



REGULATORY AGENCY ACTION

impact of a Board-approved THP allowing Pacific Lumber Company (Maxxam Corporation) to harvest timber in Humboldt County. (See CRLR Vol. 9, No. 2 (Spring 1989) p. 107; Vol. 9, No. 1 (Winter 1989) p. 94; and Vol. 8, No. 4 (Fall 1988) p. 108 for background information on this case.)

In its responses, the Board concluded that the proposed THP "will not produce a significant effect on the environment." The Board also defended its approval of the THP, citing the administrative record which contains "a discussion of cumulative effects on key wildlife species dependent on or related to old-growth habitat."

Humboldt County Superior Court Judge John E. Buffington had previously ordered the Board to supplement its administrative record by specifically answering the three questions. Judge Buffington has enjoined Maxxam from harvesting until he rules on EPIC's petition for writ of mandate to reverse the Board's approval of the THP.

In late April, the U.S. Fish and Wildlife Service (USFWS) reversed its own December 1987 decision and proposed to list the northern spotted owl as an endangered species. In November 1988, in a lawsuit by environmental groups challenging the agency's decision, a federal judge in Seattle ruled that USFWS acted arbitrarily and contrary to the findings of its own experts in not listing the owl, and gave the agency until May 1, 1989, to change its mind. (See CRLR Vol. 9, No. 1 (Winter 1989) p. 13 and Vol. 8, No. 3 (Summer 1988) p. 19 for background information.) USFWS' decision to propose the owl for endangered species treatment begins a yearlong review, during which management plans for protection of the bird will be developed and public comment sought.

FUTURE MEETINGS:

To be announced.

WATER RESOURCES CONTROL BOARD

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The Water Resources Control Board (WRCB), established in 1967 by the Porter-Cologne Water Quality Control Act, implements and coordinates regulatory action concerning California water quality and water rights. The Board consists of five full-time members appointed for

four-year terms. The statutory appointing categories for the five positions ensure that the Board collectively has experience in fields which include water quality and rights, civil and sanitary engineering, agricultural irrigation and law.

Board activity in California operates at regional and state levels. The state is divided into nine regions, each with a regional board composed of nine members appointed for four-year terms. Each regional board adopts Water Quality Control Plans (Basin Plans) for its area and performs any other function concerning the water resources of its respective region. All regional board action is subject to state Board review or approval.

Water quality regulatory activity includes issuance of waste discharge orders, surveillance and monitoring of discharges and enforcement of effluent limitations. The Board and its staff of approximately 450 provide technical assistance ranging from agricultural pollution control and waste water reclamation to discharge impacts on the marine environment. Construction grants from state and federal sources are allocated for projects such as waste water treatment facilities.

The Board administers California's water rights laws through licensing appropriate rights and adjudicating disputed rights. The Board may exercise its investigative and enforcement powers to prevent illegal diversions, wasteful use of water and violations of license terms. Furthermore, the Board is authorized to represent state or local agencies in any matters involving the federal government which are within the scope of its power and duties.

MAJOR PROJECTS:

San Francisco Bay/Sacramento-San Joaquin Delta Estuary Proceedings: Phase II. The draft revised Bay/Delta workplan was mailed to over 8,000 interested parties beginning in late April. The revision is a response to the significant controversy created when the Board released its October 1988 draft proposals. (See CRLR Vol. 9, No. 2 (Spring 1989) pp. 107-08; Vol. 9, No. 1 (Winter 1989) pp. 94-95; and Vol. 8, No. 4 (Fall 1988) p. 109 for background information.)

The new workplan sets forth tentative schedules, topics and procedures for the remaining phases of the Bay/Delta proceedings. The workplan bifurcates the hearings by dividing proceedings on water quality and water rights. Additionally, the workplan is structured so as to increase public input into the decision-making process. The WRCB was sched-

uled to hold a special meeting on July 20, at which time it would consider whether to adopt the revised workplan.

Kesterson Reservoir Clean-Up. On June 28, WRCB was scheduled to hold a public hearing on the U.S. Bureau of Reclamation's Final Clean-up Plan for the Kesterson Reservoir. Under order by the WRCB, the Bureau has been attempting to clean up selenium contamination in the Reservoir since 1985. (See CRLR Vol. 9, No. 2 (Spring 1989) p. 108; Vol. 9, No. 1 (Winter 1989) p. 95; and Vol. 8, No. 4 (Fall 1988) pp. 108-09 for background information.) On June 28, the Board will receive public testimony on the Bureau's proposal; the decision whether the proposal satisfies the Board's requirements will be made at a subsequent Board meeting.

WRCB Policy Is Ruled A Regulation. On May 17, the Office of Administrative Law (OAL) ruled that Resolution 88-63, the Board's "source of drinking water" policy adopted on May 19, 1988, is a regulation which must be adopted pursuant to the Administrative Procedure Act (APA). Resolution 88-63 interprets the term "source of drinking water" as it is used in Proposition 65, the Safe Drinking Water and Toxics Enforcement of 1986. (See CRLR Vol. 8, No. 3 (Summer 1988) p. 116 and Vol. 7, No. 4 (Fall 1987) p. 98 for background information on Resolution 88-63.)

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...." The statutory definition of the phrase is contained in Health and Safety Code section 25249.11(d), which provides that "'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 [MUN]." Thus, the identification of "sources of drinking water" is performed by a regional water quality control board as part of the process of adopting a water quality control plan for an area. Under the Porter-Cologne Water Quality Control Act, WRCB has the responsibility to coordinate the statewide program for water quality control. In May 1988, the Board adopted Resolution 88-63, which, *inter alia*, instructed the regional boards that all waters except waters which satisfy specified criteria should be designated MUN, and speci-



fied the criteria for excepting waters from such designation.

OAL ruled that these instructions implement and interpret various sections of the Water Code and the Health and Safety Code relating directly to the Board's responsibility to establish a statewide program for water quality control through its regional boards; thus, the policy must be adopted pursuant to the APA after notice, an opportunity for public comment, a hearing, and OAL review.

OAL rejected the Board's argument 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 plans. OAL held that APA exemptions must be express and not implied.

Hazardous Waste Regulations Resubmitted to OAL. On March 16, the Board approved minor modifications to several regulations regarding reportable quantities for sewage, hazardous waste, and hazardous materials, and resubmitted them to OAL. The proposed regulations—new sections 2250, 2251, 2260, Title 23 of the California Code of Regulations (CCR)—had previously been disapproved by OAL for various technical reasons. (See CRLR Vol. 9, No. 2 (Spring 1989) pp. 108-09; Vol. 8, No. 4 (Fall 1988) p. 109; and Vol. 8, No. 3 (Summer 1988) p. 116 for background information.) OAL disapproved the regulations because of improper incorporation by reference, missing and defective documents, and because the clarity and consistency standards of Government Code section 11349.1 were not met.

Tank Tester Licensing Regulations Approved. On March 30, new regulations governing the administration of the Tank Tester Licensing Program were filed with the Secretary of State. Section 25284.4 of the Health and Safety Code, signed into law in 1987, requires WRCB to adopt emergency regulations to implement tank tester licensing. On December 15, 1988, WRCB adopted these regulations. They were rejected by OAL in February 1989, but were subsequently approved as modified.

Section 2750, Title 23 of the CCR, requires all tank integrity tests conducted in California after December 31, 1989 to be performed by a licensed tank tester. Tank integrity tests are those tests capable of detecting an unauthorized release from an underground storage tank consistent with minimum standards adopted by WRCB.

Section 2760 requires all applicants for a license to have experience testing at least fifty tanks or to have successfully completed an approved course of study from a manufacturer in the test procedure to be used. The applicant also must pass a test to be administered by the Office of Tank Tester Licensing, a division of the WRCB. Each applicant for a license will have to pay a minimum of \$900 for it: a \$100 nonrefundable application fee; a \$200 examination fee; and a \$600 license fee. Once obtained, the license is valid for three years but the licensee may receive a renewal license by completing a renewal application and paying a renewal fee. The license renewal fee shall not exceed \$600.

Section 2773 provides that the licensee may be civilly liable and subject to administrative sanctions for a variety of actions. These actions include using any unsafe or unreliable method or equipment for tank integrity testing, failing to use reasonable care or good judgment while performing tank integrity tests, failing to exercise direct and personal control over unlicensed workers during testing, and using fraud or deception in the course of doing business as a tank tester.

LEGISLATION:

SB 405 (Ayala) would require any decision of the WRCB amending water appropriation permits concerning the State Water Project and the federal Central Valley Project to contain reasonable water quality standards at the "without project level," meaning that predicted level of water quality in the Delta that would theoretically exist in the absence of both the Central Valley Project and the State Water Resources Development System. The bill also makes other upstream depleters of San Francisco Bay/Sacramento-San Joaquin Delta Estuary waters responsible for the maintenance of any higher water quality standards found necessary by the WRCB. This bill is currently pending in the Senate Committee on Agriculture and Water Resources.

The following is a status update of bills discussed in detail in CRLR Vol. 9, No. 2 (Spring 1989) at pages 109-10:

AB 583 (Costa), which would authorize a single loan of \$15.2 million to the Santa Ana Watershed Project Authority for treatment facilities for DBCP removal, passed the Assembly on May 18 and is pending in the Senate Committee on Agriculture and Water Resources.

AB 478 (Bates), which would require the regional boards for the North Coast,

San Francisco Bay, Central Coast, Los Angeles, and San Diego regions to conduct unannounced inspections of waste dischargers that require a national pollutant discharge elimination system (NPDES) permit and which could affect the water quality of California coastal bays, has been amended to define major dischargers and other dischargers. Major dischargers, which are required to be visited four times each year, are defined as "persons whose waste discharge totals one million gallons per day or more." Other dischargers, which must be visited only twice each year, are those whose waste discharges are under one million gallons per day. The bill also requires that its provisions be incorporated into all future NPDES permits. AB 478 passed the Assembly on June 6 and is pending in the Senate Committee on Agriculture and Water Resources.

SB 299 (Keene), which attempts to deal with the problem of leaking underground storage tanks, has been considerably amended. As of May 16, the bill would require a local agency to revoke the permit of an underground storage tank which does not meet specified requirements imposed by the bill concerning financial responsibility. The bill would require the owner of an underground storage tank containing petroleum to establish and maintain evidence of financial responsibility for taking corrective action and compensating third parties for damages arising from tank operations.

The bill would also require the owner or operator of an underground storage tank containing petroleum to conduct corrective action in a specified manner in response to an unauthorized leak, and would authorize a regional water quality control board or local agency to undertake or contract for corrective action if necessary.

SB 299 would require an owner of an underground storage tank containing petroleum to pay a monthly storage fee of \$0.006 per gallon of petroleum stored; the fee would be deposited in the Underground Storage Tank Cleanup Fund in the General Fund, which the bill would create. Upon appropriation by the legislature, the State Board of Equalization would be authorized to expend the money in the fund to pay for the costs incurred by a regional board or local agency in taking corrective action. The bill would also create the State Underground Tank Insurance Fund and would require the Insurance Commissioner to expend these funds for the purpose of transacting insurance for underground tank owners



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and operators.

At this writing, SB 299 is pending in the Senate Appropriations Committee.

SB 201 (McCorquodale), which would authorize WRCB and regional water quality control board officials to enter and inspect areas in which timber operations are being conducted under specified conditions, passed the Senate on May 18 and is pending in the Assembly Natural Resources Committee.

AB 523 (Seastrand), which would have prohibited any discharge from a San Joaquin Valley agricultural drain in Morro Bay or the ocean between Morro Bay or any tributaries draining into those waters until January 1, 1996, failed passage in the Assembly Committee on Water, Parks and Wildlife.

SB 312 (Boatwright), which would have required the installation of water meters to measure the amount of water used on every new meter service connection on and after January 1, 1991, failed passage in the Senate Committee on Agriculture and Water Resources on April 18.

SB 277 (Kopp), which would establish requirements for protection of the waters of San Francisco Bay, is still pending in the Senate Committee on Agriculture and Water Resources.

AB 456 (Hansen), which would create the Waste Discharge Permit Fund for carrying out the water quality control laws, passed the Assembly on April 13 and is pending in the Senate Committee on Agriculture and Water Resources.

SB 65 (Kopp, et al.), which would amend Proposition 65 to include public agencies regardless of the number of employees within their jurisdiction, is still pending in the Senate Appropriations Committee.

SB 415 (Torres), which would revise the provision for civil and criminal penalties in Proposition 65, passed the Senate on May 11 and is pending in the Assembly Committee on Environmental Safety and Toxic Materials.

LITIGATION:

On April 26, in *California Trout, Inc. v. State Water Resources Control Board*, 207 Cal. App. 3d 585 (1989), the California Supreme Court unanimously declined to hear an appeal involving water diversions from Mono Lake tributaries. The six justices who participated let stand a Third District Court of Appeal ruling which requires the City of Los Angeles to decrease its diversions from the Mono Lake region. (See CRLR Vol. 9, No. 2 (Spring 1989) p. 110 for background information.) In its ruling,

the Third District ruled that section 5946 of the Water Code applies to the licenses issued to Los Angeles in 1971. This provision prohibits license holders from draining water in amounts which harm fish populations. The lower court decision did not specify how much water may be taken without violating this code section. That task has been left up to WRCB. Presently, WRCB estimates that it will take approximately three years to study and determine how much water flow is necessary to maintain the aquatic species that live in the Mono Lake tributary system.

In *United States and State of California v. City of San Diego*, No. 88-1101-B (S.D. Cal.), Judge Rudi Brewster heard oral argument on April 10 on the City's motion to dismiss for failure to state a claim under Rule 12(b)(6), Federal Rules of Civil Procedure. San Diego is being sued by the EPA for over 6,000 alleged violations of the Clean Water Act. (See CRLR Vol. 9, No. 2 (Spring 1989) p. 110 for background information.)

At the hearing, San Diego pursued its argument that it is in compliance with interim schedules regarding waste discharge into San Diego Bay and that the interim schedules supersede the original requirements of its NPDES permit. The City also admitted that it has not complied with certain construction and reporting requirements set out in the interim schedules. EPA argued that the underlying permits are enforceable and may be the subject of a suit despite compliance with interim schedules. EPA maintained that the interim schedules do not supersede the original standards, but are simply enacted to allow the City to come into compliance with the permit. EPA claims that there is no cause of action for noncompliance with the interim schedules. Judge Brewster took the matter under submission.

RECENT MEETINGS:

At its March meeting, the Board voted to accept a \$3.9 million grant from the federal Underground Storage Tank Petroleum Trust Fund for federal fiscal year 1989. The money is intended to finance underground storage tank leak identification and corrective action. It may be used for oversight and clean-up activities by both state and local agencies. The Board has received Trust Fund money each year since 1987. The current grant requires a 10% match in funds. Board member Ruiz voted against the grant out of a concern that "the effort will end up costing too much money and taking too much time...and will be

a black hole."

In other business, the Board unanimously approved redirection of approximately \$8 million of federal Clean Water Act money to fund nonpoint source activities, including a four-year Forest Practices Water Quality Management Program, a three-year Bays and Estuaries Policy Revision, Basin Planning for Nonpoint Sources, and a Nonpoint Source Program. WRCB staff are preparing draft workplans describing the proposed tasks to be accomplished under each of the nonpoint source activities.

Also at the March meeting, the Board heard testimony from a number of septic tank users from Chico protesting a proposed amendment to the regional water quality control plan which would require the petitioners to eliminate their septic tanks and pay for the cost of hooking up to the sewer system. The regional board proposed the amendment because of nitrate pollution in the groundwater, which is allegedly caused primarily by septic tanks. The board estimated that the per household cost of hooking up to the sewers would be \$3,000-\$5,000. The petitioners' expert, Dr. Benke, claimed that septic tanks are not the cause of the nitrate pollution in the water, and that it is in fact attributable to agriculture. He also maintained that the cost of hooking up will actually be much higher than estimated. In response, WRCB voted to table the proposal for 90 days to allow more time to study the issue and perhaps perform a cost analysis study.

FUTURE MEETINGS:

Workshop meetings are generally held the first Wednesday and Thursday of the month. For the exact times and meeting locations, contact Maureen Marche at (916) 445-5240.

