Channels for Conveyance

Early appropriators often found it convenient and efficient to divert water from a bounteous source stream, convey the water across the watershed boundary, and discharge it into another—perhaps intermittent—drainage system. At some point below the discharge, the appropriator would redivert the water to the place of use. In such a case the appropriator was in effect using the second stream channel as part of a conveyance system.

The courts found this to be an acceptable practice. Most importantly, the appropriator was protected in his right to redivert his “foreign” water as against those having claims to use of the naturally occurring waters of the second stream.²⁷ An important extension of this principle protects the rights of appropriators by seasonal storage, i.e., those who collect water in a reservoir during a season of surplus for later release and use during the season of need. In such cases the channel of the source stream is itself used, in whole or in part, as a conveyance system to the place of use. Water thus released from storage for redirection below is water that is “foreign in time.” “Foreign in time” water is not available for use by others who may have claims to divert naturally occurring waters of the source stream.²⁸

5. 1872 Civil Code Provisions

Throughout this period the law of water rights continued to be for the most part the product of judicial decisions. In 1872, however, the legislature entered the field. In that year provisions were added to the California Civil Code creating a statutory method for initiating and perfecting an appropriative water right.²⁹ These statutes provided for the posting of notice of intent to appropriate water and filing the notice with the county recorder. The notice contained quantification of the amount of water which was intended to be appropriated. A diversion project under the California Civil Code would invoke a statutory variation of the doctrine of relation. The priority of right subsequently acquired through beneficial use of water would be the date of posting of the notice. The amount of water to which the

27. *Hoffman v. Stone*, 7 Cal. 46, 49 (1857). See also CAL. WATER CODE § 7075 (Deerings 1977).

28. CAL. WATER CODE § 7075 (Deerings 1977). This principle follows as a corollary to the right of appropriators to use natural channels to convey appropriated water.

29. CAL. CIV. CODE §§ 1410-1422 (Deerings 1977).

right of use was acquired could not, however, exceed the quantity specified in the notice. The Civil Code provisions did not require governmental permission to initiate an appropriation; their fundamental purpose was to supply a more precise means of fixing the date of priority of an appropriative right.

Many important appropriative water rights were initiated pursuant to the Civil Code procedure. However, the courts held that the Civil Code procedure was not exclusive.³⁰ This meant that appropriative rights could continue to be initiated by simply taking the water from the source and applying it to beneficial use.³¹

6. *Statutory Forfeiture of Appropriative Rights*

In addition to providing an alternative, statutory system for initiating and perfecting appropriative rights, the 1872 Civil Code enactment also contained a provision for forfeiture of appropriative rights by reason of nonuse.³² This section provided that when an appropriator or his successor in interest ceased to use the appropriation for some beneficial purpose, the right ceased. This principle may be viewed as a corollary to the requirement for due diligence in applying water to beneficial use in order to initially perfect the right. Often referred to as "use it or lose it," the forfeiture principle rests on the same natural resource allocation policy on which the due diligence requirement was based.³³

The Civil Code statute contained no specific period of time after which nonuse would result in forfeiture. Would a farmer's decision to fallow land for one year cause his water right to be lost? Again the omission was filled by the court. Reasoning by analogy to the statute of limitations governing acquisition of prescriptive title by adverse possession, the court held that five years of continuous nonuse was the proper measure of time for forfeiture of an appropriative right for nonuse.³⁴

30. *Lower Tule River Ditch Co. v. Angiola Water Co.*, 149 Cal. 496, 499, 86 P. 1081 (1906).

31. Although many of these Civil Code provisions have not been repealed, the tendency is to describe their effect in the past tense. This is so because they are without force insofar as initiating an appropriation subsequent to December 19, 1914, the effective date of the Water Commission Act. *See infra* notes 51-64 and accompanying text (discussion of the Water Commission Act and the successor California Water Code provisions).

32. Former CAL. CIV. CODE 1411; *see* CAL. WATER CODE § 1240.

33. *See supra* note 25 and accompanying text.

34. *Smith v. Hawkins*, 110 Cal. 122, 127, 42 P. 453, 454 (1895). The five-year period has subsequently been codified. *See* CAL. WATER CODE § 1241 (Deerings Supp. 1988).

7. Reasonableness of Use and Diversion of Water

During this proprietary period the courts began to be called on to consider allegations of waste, unreasonable methods of use, and unreasonable methods of diversion of water. As emigration to California continued, competition for use of a limited resource increased. It is therefore not surprising that later ("junior") appropriators, or would-be appropriators, might take a hard look at their senior neighbors' methods of use and of diversion of water. Since the prior appropriation system is characterized by the hierarchy of priorities, waste or unreasonable use or diversion by a senior appropriator may mean less water, or no water, for the use of a junior appropriator.

Judicial decisions held that a duty of reasonableness existed between appropriators. That duty was to avoid "unreasonable waste." Diverters were not, however, required to use the most advanced scientific methods in exercising their appropriative rights. Rather, the custom of the locality was the guiding standard against which to judge reasonableness of use and diversion.³⁵

8. Federal Land Laws

The Treaty of Guadalupe-Hidalgo and California's subsequent entry into the Union resulted in the existence of vast acreages of federally-owned land within California's borders.³⁶ In the post-Civil War years, Congress enacted a series of statutes providing for management and disposition of these lands.³⁷ While water rights were not the primary thrust of these enactments, Congress nevertheless recognized that many water appropriations were made upon the federal lands, and that considerable water was being beneficially used in reliance upon these appropriations. Congress additionally recognized that a body of custom or law was being developed in the western states to resolve conflicting water claims among the appropriators. The congressional solution was to ratify these rights to use based on prior appropriation

35. See, e.g., *Joerger v. Pacific Gas & Elec. Co.*, 207 Cal. 8, 23, 276 P. 1017, 1024 (1929). But see CAL. WATER CODE § 100.5 (Deering Supp. 1988) (local custom is not determinative of reasonableness, but is one factor to be considered).

36. Today the United States is estimated to own about 48% of the land within California. BUREAU OF LAND MANAGEMENT, U.S. DEP'T OF INTERIOR, PUBLIC LAND STATISTICS: 1986, at 5 (vol. 171, 1987).

37. See, e.g., Desert Land Act of 1877, 19 Stat. 377, 43 U.S.C. §§ 321-339; Mining Act of 1866, 14 Stat. 253, amended by 16 Stat. 218 (1870), 43 U.S.C. § 661.

on the federal lands in accordance with the laws of the states.³⁸

B. *Prescriptive Rights*

As we have seen, the earliest judicial decisions on water rights characterized them as real property rights. The doctrine that an owner of real property can lose title by reason of another's hostile possession of the property is a fundamental doctrine of the common law—the doctrine of adverse possession. This doctrine is also applied to incorporeal interests in lands, such as easements, where it is called the doctrine of prescription. As a water right is an interest in real property, albeit incorporeal (“usufructuary”), the California courts applied the doctrine of prescription to resolve conflicts among water rights claimants. As applied in water right cases, this meant that a junior water user could immunize himself against suit by a senior (or paramount) user by open and notorious use adverse to the rights of the senior claimant for the period of limitation of actions.³⁹

C. *Pueblo Rights*

As noted earlier, communities associated with some of the early missions took on the legal status of municipalities—pueblos—under Spanish and Mexican law. The law governing pueblos included a right to utilize adjacent water sources to meet the needs of the inhabitants. The California courts in the nineteenth century recognized and protected these rights. These rights encompassed the right to use the waters of sources that ran through the pueblo, both surface and underground, from their source to the sea. Pueblo rights are paramount to all other claims.⁴⁰

D. *Riparianism Vindicated*

During the nearly four decades that elapsed between discovery of gold on the American River and the year 1886, the judicial decisions and legislation in California treated water rights exclusively in terms of the prior appropriation doctrine. It is likely that most persons interested in the law of water rights assumed that California had

38. 43 U.S.C. §§ 321, 661 (1980). The full legal effect of these laws continues to be the subject of litigation, particularly as to the question of the existence of riparian rights accruing to federal lands. See *infra* text accompanying note 107.

39. *Alhambra Addition Water Co. v. Richardson*, 72 Cal. 598, 607-08, 14 P. 379, 384 (1887).

40. See *supra* note 8 and accompanying text.

arrived at a "pure" prior appropriation system. Note that there is no physical or logical impediment to the use of water by exercise of an appropriative right on riparian lands. Contiguity of place of use to the water source merely simplifies physical problems associated with diversion and conveyance of water to its place of use.

However, in 1886 a sharply divided California Supreme Court decided *Lux v. Haggin*,⁴¹ a conflict between two landowners in the San Joaquin Valley. One of the parties claimed under the doctrine of prior appropriation and the other claimed under the riparian doctrine. The *Lux* court clearly applied the doctrine of riparian rights for the first time in California. From this and subsequent cases, many limitations and attributes of the riparian right have been identified. The following represents doctrinal limitations on the riparian right:

- (a) The parcel of land enjoying a riparian right must at some point be contiguous to the source stream in which the right is claimed;
- (b) water may be used only upon that portion of the riparian parcel which is within the watershed of the source stream;
- (c) unless the right is reserved, a parcel severed from contiguity by conveyance loses the riparian right and it cannot thereafter be reestablished;⁴²
- (d) the right does not extend to seasonal storage of water, that is, the collecting of water in a reservoir during times of surplus for use during times of deficiency;⁴³
- (e) the right is part and parcel of riparian land and cannot be transferred for use on other lands.⁴⁴

Next is a list of attributes of the riparian right:

- (a) Riparian rights are "paramount." This means that riparian rights as a class must be satisfied before appropriators take water;
- (b) the right does not depend upon beneficial use of water for its existence, and it is not lost by nonuse of water;
- (c) unless adjudicated, the right is not quantified. Instead, it extends to that amount of water which can be reasonably and beneficially used on the riparian parcel;

41. *Lux v. Haggin*, 69 Cal. 255, 10 P. 674 (1886).

42. The courts have, however, implemented a doctrine of "implied reservation" in circumstances where an intent to reserve the riparian right to severed parcels can be established outside the language of the instrument of conveyance. See *Hudson v. Dailey*, 156 Cal. 617, 624, 105 P. 748, 757 (1909).

43. *Lodi v. East Bay Mun. Util. Dist.*, 7 Cal. 2d 316, 335, 60 P.2d 439, 447 (1936). "Regulation" of streamflow is permissible under riparian right. See CAL. ADMIN. CODE tit. 23, § 657 (1987) (definition of regulation).

44. This principle may operate to benefit the other riparian lands. A purported transfer of a riparian right apart from the land is not without legal consequences: the transferor cannot thereafter assert the right against the transferee. See *Duckworth v. Watsonville Water & Light Co.*, 158 Cal. 206, 216-17, 110 P. 927, 932 (1910).

(d) riparian rights are correlative. This means that at times when the supply in the source is insufficient to satisfy all reasonable and beneficial uses on riparian lands, the riparian proprietors share the shortage.

Despite, or perhaps because of, the length of the court's analysis in *Lux*,⁴⁵ Californians did not universally applaud this judicial embrace of the riparian doctrine for this state. The right was perceived by many as a "dog-in-the-manger" doctrine which could wreak havoc with uses under appropriative rights and result in great economic dislocation. This perception was based on the fact that the right was unquantified, did not depend on use and was not lost by nonuse. An anti-riparian political movement began, but produced no significant results.⁴⁶ Another four decades passed before popular reaction to another California Supreme Court riparian rights decision resulted in a reigning-in of the more pernicious potential of the doctrine.⁴⁷

III. THE ERA OF TRANSITION

With the dawn of this century, populist sentiments had a firm grip on Californians and these sentiments found expression in Sacramento. The populist movement perceived water and other natural resources as belonging to "the people," instead of to "special interests" or "monopolies." In 1911 the legislature created a "Conservation Commission of the State of California" to survey the use of natural resources in California and to report thereon. These reports included making recommendations for legislation to improve the allocation of these resources.⁴⁸ Water was a key subject. The narrative of the Commission's report on water makes interesting historical reading. Populist sentiment is readily apparent.

The Commission perceived two principal evils, or potential for evils, in the water rights system. First, the Commission was dead set against what it called the "cold-storaging" of water rights.⁴⁹ By this

45. *Lux v. Haggin*, 69 Cal. 255, 10 P. 674 (1886). It has been said that the majority opinion in this case is the longest in the history of the court. STATE OF CALIFORNIA, THE CALIFORNIA WATER ATLAS (W.L. Kahl 1978).

46. See Address of the State Irrigation Committee to the Fresno and Riverside Irrigation Convention and to the Anti-Riparian Voters of California (1886) (collection of contemporary anti-riparian rhetoric). This volume has no attribution as to publisher. It is an accession of the California State Library in Sacramento.

47. See *infra* text accompanying notes 85-92.

48. 1911 Cal. Stat. ch. 408, sec. 1, at 822.

49. See STATE OF CALIFORNIA, REPORT OF THE CONSERVATION COMMISSION OF THE STATE OF CALIFORNIA at 20 *passim* (1912) [hereinafter REPORT].

was meant acquisition and maintenance, usually by "monopolies," of legally protected water rights without ongoing beneficial use. Tying up rights to water use provided opportunity for speculative enrichment at the expense of persons having plans for timely beneficial use. This could most likely occur under a system which did not adequately provide for due diligence to perfect a water right, provide for forfeiture upon nonuse, or where such provisions were not adequately enforced. Obviously, it could also occur in a riparian water rights system which does not require beneficial use either to acquire or to maintain the right.

The Commission's second, but not necessarily lesser, perceived evil was the manner in which the system administered water rights. At that time recognition and enforcement of water rights were entirely the province of the courts. It is clear from the Commission's narrative report that it did not perceive that the judiciary was the best institution for water rights administration, at least as the forum of first instance.⁵⁰ Implicit in the Commission's criticism is the understanding that decisions affecting the allocation of a limited natural resource among competing demands involves application of public policy, not merely interpretation and application of settled property law.

The Commission recommended legislation that reflected the views contained in its narrative report. As enacted by a receptive legislature, this legislation was called the Water Commission Act.⁵¹ In broad outline, that Act contained the basic water rights provisions found in today's California Water Code, although there have been many statutory accretions in the intervening seventy-five years.⁵²

A. The Permit System

The Water Commission Act declared that all water within the state is the property of the people of the state, but that the right to use water could be acquired as provided by law.⁵³ A state administrative

50. *Id.* at 25-26.

51. 1913 Cal. Stat. ch. 586, at 1012. The Act took its name from the State tribunal which was created to administer it, the Water Commission. The Water Commission was the first ancestor of today's State Water Resources Control Board in the water rights administration function.

52. The Act, as amended up to that time, was codified as part of the new California Water Code in 1943. *See generally*, CAL. WATER CODE §§ 100, 103 (Deerings 1977).

53. CAL. WATER CODE § 102 (Deerings 1977). This citation and those that follow in the discussion of the appropriative right permit system and the statutory adjudication procedure are to the Water Commission Act's modern counterparts in the California Water Code.

agency was created to allocate the state's unappropriated waters.⁵⁴ The Act created a permit system which required an application to appropriate unappropriated water.⁵⁵ Before a permit would be issued, the Act required an opportunity for interested persons to protest,⁵⁶ investigation by the state water rights administrative agency,⁵⁷ and a finding by that agency that unappropriated water is available.⁵⁸

The Act required that permittees exercise due diligence in constructing works and in applying the water to beneficial use. A provision was also made for approving extensions of time to complete use where the permittee was found to have been acting diligently.⁵⁹ The Act adopted the 1872 Civil Code provision for forfeiture of rights by reason of nonuse but was content not to disturb the decisional law's holding regarding the time period after which nonuse would result in forfeiture.⁶⁰ Pre-approval of the Commission was required before effecting a change in point of diversion, place of use, or purpose of use specified in the permit.⁶¹

B. System-Wide Stream Adjudication

As noted above, the Conservation Commission criticized the judicial administration of the water rights legal system, criticism which was based in part on the piecemeal nature of water rights litigation. The Conservation Commission recommended and the Water Commission Act created an *in rem* statutory procedure for adjudicating and decreeing the relative rights of all claimants to the use of water in a particular stream system, whether based on riparian or appropriative claims. This proceeding was triggered by petition from any claimant within the stream system, or upon the motion of the state water rights agency. In either case, the decision to undertake the proceeding was discretionary.⁶²

If the state agency decided to undertake the adjudication, following investigation and hearing, it would make findings with respect to the relative rights of the claimants. The agency would then file its evidence

54. *Id.* §§ 174, 175.

55. *Id.* §§ 1250-1258.

56. *Id.* §§ 1330, 1331.

57. *Id.* § 1051.

58. *Id.* § 1375(d). The agency has broad powers to investigate use of water to aid it in making this determination. *Id.* § 183.

59. *Id.* §§ 1395-1398.

60. *Id.* § 1240. *See also* Smith v. Hawkins, 110 Cal. 122, 127, 42 P. 453, 454 (1895).

61. CAL. WATER CODE §§ 1700-1706 (Deerings 1977).

62. *See id.* § 2525.

and findings with the appropriate superior court, which then conducted proceedings leading to a comprehensive decree.⁶³ To overcome the vice of piecemeal litigation, the provisions emphasized the *final* judicial adjudication of the *relative* water rights of *all* claimants. The Act provided that it was the duty of all claimants to appear and submit proof of their claims and, further, that any such claimant who failed to appear in such proceedings and submit proof of his claim "shall be barred and estopped from subsequently asserting any rights theretofore acquired upon the stream system embraced in the proceedings, and shall be held to have forfeited all rights" to said water or the use of water theretofore claimed by him on such stream.⁶⁴ This was, and remains, strong medicine.

C. Attempt to Sunset Unexercised Riparian Rights

It is clear that the inherent power of proprietors of riparian lands to "cold-storage" their riparian water rights was within the ambit of the Conservation Commission's distaste.⁶⁵ This power follows from the characteristic of the riparian right that it is not lost through nonuse. Accordingly, the Commission's recommendation for legislation contained, and the legislature adopted within section 11 of the Act, a provision whereby nonuse of water on riparian lands for any consecutive ten-year period would release such water to the state and make it available for appropriation.⁶⁶

Many of the other western states have similarly dealt with riparian claims.⁶⁷ However, section 11 of the Act was not favored by the California courts. The death blow was struck in 1935 by the Supreme Court in *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, when the court held section 11 unconstitutional.⁶⁸ Another

63. See generally *id.* § 2769. Section 2769 states that:

The decree shall in every case declare as to the water right adjudged to each party, the priority, amount, season of use, purpose of use, point of diversion, and place of use of the water; and as to water used for irrigation, the decree shall also declare the specific tracts of land to which it is appurtenant, together with such other factors as may be necessary to define the right.

Id.

64. *Id.* § 2774.

65. See REPORT, *supra* note 49, at 27.

66. 1913 Cal. Stat. ch. 586, sec. 11, at 1017.

67. See 2 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 13-14 (1974).

68. 3 Cal. 2d 489, 530, 45 P.2d 972, 988-89 (1935). A close reading of this decision suggests that the language relied upon as striking down section 11 might have been *obiter dicta*. However, it was not regarded as such in subsequent decisions.

fifty years were to pass before a means was found to attenuate the threat to security of existing water uses posed by unexercised riparian rights.⁶⁹

D. The Federal Presence: The Camel's Nose Under the State Water Rights Law Tent

1. The 1902 Reclamation Act

During the nineteenth century, the federal government's attention towards western natural resources was primarily focused on the management and disposition of public lands.⁷⁰ Shortly after the turn of the century, the federal government formally entered the western water arena. In 1902 Congress enacted the Reclamation Act, inaugurating a program of water project construction and operation.⁷¹ Previously, construction and operation of works for development and conveyance of water was the province of private enterprise,⁷² municipalities, and in California, public districts formed pursuant to the Irrigation District Law and other special-purpose local public districts.⁷³

The 1902 Reclamation Act was not federal water rights legislation. Instead, it created the Reclamation Service⁷⁴ within the Department of Interior and, together with many subsequent project-specific authorizing acts, provides for development of water through systems of works by the federal government to reclaim the western desert. Section 8 of the 1902 Act contained the Act's reference to water rights. On its face, section 8 appeared to disclaim any intent to affect State water rights law with regard to water development undertaken pursuant to the Act. In fact, it further appeared to mandate the Secretary of Interior to administer the Act in strict compliance with the water rights laws of the various western states.⁷⁵ As we shall see, a series

69. See *infra* text accompanying note 103.

70. See *supra* text accompanying note 37.

71. Reclamation Act, 32 Stat. 388 (1902).

72. The plaintiff in California's seminal prior appropriation decision, *Eddy v. Simpson*, was actually a private water purveyor partnership. *Eddy v. Simpson*, 5 Cal. 140 (1955). See also D.R. LITTLEFIELD, *supra* note 9 (analysis emphasizing the private enterprise economic influence on water rights law).

73. See 1887 Cal. Stat. ch. 34, at 29 (authorizing creation of irrigation districts).

74. The Reclamation Service subsequently became the Bureau of Reclamation. It enjoyed a brief interlude as the Water and Power Resources Service, or the WAPRS, during the 1970s. Under the present Administration, the Bureau of Reclamation again became "the Bureau."

75. Section 8 provides in pertinent part that:

[N]othing in this Act shall be construed as affecting or intended to affect or to in any

of United States Supreme Court decisions was perceived (at least by the federal bureaucracy) as eviscerating the strong states' water rights policy implicit in section 8 of the Reclamation Act—until the Court revitalized that policy in 1978.⁷⁶

2. *The Federal Power Act*

At about this same time, the federal government became interested in hydroelectric power development. This interest took the form not of government construction and operation of hydroelectric projects but of government encouragement of non-federal development by removing obstacles to utilization of federal lands. Following a veto by President Theodore Roosevelt of project-specific legislation which would have made certain federal lands available for that purpose,⁷⁷ Congress responded by enacting the Federal Power Act.⁷⁸ That Act created a licensing system for hydroelectric projects proposing to utilize navigable waters or federal lands which was to be administered by the Federal Power Commission.⁷⁹

As was the case with the 1902 Reclamation Act, the Federal Power Act was not federal water rights legislation. However, use of water to generate power is a classic instance of exercise of a water right.⁸⁰ During the course of congressional debate on measures leading to the enactment of the Power Act, western legislators exhibited concern over the potential impact of the legislation on the water rights systems of the states. Again, as was the case with the 1902 Reclamation Act, Congress chose to disclaim any intent to interfere with the water rights laws of the states and included a provision in the legislation to assure this result. This provision is section 27 of the Federal Power Act. The legislative history materials of the debates clearly show that

way interfere with laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws

32 Stat. 390 (1902).

76. See *infra* text accompanying note 125.

77. President Roosevelt's veto was not based on distaste for hydroelectric development; the President wanted a comprehensive rather than an *ad hoc* statutory treatment of the problem.

78. Federal Power Act, 41 Stat. 1063 *codified at* 16 U.S.C. §§ 791(a)-793, 795-818, 820-825 (1920).

79. The Federal Power Commission has since been renamed the Federal Energy Resources Commission, or the FERC, the federal penchant for choosing infelicitous acronyms being boundless.

80. See *Mentone Irrigation Co. v. Redlands Elec. Light & Power Co.*, 155 Cal. 323, 328, 100 P. 1082, 1084 (1909).

this section was deliberately modeled upon section 8 of the 1902 Reclamation Act and that Congress included it for the same reason it included section 8 in the Reclamation Act.

3. *The Federal Reserved Water Right*

Our discussion of federal presence thus far has been of federal laws which do not directly create any type of federal water right. The issue has been the interface of federal water project construction and regulation programs and the water rights laws of the states. However, in 1908 the United States Supreme Court issued a decision regarding the water right claims of the Ft. Belknap Indians living on a reservation. The reservation lands had been withdrawn from the public domain. The Indians had acquired no water rights under state law. The Court held that the withdrawal of public domain lands by the United States for Indian reservation purposes operates to impliedly reserve from appropriation under state law that amount of water needed to accomplish the purpose of the withdrawal. This "reserved" right, which is decidedly not based on state law doctrine, enjoys a priority as of the effective date of the reservation.⁸¹

Subsequent federal court decisions have extended the doctrine to withdrawals for purposes other than Indian reservations and have held that the federal reserved right doctrine encompasses ground water.⁸²

The federal reserved water right doctrine has presented greater conceptual problems for the water managers of the majority of western states which rely exclusively, or virtually exclusively, on the doctrine of prior appropriation. In this case, California's plural system of water rights is a conceptual benefit. The co-existence in California of several independent water rights doctrines (riparian, appropriative, pueblo, prescriptive, ground water) makes federal reserved right claims considerably easier to accommodate.⁸³ In any event, the scope of the doctrine has recently been substantially narrowed by the United States Supreme Court.⁸⁴

81. *Winters v. United States*, 207 U.S. 564, 567-77 (1908).

82. *Cappaert v. United States*, 426 U.S. 128, 142 (1976).

83. The Board has routinely determined federal reserved rights in statutory adjudications. See, e.g., In the Matter of Rights to the Waters of Scott River Stream System, S.W.R.C.B. (1978) (order of determination).

84. See *infra* text accompanying note 130.

4. *The End of the Era: Herminghaus*

As previously noted, the notion that water users owed each other a duty not to waste water, and to divert and use it reasonably, had begun to appear in judicial decisions.⁸⁵ This principle was established as between appropriators. However, no case had squarely faced the question whether riparian water users, whose rights are generally paramount to appropriators, were under such a duty as against the appropriators.

In the 1920s, the Southern California Edison Company proposed to impound water on the San Joaquin River for hydroelectric power generation. Downstream, the owner of a large riparian ranch was accustomed to irrigate the ranch's lands from the river's high spring and summer flows when the winter snows melted in the Sierra Nevada. These were not extraordinary flood flows, but rather the regular, recurring seasonal flows from snowmelt. Edison's upstream impoundment would mean that peaks would be taken off these seasonally high flows and that water would not naturally reach some of the riparian ranch's lands to provide irrigation. Edison's impoundment would have left an ample quantity of water in the river for the ranch's use but would have interfered with customary irrigation by gravity flow. Herminghaus sought an injunction against this interference, emphasizing that her use of water was unquestionably beneficial and asserting her paramount riparian status. Edison, although an appropriator, suggested that under these circumstances riparian Herminghaus's insistence on her accustomed method of use of water was unreasonable and therefore that she had no right to enjoin Edison's hydroelectric impoundment. The case reached the California Supreme Court, which agreed with Herminghaus. The court held that, a riparian's use of water being beneficial, the riparian was under no duty to a mere appropriator to use water reasonably and by a reasonable method of diversion.⁸⁶ The Conservation Commission's view of the consequences of unbridled riparianism which was reflected in its 1912 Report was thus confirmed.⁸⁷

85. See *supra* text accompanying note 35.

86. *Herminghaus v. Southern Cal. Edison Co.*, 200 Cal. 81, 106-07, 252 P. 607, 619 (1926).

87. There is in this State a modified doctrine of riparian rights. Under such rights, proprietors of riparian lands are permitted to require that all the waters of a stream, on which their riparian lands are situated, shall flow to their riparian lands The result of this is that enormous quantities of water, which might be, and ought

IV. THE MODERN ERA: RULE OF REASONABLENESS AND PUBLIC INTEREST

A. *The 1928 Constitutional Amendment*

In the view of the people, the court's decision in *Herminghaus* was riparianism *reductio ad absurdum* and the popular reaction was swift and pointed. An amendment to the California Constitution was proposed, adopted by the legislature, and approved by the people in 1928.⁸⁸ While taking care to preserve riparian rights, the amendment prohibits waste of water and enjoins the rule of reasonableness of use, method of use, and method of diversion on all uses of water.⁸⁹ Further, it has been held that to the extent water use is wasteful or otherwise unreasonable, it is not part of a water right.⁹⁰

The 1928 Amendment has been called the fundamental expression of California's water policy.⁹¹ However, the rule of reasonableness is not exclusively defined either by statute or judicial decision. We may draw two general principles from the interpretive judicial decisions: (1) what is reasonable (or unreasonable) depends upon all the facts and circumstances of a particular case; and (2) concepts of reasonableness may change over time.⁹²

B. *Amendments to the Water Code Requiring Consideration of the Public Interest*

We have noted that a permit system was created in 1914 by the Water Commission Act to govern acquisition and maintenance of appropriative water rights. As enacted, the role of the state agency charged with administration of the permit system (initially the California Water Commission, now the State Water Resources Control Board) was limited to determining whether unappropriated water was

to be, put to some beneficial use are permitted to run to waste into the ocean without doing anybody any good, and in districts subject to flood doing great harm.

REPORT, *supra* note 49, at 27.

88. CAL. CONST. art. X, § 2 (1928, amended 1976).

89. *Peabody v. Vallejo*, 2 Cal. 2d 351, 368, 40 P.2d 486 492 (1935).

90. *Joslin v. Marin Mun. Water Dist.*, 67 Cal. 2d 132, 141, 429 P.2d 889, 895, 60 Cal. Rptr. 377, 383 (1967).

91. *Id.*

92. See Kramer & Turner, *Prevention of Waste or Unreasonable Use of Water: The California Experience*, AGRIC. L.J. 519 (1979-80).

available to supply the permit applicant.⁹³ The authority of the State to make that determination was seen by the Conservation Commission as central to the goal of the permit system. Without question that authority continues to be of very great importance.⁹⁴ However, in recent decades the scope of the State's authority in acting on appropriative water right applications has been broadened to include factors generally grouped under the rubric "public interest."⁹⁵

Like the rule of reasonableness, the public interest principle is nowhere exclusively defined. This lack of definition requires the State Water Resources Control Board to make policy judgments when a public interest finding is at issue. The courts will not disturb the Board's public interest findings so long as substantial evidence exists to support them in the record upon which the findings are based.⁹⁶

In proceedings on appropriative water right applications, the public interest typically focuses on public uses of the source stream or other water body: fishing, sustenance of other wildlife, and recreation. In the 1950s the legislature specifically identified these uses as beneficial uses of water and required that the Board, in determining the amount of water available for appropriation for other beneficial uses, take into account the amounts of water needed to be left in the source to sustain and enhance these uses.⁹⁷ However, insofar as providing for these beneficial uses in a particular case requires the reservation of flows instream and does not contemplate a physical act manifesting possession of some part of the flow—typically, a diversion of water—they may not be the subject of an application to appropriate water.⁹⁸

C. The California Environmental Quality Act

The California Environmental Quality Act (CEQA)⁹⁹ is applicable to State Water Board application and petition approval actions. The

93. See CAL. WATER CODE § 1375(d). See also *id.* § 1202 (definition of "unappropriated water"); *Modesto Properties Co. v. State Water Rights Bd.*, 179 Cal. App. 2d 856, 860, 4 Cal. Rptr. 226, 229 (1960).

94. See CAL. WATER CODE §§ 1205-1207 (Deerings Supp. 1988).

95. See CAL. WATER CODE § 1255. Section 1255 states that: "The board shall reject an application when in its judgment the proposed appropriation would not best conserve the public interest." *Id.* See also *id.* § 1253. Section 1253 states that: "The board shall allow the appropriation . . . under such terms and conditions as in its judgment will best develop, conserve, and utilize in the public interest the water sought to be appropriated." *Id.*

96. *Bank of America, N.T. & S.A. v. State Water Resources Control Bd.*, 42 Cal. App. 3d 198, 206, 116 Cal. Rptr. 770, 773-74 (1974).

97. CAL. WATER CODE § 1243 (Deerings 1977). See also *id.* § 1257.5 (Deerings Supp. 1988).

98. *Fullerton v. State Water Resources Control Bd.*, 90 Cal. App. 3d 590, 598, 153 Cal. Rptr. 518, 524 (1979); *California Trout, Inc. v. State Water Resources Control Bd.*, 90 Cal. App. 3d 816, 819-20, 153 Cal. Rptr. 672, 674-75 (1979).

99. CAL. PUB. RES. CODE §§ 21000-21176 (Deerings 1987).

Board is typically the "responsible agency," and occasionally the "lead agency."

An unsettled question exists as to the evidentiary status of environmental documents in adjudicatory proceedings before the State Water Board. Protested applications require a hearing; further, the Board may not reject an unprotested application without a hearing.¹⁰⁰ These hearings are adjudicatory in nature, and administrative due process of law is therefore accorded the parties. One adjudicatory due process principle is that findings may not be based solely on hearsay evidence.¹⁰¹ Typically persons who have contributed data contained in an environmental document, and drawn technical conclusions and made recommendations therein, do not testify at hearings. On the other hand, CEQA requires that the agency consider the environmental document. In the absence of direct testimony by those who prepare the document, it may fairly be characterized as hearsay evidence. Thus, a potential conflict exists between CEQA's requirements and the due process rules governing adjudicatory hearings. This conflict has not been resolved by the courts.

V. WHERE WE STAND TODAY; RECENT DEVELOPMENTS

California's water rights system remains firmly pluralistic. Riparian proprietors continue to exercise water rights that are part and parcel of their lands. The pueblo rights of the cities of Los Angeles and San Diego are well-recognized. "Old" appropriative rights—those initiated prior to December 19, 1914, and continuously exercised—are recognized and protected. Appropriative rights initiated pursuant to the Water Commission Act and the California Water Code have statutory sanction and the benefit of a title document issued by the State. The price paid for these many doctrinal mansions within the system's house is a pervasive lack of security for all water uses. This is inherent in a system which: (1) sanctions unregulated first-time use of water (riparian rights) as paramount to other long-established uses having doctrinal inferiority; (2) does not widely utilize the statutory means of integrating intra- and inter-doctrinal claims of right within a stream system; (3) applies the rule of reasonableness on an *ad hoc* basis;¹⁰² and (4) has lately had judicially engrafted upon it the public trust doctrine.

100. CAL. WATER CODE §§ 1350, 1351 (Deerings 1977).

101. See CAL. ADMIN. CODE tit. 23, § 761(c).

102. The standard of reasonableness applied by the courts depends on all the facts and

A. Riparian Rights

Having reached a peak of doctrinal preference in *Herminghaus*, riparianism was reigned in during the following half-century, starting with the 1928 California constitutional amendment and perhaps culminating in 1979 in *In Re Waters of Long Valley Creek Stream System*.¹⁰³ That case arose from review of a superior court decree based upon a State Water Board order of determination in an *in rem* statutory adjudication proceeding.¹⁰⁴ The State Water Board followed its long-standing practice of determining priority, amount, season of use, purpose of use, point of diversion and place of use of all water rights in Long Valley Creek¹⁰⁵—including the presently exercised riparian rights. However, also in accordance with long-standing practice, the Board's order did not make a provision recognizing unexercised ("dormant") riparian rights. The proprietor of a substantial amount of riparian land, who was not at the time of the order using water on most of the land, excepted to the order. The superior court entered its decree sustaining the Board's order on this point and the riparian proprietor appealed. The court of appeal reversed, and the supreme court granted hearing.

The supreme court held that while unexercised riparian rights could not be extinguished in the statutory adjudication process, in many cases they could be subordinated to all presently exercised rights recognized in the decree whether riparian or appropriative. When at some future date the riparian proprietor wishes to activate such rights, he is required to apply either to the Board or to the superior court for permission. A right thus granted will be incorporated into the decree but it will have a priority as of the date of the riparian proprietor's application. Thus, the riparian right will be subordinate to all rights recognized in the original decree and also to rights, including appropriative, that may have been granted subsequent to the original decree, up to the date of the riparian's application.¹⁰⁶ The net effect of this holding is to transform stream systems adju-

circumstances of the particular case and may change over time. *But see* CAL. ADMIN. CODE tit. 23, §§ 697 (examples of amounts considered reasonably necessary); 698 (action upon an application for an excessive amount).

103. 25 Cal. 3d 339, 599 P.2d 656, 158 Cal. Rptr. 350 (1979).

104. *See* CAL. WATER CODE §§ 2500-2900 (Deerings 1977 & Supp. 1988).

105. *See id.* §§ 2501, 2769.

106. *Long Valley Creek*, 25 Cal. 3d at 351, 599 P.2d at 668, 158 Cal. Rptr. at 362 (court's guidance to the courts and to the Board on these points was explicit).

dedicated pursuant to the statutory adjudication procedure into “pure appropriation” systems.

Despite the reigning-in of the riparian doctrine itself in the years following the 1928 Amendment, a recent decision of the California Supreme Court greatly enlarged the total quantity of lands within California that may lay claim to riparian rights. That decision, *In re Waters of the Hallet Creek Stream System*,¹⁰⁷ is discussed separately in another article in this symposium.¹⁰⁸

B. Modern Appropriative Rights

The permit system inaugurated by the enactment of the Water Commission Act in 1914 continues to be the basic law applicable to initiation, perfection and administration of appropriative rights.¹⁰⁹

C. Standard of Judicial Review

In 1974, the court of appeal in *Bank of America N.T. & S.A. v. State Water Resources Control Board*¹¹⁰ confirmed that the standard of judicial review of State Water Board findings made in connection with applications for appropriative right permits is the substantial evidence test.¹¹¹ That decision also reinforces the weight of evidence presented by the California Department of Fish and Game in water right proceedings before the Board to establish the public interest needs of fish, wildlife, and recreation.¹¹²

D. Water Rights Enforcement

The authority of the State Water Board to enforce water rights has also been increased during the past decade. The Water Commission Act stated that the diversion or use of water in violation of the law constituted a trespass subject to injunction.¹¹³ In an injunction action brought by the Board, the supreme court held in *People v. Shirokow*¹¹⁴

107. 44 Cal. 3d 448, 749 P.2d 324, 243 Cal. Rptr. 887 (1988).

108. See Dunn, *Cooperative Federalism in the Acquisition of Water Rights: A Federal Practitioner's Point of View*, 19 PAC. L.J. 1321 (1988).

109. See generally CAL. WATER CODE §§ 1000-1106; 1200-1801 (Deerings 1977). See also CAL. ADMIN. CODE tit. 23, §§ 16-18 (1988).

110. 42 Cal. App. 3d 198, 116 Cal. Rptr. 770 (1974).

111. *Id.* at 201, 204-07, 116 Cal. Rptr. at 771, 773-75.

112. *Id.* at 207-10, 116 Cal. Rptr. at 775-77.

113. CAL. WATER CODE § 1052 (Deerings 1977 & Supp. 1988).

114. 26 Cal. 3d 301, 605 P.2d 859, 162 Cal. Rptr. 30 (1980).

that a claim of prescriptive right could not prevail against the State's interest in regulating appropriative rights after the enactment of the Water Commission Act. The court expressly left undecided the question whether the prescriptive right doctrine had any vitality as among private parties and, if so, to what extent and effect. The question remains unsettled.

By legislation effective January 1, 1988, the State Water Board was given additional authority under California Water Code section 1052. Specifically, along with its injunctive powers the Board may now impose civil monetary penalties against unauthorized diverters. Meanwhile, in 1980 legislation was enacted authorizing the Board to issue cease and desist orders against water right permittees and licensees who are found to be in violation of permit or license conditions.¹¹⁵

E. The Rule of Reasonableness Revisited

The State Water Board and the State Department of Water Resources are commanded by statute to take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste or other misuse of water.¹¹⁶ The Board's usual implementation of this responsibility occurs in evaluating and acting upon applications to appropriate water. The Board does not permit appropriation of amounts of water that are unreasonable to serve the beneficial uses proposed.¹¹⁷ Similarly, the Board does not give weight to a protest based upon injury to prior rights to the extent evidence shows that the protestant's use of water is wasteful or otherwise unreasonable.¹¹⁸

In 1976 the Board's standing to sue to enforce the constitutional reasonableness mandate was confirmed by the court of appeal.¹¹⁹ Subsequently, the Board and the Department of Water Resources adopted joint rules that create a procedure to investigate and act upon instances of alleged waste or other misuse of water both within, and independent of, the application/permit process.¹²⁰

115. CAL. WATER CODE §§ 1831-1836 (Deerings Supp. 1988). This body of legislation also provides for civil monetary penalties. *Id.* § 275.

116. *Id.* § 275.

117. See CAL. ADMIN. CODE tit. 23, §§ 697-698 (1987).

118. See, e.g., S.W.R.C.B., Decision 1592, at 6 (June 16, 1983).

119. *People v. Forni*, 54 Cal. App. 3d 743, 753, 126 Cal. Rptr. 851, 858 (1976). Note that the final clause of article 10, section 2, of the Constitution provides both that its terms are self-executing and that the legislature may enact legislation in furtherance of its policy. See CAL. CONST. art. X, sec. 2.

120. CAL. ADMIN. CODE tit. 23, §§ 4000-4007 (1979).

F. Imperial Irrigation District Case

In 1986 the court of appeal confirmed the Board's authority to implement these rules through conduct of an adjudicatory hearing on reasonableness issues and subsequent issuance of a binding order designed to terminate misuse of water.¹²¹ The case also held that judicial review of such an order is by way of administrative mandamus pursuant to California Code of Civil Procedure section 1094.5. The standard of review of an order produced by such a proceeding is independent judgment on the Board's adjudicatory hearing record.

G. Temporary Urgency Permits

Prior to 1973, no provision of law authorized temporary diversion and use of water under urgent conditions. In that year, legislation became effective which authorized the State Water Board to grant permits allowing such temporary and urgent use.¹²² Subsequently, parallel provisions were enacted authorizing Board approval of temporary urgency changes in existing permitted and licensed rights.¹²³

These provisions have increased the ability of water rights law to be flexible and to act timely. They have proven to be especially useful in water-short years. Pursuant to statutory authorization, the Board has delegated to each individual Board member the power to order *ex parte* issuance of temporary urgency permits and change approvals. However the *ex parte* orders are contingent upon subsequent notice to affected parties, opportunity for a hearing, and Board validation within thirty days of issuance.

VI. FEDERAL-STATE RELATIONS

A. California v. United States

We noted above that the federal government formally entered the western water arena with enactment of the 1902 Reclamation Act. Although that Act contained section 8, which seemed clearly to require the United States to comply with state water rights law, a series of

121. *Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 183 Cal. App. 3d 1160, 231 Cal. Rptr. 283 (1986).

122. CAL. WATER CODE §§ 1425-1431 (Deerings Supp. 1988).

123. *Id.* §§ 1435-1455.

United States Supreme Court decisions appeared to interpret section 8 as being merely a compensation statute, that is, as only requiring the United States to pay just compensation for non-federal water rights taken in connection with construction and operation of its reclamation projects.¹²⁴ In addition, the cases hinted that section 8 might require the United States to file with the state an application to appropriate water, but only to give the state notice of its intentions.¹²⁵ The critical question was whether the states were authorized under section 8 to place conditions upon appropriations of water made by the United States in connection with its water projects. Conditional permits lie at the heart of the modern permit system.¹²⁶

Miraculously, a federal-state confrontation over this issue had been avoided for a half-century. In practice the United States, through the Bureau of Reclamation, not only had filed water right applications with the state, but had also participated fully in the proceedings—after voicing for the record the usual disclaimers of immunity to state water rights law jurisdiction. Moreover, the United States had accepted permit conditions on its applications, including the numerous permits issued for the various units of the massive federal Central Valley Project. Generally the federal government had a good record of observing permit conditions.

However, in 1973 the California State Water Board issued a decision ordering issuance of conditional permits to the Bureau of Reclamation on water right applications for its New Melones Project, a dam and reservoir which is part of the Central Valley Project.¹²⁷ The Bureau found many of the permit conditions unacceptable—above all, those which restricted storage in the reservoir until such time as the Bureau could present a firm plan for consumptive use of the water to be appropriated by storage. The Board's purpose in so conditioning the permits was to preserve for so long as possible the free-flowing character of the Stanislaus River above the New Melones Dam. With unlimited storage, a substantial reach of the River is inundated by the still waters of the reservoir.

The United States brought suit in the federal district court to nullify the objectionable conditions and to confirm what appeared to be the

124. *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958); *City of Fresno v. California*, 372 U.S. 627 (1963); *Arizona v. California*, 373 U.S. 546 (1963).

125. *See United States v. State of California*, 558 Fed.2d 1347 (1977), *rev'd*, *California v. United States*, 438 U.S. 645 (1978).

126. *See CAL. WATER CODE* § 1253 (Deerings 1977).

127. S.W.R.C.B. Decision 1422.

limited interpretation of section 8 of the Reclamation Act contained in prior decisions. The case was ultimately decided by the United States Supreme Court in *California v. United States*.¹²⁸ The Court observed that the position taken by the United States on its duty to comply with state water rights law would “trivialize” section 8 of the Reclamation Act. Instead, the Court held that the United States, in constructing and operating water projects pursuant to the Reclamation Act, must comply with conditions of water right permits issued under state law, excepting only such conditions which are in direct conflict with “clear Congressional directives” respecting the project. This was essentially California’s position in the litigation. On remand, the Circuit Court of Appeals for the Ninth Circuit approved all of the conditions in the New Melones water right permits, applying the “clear Congressional directives” test.¹²⁹

B. Federal Reserved Rights Limited

We noted above that federal reserved water rights are rights created by federal law to serve the water needs of lands withdrawn from the public domain to establish federal reservations. In a decision arising from a federal-state water conflict in New Mexico,¹³⁰ the United States Supreme Court limited reserved right water uses on federal reservations to those for which the lands were originally withdrawn—the “primary” purposes of the reservation. Thus, subsequent federal legislation that has generally enlarged the scope of uses to which the National Forests may be devoted¹³¹ does not operate to enlarge the federal reserved right appurtenant to these lands. The Court held that water used to serve these “secondary” purposes must be acquired pursuant to state water rights law. The specific language of the decision states that the federal land managers are authorized to acquire water rights pursuant to the laws of the states governing *appropriation*. The holding of *New Mexico*, along with its specific reference to state laws governing appropriation, will likely be of considerable importance in a Supreme Court review of the *Hallett Creek* case,¹³² should *certiorari* be granted.

128. 438 U.S. 645 (1978).

129. *United States v. California State Water Resources Control Bd.*, 694 Fd.2d 1171 (1982) (Kennedy, J., opinion).

130. *United States v. New Mexico*, 438 U.S. 696 (1978).

131. *E.g.*, Multiple-Use Sustained-Yield Act of 1960, 74 Stat. 215, 16 U.S.C. §§ 528-530 (1982).

132. *See supra* note 107 and accompanying text.

C. The Public Trust Doctrine

The doctrine of a public trust in the state's management of lands in which it has ownership interests is relatively ancient in California law.¹³³ Prior to 1983, however, no judicial decision squarely faced the question of the applicability, if any, of the public trust doctrine to another resource in which the state has a vital interest, that is, water.¹³⁴ In that year the California Supreme Court decided *National Audubon Society v. Superior Court*.¹³⁵ For the first time the court related the public trust doctrine to the appropriative rights doctrine.

From the perspective of the State Water Board, *Audubon* has several important teachings directly applicable to the water allocation work of the Board. These include the following duties: (1) To take into account the public trust in the state's waters when acting upon applications to appropriate water; (2) to re-examine past allocation decisions if changed circumstances warrant; (3) to balance public trust uses against the need to provide for conventional water uses under the constitutional rule of reasonableness; and (4) to entertain petitions for statutory adjudications of stream systems from persons claiming public trust uses and to consider those uses in framing its order of determination.

D. The Decision in the Delta Water Cases

In 1978 the California State Water Board took action with respect to the waters of the Sacramento-San Joaquin Delta in a proceeding which combined the Board's water rights and water quality regulatory authorities.¹³⁶ This proceeding produced both a water quality control plan for the Delta and a water right decision.¹³⁷ The latter amended appropriation permits held by the United States Bureau of Reclamation for its Central Valley Project, and by the State Department of Water Resources for its State Water Project, pursuant to the conditions in the permits reserving jurisdiction.¹³⁸ The water rights for both

133. See *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983) (discussing the public trust doctrine and its origins).

134. *Id.*

135. *Id.* This symposium contains a separate article on the public trust doctrine in water law. See Littleworth, *The Public Trust vs. The Public Interest*, 19 PAC. L.J. 1201 (1988).

136. See CAL. WATER CODE §§ 174, 1238 (creation of State Water Board with combined water rights and water quality function) (Deerings 1977).

137. S.W.R.C.B., Decision 1485.

138. See CAL. WATER CODE § 1394 (Deerings 1977 & Supp. 1983).

projects allow upstream storage and direct diversion and redirection of stored water from diversion points within the Delta. Most of the water thus diverted would, if unimpeded, flow through the Delta and San Francisco Bay to the sea.

The Delta is a great pool from which water is diverted for use in the San Joaquin Valley and Southern California. The Delta is also part of an estuary adjacent to the waters of the Pacific Ocean from whence tidal action causes eastward movement of salinity into the Delta's myriad channels and sloughs. The extent and timing of the eastward migration of salts depends at critical times upon the discharge into the estuary of fresh water from its major tributaries, the Sacramento River and the San Joaquin River. In turn, this discharge depends at critical times upon operation of the state and federal projects' reservoirs upstream on the major tributaries, as well as direct diversion and redirection of water released from storage at the projects' pumps within the Delta. In addition, water in the Delta serves important internal irrigation, municipal, and industrial beneficial uses. Finally, together with San Francisco Bay, Delta waters support important public beneficial uses of water: fisheries, other wildlife habitat, and water-related recreation.

Needless to say, balancing the Delta-dependent water needs of extra-estuary areas of the State with the internal fresh water needs of the Delta and the Bay is a complex and sensitive task. The water rights decision produced by that proceeding was immediately subjected to numerous mandate petitions,¹³⁹ about evenly divided between the extra- and intra-Delta interests. This litigation ultimately produced a thoroughly considered decision by the court of appeal in *United States v. State Water Resources Control Board* (the "*Delta Water Cases*").¹⁴⁰ That decision and some of its consequences are the subject of a separate article in this symposium.¹⁴¹ Again, however, it is appropriate to list here the major legal teachings of the *Delta Water Cases* decision from the perspective of the State Water Board as it undertakes a re-examination of the complex Delta-Bay issues. They are: (1) The Board's water quality control plan for the estuary should not be driven by its water rights allocation authority; (2) to the extent that regulation of water rights is a part of the solution to the Delta-Bay

139. See *id.* § 1360.

140. 182 Cal. App. 3d 82, 227 Cal. Rptr. 161 (1986).

141. See Robie, *The Delta Decisions: The Quiet Revolution in California Water Rights*, 19 Pac. L.J. 1111 (1988).

problem, water rights held by others than the state and federal projects should be examined; (3) the public trust doctrine, as articulated by the supreme court in *Audubon*,¹⁴² must be applied by the Board in balancing the competing interests in the uses of the waters of the Delta-Bay estuary; and (4) no "clear Congressional directives"¹⁴³ immunize the United States from compliance with the amended conditions of its water right permits ordered by the State Water Board's decision.¹⁴⁴

VII. SOME PENDING ISSUES

In this discussion we have made reference to several important issues which remain for future decision. These include the following questions: (1) Whether prescriptive rights may still be acquired against private water users; (2) the evidentiary status of environmental documents, produced pursuant to the California Environmental Quality Act, in adjudicatory water right proceedings before the State Water Resources Control Board; and (3) the impact of newly-discovered riparian rights on federal lands withdrawn from the public domain in light of the California Supreme Court's *Hallett Creek* decision.¹⁴⁵ There are some other important issues facing California's water law system.

A. Federal Power Act Preemption

We noted above that the Federal Power Act¹⁴⁶ created a federal regulatory licensing system presently administered by the Federal Energy Regulatory Commission (the "FERC") for hydroelectric projects proposing to utilize navigable waters or federal lands. Contained in section 27 of the Act is a state's water rights savings clause closely modeled upon section 8 of the 1902 Reclamation Act. In 1946 the United States Supreme Court decided *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*,¹⁴⁷ which has been perceived as holding that the licensing of a hydroelectric project by the FERC

142. See *supra* note 133 and accompanying text.

143. See *California v. United States*, 438 U.S. 645 (1978).

144. During the course of the *Delta Water Cases* litigation, the United States—although the lead petitioner in the state court litigation—mounted a diversionary attack on Decision 1485 in the federal court system. The Federal District Court for the Eastern District of California did not respond favorably to this attack. See *United States v. California*, 529 F. Supp. 303 (1981).

145. See *supra* notes 101, 107, 114 and accompanying text.

146. See *supra* note 79 and accompanying text.

147. 328 U.S. 152 (1946).

operates to preempt state water rights laws, and that a FERC licensee may divert and use water for hydroelectric purposes without meeting state requirements.

The energy shortages of the 1970s precipitated federal and state legislation encouraging, through tax breaks and otherwise, proliferation of small, run-of-the-river hydroelectric generating projects which had not been previously economically feasible.¹⁴⁸ Though their contribution to the states' and nation's energy needs are exceedingly minor, they are capable of having a substantial adverse impact on public uses of the streams, such as fisheries, which they divert for power generation purposes.

Diversion and use of water to generate power is a classic exercise of a water right. In most cases, this use requires an appropriative water right permit from the State Water Board. Perhaps understandably leary of the Board's duty and authority to condition appropriative permits with public interest conditions, such as specific flow bypass requirements to sustain a fishery in the stream reach between the project's intake and the power plant, some hydroelectric developers have argued that issuance of a FERC license under the Federal Power Act preempts the need to obtain an appropriative water right permit from the state. This argument relies on language in the United States Supreme Court's decision in *First Iowa*.

In March, 1987, in a license proceeding before the FERC, a hydroelectric project developer succeeded in obtaining a declaratory order from the FERC¹⁴⁹ that state water rights laws were preempted by the Federal Power Act. As a result, the FERC declared its licensees need not obtain an appropriative water right permit under state law, citing *First Iowa*. Incredibly, no agency of the State of California had been notified of the pendency of the developer's request for a FERC declaratory order on this issue. Following receipt of the FERC order by the State Water Board in a routine mailing, the California Attorney General petitioned to intervene in the FERC proceeding and requested a rehearing on the preemption issue. The petition to intervene was granted and the request for rehearing was denied. The stage

148. See, e.g., CAL. WATER CODE § 106.7. Enacted in the 1970s, this statute declares it to be legislative policy to encourage the development of small hydroelectric projects as a renewable energy source. As petroleum has become a glut on the world market in succeeding years and as its cost has dropped precipitously, the number of environmentally protective provisos and qualifications of the pro-hydro policy contained in section 106.7 have proportionately increased through amendment.

149. FED. ENERGY REG. COMM'N, *Order in Response to Request for Declaratory Order* (March 11, 1987) (on file at *Pacific Law Journal*).

was thus set for California's appeal to the United States Circuit Court of Appeals, which was promptly taken. At this writing, the issue is being briefed in the United States Court of Appeals for the Ninth Circuit, *sub nom State of California v. Federal Energy Regulatory Commission*.¹⁵⁰

B. The American River

Our story of the development of the appropriative water rights doctrine in California began with reference to the discovery, almost a century-and-a-half ago, of gold in the millrace of a lumber mill on the American River. It is fitting that our overview of the law of California water rights end by noting an important pending water rights matter again centered on that historic watercourse. In a sense it illustrates a central problem inherent in our water rights legal system.¹⁵¹

Much of course has changed in the basin of the American River since the coming of the goldseekers. In its lower reach, at its confluence with the Sacramento River, the Sacramento metropolitan area has become the home of more than a million Californians. Further downstream from the confluence, on the eastern rim of the Bay in the hills of the Coast Range facing San Francisco and the Peninsula, East Bay communities in Alameda and Contra Costa counties have become home to another million plus Californians. The municipal and industrial water needs of much of this population are met by the East Bay Municipal Utility District from its water development facilities on the Mokelumne River.

One obvious physical change is the existence at Folsom, about twenty-five miles upstream from its confluence, of the Folsom Dam and Lake. This facility is a unit of the federal Central Valley Project and is operated by the United States Bureau of Reclamation. The Bureau and the East Bay District entered into a contract looking to the Bureau's delivering to the District of up to 150,000 acre-feet of water per annum from the Folsom unit. This supply would augment in dry years the water developed by the East Bay District's own facilities and is also intended to meet the needs of continued growth in its East Bay service area.

150. Docket No. 87-7538 (9th Cir. 1988).

151. See DIVISION OF WATER RIGHTS, STATE WATER RESOURCES CONTROL BOARD, DRAFT REPORT OF REFEREE, AMERICAN RIVER COURT REFERENCE (description of the American River litigation).

The water supply contract between the Bureau and the East Bay District calls for delivery of the contract water through the Folsom South Canal, a facility which conveys American River water southward from an afterbay on the American River a short distance below Folsom Dam. Water thus diverted from the American River at Folsom South Canal would then be conveyed westward to the District's service area.

American River water delivered by the Bureau pursuant to this plan, under its state-issued water rights, would in effect bypass the reach of the lower American River between the diversion into the Folsom South Canal and the River's confluence with the Sacramento River. That reach of the River supports valued instream uses of water. These include fisheries (Chinook salmon, Steelhead trout, American shad), recreational boating, and other river-oriented recreation. The reach is associated with Sacramento County's prized American River Parkway.

In 1974 the environmental organization, Environmental Defense Fund (EDF), and others, brought suit in the Alameda County Superior Court against the East Bay District. EDF's theory is that the existing plan of delivery of the contract water would violate the rule of reasonableness of article 10, section 2, of the California Constitution. This position is based on allegations that it would be feasible for the East Bay District's contract water supply to be diverted at a point in the system below the American River-Sacramento River confluence. Such point of diversion would allow the contract water destined for use in the East Bay to first serve the valuable instream uses associated with the lower American River.

Following lengthy litigation of a federal preemption issue,¹⁵² which ultimately reached the United States Supreme Court, the way was cleared for state law and state court litigation of the case.¹⁵³ After remand, the Alameda County Superior Court appointed the State Water Resources Control Board referee in the case. The Board was ordered to render a report responding to numerous specific questions posed by the court. These questions highlight the central substantive issue in the case. That issue is the authority and responsibility of the East Bay District to obtain the highest possible quality of water for

152. *Environmental Defense Fund v. East Bay Mun. Util. Dist.*, 20 Cal. 3d 327, 572 P.2d 1128, 142 Cal. Rptr. 904, (1977) [EDF I].

153. *Environmental Defense Fund v. East Bay Mun. Util. Dist.* 26 Cal. 3d 183, 605 P.2d 1, 161 Cal. Rptr. 466, (1980) [EDF II].

its people, versus the constitutional mandate to maximize beneficial uses of water, which include the instream uses of the lower American River.

But the case also illustrates a more fundamental problem of process. The sole defendant in this *in personam* litigation is the East Bay District. Yet the existing and potential use of American River water by many others—including use by diversion through Folsom South Canal—has affected and will increasingly affect the instream uses of the lower American River. The Bureau of Reclamation itself, which holds the water rights under which the East Bay District would be served water and which physically regulates the river at Folsom Dam, is not a party. The County of Sacramento, which has plans for increased diversion to meet its own population growth needs, has intervened as plaintiff in the action; but that county's duties, if any, to the instream uses of the lower American River are not at issue in the present case.

We noted above the criticism of the then existing system of water rights administration made by the Conservation Commission in its 1913 Report. Chiefly it included criticism of the system's encouragement of "piecemeal litigation." Despite enactment of that Commission's legislative recommendations and their subsequent codification in the California Water Code, the system's administrative capability of dealing efficiently with modern water right conflicts remains questionable. This problem is highlighted by the American River litigation.

PART TWO—DEVELOPMENT AND STRUCTURE OF WATER QUALITY CONTROL IN CALIFORNIA

In 1969 the state legislature enacted the Porter-Cologne Water Quality Control Act.¹⁵⁴ This Act contains a complete regulatory framework for the regulation of waste discharges to both surface and ground waters of the state. The Act provides for the adoption of water quality control plans and implementation of these plans by adoption of waste discharge requirements for each discharger of waste

154. CAL. WATER CODE §§ 13000-13999.10 (West 1972). The author will use the terms Porter-Cologne Act and Division 7 of the California Water Code interchangeably. Technically the Porter-Cologne Act is the Act as enacted by the legislature in 1969. Such act has been amended every year since 1969. However, the term Porter-Cologne Act is so widely recognized as the state's basic water quality law it will continue to be used for the most part instead of Division 7.

that could impact the waters of the state. The Act also contains a wide array of enforcement tools to ensure that the requirements will be met.

The Porter-Cologne Act was conceived in simpler times when the main concerns were the treatment of municipal waste prior to discharge to our ground waters, rivers, bays, and the ocean. Hand in hand with the Porter-Cologne regulatory program was a multi-billion dollar federal/state clean water grants program which provided funds to local agencies to build modern sewage treatment facilities. As time has moved forward we have, for the most part, successfully handled municipal waste water problems. Still, many serious water quality problems must be confronted. For example, many water quality problems have resulted from the improper storage and disposal of toxic and hazardous waste, massive discharges of waste water from storm drains, and the impact of nonpoint sources of pollution from timber operations, street runoff, and runoff of soil from construction projects. Since the Porter-Cologne Act became effective on January 1, 1970, Congress has enacted and amended several times the federal Clean Water Act.¹⁵⁵ In addition, each year since 1970 the state legislature has added to or amended sections of the Porter-Cologne Act. The legislature also has enacted significant laws that deal with toxic and hazardous materials and hazardous waste.¹⁵⁶ Therefore, in an important way, the state's water quality control program is much different today than it was in 1970.

The purpose of this part of the article is to survey the water quality control laws in California and explain their implementation. The history of events leading up to the adoption of the Porter-Cologne Act has been dealt with in other articles and will not be repeated here.¹⁵⁷ At the end of this article is a discussion of the growing edge of water quality law and how the water quality and water rights laws interface.

155. Pub. L. No. 92-500, 86 Stat. 816 (1972) (codified as amended at 33 U.S.C. §§ 1251-1376, (1986)). The latest amendments are contained in Public Law 100-4 (1987) and are codified at 33 U.S.C. §§ 1251-1311 (1986). Initially the act was called the Federal Water Pollution Control Act and is now commonly referred to as the Federal Clean Water Act.

156. See generally CAL. HEALTH & SAFETY CODE §§ 25100-25249 (hazardous waste control); *id.* §§ 25249.5-25249.13 (Safe Drinking Water Act of 1986 approved by Proposition 65 on November 4, 1986); *id.* §§ 25280-25299.6 (underground storage of hazardous substances); *id.* §§ 25300-25395 (hazardous substance account); *id.* § 25400 (liability for abatement of hazards); *id.* §§ 25500-25541 (hazardous materials release response plans and inventory); and *id.* §§ 25570-25570.4 (environmental quality assessment).

157. Robie, *Water Pollution: An Affirmative Response by the California Legislature* 1 Pac. L.J. 2 (1970) (discusses the history underlying the enactment of the Porter-Cologne Act).

I. PORTER-COLOGNE WATER QUALITY CONTROL ACT

The Porter-Cologne Act is the basic water quality control law for California. It is a broad-based regulatory program designed to protect water quality and to protect beneficial uses of the state's waters. The Act is implemented by the State Water Resources Control Board¹⁵³

158. CAL. WATER CODE § 174 (West 1971). The state water board was created by the legislature in 1967, based on the realization that decisions affecting water quality and water rights were inseparable. Between 1950-1965, concerns about the impact of water quality on the lives of California citizens began to develop. For example, when the state water project was being developed, the Department of Water Resources recognized that water quality was an important consideration. When the federal Shasta Dam was built, downstream rice production dropped because the water released from the dam was too cold. This was a water quality consideration that had to be taken into account in constructing Oroville Dam. Thus, the Department designed the Oroville Dam with a multi-level outlet structure to draw off water at the proper temperature to accommodate downstream beneficial uses. The Thermalito afterbay was also deliberately designed as a large shallow pond for warming the water. The Department recognized that maintaining water quality in the Sacramento-San Joaquin Delta (the location of the Department's export pumps) would be a problem. Water quality needs would have to be met in the Delta for agricultural and domestic uses. Additionally, the water had to be good quality for export to the San Joaquin Valley and Southern California.

With growing concern about water quality, several bills were introduced in the legislature in 1963 to strengthen the then existing Water Pollution Control Board. Since water quality concerns were far more than traditional health related pollution problems, the name of the state pollution board was changed to the State Water Quality Control Board. A prime function of the Board was to establish water quality control policies. The state departments (including the State Department of Water Resources) were to recognize this policy in planning and carrying out their activities. Thus, the legislature in 1963 made a significant change in California water policy. A state board was created to take charge of both the broader field of water quality control and the limited field of sewage and industrial waste control.

In 1965 a report was issued by the Little Hoover Commission. The report recommended that the water quality program be turned over to the Department of Water Resources. At that time, the executive officer of the State Water Quality Control Board was Paul Bonderson. Although Mr. Bonderson died in 1983, his thoughts on the history of the water board are preserved through a series of interviews which have been compiled in the regional oral history, Bancroft Library, University of California, Berkeley. With respect to turning over the water quality functions to the Department of Water Resources, Mr. Bonderson stated:

[t]he report recommendations that the program in essence be turned over to the Department of Water Resources and the California Water Commission was totally inappropriate. The reason being is the Department, which the Commission is involved with is the biggest purveyor of water in the state of California, with possibly the exception of the Bureau of Reclamation. So there's a fundamental conflict here. How can they (Department of Water Resources) regulate people who have an interest or an activity that conflicts with the basic interest or responsibility of the Department as a purveyor of water? They are a vested interest. So, just fundamentally it was wrong.

Instead of combining the regulatory functions with respect to water quality in the Department, Mr. Bonderson saw the need to have a coordinated water regulatory program. Mr. Bonderson also recommended combining the state water rights board and the water quality board into an overall water regulatory agency that would handle both quantity and quality considerations.

During the next two years, the Assembly Water Committee held hearings and issued reports concerning the impact of combining the two boards. The three main reports are as follows: ASSEMBLY INTERIM COMMITTEE ON WATER, A PROPOSED WATER RESOURCES CONTROL BOARD

(State Board) and the nine regional water quality control boards.¹⁵⁹

At the outset, it is necessary to understand that the State and regional boards implement portions of the federal Clean Water Act as well as the Porter-Cologne Act. The boards also implement the permit provisions (section 402) as well as certain planning provisions (sections 205, 208, and 303 of the federal Act).¹⁶⁰ This means that the state issues one discharge permit for purposes of both state law (Porter-Cologne Act) and federal law (Clean Water Act). Under state law, the permit is officially called a waste discharge requirement. Under federal law, the permit is officially called a National Pollutant Discharge Elimination System permit (NPDES permit). A NPDES permit is required for all point discharges of pollutants to surface waters. A point source is a discernible, confined, and discrete conveyance, such as a pipe, ditch or channel. Under the federal Clean Water Act, a point source does not include return flows from irrigated agriculture.¹⁶¹ All other discharges that could impact water quality or beneficial uses, including return flow from irrigated agriculture, require waste discharge requirements unless waived by the regional board.¹⁶² For example, the discharge of treated sewage by the city of

FOR CALIFORNIA (a staff study) (1966), ASSEMBLY INTERIM COMMITTEE REPORT, NEW HORIZONS IN CALIFORNIA WATER DEVELOPMENT, Vol. 26 (Nov. 16, 1966), and FINAL REPORT OF THE STATE WATER QUALITY CONTROL BOARD, USEFUL WATERS OF CALIFORNIA, Pub. No. 37 (1967) (page 71 contains a summary of the 1967 legislation creating the State Water Resources Control Board).

AB 163 was introduced in 1967 to create the State Water Resources Control Board. Mr. Bonderson recalls the legislative action as follows:

[I]t passed rather quickly; there was not a great deal of delay or controversy over the bill. The only controversy I recall with the bill was that the discharge group . . . I use the phrase "discharge group," which included people like the League of California Cities, the Supervisors Association, the Farm Bureau, whatnot. The only real argument and debate was over having what was finally put into the bill as a water quality advisory committee, which was to be made up of essentially the old appointive members of the state water quality control board.

Subsequent to the passage of the legislation combining the water rights and water quality boards into the present board, the Assembly Water Committee requested that the Board study the need to reform the state's water quality control laws. The Board created a study panel composed of a cross-section of industrial, agricultural, and state and local government persons. The panel issued a report recommending certain changes in the water quality control laws but no changes in terms of organization of the state or regional boards. The study panel's recommendations were enacted into law as the Porter-Cologne Act. This act did not create the Board. The Board was created by special legislation in 1967. The Porter-Cologne Act was passed in 1969.

159. CAL. WATER CODE § 13200 (West 1971).

160. See 33 U.S.C.A. §§ 1342 (West 1986) (permit provision), 1285 (determination of amount), 1313 & 1288 (planning provision).

161. 33 U.S.C.A. § 1362 (West 1972).

162. CAL. WATER CODE §§ 13370-13389 (West 1971) (enables the State Board and the nine regional water quality control boards to operate the NPDES permit program in California)

San Francisco to San Francisco Bay requires a NPDES permit. A non-point discharge of waste to surface water or any discharge of waste to ground water requires the issuance of waste discharge requirements unless waived. The latter includes discharges from land fills, discharges resulting from mining operations, etc. The issuance of NPDES permits has been integrated with the regular Porter-Cologne Act process for the adoption of waste discharge requirements. Also, federal water quality planning requirements are met by the provisions of the Porter-Cologne Act.¹⁶³

For ease of understanding, the remainder of the discussion will be broken down as follows: planning, waste discharge requirements and NPDES permits, enforcement, State Board functions and responsibilities, and the "growing edge of the law." The last category includes recent statutory enactments which impact the regulation of water quality.

A. Planning

Under the Porter-Cologne Act, the regional boards have adopted water quality control plans for most areas within their regions.¹⁶⁴ The plans are continually reviewed and updated as required by state and federal law.¹⁶⁵ The water quality control plans are essentially blueprints for water quality control, somewhat akin to a general plan for a county. The plans contain an inventory of beneficial uses of the water within the region and water quality objectives to ensure the reasonable protection of beneficial uses and the prevention of nuisance.¹⁶⁶ The objectives are not merely directory, but are really standards that must be implemented by the regional boards. The regional boards look at a wide range of factors in determining appropriate water quality objectives. The plans also contain an implementation program to achieve the objectives.¹⁶⁷ Such a program includes a description of

In enacting these provisions, the legislature found that state assumption of the federal permit program was in the state's best interest because it would "avoid direct regulation by the state law." *Id.* See *id.* § 13372 (West 1971) ("[t]o the extent other provisions of [division 7] are consistent with the provisions of this chapter, such provisions shall be applicable to actions and procedures provided for in this chapter"). The legislature stated that any requirement of these provisions would prevail over other provisions of the Porter-Cologne Act (division 7) to the extent of any inconsistency. *Id.*

163. *Id.* §§ 13160, 13164, 13170, 13240-47 (West 1988) (discusses state compliance with federal regulations).

164. *Id.* § 13240 (West 1971).

165. See 33 U.S.C.A. § 1313 (1986), CAL. WATER CODE § 13240 (West 1971).

166. *Id.* § 13241 (West 1971).

167. *Id.* § 13242 (West 1971).

the actions necessary to achieve the objectives, a time schedule for these actions, and a description of the surveillance necessary to determine compliance with the objectives. The plans can also specify certain conditions or areas where the waste discharge or certain types of waste will not be permitted.¹⁶⁸ For example, under this authority, regional boards have adopted discharge prohibitions in certain areas of the California coastline which are of special biological significance.

Water quality control plans or amendments are not effective unless approved by the State Board.¹⁶⁹ If the Board does not approve the plan or amendment, it sends it back to the regional board with directions regarding necessary changes. If the regional board does not make the changes, the State Board has the authority to hold a hearing in the area covered by the plan and then make the changes itself. Planning which covers waters regulated under the federal Clean Water Act requires approval by the federal Environmental Protection Agency (EPA). Such plans, or portions of plans, are submitted to EPA for review and approval.¹⁷⁰ When approved by the EPA, the water quality objectives, beneficial use designations, etc., become water quality standards under the federal Clean Water Act. The State Board may also adopt a water quality plan without first having the plan adopted by a regional board.¹⁷¹ However, such a plan can only deal with surface waters. Pursuant to this authority, the State Board adopted the water quality control plan for Lake Tahoe because the lake covers two states. The Board has also adopted water quality control plans for ocean discharges and a thermal plan covering elevated temperature wastes in order to ensure statewide consistency in the implementation of the Porter-Cologne Act.

In addition to approving regional board water quality control plans in the first instance, the State Board is empowered to adopt state policies for water quality control.¹⁷² The operative effect of adopting a policy is several-fold. First, all regional board water quality control plans must conform to the State Board policies. In practice, the regional boards specifically incorporate the wording of the policies into plans or incorporate the policies by reference. Second, in implementing the plans by regulatory actions such as waste discharge requirements, the regional boards must implement the State Board

168. *Id.* § 13243 (West 1971).

169. *Id.* § 13245 (West 1971).

170. 33 U.S.C.A. § 1313 (1986).

171. CAL. WATER CODE § 13170 (West Supp. 1988).

172. *Id.* §§ 13140-13147 (West Supp. 1988) (state policy for water control).

policies as well as other relevant provisions in the plan. Finally, adoption of a policy ensures statewide consistency in dealing with specific issues. The policies contain water quality principles and guidelines for long range resource planning, including ground water and surface water management programs and control and use of reclaimed water.¹⁷³ The policies also contain water quality objectives at key locations for planning and operation of water resources development projects and for water quality control activities as well as any other principles and guidelines deemed essential by the State Board for water quality control. Since 1970 the State Board has adopted seven policies.¹⁷⁴

At times it has been difficult to discern why the State Board decides to adopt a policy rather than a plan. Both essentially require notice and a hearing or an opportunity for a hearing, but the effect is different in each case. When the State Board adopts a water quality control plan, such plan supersedes any regional plan to the extent of any inconsistency. Such supersession is automatic. The regional board need not act to delete the inconsistencies from its plan before the State Board's plan is effective. Any policy or plan adopted or approved by the State Board is binding on other state agencies unless specifically authorized to the contrary by statute. Except for prohibitions or specific limitations in plans, plans and policies are not really self-implementing. That is, either the State Board or a regional board must take some further action to make the plan or policy come alive and have a real world impact. Such an action can be the adoption of waste discharge requirements, NPDES permits, cleanup and abatement orders, or any of the myriad of other enforcement orders available to a regional board. In the next section of this article, we will see how the system of requirements, permits, and enforcement makes the water quality protection program work.

173. *See, e.g.*, State Water Resources Control Board Resolution 68-16 (establishes a general policy of nondegradation for both surface and ground waters). However, this policy does have some flexibility to allow changes in water quality where it is in the best interests of the state. *Id.*

174. The eight policies are: the water quality control policy for the enclosed bays and estuaries of California, the water quality control policy on the use and disposal of inland waters used for powerplant cooling, the state policy for water quality control, the statement of policy with respect to maintaining high quality of waters in California, the policy and action plan for water reclamation in California, the policy on the disposal of shredder waste, a policy regarding the regulation of underground tanks, and a policy defining "sources of drinking water."

B. Waste Discharge Requirements and NPDES Permits

The water quality portion of this article began with a discussion of the difference between waste discharge requirements and NPDES permits. It is an important concept and presented early in order to prepare the reader for the following discussion.

There are in California about 8,500 dischargers of waste to surface and ground water presently under waste discharge requirements or NPDES permits. About 1,200 of the 8,500 have NPDES permits. By volume, most of the waste discharged is to the ocean from the cities of San Diego and Los Angeles, Los Angeles County Sanitation District, Orange County Sanitation District, the city of San Francisco, and numerous other cities and special districts along the coast. About 5,600 of the dischargers discharge their waste to non-ocean or other non-saline waters. This means they either discharge to fresh surface waters, or to land overlying groundwater or directly to groundwater, either of which may be used for drinking water or for agricultural uses. In any event, a massive number of discharges must be regulated in order to protect fresh water for domestic and other uses.

Because most of the dischargers in the state are regulated via waste discharge requirements rather than NPDES permits, it will be simpler to explain the regulatory enforcement process in terms of the state-only waste discharge requirements. However, it is important to remember that all discharges of waste to surface waters have special requirements and time lines that are mandated by the Clean Water Act and implemented by the NPDES permits that are issued by the state.

The Porter-Cologne Act requires that anyone who is discharging waste or proposing to discharge waste which could affect the quality of the state's waters must file a "report of waste discharge" with that regional water quality control board within whose jurisdiction the discharge lies.¹⁷⁵ Also, a report of waste discharge is required if there is a material change in the volume, location, or nature of the discharge. Dischargers who fail to file a report are subject to a wide variety of enforcement actions by the regional board (including fines) or a court action by the attorney general or a county district attorney.

175. CAL. WATER CODE § 13620 (West Supp. 1988).

In simple terms, all dischargers of waste to the waters of the state must apply for and receive from a regional board a waste discharge requirement. This is a document which tells a discharger what it can and cannot discharge to the waters of the state. Such waters include the ocean, all bays and estuaries, lakes, rivers, streams, and all ground water.¹⁷⁶ Assuming that the report of waste discharge is properly and completely filed with the regional board (with the necessary filing fee), then the regional board staff analyzes the discharge and prepares draft waste discharge requirements. The draft is sent to the discharger and other interested persons, such as other public agencies which may use the water, the Department of Fish and Game and others. The requirements are then placed on the agenda of the regional board meeting for adoption by the full board. Regional boards may modify the staff recommended requirements.¹⁷⁷

Adoption of waste discharge requirements by a regional board is a quasi-judicial action. Therefore, all parties, including the discharger, any person opposed to the discharge, and the regional board staff, can present direct testimony and be subject to cross examination. The requirements must implement the water quality control plans and protect the beneficial uses of the receiving waters.¹⁷⁸ If there is no water quality control plan for a body of water, then the regional board determines what the beneficial uses are of the receiving water and what the quality of the discharge must be to protect those uses.¹⁷⁹ The board then sets the limits on the discharge.

At this point, it is important to emphasize two key points of law. First, the Porter-Cologne Act states without reservation that all discharges of waste to the waters of the state are privileges and not rights, and even if a discharger has waste discharge requirements, the discharger has no vested right to continue the discharge.¹⁸⁰ That is, the regional board could order termination or reduction or modification of the discharge. The second important concept is that the regional board need not allocate all of the waste assimilative capacity of the receiving water.¹⁸¹ This means that the regional boards should be conservative in determining how much waste can be discharged in

176. *Id.* § 13050(e) (defines waters of the state as "any water, surface or underground, including saline waters, within the boundaries of the state").

177. *Id.* § 13223(a) (West 1971). The actual adoption of waste discharge requirements is a board function and cannot be delegated to the board's executive officer or the staff. *Id.*

178. CAL. WATER CODE § 13263(a) (West 1971).

179. *Id.*

180. *Id.* § 13263(g) (West 1971).

181. *Id.* § 13263(b) (West 1971).

each instance. The boards must anticipate that some sewage treatment facilities and industrial treatment facilities will malfunction from time to time and that there will be accidents and unanticipated spills and discharges by persons intent upon avoiding the law. The boards must also anticipate growth and additional discharge. Each waste discharge requirement contains monitoring requirements. These requirements must be met by the discharger at his own expense. Major dischargers, such as cities and large industries, will generally have employees prepare the monitoring reports. Smaller dischargers may contract out the work to private companies. In either event, the discharger is responsible for the data submitted and either the discharger or his agent signs under penalty of perjury that the data submitted is correct.¹⁸²

The regional boards have a staff of inspectors who spot check the dischargers. In general, the larger dischargers are inspected more often than the smaller ones. The Porter-Cologne Act provides that regional board staff may inspect a discharge with the consent of the owner, and if the owner does not consent, then the regional board can get an inspection warrant from the appropriate superior court.¹⁸³ Only rarely in the last seventeen years has a regional board needed an inspection warrant.¹⁸⁴ The regional board is subject to special rules when regulating individual disposal systems, such as septic tanks,¹⁸⁵ and solid waste sites or former solid waste sites.¹⁸⁶ Special rules also apply to the regulation of sites that accept hazardous waste.¹⁸⁷

C. NPDES Permits

As previously mentioned, the enactment of the Porter-Cologne Act in 1969 provided for the complete regulation of the discharge of waste and other actions that could impact the quality of surface and ground waters. In 1972 Congress enacted the Federal Water Pollution Control Act (Clean Water Act).¹⁸⁸ The Clean Water Act provided for a permit

182. *Id.* § 13267(b) (West Supp. 1988).

183. *Id.*

184. *See Joseph v. Masonite Corp.*, 148 Cal. App. 3d 6, 195 Cal. Rptr. 629 (1983) (warrant held valid).

185. CAL. WATER CODE §§ 13280-13283 (West Supp. 1988) (policies and requirements concerning individual disposal systems).

186. *Id.* § 13273 (West Supp. 1988).

187. *See, e.g., id.* § 13261(c) (West Supp. 1988) (criminal penalty for persons who dispose or discharge hazardous waste and knowingly furnish a false report on the activity).

188. 33 U.S.C.A. §§ 1251-1376 (1986) (Congress enacted the statute over President Nixon's veto).

system to regulate the point discharge of pollutants to the navigable waters of the United States. After some judicial interpretation, navigable water was defined as any surface body of water. The Environmental Protection Agency (EPA) was charged with its implementation. The Act also provided that if a state had sufficient authority, it could implement a permit system in lieu of the system developed by the EPA.¹⁸⁹

In late 1972 the California Legislature enacted a law amending the Porter-Cologne Act to provide the necessary authority for the state to operate a NPDES permit program in lieu of the federal system. This law is codified in Chapter 5.5, Division 7 of the California Water Code. Chapter 5.5 contains selected provisions of the federal act which are necessary for California to substitute its program for the federal system. As a result, the issuance of the California permit satisfies both state and federal law. The provisions amending the Porter-Cologne Act include: the authority to issue permits for a fixed term not exceeding five years, inspection and monitoring, notice to the public, notice to the EPA, notice to any other affected state, protection of navigation, enforcement, a pretreatment program, and the necessary enforcement authorities. By the terms of Chapter 5.5, the state also incorporates by reference existing and future changes in the federal Clean Water Act and the implementing regulations.¹⁹⁰

To incorporate the previous regulations under the Porter-Cologne Act, Chapter 5.5 states that the permits for the point source discharges of pollutants to surface waters are subject to the other provisions of the Porter-Cologne Act that are consistent with Chapter 5.5.¹⁹¹ This means that the other provisions of the Porter-Cologne Act supplement the provisions of Chapter 5.5.

In the discussion above we pointed out the need for a discharger to file a report of waste discharge. The State Board's regulations provide that a report of waste discharges is the equivalent of a NPDES permit application.¹⁹² When the regional boards issue NPDES permits, they must ensure compliance with all terms and conditions of the federal Clean Water Act and regulations adopted under it by the EPA. This means that, to fully understand how the regional

189. See 33 U.S.C.A. § 1342(b) (1986) (state permit program requirements).

190. See *id.* (the statute does provide for incorporation by reference; it was necessary to substantially amend Chapter 5.5 in 1987 in order to fully comply with the 1987 changes to the federal Clean Water Act).

191. CAL. WATER CODE § 13372 (West Supp. 1988).

192. CAL. ADMIN. CODE tit. 23, § 2235(b) (1987) (definition of report of waste discharge).

boards integrate the NPDES permit system into the Porter-Cologne Act, the practitioner must be fully knowledgeable not only with state law and regulations, but with the federal Clean Water Act and regulations adopted under it. This is important because the EPA regulations determine not only the procedures and time lines to be followed in issuing NPDES permits, but some of the water quality standards and discharge limits. An important part of the NPDES permit program is the so-called pretreatment program. This program was not a part of the original Porter-Cologne Act but was inserted with the adoption of Chapter 5.5. Simply stated, the pretreatment program gives the state the authority to apply to industrial users of Publicly Operated Treatment Works pretreatment standards promulgated by the EPA. Such standards are limitations on what can be discharged to a municipal sewer system. The standards are enforced to protect the treatment works from damage due to industrial discharges and to protect the receiving waters from substances that could pass through the treatment works untreated and thus impair the quality of the receiving waters. The state can enforce the pretreatment standards directly against the discharger to the municipal treatment works or may enforce the standards through the permit issued to the publicly operated treatment works itself. The latter is the preferred alternative. By virtue of the state and federal law, no state regulation, permit, or order is required for the State and regional boards to take an enforcement action against industrial users for violation of pretreatment standards.¹⁹³

D. State Water Resources Control Board

We have discussed the regional water quality control boards and some functions of the State Board in terms of programs. However, in order to have a complete picture of water quality control in California, we must discuss more fully the State Water Resources Control Board (State Board) as an entity and consider some of its functions that do not fit neatly under any specific heading.

The State Board has wide ranging authority to hold any hearings and conduct any investigations in any part of the state necessary to

193. Water quality enforcement actions can be taken by either a regional board or the State Water Resources Control Board. During the last seventeen years, however, the State Board has not taken a single enforcement action against any discharger of waste to the waters of the State of California. The State Board received and acted upon more than 400 petitions to review regional board actions during the same time period. In general, any enforcement action required under the Porter-Cologne Act is taken by a regional board.

carry out its vested powers.¹⁹⁴ The State Board is also the state agency designated as the state water pollution control agency for purposes of the federal Clean Water Act.¹⁹⁵ Therefore the State Board (or the regional board at the direction of the State Board) is the only agency that directly implements the federal Act. This procedure allows the EPA to deal with one agency for the implementation of the Clean Water Act.

The State Board also conducts a wide range of investigations and research regarding water quality issues. Some of this work is done by State Board staff, while some is contracted out to other agencies, colleges and universities, or the private sector.¹⁹⁶

Another important Board function is preparation of the budget. While the regional boards have a large degree of autonomy, it is the State Board which is responsible for the preparation of its own budget and the budget of the regional boards.¹⁹⁷ This authority allows the State Board to exercise significant policy influence on the regional boards.

Also, it is the State Board which adopts administrative regulations for the implementation of the legislative mandates. This is an important function since it ensures statewide uniformity of the water quality program.

The State Board is also responsible for the operation of a complex grants and loans program. Through loans and grants the state funnels federal funds and state bond funds to local agencies for the construction of sewage treatment facilities.¹⁹⁸ In recent times, the grants were approximately 87.5% of the eligible costs of the treatment facility. This was, of course, a great incentive for local agencies to build needed facilities. Use of grant monies has allowed the facilities to consistently meet their waste discharge requirements. However, the state-federal assistance program is now phasing into a loan program, and only time will tell whether the loan program will provide the same incentive as the grant program.

194. CAL. WATER CODE § 183 (West Supp. 1988).

195. *Id.* § 13160 (West Supp. 1988).

196. *Id.* §§ 13161-13163, 13165-13166 (West Supp. 1988).

197. *Id.* § 13168 (West 1971).

198. *See id.* §§ 13400-443 (West Supp. 1988) (state financial assistance policies and procedures); 13450-13469 (also known as the Water Conservation & Water Quality Control Board Law of 1986); 13600-13612 (West Supp. 1988) (federal assistance program); 13955-13969 (also known as Clean Water and Water Conservation Bond Law of 1978); 13970-13983 (West Supp. 1988) (also known as the Clean Water Bond Law of 1970); 13985-13998 (West Supp. 1988) (also known as Clean Water Bond Law of 1974) (West Supp. 1988); 13999-13999.16 (West Supp. 1988) (also known as the Clean Water Bond Act of 1984).

The State Board also licenses the people who operate sewage treatment facilities to make sure that competent personnel are employed. Competent personnel are more likely to protect the public's investment and ensure that waste discharge requirements will be met.¹⁹⁹ Finally, the State Board has the authority to commence an adjudication to protect the quality of ground water. This authority has been exercised only once during the last eighteen years.²⁰⁰

E. State Board Review of Regional Board Action

The Porter-Cologne Act provides that any aggrieved person may petition the State Board to review specified actions or failure to act by a regional board.²⁰¹ The petition must be received by the State Board within thirty days of the regional board action or within sixty days after a request has been made by the petitioner to the regional board to act.²⁰² The State Board can additionally review on its own motion actions or failure to act by a regional board at any time. Therefore the State Board is not constrained by the thirty and sixty day limits that apply to the petitioner.²⁰³

There have been over 500 petitions filed with the State Board since January 1, 1970. Petitioners come in all forms. They can be the discharger petitioning for review of his waste discharge requirements alleging that they are too strict. Petitioners can also be a public interest group or an individual alleging that the requirements are not strict enough. Petitioners can be other public agencies, such as the state Department of Fish and Game or a local public agency. The basic test for petitioners is that they are "aggrieved."

If the petition is filed in a timely manner, the State Board must decide whether or not to accept it.²⁰⁴ If the State Board does not accept the petition, the regional board action becomes final and the petitioner is free to seek a judicial remedy. Experience has been that

199. *Id.* §§ 13625-13634 (West Supp. 1988) (waste water treatment plant certification and operator certification requirements).

200. *Id.* §§ 2100-2102 (West 1971).

201. *Id.* § 13320 (West Supp. 1988). Not all regional board actions are reviewable under this section. For example, a water quality control plan adopted by a regional board is not reviewable under this section because the State Board must approve the plans under another section of the law before the plan can become effective. Most regulatory actions of a regional board involving adoption of waste discharge requirements, NPDES permits, and any subsequent enforcement actions are subject to State Board review.

202. *Id.* § 13320(a) (West Supp. 1988).

203. *Id.*

204. CAL. ADMIN. CODE tit. 23 §§ 2050-2053 (1981) (petition procedures).

few judicial actions have been filed based upon State Board refusal to accept a petition.

If the Board accepts a petition, it has 270 days to deal with the merits of the issues raised therein.²⁰⁵ The evidence before the State Board is the record before the regional board and any other relevant evidence which, in the judgment of the State Board, is required.²⁰⁶ In general, this means that the Board's staff will cull through the regional board record and make a preliminary decision as to whether or not the record contains answers to the issues raised in the petition. If the record is sufficient, then the Board does not hold a hearing but prepares a draft order in response to the petition based solely upon the record before the regional board. If the record is insufficient, then the Board will supplement the record after notice and a hearing or upon stipulation of the parties. The hearing is a typical quasi-judicial hearing, where evidence is taken under oath and cross-examination allowed. The State Board may find the regional board action or inaction to be appropriate and proper or inappropriate and improper.²⁰⁷ In the latter case, the State Board has the options of directing the regional board to take the appropriate action, taking the action itself, or referring the matter to another state agency having jurisdiction.²⁰⁸ More often than not, the State Board has found regional board actions to be appropriate and the petition is then dismissed. When the State Board finds that the regional board action is inappropriate (or partially inappropriate, as is usually the case) the State Board will ordinarily direct the regional board to take the appropriate action.

Seldom is a State Board order in response to a petition appealed to the courts. If an appeal is taken, it must be filed within thirty days of the State Board action.²⁰⁹ The evidence before the reviewing court is the record before the State Board, including the regional board's record and any other relevant evidence which, in the judgment of the court, should be considered.²¹⁰ In rendering its decision, the court is directed to apply its independent judgment of the evidence.²¹¹

205. *Id.* § 2052(d) (1981).

206. CAL. WATER CODE § 13320(b) (West Supp. 1988).

207. *Id.* § 13320(c) (West Supp. 1988).

208. *Id.*

209. *Id.* § 13330(a) (West 1971).

210. *Id.* § 13330(b) (West 1971).

211. *Id.*

F. Enforcement

There are a wide variety of enforcement actions which regional boards can take to ensure that NPDES permits and waste discharge requirements are met. The enforcement action can be administrative (taken by the regional board itself) or judicial. If judicial enforcement is selected the matter is referred to the State Attorney General which then takes the case to the appropriate state or federal court. Until recently, the preferred enforcement technique was reference to the attorney general for both injunctive relief and the imposition of civil monetary remedies by the courts. Now it appears that the preferred enforcement process, at least for civil monetary remedies, is an administrative action. We shall begin our discussion of enforcement with this administrative process.

Effective January 1, 1985, the regional boards were empowered by statute to administratively impose civil liability on dischargers for a variety of violations of the Porter-Cologne Act.²¹² If administrative civil liability is imposed for non-NPDES dischargers, the remedy is in lieu of other Porter-Cologne Act civil liability provisions.²¹³ The process of imposing civil liability begins when the regional board executive officer issues a complaint to the alleged violator.²¹⁴ The complaint must be served personally or by certified mail. The complaint must state the action or inaction which constitutes the violations and the citation of authority for imposing the liability. The complaint also states the amount of the proposed liability. In determining the amount of liability, the regional board executive officer must take into account:

the nature, circumstances, extent, and gravity of the violation or violations, whether the discharge is susceptible to cleanup or abatement, and with respect to the violator, the ability to pay, the effect on ability to continue in business, any voluntary cleanup efforts undertaken, any prior history of violations, the degree of culpability, economic savings, if any, resulting from the violation, and such other matters as justice may require.²¹⁵

212. See, e.g., *id.* §§ 13261(b)(1), (d)(1) (West Supp. 1988) (civil liability for filing a false report or failing to file a report); 13265(b)(1), (d)(1) (West Supp. 1988) (civil liability for discharging waste); 13268(b)(1), (d)(1) (West Supp. 1988) (civil liability for failure to furnish or furnishing false technical or monitoring program reports); 13350(d)(1), (f)(1), (e)(1) (West Supp. 1988) (civil liability for various cleanup and abatement violators).

213. *Id.* § 13326 (West Supp. 1988). But see *id.* § 13385 (regarding NPDES permits).

214. *Id.* § 13323 (West Supp. 1988).

215. *Id.* § 13327 (West Supp. 1988).

The complaint must also state that a hearing will be conducted by the regional board or a panel thereof within sixty days after service unless waived by the alleged violator.

The provisions of the Porter-Cologne Act governing administrative civil liability state that such orders become final and effective upon issuance. If no person petitions for review within thirty days the "order shall not be subject to review by any court or agency."²¹⁶ This means that such orders cannot be reopened or reconsidered by a regional board if no person petitions for State Board review within thirty days after the regional board issues the order. In addition to the issuance of orders imposing administrative civil liability, the regional boards have numerous other enforcement options. First, the regional board can issue a cease and desist order.²¹⁷ Such an order is based upon the violation of a waste discharge requirement, a NPDES permit, or a prohibition in a water quality control plan. The cease and desist order was especially important in the early days of the Porter-Cologne regulatory system. The order enabled the regional boards to prevent new connections to a publicly operated sewage system if such a system was violating or threatening to violate its waste discharge requirements.²¹⁸ In the 1970s, there were numerous limitations placed on new connections to sewer systems by the regional boards. As the state-federal grants and loans program funded greater

216. *Id.* §§ 13323(d), 13324(a) (West Supp. 1988).

217. A cease and desist order is based upon a violation of waste discharge requirements, a NPDES permit or a prohibition in a water quality control plan. The violation can be actual or threatened (order must be adopted by the regional board itself and cannot be issued ex parte by the board's executive officer). *See id.* § 13223 (West 1971).

The cease and desist order can direct compliance forthwith, in accordance with a time schedule set by the board, or in the event of a threatened violation, direct appropriate remedial or preventive action. The cease and desist order is widely used by the regional boards as a device to place dischargers on a strict time schedule. If the order is violated, the boards will generally refer the violations to the State Attorney General for enforcement action such as injunctive relief. *Id.* § 13331 (West 1971).

The Attorney General may also, at the request of the regional board, seek to impose civil liability on the violator. *See id.* § 13350 (West 1971) (cease and desist orders based upon violations of waste discharge requirements and California Water Code section 13385 regarding cease and desist orders based upon violations of NPDES permits).

218. *Id.* § 13301 (West Supp. 1988). This section provides in part that the regional boards, "in the event of an existing or threatened violation of waste discharge requirements in the operation of a community sewer system, [may issue] cease and desist orders [to] restrict or prohibit the volume, type or concentration of waste that might be added to such system by dischargers who did not discharge to the system prior to the issuance of the cease and desist order." *Id.* *See* CAL. ADMIN. CODE tit. 23, §§ 2240-2245 (cease and desist orders enforcement procedure). *See also* *Morshead v. California Regional Water Quality Control Bd.*, 45 Cal. App. 3d 442, 119 Cal. Rptr. 586 (1975); *Pacific Water Conditioning Ass'n v. City of Riverside*, 73 Cal. App. 3d 546, 140 Cal. Rptr. 812 (1977) (policy and purpose of cease and desist orders).

numbers of publicly operated treatment works to update their physical facilities, the need for limitations on new connections grew less and less. Today, it is not so much a question of sewage treatment plants being over capacity that causes violations as it is operation and maintenance problems. While cease and desist orders are still adopted in appropriate cases, the regional boards are increasing the use of the administrative civil liability orders²¹⁹ and the clean up and abatement order.²²⁰

The use of these two orders is important because they can be issued on short notice and deal with a violation almost instantly. The Porter-Cologne Act allows the regional board executive officer to issue the orders directly, generally without a regional board hearing. If either order is not complied with, the regional board itself can request judicial enforcement by the State Attorney General.²²¹

In emergency situations the regional board has the option of going directly to court to seek a judicial remedy. An emergency situation arises where there is a discharge of waste within the board's region which is taking place or threatening to take place which does or will cause a pollution or a nuisance.²²² While this appears to be a potent weapon to stop pollution, it has rarely, if ever, been used.

If there is a violation of a regional board enforcement order, the regional board can seek judicial enforcement. The board can seek injunctive relief or, in some cases, civil monetary remedies.²²³ For

219. See CAL. WATER CODE §§ 13261(b) and (d), 13265(b)(1) and (d)(1), 13268(b)(1) and (d)(1), 13323-13327, 13350(d)(1), (e)(1), and (f)(1), 13385(c) and (e) (West 1971 & Supp. 1988).

220. See CAL. WATER CODE § 13304 (West Supp. 1988 (cleanup and abatement order can and generally is issued by the executive officer of a regional board). The order is issued ex parte without notice or a hearing and is essentially an administrative injunction directing a discharger to do something or stop doing something. *Id.* The cleanup and abatement order can be based upon a violation of existing regional board orders (e.g., waste discharge requirements) or where someone has discharged waste or threatens to discharge waste. The effect of the order is to mandate the discharger to "clean up [the] waste [discharged] or abate the effects thereof or in the case of threatened pollution or nuisance, to take other remedial action." *Id.* § 13304(a) (West Supp. 1988). If the discharger fails to comply with a cleanup and abatement order the regional board can seek injunctive relief in the courts.

221. CAL. WATER CODE § 13340 (West 1971).

222. *Id.*

223. See *id.* §§ 13304, 13331, 13340, 13361, 13386, 13522.7, 13525, 13951 (West 1971). See also *id.* §§ 13173(e), 13261(b)(2) and (d)(2), 13265(b)(2) and (d)(2), 13268 (b)(2) and (d)(2), 13350, 13385(b), (c) and (e) (West 1971 & Supp. 1988) (civil monetary remedies). All monies collected under division 7 of the Water Code are placed in the State Board's clean up and abatement account. *Id.* § 13441 (West 1971). Funds in the account can be used for cleanup of waste by a regional board or other public agency. *Id.* § 13442 (West 1971). In addition, the regional boards can use the funds to remedy a significant unforeseen water pollution problem posing an actual or potential health threat for which the regional board does not have adequate resources budgeted. *Id.* § 13443 (West 1971). In practical terms the demand for funds far

some violations, the regional boards can also seek criminal penalties.²²⁴

The enforcement actions are at the discretion of each individual board, and, as a result, there may not be strict uniformity as to method or level of enforcement from region to region. Also, it should be noted that levels of civil and criminal liability will vary depending on whether the discharger is regulated by waste discharge requirements or a NPDES permit.²²⁵

II. THE GROWING EDGE OF THE LAW—REGULATION OF HAZARDOUS WASTE

The provisions of the Porter-Cologne Act contain a vast array of authority to protect water quality. However, certain statutory provisions in the California Health and Safety Code supplement the Porter-Cologne Act. First, there are the general statutory provisions regarding the regulation and enforcement of hazardous materials and hazardous waste.²²⁶ Then, beginning in 1983, statutes were enacted to deal with three specific types of perceived hazardous waste problems—surface impoundments containing hazardous waste, underground storage of hazardous substances, and underground injection of toxic substances. While these three statutes were designed to protect water quality, they were not codified as part of the Porter-Cologne Act. Instead, they were codified as a part of general laws relating to hazardous waste in the Health and Safety Code. In November of 1986 the voters approved an initiative measure entitled "The Safe Water Drinking and Toxic Enforcement Act of 1986" (commonly known as Proposition 65). This Act attempts to regulate the discharge or release of cancer causing chemicals and reproductive toxins to drinking water. This Act also added to or amended existing provisions in the Health and Safety Code. Neither the three statutory enactments nor Proposition 65 fits neatly into the Porter-Cologne Act process. Instead, each of the four laws has its own set of definitions or incorporates by reference existing definitions in the Health and Safety Code. The

exceeds the funds in the cleanup and abatement account and therefore the State Board exercises its discretion in determining how the funds in the account are dispersed. *See id.* §§ 13441(c), 13442, 13443 (West 1971).

224. *Id.* §§ 13261(c), 13265(a), 13268(a), 13271(c), 13272(c), 13387, 13522.6, 13525.5, 13526, 13754 (West 1971).

225. In general, the civil monetary remedies and criminal penalties associated with NPDES permits reflect the level of remedies and penalties in the federal Clean Water Act.

226. *See* CAL. HEALTH & SAFETY CODE §§ 25130-25250 (hazardous waste control), 25300-25395 (hazardous waste substance account, which is commonly called the State Super Fund).

existence of the Porter-Cologne Act and the Health and Safety Code statutes does not necessarily mean that they cannot be implemented in an integrated manner to protect water quality. However, the multiple statutes do mean that persons dealing with these statutes need to exercise caution.

A. Permitting and Enforcement—General Regulation of Hazardous Waste

Chapter 6.5 of division 20 of the California Health and Safety Code contains detailed provisions for the regulation of hazardous waste. Included in Chapter 6.5 is regulation of generators of hazardous waste, waste haulers, hazardous waste facilities, hazardous waste disposal, and land use.²²⁷ In general, the hazardous waste laws are a comprehensive “cradle to grave” program directed toward preventing the release of hazardous substances into the environment. These laws will, if properly implemented, greatly reduce the adverse impact of such waste on water quality. These laws are implemented by the Department of Health Services.

The Health and Safety Code provisions regarding hazardous waste and the Porter-Cologne Act water quality control provisions operate jointly in the issuance of permits for hazardous waste facilities and in enforcement actions. A hazardous waste facility permit is required for a storage or treatment facility, waste transfer station, resources recovery facility, or waste disposal site.²²⁸ Disposal of hazardous waste at a facility without a permit is prohibited.²²⁹ The permits are issued by the Department of Health Services.²³⁰ Since the Department of Health Services would be issuing permits which may affect water

227. The state's hazardous waste control law is designed to ensure, in part, that the state has the minimum requirements to implement the federal Resources Conservation and Recovery Act (RCRA).

228. CAL. HEALTH & SAFETY CODE § 25201 (West Supp. 1988). Such permitting requirements are in addition to the State Water Board's regulations. See CAL. ADMIN. CODE tit. 23 §§ 2510-2601. However it is important to note that the Department of Health Services and State Water Board use the same definition of hazardous waste as contained in California Health and Safety Code section 25117. See also *id.* §§ 2521 (hazardous waste); 66300 (applicability). Hazardous waste is waste or combinations of wastes, which because of its quality, concentration, or physical, chemical or infectious characteristics may either: (a) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness, or (b) pose a substantial present or potential hazard to human health or environment when improperly treated, stored, transported, or disposed of, or otherwise managed. CAL. HEALTH & SAFETY CODE § 25117 (West 1971).

229. CAL. HEALTH & SAFETY CODE § 25189.5 (West Supp. 1988).

230. *Id.* at § 25200. See also 22 CAL. ADMIN. CODE tit. 23 §§ 67100-67108 (general facility standards for interim status and permitted facilities).

quality protective measures, the Department is specifically prohibited from issuing a permit which is in conflict with any determination by the State Board or regional board relating to water quality. At a minimum, the determinations of the State or regional boards would include: water quality policies; water quality control plans containing water quality objectives; and decisions, orders and requirements adopted by the respective board. Also, the permit issued by the Department of Health Services must include any limit or requirement imposed by the regional board. These requirements include those contained in waste discharge permits for the facility.²³¹ It is important to note that, with certain minor exceptions not directly related to water quality control, the state's hazardous waste control laws do not limit or abridge the administration and implementation of the Porter-Cologne Act by the state and regional boards.²³²

Enforcement and cleanup authority is available to the Water Board under the Porter-Cologne Act, even if a hazardous waste is involved. This authority is also available to the Department of Health Services and, to a certain extent, the regional boards, under provisions of the California Health and Safety Code. Cleanup can be carried out by the Department, a regional board, or a local agency. Most cleanups in California are carried out by responsible parties pursuant to a Water Board or Health Services order. Admittedly, there is not always a bright line delineating when one agency or the other will take an enforcement action. However, it is clear that, if the state must fund a cleanup, the persons responsible for the discharge must reimburse the state for all its costs plus any other penalties assessed.²³³ Both the Department and regional boards possess a wide range of administrative enforcement tools to deal with discharges of hazardous waste. The regional boards' authority has been discussed in a previous section. The administrative authority of the department includes suspension or revocation of a permit.²³⁴ One basis for a department enforcement action includes violation of provisions of the Porter-

231. CAL. HEALTH & SAFETY CODE § 25205(b) (West Supp. 1988).

232. State and regional Porter-Cologne authority is specifically reserved in California Health and Safety Code section 25159.22 (Toxic Injection Well Control Act), in the California Health and Safety Code section 25208.11 (Toxic Pits Act) and in the California Health and Safety Code section 25299.5 (Underground Tank Law). Proposition 65 is silent on the Porter-Cologne process except to provide that drinking water is defined, in part, as water so designated in water quality control plans. *See id.* § 25249.11(d).

233. *See* CAL. HEALTH & SAFETY CODE § 25360 (West Supp. 1988); CAL. WATER CODE § 13304 (West 1971).

234. CAL. HEALTH & SAFETY CODE § 25186 (West Supp. 1988).

Cologne Act.²³⁵ Judicial actions to enforce administrative orders or to enforce other provisions of the hazardous waste laws can be brought by the state attorney general, city attorneys, and county district attorneys.²³⁶

A release of hazardous substances which is not cleaned up can result in a listing of the affected site and expenditure of state funds pursuant to the State Super Fund law.²³⁷ Remedial actions to clean up a site can be taken by persons responsible for the release, a city or county under specified conditions, the department, or if appropriate, a regional board.²³⁸ Some funds are available to the department for emergency actions.²³⁹ With certain exceptions, the department cannot expend Super Fund monies unless it issues specified orders or enters into specified agreements.²⁴⁰ The sites are ranked based upon potential hazards to the public and other criteria.²⁴¹ Remedial action plans must be prepared or approved by the department or a regional board for each of the listed sites. This shared function between the department and water boards is another example of the integrated health/water quality partnership of the two state agencies.²⁴²

B. Underground Tanks

The state's underground tank law, in general, provides for the licensing, inspection, and monitoring of underground storage tanks

235. *Id.* §§ 25186(a), 25187 (West Supp. 1988).

236. *Id.* § 25182 (West Supp. 1988). Civil actions can be instituted to collect fines pursuant to California Health and Safety Code sections 25187.5, 25187.6, 25188, 25189, 25189.2, 25189.3, 25189.5, 25191, and 25196. *See also id.* §§ 25190, 25191, 25195 (West Supp. 1988) (criminal sanctions). Apportionment of civil and criminal fines is made pursuant to the formula contained in California Health and Safety Code section 25192.

237. *See id.* § 25320 (West Supp. 1988) (defines release to include any spilling, leaking, pumping, pouring, emitting, emptying, discharging, injecting, escaping, leaching, dumping, or disposing into the environment).

238. *Id.* § 25351.2 (West Supp. 1988).

239. *Id.* § 25354 (West Supp. 1988).

240. *Id.* § 25355.5 (West Supp. 1988).

241. *Id.* § 25356 (West Supp. 1988). It should be noted that there will probably be insufficient funds at any one time to remediate all of the listed sites.

242. *See id.* § 25356.1 (West Supp. 1988). This section provides for judicial review of any final remedial plan issued by the Department or a regional board. However, California Health and Safety Code section 25356.1(h) also provides for a petition to be filed with the State Board to review any regional board action regarding a remedial action plan. While not specifically stated, it appears that any person who decides to contest a regional board action remedial action plan must first exhaust their administrative remedies by filing a petition with the State Board. *See Hampson v. Superior Court*, 67 Cal. App. 3d 472, 136 Cal. Rptr. 722 (1977). Also, responsible parties may seek arbitration regarding apportioned liability in the remedial action pursuant to California Health and Safety Code section 25356.2. CAL. HEALTH & SAFETY CODE § 25356.2 (West Supp. 1988).

containing hazardous substances.²⁴³ Tanks installed prior to January 1, 1984, require extensive monitoring in order to detect any tank leakage.²⁴⁴ Tanks installed after January 1, 1984, must have two walls in order to contain any leakage if the inside wall does not hold the hazardous substance.²⁴⁵ The law is implemented by all counties in the state and some approved cities pursuant to regulations adopted by the State Board.²⁴⁶

Permits are good for five years.²⁴⁷ Inspections are required once every three years,²⁴⁸ and an annual report to the permitting agency on tank usage, changes in tank content, or monitoring must be made.²⁴⁹ Any pipe installed after July 1, 1987, which is connected to an underground tank must be equipped with secondary containment.²⁵⁰ Double walled tanks must be designed and constructed with a monitoring system capable of detecting the entry of the stored hazardous substance into the secondary containment.²⁵¹ Unauthorized releases of contained substances must be reported to the local permitting agency.²⁵² The underground tank law does not directly address responsibility for the cleanup of unauthorized releases. However, the law does state that a local agency may request the State Board, a regional board, or the state Department of Health Services to take action pursuant to their organic laws.²⁵³ In actual practice, cleanup of hazardous material from leaking underground tanks takes a variety of forms. Cleanup and abatement orders have been issued by regional boards, which have also assessed civil liability against responsible parties. Cleanup has been ordered by some local agencies, and some leaking tanks have been placed on the State Super Fund list for remedial action.

In an effort to gain greater local participation in the cleanup of leaking underground tanks, the state's 1987-88 Budget Act authorized \$7.5 million for the cost of local agencies to oversee cleanup by responsible parties.

243. CAL. HEALTH & SAFETY CODE §§ 25280-25299.6 (underground storage of hazardous substances).

244. *Id.* § 25292 (West Supp. 1988).

245. *Id.* § 25291 (West Supp. 1988).

246. *Id.* § 25283 (West Supp. 1988).

247. *Id.* § 25285 (West Supp. 1988).

248. *Id.* § 25288 (West Supp. 1988).

249. *Id.* § 25286(c) (West Supp. 1988).

250. *Id.* § 25291(a)(7)(E) (West Supp. 1988).

251. *Id.* § 25291(b) (West Supp. 1988).

252. *Id.* § 25295 (West Supp. 1988).

253. *Id.* § 25297 (West Supp. 1988).

C. *Underground Injection of Toxic Waste*

The Toxic Injection Well Control Act of 1985 is aimed at less than ten existing injection wells in California. Given the small number of existing wells and the general prohibitory nature of the Act, it is unlikely that new injection wells will be constructed.²⁵⁴ The Injection Control Act provides that anyone using an injection well after January 1, 1960, for the discharge of hazardous waste must provide detailed information to the Department of Health Services.²⁵⁵ The use of injection wells after January 1, 1986, is prohibited unless an exemption is obtained from the Department.²⁵⁶

The Department of Health Services has the authority to prohibit the use of injection wells²⁵⁷ and inspect injection wells.²⁵⁸ Anyone applying for a permit to use an injection well must file with the Department a lengthy hydrologic assessment report.²⁵⁹

While the Underground Tank Law and the Underground Injection Control Act are fairly straightforward, the next two laws to be discussed are complex in their wording and in their application. In fact, the complexity is so great that it is only possible to give the reader a survey of the scope of the laws. Practical application is still a matter of growing interpretation.

D. *Toxic Pits Act*

The Toxic Pits Cleanup Act of 1984 grew out of research reports indicating that hazardous waste from surface impoundments²⁶⁰ was migrating to usable groundwater. The Act prohibits a discharge of

254. See *id.* §§ 25159.10-25159.25 (West Supp. 1988).

255. *Id.* § 25159.13 (West Supp. 1988).

256. *Id.* § 25159.15 (West Supp. 1988).

257. *Id.* § 25159.16 (West Supp. 1988).

258. *Id.* § 25159.17 (West Supp. 1988).

259. *Id.* § 25159.18 (West Supp. 1988).

260. Surface impoundments are defined in California Health and Safety Code section 25208.2(w) as follows:

Surface impoundment or impoundment means a waste management unit or part of a waste management unit which is a natural topographic depression, artificial excavation, or diked area formed primarily of earthen materials, although it may be lined with artificial materials, which is designed to hold an accumulation of liquid hazardous wastes or hazardous wastes containing free liquids, including but not limited to holding, storage, settling, or aeration pits, evaporation ponds, percolation ponds, other ponds, and lagoons. Surface impoundment does not include a landfill, a land farm, a pile, emergency containment dike, tank, or an injection well.

Id. § 25208.2(w) (West Supp. 1988).

liquid hazardous wastes or hazardous wastes containing free liquids into a surface impoundment after June 30, 1988. This prohibition is effective if the surface impoundment or the land immediately beneath it contains hazardous wastes and is within one-half mile upgradient from a potential source of drinking water. The Act also prohibits the discharge of liquid hazardous wastes or hazardous waste containing free liquids into any surface impoundment after January 1, 1988, unless the impoundment is double lined, contains a leachate collection system, and monitoring is conducted. Additionally, the Act requires the discharger to file a hydrologic assessment report, the factual cornerstone of the Act. While the Act allows for exemptions, few people have applied for them, apparently based on the theory that the exemption process is too expensive and the likelihood of success is remote at best.²⁶¹ If hazardous wastes are polluting state waters, the Act directs the regional boards to use their existing Porter-Cologne Act enforcement powers.²⁶²

Both mining waste and pesticide waste (e.g., rinse water from pesticide containers, crop duster airplane washing, etc.) are given special consideration in the Act.²⁶³ Special provisions also apply to persons who have closed a toxic pit or will close a toxic pit by January 1, 1988.²⁶⁴

When the discharger to the impoundment fails to meet the "cease discharge" time-line in the Act, the regional board's options include issuance of cease and desist orders, cleanup and abatement orders, administrative civil liability orders, and referral to the attorney general for judicial injunctive relief or civil monetary remedies. Failure of the discharger to file a hydrologic assessment report could result in civil liability. The Act provides for liability between \$1,000 and \$10,000 per day for each day the report has not been received by a regional board, with recovery through the courts. An injunction requiring submittal of a hydrologic assessment report may also be sought.

In addition to the above, the regional boards may also seek administrative civil liability if a hydrologic assessment report is not filed in a timely manner. Health and Safety Code section 25208.11 specif-

261. See *id.* § 25208.4(b) (West Supp. 1988) (exemption process). See also *id.* § 25208.8 (West Supp. 1988) (description of the contents of the lengthy and expensive hydrological assessment report).

262. *Id.* § 25208.6 (West Supp. 1988).

263. *Id.* §§ 25208.13, 25208.15 (West Supp. 1988).

264. *Id.* § 25208.17 (West Supp. 1988).

ically provides that the Porter-Cologne Act provisions are not limited by the Toxic Pits Act. California Water Code section 13267 authorizes regional boards to require dischargers to prepare technical and monitoring reports. Where hydrologic assessment reports have been requested under this section, administrative civil liability may be assessed against any person failing or refusing to furnish the requested information. When a person knowingly fails or refuses to submit the requested information, then the person is also guilty of a misdemeanor.²⁶⁵

Anyone working with the Toxic Pits Act must also consider the State Board's regulations on waste disposal to land, commonly known as the "subchapter 15 regulations."²⁶⁶ Whereas the Toxic Pits Act covers only surface impoundments that receive liquid hazardous waste or hazardous waste containing free liquids, subchapter 15 regulations deal in an extensive and detailed manner with all aspects of waste disposal to land. Subchapter 15 covers both hazardous and non-hazardous wastes in landfills and surface impoundments, land treatment facilities, and waste piles. The subchapter 15 regulations relating to surface impoundments that receive hazardous waste are consistent with the Toxic Pits Act. However, subchapter 15 imposes additional requirements that must be met, such as specified monitoring and construction requirements. Where the Toxic Pits Act requires liners, leachate control, and monitoring, subchapter 15 details the performance and design standards for such control measures.

An example of the far-reaching results of the Toxic Pits Act occurred in 1987 when the Central Valley Regional Water Quality Control Board applied the Act to the discharge of agricultural drainage water to evaporation ponds when the water contained selenium in amounts rendering the drainage water hazardous. The discharger first argued that the Toxic Pits Act did not apply to agricultural activities. The response from the Board was severalfold. First, the Board stated that nowhere in the Act is there any exemption or special treatment of agricultural waste as there is for mining and pesticide waste. In fact, the Act applies to "every person discharging liquid hazardous wastes . . . into a surface impoundment." It is black letter law that if a statute contains express exceptions it is presumed that no other exceptions were intended.²⁶⁷

265. CAL. WATER CODE § 13268(c) (West Supp. 1988).

266. CAL. ADMIN. CODE tit. 23, §§ 2510-2601 (1987).

267. It is also black letter law that if the language of a statute is clear, effect must be given

The discharger next argued that the Board had to comply with certain policy and planning provisions of the Porter-Cologne Act before implementing the Toxic Pits Act. As indicated at the beginning of this discussion, the Toxic Pits Act is part of the hazardous waste control laws codified in the Health and Safety Code and is generally separate from the Porter-Cologne Act. The Toxic Pits Act is quite detailed and mandates that its provisions apply. It is not implemented by the Porter-Cologne Act provisions except for some available enforcement measures.

E. Proposition 65

So far, we have seen that a general water quality control law with very general and expansive provisions (Porter-Cologne Act) is complicated in its implementation by the enactment of statutes which deal with site-specific discharges to toxic pits, underground injection, and from leaking tanks. In November 1986, the voters approved an initiative measure which further complicates the world of water quality regulation. The initiative is called the "Safe Drinking Water and Toxic Enforcement Act of 1986" and is commonly known by its ballot number—Proposition 65 or Prop. 65 for short. As an initiative measure, it could not be vetoed by the Governor and can only be amended by the legislature pursuant to the provisions contained within the proposition. Uncodified section 7 of the Proposition provides that it can be amended by a two-thirds vote of each house of the legislature to further the purposes of the Proposition. The effective date of the Proposition was January 1, 1987, but certain features of the Proposition do not come into effect until much later. Unfortunately, Prop. 65 does not appear in one location in the printed codes, but instead adds to or amends existing provisions in the Health and Safety Code.²⁶⁸ With respect to water, Prop. 65 contains a prohibition on the discharge of cancer causing chemicals to sources of drinking water. The prohibition provides that "no person in the course of doing business

to the statute's plain meaning. *See County of San Francisco v. Superior Court*, 130 Cal. App. 3d 481, 485, 181 Cal. Rptr. 775, 777 (1982). While it has been alleged that one or more legislators have stated that it was not their intent that the act apply to agriculture, it is clear that no effect can be given to an individual legislator's statement of intent. *See California Teachers Ass'n. v. San Diego Community College Dist.*, 28 Cal. 3d, 692, 699-700, 170 Cal. Rptr. 817 (1981).

268. Proposition 65 is partially codified at California Health and Safety Code sections 2549.5-2549.13. *See also* CAL. HEALTH & SAFETY CODE §§ 25189.5, 25192 (West Supp. 1988) (amended by Proposition 65). Also several sections of Proposition 65 are uncodified.

shall knowingly discharge or release a chemical known to the state to cause cancer or reproductive toxicity into water or onto or into land where such chemical passes or probably will pass into any source of drinking water, notwithstanding any other provision or authorization of law except as provided in section 25249.9.”²⁶⁹ A source of drinking water means either a present source of drinking water or water which is identified or designated in a water quality control plan adopted by a regional board as being suitable for domestic or municipal use.²⁷⁰

A “person in the course of doing business” is defined in Prop. 65 as a business employing ten or more employees.²⁷¹ This means by its very terms the Proposition does not apply to large volumes of waste water discharged from public entities, such as local sanitation districts. Nor does Prop. 65 apply to discharges by the state, county, or city governments, even if such a discharge is to a source of drinking water.

Another problem with Prop. 65 is the lack of definition of the various unique words and phrases contained in the law. In order to remedy this deficiency, the state Health and Welfare Agency (designated as the lead agency to implement Prop. 65 by the Governor) is publishing guidelines and eventually regulations containing definitions of some of the undefined words and phrases.²⁷²

The prohibition on the discharge of cancer causing chemicals and reproductive toxins does not go into effect until twenty months subsequent to the listing of the chemical by the Health and Welfare Agency.²⁷³ Since no attempt was made by the drafters of Prop. 65 to

269. *Id.* § 25249.5 (West Supp. 1988).

270. *Id.* § 25249.11(d) (West Supp. 1988). This is the only section of Prop. 65 which contains a cross-reference to the Porter-Cologne Act. Unfortunately, the water quality control plans are, in some cases vague about what is and what is not a source of drinking water. In an effort to provide a baseline on what is drinking water, the State Board has adopted a state policy entitled, “Sources of Drinking Water.” State Water Resources Control Board Resolution No. 88-63 (May 19, 1988). The Resolution defines drinking water for both surface and groundwater. All state agencies are mandated to comply with such policy unless otherwise specifically directed to the contrary.

271. *Id.* § 25249.11(b) (West Supp. 1988).

272. Such definitions will eventually appear in chapter 1, division 24, title 26 of the California Administrative Code.

273. The creation of the chemical list has been a somewhat long and involved process. First, many persons assumed that an initial list of approximately 200 chemicals would be published within three months of the effective date of the Proposition, because of the language in California Health and Safety Code section 25249.8 which purports to incorporate several cancer lists by reference. However because of other language in the Proposition which states in essence that the list of chemicals would be created by experts in the field, the Health and Welfare Agency published an initial list of 32 chemicals on February 27, 1987, and has substantially added to the list as of this writing. In fact, it is obvious that the list will continue to grow for

integrate it with the Porter-Cologne Act, all dischargers to ground or surface water which could possibly be a source of drinking water have been notified that their waste discharge requirements, NPDES permits, or enforcement orders, do not insulate and protect them from the prohibitions contained in Prop. 65.

The absolute prohibition on the discharge of the listed chemicals does have several exemptions. The first exemption states that the prohibition is not effective until the chemical discharged has been on the list of cancer causing chemicals for twenty months. The second exemption is a statutory narrative exemption from the discharge prohibition and has two parts. Part 1 provides the prohibition on discharge does not apply if the "discharge or release will not cause any significant amount of discharged or released chemical to enter any source of drinking water."²⁷⁴ Part 2 provides that the discharge or release must be in conformity with all other laws and regulations.²⁷⁵ The term "significant amount" is defined to mean "any detectable amount," except an amount which meets yet an additional exemption test. The "any detectable amount" exemption may be difficult to meet given the current ability to detect very low levels of chemicals in water.

If the discharger cannot meet part 1 of the above test, there is one additional exemption test for dischargers. Dischargers can discharge the chemical in question if they can demonstrate that:

the exposure poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer (i.e. chemicals on the list) and that the exposure will have no observable effect assuming exposure at one thousand (1,000) times the level in question for substances known to the state to cause reproductive toxicity. . . .²⁷⁶

An obvious flaw in the law is that Proposition 65 does not specify who grants this exemption. There are three current non-judicial possible alternatives for getting an exemption. First, in response to a request regarding a site specific discharge, the State Health and

the indefinite future as other chemicals are investigated in addition to the ones on the initial target list. The listing of the chemicals is based upon the recommendation of a 12 person scientific advisory panel appointed by the Governor. It is also interesting to note that of the approximately 200 chemicals on the target list, most will probably not be found in discharges. Many are drugs used in research, experimental chemicals, chemicals no longer used in California, etc. In fact it appears that probably not more than 50 chemicals will be of significance in terms of discharges to water. The big unknown however is what the list of reproductive toxins will look like. As of this writing there appears to be no agreed upon list of such chemicals.

274. CAL. HEALTH & SAFETY CODE § 25249.9(b)(1) (West Supp. 1988).

275. *Id.* § 25249.9(b)(2) (West Supp. 1988).

276. *Id.* § 25249.10(c) (West Supp. 1988).

Welfare Agency will give an advisory opinion on a safe level of a chemical in drinking water.²⁷⁷ Second, the Agency will provide “no significant risk” numbers for some chemicals the Agency thinks are the most critical.²⁷⁸ Third, the Agency has set forth an approved process by which a person could determine a safe use level on his own. However, under this process it would seem there could be multiple safe use numbers for the same chemical.²⁷⁹ A fourth option is that as a result of a lawsuit, a court could determine a safe level of use for an individual chemical in general or safe use for a chemical discharged at a specific site.

Prop. 65 is enforced by the State Attorney General, county district attorneys, and some city attorneys. Enforcement can also be initiated under certain circumstances by private persons. Enforcement actions include injunctions and civil penalties not to exceed \$2,500 per day.

A final interesting facet of Prop. 65 regarding water quality relates to the reporting of information related to the illegal discharge of hazardous waste. A person must make a report if the person knows the discharge will cause substantial injury to the public health and safety. This reporting requirement relates to hazardous waste and not the listed chemicals. There are probably thousands of hazardous chemicals. The persons who have to make such reports are so-called “designated employees” under a different law. There are approximately 20,000 such public employees at the state, county, city, and special district level. Under this reporting requirement, the public employee has difficult decisions to make. First, designated employees must report the information they receive within seventy-two hours to local officials. Failure to report could result in a felony conviction and loss of public employment. On the other hand, not every unauthorized discharge of hazardous waste will require the employee to report since not all discharges will put the employee on notice of a substantial threat of injury to public health and safety.

F. Agricultural Regulation Generally

The great agricultural machine which fuels California’s economy and provides the state, the nation, and the world with over 200

277. See *Guideline and Safe Use Determination Procedures*, CALIFORNIA NOTICE REGISTER 87, No. 11-12, A-25 (app. B) (March 13, 1987).

278. Under this procedure no request for determination and fee need be filed with the Agency.

279. See HEALTH AND WELFARE AGENCY INTERPRETATIVE GUIDELINES 87-5, DETERMINATION OF NO SIGNIFICANT RISK LEVELS FOR CARCINOGENS; 87-6 NO OBSERVABLE EFFECT LEVELS FOR REPRODUCTIVE TOXICANTS.

different crops brings with it certain practices which are now known to have serious deleterious effects on water quality. Agricultural operations have always received "special consideration" when water quality laws were prepared or enforced. For example, the term "point source of pollution" as used in the federal Clean Water Act does not include agricultural storm water discharges and return flows from irrigated agriculture.²⁸⁰ This has in effect written irrigated agriculture out of any regulation under the Clean Water Act. When the Porter-Cologne Act was enacted, statements were inserted into the legislative history by state lawmakers indicating that historically irrigated agriculture had not been regulated under previous water quality control laws.²⁸¹ For example, state officials have been aware of the potential salt balance problems since the inception of the massive state and federal water projects in the state. In 1974, the California Department of Water Resources stated in Bulletin 127-74:

The salt management problem in the San Joaquin Valley is not a unique one; the problem has plagued irrigated agriculture in all arid and semi-arid areas of the world since before the beginning of recorded history. Many flourishing early civilizations fell principally because of an inability to understand and cope with salt balance and drainage problems. The Tigris and Euphrates River Valleys in ancient Mesopotamia became mostly desert because of the accumulation of salts in the surface soil layers. Relics of abandoned irrigation systems, alkali areas, and salt accumulation extending from the Sahara Desert through ancient Persia show that a lack of proper drainage eventually resulted in the physical and economic ruin of vast agriculturally productive areas.

Today one need only fly over the great Central Valley at 30,000 feet to view the vast patches of white encrusted ground which verify this phenomenon. However, today there appears to be a new awareness

280. 33 U.S.C.A. § 1362(14) (West 1986).

281. While legislative intent statements such as these did not legally prevent the regional boards from regulating irrigated agriculture, they did have a chilling effect upon such regulation. Irrigation districts which put in "tile drains" to carry away water from the root zone and thus had point source discharges which could be easily regulated, complained that regulation of agricultural return flow should be uniform, and not based upon the type of drainage system constructed. Also, after attempts were made by the Central Valley Regional Board to propose modest regulatory measures for irrigated agriculture in the mid 1970s, a series of legislative hearings resulted in oversight of regional board practices. While the results of such hearings did not outright prevent regional board regulation, the Porter-Cologne Act was amended to provide that prior to implementation of any agricultural water quality control program, an estimate of the total cost of such program, together with an identification of potential sources of financing, shall be indicated in any regional water quality control plan. *See CAL. WATER CODE* § 13141 (West Supp. 1988).

of water quality problems resulting from irrigated agriculture. The State and regional boards have taken action to regulate such problems as herbicides in the Sacramento River, agricultural ponds under the Toxic Pits Act, and the problems of selenium at Kesterson Reservoir.²⁸²

III. STATUTORY INTERFACE OF WATER QUALITY AND WATER RIGHTS

In creating the State Board and the subsequent enactment of the Porter-Cologne Act, the legislature added certain provisions to the basic water rights law which required the State Board, in its water rights process, to consider water quality issues.²⁸³ For example, the Board can approve an appropriation of water to protect or enhance water quality.²⁸⁴ Additionally, the Board can ensure that natural flow remains in a water course to protect beneficial uses designated in a regional board's water quality control plan.²⁸⁵ The State Board has dealt with the water rights/water quality interface on many occasions. Many of these occasions arise when the Board is exercising its statutory water rights functions through the determination of waste and unreasonable use and its authority to review regional board actions. Instances of the water rights/water quality interfacing have been associated with the Imperial Irrigation District (IID) and the Salton Sea, Kesterson Wildlife Refuge, Mono Lake, and the Sacramento-San Joaquin Delta.

A. Kesterson

In 1984, the spotlight of regulatory attention focused on irrigated agriculture in a meaningful way. The State Water Board concluded that the United States Bureau of Reclamation, in its operation of the Kesterson Drainage Reservoir, discharged wastewater which reached or threatened to reach surface water. This discharge caused or threatened to cause pollution and nuisance. The reservoir, located in Merced County, had originally been designed in 1968 by the federal government as a series of ponds to regulate the flow of irrigation runoff from San Joaquin farmland into San Francisco Bay. The Board

282. See *supra* notes 260-267 and accompanying text.

283. See, e.g., CAL. WATER CODE §§ 1242.5 (release of appropriated water), 1243 (recreation; preservation of fish and wildlife), 1243.5 (preservation of source water), 1257 (consideration of relative benefit), 1257.5 (consideration of stream flow requirements), 1258 (consideration of water quality control plants).

284. *Id.* § 1242.5 (West Supp. 1988).

285. *Id.* §§ 1243.5, 1258 (West Supp. 1988).

concluded that since the Kesterson Reservoir was located within one-half mile upgradient from a drinking water source, the runoff water was hazardous waste for purposes of the State Board's subchapter 15 regulations and the Toxic Pits Act. The Board's action resulted in the historic February 5, 1985 order directing the United States Department of Interior to clean up its problem at Kesterson within a designated time. The irony of the Kesterson salt balance/pesticide contamination issues is that they all resulted from the operation of massive water projects which, under state law, are dependent upon state water rights permits and licenses. It is obvious that, with the exception of the salt balance problem, the state was oblivious to the potential for other water quality problems when the water permits were issued.²⁸⁶

B. Imperial Irrigation District

In 1984 the State Board concluded that the Imperial Irrigation District (IID) allowed approximately one million acre-feet per year of its 2.6 million acre-feet annual allotment of Colorado River water to enter the Salton Sea as irrigation return flow.²⁸⁷ The Board's decision stated that allowing such a large volume of water to drain to the sea constituted a misuse of water under the California Constitution and California Water Code.²⁸⁸ The Board ordered the IID to implement specific water conservation measures already called for by IID policies and to develop a detailed water conservation plan. Among the many issues raised during the Board's six day hearing was the

286. Both the Kesterson and IID issues were brought to the state's attention by individuals. In the IID case, a farmer within the IID filed a waste and unreasonable use petition with the state because the massive return flows made the Salton Sea rise and flood his farm land. In the Kesterson case, a person who owned land adjoining Kesterson appealed to the Central Valley Regional Board for relief after alleging that his land was being destroyed by the Kesterson operation. At the same time the United States Fish and Wildlife Service was documenting the birth defects of wildlife in the Kesterson area. When the regional board failed to grant any relief, the landowner filed a petition with the State Board requesting the Board to review the inaction of the regional board. After a series of hearings the State Board issued order No. WQ 85-1 requiring the United States to cleanup and abate the effects of the drainage water at Kesterson. The proximate cause of the birth defects to wildlife, of course, was selenium poisoning. The selenium was located in the soil and leached out when irrigation water passed through it. The Westlands Water District had placed collecting drains below the root zone to take away the highly saline leachate and the collected water was taken by open drainage ditch to the Kesterson Reservoir and there further concentrated to the ultimate harm of the wildlife. The baseline lessons of IID and Kesterson are twofold: First, one person can have a great impact on the water history of this state and second, we must always expect the unexpected!

287. State Water Resources Control Board Decision 1600.

288. CAL. CONST. art. X, § 2; CAL. WATER CODE § 100 (West 1971).

impact that water conservation within the district would have on the salinity of the Salton Sea. The modern day Salton Sea was formed in 1905 when the Colorado River broke through its banks and flooded a low lying, closed basin straddling the Imperial-Riverside counties border. After two years of flooding the basin, the river bank was repaired and the Colorado River ceased to flow to the Salton Sea.

The Sea in its present state is dependent on the drainage of irrigation return flow from the surrounding irrigation districts such as IID.²⁸⁹ Saltier than the ocean, the Sea's salinity level is approximately 39,000 ppm. Yet even at this high salinity level the sea supports an extensive fishery.²⁹⁰ However, at salinity levels above 40,000 ppm, reproduction is expected to fail. At 50,000 ppm, adult fish would be adversely affected. Reduction of inflow due to conservation by the IID will undoubtedly result in an increased salinity in the Sea. However, the salinity of the Sea has increased measurably in recent years, even without reduction of IID inflow. Based upon these facts the Board found that a prolonged delay in water conservation measures by IID would not save the fishery for an appreciable length of time.²⁹¹

C. Mono Lake

In 1940, the city of Los Angeles' Department of Water and Power was granted a permit to appropriate water by the State of California to divert water from streams tributary to Mono Lake. In 1974, the city received a license from the State Water Resources Control Board to appropriate an amount of water in accordance with the terms of the permit. The permit and license issued by the state had the net effect of reducing the inflow to Mono Lake. The reduction of inflow resulted in reduction of the lake levels and increased salinity of the lake.

As a result of a lawsuit filed by the Audubon Society, the California Supreme Court merged the public trust doctrine with the California water right system.²⁹² The court held that the State Board has a continuing duty to supervise the taking and use of appropriated water

289. During the period 1972-82, 78% of the total inflow to the Salton Sea came from IID.

290. The fishery is mainly a sport fish called corvina.

291. In November 1986, the Court of Appeal, Fourth Appellate District, Division 1, upheld the authority of the board to adjudicate the issue of unreasonable use of water by IID. *See Imperial Irrigation Dist. v. State Water Resources Control Bd.*, 186 Cal. App. 3d 1162, 231 Cal. Rptr. 283 (1986).

292. *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d 419, 658 P.2d 709, 189 Cal. Rptr. 346 (1983).

under the public trust doctrine. This duty included the water from Mono Lake tributaries. As part of this duty, the Board has the authority to reexamine diversions of water appropriated under the Water Code to determine whether the diversions should be changed to protect the public trust uses of water. The court also stated that the courts have an equal ability to determine the public trust interests. In addition the supreme court stated that both the existing uses and the uses following any reallocation of water through the reexamination must conform to the standard of reasonableness contained in article X, section 2 of the California Constitution. As of this writing, neither the State Board nor a trial court has reexamined the water right licenses for diversions from the tributaries of Mono Lake. After the supreme court decision, there followed a flurry of court cases to apply the enunciated law to specific facts.²⁹³

D. Sacramento-San Joaquin Delta

The two largest water projects in the state are the federal Central Valley Project and the State Water Project. The two projects deliver water to the vast farming areas of the Central Valley and to Southern California. Both projects divert the majority of their water from the Sacramento-San Joaquin Delta. In order for the water to be fit for domestic, industrial, and agricultural use, the quality of the Delta's water must be controlled. The primary quality problem is salt con-

293. After the Supreme Court decision in *Audubon*, the case was returned to the federal district court for a decision as to whether the federal court would exercise jurisdiction and, if it does, how it will proceed. In *Dahlgren v. City of Los Angeles*, (the so-called *Rush Creek* case) the plaintiff seeks to require the Los Angeles Department of Water and Power to release water from its dam on Rush Creek in Mono county to maintain fishlife downstream. In *Mono Lake Committee v. City of Los Angeles* (the so-called *Lee Vining Creek* case), the plaintiffs seek to require Los Angeles Department of Water and Power to release water from its dam on Lee Vining Creek in Mono county to maintain fishlife downstream. These lawsuits raise issues related to the public trust doctrine, CEQA violations, and violation of Fish and Game Code section 5937. In *California Trout, Inc. v. State Water Resources Control Board* and *National Audubon Society v. State Water Resources Control Board*, the plaintiffs seek to require the state board to revise Los Angeles' water right license to include a term or condition that requires full compliance with Fish and Game Code section 5937. The current posture of the aforementioned cases is as follows: *Cal Trout* and *National Audubon* have been argued before the California Court of Appeal for the Third District. Issues include the statute of limitations to file the action, whether the Board's continuing authority requires it to initiate a reexamination of the Department of Water and Power's license and the meaning of Fish and Game Code section 5496. *Lee Vining* was heard for a preliminary injunction in October 1987 and the court ordered Los Angeles to maintain a small flow. A study will also be done regarding fish needs. *Dahlgren* is awaiting completion of a study before going to trial for a "public trust balancing." Trial is anticipated in 1989; meanwhile the court has ordered that a small flow is to be maintained by the city.

tamination. Salt is contained in the water the tides bring up from San Francisco Bay. In order for the state and federal water projects to function properly, the salt water from the bay must be repelled from the water which is pumped south. With respect to exports of water from the Delta, the measure of the water right is as much the quality of the water as the quantity.

In order to ensure that the competing uses of the Delta's waters are properly balanced, the State Board has held, since 1967, a series of hearings and issued a series of orders. These orders have generally placed limits on the quantity of water that could be exported by the two major projects and have also placed limits on the export of water depending on its quality. Currently, the State Board is embarked on a three year hearing process on the Delta. The matters being addressed by the Board are twofold. First, the Board is undertaking a planning process to address the flow and salinity of water in the Bay-Delta estuary. Second, because it is apparent that flow and salinity in the Delta are greatly influenced by the diversion and use of water by holders of water rights, the Board will reexamine and possibly modify existing water rights to achieve planned-for salinity and flow levels in the Delta.

The relationship between water quality law and water rights law in the current hearing can most simply be described as one of seriatim planning and implementation. The relationship between the two bodies of law was recently extensively reviewed by the California Court of Appeal for the First District, in *United States v. State Water Resources Control Board*.²⁹⁴ In this case, the court defined the relationship and gave instructions on the procedural requirements to address flow and salinity problems. In that decision, the court emphasized that the water rights of the parties should not be considered in setting the water quality standards for the Delta. Rather, the standards should be set to provide reasonable protection for the beneficial uses of the waters of the Delta. In determining what is reasonable protection for the beneficial uses, the Board is instructed to consider all demands being made and to be made of the waters of the estuary, as well as the amount of water available. After a water quality control plan is adopted, it may be implemented in a variety of ways, both within and outside of the authority of the Board. Implementation measures are to be set forth and described in the program of implementation in the plan.

294. Cal. App. 3d 82, 227 Cal. Rptr. 161 (1986).

The court further held that the Board in a water right proceeding may enforce relevant parts of the water quality control plan by requiring the water right holders within the watershed of the Delta to change their diversions and use of water. If the Board required changes in diversions of water, it could do so by invoking its (1) reserved jurisdiction over certain permits under Water Code section 1394, (2) continuing authority to prevent waste and unreasonable use or unreasonable method of use or diversion of water under California Constitution, article X, section 2, or (3) continuing authority to protect public trust uses of water.²⁹⁵ In accordance with *National Audubon* and *United States*, any change in water rights the Board required would be consistent with the public interest and would be reasonable under California Constitution, article X, section 2. According to *United States*, determinations of reasonableness would require a balancing of competing public interests, public trust uses, water quality interests, water supply interests, and other matters. What constitutes a reasonable use or method of diversion is ordinarily a question of fact. It is for this very reason that the factual determinations of the Board are pivotal to any proper balancing.

²⁹⁵. See *National Audubon Soc'y v. Superior Court*, 33 Cal. 3d. 419, 189 Cal. Rptr. 346 (1983).