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## FUTURE MEETINGS:

To be announced.

## WATER RESOURCES CONTROL BOARD

*Executive Director: James W. Baetge*

*Chair: W. Don Maughan*

*(916) 445-3085*

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 appointment 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.

The State Board and the regional boards have quasi-legislative powers to adopt, amend, and repeal administrative regulations concerning water quality issues. Water quality regulatory activity also 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 appropriative 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.

On July 6, the Senate confirmed the reappointment of W. Don Maughan as Chair of the State Board by a 25-6 vote. Maughan, a registered civil engineer, was first appointed as the Board's Chair in May 1986 by Governor Deukmejian. Prior to that, Maughan acted as a part-time consultant to the California Department of Water Resources and served on the Board from 1973-1979. He was Assistant State Engineer and Deputy Director of the Arizona Department of Water Resources from 1979-1985.

## MAJOR PROJECTS:

*Kesterson Reservoir Clean-Up Order Issued.* The controversy over Kesterson Reservoir dates back to April 1984, when Robert James Claus, owner of land adjacent to the Reservoir, presented a petition to WRCB. In his petition, Claus alleged that the Central Valley Regional Board had improperly failed to regulate the discharge of subsurface agricultural drainage into the Reservoir. The Reservoir, part of a 5,900-acre wildlife refuge, also served as an evaporation pond for drainage water from farmlands in the Westlands Water District.

The State Board ordered an investigation into the condition of the Reservoir. High levels of selenium, heavy metals, and other trace elements were found in the drainage water. Studies showed that the selenium contamination had wreaked havoc on the wildlife in the refuge throughout the food chain, and had particularly affected the migratory bird population.

In February, WRCB directed the federal Bureau of Reclamation (Bureau), an agency of the U.S. Department of the Interior, to clean up the pollution at the site. The Bureau, as owner and operator of Kesterson Reservoir, ordered the Reservoir closed and terminated all discharge of drainage into the Reservoir in 1986. The State Board directed the Bureau to propose a final clean-up plan by December 1986. The Bureau's Onsite Disposal Plan, adopted by the Board in March 1987 as Order No. WQ 87-3, called for the removal and disposal of contaminated soil in double-sealed clay-lined landfills within the refuge itself.

However, subsequent data compiled by the Bureau forced it to reevaluate this plan. High concentrations of selenium were discovered in the ephemeral pools (seasonal wetlands) at the Reservoir. The Bureau decided the Onsite Removal Plan would not adequately address this problem. In response, the

Board requested the Bureau to perform four tasks within a certain time schedule. The tasks included: (1) fill all ephemeral pool areas in the Reservoir to six inches above rising ground water by January 1, 1989, and submit a report to the Board by April 1, 1989 evaluating the success of the fill program; (2) submit a report by December 1, 1988 on the viability of microbial volatilization as a clean-up technique; (3) complete an upland habitat assessment by April 1, 1989; and (4) submit a final clean-up plan by April 1, 1989. The Bureau completed all these tasks as required by the Board. (For a complete and detailed discussion of the Kesterson Reservoir clean-up, see CRLR Vol. 9, No. 3 (Summer 1989) p. 114; Vol. 9, No. 2 (Spring 1989) p. 108; Vol. 9, No. 1 (Winter 1989) p. 95; Vol. 8, No. 4 (Fall 1988) pp. 108-09; Vol. 8, No. 3 (Summer 1988) pp. 115-16; Vol. 8, No. 3 (Spring 1988) p. 111; Vol. 7, No. 3 (Summer 1987) p. 121; Vol. 6, No. 3 (Summer 1986) p. 76; Vol. 5, No. 4 (Fall 1985) p. 87; and Vol. 5, No. 1 (Winter 1985) p. 72.)

On June 28, 1989, the Board held a public hearing to hear evidence and comments on the viability of the Bureau's proposed final clean-up plan. The plan notes that all drainage discharge at the site has ceased, and that the ephemeral pool areas have been successfully filled as ordered. The Bureau's study of volatilization has resulted in strong reservations about its feasibility on a full-scale basis. Thus, the Bureau's final clean-up plan consists of three components: active site management, continued monitoring of the site, and continued research. The Bureau decided on these three approaches as it has concluded there is no reasonable short-term means of removing the selenium-contaminated soil from Kesterson. The Bureau intends to conduct specific site management actions at the Reservoir, and will focus this year on the problem of persistent rainwater puddles and elevated selenium levels in vegetation in open areas. Other aspects of the plan will involve active monitoring of the site for selenium contamination and continued research into techniques to dissipate the presence of selenium at the reservoir.

Representatives from various government agencies and environmental organizations and interested individuals presented testimony at the June 28 hearing. The Board made no decision at that meeting, but took all comments under advisement, and issued a draft order regarding the final clean-up plan which incorporated some of the concerns ex-



## REGULATORY AGENCY ACTION

pressed about the plan at the June 28 hearing. The Board held a workshop on September 6-7; Kesterson was one of the items discussed, and public testimony was presented regarding the Board's draft order.

At its September 21 regular business meeting, the Board adopted the Bureau's final clean-up plan and issued Order No. WQ 89-16 directing the Bureau to initiate action on the plan. The final clean-up plan was approved on the condition that the Bureau obtain the approval of the Central Valley Regional Board prior to implementation of the Bureau's annual site management plan. Further, the Central Valley Regional Board was put in charge of overseeing the clean-up plan.

*San Francisco Bay/Sacramento-San Joaquin Delta Estuary Proceedings: Phase II.* On July 20, the Board accepted the draft revised Bay/Delta workplan via Resolution 89-65. The revision is a response to the significant controversy created when the Board released its October 1988 draft proposals. (See CRLR Vol. 9, No. 3 (Summer 1989) p. 114; Vol. 9, No. 2 (Spring 1989) pp. 107-08; and Vol. 9, No. 1 (Winter 1989) pp. 94-95 for background information.)

The revised workplan has been mailed to over 1,800 interested parties; an additional 6,800 were notified of its availability. The workplan sets forth tentative schedules, topics, and procedures for the remaining phases of the Bay/Delta proceedings. Future hearings will be bifurcated between water quality and water rights issues.

### LEGISLATION:

*AB 444 (Isenberger)* creates the Environmental Water Act of 1989, and declares the intent of the legislature that the Department of Water Resources expend money appropriated to it from the Environmental Water Fund for water resources projects or programs that will contribute significant environmental benefits. The bill authorizes the City of Los Angeles to submit grant applications to the Department to protect and preserve the Mono Lake Basin and would require the Department, as a first priority, to expend available funds to preserve the wildlife and environment of the Mono Lake Basin. The bill prohibits acceptance of any applications that would expend any money to replace water or power supplies lost by the City of Los Angeles because of a final court judgment or final WRCB order regarding the Mono Lake Basin. This bill was signed by the Governor on September

22 (Chapter 715, Statutes of 1989).

*AB 1442 (Baker)*, as amended September 13, makes specified transfers from the California Water Fund to the Delta Flood Protection Fund pursuant to the 1989-90 Budget Act contingent on the availability of project revenues to reimburse the California Water Fund, as specified, and specifies legislative intent concerning the funding of the Delta Flood Protection Fund in future years. This bill was signed by the Governor on September 22 (Chapter 716, Statutes of 1989).

The following is a status update on bills reported in detail in CRLR Vol. 9, No. 3 (Summer 1989) at pages 115-16:

*AB 583 (Costa)*, as amended August 28, authorizes a loan in the amount of \$100,000 pursuant to the Water Conservation and Water Quality Bond Law of 1986, to the Buena Vista Storage District for a groundwater feasibility study. This bill was signed by the Governor on September 26 (Chapter 934, Statutes of 1989).

*SB 299 (Keene)*, regarding leaking underground storage tanks, authorizes a California regional water quality control board or local agency to undertake or contract for corrective action if a person to whom a specified order is issued does not comply with the order or if prompt action is required by the regional board or local agency to protect human health or the environment. This bill was signed by the Governor on October 2 (Chapter 1442, Statutes of 1989).

*SB 201 (McCorquodale)*, as amended September 5, authorizes WRCB, if accompanied by Department of Forestry and Fire Protection personnel and after 24-hour advance notification to the landowner, to enter and inspect land during normal business hours, under specified conditions. This bill was signed by the Governor on September 26 (Chapter 915, Statutes of 1989).

*AB 456 (Hansen)*, as amended August 31, creates the Waste Discharge Permit Fund for carrying out the water quality control laws. This bill was signed by the Governor on September 21 (Chapter 627, Statutes of 1989).

The following bills were made two-year bills, and may be pursued when the legislature reconvenes in January: *AB 478 (Bates)*, which, as amended September 5, would require certain regional boards to conduct unannounced inspections of waste discharges that could affect the quality of specified waters; *SB 415 (Torres)*, which, as amended August 21, would revise the provision for civil and criminal penalties of Proposition

65; *SB 277 (Kopp)*, which, as amended August 21, would establish requirements for protection of the waters of San Francisco Bay; *AB 405 (Ayala)*, which would require any decision of 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"; and *SB 65 (Kopp, et al.)*, which would amend Proposition 65 to include public agencies regardless of the number of employees within their jurisdiction.

### LITIGATION:

On June 6 in *California ex rel. State Water Resources Control Board v. Federal Energy Regulatory Commission (FERC)*, No. 87-7538, 89 D.A.R. 7226, the U.S. Ninth Circuit Court of Appeals ruled that the federal government has exclusive control over the setting of water flow rates from hydroelectric power plants. In upholding a 1987 FERC decision, the court unanimously held that the Federal Power Act of 1920 preempts state water controls and gives exclusive power to regulate water flows to the FERC.

WRCB had sought to regulate the flows from a small hydroelectric dam project on Rock Creek, a tributary of the American River. In 1984, the Board issued two appropriation permits to the project, which ordered the project owners to allow 60 cubic feet per second (cfs) of water to flow through the creek between March and June, and 30 cfs between July and February. The flow rates were viewed by the Board as important for the protection of adult trout in the Rock Creek-American River system. However, the flow rates set were higher than the minimum flow requirements established by a prior FERC license to the dam. Under the 1983 FERC license, the minimum flow rate was 11 cfs between May and September, and 15 cfs between October and April.

The Board argued that the U.S. Supreme Court's holdings in *California v. United States*, 438 U.S. 645 (1978), allow states to impose any condition on a water rights permit, so long as the condition does not conflict with congressional directives authorizing the reclamation project. Although *California v. United States* construed the Reclamation Act of 1902, the Board argued that since the Reclamation Act's relevant section is nearly identical with a provision in the Federal Power Act of 1920, the holding is applicable.

However, the court rejected this argu-



ment, relying instead on a prior Supreme Court case, *First Iowa Hydro-Electric Coop. v. FPC*, 328 U.S. 152 (1946). Under *First Iowa*, the activities left for state regulation are limited to proprietary uses of water for irrigation or municipal purposes. The court interpreted this holding as supporting the proposition that federal regulation preempts state regulation in all other areas of hydroelectric power.

The Board is considering an appeal of the decision to the U.S. Supreme Court, based upon the apparent inconsistency of the *California v. United States* and *First Iowa* holdings.

Last February, the United States government filed suit against WRCB and the San Francisco Regional Water Quality Control Board (Regional Board). The case, *U.S. ex rel. Dep't of the Navy v. San Francisco Regional Water Quality Control Board*, No. 89-0598 JPV (N.D. Cal.), seeks a judicial declaration that the Regional Board acted improperly when it refused to issue a water quality permit for the Navy. The Navy had applied to the Regional Board for a water quality certification pursuant to section 401 of the Clean Water Act. The Army Corps of Engineers required the certification before issuing a dredging permit for the Navy's proposed mooring facility at Hunter's Point Annex in San Francisco Bay. The Regional Board denied the application because the Navy refused to provide environmental information about its project in accordance with the California Environmental Quality Act (CEQA). The Navy initially alleged that the Regional Board could not condition the certification on compliance with CEQA. The amended complaint charges that only the State WRCB is entitled to deny the application, rather than the Regional Board. A hearing on WRCB's motion for summary judgment was scheduled for October 26.

In *United States and State of California v. City of San Diego*, No. 88-1101-B (S.D. Cal.), the Sierra Club was recently granted intervenor status, which entitles it to participate in settlement negotiations between the federal Environmental Protection Agency (EPA), state water quality officials, and the City of San Diego. (See CRLR Vol. 9, No. 3 (Summer 1989) p. 116 and Vol. 9, No. 2 (Spring 1989) p. 110 for background information.) The Sierra Club offered suggestions to reduce the flow of wastewater into the city's sewage system. The Club contends this reduction would thus eliminate the need for a new sewage plant in the South Bay, and would make

the cost of upgrading the present sewage system in San Diego more affordable. These suggestions were taken under advisement; at this writing, negotiations between the parties are still continuing.

## RECENT MEETINGS:

At its September 21 meeting, the Board adopted two orders proposing Temporary Urgency Changes in Point of Rediversion. The orders allow the federal Bureau of Reclamation and the Yuba County Water Agency to temporarily divert water from the State Water Project (SWP) to the Kern National Wildlife Refuge and the Grasslands Water District, respectively.

The Bureau requested a diversion of 8,200 acre-feet of water from the SWP to the Refuge for wintering migratory waterfowl. Water for the Refuge, ordin-

arily provided by transfers from the Bureau's Central Valley Project, is unavailable this year between September and December due to the recent drought conditions.

The Yuba County Water Agency requested a diversion of 30,000 acre-feet of water from the East Bay Municipal Utility District, for delivery to the Grasslands area near Los Banos to support migratory waterfowl. After the migration is over, the water is to be released into the San Joaquin River system to support salmon migration.

## FUTURE MEETINGS:

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



## INDEPENDENTS

### AUCTIONEER COMMISSION

*Executive Officer: Karen Wyant*  
(916) 324-5894

The Auctioneer and Auction Licensing Act was enacted in 1982 (AB 1257, Chapter 1499, Statutes of 1982) and established the California Auctioneer Commission to regulate auctioneers and auction businesses in California.

The Act was designed to protect the public from various forms of deceptive and fraudulent sales practices by establishing minimal requirements for the licensure of auctioneers and auction businesses and prohibiting certain types of conduct.

The Auctioneer and Auction Licensing Act provided for the appointment of a seven-member Board of Governors, composed of four public members and three auctioneers, to enforce the provisions of the act and to administer the activities of the Auctioneer Commission. Members of the Board are appointed by the Governor for four-year terms. Each member must be at least 21 years old and a California resident for at least five years prior to appointment. In addition, the three industry members must have a minimum of five years' experience in auctioneering and be of recognized standing in the trade.

The Act provides assistance to the Board of Governors in the form of a

council of advisers appointed by the Board for one-year terms. In September 1987, the Board disbanded the council of advisers and replaced it with a new Advisory Council (see CRLR Vol. 7, No. 4 (Fall 1987) p. 99 for background information).

Licensee Board member Vance Van Tassell was recently reappointed to another four-year term by Governor Deukmejian. Additionally, Stephen Grove, a licensee from Los Angeles, was appointed to replace S.M. "Sandy" Hochman, whose second term on the Board expired. Finally, public members Howard "Gus" Hall and Duayne Epele were also reappointed for another four-year term by Governor Deukmejian.

## MAJOR PROJECTS:

*Enforcement Program.* Private investigators continue to inspect and investigate licensees about whom complaints are filed with the Commission. Over 160 field inspections and investigations were initiated prior to June 30. (See CRLR Vol. 9, No. 2 (Spring 1989) p. 111 and Vol. 9, No. 1 (Winter 1989) p. 97 for background information.) The investigators spent approximately 60% of their time on compliance checks and 40% on complaint investigations. Results of the investigations are now being prepared for referral to the Attorney General's Office. The Commission will seek disci-