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The Excess in Environmental Regulation of the Water Resource

Stuart L. Somach*

I. INTRODUCTION

As has been the case with many areas of resource development, water resources development has become increasingly subject to intense environmental scrutiny and regulation. In the abstract, this regulation is appropriate. When one considers the vital role that water plays in the health of any ecosystem and the significant aesthetic values placed on the resource by society in general, a full evaluation of the environmental effect of water resource development is imperative. The level and method of evaluation, however, must be reasonable. The effects upon society and those who wish to develop the resource must be considered, and the evaluation process itself cannot be allowed to become so intimidating as to discourage reasonable and beneficial development opportunities.

This article will first explore the rationale and need for environmental evaluation and protection of the water resource. The article will then explore the various means of environmental evaluation and protection afforded the water resource, at both the federal and state levels. The article will conclude (through use of case examples) by examining the undesirable effect that excessive application of regulatory measures can have on reasonable and beneficial development,

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and will suggest methods of avoiding the demonstrated regulatory excess.

II. THE HISTORY AND NEED FOR ENVIRONMENTAL PROTECTION

A. Environmental Protection Prior to the Decade of the 1970s

It would be improper to assert that prior to the 1970s there had not developed an environmental ethic in the United States. This is particularly true if one considers the writings of Henry David Thoreau, John Muir and Aldo Leopold, among others. The writings and actions of these individuals have formed the very strong bedrock upon which the environmental legal framework of the 1970s was built. However, the evolution of the environmental ethic in the United States in many ways reflects the development of the nation as a whole. In a situation where resources are in abundance, conservation is not normally a goal.

In the United States resources were, until the last few decades, in apparent abundance and the environment generally was considered something to be subdued, not preserved. Alexis de Tocqueville in *Democracy in America* commented that:

[I]n Europe people talk a great deal of the wilds of America, but the Americans themselves never think about them; they are insensitive to the wonders of inanimate nature and they may be said not to perceive the mighty forests that surround them till they fall beneath the hatchet. Their eyes are fixed upon another sight. . . . they . . . march across these wilds, draining swamps and turning the course of rivers, peopling solitudes and subduing nature.

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1. It is beyond the scope of the instant article to trace, in detail, the history of the development of environmental law within the United States or even within California. Moreover, the field of environmental law itself can be divided into many diverse areas ranging from general environmental protections to the more specific areas of the law which regulate the use, effect and consequences of toxic substances. For the instant discussion, it is sufficient to focus briefly upon the broad protections afforded the environment, generally, and wildlife and aesthetics, in particular. The goal is to convey a sense of how the law developed to its current status rather than to make an exhaustive study of the history of the development of environmental law within the United States.

2. The writings of these individuals are extensive and would be beyond the author’s ability to summarize here. An explanation of these works and their application to the instant thesis can be found in R. Nash, *Wilderness and the American Mind*, 84-95, 122-140, 182-199 (3d ed. 1982).


Roderick Nash, in *Wilderness and the American Mind*, noted that Tocqueville, on the whole, was correct in his analysis that 'living in the wilds' produced a bias against them. Constant exposure to wilderness gave rise to fear and hatred on the part of those who had to fight it for survival and success. Although there were a few exceptions, American frontiersmen rarely judged wilderness with criteria other than the utilitarian or spoke of their relation to it in other than a military metaphor. It was their children and grandchildren, removed from the wilderness condition, who began to sense its ethical and aesthetic values.\(^5\)

As a consequence of continued growth and development in the United States, as well as the pressure created by the writings and teachings of individuals like Thoreau, Muir and Leopold, certain limited actions were taken to preserve and protect isolated resources within the United States.

Thus, at the federal level\(^6\) Yellowstone National Park was established in 1872, while the first state level preservation action was the establishment of the Adirondack Forest Preserve in 1892 by the State of New York.\(^7\) These actions were followed by the establishment of Yosemite National Park,\(^8\) and, in 1916, by the establishment of the National Parks System.\(^9\) It was not until 1968 that Congress established the National Wild and Scenic Rivers Systems, the first specific protection associated with the water resource.\(^10\) These actions, however, were not broad based in nature. Rather, they were isolated attempts to preserve certain areas which, because of their unique qualities (and vocal supporters), were determined to need preservation.

The development of more generalized environmental protections in all important respects did not materialize until the 1970s. The law until that time, with the exception of the specific type of preservation measures discussed above, was focused on traditional property law concepts. Environmental concerns were addressed through combinations of nuisance, injunctive, damage and strict liability actions.\(^11\) Although from time to time public interest and public trust concepts

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5. R. Nash, *supra* note 2, at 43.
7. Id.
appeared to limit actions that would otherwise have an adverse effect upon the environment, these concepts were utilized not to protect the environment, per se, but to protect one type of resource exploitation from another.12

Where the law did attempt to focus on more generalized environmental concerns, it did so in an inadequate manner. For example, with respect to the water resource, Congress enacted the Federal Water Pollution Control Act of 194813 (FWPCA). This Act initially was not particularly strong and delegated most of the pertinent authority to limit pollution to the states. From 1956 through 1970 the Act was strengthened on five separate occasions.14 It was not until the enactment of the FWPCA amendments of 197215 and the Clean Water Act of 197716 that adequate environmental protections for the water resource were put into place.

Far from being a time of real environmental protection, the period prior to the 1970s is best characterized as a period where legislation focused on subduing the environment. Thus, at the same time legislation was enacted to preserve certain specific and limited areas of the nation, other laws were passed, particularly related to the West, which were intended to foster development.17 Chief among these, and most relevant to the area of water resource management, was the Reclamation Act of 1902.18 This Act did not provide for any type of environmental review and was intended for “the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semi-arid lands in the . . . states . . . ”19 Indeed, it must be kept in mind that the law of appropriative water rights in the West encouraged the

17. A typical example of this type of inconsistent legislation which invariably tipped in favor of development may be the enactment of the Raker Act which allowed the damming of the Hetch-Hetchy Valley, even though it was within the Yosemite National Park. See R. Nash, supra note 2, at 161-81.
19. Id. ch. 1093, sec. 1.

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utilization of all of the water in a stream without regard to the effect that drying up a stream would have on the environment.

B. Wildlife Protection Prior to the Decade of the 1970s

Prior to 1900, the law, as it related to wildlife, was based upon a public trust concept which found that "ownership" of wildlife was vested in the states for the benefit of the people. The doctrine of state ownership of wildlife has traditionally been thought to authorize, in the absence of affirmative federal regulation or express constitutional restraint, state regulation of private activity directly pertaining to wildlife within state borders. This concept, as well as limitations on its application, were found to be constitutionally based in specific federal powers emanating from the federal treaty making power, property power, and commerce power. The history of wildlife law in the United States is a history of eroding state ownership claims in light of asserted federal supremacy.

In 1916 the United States executed a treaty with Great Britain (on behalf of Canada) for the protection of migratory birds. The Migratory Bird Treaty Act (the treaty's implementing legislation) was passed in 1918. In Missouri v. Holland, the United States Supreme Court found the treaty and its implementing Act constitutional, establishing the supremacy of the federal treaty making power as a source of authority for federal wildlife regulation. Subsequently, the United States Supreme Court found sources of authority for federal wildlife regulation within the property clause of the United States Constitution and within the commerce clause.

The major thrust toward wildlife protection began in much the same way as did the environmental protections discussed above. The legislation was focused upon the desire to protect certain species as

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a resource base or because of some unique qualities. Thus, the Migratory Bird Treaty Act was enacted to protect certain species due to the need to harbor the food source provided by those species. The Bald Eagle Protection Act\textsuperscript{27} was passed because Congress felt that the bald eagle, the nation's symbol, was threatened. These statutes, as they were originally drafted, focused upon prohibitions on takings of species and did not deal with the consequence of habitat destruction on species viability. However, Congress recognized the need to consider the effects of development, particularly water resources development, on fish and wildlife much earlier than it did in the area of general environmental review. In 1934, Congress enacted the Fish and Wildlife Coordination Act.\textsuperscript{28} Nonetheless, until the 1970s, the status of wildlife law was not too dissimilar from that of environmental law in general.

The Fish and Wildlife Coordination Act, with its broad-based requirement that water projects be reviewed for their effect on fish and wildlife, served as a model for the type of environmental review which was developed in the 1970s.

\textbf{III. Current Environmental Evaluation and Protections}

It was not until the 1970s, with the full blossoming of the environmental movement in the United States, that legal mechanisms were developed to provide the broad-based protections that were needed to guard against unnecessary environmental degradation. These statutes provide a procedural mechanism which insures that the effects of human development on the environment will be identified and fully evaluated prior to the time that the development activity is initiated. Once the effects of the development are evaluated, substantive safeguards come into play to limit human activities. As noted above, an exhaustive discussion of any or all of these statutes is beyond the scope of this article. Instead, a brief review of certain significant federal and state statutes should establish the underlying framework for further discussion.

\textbf{A. Federal Environmental Protection of the Water Resource}

\textsuperscript{27} Bald Eagle Protection Act, ch. 278, 54 Stat. 250 (1940).

\textsuperscript{28} Fish and Wildlife Coordination Act, ch. 55, 48 Stat. 401 (1934). This Act has been amended numerous times since its initial enactment.
1. The National Environmental Policy Act of 1969

The goals and purposes of the National Environmental Policy Act (NEPA)⁹⁹ are sweeping and contain Congress' most comprehensive statements recognizing the need for environmental protection. NEPA provides that the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policy contained in NEPA and that all agencies of the federal government shall prepare an environmental impact statement (EIS) for all major federal actions which significantly affect the quality of the human environment.⁹⁰

Regulations promulgated by the Council of Environmental Quality (CEQ) explain when and how to apply NEPA.³¹ They also explain how an agency is to determine if it is necessary to prepare an EIS. The regulations explain that:

The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in the Act are infused into the ongoing programs and actions of the Federal Government. It shall provide full and fair discussion of significant environmental impacts and shall inform decision-makers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is more than a disclosure document. It shall be used by Federal officials in conjunction with other relevant material to plan actions and make decisions.³²

NEPA, therefore, is not intended to preclude particular actions, but seeks to require a thorough review of the environmental implications of a given action to ensure that the consequences to the environment are considered prior to the action being undertaken. NEPA was intended to provide an environmental "hard look" that would overcome the mission oriented decision making that, until the

³⁰. Id. §§ 102, 105.
³¹. 40 C.F.R. §§ 1500-1517 (July 1, 1987).
³². Id. § 1562.1.
enactment of NEPA, was typical of federal programs. NEPA does not seek to halt any given action nor does it require environmental review to become so onerous that it precludes the action being studied. Indeed, CEQ regulations seek to reduce delay and to eliminate duplication of effort with state and local environmental requirements. The procedural focus of NEPA is in marked contrast to the specific substantive regulation contained in federal legislation enacted after NEPA.

2. The Federal Water Pollution Control Act and Amendments

The Federal Water Pollution Control Act and Amendments (FWPCA), discussed earlier, differ from NEPA in that the FWPCA is not concerned with a broad view of the environmental consequence of a given action, but rather focuses upon specific actions and prohibits them without permit. It is therefore substantive and not procedural in nature.

For the instant analysis, the FWPCA can be divided into three parts. First, the Act addresses the question of water pollution generally. Second, it deals with water quality certification. Finally, the FWPCA addresses dredge and fill permits. Each aspect of the FWPCA will be discussed briefly below.

(a) General Water Pollution Control

The general water quality control mandated under the FWPCA includes two distinct areas of control: (1) The achievement of effluent limitations on point sources of pollution, and (2) the achievement of acceptable water quality standards. The term "effluent limitation" means "any restriction established by a State ... on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters ...." The term "point sources" means "any discernible,
confined and discrete conveyance . . . from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture.\textsuperscript{336}

The discharge of pollutants into a navigable body of water from a point source is restricted. The requirement of National Pollutant Discharge Elimination System (NPDES) permits for discharges is a means of achieving and enforcing effluent limitations in receiving waters.\textsuperscript{37} The NPDES obligates point source discharges of pollutants to meet applicable effluent limitations. It is unlawful under the FWPCA to discharge pollutants over an established effluent limitation.\textsuperscript{38} As noted above, effluent limitations are to be established to protect the water resources.\textsuperscript{39} This obligation is separate from the obligation to meet “standards” that apply to “pollutants” generally.\textsuperscript{40} Thus, in relevant part, the 1972 amendments focused upon the prohibition of any discharge of pollutants from a point source without first obtaining and complying with a permit issued by the relevant entity.\textsuperscript{41}

In addition to the effluent limitation aspects of water quality control, Congress has delegated to the states responsibilities with respect to pollutants in water that are not associated with discharges from point sources.\textsuperscript{42} The goal here is to identify water in which control of pollutant discharges from point sources alone is inadequate to meet water quality standards. The standards themselves are retained as a supplement to the point source discharge limitations.\textsuperscript{43}

\textbf{(b) Section 401 - Water Quality Certification}

Section 401(a)(1)\textsuperscript{44} of the FWPCA provides, in relevant part, that:

\begin{itemize}
\item[36.] \textit{Id.} § 1362(14).
\item[37.] \textit{Id.} § 1342. The FWPCA provides that “[t]he Administrator shall not require a permit under this section for discharges composed entirely of return flows from irrigated agriculture, nor shall the Administrator directly or indirectly, require any State to require such a permit.” \textit{Id.} § 1342(l); see \textit{id.} § 1362(14) (the term “point source” does not include return flows from irrigated agriculture). The FWPCA, however, allows state regulation to be more stringent than regulation under federal law. \textit{Id.} § 1370. The State of California, in certain instances, regulates agricultural return flows as well as non-point sources of pollution. \textit{See 23 CAL. CODE REGS.} §§ 2205-2234 (1982).
\item[38.] 33 U.S.C. § 1319 (1982).
\item[39.] \textit{Id.} § 1312(a).
\item[40.] \textit{Id.}
\item[41.] \textit{See id.} §§ 1311, 1342; \textit{see also} Environmental Protection Agency v. State Water Res. Control Bd., 426 U.S. 200, 204-208 (1976).
\item[42.] 33 U.S.C. §§ 1311(b)(1)(C), 1313 (1982).
\item[43.] \textit{Id.} § 1313.
\end{itemize}
Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of . . . [the water quality standards provisions of the Act] . . . .

Section 401(a)(3)\textsuperscript{46} provides that certification obtained under the FWPCA, with respect to construction of any facility, shall fulfill the certification requirements in connection with any other federal license or permit required for the operation of such facility, unless notice to the contrary is given. Section 401 insures that facilities operating pursuant to a federal license or permit comply with the FWPCA's general provisions. Licenses or permits can be suspended or revoked for failure to obtain certification or to meet appropriate effluent limitations.\textsuperscript{47}

\textbf{(c) Section 404 - Dredge or Fill Permits}

With certain exceptions,\textsuperscript{48} section 404 of the FWPCA requires that a permit be obtained from the Secretary of the Army for the discharge of dredged or fill material into waters of the United States.\textsuperscript{49}

In order to obtain a permit to discharge dredged or fill materials, the applicant must establish that there is no reasonable and practicable alternative to the discharge in question. This is done through

\textsuperscript{45} See Federal Water Pollution Control Act § 401(a)(4), 16 U.S.C. § 1341(a)(4) (1982) (providing similar requirements for projects with federal licenses and permits, but which have not yet been operated).

\textsuperscript{46} Id. § 401(a)(3), 16 U.S.C. § 1341(a)(3).

\textsuperscript{47} Id. § 401(a)(5),(d), 16 U.S.C. § 1341(a)(5),(d).

\textsuperscript{48} See id. § 404(f), 16 U.S.C. § 1344(f).

\textsuperscript{49} Id. § 404(a), 16 U.S.C. § 1344(a). "Waters of the United States" is defined broadly and by regulation includes "wetlands." See 33 C.F.R. § 328.3 (1987). Wetlands are defined as follows:

Those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support a prevalence of vegetation typically adapted for life in saturated soil conditions.

Wetlands generally include swamps, marshes, bogs and similar areas.

33 C.F.R. § 288.3(b) (1987).
an... alternatives analysis... Where discharges are permitted, mitigation measures are usually incorporated into the permit.\textsuperscript{50}

Even after the Secretary of the Army has determined that a permit should be issued, the Administrator of the Environmental Protection Agency can independently determine, after notice and opportunity for public hearing, that the discharge of dredged or fill materials "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas" and thus preclude the issuance of a permit.\textsuperscript{51}

The FWPCA is broad-based in its protection of water quality and has application in one form or another in almost any situation involving the water resource.

3. Federal Endangered Species Act

In enacting the Federal Endangered Species Act (FESA)\textsuperscript{52} Congress determined that "all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purpose of this chapter."\textsuperscript{53} Section 7 of the FESA\textsuperscript{54} requires all federal agencies to consult with the Secretary of the Interior to insure that federal actions are "not likely to jeopardize the continued existence of any endangered species or threatened species... unless such agency has been granted an exemption for such action..."\textsuperscript{55}

A finding of "jeopardy" under the FESA precludes the action in question, unless an exemption is granted.\textsuperscript{56} In addition to the listing of species, the Act requires a designation of "critical habitat" for each species listed. The term "critical habitat" may include the geographical area occupied by the species at the time of its listing, as well as other areas determined essential for the conservation of

\textsuperscript{50} Federal Water Pollution Control Act § 404(b), 16 U.S.C. § 1344(b) (1982).
\textsuperscript{51} Id. § 404(c), 16 U.S.C. § 1344(c). See, e.g., Bersani v. Robichaud, 850 F.2d 36 (2d Cir. 1988) (discussion of veto authority).
\textsuperscript{53} Id. § 1531(o)(I). See Carson-Truckee Water Conservancy Dist. v. Clark, 741 F.2d 257 (9th Cir. 1984).
\textsuperscript{55} Id. § 1536(a)(2).
\textsuperscript{56} The Act also prohibits the taking of listed species in a manner similar to the provisions of the Migratory Bird Treaty Act and the Bald Eagle Protection Act. Id.
the species.\textsuperscript{57} Section 7 consultations require a determination of a particular action's effect upon critical habitat.\textsuperscript{58}

The FESA addresses fish and wildlife needs in a manner similar to the way the FWPCA addresses the physical environment. The physical environment, as well as fish and wildlife concerns, must be addressed under NEPA.

\section*{B. California Environmental Protection of the Water Resource}

\subsection*{1. The California Environmental Quality Act}

The California Environmental Quality Act ("CEQA")\textsuperscript{59} was adopted soon after NEPA and uses NEPA as a model. However, CEQA extends the environmental review requirements further than NEPA. CEQA, for example, does not limit itself to the effect of agency actions. Rather, environmental review (an environmental impact report or EIR) must be undertaken for "any project . . . [an agency intends] to carry out or approve which may have a significant effect on the environment."\textsuperscript{60} The EIR was intended as an informational document which must be considered by public agencies before approving or disapproving a project.\textsuperscript{61} Unlike NEPA, CEQA has a substantive quality to it. As a consequence, when an EIR identifies at least one significant effect, a public agency may not approve or carry out a project unless it finds that mitigation measures have been adopted that "mitigate or avoid" the environmental effect identified in the report.\textsuperscript{62}

\subsection*{2. The Porter-Cologne Water Quality Control Act}

The Porter-Cologne Water Quality Control Act (Porter-Cologne)\textsuperscript{63} contains the State of California's statutory framework for controlling water quality. Porter-Cologne contemplates a joint effort between local Regional Water Quality Control Boards and the State Water

\footnotesize
\begin{itemize}
\item \textsuperscript{57} \textit{Id.} § 1532(5)(A).
\item \textsuperscript{58} \textit{Id.} § 1536(a)(2).
\item \textsuperscript{59} \textit{CAL. PUB. RES. CODE} §§ 21000-1177 (West 1986).
\item \textsuperscript{60} \textit{Id.} §§ 21100, 21151.
\item \textsuperscript{61} \textit{Id.} § 21061.
\item \textsuperscript{62} \textit{Id.} §§ 21002.1(c), 21081(a), (b).
\item \textsuperscript{63} \textit{CAL. WATER CODE} §§ 13000-13009 (West 1971 & Supp. 1988).
\end{itemize}
Resources Control Board (SWRCB). It is through Porter-Cologne that the Regional Water Quality Control Boards and the SWRCB implement the provisions of the FWPCA within California. The Regional Water Quality Control Boards and the SWRCB are also the designated agencies within the State of California for the issuance of FWPCA section 401 certifications.

3. Stream Bed Alteration Agreements

While Porter-Cologne does not have a provision similar to the FWPCA section 404 permit procedure, the California Fish and Game Code does contain provisions which have a similar effect upon development activities within stream systems.64 Among other things, these Code provisions make it unlawful for any person to "substantially divert or obstruct the natural flow or substantially change the bed, channel, or bank of any river, stream or lake . . . or use any material from streambeds . . ."65 without prior notice as provided by the Code66 and an agreement (1603 Agreement) which may include conditions imposed upon the individual or entity who wishes to undertake the work in question.67

4. The California Endangered Species Act

The California Endangered Species Act (CESA)68 provides that it is state policy to conserve, protect, restore and enhance endangered species and threatened species, and their habitat, because of their ecological, educational, historical, recreational, aesthetic, economic and scientific value to the people of California; and that all state agencies, boards and commissions must join in this effort.

While these sections provide that it is state policy to conserve endangered and threatened species, this policy is tempered with a requirement that it be imposed in a "reasonable" fashion. For example, while the CESA would require the development of "reasonable and prudent alternatives" to a project69 which would jeop-

64. CAL. FISH & GAME CODE §§ 1600-1607 (West 1984).
65. Id. § 1603.
66. Id. § 1601.
67. Id. §§ 1603, 1607.
69. The term "project" means a project as defined in CEQA. See id. § 2064.
ardize the continued existence of any endangered or threatened species, it allows individual projects to proceed if "economic, social or other conditions make infeasible such [reasonable and prudent] alternatives . . . [so long as] appropriate mitigation and enhancement measures are provided." 70

The substantive application of the CESA is somewhat different than the application of the FESA. The CESA is closely tied to the provisions of CEQA, and compliance with CEQA, in essence, insures compliance with the CESA.

IV. The Excess in Environmental Regulations

As has been outlined above, the law with respect to the environment has developed from a level of little or no environmental sensitivity to its current level of considerable (and in some cases extreme) protections. Moreover, it has developed not only at the federal level, but also at the state level.

In most respects the statutory framework for environmental protection is appropriate. However, it must appear obvious to even the casual observer that the application of all of the environmental regulation described above, much of which is duplicative, on any given project by both the federal and state governments has the potential of preventing even the most worthwhile project from being developed. 71 It can do this, of course, through the substantive prohibitions contained in Acts such as the FWPCA and FESA. However,

70. Id. § 2054.

The Legislature further finds and declares that it is the policy of the state that state agencies should not approve projects as proposed which would jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat essential to the continued existence of those species, if there are reasonable and prudent alternatives available consistent with conserving the species or its habitat which would prevent jeopardy.

Furthermore, it is the policy of this state and the intent of the Legislature that reasonable and prudent alternatives shall be developed by the department, together with the project proponent and the state lead agency, consistent with conserving the species, while at the same time maintaining the project purpose to the greatest extent possible.

Id. § 2053. "The Legislature further finds and declares that, in the event specific economic, social, or other conditions make infeasible such alternatives, individual projects may be approved if appropriate mitigation and enhancement measures are provided." Id. § 2054.

71. As noted supra, the statutes outlined in this article are merely representative in nature. The potential for the abuse described herein is even more significant when one considers the hundreds of other statutes and regulations applicable to any given project that have not been discussed.
it can also preclude the development of desired projects through the application of time-consuming and costly duplicative review requirements and by imposing duplicative and sometimes conflicting substantive terms and conditions to development licenses and permits. It is this excess that must be avoided. Valid regulation and protection must not be allowed to fall victim to misuse by those who wish to block any development, no matter how reasonable, or to mindless application by those who lose sight of the environmental goals which gave birth to the statutory and regulatory structure. The problems associated with this type of excess are perhaps best demonstrated by way of two hypothetical case examples. One example is specific in nature; the other is more general.

A. Case One - Hydroelectric Development

I. The Federal Power Act

Part I of the Federal Power Act (FPA), which was originally enacted as the 1920 Federal Water Power Act, created a comprehensive scheme for issuing licenses for the purpose of constructing and operating hydroelectric facilities in any waters over which Congress had regulatory authority. Under the Act, the Federal Energy Regulatory Commission (FERC) has exclusive jurisdiction to act on an application for a license to develop a hydroelectric project on a navigable river.

As the legislative history of the Water Power Act demonstrates, the purpose of this licensing provision was to centralize in one federal agency the final authority over all hydroelectric projects within the

72. This hypothetical is modeled after the circumstances surrounding the development of the Sayles Flat Hydroelectric Project, Federal Energy Regulatory Commission (FERC) License No. 3195. 24 FERC para. 61,343; 32 FERC para. 61,290. It is important to note, however, that the problems described herein can exist with respect to any water development activity which requires federal and state involvement. Given the ambit of the environmental statutes involved, it is difficult to visualize a water project where the problems discussed herein would not exist.


reach of federal power.\textsuperscript{76} During testimony before the House Committee, the Department of Agriculture's representative highlighted the point that the purpose of the licensing provisions of the Act was to avoid duplication of work by various federal agencies.

The first step in carrying out the purpose of the bill . . . should consist in coordinating the activities of the three departments [War, Agriculture, Interior] which have to do with water power in order that whatever is done by existing agencies may be done under a consistent plan with a definite end in view that there may be no duplication of work, overlapping of functions or conflict of authority.\textsuperscript{77}

The Attorney General of the United States also interpreted the licensing provisions of the Act, stating:

\textit{[I]t seems clear that it was the purpose of the Congress to bring under this Act all future power development . . . and to concentrate in the hands of the Federal Power Commission [FERC's predecessor] all the administrative authority thereover which was in part previously distributed among the Secretaries of the Interior, Agriculture, and War. It is also clear that no further original permits, at least, were thereafter to be issued by the Secretaries.}\textsuperscript{78}

More recent analyses of the purpose of the Act have been consistent with these statements. In First Iowa Hydro-Electric Cooperative v. Federal Power Commission,\textsuperscript{79} for example, the United States Supreme Court said:

\textit{It was the out-growth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal,}

\textsuperscript{76} The House Report stated:

\textit{The [Water Power] bill . . . proposes a method by which the water powers of the country, wherever located, can be developed by public or private agencies under conditions which will give the necessary security to the capital invested and at the same time protect and preserve every legitimate public interest. It provides that the administration of water power within Federal jurisdiction, which have hitherto been handled independently by three separate departments . . . in order that duplication may be avoided, that a common policy may be pursued, and that the combined efforts of the three agencies may be directed toward a constructive national program of intelligent, economical utilization of our resources.}

H. R. REP. No. 61, 66th Cong. 1st Sess. 5 (1919) (emphasis added).


\textsuperscript{78} 32 Op. Att'y Gen. 525, 528 (1921).

\textsuperscript{79} 328 U.S. 152 (1946).
restrictive, negative approach of the River and Harbor Acts and other federal Laws previously enacted.80

It is in this context that the relationships between FERC and all other federal agencies must be understood. Although the Act gives FERC exclusive authority to issue licenses, the Act also provides a mechanism by which the valid responsibilities of these other federal entities may be exercised. Section 4(e) of the Act provides that FERC licenses “shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation.”81

In *Escondido Mutual Water Co. v. La Jolla Indians*,82 the question before the Court was whether FERC, in issuing a hydroelectric facility license, was required to include, as part of the facility license, conditions submitted by the Secretary of the Interior.83 After surveying the legislative history of the FPA, the Supreme Court concluded that:

[I]t is thus clear enough that while Congress intended that the Commission would have exclusive authority to issue all licenses, it wanted the individual Secretaries to continue to play the major role in determining what conditions would be included in the license in order to protect the resources under their respective jurisdiction.84

While FERC must include section 4(e) conditions in the license, the Secretary of another agency may not veto the Commission’s decision to issue a license. Conditions insisted upon by the Secretary must be “reasonably related” to the legitimate concerns of the Secretary.85 The Act also addresses the determination of whether the proposed conditions are “reasonably related” to other agencies’ legitimate concerns. Section 313(b) provides that FERC orders, including hydroelectric licenses, can be reviewed in the United States Court of Appeals where the licensee is located.86 If an individual or agency wishes to challenge FERC’s decisions with respect to a license condition, it may do so in the courts of appeals.87

80. *First Iowa Hydro-Electric Coop.*, 328 U.S. at 180.
84. *Id.* at 775 (emphasis added).
85. *Id.* at 777.
86. *Id.* at 777 n.19; 16 U.S.C. § 825l(b) (1982).
The statutory scheme is clear. As part of FERC's decision-making process, agencies with an interest in the property at issue submit conditions that will serve to protect the interests they are charged with guarding. FERC then makes its decision on the license and, if the license is approved, the conditions submitted by the other agencies must be included. Anyone protesting the license or the conditions has available an expeditious appeal to the court of appeals.

2. Regulatory Excess at the Federal Level

As part of the licensing process, FERC must, of course, comply with the requirements of NEPA as well as with the constraints of the FESA. Moreover, and as a direct result of the United States Supreme Court's decision in Escondido, FERC must include within the license all terms and conditions forwarded to it by other federal agencies pursuant to section 4(e) of the Federal Power Act. The statutory scheme envisioned by Congress not only places the comprehensive planning (technical and environmental) for hydroelectric licensing in FERC, but by so doing, prevents the regulatory excess that might otherwise exist if a potential licensee had to obtain necessary approvals from each of the federal agencies that might have jurisdiction over an aspect of the proposed project.

Two areas of significant environmental concern, however, fall outside of the constraints of FERC jurisdiction and, as a consequence, have the ability to disrupt the orderly process established by Congress. First, in Monongahela Power Co. v. Alexander, the District of Columbia Court of Appeals determined that the Corps of Engineers section 404 permitting authority exists concurrently with

88. State agencies may intervene in the FERC licensing process and ask that terms and conditions be added to the license to protect their interests. Moreover, Section 9 of the Act provides that FERC should be aware of all state and local laws and regulations relevant to the project, but need not compel compliance with the provisions of those laws and regulations.

89. This is exactly what happened with respect to the Sayles Flat Hydroelectric Project. The Project was planned for the South Fork of the American River on lands of the United States in Eldorado National Forest. After the Project was licensed, the United States Forest Service (which had not proposed any conditions pursuant to Section 4(e) of the Federal Power Act) insisted that the Project's proponents obtain a Special Use Permit which contained environmental mitigation measures over and above those contained in the license obtained from FERC. The costs and operational modifications caused by this additional environmental regulation had an adverse effect upon the viability of the Project. It appears, however, that since Escondido the United States Forest Service, with respect to projects licensed after the date of that opinion, has accepted the limitations imposed on its actions by Section 4(e). See supra note 86 and accompanying text.

90. 809 F.2d 41 (D.C. Cir. 1987).
FERC's licensing authority. As noted above, this section of the FWPCA requires a permit before any dredge or fill material is discharged into waters of the United States. The section 404 permitting process is itself complex and can result in terms and conditions being imposed upon the permittee which may be inconsistent with those in the FERC license.

Moreover, the Secretary of the Army or the Administrator of the EPA may deny the permit, under certain circumstances, thus precluding the project's construction even if it is licensed by FERC. There appears to be no reason why this potential conflict need exist, nor why an applicant must proceed through two federal procedural mechanisms to obtain just one license. Application of the section 4(e) procedure, outlined by the Supreme Court in *Escondido*, to section 404 questions would prevent this situation from occurring. Indeed, this was, in essence, the position advanced by the District Court which was later reversed by the Court of Appeals.91

Second, a project applicant must obtain a FWPCA section 401 water quality certification. The requirement in the abstract presents no significant problems since the certification really works independently of the project and focuses upon other substantive provisions of the law. It is intended to ensure that the project, during construction and operation, can comply with previously established water quality standards. Moreover, the certification is required early in the process, thus disclosing problems before significant investment is made by the permittee.

In application, this requirement can create significant environmental roadblocks to projects that FERC determines to be reasonable and in the public interest. This situation is discussed immediately below.

3. Regulatory Excess at the State Level

(a) FWPCA Section 401 Certification and CEQA

As noted above, in order to obtain a FERC license, a FWPCA section 401 certification is required. In California the certification is

obtained through the Regional Water Quality Control Board or, in some instances, through the SWRCB. Until recently these certifications were not difficult to obtain for small hydroelectric facilities and, indeed, most projects received a waiver. In the past few years, however, this situation has changed. The SWRCB has determined that the issuance of a section 401 certification or waiver is a "project" and, as a consequence, CEQA must be complied with prior to any action taking place. At the very least, this requirement serves to delay decision making and adds significant costs to the permitting process. Additionally, since the provision of NEPA already applies to FERC actions, the CEQA requirement is duplicative in most respects to reviews already undertaken by FERC.

Moreover, the CEQA requirement has the potential of conditioning the project in a manner inconsistent with FERC conditions; or vetoing the project by denying certification. A veto by the state (or the imposition of inconsistent conditions) could occur even if FERC determines (without consideration of the certification requirement) that the project is reasonable and in the public interest. This problem arises from the CEQA mandate to review the whole of a project and to withhold approval unless the state agency finds that mitigation measures have been adopted that mitigate or avoid the identified environmental effect.

Duplicate environmental review is improper for two reasons. First, the state's imposition of its environmental law in a manner inconsistent with FERC or in a manner calculated to veto a FERC-licensed project is impermissible under the supremacy clause of the United States Constitution. Second, even if duplicative environmental re-

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92. See Opinion of Chief Counsel, SWRCB to Regional Board Executive Officers, Division of Water Rights (March 27, 1985) (water quality certifications and small hydro project permitting).

93. With respect to the Sayles Flat Hydroelectric Project license, the Ninth Circuit, upon review of FERC Order Issuing License, determined that NEPA had not been complied with and, as a consequence, remanded the matter to FERC. See LaFlamme v. Federal Energy Regulatory Comm'n, 852 F.2d 389 (9th Cir. 1988).

94. CAL. PUB. RES. CODE §§ 21002.1(c), 21081(a), (b). In the Sayles Flat situation, the SWRCB also asserted that the Project needed to obtain appropriative rights under state law which would involve, in addition to CEQA, the application of the California public trust doctrine. See National Audubon Soc'y v. Superior Court, 33 Cal.3d 419 (1983). The SWRCB asserted that if, based upon its CEQA or public trust review, such action was warranted, it could condition a water rights permit in a manner inconsistent with the FERC license or even deny the permit, thereby vetoing the Project. Moreover, the SWRCB asserted that its review was not limited to the water resource but, under CEQA, must embrace the whole of the Project.

view was constitutional, it should be avoided because of the duplicative nature of the review involved and the increased costs associated with that excess.

It is not necessary for a single project to undergo full scale NEPA review and full scale CEQA review in addition to the environmental review required pursuant to FWPCA section 404. And it certainly is not necessary for a single project to be saddled with mitigation measures (perhaps inconsistent one with the other) imposed by all of the various state and federal agencies involved. Instead, the state agency should drop its CEQA requirement for FWPCA section 401 certification. In the event that it does not, the Administrator of the EPA should provide the needed certification in the place of the state.96

(b) FWPCA Section 404 and Department of Fish and Game Section 1603 Agreements

As noted above, in addition to the environmental review involved with obtaining a FERC license, a project licensee must undergo the environmental review associated with obtaining a FWPCA section 404 permit. This permit allows the discharge of dredge and fill materials into “waters of the United States,” Section 404 permits in most instances include terms which require mitigation measures to be undertaken as a condition to permit issuance. These conditions are in addition to those imposed by FERC in the granting of the FERC license.

In California, in addition to these two independent federal reviews of the same project and (if CEQA is applied to a FWPCA section 401 certification) a state review, the Department of Fish and Game will require anyone whose activities have a substantial effect on a river, stream, or lake to enter into an agreement which obligates the project proponent to undertake its work in a specified manner and may include terms and conditions different from and in addition to those imposed by FERC or the Corps of Engineers.97 Thus, the

96. See Federal Water Pollution Control Act § 401(a)(1), 33 U.S.C. § 1341(a)(1) (1982). “In any case where a state agency has no authority to give 401 certification, such certification shall be from the Administrator. [In the absence of action by the state within one year for application or certification, the certification requirement is waived].” Id. See also id. § 1371(c) (exempting certain aspects of the FWPCA from NEPA).

potential exists for still more environmental review of the same actions already reviewed three times.⁹⁸ Even if the section 1603 requirement is not preempted under federal law,⁹⁹ there appears no valid reason why the agreement is necessary.

B. Case Two - Waters of the United States

1. Development within Waters of the United States

As noted above, a FWPCA section 404 permit is required whenever dredge or fill material is discharged into waters of the United States. This can occur with the construction of a dam and the subsequent impoundment of water. It can also occur when land based construction is contemplated in wetlands. In either event, the environmental process is likely to be costly, time consuming, and duplicative in nature.

2. Regulatory Excess at the Federal Level

In issuing a permit pursuant to FWPCA section 404, the Corps of Engineers undertakes a basic environmental review pursuant to NEPA. In conjunction with this activity, it must undertake an “alternatives analysis” to determine if there are other ways to accomplish the project purpose than by discharging into waters of the United States.¹⁰⁰ In the case of water dependent action, such as the construction of a dam, it is presumed that no alternatives exist. In the case of discharges into wetlands, the contrary is presumed. Permits, when issued, invariably contain conditions which mandate mitigation measures.

In the process of reviewing the permit, the Corps of Engineers consults with various federal agencies. The federal agencies involved normally include the United States Fish and Wildlife Service as well as the agency which administers the lands in question (assuming federal lands are involved). The EPA also reviews the project. Each

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⁹⁸. The Sayles Flat Hydroelectric Project obtained section 404 permits and was still required to enter into section 1603 agreements with the Department of Fish and Game.
of these agencies is allowed to comment and suggest conditions to be imposed in the permit.

The EPA, however, also has the authority to review the project in its own right and can veto the Corps of Engineers' decisions.\footnote{Id. § 404(c), 16 U.S.C. § 1344(c).} Moreover, in the area of wetlands, the EPA has utilized different criteria while proceeding under the section 404(b)(1) alternatives analysis.\footnote{See, e.g., Bersani v. Robichaud, 850 F.2d 36 (2d Cir. 1988).} In the case of wetlands, this is compounded by the fact that the Fish and Wildlife Service, in commenting on applications for permits to fill wetlands, uses a more expansive definition of wetlands than does the Corps of Engineers.\footnote{The Corps of Engineers uses wetland criteria that requires a finding of three physical facts: (1) Hydrology; (2) hydric soils; and (3) support of vegetation under normal circumstances. A wetland determination by the Fish and Wildlife Service may require only one of these three physical facts.}

This overlapping authority for duplicative review on the federal level consumes an enormous amount of time and money without ever providing any degree of certainty that the process can ever be completed. This review becomes even more excessive when the existence of an endangered or threatened species is involved, or when critical habitat is at issue. Even if the activity is not precluded outright by the CESA, the permitting requirements established pursuant to section 7 of the FESA are among the most difficult with which to comply.

3. Regulatory Excess at the State Level

The excess described above becomes even more onerous when state involvement is required. State or local involvement is required in almost any wetlands situation because of the need for local land use and other related permitting. In addition to the Department of Fish and Game's involvement in the FWPCA section 404 process, if an endangered species or threatened species is involved (assuming listing under the California Act), the provisions of the CESA may come into play. This, of course, triggers not only the provisions of the CESA, but also the provisions of CEQA.\footnote{The provisions of CEQA may have already been triggered by the local permitting activity.} Additionally, any activity associated with waters of the United States may require FWPCA.
section 401 certification, which also could trigger the provisions of CEQA.

Activities that are not land based but are related to lakes, streams or rivers may also involve the Department of Fish and Game’s section 1603 agreement process. Activities such as the construction of a dam and the diversion and impoundment of water will involve the SWRCB which will proceed through a CEQA analysis as well as a public trust review of a given project.

V. METHODS OF AVOIDING REGULATORY EXCESS

Solutions to the regulatory excess described above should not be found in the weakening of any of the statutory provisions enacted to ensure basic environmental protection. That basic regulatory structure is sound. Since the abuse is created by the application of duplicative protections to a single project, solutions must be found in the reasonable application of the law, combined with consolidation of the regulatory structure.

A. Reasonable Application

The reasonable application of environmental regulation and the use of "common sense" by agencies charged with environmental protection would achieve more toward avoiding the abuses identified in this article than any other solution that could be posed. In many situations the burdens presented by the legal structure are compounded by the predisposition of agencies to block any development project, no matter how reasonable. This intransigence must be overcome.

Agencies on both the state and federal level must not engage in the apparent inter-agency competition to see which agency can be most protective of the environment. Instead of insisting upon its own environmental review and its own set of regulatory conditions, each involved agency should look to the review already conducted on the proposed development and refrain from doing that which has already been done by another agency.

In this regard, a great deal of abuse is created not by the statutory and regulatory structure, but rather by the individual agency’s staff who appear to be on a mission to preserve the environment at all costs. A common sense solution to the problem, however, will undoubtedly fail without some type of legislative mandate.

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B. Consolidation of the Regulatory Structure

Aside from the "common sense" approach advocated above, the most logical way to address the abuses identified in this article is through legislation which consolidates responsibilities under the various statutes. Since legislation protecting the environment exists on both the state and federal level, the solution may not be easy to achieve. Using the statutes discussed above as a model, the following sections provide examples of how consolidation could be accomplished.

1. NEPA/CEQA

NEPA and CEQA already contain the core elements of a state and federal consolidated review process. NEPA regulations require federal agencies to cooperate with state agencies in the preparation of environmental documents.\[105\] This cooperation is to include joint planning, joint environmental research and studies, joint public hearings, joint environmental assessments, and joint environmental impact statements. The regulation provides:

Agencies shall cooperate with State and local agencies to the fullest extent possible to reduce duplication between NEPA and State and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent possible include joint environmental impact statements. § 1506.2. In such cases one or more Federal agencies and one or more State or local agencies shall be joint lead agencies. Where State laws or local ordinances have environmental impact statement requirements in addition to but not in conflict with those in NEPA, Federal agencies shall cooperate in fulfilling these requirements as well as those of Federal laws so that one document will comply with all applicable laws.

To better integrate environmental impact statements into State or local planning processes, statements shall discuss any inconsistency of a proposed action with any approved State or local plan and laws (whether or not federally sanctioned). Where an inconsistency

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exists, the statement should describe the extent to which the agency
would reconcile its proposed action with the plan or law.106

NEPA regulations also provide for the adoption of a statement
prepared by another agency or the combination of other environ-
mental documents which may meet the requirements of NEPA, rather
than requiring the preparation of an EIS.107

As was the case with NEPA, CEQA authorized the promulgation
of guidelines for use in the application of CEQA.108 The CEQA
guidelines seek to reduce delay by establishing specific time limitations
for the preparation of environmental documents109 and seek to elim-
inate duplication of efforts with the NEPA process.110

All that is necessary to achieve the desired end of avoiding duplica-
tive review is to make mandatory the optional regulatory provisions
outlined above. This could be accomplished merely by enacting
authorizing legislation for this purpose at either the state or federal
level. This legislation could be as simple as adopting the "lead
agency" concept which exists at both the state and federal levels.111
This concept requires a lead agency to be designated in the prepa-
ration of environmental documentation. Other agencies with an in-
terest in the project under review would be required to submit their
concerns to the lead agency for incorporation into the environmental
review, rather than having each agency conduct a review of its own.

As noted above, the lead agency concept exists at both the state
and federal levels but does not exist for projects which involve both
state and federal agencies. Application of the lead agency concept to
projects which fall within both state and federal jurisdiction would
require the designation of one agency, at either the state or federal
level, to be the lead agency. All comments by any state or federal
agency would then be submitted to the lead agency for review. In
this way all environmental review would be consolidated in one
environmental review process without diminishing the input by any
individual or agency.

106. Id. § 1506.2(b),(c),(d).
107. Id. §§ 1506.3, 1506.4.
108. CAL. PUB. RES. CODE § 21083 (West 1986).
110. Id. § 15170, 15220.
111. See CAL. PUB. RES. CODE § 21083.5 (West 1986); 14 CAL. CODE REGS. §§ 15050,
15222; see also 40 C.F.R. § 1506.2 (1987).
2. Endangered Species

Consolidation of endangered species considerations with other environmental review may be more difficult to achieve than consolidation under NEPA/CEQA. Nonetheless, such consolidation can be accomplished.

As noted above, the CESA is closely tied to the provisions of CEQA.\(^{112}\) In this regard, at the state level a certain amount of consolidation already exists and the CESA can, therefore, be looked to as a model for the larger consolidation effort. The CESA adopts the lead agency concept discussed above and defines the lead agency for CESA purposes as the same agency that undertakes that role under CEQA.

The CESA defines the term "state lead agency" as the state agency, board, or commission which is a lead agency under CEQA.\(^{113}\) The state lead agency must consult with the California Department of Fish and Game as it proceeds with the planning of the project in question.\(^{114}\) During that consultation the Department of Fish and Game shall issue a written finding regarding "jeopardy."\(^{115}\) This finding also must include the Department of Fish and Game's determination of whether a proposed project will result in any "taking" of endangered or threatened species.\(^{116}\) If jeopardy is found, the Department of Fish and Game must determine and specify to the state lead agency "reasonable and prudent alternatives" consistent with conserving the species which would prevent jeopardy.\(^{117}\)

Fish and Game Code section 2092 provides a specific mechanism for applying the reasonable and prudent alternative criteria, assuming a finding of jeopardy.\(^{118}\) This is the exact type of determination that

\(^{112}\) See supra text accompanying notes 68-70.

\(^{113}\) CAL. FISH & GAME CODE § 2065 (West 1984).

\(^{114}\) CAL. PUB. RES. CODE § 21104.2 (West 1986).

\(^{115}\) The term "jeopardy" means that a proposed project would jeopardize the continued existence of any endangered species or threatened species or result in the destruction of essential habitat. See CAL. FISH & GAME CODE § 2090 (West 1984).

\(^{116}\) Id. § 2090.

\(^{117}\) Id. § 2091.

\(^{118}\) Fish and Game Code section 2092 provides:

(a) Notwithstanding Section 21081 of the Public Resources Code, if, after consulting with the department pursuant to Section 2090, jeopardy is found, the state lead agency shall require reasonable and prudent alternatives consistent with conserving
must be made to properly protect fish and wildlife beneficial uses, including endangered species, under Porter-Cologne. Since the entire question is dealt with in one process, compliance with the provisions of CESA will, by necessity, also meet the requirements of CEQA and Porter-Cologne.

Even though the substantive provisions of CESA are different from the provisions of ESA, there appears no reason why the procedures outlined above cannot be adopted at the federal level. Moreover, in light of the discussion regarding NEPA and CEQA, consolidation of state and federal review under those statutes will also consolidate state and federal review under ESA and CESA.

3. Water Pollution Control

The most substantively complex area of environmental review may be the easiest to consolidate. As noted above, the review of water quality has been preempted by the United States. All state law in this area is, therefore, dependent on its meeting the “stringency” requirement contained in federal legislation. Federal legislation should be amended to preclude duplicative review such as that posed in the context of sections 401 and 404.

In general, section 401 certification is undertaken for federal projects which are themselves development projects. In those cases full 401 involvement by the state is appropriate. In the section 404 context, however, the federal activity is the act of issuing a permit to ensure environmental protection. If environmental concerns cannot be adequately addressed, the Corps of Engineers cannot issue the permit. In this light, there is simply no need for the Corps of Engineers, through its process, and the states, through their water certification process, to be reviewing and, in essence, permitting the exact same aspect of a single project. The solution here is to exclude permitting pursuant to section 404 from the ambit of section 401 review.

4. The Federal Power Act Example

The Federal Power Act was enacted in the 1920s, long before the enactment of legislation containing the extensive environmental protections discussed above. The FPA, however, in the proper application of section 4(e), probably contains as good a model as can be developed to address the abuses described in this article. As previously noted, that statute consolidates the decision-making in one agency with substantive provision for input from all other interested agencies. Moreover, by making conditions forwarded by other agencies mandatory on FERC, any institutional bias on the part of FERC toward development is negated.120

VI. CONCLUSION

The hypothetical cases discussed above demonstrate the potential for regulatory excess that exists first under a licensing scheme that was intended to be comprehensive in nature in order to prevent time-consuming, costly and potentially inconsistent results. Abuse can also occur under a review scheme that opens up the permitting process to full review by almost every agency that could have even a remote interest in the project. The excess demonstrated by these examples is detrimental in several ways. First, regulatory excess adds costs. The duplicative environmental review described above multiplies costs to

120. See supra note 89.
the detriment of the project's proponent as well as requiring unnecessary fiscal outlay at both the federal and state levels. Second, it consumes time. The duplicative review unreasonably delays the ultimate decision-making process to the detriment of the project's proponent and of those who will benefit from the development in question. Even if the project's proponent can bear the costs associated with excess environmental review, the proponent is unlikely to be able to delay development for the time it takes to move through the process. Third, assuming adequate review undertaken pursuant to any of the authorities outlined above, the duplicative effort is not necessary and does not, in any meaningful way, serve to protect the environment.

A goal of the 1970s was the development of laws that would procedurally and substantively protect the environment. The goal of the 1990s may well be the development of methodologies whereby those laws can be applied without destroying reasonable development-related water resources activities. In most respects these methodologies cannot be obtained through judicial review, although application of the supremacy clause and a determination of federal preemption, in some instances, would certainly simplify the problem. Nor can one expect the problem to be dealt with through voluntary restraint on the part of the regulatory agencies. Indeed, the history of environmental regulation demonstrates that the contrary is true. The solution to the problem, if a solution exists, is through legislation which seeks to consolidate environmental review whenever possible.

Consolidation of the environmental review process addresses each of the three major concerns enumerated above by ensuring timely, cost-effective environmental review. Failure to address the problems identified above may result not only in the loss of reasonable and beneficial water-related development, but also may create a backlash that in the long run will prove destructive to the environmental protections that have taken decades to develop.