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VIA E-MAIL ONLY
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Chairman Longley and Members of the Board
Regional Water Quality Control Board, Central Valley Region
11020 Sun Center Drive, #200
Rancho Cordova, CA 95670

Attn: Danny McClure

Re: Proposed Revisions to the 303(d) List of Impaired Water Bodies for the Central Valley Region

Dear Chairman Longley and Members of the Board:

These comments to the Proposed Revisions to the 303(d) List of Impaired Water Bodies for the Central Valley Region (Revised 303(d) List) are submitted on behalf of the Turlock Irrigation District (TID)[1] and supplement those submitted by TID under separate cover. While TID recognizes and appreciates the effort that the Regional Board staff has put into developing these proposed revisions to the 303(d) List, TID objects to those proposed for the Highline Canal and the Harding Drain.

In general, TID believes the assignment of Beneficial Uses to these waterways is improper and violates the Federal Clean Water Act (CWA) and/or the State's Porter-Cologne Water Quality Control Act (Porter-Cologne). TID believes that the Regional Board may not simply assign Beneficial Uses to previously undesignated water bodies without going through a proper Use Attainability Analysis. Similarly, the Board may not apply the Basin Plan's Water Quality Objectives to these particular waterways. Those Water Quality Objectives were adopted without either a proper analysis of the consequences of applying them to constructed agricultural canals and drains as required by Water Code section 13241. Moreover, they were adopted

[1] TID staff has reviewed this letter and affirms the factual statements made in it.

without a concurrent adoption of an Implementation Plan applicable to constructed agricultural canals and drains under Water Code section 13242.[2]

In particular, TID objects to those listings based on a supposed "Municipal and Domestic Supply" (MUN) Beneficial Use. Neither the Highline Canal nor the Harding Drain has ever been properly designated for such a Beneficial Use. These waterways are both constructed agricultural waterways owned and operated by TID. There is no such use of these two agricultural waterways currently, there are no plans to put them to such a use, nor is such a use probable or reasonably attainable in the foreseeable future. Therefore, and for the reasons set forth in greater detail below, TID urges the Board to decline to include any listings for Harding Drain and the Highline Canal in the revised 303(d) List based on a supposedly impaired MUN Beneficial Use.

In addition, the Basin Plan's "Chemical Constituents Objective, which prospectively incorporates by reference drinking-water Maximum Contaminant Levels (MCLs) developed by a different agency for an entirely different purpose, and the Basin Plan's "Pesticide Objective," which prospectively incorporates changing analytical standards approved by others, are unlawful Water Quality Objectives. It would be improper to rely on these unlawful Water Quality Objectives in finding "impairment" of these waterways.

Finally, TID objects to the application of Water Quality Objectives to either the Highline Canal or the Harding Drain based on either a REC-1 or WARM Beneficial Use until a proper analysis of the Water Quality Objectives has been performed as required by Water Code section 13241 and an Implementation Plan has been adopted as required by Water Code section 13242. These two waterways are not safe for swimming or other contact recreation, and they are both posted to this effect. Although TID recognizes that "fishable/swimmable" are the "default" *uses* under the Clean Water Act, the adoption of *Water Quality Objectives* to protect those uses is up to the individual states. Until Water Quality Objectives are properly adopted for constructed agricultural waterways, they cannot be applied to the Highline Canal or the Harding Drain and any 303(d) listing based on "impairment" of either a REC-1 or a WARM Beneficial Use is unsupported.

DISCUSSION

1. The Regional Board may not assign a MUN Beneficial Use without first conducting a full Use Attainability Analysis.

Federal law is clear: a state may not assign Beneficial Uses other than "fishable/ swimmable" without first conducting a Use Attainability Analysis. There has been no Use

[2] TID requests the Board take Administrative Notice of its own historic Basin Plan administrative records, starting with the adoption of the 1975 Basin Plan and continuing through the present. The Board will see that the analyses required by section 13241 have never been performed as they relate to constructed agricultural canals and drains, nor are there any Implementation Plans adopted for constructed agricultural canals and drains.

Attainability Analysis for either the Harding Drain (a constructed agricultural drain) or for the Highline Canal (a constructed agricultural supply canal) for the purpose of establishing an MUN Beneficial Use for either of these waterways. The Board may not simply "designate" an MUN Beneficial Use for these water ways without first conducting a Use Attainability Analysis.

"A State ***must*** conduct a use attainability analysis as described in § 131.3(g) whenever: (1) The State designates or has designated uses that do not include the uses specified in Section 101(a)(2)[3] of the Act, ..." (40 C.F.R. § 131.10(j)) This requirement is mandatory. "A Use Attainability Analysis is a structured scientific assessment of the factors affecting the attainment of the use which may include physical, chemical, biological, and economic factors as described in § 131.10(g)." (40 C.F.R. § 131.3 (g)).

A review of the historic Basin Planning administrative records from 1975 to the present shows that there has never been a full Use Attainability Analysis for the purpose of establishing ***any*** Beneficial Uses for either the Highline Canal or the Harding Drain.[4] It would be unlawful and an abuse of discretion to assign a MUN Beneficial Use to either of these two waterways without first performing a Use Attainability Analysis.

2. The Regional Board may not assign a MUN Beneficial Use to the Highline Canal or the Harding Drain without complying with Porter-Cologne sections 13241 and 13242.

Water Code section 13241 requires that Water Quality Objectives be the product of a reasoned balancing of a variety of factors to achieve the highest quality of water that is reasonable. Water Code section 13242 requires that Basin Plans contain a program of implementation to achieve Basin Plan Water Quality Objectives.

In full, Water Code section 13241 provides:

> Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the *reasonable protection* of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives *shall* include, but not necessarily be limited to, all of the following:

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[3] Section 101(a)(2) of the Clean Water Act requires that waters be "fishable/swimmable" wherever attainable.

[4] For example, flows in Harding Drain can, at times, consist solely of treated effluent and/or agricultural tailwater. These flow and water quality concerns would likely preclude direct MUN use. Without a full Use Attainability Analysis, it is unknown whether MUN is reasonably attainable for either the Harding Drain or the Highline Canal in the foreseeable future.

(a) Past, present, and probable future beneficial uses of water.

(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.

(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

(d) Economic considerations.

(e) The need for developing housing within the region.

(f) The need to develop and use recycled water.

(Emphasis added.)

As the Chief Counsel of the State Board has explained, Porter-Cologne, including Water Code section 13241, imposes "an affirmative duty on the Boards to consider economics when adopting Water Quality Objectives."[5] (Exhibit A, at p. 1) The Chief Counsel cites legislative history reinforcing that "economic considerations are a necessary part of the determination of reasonableness" and Porter-Cologne requires the regional boards to "balance" economic and environmental factors.[6]

TID has requested the Board take Administrative Notice of it own historic basin planning records. Nowhere in any of those administrative records will the Board find any analysis of the consequences of applying MUN-based Water Quality Objectives to constructed agricultural canals or drains. Such an analysis is mandatory under Water Code section 13241. Similarly, no Basin Plan from 1975 to the present includes any Implementation Plan for applying MUN-based

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[5] As the Office of Chief Counsel advises, the requirement to consider economics is not satisfied by a perfunctory review:

> the Boards should review any available information on receiving water and effluent quality to determine whether the proposed objective is currently being attained or can be attained. If the proposed objective is not currently attainable, the Boards should identify the methods which are presently available for complying with the objective. Finally, the Boards should consider any available information on the costs associated with the treatment technologies or other methods which they have identified for complying with a proposed objective.

(Exhibit A, art p. 4)

[6] The Water Code does not further define "economic considerations." Courts, however, have found that economic considerations at least include the "cost of compliance." (*City of Arcadia, supra*, 135 Cal.App.4th at p. 1415; *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 625.) There has never been any analysis of the cost of meeting MUN-based Water Quality Objectives in constructed agricultural waterways.

Water Quality Objectives to constructed agricultural canals and drains. Without first complying with sections 13241 and 13242, it is unlawful and an abuse of discretion to apply MUN-based Water Quality Objectives to such waterways, including the Highline Canal and the Harding Drain.

3. The Basin Plan's incorporation of an unlawful regulation, State Board Resolution 88-63, is not a basis for designating a MUN Beneficial Use for the Highline Canal or the Harding Drain.

a. <u>Resolution 88-63 was invalidated by the Office of Administrative Law and is not a lawful basis for designating MUN as a Beneficial Use</u>

The Fact Sheets for the Revised 303(d) List do not identify the basis for assigning a MUN Beneficial Use to either the Highline Canal or the Harding Drain. This alone is sufficient to render any listing based on an MUN Beneficial Use unlawful. There is simply no evidence in the record to substantiate applying a MUN Beneficial Use to these two waterways.

TID can only assume that Regional Board staff is relying on the "incorporation" of State Board Resolution 88-63 into the Basin Plan to justify the first-time-ever application of a MUN Beneficial Use to these two constructed agricultural waterways for the purpose of a 303(d) List. Resolution 88-63, however, is an invalid regulation and may not be relied on by any agency for ***any*** purpose.

The Basin Plan states:

> Water bodies within the basins that do not have beneficial uses designated in Table II-1 are assigned MUN designations in accordance with the provisions of State Water Board Resolution 88-63 which is, by reference, a part of this Basin Plan.

(Basin Plan at II-2.00)

State Board Resolution 88-63, entitled "Sources of Drinking Water," was adopted in May 1988 in response to the passage of Proposition 65, the Safe Drinking Water and Toxic Enforcement Act of 1986.[7] Proposition 65 defines "source of drinking water" as "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 uses." (Health & Saf. Code § 25249.11(d).) The State Board passed Resolution 88-63 in an effort to clarify Proposition 65's reference to "source of drinking water."(Exhibit B). Resolution 88-63

[7] Under Proposition 65, "[n]o person in the course of doing business 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 . . .." (Health & Saf. Code, § 25249.5).

provides that "[a]ll surface and ground waters of the State are considered to be suitable, or potentially suitable, for municipal or domestic water supply and should be so designated by the Regional Boards with the exception of [certain specified waters]."

Resolution 88-63 immediately ran afoul of the California Administrative Procedure Act (APA). The APA establishes the process an agency must follow in adopting regulations. (Gov. Code, §§ 11346-11346.8.) Any regulation adopted by an agency must be submitted to the Office of Administrative Law (OAL). (*Id.* at § 11349.1(a).) The OAL reviews the regulation for clarity, consistency with other laws and regulations, necessity, and authority of the agency to adopt the regulation. (*Ibid.*) If the OAL disapproves the regulation, it is sent back to the adopting agency with a decision specifying why it was disapproved. (*Id.* at § 11349.3(b).) It is unlawful for an agency to even *attempt* to apply a regulation that has not been approved by the OAL:

> No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in Section 11342.600, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter. (*Id.*, § 11340.5(a).)[8]

In the 1989 OAL Determination No. 8[9], the OAL held that Resolution 88-63 was a "regulation" subject to the APA, and that its adoption violated Government Code section 11347.5 (now section 11340.5) because the State Board failed to adopt this rule in compliance with the APA. (Exhibit C; *See also State Water Resources Control Bd. v. Office of Admin. Law*, 12 Cal.App.4th 697 (basin plan amendments are subject to the APA)). Although the APA allows an agency to challenge an OAL determination,[10] the State Board never challenged Determination No. 8. Thus, Resolution 88-63 is invalid and may not be applied by any agency.

TID acknowledges that the State Board has asserted that OAL Determination No. 8 was advisory only. (*In the Matter of the Review on Own Motion of Waste Discharge Requirements*

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[8] Government Code section 11340.5(a) is the same as Government Code section 11347.5(a), which was in effect at the time Resolution 88-63 was adopted.

[9] Regulatory Determination Decision of the California Office of Administrative Law (Docket No. 88-010) entitled: "In re: Request for Regulatory Declaration filed by Blackwell Land Company, Inc., concerning the State Water Resources Control Board's Resolution No. 88-63, 'Sources of Drinking Water,' adopted May 19, 1988," issued May 17, 1989, pursuant to Government Code section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2.

[10] The APA allows an agency to: (1) redraft the regulation to comply with the OAL determination; (2) seek judicial review of the OAL determination (Gov. Code, §§ 11340.5(d), 11350); or (3) request a review of the determination by the Governor's Office (Gov. Code, § 11349.5). The State Board did not pursue any of these options.

Order No. 5-01-044 For Vacaville's Easterly Wastewater Treatment Plant, State Board Order WQO 2002-0015). However, the State Board did not provide any legal authority to support its conclusion and this conclusion directly contradicts Government Code section 11340.5(a), quoted above, which expressly *prohibits* any agency from "issue[ing], utilize[ing], enforce[ing], or attempt[ing] to enforce" any regulation that has not been approved by the OAL. The State Board decision in the *Vacaville* matter never explains its anomalous conclusion, and it would be unlawful to attempt to apply the invalid Resolution 88-63 to designate Beneficial Uses in the Highline Canal and the Harding Drain as a basis for 303(d) listings for the first time now.

b. Resolution 88-63 was not "Grandfathered" Under the Subsequent APA Amendments

In other proceedings, the State Board has attempted to avoid the invalidation of Resolution 88-63 by claiming the Resolution was "grandfathered" by 1992 amendments to the APA. Those amendments provided that water quality control plans or amendments occurring after June 1, 1992 must comply with the APA, but that then-existing and uncontested plans were exempt from the APA. (See Gov. Code, § 11353; Order WQO 2002-0015). Of course, OAL Determination No. 8 was issued long *before* the 1992 APA amendments. By 1992, the OAL had already determined that Resolution 88-63 was invalid. Neither Resolution 88-63, nor any subsequent Basin Plan provision purporting to incorporate this invalid Resolution, is resurrected by the 1992 amendment to the APA.

c. Any blanket designation of MUN Use was unintended when the Basin Plan provision was adopted and reinterpretation now would be unlawful

At the time it purportedly incorporated Resolution 88-63 into the Basin Plan, the Regional Board did not intend to make a blanket designation of MUN Beneficial Uses throughout the Central Valley basin. If it had, it would have produced irrational results and would not have withstood judicial scrutiny. The Board cannot now simply reinterpret its own regulation to provide for something that was never intended.

In August of 2000, the Regional Board wrote that it did *not agree* with US EPA's contention that the Sources of Drinking Water Policy (Resolution 88-63) designates Beneficial Uses as defined in the CWA. (Exhibit D, at p. 3 ["We do not agree that this policy *designates* beneficial uses as defined in the Clean Water Act."], emphasis in the original.) The current, first-time-ever application of Resolution 88-63 to the Highline Canal and to the Harding Drain to justify inclusion on the 303(d) List represents a reinterpretation of the Basin Plan.

A reinterpretation of a regulation is itself a regulatory rulemaking that must comply with the Administrative Procedure Act. (*See Capen v. Shewry,,* (DATE) 155 Cal.App.4th 378; *McGill v. Regents of University of California,* 44 Cal.App.4th 1776). There has never been a proper rulemaking for the purpose of reinterpreting the original incorporation of Resolution 88-63. Accordingly, it would be unlawful to apply a MUN Beneficial Use to these two constructed agricultural waterways based on the past incorporation of Resolution 88-63 into the Basin Plan.

d. <u>To the Extent the Basin Plan Contains Blanket Beneficial Use Designations, Such Designations are Unlawful</u>

Under Regional Board staff's current interpretation, application of Resolution 88-63 to establish a MUN use of all surface waters in the basin amounts to an automatic regulatory designation of Beneficial Uses. Any "blanket" designation of Beneficial Uses without a specific water-body by water-body consideration is, of necessity, arbitrary, capricious and entirely lacking in evidentiary support.

State and federal law are generally consistent as to when a Beneficial Use is to be designated. Uses should be designated for protection in channels where the use is existing or determined to be attainable (40 C.F.R. § 131.10) or where the use is a past, present or *probable* future use. (Wat. Code, § 13241.)

Blanket regulatory designations of Beneficial Uses, by definition, involve no consideration of whether a use is a past, present, or probable future Beneficial Use. As such, the short-cut form of regulation is arbitrary and capricious. The Regional Board itself has said as much: "There are *so many obvious examples* where tributaries *do not* have the same beneficial uses as the downstream named receiving waters ..." (Exhibit D, at p. 1, emphasis added.) The *Basin Plan itself* provides evidence that a blanket designation is arbitrary and capricious. For example, in Table II-1, where the Regional Board actually listed waters and identified their beneficial uses, not all channels have MUN use. Uses also vary between segments of an individually listed stream. (*See* Basin Plan Table II-1).

Any blanket regulatory designation would be, moreover, completely lacking in evidentiary support. In the entire record of the Basin Plan and Resolution 88-63, there is not one shred of evidence that MUN is a past, present, or probable future uses of either the Highline Canal or the Harding Drain. In the absence of such evidence, any regulatory designation must be set aside. (See *Idaho Mining, supra*, 90 F.Supp.2d at p. 1107 (Beneficial Use may not be designated where there is insufficient evidence to demonstrate the existence of the proposed use); Code Civ. Proc., § 1085.)[11]

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[11] Regional Board staff may also assert that a MUN blanket designation was also established by the Delta Plan. The Delta Plan is primarily a water rights document, proposing to attain the limited water quality standards contained therein through controls of water flows and diversions and agricultural drainage. (*See* Delta Plan at 3, www.waterrights.ca.gov/baydelta/2006controlplan.html, ("Most of the objectives in this plan are being implemented by assigning responsibilities to water right holders because the parameters to be controlled are primarily impacted by flows and diversions.").) The water quality objectives contained in the Delta Plan relate to specific constituents not at issue in this case (*e.g.*, chloride, electrical conductivity, dissolved oxygen, and flow) and apply only at compliance locations not found within either the Highline Canal or the Harding Drain. (*Id.* at 10-17.) A review of the Delta Plan record, which TID also requests the Board take Administrative Notice, reveals it, too, never conducted a proper, waterway-by-waterway analysis of the existence of a MUN beneficial use or the consequences of applying MUN-based Water Quality Objectives to constructed agricultural waterways.

4. Water Quality Objectives based on standards incorporated by reference are invalid and do not support 303(d) listings

a. <u>The Chemical Constituent Objective and the Pesticide Objective have never undergone a proper section 13241 analysis are therefore unlawful Water Quality Objectives</u>

Several of the proposed listings for the Highline Canal and the Harding Drain[12] are improper because they are based on exceedances of Water Quality Objectives that were never properly adopted. Instead, the Basin Plan simply incorporates by reference present and future "standards" developed by other agencies for other purposes. These Objectives include the "Chemical Constituents Objective," which incorporates by reference the Department of Public Health's present and future Maximum Contaminant Levels (MCLs)[13], and the "Pesticide Objective," which incorporates by reference present and future "analytical methods approved by the Environmental Protection Agency or the Executive Officer."[14] Water quality objectives such as these are unlawful because they are based solely on standards set by other agencies that are then incorporated by reference without analysis of the factors mandated by Water Code section 13241[15] and without the simultaneous adoption of the Implementation Plan required by section 13242.[16,17]

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[12] Constituent listings based in whole or in part on invalid Water Quality Standards include: .alpha.-BHC (Benzenehexachloride) -Harding Drain/MUN/Pesticide Objective; DDE - Harding Drain/WARM/Pesticide Objective; Lindane/gamma Hexachlorohexane (gamma-HCH) - Harding Drain/WARM/Pesticide Objective; and Simazine - Highline Canal/MUN/Chemical Constituent Objective.

[13] "Waters shall not contain chemical constituents in concentrations that adversely affect beneficial uses . . .. At a minimum, water designated for use as domestic or municipal supply (MUN) shall not contain concentrations of chemical constituents in excess of the maximum contaminant levels (MCLs) specified in the following provisions of Title 22 of the California Code of Regulations, which are incorporated by reference into this plan . . .. This incorporation-by-reference is prospective, including future changes to the incorporated provisions as the changes take effect." (Basin Plan at III-3.00.)

[14] "Total identifiable persistent chlorinated hydrocarbon pesticides shall not be present in the water column at concentrations detectable within the accuracy of analytical methods approved by the Environmental Protection Agency or the Executive Officer." (Basin Plan at III-6.00).

[15] Porter-Cologne contains a core requirement of reasonableness for all regulatory actions of the Regional Board. (Water Code, §§ 13000, 13001.) This general mandate is implemented by Water Code section 13241, which, again, provides:

While an agency may incorporate standards developed by other agencies, it may not do so without receiving the evidence supporting those standards and without performing it own independent analysis. (*California Assn. of Nursing Homes v. Williams*, *supra*, 4 Cal.App.3d at p. 815.) Incorporation of standards set by other agencies without independent analysis prevents meaningful public participation and informed legislative and judicial review. (*Id.* at 810-811.)

Incorporation of *future* standards simply magnifies these concerns:

> Prospective incorporation entirely removes from the usual rule-making process individual consideration, by the public and the agency, of each future change to the matter incorporated by reference, thereby effectively denying the many benefits of that process to those who may object to the legality or merits of the new amendments or editions. This is not an inconsiderable loss. *It is equivalent to a declaration by the agency that it will not hold rule-making proceedings of any kind on the specific contents of each of those future amendments to or editions of the matter incorporated by reference, even though such changes will become effective law of the agency, and even if many of them turn out to be very controversial and of doubtful legality.* Furthermore, it should be obvious that no one

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Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses and the prevention of nuisance; however, it is recognized that it may be possible for the quality of water to be changed to some degree without unreasonably affecting beneficial uses. Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:

(a) Past, present, and probable future beneficial uses of water.
(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto.
(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.
(d) Economic considerations.
(e) The need for developing housing within the region.
(f) The need to develop and use recycled water.

[16] Section 13242 provides:

The program of implementation for achieving water quality objectives shall include, but not be limited to:

(a) A description of the nature of actions which are necessary to achieve the objectives, including recommendations for appropriate action by any entity, public or private.

(b) A time schedule for the actions to be taken.

(c) A description of surveillance to be undertaken to determine compliance with objectives.

[17] Again, TID asks the Board to take Administrative Notice of its own historic Basin Planning administrative records and the lack of any 13241 analysis and a 13242 Implementation Plan for either the MCL-based or "undetectable pesticides" Objectives.

> could effectively object to such later changes at the time the initial rule was adopted prospectively incorporating them by reference; at the time of the original rule-making proceeding in which the wholesale incorporation by reference of future changes was adopted, the specific content of those future changes would be unknown and unknowable.
>
> (Exhibit E, at pp. 6-7, quoting Bonfield, *State Administrative Rule Making* (1986) pp. 325-326, emphasis added.)

With respect to the Chemical Constituents Objective, the 1975 Basin Plan simply incorporated drinking water MCLs and converted them to Water Quality Objectives without ever considering the section 13241 factors, nor has there been any consideration of those factors in any of the subsequent Basin Planning administrative records.[18] The Department of Public Health (DPH; formerly the Department of Health Services) establishes MCLs for drinking water delivered to residences after filtering and treatment by drinking water suppliers.[19] (Health & Saf. Code, § 116275(c); Cal. Code Regs., tit. 22, § 64431(a).) Admittedly, the State Board has concluded that "the public has an opportunity to participate in any future [DPH] rulemakings to change drinking water standards." (Order WQO 2002-0015). However, the drinking water standards developed by DPH serve a different purpose than the Water Quality Objectives set by the Regional Board. MCLs are criteria that DPH determines must be met in tap water delivered to residences.[20] DPH is not subject to Porter-Cologne and properly does not concern itself with the cost of meeting drinking water standards in open surface water channels when it adopts MCLs for tap water. Water quality objectives are criteria reasonably necessary to protect Beneficial Uses in ambient surface waters, not kitchen sinks.

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[18] The 1975 Basin Plan's incorporation of MCLs did not explicitly state that such incorporation was prospective. Nonetheless, from the context of the amendment, OAL review, and subsequent publication, it appears the Regional Board always interpreted the water quality objective to include prospective incorporation. An explicit "prospective" incorporation by reference did not actually appear in the Basin Plan, nor was it suggested as an amendment to the Basin Plan, until after the OAL issued its decision on the 1994 Basin Plan Amendments. OAL determined that "[a] prospective incorporation-by-reference (one that automatically incorporates future changes to an incorporated document) is of dubious validity." Nonetheless, the Basin Plan was subsequently published including explicit incorporation-by-reference language. This occurred without any prior public notice or hearings in contravention of Water Code section 13244 and the APA.

[19] The Legislature delegated to DPH the initial and primary authority, and corresponding responsibility, for establishing drinking water standards under the Safe Drinking Water Act (Health & Saf. Code, § 116270 et seq). (*Western States Petroleum Assn v. State Dept. of Health Services* (2002) 99 Cal.App.4th 999, 1008; Health & Saf. Code, §§ 116270(g), 116275(c), (d).) The act's purpose is "to ensure that the water *delivered by public water systems of this state* shall at all times be pure, wholesome, and potable." (Health & Saf. Code, § 116270(e), emphasis added.)

[20] The Legislature delegated to DPH the initial and primary authority, and corresponding responsibility, for establishing drinking water standards under the Safe Drinking Water Act (Health & Saf. Code, § 116270 et seq). (*Western States Petroleum Assn v. State Dept. of Health Services* (2002) 99 Cal.App.4th 999, 1008; Health & Saf. Code, §§ 116270(g), 116275(c), (d).) The act's purpose is "to ensure that the water *delivered by public water systems of this state* shall at all times be pure, wholesome, and potable." (Health & Saf. Code, § 116270(e), emphasis added.)

Similarly, there is no evidence in the historic Basin Planning administrative records showing the Regional Board has ever considered the cost of complying with the continually-lowering analytical detection limits for lab analyses.[21] What might have been reasonable and necessary for the protection of Beneficial Uses in 1975 when pesticides were detectable in parts per million may be wholly unnecessary and unreasonable in 2009 when pesticides are detectable in parts per billion or even lower.

In short, there is no evidence in the historic administrative records of the adoption of the original Basin Plan, nor in those for any of the subsequent amendments of the Basin Plan, of compliance with Water Code section 13241. The Regional Board has never performed the mandatory balancing of economic and environmental factors implicated by applying a "post-treatment/from-the-tap" drinking water standard to a "raw/untreated" surface water channel. Similarly, there has never been a consideration of the section 13241 factors in relation to the cost and benefit of satisfying a Water Quality Objective based on continually-lowering analytical detection limits. These two Water Quality Objectives are unlawful and may not form the basis for a 303(d) listing.

b. The Water Quality Objectives Impermissibly Delegate the Regional Board's Legislative Power

The Regional Board has the exclusive responsibility for adopting Water Quality Objectives. (Water Code, § 13241.) It may not delegate that authority even to its Executive Officer. (Water Code, § 13223(a).) As such, it is improper and unlawful for the Regional Board to, in essence, delegate that responsibility to DPH, the EPA, or its Executive Officer by incorporating present and future standards adopted by these individuals or agencies without the Board itself receiving and considering the evidence underlying those standards and performing it own independent analysis of the Water Code section 13241 factors.

In addition, by prospectively incorporating future changes to MCLs and analytical standards, the Regional Board also unlawfully delegated its power under the general delegation of powers doctrine. This doctrine prohibits a legislative body from delegating "unrestricted authority to make fundamental policy determinations." (*Clean Air Constituency v. State Air Resources Bd.* (1974) 11 Cal.3d 801, 816; see *Bock v. City Council* (1980) 109 Cal.App.3d 52, 56.) To avoid unlawful delegation, the legislative body must provide an "adequate yardstick for the guidance of the administrative body empowered to execute the law." (*Clean Air Constituency* at p. 817.) It must also provide "adequate safeguards" to ensure that the delegatee will not arbitrarily implement the law. (*Kugler v. Yocum* (1968) 69 Cal.2d 371, 381-382; *Bock* at p. 56.) By blindly incorporating all future changes to DPH's MCLs and changes in laboratory analytical procedures, the Regional Board failed to provide any safeguards to assure such future changes go

[21] It is common knowledge that detection limits for the analytical techniques used for chlorinated pesticides have been dramatically lowered since the "Pesticide Objective" was first adopted. TID asks the Regional Board to take administrative notice of this indisputable fact.

through a proper evaluation as they apply to surface water quality. The two Objectives' incorporation by reference of future standards is clearly an unlawful delegation of the Regional Board's exclusive authority.

c. <u>The Regional Board failed to adopt an Implementation Plan when they adopted the Chemical Constituent and Pesticide Objective, rendering those Objectives invalid.</u>

Water Code section 13242 requires that Basin Plans contain a program of implementation to achieve Basin Plan Water Quality Objectives. The Basin Plan is devoid of any such program for the Water Quality Objectives based on incorporation by reference. (See Basin Plan at IV-1.00 to IV-38.00) Indeed, it would be impossible to adopt any such program because the Regional Board could not have known what values would later be incorporated. This, of course, underscores the basic impropriety of a regulatory approach using prospective incorporation by reference.

5. Application of Water Quality Objectives based on a REC-1 or WARM Beneficial Use to the Highline Canal or Harding Drain is unlawful because those Water Quality Objectives never underwent a section 13241 analysis that considered their application to agricultural canals and drains and has never adopted the Implementation Plan required by Section 13242.

Neither the Highline Canal nor the Harding Drain is safe for swimming or other contact recreation, and both are posted. REC-1 is clearly not an appropriate Beneficial Use for either of these waterways. Neither has either of these two constructed agricultural waterways ever been evaluated to determine whether a WARM Beneficial Use is appropriate.

Although TID recognizes that "fishable/swimmable" are generally considered "default" uses under the Clean Water Act, the adoption of Water Quality Objectives to protect those uses is, in the first instance, the responsibility of the individual states. (33 U.S.C.A. § 1251 ("It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution . . .."). In other words, when developing Water Quality Objectives are first and foremost a State function for which the States must follow their own laws.

As discussed earlier, in California, the development of Water Quality Objectives necessary to protect Beneficial Uses, and the steps necessary to implement those Water Quality Objectives, are governed by Porter-Cologne generally and specifically by section 13241 and 13242. Section 13241 requires the Regional Board to analyze a variety of factors to assure that the Water Quality Objectives comply with the overarching goal of Porter-Cologne that water quality protection be "reasonable" (Water Code § 13000.) Section 13242 requires the Regional Board to adopt an Implementation Plan outlining the steps that will be followed to implement the

Water Quality Objective. Clearly, these two sections are inextricably tied: one cannot, for example, determine the economic impact of establishing a particular Water Quality Objective if one does not know where and how one is going to implement it.

Historically, Beneficial Uses have not been applied to constructed agricultural canals and drains. The practice is of relatively recent origin and post-dates the decision in *Headwaters, Inc. v. Talent Irrigation District* (9th Cir. 2001) 243 F.3d 526. It was only after that case was decided that Regional Boards began to consider whether these constructed agricultural waterways might be "Waters of the United States" and subject to meeting Water Quality Objectives. Since the *Talent* decision, however, there has been no effort to revisit the Basin Plans' Water Quality Objectives to determine if they are, in fact, reasonable when applied to constructed agricultural waterways.

In short, there has never been a section 13241 analysis of any the Water Quality Objectives applicable to a REC-1 or the WARM Beneficial Use in the context of applying them to agricultural waterways, nor has there ever been a section 13242 Implementation Plan describing how these Water Quality Objectives are to be achieved and maintained in agricultural waterways. Until the Regional Board performs a proper section 13241 analysis and adopts a proper section 13242 Implementation Plan, it would be unlawful to apply Water Quality Objectives developed for REC-1 and WARM Beneficial Uses to constructed agricultural waterways such as the Highline Canal and the Harding Drain. Any 303(d) listings predicated of such Water Quality Objectives are unsupported.

CONCLUSION

As detailed above, the proposed 303(d) listings for the Highline Canal and the Harding Drain suffer from numerous regulatory flaws. TID urges the Board to remove these proposed listings from the proposed Revised 303(d) List before it is finalized.

Pleased do not hesitate to call should you have any questions or wish to discuss any of the issues raised in these comments. TID appreciates your consideration of these issues.

Very truly yours,

ARCHER NORRIS

Peter W. McGaw

cc: Robert Nees, TID
Deborah Liebersbach, TID

EXHIBIT A

Memorandum

To : Regional Water Board
Executive Officers

Regional Water Board Attorneys

Date: JAN - 4 1994

From : William R. Attwater
Chief Counsel
OFFICE OF THE CHIEF COUNSEL
STATE WATER RESOURCES CONTROL BOARD
901 P Street, Sacramento, CA 95814
Mail Code: G-8

Subject: GUIDANCE ON CONSIDERATION OF ECONOMICS IN THE ADOPTION OF WATER QUALITY OBJECTIVES

ISSUE

What is required of a Regional Water Quality Control Board (Regional Water Board) in order to fulfill its statutory duty to consider economics when adopting water quality objectives in water quality control plans or in waste discharge requirements?

CONCLUSION

A Regional Water Board is under an affirmative duty to consider economics when adopting water quality objectives in water quality control plans or, in the absence of applicable objectives in a water quality control plan, when adopting objectives on a case-by-case basis in waste discharge requirements. To fulfill this duty, the Regional Water Board should assess the costs of the proposed adoption of a water quality objective. This assessment will generally require the Regional Water Board to review available information to determine the following: (1) whether the objective is currently being attained; (2) what methods are available to achieve compliance with the objective, if it is not currently being attained; and (3) the costs of those methods. The Regional Water Board should also consider any information on economic impacts provided by the regulated community and other interested parties.

If the potential economic impacts of the proposed adoption of a water quality objective appear to be significant, the Regional Water Board must articulate why adoption of the objective is necessary to assure the reasonable protection of beneficial uses of state waters, despite the potential adverse economic consequences. For water quality control plan amendments, this

discussion could be included in the staff report or resolution for the proposed amendment. For waste discharge requirements, the rationale must be reflected in the findings.

DISCUSSION

A. Legal Analysis

1. Porter-Cologne Water Quality Control Act

Under the Porter-Cologne Water Quality Control Act, Water Code Section 13000 et seq. (Porter-Cologne Act or Act), the State Water Resources Control Board (State Water Board) and the Regional Water Boards are the principal state agencies charged with responsibility for water quality protection. The State and Regional Water Boards (Boards) exercise this responsibility primarily through the adoption of water quality control plans and the regulation of waste discharges which could affect water quality. See Water Code Secs. 13170, 13170.2, 13240, 13263, 13377, 13391.

Water quality control plans contain water quality objectives, as well as beneficial uses for the waters designated for protection and a program of implementation to achieve the objectives. Id. Sec. 13050(j). In the absence of applicable water quality objectives in a water quality control plan, the Regional Water Boafd may also develop objectives on a case-by-case basis in waste discharge requirements. See id. Sec. 13263(a).[1]

When adopting objectives either in a water quality control plan or in waste discharge requirements, the Boards are required to exercise their judgment to "ensure the reasonable protection of beneficial uses and the prevention of nuisance". Id. Secs. 13241, 13263; see id. Sec. 13170. The Porter-Cologne Act recognizes that water quality may change to some degree without

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1 *The focus of this memorandum is limited to an analysis of the Boards' obligation to consider economics when adopting water quality objectives either in water quality control plans or, on a case-by-case basis, in waste discharge requirements. This memorandum does not discuss the extent to which the Boards' are required to consider the factors specified in Water Code Section 13241 in other situations. Specifically, this memorandum does not discuss the applicability of Section 13241 to the development of numeric effluent limitations, implementing narrative objectives contained in a water quality control plan. Further guidance on the latter topic will be developed at a later date.*

causing an unreasonable effect on beneficial uses. Id. The Act, therefore, identifies factors which the Boards must consider in determining what level of protection is reasonable. Id.[2] These factors include economic considerations. Id.[3]

The legislative history of the Porter-Cologne Act indicates that "[c]onservatism in the direction of high quality should guide the establishment of objectives both in water quality control plans and in waste discharge requirements". Recommended Changes in Water Quality Control, Final Report of the Study Panel to the [State Water Board], Study Project--Water Quality Control Program, p. 15 (1969) (Final Report). Objectives should "be tailored on the high quality side of needs of the present and future beneficial uses" Id. at 12. Nevertheless, objectives must be reasonable. and economic considerations are a necessary part of the determination of reasonableness. "The regional boards must balance environmental characteristics, past, present and future beneficial uses, and economic considerations (both the cost of providing treatment facilities and the economic value of development) in establishing plans to achieve the highest water quality which is reasonable." Id. at 13.

2. Senate Bill 919

The Boards are under an additional mandate to consider economics when adopting objectives as a result of the recent enactment of Senate Bill 919. 1993 Cal. Stats., Chap. 1131, Sec. 8, to be codified at Pub. Res. Code, Div. 13, Ch. 4.5, Art. 4. The legislation, which is

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2 *Other factors which must be considered include:*

(a) Past, present, and probable future beneficial uses of water;
(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of water available thereto;
(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area;
(d) The need for developing housing within the region;
(e) The need to develop and use recycled water.

3 *See also Water Code Section 13000 which mandates that activities and factors which may affect water quality "shall be regulated to attain the highest water quality which is reasonable, considering all demands being made and to be made on those waters and the total values involved, beneficial and detrimental, economic and social, tangible and intangible" (emphasis added).*

effective January 1. 1994, amended the California Environmental Quality Control Act, Public Resources Code Section 21000 et seq. (CEQA), to require that, whenever the Boards adopt rules requiring the installation of pollution control equipment or establishing a performance standard or treatment requirement, the Boards must conduct an environmental analysis of the reasonably foreseeable methods of compliance. This analysis must take into account a reasonable range of factors, including economics. For the reasons explained above, the latter requirement is duplicative of existing requirements under the Porter-Cologne Act regarding consideration of economics.

B. Recommendation

The meaning of the mandate to "consider economics" in the Porter-Cologne Act is not entirely clear. It is clear that the Porter-Cologne Act does not specify the weight which must be given to economic considerations. Consequently, the Boards may adopt water quality objectives even though adoption may result in significant economic consequences to the regulated community. The Porter-Cologne Act also does not require the Boards to do a formal cost-benefit analysis.

The Porter-Cologne Act does impose an affirmative duty on the Boards to consider economics when adopting water quality objectives. The Boards probably cannot fulfill this duty simply by responding to economic information supplied by the regulated community. Rather, the Boards should assess the costs of adoption of a proposed water quality objective. This assessment will normally entail three steps. First, the Boards should review any available information on receiving water and effluent quality to determine whether the proposed objective is currently being attained or can be attained. If the proposed objective is not currently attainable, the Boards should identify the methods which are presently available for complying with the objective. Finally, the Boards should consider any available information on the costs associated with the treatment technologies or other methods which they have identified for complying with a proposed objective.[4]

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4 See, for example, Managing Wastewater In Coastal Urban Areas, National Research Council (1993). This text provides data on ten technically feasible wastewater treatment technologies, which can be used to make comparative judgments about performance and to estimate the approximate costs of meeting various effluent discharge standards, including standards for toxic organics and metals.

In making their assessment of the cost impacts of a proposed objective, the Boards are not required to engage in speculation. Rather, the Boards should review currently available information. In addition, the Boards should consider, and respond on the record, to any information provided by dischargers or other interested persons regarding the potential cost implications of adoption of a proposed objective.

If the economic consequences of adoption of a proposed water quality objective are potentially significant, the Boards must articulate why adoption of the objective is necessary to ensure reasonable protection of beneficial uses. If the objective is later subjected to a legal challenge, the courts will consider whether the Boards adequately considered all relevant factors and demonstrated a rational connection between those factors, the choice made, and the purposes of the Porter-Cologne Act. See California Hotel & Motel Assn. v. Industrial Welfare Com., 25 Cal.3d 200, 212, 157 Cal.Rptr. 840, 599 P.2d 31 (1979).

Reasons for adopting a water quality objective, despite adverse economic consequences, could include the sensitivity of the receiving waterbody and its beneficial uses, the toxicity of the regulated substance, the reliability of economic or attainability data provided by the regulated community, public health implications of adopting a less stringent objective, or other appropriate factors. These factors may also include the legislative directive that a "margin of safety [ ] be maintained to assure the protection of all beneficial uses." Final Report, p. 15 and App. A, p. 59.

If objectives are proposed for surface waters and adverse economic consequences stemming from adoption of the objectives could be avoided only if beneficial uses were downgraded, the Boards should address whether dedesignation would be feasible under the applicable requirements of the Clean Water Act and implementing regulations. See 40 C.F.R. Sec. 131.10. Dedesignation is feasible only for potential, rather than existing, uses. See id. Sec. 131.10(g). If dedesignation of potential beneficial uses is infeasible, the Boards should explain why, e.g., that there is a lack of data supporting dedesignation.[5]

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5 It should also be noted that, even if dedesignation of potential beneficial uses is feasible, in the great majority of cases it will not have any significant effect on the selection of a proposed objective. This is so because the proposed objective will be necessary to protect existing beneficial uses, which cannot be dedesignated.

4-44

The State or Regional Water Board's rationale for determining that adoption of a proposed objective is necessary to protect water quality, despite adverse economic consequences, must be discernible from the record. This reasoning could be included in the staff report or in the resolution adopting a proposed water quality control plan amendment. When objectives are established on a case-by-case basis in waste discharge requirements, the rationale must be included in the findings.

EXHIBIT B

STATE WATER RESOURCES CONTROL BOARD

RESOLUTION NO. 88-63

ADOPTION OF POLICY ENTITLED

"SOURCES OF DRINKING WATER"

WHEREAS

1. California Water Code Section 13140 provides that the State Board shall formulate and adopt State Policy for Water Quality Control; and,

2. California Water Code Section 13240 provides that Water Quality Plans "shall conform" to any State Policy for Water Quality Control; and,

3. The Regional Boards can conform the Water Quality Control Plans to this policy by amending the plans to incorporate the policy: and,

4. The State Board must approve any conforming amendments pursuant to Water Code Section 13245; and,

5. "Sources of drinking water" shall be defined in the Water Quality Control Plans as those water bodies with beneficial uses designated as suitable, or potentially suitable, for municipal or domestic water supply (MUN); and,

6. The Water Quality Control Plans do not provide sufficient detail in the description of water bodies designated MUN to judge clearly what is, or is not, a source of drinking water for various purposes.

THEREFORE BE IT RESOLVED:

surface and ground waters of the State are considered to be suitable, or potentially suitable, for municipal or domestic water supply and should be so designated by the Regional Boards[1] with the exception of:

1. Surface and ground waters where:

a. The total dissolved solids (TDS) exceed 3,000 mg/L (5,000 uS/cm, electrical conductivity) and it is not reasonably expected by Regional Boards to supply a public water system, or

b. There is contamination, either by natural processes or by human activity (unrelated to the specific pollution incident), that cannot reasonably be treated for domestic use using either Best Management Practices or best economically achievable treatment practices, or

c. The water source does not provide sufficient water to supply a single well capable of producing an average, sustained yield of 200 gallons per day.

2. Surface Waters Where:

a. The water is in systems designed or modified to collect or treat municipal or industrial wastewaters, process waters, mining wastewaters, or storm water runoff, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Boards; or,

b. The water is in systems designed or modified for the primary purpose of conveying or holding agricultural drainage waters, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Boards.

3. Ground water where:

The aquifer is regulated as a geothermal energy producing source or has been exempted administratively pursuant to 40 Code of Federal Regulations, Section 146.4 for the purpose of underground injection of fluids associated with the production of hydrocarbon or geothermal energy, provided that these fluids do not constitute a hazardous waste under 40 CFR, Section 261.3.

Regional Board Authority to Amend Use Designations:

Any body of water which has a current specific designation previously assigned to it by a Regional Board in Water Quality Control Plans may retain that designation at the Regional Board's discretion. Where a body of water is not currently designated as MUN but, in the opinion of a Regional Board, is presently or potentially suitable for MUN, the Regional Board shall include MUN in the beneficial use designation.

The Regional Boards shall also assure that the beneficial uses of municipal and domestic supply are designated for protection where those uses are presently being attained, and assure that any changes in beneficial use designations for waters of the State are consistent with all applicable regulations adopted by the Environmental Protection Agency.

The Regional Boards shall review and revise the Water Quality Control Plans to incorporate this policy.

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1 This policy does not affect any determination of what is a potential source of drinking water for the limited purposes of maintaining a surface impoundment after June 30, 1988, pursuant to Section 25208.4 of the Health and Safety Code.

CERTIFICATION

The undersigned, Administrative assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a policy duly and regularly adopted at a meeting of the State Water Resources Control Board held on May 19, 1988.

/s/

Maureen Marché

Administrative Assistant to the Board

LIST OF ITEMS RELATING TO

"SOURCES OF DRINKING WATER" (SODW) POLICY

(Chronologically arranged)

- Workshop (Sept. 1987) and Hearings (Jan. 1988 & April 1988), and Draft Resolution
- Comment Letters on Workshop (Oct. 1987 - Jan. 1988)
- Internal (within SWRCB) Communications (Oct. 1987 - April 1988)
- Comments on April 7, 1988 Hearing
- Resolution adopting the "Policy"
- Follow-up activity on adoption of the "Policy" (October 1988)
- Transcripts of Public Hearings (Jan. 1988 & April 1988) and "Abridged Transcript" (May 1988)

File New f.e. September 2, 1987 Workshop

AUG 26 1987

STATE WATER RESOURCES CONTROL BOARD
WORKSHOP--DIVISION OF WATER QUALITY
SEPTEMBER 2 AND 3, 1987

ITEM: 6

SUBJECT: CONSIDERATION OF A STATE POLICY FOR WATER QUALITY CONTROL DEFINING "SOURCES OF DRINKING WATER" FOR THE PURPOSES OF PROPOSITION 65 DISCHARGE PROHIBITIONS

DISCUSSION: Definition of "sources of drinking water" is necessary to clarify how basin plan designations of municipal/domestic water supply (MUN) should be interpreted for the purposes of Proposition 65 discharge prohibitions. The attached staff paper is a discussion of five approaches for defining sources of drinking water for the purposes of Regional Board accommodation of and discharger compliance with Proposition 65.

POLICY ISSUE: How should the State and Regional Boards define "sources of drinking water" in the basin plans for the purposes of Proposition 65?

FISCAL IMPACT: The staff-recommended alternative is compatible with the resource allocations for this task in the Governor's FY 1987-88 budget.

REGIONAL BOARD IMPACT: Yes. All Regional Boards.

STAFF RECOMMENDATION: If no Board Member objects, staff will schedule a public hearing to receive comments on a policy for water quality control which defines sources of drinking water for the purposes of Proposition 65.

Policy Review _____

Fiscal Review _____

Legal Review _____

STATE WATER RESOURCES CONTROL BOARD
RESOLUTION NO. 87-___

APPROVAL OF A POLICY FOR WATER QUALITY CONTROL DEFINING "SOURCES OF DRINKING WATER" FOR THE PURPOSES OF PROPOSITION 65 DISCHARGE PROHIBITIONS

WHEREAS:

1. The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) prohibits the discharge of chemicals which have been found to be carcinogens and reproductive toxicants where chemical passes or probably will pass into any source of drinking water (Health and Safety Code, Section 25249.5).

2. Proposition 65 defines "source of drinking water" as either

   a) a present source of drinking water, or
   b) water which is identified or designated in a water quality control plan (basin plan) adopted by a Regional Water Quality Control Board as being suitable for domestic or municipal uses (MUN).

3. The basin plans do not provide sufficient detail in the description of water bodies designated MUN to judge compliance with Proposition 65 discharge prohibitions.

4. The State Water Resources Control Board and the Regional Water Quality Control Boards have responsibility for the basin plans.

THEREFORE BE IT RESOLVED:

That designation of waters suitable for municipal or domestic use for the purposes of The Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65) is defined as follows:

1. All surface waters, with the exception of:

   a. the ocean,
   b. saline bays,
   c. Salton Sea,
   d. Mono Lake,
   e. other salt sinks, or
   f. surface waters with designations of existing or potential beneficial uses which exclude MUN.

2. All ground waters, with the exception of:

   a. portions of aquifers with waters in excess of 10,000 mg/l TDS, or

b. waters with designations of existing or potential beneficial uses which exclude MUN in the basin plans.

Surface or ground waters, which by this definition, or by designation in the basin plans are inappropriately defined as a sources of drinking water, may be properly designated as unsuitable for MUN through the normal Regional Board basin plan amendment process. Regional Boards may require that requests for such revisions be accompanied by all necessary supportive materials.

CERTIFICATION

The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of a resolution duly and regularly adopted at a meeting of the State Water Resources Control Board held on _____, 1987.

_____

Maureen Marche'
Administrative Assistant to the Board

STAFF REPORT BY THE
DIVISION OF WATER QUALITY
SOURCES OF DRINKING WATER - STATEMENT OF REASONS
DECEMBER 23, 1987

The Safe Drinking Water and Toxic Enforcement Act of 1986 prohibits the contamination of drinking water with chemicals known to be carcinogens or reproductive toxicants (Health and Safety Code Chapter 6.6, Section 25249.5). "Source of drinking water" is defined in Section 25249.11(d) as either (1) a source used for drinking water, or (2) water which is identified or designated in a water quality control plan (basin plan) adopted by a Regional Water Resources Control Board (Regional Board) as being suitable for domestic or municipal use (MUN).

The original basin plans designated actual or potential uses of water for domestic or municipal use as of 1975. Designations of MUN beneficial use in the basin plans are general, often in the form of a narrative, or reference to regions on a map. These designations are not adequate for the purposes of Proposition 65 which requires more specific information about present or potential uses of specific water bodies than is found in the basin plans. A policy providing a uniform interpretation of the MUN beneficial use would be beneficial for the purposes of Proposition 65 as well as all activities dependant on an interpretation of the designation of this beneficial use in the basin plans.

For example, ground water with MUN beneficial uses is usually designated by reference to a specific map of ground water basins. Such a designation extends from the surface to the deepest aquifer under that mapped area, although there may be aquifers in that ground water unit which contain waters unfit for MUN use (e.g., saline waters).

Designation of MUN in surface waters is not specific to all stream segments or all surface water bodies in the basin plans. The so-called "tributary rule" refers to statements in several basin plans to the effect that surface water tributaries which are not specifically listed in the basin plans take on the beneficial use designations (e.g., MUN) of the main stem. Some of these tributaries may be unfit for the MUN use.

A clear definition of "sources of drinking water" will help Regional Boards and dischargers to determine whether or not a discharge is in compliance with Proposition 65 discharge prohibitions. This definition, by itself, will not answer all questions regarding discharges subject to Proposition 65.

Proposition 65 prohibits discharge of a chemical where it "will pass, or probably will pass" into any source of drinking water. The question of whether a chemical probably will pass into a source of drinking water must be answered on a case-by-case basis by the discharger or the Regional Board before it may be determined whether a discharge is allowable under Proposition 65.

Any definition of "sources of drinking water" for the purposes of discharge prohibitions should be consistent with Porter Cologne. Therefore, any definition "for the purposes of Proposition 65 protection of sources of drinking water" should be applicable to all discharge prohibitions to protect MUN.

Staff have prepared a draft policy for water quality control defining "sources of drinking water" for the purposes of discharge prohibitions. The draft policy may be modified based on public input received in response to the hearing on this subject to be held on January 6, 1988. A discussion of all provisions of the proposed policy is provided below:

1. "All surface waters": The proposed definition of "sources of drinking water" was developed with the objective of protecting all waters of the State to the maximum extent possible. Therefore, all surface waters are included in the definition of sources of drinking water, with the following exceptions:

1a. "The ocean, saline bays, Salton Sea, Mono Lake, New River, Alamo River": These specific water bodies are recognized by the State Board as being unsuitable as present or potential sources of drinking water. They are listed specifically because they may not clearly fall under other exceptions. Other water bodies unsuitable as a source of drinking water will have to be identified by Regional Boards. The demarcation between the ocean or saline bays, and potable water is also left to the Regional Boards.

1b. "surface waters with existing or potential beneficial use designations which specifically preclude a MUN beneficial use designation because of unsuitability for domestic or municipal use.": Many waters have beneficial use designations which may exclude MUN. However, the exclusion of the MUN designation was often for reasons other than water quality. For example, many coastal streams do not include the MUN designation because they are intermittent. However, these streams are actually used or may be used for drinking water purposes. Many such streams actually flow into municipal drinking water impoundments. This exception is an acknowledgement that, unless a stream is specifically determined by a Regional Board to be unsuitable for drinking water (MUN) for water quality reasons, it is a potential source of drinking water.

1c. "waters in man-made systems of impoundments, catchments or conduits specifically designed to collect municipal or industrial wastewaters": Waste waters in sewers, sewage treatment plants, and waste water collection systems are specifically excluded from the definition of sources of drinking water. Discharges from these systems into sources of drinking water would be subject to discharge limits. Storm water collection systems are not specifically addressed by this paragraph.

1d. "agricultural drainage waters in conduits designed primarily for conveyance to a source of drinking water, if the discharge from such a conduit is periodically monitored at the point of discharge to a source of drinking water for compliance with drinking water quality standards according to requirements set by the Regional Water Quality Control Boards": Under this exception, waters in agricultural drains would not be designated as suitable for domestic or municipal use. Discharges into agricultural drains would therefore not be subject to discharge limits in the drain. The requirement to monitor these discharges for water quality standards is a recognition that discharges from the drain will be subject to discharge limits under the law. Non-monitored agricultural drains would not be covered under this exemption.

2. "All ground waters . . .": The proposed definition of "sources of drinking water" was developed with the objective of protecting all waters of the State to the maximum extent possible. Therefore, all ground waters are included in the

Author	Date	Resolution Section							Specific / General Comments
		1a	1b	1c	1d	2a	2b	2c	3	
3. City of Los Angeles, Department of Water and Power	Oct. 23, 1987									General - They fully support the draft Resolution.
4. Central Valley RWQCB, San Joaquin Branch (Fresno)	Nov. 6, 1987					X				2a - Should modify the sole criteria for groundwater of < 10,000 mg/l TDS as suitable for municipal or domestic use. Suggest an additional section be added which uses additional specific criteria to demonstrate that an aquifer with < 10,000 mg/l TDS will have no potential beneficial use. The Federal Underground Injection Control Program has specific criteria for exempting an aquifer as "an underground source of drinking water".
								X		2c - Not all groundwater in subsurface oil-bearing zones should be excluded from being suitable for municipal of domestic use. In some areas groundwater extracted from oil-bearing zones have < 1000 mg/l TDS and is used for irrigation, stock watering, and groundwater recharge.
										General - The definition of domestic drinking water supply associated with the TPCA allows an evaluation of the quantity of groundwater available for use to supply a public water system. This Resolution as it stands has too broad a designation of municipal and domestic use without allowance for quantity of available supply. This could effect the way we address this issue at Chemical Waste Management (Kettleman). See letter for additional specific comments on this subject.
									X	3 - It is stated that waters inappropriately defined as sources of drinking water by the definition in the Resolution may be designated as unsuitable as a source of drinking water through the basin plan amendment process. The above comments should be incorporated into the Resolution so that it could be considered on a site specific basis, rather than through the time consuming basin plan amendment process.

Regional Boards, is responsible for approving aquifers for this purpose (that is, exempting them as sources of drinking water), it is appropriate that it continue to do so for the purposes of this policy as well. "Hydrocarbon" is a preferrable word to "oil-bearing" in that it includes natural gas zones that are also used for injection of waste fluids. Geothermal fluids analagous to hydrocarbon fluids should also be included in the Section.

COMMENTS #11, 15, 17, 19, 20, 32, 35, 40, AND 53: Include in the exemption aquifers that are used for disposal of geothermal fluids.

RESPONSE: See Section 3 of the revised draft policy and response to author #2.

<u>REGIONAL BOARD AUTHORITY TO AMEND USE DESIGNATIONS</u>

There was a total of four comments received on this paragraph, of which two were substantive.

AUTHORS #4 AND 5: Incorporate the provisions of this draft policy into a resolution so that it could be considered on a site specific basis, rather than through the time consuming Basin Plan amendment process; will this policy result in a reclassification of water bodies?

RESPONSE: See Section 4 of the revised draft policy.

California Regional Water Quality Control Board
Santa Ana Region

March 10, 1989

ITEM: 6

SUBJECT: Basin Plan Amendment: Incorporation of the Sources of Drinking Water Policy

Introduction

On May 19, 1988, the State Water Resources Control Board (SWRCB) adopted a State policy for water quality control entitled "Sources of Drinking Water" (Resolution No. 88-63 (attachment 1)). The phrase "sources of drinking water" has been used in law (e.g. the Safe Drinking Water and Toxic Enforcement Act of 1986 (Proposition 65)), and its application has an impact upon dischargers, the public and the State and Regional Boards. Proposition 65, for example, prohibits the discharge of significant amounts of specific toxic chemicals into "sources of drinking water". In reviewing Water Quality Control Plans (Basin Plans) statewide, the State Board found insufficient detail in the descriptions of water bodies designated as suitable, or potentially suitable, for municipal or domestic supply (MUN) to judge clearly what is, or is not, a source of drinking water. The intent of the Policy, therefore, is to define "sources of drinking water" to more clearly identify those waters of the State which should be designated MUN in Basin Plans.

The Sources of Drinking Water Policy declares that, with certain exceptions, all waters of the State are to be considered suitable, or potentially suitable, for municipal or domestic supply and should be so designated by the regional boards. Those waters excepted under the Policy include the following: surface and ground waters with total dissolved solids (TDS) levels in excess of 3000 mg/l; surface and ground waters that are contaminated, either by natural processes or by human activity, to the extent that they cannot reasonably be treated for domestic use; and surface waters in systems designed or modified to carry municipal/industrial/agricultural wastewaters or stormwater runoff. The Policy allows some regional board discretion in assigning MUN designations. Other exceptions are also specified in the Policy (see Attachment 1).

Description of the Proposed Activity

California Water Code section 13240 provides that Basin Plans "shall conform" to any state policy for water quality control. A regional board can conform the Basin Plan to the state policy by amending the Plan to incorporate the policy. Incorporation of the Sources of Drinking Water Policy requires that Basin Plans be

amended to add MUN for those water bodies not already so designated, unless they are specifically excepted.

The activity proposed herein is amendment of the Basin Plan for the Santa Ana Region to incorporate the Sources of Drinking Water Policy, per the requirements of the Water Code.

CEQA Requirements for Basin Plan Amendments

The basin planning process, which provides the mechanism for amending Basin Plans, has been determined to be functionally equivalent to the process required by the California Environmental Quality Act (CEQA) and is therefore exempt from the Environmental Impact Report process required by CEQA. Environmental review is nonetheless required. This review consists of the preparation of a written report which describes the proposed project, identifies the potential adverse environmental impacts of that project and discusses possible alternatives and mitigation measures. This staff report serves as that written report. The environmental review process also includes the completion of an Environmental Checklist (Attachment 2).

Specific public notice requirements pertaining to Basin Plan amendments have been fulfilled. A Notice of Public Hearing and Notice of Filing were published in newspapers of general circulation in Orange, Riverside and San Bernardino Counties 45 days prior to this hearing. The Notice of Filing and Notice of Public Hearing were also submitted to the Secretary of Resources, and the three county clerks and mailed to all interested persons and agencies. A Notice of Decision will be filed after the Board acts on this matter.

Alternatives and Mitigation Measures

Because of the Water Code requirements for conformance of Basin Plans to state water quality control policy, a decision not to adopt the Sources of Drinking Water Policy is not an alternative which the Regional Board can consider. The alternatives available to the Regional Board assume the adoption of the Policy and lie in the selection of those water bodies that will be specifically excepted from the MUN designation.

It is important to understand that adding a MUN designation to a ground or surface water body results in the concomitant application of MUN water quality objectives to that water body. For example, water bodies designated MUN become subject to the toxic discharge prohibitions specified in Proposition 65, and more stringent microbiological objectives also apply. The addition of the MUN designation, then, could necessitate new or additional treatment or other mitigation of waste discharges, stormwater runoff, agricultural/urban drainage or other sources of inputs to receiving waters in order to ensure that MUN objectives are met. Clearly,

it is not feasible, practical or reasonable to provide the extensive treatment or other possible mitigation (diversion of drainage courses, etc.) necessary to meet MUN objectives in all ground and surface waters of the State. Recognizing this, the State Board, through a public participation process, identified those circumstances under which it would not be considered reasonable to meet MUN objectives; these circumstances are specified in the Policy's criteria for exception from the MUN designation.

In adopting the Sources of Drinking Water Policy, then, it is incumbent upon each regional board to determine which water bodies within the region cannot reasonably be expected to meet MUN objectives, and therefore, should be excepted from the MUN designation. In making this determination, the boards must utilize the exception criteria set forth in the Policy.

Recommended Alternative:

In accordance with the precepts described above, Regional Board staff has reviewed the surface and ground waters of the Santa Ana Region. Most of the waters of the Region are already designated MUN in the Basin Plan (see Table 2-1, Beneficial Uses). Of those water bodies which are not now designated as MUN, those which are proposed to be specifically excepted from this designation are shown in Table 1; those water bodies for which the MUN designation would be added are shown in Table 2.

It should be emphasized that staff's proposed list of excepted water bodies in Table 1 does <u>not</u> reflect any proposal to remove an existing MUN designation; the water bodies listed in Table 1 are <u>not now</u> designated MUN in the Basin Plan. The Basin Plan amendment proposed herein would simply give formal recognition to the propriety of the status quo with respect to the MUN designation for these water bodies.

It should be noted also that the water body descriptions used in Tables 1 and 2 are, for the most part, those used in the 1983 Basin Plan (Table 2-1) and do not reflect any of the changes proposed by staff at the beneficial use workshop held on October 14, 1988. There are two exceptions, both found in Table 1: Bedford Canyon Wash and Salt Creek have been added to the list of individual water bodies recognized in the Plan, as proposed in October, 1988.

Staff's rationale for proposing to except each of the water bodies listed in Table 1 is described in that Table. Briefly, waters which exceed 3000 mg/l TDS (e.g., ocean waters) or which could not reasonably be managed to meet MUN objectives due to the predominance of municipal wastewaters or agricultural/urban runoff (e.g. Santa Ana River, San Diego Creek) are proposed for exception. Privately owned and operated reservoirs constructed and used solely for the purpose of storing agricultural irrigation waters are also

EXHIBIT C

master

CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

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SECRETARY OF STATE
OF CALIFORNIA

In re: Request for Regulatory Determination filed by Blackwell Land Company, Inc., concerning the State Water Resources Control Board's Resolution No. 88-63, "Sources of Drinking Water," adopted May 19, 1988 [1]	1989 OAL Determination No. 8 [Docket No. 88-010] May 17, 1989 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2

Determination by:

JOHN D. SMITH
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney
Michael McNamer, Senior Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether the State Water Resources Control Board's policy on designation of surface and ground waters of the state as sources of drinking water is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that Resolution 88-63, the Board's "Sources of Drinking Water" policy, is a "regulation" required to be adopted in compliance with the Administrative Procedure Act because the resolution implements, interprets, and makes specific statutory law that governs water quality.

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether State Water Resources Control Board's Resolution No. 83-63, "Adoption of Policy Entitled 'Sources of Drinking Water,'" adopted on May 19, 1988, is (1) a "regulation" as defined in Government Code section 11342, subdivision (b), (2) required to be adopted pursuant to the Administrative Procedure Act ("APA"), and (3) therefore violates Government Code section 11347.5, subdivision (a).[4]

THE DECISION [5,6,7,8]

The provisions of Resolution No. 88-63, except for the "Whereas" provisions, (1) are "regulations" as defined in Government Code section 11342, subdivision (b); (2) are subject to the requirements of the APA (see footnote 9);[9] have not been adopted pursuant to the requirements of the APA; and (3) therefore, violate Government Code section 11347.5, subdivision (a).

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

The State Water Resources Control Board (the "State Board") and the California Regional Water Quality Control Boards (the "Regional Boards") are "the principal state agencies with primary responsibility for the coordination and control of water quality. . . ."[10] The State Board sets policy for and coordinates the statewide program for water quality control for all the waters of the state.[11,12] A Regional Board administers the statewide program for water quality control within each of the State's nine designated geographical regions.[13,14] The State Board and the Regional Boards are in the Resources Agency,[15] a part of the executive branch of State government.

Authority [16]

The State Board and the Regional Boards have quasi-legislative powers to adopt, amend and repeal administrative regulations concerning water quality control. The State Board and a Regional Board's rulemaking authority and implied exemptions from the APA were recently discussed in an OAL Determination, which found that the Boards' policies on "wetlands" were "regulations" required to be adopted in compliance with the APA.[17] With regard to the rulemaking authority of the State Board,[18] Water Code section 1058 provides:

> "The board may make such reasonable rules and regulations as it may from time to time deem advisable in carrying out its powers and duties under [the Water Code]."

The State Board exercises "the adjudicatory and the regulatory functions of the state in the field of water resources."[19] Water Code section 13001 provides in part:

> "It is the intent of the Legislature that the state board and each regional board shall be the principal state agencies with primary responsibility for the coordination and control of water quality. . . ." [Emphasis added.]

These sections expressly delegate to the State Board the power to adopt quasi-legislative administrative regulations to govern water quality control in California. Moreover, the State Board has implied quasi-legislative power to adopt regulations necessary to exercise powers expressly granted to it.[20]

Applicability of the APA to Agency's Quasi-Legislative Enactments

Several provisions of law evidence the applicability of the APA to "regulations" adopted by the State Board.

Government Code section 11346 provides that "[i]t is the purpose of this article to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. . . ." The section goes on to say:

> "the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. . . ." [Emphasis added.]

Another section, Government Code section 11343, subdivision (a) provides that "[e]very state agency shall:

> "(a) Transmit to the office for filing with the Secretary of State a certified copy of every regulation adopted or amended by it . . . ."[21] [Emphasis added.]

The State Board is a "state agency" for purposes of the APA. Government Code section 11342, subdivision (b) clearly indicates that the term "state agency" applies to all state agencies, except those "in the judicial or legislative departments."[22]

The State Board is authorized by Water Code section 1058 (quoted above under "Authority") to adopt regulations on water quality control. The State Board's rulemaking authority under section 1058 was expanded in 1969 to include regulations on water quality control under the Porter-Cologne Water Quality Control Act, Division 7 of the Water Code, sections 13000 through 13999.16 (the "Porter-Cologne Act").[23]

Reading Government Code sections 11346, 11343 and 11342 together with Water Code section 1058, we conclude that the state policies for water quality control, which satisfy the definition of a "regulation" for purposes of the APA--and which are not otherwise exempt--must be adopted pursuant to the APA.

Moreover, the State Board has adopted water quality control policy pursuant to the APA.[24] Section 641 of Title 23 of the California Code of Regulations provides that "[t]he regulations contained in [chapter 3 of Title 23, which begins at section 640] are adopted for the purpose of implementing

and carrying out provisions of . . . , [the Porter-Cologne Act]." The reference notes[25] printed with State Board regulations in the California Code of Regulations also demonstrate that the State Board has adopted regulations pursuant to the APA to set state policy for water quality control under the Porter-Cologne Act. For example, Water Code sections 13140-13147, 13260 and 13263, all sections within the Porter-Cologne Act, are cited in the reference note for section 2510 of Title 23 of the CCR. Section 2510 concerns discharges of waste to land. The cited sections of the Porter-Cologne Act provide for the adoption of state policy for water quality control,[26] govern the filing of waste discharge reports with Regional Boards,[27] and provide for the regulation of waste discharges by Regional Boards.[28] State policy for water quality control has thus been adopted pursuant to the APA.

Further, the State Board's own regulations recognize that "regulations" adopted by the State Board are subject to the APA. Subdivision (a) of section 649 of Title 23 of the CCR provides:

> "(a) 'Rulemaking proceedings' shall include any hearings designed for the adoption, amendment, or repeal of any rule, regulation, or standard of general application, which implements, interprets or makes specific any statute enforced or administered by the State and Regional Boards." [Emphasis added.]

Section 649.1 of Title 23 provides:

> "Proceedings to adopt regulations, including notice thereof, shall, as a minimum requirement, comply with all applicable requirements established by the Legislature (Government Code Section 11340, et seq.) [the APA]. This section is not a limitation on additional notice requirements contained elsewhere in this chapter." [Emphasis added.]

We note that the Board concedes that Resolution 88-63 is a "regulation."[29] If this is the case, the above-quoted State Board regulations would appear to confirm that the regulatory provisions of Resolution 88-63 must be adopted pursuant to the APA.

General Background

To facilitate an understanding of the issues presented in this Request, we will discuss pertinent statutory, regulatory, and case law history, as well as the undisputed facts and circumstances that have given rise to the present Determination.

In 1986 by initiative measure, the voters of California enacted the Safe Drinking Water and Toxics Enforcement Act of 1986[30] (Proposition 65). One of the purposes of Proposition 65 is to protect the drinking water supply. With certain exemptions and exceptions, Proposition 65 prohibits the knowing discharge or release of a chemical known 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, . . ."[31] (Emphasis added.) The phrase "source of drinking water" as used in Proposition 65 makes use of designations attached to bodies of water by Regional Boards in Water Quality Control Plans. The phrase is defined as follows by Health and Safety Code section 25249.11, subdivision (d):

> "'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 uses."

The identification or designation of waters as suitable for domestic or municipal uses is done by a Regional Board as a part of the process of adopting water quality control plans for its region. The Porter-Cologne Act, adopted in 1969, authorizes each Regional Board to identify or designate waters in its region that are suitable for domestic or municipal uses. Water quality control plans must be adopted by each Regional Board for all areas within its region[32] and must include such water quality objectives[33] as will in the judgement of the Regional Board "ensure the reasonable protection of beneficial uses and the prevention of nuisance; . . ."[34] Beneficial uses for which objectives may be established include domestic and municipal uses.[35]

Under the Porter-Cologne Act, the State Board has the responsibility to coordinate the state-wide program for water quality control[36] and to "formulate and adopt state policy for water quality control."[37] Apparently pursuant to this authority, the State Board adopted Resolution No. 88-63, "Sources of Drinking Water" on May 19, 1988. The resolution (which is reprinted in note 38) directs Regional Boards to identify all waters suitable for domestic or municipal uses and establishes criteria for making the designations.[38]

On July 15, 1988, the Blackwell Land Company, Inc. ("the Requester") filed a Request for Determination with OAL challenging Resolution No. 88-63. In its Request, the Requester alleges:

> "the Board has failed and refused to adopt Resolution 88-63 pursuant to the California APA. The

> Board has not, e.g., submitted the policy to OAL for Review and approval under the standards set forth in Government Code section 11349.1. Nor did the Board prepare and distribute an adequate initial statement of reasons upon proposing the policy, or a final statement of reasons upon adoption of the policy, as required by Government Code section 11346.7. Nor has the Board responded, in writing, to the many comments submitted on the proposed policy. Id."[39]

On February, 10, 1989, OAL published a summary of this Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.[40]

On request of the State Board, OAL granted the Board an extension of time in which to file its response. On May 2, 1989, the State Board filed an Agency Response to the Request with OAL.

II. DISPOSITIVE ISSUES

There are three main issues before us:[41]

(1) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(2) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

(3) WHETHER THE LEGISLATURE HAS IMPLIEDLY EXEMPTED THE CHALLENGED RULES FROM THE APA.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . . [Emphasis added.]"

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> " (a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]. . . . [Emphasis added.]"

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- a rule or standard of general application or
- a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency or
- govern the agency's procedure?

Do the challenged rules establish standards of general application?

Resolution No. 88-63 clearly sets rules or standards of general application. The resolution provides that "[a]ll surface and ground waters of the State are considered to be suitable, or potentially suitable, for municipal or domestic water supply and should be so designated by the Regional Boards . . . ." The resolution also establishes criteria to be used by the Regional Boards in excepting waters from this designation. These provisions and criteria apply to all designations to be made by all Regional Boards[42] concerning all waters of the state, with specified exceptions.[43] Thus, the provisions of the resolution are of general application.

Do the challenged rules implement, interpret or make specific the law enforced or administered by the agency?

The resolution also implements, interprets, and makes specific the law enforced or administered by the State Board and the Regional Boards. The resolution implements Health and Safety Code section 25249.11, subdivision (d) (quoted above)

by directing the Regional Boards to identify those waters potentially suitable for domestic or municipal uses in their Water Quality Control Plans. It makes subdivision (d) specific by providing:

> "'Sources of drinking water' shall be defined in Water Quality Control Plans as those water bodies with beneficial uses designated as suitable, or potentially suitable for municipal or domestic water supply (MUN); . . ."[44]

The resolution also makes the subdivision specific by providing: "All surface and ground waters of the State are considered to be suitable, or potentially suitable, for municipal or domestic water supply . . . ."

Water Code section 13240 provides that "[e]ach regional board shall formulate and adopt water quality control plans for all areas within the region. . . ." The section also provides that "[s]uch plans shall be periodically reviewed and may be revised." Resolution 88-63 makes this section specific by requiring the Regional Boards to review existing Water Quality Control Plans and reconsider current designations assigned to any body of water to identify those water bodies presently or potentially suitable for municipal or domestic water supply. In this regard, Resolution 88-63 provides:

> "Any body of water which has a current specific designation previously assigned to it by a Regional Board in Water Quality Control Plans may retain that designation at the Regional Board's discretion. Where a body of water is not currently designated as MUN but, in the opinion of a Regional Board, is presently or potentially suitable for MUN, the Regional Board shall include MUN in the beneficial use designation."

Water Code section 13241 provides for the designation of beneficial uses. The section provides: "Each regional board shall establish such water quality objectives in water quality control plans as in its judgment will ensure the reasonable protection of beneficial uses . . . ." The section also provides:

> "Factors to be considered by a regional board in establishing water quality objectives shall include, but not necessarily be limited to, all of the following:
>
> "(a) Past, present, and probable future beneficial uses of water.

"(b) Environmental characteristics of the hydrographic unit under consideration, including the quality of the water available thereto.

"(c) Water quality conditions that could reasonably be achieved through the coordinated control of all factors which affect water quality in the area.

"(d) Economic considerations.

"(e) The need for developing housing within the region."

Resolution 88-63 makes Water Code section 13241 specific (1) by providing that all waters except waters which satisfy specified criteria are suitable, or potentially suitable for municipal or domestic water supply and should be so designated, and (2) by specifying the criteria for excepting waters from such designation.[45]

Water Code section 13140 provides that "[t]he state board shall formulate and adopt state policy for water quality control. . . ." In establishing the Porter-Cologne Water Quality Control Act the Legislature found in part that "the state-wide program for water quality control can be most effectively administered regionally, within a framework of state-wide coordination and policy."[46] Resolution 88-63 implements the intent of the Legislature as reflected in these provisions by establishing uniform criteria to be applied throughout the state by each Regional Board in designating waters as suitable or potentially suitable for municipal or domestic water supply.

Provisions in Resolution 88-63 thus implement, interpret and make specific Health and Safety Code section 25249.11, subdivision (d); and Water Code sections 13000, 13140, 13240 and 13241. We note, however, that several of the provisions in the resolution do not appear to implement, interpret or make specific the law enforced or administered by the State Board. Paragraphs 1 -- 4 of the "WHEREAS" part of the resolution merely restate existing law.[47] Paragraph 6 of the "WHEREAS" part of the resolution is a finding of fact.[48]

WE THEREFORE CONCLUDE that the provisions of State Water Resources Control Board Resolution No. 88-63, "Sources Of Drinking Water," except for "WHEREAS" provisions 1 through 4 and 6, are "regulations" as defined in Government Code section 11342, subdivision (b).

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies--for

instance, "internal management"--are not subject to the procedural requirements of the APA.[49] However, none of the recognized exceptions apply to the provisions of Resolution 88-63.

THIRD, WE INQUIRE WHETHER THE LEGISLATURE HAS IMPLIEDLY EXEMPTED THE CHALLENGED RULES FROM APA REQUIREMENTS.

The State Board argues that the Porter-Cologne Act implicitly exempts Resolution 88-63 from the procedural requirements of the APA because the Porter-Cologne Act establishes a separate and distinct procedure for the adoption of water quality control policies.[50]

Exemptions from the APA must be express, not implied

As we explained in 1989 OAL Determination No. 4,[51] Government Code section 11346 provides that APA exemptions must be express and not implied. There we said:

> "In 1947, the Legislature enacted the following APA provision:
>
> > 'It is the purpose of this article to establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations. Except as provided in section 11346.1, the provisions of this article are applicable to the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, but nothing in this article repeals or diminishes additional requirements imposed by any such statute. The provisions of this article shall not be superseded or modified by any subsequent legislation except to the extent that such legislation shall do so expressly.' [Emphasis added.]
>
> "In 1947, the above provision was numbered Government Code section 11420. Despite the dramatic rewriting of the APA in 1979 which led to the creation of OAL, this section was reenacted unaltered, except for renumbering as section 11346. Section 11346 thus represents a clear and strong legislative policy of 42 years standing, which was reaffirmed and underscored by the determined 1979 legislative effort to establish a central quality control authority to review state agency rules.
>
> "What did the Legislature mean by the word 'expressly' in section 11346?
>
> "According to settled principles of statutory interpretation, we are to look to the ordinary meaning of the

word. According the American Heritage Dictionary, 'expressly' means 'definitely and explicitly stated.' It also means 'in an express or definite manner; explicitly.' In a usage note under the word 'explicit,' the American Heritage Dictionary states:

> 'Explicit and express both apply to something that is CLEARLY STATED RATHER THAN IMPLIED. Explicit applies more particularly to that which is carefully spelled out: explicit instructions. Express applies particularly to a clear expression of intention or will: an express promise or an express prohibition.' [Underlined emphasis in original; capitalized emphasis added.]

"According to Black's Legal Dictionary, 'express' means:

> 'clear; definite; explicit; plain; direct; unmistakable; not dubious or ambiguous. . . . Made known distinctly and explicitly, and not left to inference. . . . The word is usually contrasted with "implied."' [Emphasis added.]

"When the Legislature wants to expressly exempt an agency from the APA, it knows what to say. For instance, Labor Code section 1185 expressly exempts rules concerning the minimum wage and similar matters:

> 'The orders of the [Industrial Welfare Commission (IWC)] fixing minimum wages, maximum hours, and standard conditions of labor for all employees, when promulgated in accordance with the provisions of this chapter, shall be valid and operative and such orders are hereby expressly exempted from the provisions of Article 5 (commencing with Section 11346) of Chapter 3.5 of Part 1 of Division 3 of Title 2 of the Government Code.' [Emphasis added.]

"This statute explicitly and unmistakably exempts the listed rules. It is noteworthy, however, that the IWC has an elaborate public comment procedure that goes back to the World War I era, and is in some ways more stringent than the APA. Also, we note that the exemption is conditional--the Commission must follow the non-APA rulemaking procedures spelled out in the Labor Code. Further, we note that the exemption does not exempt the listed rules from the APA publication requirements. Thus, the researcher or member of the regulated public need not launch a multi-city search for the written rule. He or she need only turn to the appropriate CCR volume to locate the most current version of the rule. In fact, when work is completed later this year in

placing the CCR into a data base, subscribers will be able to gain instant access via computer to the text of regulations appearing in the CCR.

"Section 11346 also clarifies another important point. How do APA rulemaking requirements interact with statutes which prescribe different rulemaking procedures? Section 11346 answers this question comprehensively.

"First, section 11346 declares that the purpose of the APA is to 'establish basic minimum procedural requirements for the adoption, amendment or repeal of administrative regulations.' (Emphasis added.)

"Second, section 11346 declares that APA requirements are applicable to 'the exercise of any quasi-legislative power conferred by any statute heretofore or hereafter enacted, . . .' (Emphasis added.)

"Third, [section] 11346 provides that nothing in the APA 'repeals or diminishes additional requirements imposed by any . . . statute [heretofore or hereafter enacted].' (Emphasis added.)"[52]

1989 OAL Determination No. 4 also contains an excellent discussion[53] of the structure of the APA and the legislative intent underlying the APA, which we have considered but will not reprint here.

In the application of these principles to this determination, OAL concludes (1) the APA does not repeal or diminish the "additional" procedural requirements spelled out in the Porter-Cologne Act; (2) subsequently enacted statutes--such as the Porter-Cologne Act--cannot "supersede" or "modify" APA provisions unless the subsequent legislation does so "expressly"; and (3) where both the APA and another statute impose limitations upon one particular agency's exercise of quasi-legislative power, and the other statute's limitations add to APA rules, both sets of limitations apply. Assume, for example, that the enabling act of agency X requires it to hold a public hearing prior to adopting regulations. According to the APA, a public hearing need not be scheduled unless a timely demand is received from the public. Section 11346 (and general principles of statutory interpretation) would indicate that agency X must comply with both APA procedures (e.g., summarize and respond to written public comments) and the specific mandate of its enabling act (i.e., hold a public hearing even if one is not specifically demanded by a member of the public).

The State Board concedes that the Porter-Cologne Act does not expressly exempt water quality control policies from the APA.[54] Consequently, Resolution 88-63 is not exempt from the APA.

The language of the Porter-Cologne Act does not establish an exemption from APA requirements

The State Board contends that the language of the Porter-Cologne Act shows that the Legislature intended to exempt not only Resolution 88-63, but all policies for water quality control from the requirements of the APA.[55] OAL cannot agree with this conclusion.

The State Board suggests that the "plain" and "clear" meaning of Water Code sections 13140 and 13141 is that the Legislature established a "separate" (non-APA) procedure in the Porter-Cologne Act for the adoption of water quality control policies, and that section 13147 somehow "defines" the process for adopting state policy for water quality control.[56]

However, no intent to limit the applicability of the APA is apparent in the language of those sections. Water Code section 13140 provides that state policy for water quality "shall be adopted in accordance with the provisions of this article. . . ." Water Code section 13141 provides that state policy "adopted or revised in accordance with the provisions of this article . . . shall become a part of the California Water Plan effective when such policies . . . have been reported to the Legislature at any session thereof." Water Code section 13147[57] simply requires a public hearing, advance notice to Regional Boards[58] and newspaper publication of the notice of the hearing as part of the process to be followed in the adoption of state water quality control policy. While none of these procedures are required by the APA, Government Code section 11346 (quoted above) clearly recognizes that additional requirements may be imposed by other statutes. The most that can be said of the language of these Water Code sections is that they make no mention of the APA. Nothing in the language used makes the procedures required by the Porter-Cologne Act exclusive. Consequently, OAL cannot agree that the language of the Porter-Cologne Act exempts Resolution 88-63 from the APA.

The Board's interpretation of the Porter-Cologne Act is beyond the scope of its authority

Government Code section 11346[59] (quoted above) subjects all quasi-legislative administrative rulemaking to the requirements of the APA. Notwithstanding the clear language of section 11346, the State Board argues that Resolution 88-63 is exempt from the APA because the Legislature reenacted a statute that the State Board and its predecessor, the State Water Quality Control Board, had interpreted as establishing an exemption from the APA for water quality control policy, and argues that the Legislature has not altered the interpretation by subsequent legislation.[60]

The State Board explains that the 1969 adoption of Water Code section 13147[61] constituted a reenactment of former Water Code section 13022.4, which had a settled administrative interpretation to the effect that water quality control policies are not subject to the APA. The Board cites to Industrial Welfare Commission v. Superior Court[62] for the proposition that "[r]eenactment of a statutory provision which has a settled administrative interpretation is persuasive that the intent was to continue the previous interpretation." The Board also cites to Coca-Cola v. State Board of Equalization[63] for the proposition that:

> "The State Board's long-standing interpretation of the Porter-Cologne Act has not been altered by subsequent legislation, even though the Porter-Cologne Act has been amended several times. Later statutes amending or referencing the Porter-Cologne Act provisions for adoption of water quality policies, without making any change that would require Administrative Procedure Act regulations, may be seen as legislative ratification of the administrative practices of the State and Regional Boards."

Assuming for this discussion that Water Code section 13022.4 did have the interpretation suggested by the State Board and that the interpretation was settled,[64] we must consider whether such an interpretation was within the scope of the authority of the State Board or its predecessor the State Water Quality Control Board. Administrative interpretations that alter or amend a statute or enlarge or impair its scope are void.[65] "[A]n erroneous administrative construction does not govern the interpretation of a statute, even though the statute is subsequently reenacted without change. [Citations; emphasis added.]"[66]

The resolution of this issue requires the application of principles of statutory construction. The powers of a state agency are drawn from California statutes or the Constitution.[67] While an agency may construe its enabling statutes or the statutes it is authorized to administer, such construction is constrained by the same rules of construction that apply to the courts. Principal rules of statutory construction were recently summarized by the California Supreme Court:

> "[The] first task in construing a statute is to ascertain the intent of the Legislature so as to effectuate the purpose of the law. In determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual ordinary

> import and according significance, if possible to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other to the extent possible. [Citations.] Where uncertainty exists consideration should be given to the consequences that will flow from a particular interpretation. [Citation.] Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent. [Citations.] A statute should be construed whenever possible so as to preserve its constitutionality. [Citations.]"[68]

Further, "[t]he contemporaneous construction of a new enactment by the administrative agency charged with its enforcement, although not controlling, is entitled to great weight. [Citations.]"[69] Moreover, OAL, like the courts, must defer to an agency's construction of its own authority unless that interpretation is clearly erroneous.[70] Neither OAL nor a court may substitute its judgment for that of an agency's regarding the substantive content of an agency's interpretation of a statute it administers.[71] If, however, the meaning of a statute is clear, the statute is not subject to construction, even by the agency charged with its enforcement, unless otherwise provided by the Legislature.[72] An agency may not, through construction, alter or amend a statute, or enlarge or restrict its scope.[73] While a state agency may exercise delegated discretion, it has no discretion to exceed the authority conferred.[74] An administrative regulation that exceeds the scope of the authority granted to an agency is void.[75]

We apply these principles to the matter at hand. We look first to the words of Water Code section 13022.4. As added to the Dickey Water Pollution Act in 1965, Water Code section 13022.4[76] provided:

> "The state board shall not adopt water pollution or water quality control policy unless a public hearing is first held respecting the adoption of such policy. At least 60 days in advance of such hearing, the state board shall notify any affected regional board or boards. The affected regional board or boards shall submit written recommendations to the state

board at least 20 days in advance of the hearing."

The obvious purpose of this statute is to establish a procedure for the adoption of water pollution or water control policy by the state board that gives due regard for the authority of the regional boards.[77] Giving effect to the language in its usual, ordinary import and according significance to every word, phrase and sentence, we see nothing that even hints that the purpose of this law was to exempt the adoption of water quality control policies from the APA.

We next construe the words in context, keeping in mind the statutory purpose and harmonizing the words with the provisions of Government Code section 11346, a statute relating to the same subject. In doing so, we find that no conflict existed between the procedures in Water Code section 13022.4 or in any other provision in the Dickey Water Pollution Act, and the procedures required by the APA. Although the APA requires neither a public hearing nor notification of the Regional Boards, it clearly recognizes that other statutes may impose additional requirements.[78] The Agency Response identifies nothing in the legislative history or historical circumstances surrounding the enactment of Water Code section 13022.4 or any other provision in the Dickey Water Pollution Act that would lend support to the proposition that the Legislature intended by its enactment to exempt the adoption of water pollution or water quality control policy by the state board from the coverage of the APA. The only historical document that OAL is aware of which expressly addresses the question does not support the State Board's view.[79]

The interpretation urged by the State Board constitutes an amendment of Water Code section 13022.4 that would in effect permit the State Board to exceed limitations imposed by the APA on the exercise of quasi-legislative powers by the State Board. Neither the State Board nor any of its predecessors have been delegated the authority to amend a statute. The application of settled rules of statutory construction clearly shows that the interpretation urged by the State Board is wrong. Thus, it was not ratified by the Legislature by the adoption of the Porter-Cologne Act. Consequently, this argument cannot serve as a valid basis for exempting Resolution 88-63 from the requirements of the APA.

THE INTERPRETATION URGED BY THE BOARD DOES NOT MEET THE LEGAL STANDARD GENERALLY APPLIED TO REPEALS BY IMPLICATION

The statutory interpretation urged by the State Board would effect a partial repeal of Government Code section 11346. Repeals by implication are not favored. The general presumption against implied repeals was explained by the court in In Re Thierry S.[80] as follows:

> "When two or more statutes concern the same subject matter and are in irreconcilable conflict the doctrine of implied repeal provides that the most recently enacted statute expresses the will of the Legislature, and thus to the extent of the conflict impliedly repeals the earlier enactment. Repeals by implication, however, are not favored and there is a presumption against operation of the doctrine. [Citation.] 'They are recognized only when there is no rational basis for harmonizing the two potentially conflicting statutes [citation (brackets in original)], and the statutes are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation. The courts [and administrative agencies] are bound, if possible, to maintain the integrity of both statutes if the two may stand together. [Citation.]"

The APA and the Porter-Cologne Act can be given concurrent effect and may "stand together" with regard to the procedures for the adoption of water quality control policies by the State Board. The State Board has identified no conflict between the Porter-Cologne Act and the APA in this regard and OAL sees none. This lack of conflict gives rise to the presumption that there was no implied repeal of the APA with regard to the adoption of state policy for water quality control by the State Board when the Legislature enacted the provisions of the Porter Cologne Act. Consequently, repeal by implication does not serve as a basis for exemption of Resolution 88-63 from the APA.

OTHER STATUTORY PROVISIONS

The State Board urges that other statutory provisions generally rely on the existence of water quality control policies. The statutory provisions cited by the State Board do not pertain to the water quality control policy at issue in this Determination i.e., the policy established by Resolution 88-63, "Sources of Drinking Water." We express no opinion in this Determination about any other policy adopted by the State Board.[81]

III. CONCLUSION

For the reasons set forth above, OAL finds that the provisions of Resolution No. 88-63, except for the "Whereas" provisions, (1) are "regulations" as defined in Government Code section 11342, subdivision (b); (2) are subject to the requirements of the APA; have not been adopted pursuant to the requirements of the APA; and (3) therefore, violate Government Code section 11347.5, subdivision (a).

DATE: May 17, 1989

for HERBERT F. BOLZ
Coordinating Attorney

for MICHAEL McNAMER
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1 This Request for Determination was originally filed by Roger Lane Carrick, Esq., Heller, Ehrman, White & McAuliffe, 333 Bush Street, San Francisco, CA 94104-2878, (213) 689-0200, on behalf of the Blackwell Land Company, Inc. The Blackwell Land Company is now represented by George H. Soares, of Kahn, Soares & Conway, 1121 I Street, Suite 200, Sacramento, CA 95814, (916) 448-3826. The State Water Resources Control Board was represented by Steven H. Blum, Staff Counsel, Legal Office, State Water Resources Control Board, P. O. Box 100, Sacramento, CA 95801-0100, (916) 322-0188.

To facilitate indexing and compilation of determinations, OAL began as of January 1, 1989 assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination is "266" rather than "1."

2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

> Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's licensee auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism"); Association for Retarded Citizens --California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n. 5, 211 Cal.Rptr. 758, 764, n. 5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); Boreta Enterprises, Inc. v. Department of Alcohol Beverage Control (1970) 2 Cal.3d 85, 107, 84 Cal.Rptr. 113, 128 (where agency had failed to follow APA in adopting policy statement banning licensees from employing topless waitresses, court declined to "pronounce a rule in an area in which the Department itself is reluctant to adopt one," but also noted agency failure to introduce evidence in the contested disciplinary hearings supporting the conclusion that the forbidden practice was contrary to the public welfare and morals because it necessarily led to improper conduct), vacating, (1969) 75 Cal.Rptr. 79 (roughly the same conclusion; multiple opinions of interest as early efforts to

grapple with underground regulation issue in license revocation context); California Association of Health Facilities v. Kizer (1986) 178 Cal.App.3d 1109, 224 Cal.Rptr. 247 (court issued mandate requiring Department of Health Services to comply with statute which directed the Department to establish a subacute care program in health facilities and to promulgate regulations to implement the program); Carden v. Board of Registration for Professional Engineers (1985) 174 Cal.App.3d 736, 220 Cal.Rptr. 416 (admission of uncodified guidelines in licensing hearing did not prejudice applicant); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed --a rule appearing solely on a form not made part of the CCR); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (court found that the Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Newland v. Kizer (Cal.App. 4 Dist. 1989) 89 Daily Journal D.A.R 4932 (mandate is proper remedy to require the Department of Health Services to adopt regulations regarding temporary operation of long-term health care facilities as directed by statute); Pacific Southwest Airlines v. State Board of Equalization (1977) 73 Cal.App.3d 32, 140 Cal.Rptr. 543 (invalidating Board policy that aircraft qualified for statutory common carrier tax exemption only if during first six months after delivery the aircraft was "principally" (i.e., more than 50%) used as a common carrier); Sangster v. California Horse Racing Board (1988) 202 Cal.App.3d 1033, 249 Cal.Rptr. 235 (Board decision to order horse owner to forfeit $38,000 purse involved application of a rule to a specific set of existing facts, rather than "surreptitious rulemaking"); Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of proper rule articulating standard by which to measure licensee's competence).

In a recent case, Wightman v. Franchise Tax Board (1988) 202 Cal.App.3d 966, 249 Cal.Rptr. 207, the court found that administrative instructions promulgated by the Department of

Social Services, and requirements prescribed by the Franchise Tax Board and in the State Administrative Manual--which implemented the program to intercept state income tax refunds to cover child support obligations and obligations to state agencies--constituted quasi-legislative acts that have the force of law and establish rules governing the matter covered. We note that the court issued its decision without referring to either:

(1) the watershed case of Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, which authoritatively clarified the scope of the statutory term "regulation"; or

(2) Government Code section 11347.5.

The Wightman court found that existence of the above noted uncodified rules defeated a "denial of due process" claim. The "underground regulations" dimension of the controversy was neither briefed by the parties nor discussed by the court. [We note that, in an analogous factual situation involving the intercept requirements for federal income tax refunds, the California State Department of Social Services submitted to OAL (OAL file number 88-1208-02) in December 1988, Internal Revenue Service (IRS) Tax Refund Intercept Program regulations. These regulations were approved by OAL and filed with the Secretary of State on January 6, 1989, transforming the ongoing IRS intercept process, procedures and instructions contained in administrative directives into formally adopted departmental regulations.]

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index (see note 49, infra).

See also, the following Opinions of the California Attorney General, which concluded that compliance with the APA was required in the following situations:

Administrative Law, 10 Ops.Cal.Atty.Gen. 243, 246 (1947) (rules of State Board of Education); Workmen's Compensation, 11 Ops.Cal.Atty.Gen. 252 (1948) (form required by Director of Industrial Relations); Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56 (1956) (Department of Industrial Relations rules governing electrical wiring in trailer parks); Los Angeles Metropolitan Transit Authority Act, 32 Ops.Cal.Atty.Gen. 25 (1958) (Department of Industrial Relations's State Conciliation Service rules relating to certification of labor organizations and bargaining units); and Part-time Faculty as

Members of Community College Academic Senates, 60 Ops.Cal.Atty.Gen. 174, 176 (1977) (policy of permitting part-time faculty to serve in academic senate despite regulation limiting service to full-teachers). Cf. Administrative Procedure Act, 11 Ops.Cal.Atty.Gen. 87 (1948) (directives applying solely to military forces subject to jurisdiction of California Adjutant General fall within "internal management" exception); and Administrative Law and Procedure, 10 Ops.Cal.Atty.Gen. 275 (1947) (Fish and Game Commission must comply with both APA and Fish and Game Code, except that where two statutes are "repugnant" to each other and cannot be harmonized, Commission need not comply with minor APA provisions).

3 Title 1, California Code of Regulations (CCR), (formerly known as California Administrative Code), section 121, subdivision (a) provides:

> "'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]." [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4 Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule

which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a regulation as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a regulation as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

5 As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great

weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." (Emphasis added.)

6 Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 and 125. The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

In the matter at hand, comments were submitted to OAL by the Environmental Defense Fund, the Health and Welfare Agency, the Honorable Byron D. Sher member of the California Assembly, and by the original Requester, the Blackwell Land Company. On May 2, 1989, the Board submitted a Response to the Request for Regulatory Determination under Government Code section 11347.5. OAL considered all of these materials in making this determination.

7 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

8 Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

9 We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL for the purchase price of $3.00.

10 Water Code section 13001.

11 "'Waters of the state' means any water, surface or underground, including saline waters within the boundaries of the state." Water Code section 13050, subdivision (e).

12 Water Code sections 13000, 13140.

13 See Water Code section 13000.

14 Water Code section 13200.

15 Water Code section 13100, Government Code section 12805.

16 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does <u>not</u>

review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

17 1989 OAL Determination No. 4 (State Water Resources Control Board and San Francisco Regional Water Quality Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, p. 1026.

18 The State Board also succeeds to rulemaking powers previously delegated to certain other entities. Water Code section 179 provides:

> "The board succeeds to and is vested with all of the powers, duties, purposes, responsibilities, and jurisdiction vested in the Department and Director of Public Works, the Division of Water Resources of the Department of Public Works, the State Engineer, the State Water Quality Control Board, or any officer or employee thereof, under Division 2 (commencing with Section 1000), except Part 4 (commencing with Section 4000) and Part 6 (commencing with Section 5900) thereof; and Division 7 (commencing with Section 13000) of this code, or any other law under which permits or licenses to appropriate water are issued, denied, or revoked or under which the functions of <u>water pollution and quality</u> control are exercised." [Emphasis added.]

19 Water Code section 174.

20 Kerr's Catering Service v. Department of Industrial Relations (1962) 57 Cal.2d 319, 330, 19 Cal.Rptr. 492, 498; City of San Marcos v. California Com'n, Dept. of Transp. (1976) 60 Cal.App.3d 383, 405, 131 Cal.Rptr. 804, 818.

21 The section goes on to list exceptions to the filing requirement, none of which are applicable here.

22 Government Code section 11342, subdivision (a).

23 As part of the major revision of statutes governing water quality control enacted as the Porter-Cologne Water Quality Control Act, Water Code section 1058 was amended to authorize the adoption of regulations to carry out the State Board's powers and duties "under this code." It previously read "under this division." This change was recommended in a report entitled, "Recommended Changes in Water Quality Control, Final Report of the Study Panel to the California State Water Resources Control Board, Study Project, Water Quality Control Program (1969)." In the report, the proposed amendment was followed by a note which provides:

> "Amendment would authorize state board to issue regulations with respect to water quality under the provisions of [the Porter-Cologne Water Quality Control Act.] [Emphasis added.]"

The report is to be given substantial weight in interpreting the Porter-Cologne Act. People v. Berry (1987) 194 Cal.App.3d 158, 173-174, 239 Cal.Rptr. 349, 359.

24 The adoption of regulations to set state-wide policy on water quality control is consistent with legislative views on the adoption of state-wide policy for control of water pollution under the Dickey Water Pollution Act of 1949 (Stats. 1949, c. 1549), the forerunner of the Porter-Cologne Act. Those views are evidenced by this excerpt from the First Report of the Senate Interim Committee on Administrative Regulations to the 1955 Legislature (p. 59):

> "The State Water Pollution Control Board is an independent agency of government which is closely aligned to the Division of Water Resources and is charged with the formulation of a state-wide policy for the control of

water pollution, the administration of a state-wide program of financial assistance for water pollution control, and administering a state-wide program of research into technical phases of water pollution control. . . .

"The board is specifically authorized to adopt rules and regulations for the administration of the Water Pollution Control laws, but such authority does not specify the procedure to be followed in the adoption of regulations or establishing state-wide policy, nor is it limited in all cases to regulations which are reasonably necessary.

". . . .

"The board does not believe its functions are of a type which makes it necessary to adopt any large quantity of rules or regulations, but the board does try to coordinate the policies of the nine regional control boards by a Preliminary Statement of Objective and Policy, which the board believes to be only advisory in nature.

"The committee recommends the following, relating to the authority of the board to adopt regulations:

". . . .

". . . .

"3. The formulation of a state-wide policy should be required to be accomplished by way of regulation to permit public participation in the processes." [Emphasis added.]

When this report was issued, Water Code section 13020 authorized the State Water Pollution Control Board to adopt regulations and Water Code section 13022 provided:

"The state board shall formulate a state-wide policy for control of water pollution with due regard for the authority of the regional boards."

We note that the court in Armistead v. State Personnel Board. ((1978) 22 Cal.3d 198, 202 and 205, 149 Cal.Rptr. 1, 2 and 4) relied heavily on the 1955 report to the Legislature as an indicator of legislative intent with regard to the adoption of regulations by the State Personnel Board. We further note that the the State Personnel Board's enabling legislation did

not expressly require the adoption of all of its regulations pursuant to the APA, a situation parallel to the instant one.

25 A regulation transmitted to OAL for filing with the Secretary of State must be accompanied by a notation, prepared by the adopting agency, citing to the specific statute or other provision being implemented, interpreted or made specific by the regulation. Government Code section 11343.1, subdivision (b).

26 Water Code sections 13140-13147.

27 Water Code section 13260.

28 Water Code section 13263.

29 Agency Response, p. 2.

30 Health and Safety Code sections 25249.5 through 25249.13.

31 Health and Safety Code section 25249.5.

32 Water Code section 13240.

33 "'Water quality objectives' means the limits or levels of water quality constituents or characteristics which are established for the reasonable protection of beneficial uses of water or the prevention of nuisance within a specific area." Water Code section 13050, subdivision (h).

34 Water Code section 13241.

35 "'Beneficial uses' of the waters of the state that may be protected against quality degradation include, but are not necessarily limited to, domestic, municipal, agricultural and industrial supply; . . ." Water Code section 13050, subdivision (f).

36 See Water Code section 13000.

37 Water Code section 13140.

38 Resolution 88-63 provides in its entirety:

"WHEREAS:

"1. California Water Code Section 13140 provides that the State Board shall formulate and adopt State Policy for Water Quality Control; and,

"2. California Water Code Section 13240 provides that Water Quality Control Plans 'shall conform' to any State Policy for Water Quality Control; and,

"3. The Regional Boards can conform the Water Quality Control Plans to this policy by amending the plans to incorporate the policy; and,

"4. The State Board must approve any conforming amendments pursuant to Water Code Section 13245; and,

"5. 'Sources of drinking water' shall be defined in Water Quality Control Plans as those water bodies with beneficial uses designated as suitable, or potentially suitable, for municipal or domestic water supply (MUN); and,

"6. The Water Quality Control Plans do not provide sufficient detail in the description of water bodies designated MUN to judge clearly what is, or is not, a source of drinking water for various purposes.

"THEREFORE BE IT RESOLVED:

"All surface and ground waters of the State are considered to be suitable, or potentially suitable, for municipal or domestic water supply and should be so designated by the Regional Boards [footnote omitted] with the exception of:

"1. Surface and ground waters where:

"a. The total dissolved solids (TDS) exceed 3,000 mg/L (5,000 uS/cm, electrical conductivity) and it is not reasonably expected by Regional Board to supply a public water system, or

"b. There is contamination, either by natural processes or by human activity (unrelated to a specific pollution incident), that cannot reasonably be treated for domestic use using either Best Manage-

ment Practices or best economically achievable treatment practices, or

"c. The water sources does not provide sufficient water to supply a single well capable of producing an average, sustained yield of 200 gallons per day.

"2. Surface waters where:

"a. The water is in systems designed or modified to collect or treat municipal or industrial wastewaters, process waters, mining wastewaters, or storm water runoff, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Boards; or,

"b. The water is in systems designed or modified for the primary purpose of conveying or holding agricultural drainage waters, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Board.

"3. Ground water where:

"The aquifer is regulated as a geothermal energy producing source or has been exempted administratively pursuant to 40 Code of Federal Regulations, Section 146.4 for the purpose of underground injection of fluids associated with the production of hydrocarbon or geothermal energy, provided that these fluids do not constitute a hazardous waste under 40 CFR, Section 261.3.

"4. Regional Board Authority to Amend Use Designations:

"Any body of water which has a current specific designation previously assigned to it by a Regional Board in Water Quality Control Plans may retain that designation at the Regional Board's discretion. Where a body of water is not currently designated as MUN but, in the opinion of a Regional Board, is presently or potentially suitable for MUN, the Regional Board shall include MUN in the beneficial use designation.

"The Regional Boards shall also assure that the beneficial uses of municipal and domestic supply are designated for protection wherever those uses are presently being attained, and assure that any changes in beneficial use designations for waters of the State are consistent with all applicable regulations adopted by the Environmental Protection Agency.

"The Regional Boards shall review and revise the Water Quality Control Plans to incorporate this policy."

39 Request for Determination, pp. 3-4.

40 Register 89, No. 6-Z, p. 271A

41 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

42 Apparently, more discretion is allowed the Regional Boards with regard to waters that already have a specific designation assigned to them. In this regard, the resolution provides:

"Any body of water which has a current specific designation previously assigned to it by a Regional Board in Water Quality Control Plans may retain that designation at the Regional Board's discretion."

43 The resolution expressly provides that it "does not affect any determination of what is a potential source of drinking water for the limited purposes of maintaining a surface impoundment after June 30, 1988, pursuant to Section 25208.4 of the Health and Safety Code."

44 See also paragraph 5 of the "WHEREAS" part of the resolution which provides:

"'Sources of drinking water' shall be defined in Water Quality Control Plans as those water bodies with beneficial uses designated as suitable, or potentially suitable, for municipal or domestic water supply (MUN); . . ."

45 The resolution establishes the following criteria for excepting waters from designation as suitable, or potentially suitable for municipal or domestic water supply:

"1. Surface and ground waters where:

"a. The total dissolved solids (TDS) exceed 3,000 mg/L (5,000 uS/cm, electrical conductivity) and it is not reasonably expected by Regional Boards to supply a public water system, or

"b. There is contamination, either by natural processes or by human activity (unrelated to a specific pollution incident), that cannot reasonably be treated for domestic use using either Best Management Practices or best economically achievable treatment practices, or

"c. The water sources does not provide sufficient water to supply a single well capable of producing an average, sustained yield of 200 gallons per day.

"2. Surface waters where:

"a. The water is in systems designed or modified to collect or treat municipal or industrial wastewaters, process waters, mining wastewaters, or storm water runoff, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Boards; or,

"b. The water is in systems designed or modified for the primary purpose of conveying or holding agricultural drainage waters, provided that the discharge from such systems is monitored to assure compliance with all relevant water quality objectives as required by the Regional Board.

"3. Ground water where:

"The aquifer is regulated as a geothermal energy producing source or has been exempted administratively pursuant to 40 Code of Federal Regulations, Section 146.4 for the purpose of underground injection of fluids associated with the production of hydrocarbon or geothermal energy, provided that these fluids do not constitute a hazardous waste under 40 CFR, Section 261.3."

46 Water Code section 13000.

47 "WHEREAS:

"1. California Water Code Section 13140 provides that the State Board shall formulate and adopt State Policy for Water Quality Control; and,

"2. California Water Code Section 13240 provides that Water Quality Control Plans 'shall conform' to any State Policy for Water Quality Control; and,

"3. The Regional Boards can conform the Water Quality Control Plans to this policy by amending the plans to incorporate the policy; and,

"4. The State Board must approve any conforming amendments pursuant to Water Code Section 13245; . . ."

48 Paragraph 6 of the resolution provides:

"The Water Quality Control Plans do not provide sufficient detail in the description of water bodies designated MUN to judge clearly what is, or is not, a source of drinking water for various purposes."

49 The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)

e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Kaaren Morris), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $108.

50 In contrast to the State Board's position, we note that the State Board is directed by Water Code section 13370, subdivision (c) to implement the provisions of the federal Clean Water Act, and further note that the federal regulation setting out minimum requirements for participation by states in the activities under the Clean Water Act (40 C.F.R 25.10, subd. (b) [7-1-88 Edition]) generally recognizes that rulemaking by a state under the Clean Water Act is bound by the state's own administrative procedure act. The regulation expressly provides:

> "in the event of a conflict between [minimum federal procedures for state rulemaking under the Clean Water Act] and a provision of a State's administrative procedures act, the State's law shall apply."

Thus, no support for the State Board's position may be drawn from its duty to implement the Clean Water Act.

51 See note 17, supra.

52 Id., pp. 126-128.

53 See pp. 120-126.

54 Agency Response, p. 5.

55 In this determination, OAL considers only whether the provisions of Resolution 88-63 are subject to the requirements of the APA.

56 Although the unarticulated premise of this argument appears to be that the Porter-Cologne Act establishes an exclusive process for the adoption of state policy for water quality control, that does not appear to be the State Board's position. If it were, then logically the Board would also be exempt from other general procedural requirements such as the provisions of the Bagley-Keene Open Meeting Act (Gov. Code secs. 11120 through 11132), which govern the conduct of meetings by state bodies. The State Board, however, recognizes that it is covered by the Bagley-Keene Open Meeting Act. See California Code of Regulations, Title 23, sections 647 through 647.5.

57 Water Code section 13147 provides in its entirety:

> "The state board shall not adopt state policy for water quality control unless a public hearing is first held respecting the adoption of such policy. At least 60 days in advance of such hearing the state board shall notify any affected regional boards, unless notice is waived by such boards, and shall give notice of such hearing by publication within the affected region pursuant to Section 6061 of the Government Code. The regional boards

shall submit written recommendations to the state board at least 20 days in advance of the hearing. [Stats. 1971, ch. 1288, sec. 3.]"

58 The requirement to give notice to an affected regional board may be waived by that regional board.

59 Government Code section 11346, added by Stats. 1979, ch. 567, is derived from former section 11420, added by Stats. 1947, ch. 1425.

60 "Legislative inaction has been called a 'weak reed upon which to lean' and a 'poor beacon to follow' in construing a statute." 2A Sutherland on Statutory Construction (4th ed.) 49.10, p. 407. It is particularly weak here. The State Board suggests that the amendment of the Porter-Cologne Act without making any change that would require the adoption of state water quality control policies pursuant to the APA may be seen as legislative ratification of the State Board's interpretation. Such amendment, however, has been and continues to be wholly unnecessary in light of the clear beacon of Government Code section 11346.

61 The full text of section 13147 is set out in footnote 57.

62 (1980) 27 Cal.3d 690, 708-09, 166 Cal.Rptr 331, 341, app. dismissed, cert. denied, 449 U.S. 1029, 1034, 101 S.Ct. 602, 610.

63 (1945) 25 Cal.2d 918, 922. Accord, Mission Pak. Co. v. State Board of Equalization, (1972) 23 Cal.App.3d 120, 125-126, 100 Cal.Rptr. 69, 72.

64 It is not clear from the information provided in the Agency Response that a settled administrative interpretation regarding non-APA adoption of state policy under the Dickey Water Pollution Act existed in 1969. The State Board asserts that the 1969 interpretation is based upon Resolution No. 66-17, "Approving Procedures for Formulating Water Quality Control Policy," which, according to the State Board, "did not provide for Administrative Procedure Act rulemaking." OAL has not been provided with a copy of the Resolution and it is not clear from the Agency Response whether the resolution even applies to the adoption of statewide policies by the State Water Quality Control Board. The discussion of the resolution in the Agency Response focuses on the adoption of poli-

cies by the Regional Boards. It is also unclear from the Agency Response whether the resolution expressly addresses the non-application of the APA to state-wide policies. These ambiguities are compounded by the fact that from July 14, 1960 (Cal. Admin. Code Supp., Register 60, No. 14 (June 25, 1960) Title 23, p. 78.14), until July 29, 1971 (Cal. Admin. Code Supp., Register 71, No. 27 (July 3, 1971) Title 23, p. 78.9), state-wide policy for control of water pollution was codified in the form of regulations in the California Administrative Code. Thus, from the information available to OAL in making this determination, it is debatable whether a settled administrative interpretation on the applicability of the APA to state policy on water quality control existed in 1969.

65 Dyna-Med v. Fair Employment & Housing (1987) 43 Cal.3d 1379, 1389, 241 Cal.Rptr. 67, 71 (interpretation that Fair Employment and Housing Commission may impose punitive damages found to be unauthorized).

66 Whitcomb Hotel, Inc. v. California Employment Com. (1944) 24 Cal.2d 753, 757-758.

67 Ferdig v. State Personnel Bd. (1969) 71 Cal.2d 96, 103-104, 77 Cal.Rptr. 224, 228-229.

68 Dyna-Med v. Fair Employment & Housing, supra, note 65, 43 Cal.3d 1379, 1386-1387, 241 Cal.Rptr. 67, 69-70.

69 Id., at p. 1388.

70 See Cal. Drive-In Restaurant Assn. v. Clark (1943) 22 Cal.2d 287, 294.

71 Government Code section 11340.1.

72 Tiernan v. Trustees of Cal. State University (1983) 33 Cal.3d 211, 218-219, 188 Cal.Rptr. 115, 119-120.

73 Association for Retarded Citizens--California v. Department of Developmental Services (1985) 38 Cal.3d 384, 390-91, 211 Cal.Rptr. 758, 760-761.

74 California Welfare Rights Organization v. Brian (1974) 11 Cal.3d 237, 242, 113 Cal.Rptr. 154, 157.

75 Morris v. Williams (1967) 67 Cal.2d 733, 748, 63 Cal.Rptr. 689, 699.

76 Statutes 1965, chapter 1657.

77 As originally adopted, section 13022 of the Dickey Water Pollution Act directed the state board to "formulate a statewide policy for control of water pollution with due regard for the authority of the regional boards." (Emphasis added.)

78 Government Code section 11346.

79 See note 24, supra, for excerpt from the First Report of the Senate Interim Committee on Administrative Regulations to the 1955 Legislature of the State of California.

80 (1977) 19 Cal.3d 727, 744, 139 Cal.Rptr. 708, 717.

81 The Agency Response from the State Board and comments from the Health and Welfare Agency and Assembly Member Byron Sher urge that the adoption by the Legislature of Health and Safety Code section 25297.1 ratified the State Board's interpretation that the Porter-Cologne Act establishes an independent procedure for adopting policies for water quality control, which is exempt from the requirements of the APA. This argument is based upon the following circumstances surrounding the adoption of AB 853 of the 1987-88 Regular Session of the California Legislature. AB 853 proposed the development and implementation of a pilot program for abatement of releases of hazardous substances from underground storage tanks. When AB 853 was introduced, subdivision (d) of section 25297.1 provided that the State Board "shall adopt administrative and technical procedures for cleanup and abatement actions taken pursuant to this section. . . ." And, subdivision (b) provided that cleanup and abatement actions "shall be consistent with procedures and regulations adopted by the board pursuant to subdivision (d) . . . ." On June 1, 1987, subdivision (d) was amended to provide that the State Board shall adopt the administrative and technical procedures "as part of the state policy for water quality control adopted pursuant to Section 13140 of the Water Code, . . ." On September 4, 1987, subdivision (b) was amended to

delete the word "regulation," so that as chaptered, subdivision (b) provides that the cleanup and abatement actions "shall be consistent with procedures adopted by the board pursuant to subdivision (d).

Health and Safety Code section 25197.1 did not amend the Porter-Cologne Act procedures for the adoption of all state water quality control policies. It only subjects procedures for cleanup and abatement actions developed under Health and Safety Code section 25297.1, to adoption pursuant to the Porter-Cologne Act procedures. Consequently, its legislative history is of limited value in establishing a blanket APA exemption for all water quality control policies. The legislative history and language of the Porter-Cologne Act itself is of far greater significance. The procedures for cleanup and abatement actions under Health and Safety Code section 25297.1 are not the subject of this determination. A number of inferences could be drawn from the amendment of subdivision (d). As an example, the inclusion of the word "regulation" could have been seen as unnecessary because of the clear provisions of Government Code section 11346. However, because the procedures for cleanup and abatement actions are not the subject of this determination and because OAL is without the benefit of public comment and a complete record on the questions concerning the procedures to be adopted pursuant to section 25297.1, we express no opinion about them here.

82 We wish to acknowledge the substantial contribution of Unit Legal Assistant Kaaren Morris and Senior Legal Typist Tande' Montez in the processing and preparation of this Determination.

EXHIBIT D

California Regional Water Quality Control Board
Central Valley Region
Steven T. Butler, Chair

Winston H. Hickox
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Protection

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31 August 2000

Kathy Goforth
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RESPONSE TO US EPA ACTIONS ON BASIN PLAN AMENDMENTS

We have reviewed the letter from US EPA to State Water Resources Control Board that takes action on Basin Plan amendments that were adopted by the Regional Board in 1989, 1990, 1994 and 1995. We may submit additional comments next week to further clarify some of our points. We are concerned that US EPA has taken so long to act on these amendments, especially since US EPA proposes to disapprove some elements even though no significant adverse comments were received from US EPA during the adoption process. Following are responses to US EPA determinations.

Attachment A Disapproved Provisions

1. Tributary Footnote

US EPA suggests that the footnote on Table II-1, adopted in 1975, actually designates beneficial uses for water bodies tributary to those listed on Table II-1. US EPA, therefore, proposes to disapprove the language added in 1994 to the Basin Plan because they view this as a change from what was stated in 1975.

We do not agree with the analysis and assumptions that are included in US EPA's proposed disapproval of the amendment. The footnote was included on Table II-1 to help the regulated community understand that, in the absence of information to the contrary, the Regional Board would assume that streams had the same beneficial uses as the named water bodies to which they are tributary. Dischargers or other interested parties had the opportunity to conduct studies and present information demonstrating what beneficial uses were appropriate. The Basin Plan could then be amended to reflect the beneficial uses that were appropriate for the water body in question. In a March 1978 letter from US EPA to State Board this issue is discussed and it is clear that the state position is that the Regional Board did not intend to apply the "general rule" to designate beneficial uses to all waters tributary to the listed waters. At the time US EPA did not agree with this interpretation, but the Regional Board did not make any agreements with US EPA that contradicted this position.

The tributary footnote was not meant to designate beneficial uses and it was not meant to be applied rigidly in a manner that ignored available information. There are so many obvious examples where tributaries do not have the same beneficial uses as the downstream named receiving water, that it is

inconceivable that the Regional Board, in adopting the footnote, intended it to be used in the manner US EPA suggests is appropriate. Following are a few examples of obvious cases where the footnote language just does not make sense if it is applied as US EPA suggests:

- The Sacramento River and Delta have navigation as a beneficial use. Navigation is defined as uses of water for shipping, travel, or other transportation by private, military, or commercial vessels. Virtually none of the tributaries could possibly have this beneficial use, but according to US EPA it is designated.
- The San Joaquin River has migration and spawning for cold water species as beneficial uses. Agricultural drains, such as Orestimba Creek, Del Puerto Creek, Ingram-Hospital Creek, and others could not possibly have these beneficial uses.

When the tributary footnote was included in the Basin Plan in 1975, the Regional Board knew that the beneficial uses that were listed for the named water bodies were not always appropriate for the tributaries. It was assumed that when information became available, it would be used to determine actual beneficial uses.

The language added in 1994 to the Basin Plan was meant to clarify how the Regional Board identifies which beneficial uses are appropriate in the tributaries. This language clarified the method that had been implemented since adoption of the Basin Plan in 1975. Therefore, it is unclear what affect US EPA disapproval of the 1994 language will have on the way the Regional Board determines beneficial uses. The Regional Board still intends to make site specific determinations and amend the Basin Plan to include them. Disapproval will remove the clarification and potentially be a disservice to readers of the Basin Plan.

2. Dissolved Oxygen

In the editing that was done as part of the 1994 Basin Plan amendment, some of the dissolved oxygen provisions were misplaced. No changes in the objectives were intended and during the next printing of the Basin Plan the wording will be restored to the way it was prior to the 1994 editing.

3. Federal Antidegradation

In the 1989 amendments to the Basin Plan, the Regional Board added a section to explain the federal antdegradation policy. Staff was intending to present a factual account of the policy for public information. No special interpretations or manipulations were intended. US EPA does not agree with the way staff explained the policy. Unfortunately, US EPA did not tell us this 10 years ago when it was adopted, so 10 years of bad information has been provided to the public. We will consider US EPA recommendations for appropriate wording during the next triennial review.

Attachment B Understandings

The understandings are acceptable with the exception of the following:

5. US EPA states that it is their understanding that the MUN beneficial use is designated for all water bodies in the Region. This would include the water bodies listed in Table II-1 that currently do not have the MUN beneficial use designated and all the unnamed tributaries.

We do not agree with this understanding. The Sources of Drinking Water Policy specified that all waters of the state should be considered suitable or potentially suitable for MUN with certain exceptions. One of these exceptions allowed the Regional Board discretion on whether or not to add the MUN designation for water bodies that already had designated uses that did not include MUN. In 1975, the Regional Board specifically designated beneficial uses for the water bodies listed in Table II-1. Some of the water bodies listed in Table II-1 were specifically not designated for the MUN beneficial use. The adoption of the Sources of Drinking Water Policy did not change these designations. However, we agree with US EPA that most of the water bodies listed in Table II-1 should be designated as MUN. We will commit to updating our MUN designations for water bodies listed in Table II-1 during the next Triennial Review.

We agree that the Sources of Drinking Water Policy would apply, in general, to the unnamed tributaries because these have never formally had beneficial uses designated for them. The Regional Board will implement the Sources of Drinking Water Policy when developing permits and determining permit limits for discharges to the unnamed tributaries. We do not agree that this policy designates beneficial uses as defined in the Clean Water Act.

6. We are not sure what US EPA's position is when agencies, acting under their respective state regulations, apply pesticides or herbicides for vector and weed control, pest eradication, or fishery management. The Regional Board does not intend to adopt basin plan amendments every time any of these proposed activities are proposed or implemented. The intent of the variance described in the Basin Plan for these types of applications is to allow quick implementation of emergency projects to control undesirable and dangerous species. Often these projects involve short-term toxicity within affected waters. Because of the urgent nature of these projects, the Regional Board has not prescribed waste discharge requirements nor re-evaluated the water quality objectives of the affected waters. The term, "variance", as used in our Basin Plan, was not intended to have the same meaning as the term does in the Clean Water Act (that relates to variances of water quality standards).

Attachment C Issues That Should Be Addressed in the Next Triennial Review

US EPA has identified 13 issues that they believe should be addressed in the next Triennial Review. The Regional Board will consider US EPA recommendations along with suggestions and recommendations from other stakeholders. Many of the issues that are identified would take significant staff resources to address. During the last Triennial Review, more than 70 issues were identified. The Regional Board has less than 1 py for basin planning work. Without budget augmentations, most of US EPA's issues will likely not be addressed. Following are comments on a few of US EPA's issues:

5. Appropriate portions of TMDLs will be incorporated into Basin Plans according to time schedules included in federal and state workplans.

8. Staff will propose language to be included in the Basin Plan to reflect "the Alaska Rule" when a new edition is published.

If you have comments or questions regarding our responses, please call me at (916) 255-3093.

Jerrold A. Bruns

JERROLD A. BRUNS
Sacramento River Watershed Section

EXHIBIT E

STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW

In re:	)	NOTICE AND DECISION RE APPROVAL AND PARTIAL DISAPPROVAL OF A RULEMAKING ACTION
AGENCY: State Water Resources Control Board	)	(Gov. Code Sec. 11353)
RULEMAKING ACTION: Adoption of the Policy for the Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California. Summarized at Section 2914 of Title 23 of the California Code of Regulations	)	OAL File No. 00-0317-15

SUMMARY OF RULEMAKING ACTION

This policy, adopted by State Water Resources Control Board Resolution Nos. 2000-015 and 2000-030, establishes implementation provisions for the priority pollutant criteria promulgated by the U.S. Environmental Protection Agency in the California Toxics Rule and in the National Toxics Rule, and for priority pollutant objectives established by California Regional Water Quality Control Boards in the various basin plans. The policy also establishes monitoring requirements for 2,3,7,8-TCDD equivalents (dioxin-like compounds); chronic toxicity control provisions, procedures for initiating site-specific objective development, and exception provisions. In addition, the policy describes the State's existing nonpoint source management approach. The policy becomes effective upon approval by the California Office of Administrative Law (OAL) both for the priority pollutant criteria in the National Toxics Rule which are applicable in California and for the priority pollutant water quality objectives in the various California Regional Water Quality Control Board basin plans. For the priority pollutant criteria in the California Toxics Rule, the policy becomes effective once it is approved by OAL and the California Toxics rule becomes effective.

DECISION

OAL hereby approves the "Policy for Implementation of Toxics Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of California (the Policy) with the exception of the

provisions listed below, six of which are severed and disapproved for failing to satisfy the Clarity standard of Government Code Section 11349.1 and the last of which is severed and disapproved as a prospective incorporation by reference:

1. The provision in Section 1.4 of the Policy which provides: "Effluent limitations in NPDES permits shall be expressed in terms of either concentration or mass in accordance with State or federal law."

2. The provision in Section 2.1 of the Policy which provides: "RWQCBs shall consider the SWRCB's intent to reassess and modify, as appropriate, water quality standards for water bodies that may depend on the discharge of wastewater to support its beneficial uses in establishing compliance schedules for dischargers."

3. The provision in Section 3 of the Policy that authorizes RWQCBs to require "non-NPDES dischargers as appropriate" to monitor for 2,3,7,8-TCDD congeners (dioxin).

4. The provision in Section 3 of the Policy which provides: "The RWQCBs have discretion, on a case-by-case basis, to require storm water dischargers to monitor the cogeners at the locations and frequencies specified by the RWQCBs."

5. The provision in Section 4 of the Policy (Toxicity Control Provisions) which provides: "If persistent or repeated toxicity is identified in ambient waters, and it appears to be due to nonpoint source discharges, the appropriate nonpoint source dischargers, in coordination with the RWQCB, shall perform a TRE. Once the source of toxicity is identified, the discharger shall take all reasonable steps to eliminate toxicity."

6. Footnote 15 in Section 5.2 of the Policy which provides: "A storm water permittee or discharger regulated under a non-NPDES WDR may also request a site-specific study pursuant to this section."

7. The provision in Section 2.3 of the Policy on the analytical methods that may be required for monitoring which provides: "or alternative test procedures that have been approved by the U.S. EPA Regional Administrator pursuant to 40 CFR 136.4 and 40 CFR 136.5 (revised as of May 14, 1999).

A detailed explanation of the reasons for the disapproval of these seven provisions is set out below. The remainder of the Policy is approved because the requirements of Government Code Section 11353, including summary and response to comments as required by the Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 *et seq.*, and the standards set forth in Government Code Section 11349.1 have been satisfied.

DISCUSSION

The State Water Resources Control Board (State Board) must submit any state policy for water quality control that it adopts or revises after June 1, 1992, to the Office of Administrative Law (OAL) for review. The submittal must include a clear and concise summary of each regulatory

provision adopted or approved as part of the action, the complete administrative record of the proceeding, a summary of the necessity for each regulation, and a certification by the chief legal officer of the State Board that the procedural requirements of Division 7 (commencing with Section 13000) of the Water Code have been satisfied. Pursuant to Government Code Section 11353, OAL reviews the adopted or approved regulatory provisions for compliance with the Administrative Procedure Act standards of Authority, Reference, Consistency, Clarity, Nonduplication and Necessity, as defined by Government Code Section 11349. OAL also reviews the responses to public comments to determine compliance with the public participation requirements of the Federal Water Pollution Control Act (33 U.S.C. Sec. 1251 *et seq.*) OAL must restrict its review to the regulatory provisions in the policy and the administrative record of the proceeding. In conducting this review OAL is mindful that it is not to substitute its judgment for that of the State Board with regard to substantive content of the regulatory provisions. This review serves as an executive branch check on the exercise of quasi-legislative powers by the State Board.

A.

Each regulatory provision in a state policy for water quality control must satisfy the Clarity Standard of Government Code Section 11349.1. "'Clarity' means written or displayed so that the meaning of regulations will be easily understood by those persons directly affected by them." Government Code Section 11349, subsection (c). The following provisions do not satisfy this requirement.

1. Section 1.4 of the Policy specifies methods that may be used by a Regional Board to establish effluent limits to control a priority pollutant in a discharge and provides in part: "Effluent limitations in NPDES permits shall be expressed in terms of either concentration or mass in accordance with State or federal law."

The requirement to express effluent limits in permits "in terms of either concentration or mass in accordance with State or federal law" cannot be easily understood by those who are directly affected by it.

We consider applicable State and federal law. Permits must comply with federal regulations. Water Code Section 13377. Under applicable regulations effluent limits must be expressed in terms of mass, and may also be expressed in terms of concentration. 40 C.F.R. 122.45(f)(1) provides: "[a]ll pollutants limited in permits shall have limitations, standards. or prohibitions expressed in terms of mass" with certain exceptions. C.F.R. 122.45(f)(1) provides: "Pollutants limited in terms of mass additionally may be limited in terms of other units of measurement, and the permit shall require the permittee to comply with both limitations." In addition, 40 C.F.R. 122.44(d) requires water quality-based effluent limitations expressed in terms of concentration when the discharge of a pollutant will cause or contribute to a water quality standard violation. Thus, the need for concentration-based limits must be determined on a case-by-case basis. In some cases both may be required. In light of these requirements, the requirement to express limits "in terms of either concentration or mass" (but not both) is confusing and cannot be easily understood.

The administrative record shows that this provision was crafted by the State Board, as a substitute for a provision that required limits to be expressed in terms of both concentration and mass, immediately before it adopted the Policy on March 2, 2000. Administrative record, pp. 8866-8880. (From its initial proposal in 1997 until the day it was adopted the Policy contained a provision requiring effluent limits to be expressed in terms of both concentration and mass.) Consequently the requirement to express effluent limits "in terms of either concentration or mass in accordance with State or federal law" was adopted by the State Board without ever having been addressed in the Functional Equivalent Document and without the benefit of public comment.

The administrative record also shows that the apparent reason the State Board adopted the either/or provision was to prevent problems when a discharger engaged in water conservation efforts. As a board member stated: In a water conservation effort "the total mass goes down, which is good, but the concentration goes up. So we don't want to do something here that would discourage those types of conservation efforts within water use." Administrative record, p. 8868. After considerable discussion, including several suggested revisions, the transcript of the board meeting indicates that the board chose not to delete the provision, and thus rely on what is required by applicable law (Administrative record pp. 8874-8877); instead, the board adopted the either/or provision. Notably, at the end of the discussion one board member abstained from voting on the provision stating: "I can't vote for it at this point not knowing what that means." Administrative record, p. 8880.

Consequently, because it is not easy for those who are directly affected by this provision to easily understand whether or how the state board intended to limit the discretion a permit writer otherwise has under applicable State or federal law in expressing the terms of an effluent limit, the either/or provision fails to satisfy the Clarity standard as required by Government Code Section 11349.1.

2. Section 2.1 of the Policy authorizes a Regional Board to establish a compliance schedule in an existing discharger's National Pollutant Discharge Elimination System (NPDES) permit if the discharger demonstrates that it is infeasible to achieve immediate compliance with a priority pollutant criterion or an effluent limitation based on a priority pollutant criterion in the California Toxics Rule or the National Toxics Rule. The section provides that the compliance schedule shall be as short as practicable, but in no case shall exceed five years from the date of permit issuance, reissuance, or modification.

At the adoption hearing on March 2, 2000, the State Board inserted the following provision into the part of Section 2.1 which sets the maximum time for a compliance schedule at five years: "RWQCBs shall consider the SWRCB's intent to reassess and modify, as appropriate, water quality standards for water bodies that may depend on the discharge of wastewater to support its beneficial uses in establishing compliance schedules for dischargers." This provision was not addressed in the Functional Equivalent Document for the policy. The public was not provided with an opportunity to comment on it.

The provision apparently refers to intent with regard to an action that the State Board may (or may not) take in the future. It is not possible to know with any degree of certainty what impact

the consideration of this "intent" is supposed to have on the setting of maximum compliance times by a Regional Board now. Consequently, this provision cannot be easily understood by those who are directly affected by it.

3. Section 3 of the Policy requires a Regional Board to require dischargers in its region to monitor discharged effluent for 17 cogeners of 2,3,7,8-TCDD (dioxins and furans containing chlorine at the 2,3,7, and 8 positions). The section purports, in part, to authorize a Regional Board to require "non-NPDES dischargers as appropriate" to monitor for the 2,3,7,8-TCDD congeners. The inclusion of non-NPDES dischargers in this part of the policy is confusing in light of the State Board's clearly stated intent in the introduction to the policy (which is consistent with the Board's intent as reflected in the minutes of the March 2, 2000, adoption hearing) that: "With respect to non-point source discharges, only section 5.1 [of the policy] applies." Consequently, the reference to non-NPDES dischargers in Section 3 of the policy is severed and disapproved.

4. Section 3 of the Policy (described in item 3, above) also provides: "The RWQCBs have discretion, on a case-by-case basis, to require storm water dischargers to monitor the cogeners at the locations and frequencies specified by the RWQCBs." The inclusion of storm water dischargers in this part of the policy is confusing in light of the State Board's clearly stated intent in the introduction to the policy (which is consistent with the Board's intent as reflected in the minutes of the March 2, 2000, adoption hearing) that: "This policy does not apply to regulation of storm water discharges." Footnote 1. Consequently, the provision regarding storm water dischargers in Section 3 of the policy is severed and disapproved.

5. Section 4 of the Policy establishes minimum toxicity control requirements for implementing the narrative toxicity objectives for aquatic life protection in the various Regional Water Quality Control basin plans. The section includes a provision which provides:

> If persistent or repeated toxicity is identified in ambient waters, and it appears to be due to nonpoint source discharges, the appropriate nonpoint source dischargers, in coordination with the RWQCB, shall perform a TRE. Once the source of toxicity is identified, the discharger shall take all reasonable steps to eliminate toxicity.

The inclusion of a provision applicable to nonpoint source discharges in Section 4 of the policy is confusing in light of the State Board's clearly stated intent in the introduction to the policy (which is consistent with the Board's intent as reflected in the minutes of the March 2, 2000, adoption hearing) that: "With respect to non-point source discharges, only section 5.1 [of the policy] applies." Consequently, the reference to non-NPDES dischargers in Section 4 of the policy is severed and disapproved.

6. Section 5.2 of the Policy provides that a Regional Board may develop site specific water quality objectives and specifies the procedures and criteria for doing so. Footnote 15 in Section 5.2 states that the section applies to storm water discharges and discharges regulated under a non-NPDES waste discharge requirements as follows:

> A storm water permittee or discharger regulated under a non-NPDES WDR may also request a site-specific study pursuant to this section.

This provision is confusing in light of State Board's clearly stated intent in the introduction to the policy (which is consistent with the Board's intent as reflected in the minutes of the March 2, 2000, adoption hearing) that "With respect to non-point source discharges, only section 5.1 [of the policy] applies." and that "This policy does not apply to regulation of storm water discharges." Consequently, the provision on storm water discharges and discharges regulated under a non-NPDES waste discharge requirements in Section 5.2 of the policy is severed and disapproved.

B.

Pursuant to Section 2.3 of the Policy, a Regional Board must specify analytical methods a discharger must use to evaluate compliance with effluent limits for priority pollutants in permits. The section authorizes the use of certain analytical methods set out in a specified federal regulation, analytical methods approved by the State Board or a Regional Board (under certain circumstances), "or alternative test procedures that have been approved by the U.S. EPA Regional Administrator pursuant to 40 CFR 136.4 and 40 CFR 136.5 (revised as of May 14, 1999)." The last alternative ("alternative test procedures that have been approved by the U.S. EPA Regional Administrator ...") has the effect of delegating to the U.S. EPA Regional Administrator the power to approve test procedures for use by a Regional Board.

The State Board does not have the authority to delegate this power to the U.S. EPA Regional Administrator. Consequently this provision fails to satisfy the Authority standard of Government Code Section 11349.1. "'Authority' means the provision of law which permits or obligates the agency to adopt, amend, or repeal a regulation." Government Code Section 11349.

This provision operates, in essence, as a prospective incorporation-by-reference of certain test procedures approved at some point in the future by the U.S. EPA Regional Administrator by making such procedures a part of the Policy. (An incorporation-by-reference of an external document into a State Board policy makes the incorporated text a part of the policy, as though the incorporated text were printed in its entirety as part of the policy.)

A prospective incorporation-by-reference (one that automatically incorporates test procedures approved in the future) is of dubious validity. While prospective incorporation-by-reference could cut down on periodic rulemaking by the State Board to incorporate test procedures approved in the future, it eliminates the opportunity for public participation in the decision to give regulatory effect to those test procedures. This problem has been described as follows:

> Prospective incorporation entirely removes from the usual rule-making process individual consideration, by the public and the agency, of each future change to the matter incorporated by reference, thereby effectively denying the many benefits of that process to those who may object to the legality or merits of the new amendments or editions. This is not an inconsiderable loss. It is equivalent to a

> declaration by the agency that it will not hold rule-making proceedings of any kind on the specific contents of each of those future amendments to or editions of the matter incorporated by reference, even though such changes will become effective law of the agency, and even if many of them turn out to be very controversial and of doubtful legality. Furthermore, it should be obvious that no one could effectively object to such later changes at the time the initial rule was adopted prospectively incorporating them by reference; at the time of the original rule-making proceeding in which the wholesale incorporation by reference of future changes was adopted, the specific content of those future changes would be unknown and unknowable.
>
> In addition, allowing agencies to incorporate by reference, as rules, future amendments to or editions of the matter already incorporated in their rules involves an inappropriate delegation of power by the state legislature and the agencies involved to the body subsequently altering the incorporated matter. That is, in addition to being deprived of the benefits of the rule-making process for such future amendments or editions, the state legislature and the agencies issuing the rules containing the incorporated matter lose control over the content of the law involved. It is true, of course, that they can disapprove after the fact any specific amendment to or edition of the matter prospectively incorporated by reference. But it should be stressed that such action may be taken only after that new matter has become law. This is also why, in many states, prospective adoption of future amendments to or editions of the materials incorporated in rules by reference would be an unconstitutional delegation of authority to the body initially making those new amendments or editions, or would at least present serious questions of that nature. [Footnote omitted. Bonfield, State Administrative Rule Making (1986) pp. 325-326.]

Further, the validity of a prospective incorporation-by-reference has been questioned by the Court of Appeal on the basis of lack of opportunity for public participation in a case involving a Department of Health Care Services regulation incorporating-by-reference standards issued by the Department of Finance:

> There is no procedural barrier prohibiting the enacting agency from adopting by reference a set of standards issued by another agency if supporting evidence is made available at a public hearing, opportunity for refutation is given, the pro and con evidence considered and the evidentiary material assembled in an identifiable record. On the other hand, an attempt to embody by reference future modifications of the incorporated material without additional hearings would have dubious validity. (See Olive Proration etc. Com. v. Agric. etc. Com., ... , 17 Cal.2d at p. 209, 109 P.2d 918.) [*California Ass'n of Nursing Homes, Etc. v. Williams* (1970) 4 Cal.App.3d 800, 814, 84 Cal.Rptr. 590.]

Also, Section 20(c)(4) of Title 1 of the California Code of Regulations requires regulation text to identify a document that it incorporates by reference by "title and date of publication or issuance," unless "an authorizing California statute or other applicable law requires the adoption or

enforcement of the incorporated provisions of the document as well as any subsequent amendments thereto, . . ." The State Board has not identified such an authorizing statute.

For these reasons, OAL severed and disapproved the provision that authorizes a Regional Board to require a discharger to use a test procedure that has been approved by the U.S. EPA Regional Administrator pursuant to 40 CFR 136.4 and 40 CFR 136.5 (revised as of May 14, 1999).

FOR THESE REASONS OAL disapproved the severed parts of the Policy that are describe above.

Date: April 28, 2000

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