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Improving Efficiency Incrementally: The Governor's Commission Attacks Waste and Unreasonable Use

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Improving Efficiency Incrementally: The Governor's Commission Attacks Waste and Unreasonable Use

Andrew H. Sawyer*

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I. INTRODUCTION

The Governor's Commission to Review California Water Rights Law ("Governor's Commission") recognized that the major dam-building era in California was over. Rising construction costs and heightened environmental concerns made it increasingly difficult to carry out new projects to develop additional water supplies.¹ Instead, the emphasis would have to shift to making more efficient use of already developed water supplies.²

In its final report, the Governor's Commission made a variety of recommendations in the chapter devoted to improving efficiency in water use. Some of these recommendations were directed towards improving water right administration, which could have done as much to promote certainty or protect instream flows as to promote efficiency.³ Other recommendations emphasized improving efficiency by improving economic incentives for water conservation.⁴ This included removing disincentives to conservation, like the risk of losing the water right for non-use,⁵ and establishing procedures to facilitate voluntary transfers.⁶

Measured by the extent to which the recommendations were enacted, the recommendations on improving efficiency were remarkably successful, in sharp contrast to the success rate in other areas.⁷ Of twelve specific recommendations,⁸ nine were enacted in language virtually identical to that recommended by the Commission.⁹ Eight of these recommendations were enacted in a single bill, Assembly Bill 1147.¹⁰ The other recommendation was initially included in Assembly Bill 1147, but was enacted earlier as part of another bill.¹¹ A tenth recommendation was enacted two years later, in substantially different language

1. GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, FINAL REPORT 50-51 (Dec. 1978) [hereinafter FINAL REPORT].

2. *Id.* at 51.

3. *Id.* at 57-59, 62-66.

4. *Id.* at 59-62, 66-69.

5. *Id.* at 60.

6. *Id.* at 62-65.

7. None of the recommendations on greater certainty, protection of instream uses, or groundwater management were enacted as proposed by the Governor's Commission, although in some areas, the Final Report has influenced judicial developments. *See, e.g.,* *People v. Shirokow*, 605 P.2d 859, 862 n.3 (Cal. 1980); *In re Waters of Long Valley Creek Stream Sys.*, 599 P.2d 656, 665-67 (Cal. 1980).

8. *See* FINAL REPORT, *supra* note 1, at 71-72 (listing the twelve specific recommendations). Some of the recommendations sought relatively minor changes, while others reflect more complex proposals that could have been characterized as combining several recommendations under one heading.

9. *Compare id.* at 73-96 (setting forth text of the proposed legislation to implement the Governor's Commission's recommendations on improving efficiency), *with* 1980 Cal. Stat. 2, ch. 933, sec. 13, at 2954-2960 (enacting the Commission's draft legislation, with some modifications).

10. 1980 Cal. Stat. 2, ch. 933, at 2954-2960.

11. 1979 Cal. Stat. 3, ch. 1112, sec. 2, at 4046-4047. *See* A.B. 1147, as amended in Senate Feb. 11, 1980 at 4-5 (removing the already enacted section, California Water Code section 1011, from the bill).

but having the same effect.¹² Two recommendations were rejected by the Legislature.¹³ A thirteenth recommendation, although rejected by the Governor's Commission,¹⁴ was later enacted after revisions were made that obviated the Governor's Commission's concerns.¹⁵ For the recommendations that were enacted, the final report provides relevant legislative history.¹⁶

This article reviews the implementation of the enacted recommendations, including the legislative response, application of the enacted legislation in administrative proceedings and the courts, and, for many of the recommendations, further legislative developments.

II. IMPROVING WATER RIGHT ADMINISTRATION

The Governor's Commission made several recommendations that amount to clarifications of water right law, or development of new procedures, designed to improve the protection of water rights or to make permitting and enforcement more efficient. These included recommendations concerning enforcement, forfeiture periods, rights to reclaimed water, and permitting of small diversions.

A. Enforcement

1. Relation of Enforcement to Efficiency

The Governor's Commission recognized a connection between effective enforcement and improvement of efficiency. The efficient allocation of any resource requires the development of a property rights system that ensures users of the resource reasonable certainty as to their rights. "Enforcement of surface water rights is the primary method by which the Board [the State Water Resources Control Board (SWRCB)] provides protection for water users against unauthorized uses of water."¹⁷

The importance of enforcement to efficiency should be clear. Conserved water transfers will not work if other parties make unauthorized diversions to capture the savings for themselves. Permit and license conditions established to

12. FINAL REPORT, *supra* note 1, at 72 (proposing the repeal of sections that restrict sale of water outside of district boundaries to "surplus" water); see CAL. WATER CODE §§ 382-383 (West Supp. 2004) (authorizing transfer outside district boundaries of water the user voluntarily forgoes during the period of the transfer). These sections were enacted by AB 3491. 1982 Cal. Stat. 3, ch. 867, sec. 2, at 3221.

13. See FINAL REPORT, *supra* note 1, at 71-72 (listing the two rejected recommendations, which were procedures governing salvage water and the repeal of California Water Code sections 1392 and 1629).

14. See *id.* at 69-70 (rejecting the proposal to certify small unauthorized diversions).

15. Water Rights Permitting Reform Act of 1988, 1988 Cal. Stat. Ch. 1040, sec. 1 (codified at CAL. WATER CODE §§ 1228-1229.1) (providing for registration of appropriations for small domestic use or livestock stockpounds).

16. A commission report that leads to the enactment of a statute is part of the statute's legislative history. *Lee v. Yang*, 3 Cal. Rptr. 3d 819, 826 (Ct. App. 2003).

17. FINAL REPORT, *supra* note 1, at 58.

prevent waste and unreasonable use will have little effect if they are not enforced. Proceedings to apply and enforce water right requirements often are controversial, however, and may be subject to charges that they undermine voluntary efforts to promote efficiency.¹⁸ It is important not to lose sight of the basic principle, recognized by the Commission, that enforcement promotes efficiency.

Enforcement also promotes other Water Code policies, including protection of property rights to the use of water and protection of environmental resources and the public interest. The Governor's Commission's recommendation to improve the SWRCB's enforcement authority promotes these other policies as much as, or more than, the promotion of efficiency.

2. *Governor's Commission's Cease and Desist Order Proposal*

The Governor's Commission proposed to authorize the SWRCB to issue water right cease and desist orders for two types of violations: unauthorized diversions and violation of the terms and conditions of water right permits and licenses.¹⁹ After providing an alleged violator notice and an opportunity to be heard, the SWRCB could issue a preliminary cease and desist order.²⁰ Despite the term, a "preliminary" cease and desist order was a final administrative order for most purposes.²¹ The SWRCB could convert a preliminary cease and desist order into a final cease and desist order without notice, at which time it would no longer be subject to amendment.²² Upon violation of a preliminary or final cease and desist order, the Attorney General, upon request from the SWRCB, could bring an action in court for civil penalties of up to \$500 per day, or injunctive relief.²³

3. *Legislative Response*

The Legislature enacted the Governor's Commission's recommendations for water right cease and desist orders with one major change. The enacted legislation

18. See, e.g., S.W.R.C.B. Decision 1644, at 22-24 (Mar. 1, 2001) (responding to criticism that proceeding to apply public trust and reasonable use requirements would undermine voluntary transfers). The SWRCB has designated as precedential all decisions and orders adopted by the Board itself, as opposed to decisions and orders adopted by SWRCB staff under delegated authority, except where a decision or order states that it is not precedential, or is superseded by later enacted statutes, judicial opinions, or actions of the SWRCB. S.W.R.C.B. Order No. WR 96-01, at 17 n.11 (Jan. 18, 1996). SWRCB decisions and orders are available on the SWRCB website at www.waterrights.ca.gov and the Lexis and Westlaw databases. All SWRCB decisions and orders cited in this article have been designated as precedential, except as otherwise noted.

19. FINAL REPORT, *supra* note 1, at 71. See *id.* at 74-75 (proposed CAL. WATER CODE §§ 1825, 1830, 1831).

20. *Id.* at 74-75 (proposed CAL. WATER CODE §§ 1830, 1831, 1834).

21. *Id.* at 75-76 (proposed CAL. WATER CODE §§ 1832, 1840, 1841). *But see id.* at 78 (proposed CAL. WATER CODE § 1845).

22. See *id.* at 75 (proposed CAL. WATER CODE §§ 1832-1833).

23. *Id.* at 77-78 (proposed CAL. WATER CODE § 1841).

removed the SWRCB's authority to issue a cease and desist order for unauthorized diversion or use of water.²⁴ In all other respects, the enacted legislation was either identical to the Governor's Commission's recommendations, or the changes were non-substantive.²⁵

4. Administrative Implementation

Until recently, the SWRCB has made only limited use of its water right cease and desist order authority. The SWRCB initiated proceedings for issuance of a cease and desist order several times in the years immediately following enactment of the SWRCB's cease and desist order authority, although the proceedings did not necessarily result in the issuance of a cease and desist order.²⁶ After that, the SWRCB rarely issued cease and desist orders.²⁷

There are several reasons for the SWRCB's infrequent use of its water right cease and desist order authority. With changes in board membership after Governor Deukmejian replaced Governor Brown, the SWRCB was less committed to the implementation of the Governor's Commission's recommendations, and was less interested in water right enforcement in general.²⁸ The SWRCB also took on substantial new responsibilities in the 1980's, including public trust responsibilities,²⁹ expanded Bay-Delta planning responsibilities,³⁰ and review of short-term transfers.³¹ This occurred without a corresponding increase in funding, resulting in a shift of resources from other water right activities, including enforcement.³² For example,

24. A.B. 1147, as amended in the Assembly May 25, 1979, at 11-12. The Association of California Water Agencies (ACWA) had objected to the entire cease and desist order process on the grounds that water right violations should not be subject to administrative enforcement. Letter from ACWA to the Hon. William J. Filante, Re: Assembly Bill 1147, at 2 (Apr. 23, 1979) (on file with the *McGeorge Law Review*) [hereinafter ACWA Letter]. ACWA also raised a more specific objection that the proposed cease and desist order authority "apparently is not limited to the enforcement of terms and conditions in water rights permits issued by the board but extends to all water rights issues." *Id.*

25. See A.B. 947, 1980 Cal. Stat. 2, ch. 933, sec. 13, at 2958-2960.

26. See S.W.R.C.B. Order No. WR 83-13 (July 21, 1983) (deciding not to issue cease and desist order and deleting permit condition instead); S.W.R.C.B. Order WR 83-10 (June 16, 1983) (deciding not to issue cease and desist order and revising permit conditions instead); S.W.R.C.B. Order WR 82-01 (Mar. 18, 1982) (deciding not to issue cease and desist order and revising permit conditions instead).

27. *E.g.*, S.W.R.C.B. Order No. WR 96-04 (July 8, 1996); Cease and Desist Order 9P.2 (1992) (nonprecedential order), amended by S.W.R.C.B. Order No. WR 97-01 (Jan. 8, 1997); Cease and Desist Order 5F (1987) (nonprecedential order), continued in effect by S.W.R.C.B. Order No. WR 88-07 (Apr. 21, 1988).

28. SWRCB board members are appointed to staggered four-year terms. CAL. WATER CODE § 177 (West Supp. 2004). As a result, changes in regulatory approach are likely to occur gradually, and not through sudden reversals with a change of administration.

29. See generally *Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709 (Cal. 1983).

30. See generally *United States v. State Water Res. Control Bd.*, 227 Cal. Rptr. 161 (Ct. App. 1986).

31. See CAL. WATER CODE §§ 1725-1732 (West Supp. 2004).

32. A staff report to the Governor's Commission observed that "only 15 members of the engineering staff of the Division of Water Rights are actively handling enforcement problems." MARYBELLE D. ARCHIBALD, GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, STATE ENFORCEMENT OF APPROPRIATIVE WATER RIGHTS 2 (Staff Memo. No. 3, Sept. 1977).

permit and license revocations, ordinarily ordered for failure to put water to beneficial use, were relatively common up until the early 1980s,³³ and relatively infrequent thereafter.³⁴

In addition, deficiencies in the SWRCB's water right cease and desist order authority limited its usefulness. In particular, the SWRCB could not enforce a cease and desist order without litigating the issue in court. The new law authorized civil penalties of up to \$500 per day, but penalties could only be imposed in court, not by the SWRCB.³⁵ By requiring the SWRCB to go to court to enforce its cease and desist orders, the new law left the SWRCB with essentially the same problem that the Governor's Commission's recommendation sought to remedy: the inability to take effective enforcement action without undue costs and delays.³⁶ Indeed, the relatively low amount of the authorized penalty in comparison with the cost of litigation meant there was little threat of enforcement for missing deadlines, unless the violation continued for a substantial period.³⁷ Worse, until they were amended in 1996, the procedures specified for judicial enforcement in response to violation of a cease and desist order appeared to open the possibility of a collateral attack on the cease and desist order.³⁸ In addition, cease and desist orders could only be used for violation

33. See S.W.R.C.B. Order No. WR 82-05 (June 17, 1982) (reconsideration denied by S.W.R.C.B. Order No. WR 82-08); S.W.R.C.B. Order No. WR 80-17 (Sept. 18, 1980) (reconsideration denied by S.W.R.C.B. Order No. WR 80-19); S.W.R.C.B. Order No. WR 80-02 (Jan. 24, 1980); S.W.R.C.B. Order No. WR 78-16 (Mar. 15, 1979); S.W.R.C.B. Order No. WR 76-14 (Dec. 16, 1976); S.W.R.C.B. Order No. WR 76-11 (July 15, 1976); S.W.R.C.B. Order No. WR 75-19 (Dec. 18, 1975); S.W.R.C.B. Order No. WR 73-53 (reconsideration denied by S.W.R.C.B. Order No. WR 75-03); S.W.R.C.B. Order No. WR 74-30 (Oct. 17, 1974) (limited reconsideration granted on other issues by S.W.R.C.B. Order No. WR 74-34); S.W.R.C.B. Order No. WR 74-27 (Sept. 19, 1974); S.W.R.C.B. Order No. WR 74-28 (Sept. 19, 1974); S.W.R.C.B. Order No. WR 74-11 (Apr. 18, 1974); S.W.R.C.B. Order No. WR 73-51 (Dec. 6, 1973) (reconsideration denied by S.W.R.C.B. Order No. WR 74-03); S.W.R.C.B. Order No. WR 73-52 (Dec. 6, 1973); S.W.R.C.B. Order No. WR 73-42 (Sept. 6, 1973); S.W.R.C.B. Order No. WR 73-40 (Aug. 2, 1973); S.W.R.C.B. Order No. WR 73-26 (May 17, 1973); S.W.R.C.B. Order No. WR 73-19 (Apr. 19, 1973); S.W.R.C.B. Order No. WR 73-16; S.W.R.C.B. Order No. WR 73-07 (Feb. 1, 1973).

34. See S.W.R.C.B. Order No. WR 2001-24 (Sept. 20, 2001); S.W.R.C.B. Order No. WR 97-06 (Sept. 18, 1997); S.W.R.C.B. Order No. WR 93-03 (Mar. 18, 1993); S.W.R.C.B. Order No. WR 92-01 (Mar. 19, 1992) (reconsideration denied by S.W.R.C.B. Order No. WR 92-04); S.W.R.C.B. Order No. WR 88-25 (Dec. 15, 1988). These orders, and those in the preceding footnote, reflect revocations that were the subject of a hearing or otherwise contested. In addition, there are many voluntary revocations agreed to by permit or license holders who no longer have a need for their water rights.

35. 1980 Cal. Stat. 2, ch. 933, sec. 13, at 2960 (current version at CAL. WATER CODE § 1845(b) (West Supp. 2004)). The SWRCB was also authorized to seek injunctive relief to enforce its cease and desist order. *Id.*

36. In support of its recommendation for administrative cease and desist orders, the Governor's Commission observed, "injunctive actions to prevent unauthorized diversions commonly take the Board and the State Attorney General months to prepare and file. These delays may render preventative action meaningless. . . ." FINAL REPORT, *supra* note 1, at 58.

37. The Legislature later increased the maximum penalty to \$1,000 per day. CAL. WATER CODE § 845(b)(1) (West Supp. 2004). This is still too small a penalty to address short-term violations, or cases where the cost of compliance, either in terms of lost diversions or costs of constructing facilities necessary to comply, exceeds the maximum penalty.

38. The statute specified that evidence before the court shall include the administrative record before the board, and any evidence that could not be produced with reasonable diligence at the administrative hearing or was improperly excluded. 1980 Cal. Stat. 2, ch. 933, sec. 13, at 2960 (current version at CAL. WATER CODE

of permit and license conditions, not for unauthorized diversion or use, as the Governor's Commission had originally proposed. It was also unclear whether a cease and desist order could be issued in response to a threatened violation.³⁹

The SWRCB's relatively infrequent use of its water right cease and desist order authority may also be explained by the later enactment of other more effective enforcement authority. Since 1992, the SWRCB has had the authority to administratively impose civil liability for the unauthorized diversion or use of water.⁴⁰ The SWRCB may impose liability in an amount up to \$500 per day of violation for "[t]he diversion or use of water subject to this division other than as authorized in this division. . . ."⁴¹ Where diversion or use occurs without compliance with applicable terms and conditions of the authorizing permit or license, the SWRCB may impose administrative civil liability. This provides a much more efficient enforcement tool than the water right cease and desist order authority recommended by the Governor's Commission. Instead of having to first issue a cease and desist order in response to a violation and then go to court to seek civil penalties if there is a subsequent violation of the cease and desist order, the SWRCB may impose liability on its own in response to the initial violation. In addition, the SWRCB may impose administrative civil liability for unauthorized diversion or use in cases where the violator does not hold a permit or license. This fills the gap created by the Legislature's decision to enact the Governor's Commission's recommendations without including the proposed authority to issue a cease and desist order for unauthorized diversion or use.

Although the SWRCB's authority to impose administrative civil liability helped make up for deficiencies in its cease and desist order authority, there remain a number of circumstances where the SWRCB's cease and desist order may be useful. In some instances, the SWRCB may want to take steps to require

§ 1845 (West Supp. 2004)). This is the evidence ordinarily considered by a court in an action to review the validity of an administrative decision or order. CAL. CIV. PROC. CODE § 1094.5(a), (e) (West Supp. 2004). In the case of enforcement for violation of a cease and desist order, however, there would be no administrative decision or order in response to the violation. In this situation, enforcement was left to the court. The only administrative decision or order for which there would be an evidentiary hearing and an administrative record was the underlying cease and desist order. The statute was drafted as though the proceeding involved review of the validity of the cease and desist, not just the fashioning of an appropriate remedy for violation of the cease and desist order. These problems were corrected by 1996 legislation that expressly prohibited collateral attack on SWRCB decisions and orders, and deleted the provisions that appeared to contemplate review of the underlying cease and desist order in an action to enforce that order. See CAL. WATER CODE §§ 1126(d), 1845 (West Supp. 2004).

39. Compare 1980 Cal. Stat. 2, ch. 933, sec. 13, at 2958 (authorizing issuance of a cease and desist order if the board finds a person "is violating," without any express authority to issue an order in response to a threatened violation) with 1980 Cal. Stat. 2, ch. 933, sec. 13, at 2959 (authorizing issuance of a notice of violation, and adoption of a cease and desist order without a hearing if the notified party does not request a hearing, if a violation is occurring "or threatening to occur").

40. CAL. WATER CODE § 1052(b) (West Supp. 2004). As originally enacted, this authority applied only in critically dry years. 1987 Cal. Stat. ch. 756, sec. 1. In 1991, the Legislature expanded this authority to cover violations in all years. 1991 Cal. Stat., ch. 1098, sec. 1.

41. *Id.* § 1052(a) (referring to Division 2, commencing with section 1000 of the Water Code, which establishes the water right permit and license system).

compliance, without proceeding immediately to impose liability for past violations.⁴² This may be particularly true for violations involving small diversions, or for violators who are taking some steps to comply, but do not appear to be trying hard enough. A cease and desist order also provides a basis for setting a schedule of compliance, which may be especially appropriate where immediate compliance is infeasible or would cause undue hardship. For example, a schedule of compliance may be appropriate where achieving compliance without disrupting critical supplies will require construction of facilities or obtaining an alternate water supply.⁴³ The SWRCB may issue a cease and desist order setting a schedule of compliance in addition to, or in lieu of, imposing administrative civil liability.⁴⁴ Furthermore, there are circumstances where a cease and desist order may be issued, but administrative civil liability would be inappropriate or unenforceable. These circumstances include cases where a violation is threatened but has not yet occurred, and cases where federal sovereign immunity precludes the imposition of civil penalties.⁴⁵

5. *Revitalized Cease and Desist Order Authority*

In 2002, the Legislature enacted legislation sponsored by the SWRCB to correct the deficiencies in the SWRCB's water right cease and desist order authority.⁴⁶ The SWRCB may now impose civil liability administratively, in an amount not to exceed \$1000 per day, for violation of a cease and desist order.⁴⁷ The SWRCB may also issue a cease and desist order for unauthorized diversion or use, not just for violations of water right permits and licenses.⁴⁸ In addition, the SWRCB may issue a cease and desist order for violations of other SWRCB decisions and orders, including decisions and orders prohibiting the waste or unreasonable use of water or setting conditions on water transfers.⁴⁹ The SWRCB's authority to issue a cease and desist order in response to a threatened violation has also been clarified.⁵⁰ Finally, the procedures for issuance and

42. Cf. CAL. WATER CODE §§ 13300, 13308 (West Supp. 2004) (authorizing compliance orders for water quality violations).

43. See CAL. WATER CODE § 1831(b) (West Supp. 2004) (authorizing schedules of compliance). The SWRCB may also issue an order imposing administrative civil liability, but suspend all or part of that liability on condition that the violator adheres to a schedule of compliance.

44. See CAL. WATER CODE § 1836 (West Supp. 2004) (specifying that nothing in the chapter governing cease and desist orders precludes the SWRCB from taking action to impose liability for unauthorized diversion or use).

45. Cf. *Dep't of Energy v. Ohio*, 503 U.S. 607, 611 (1992) (holding that the United States did not waive sovereign immunity for imposition of penalties to punish past violations of water quality requirements, while recognizing state authority to take enforcement actions against federal agencies to require future compliance).

46. A.B. 2267, 2002 Cal. Stat. ch. 652.

47. CAL. WATER CODE § 1845(b)(1), (3) (West Supp. 2004).

48. *Id.* § 1831(d)(1).

49. *Id.* § 1831(d)(3).

50. *Id.* § 1831(a).

modification of cease and desist orders have been revised, eliminating the confusing distinction between preliminary and final cease and desist orders.⁵¹

The SWRCB was particularly interested in obtaining authority to issue cease and desist orders for unauthorized diversion or use to address the situation where a diverter files an application in response to threatened enforcement but fails to diligently pursue the application.⁵² The SWRCB may now issue a cease and desist order setting a detailed schedule of steps that the applicant must take to pursue the application or cease diverting. In part because of this new authority, the SWRCB has taken greater interest in the use of its water right cease and desist order authority.⁵³

6. *Limited Scope of the Enforcement Recommendation*

The Governor's Commission's recommendation concerning water right enforcement barely scratched the surface of the issues that could have been examined concerning water rights enforcement. The Governor's Commission paid only limited attention to legal issues concerning the SWRCB's investigatory powers. While it examined the issue of authority to enter property to make inspections, it ultimately recommended against any changes.⁵⁴ The Governor's Commission apparently did not even consider other legal issues affecting the SWRCB's ability to monitor compliance, such as authority to require reporting and monitoring by parties who divert and use water.⁵⁵

Similarly, the Governor's Commission's recommendations on enforcement focus on cease and desist orders, and ignore other effective enforcement tools.⁵⁶ Even the recommendation on cease and desist orders was limited in scope. Two particularly noteworthy omissions are the absence of authority to impose liability administratively for violations of cease and desist orders and the absence of authority to issue a cease and desist order for violations of SWRCB orders issued under Water Code section 275.

51. *Id.* §§ 1832, 1834; *see id.* § 1833 repealed by 2002 Cal. Stat. ch. 652, sec. 8.

52. SENATE COMMITTEE ON AGRICULTURE AND WATER RESOURCES, COMMITTEE ANALYSIS OF AB 2267, at 2 (June 24, 2002).

53. Between June 2003 and April 2004, the SWRCB issued eight cease and desist orders. Letter from Victoria A. Whitney, Division Chief, SWRCB Division of Water Rights, to Kristen T. Castaños, Somach Simmons & Dunn (Mar. 25, 2004) (on file with the *McGeorge Law Review*).

54. FINAL REPORT, *supra* note 1, at 59.

55. The SWRCB's water quality program relies extensively on reporting and monitoring requirements, either imposed as part of SWRCB approvals or issued independently. *See generally* CAL. WATER CODE §§ 13267, 13383 (West Supp. 2004). As part of water right administration, the SWRCB requires reports of permittees and licensees. CAL. CODE REGS. tit. 23, §§ 846-848 (2003). The Commission did not consider whether there should be any changes in the SWRCB's authority to require monitoring and reporting of water diversion and use, or whether the SWRCB needed additional enforcement authority to address the failure to report or false reporting. *Cf.* CAL. WATER CODE § 5107(b)-(c) (West Supp. 2004) (authorizing imposition of civil liability for material misstatements in statements of diversion and use).

56. The Governor's Commission also made recommendations concerning forfeiture, but these were not directed to improving the effectiveness of enforcement. FINAL REPORT, *supra* note 1, at 60.

While the Governor's Commission was aware of the potential for providing authority to administratively impose civil liability, its Final Report made no mention of the issue. Earlier in 1978, the SWRCB proposed legislation providing authority to impose civil liability administratively for certain water quality violations.⁵⁷ A staff report to the Commission recommended that the Governor's Commission support granting the SWRCB authority to impose civil liability administratively for violations of cease and desist orders.⁵⁸

As the staff report noted, the Administrative Conference of the United States had recommended the adoption of procedures for the administrative adjudication of civil liability, especially for minor cases.⁵⁹ The reasoning was that courts were not well equipped to handle a large number of cases involving relatively minor regulatory offenses.⁶⁰ The resources needed to bring these cases to trial would make imposition of liability impractical.⁶¹ As a result, most cases would settle. The lack of a reasonably available forum to adjudicate these cases may affect the fairness and consistency of the settlements.⁶² It may force agencies to accept inadequate settlements, and may result in some of the worst offenders, who are most obstinate in refusing to accept liability, escaping liability altogether.⁶³ The Administrative Conference concluded that establishment of a system for administrative adjudication of liability could remedy these problems. Leading commentators on administrative law had recommended the administrative imposition of civil liability.⁶⁴ Cases issued not long before the Governor's Commission's Final Report upheld state and federal statutes that authorized administrative imposition of civil penalties.⁶⁵

Although the Governor's Commission did not address the issue of administrative civil penalties, the Legislature did. The legislation sponsored by the SWRCB in 1978 was not enacted, but it was the precursor for a number of legislative enactments providing administrative civil liability for environmental violations. In 1984, the Legislature enacted legislation authorizing the administrative imposition of civil liability for water quality violations.⁶⁶ Subsequent legislation authorized several other

57. A.B. 3220 (Cal. 1978) (as introduced on Mar. 27, 1978, but not enacted).

58. CLIFFORD T. LEE, GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, ENFORCEMENT OF THE SURFACE WATER RIGHTS SYSTEM 13 (Staff Memo. No. 6, Apr. 1978).

59. *Id.* at 12; 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 67-70 (1972).

60. Harvey J. Goldschmid, *An Evaluation of the Present and Potential Use of Civil Money Penalties as a Sanction by Federal Administrative Agencies*, in 2 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 925-27 (1972).

61. *Id.* at 919-21.

62. *Id.* at 924-25.

63. *Id.* at 921-23.

64. KENNETH CULP DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 2.13 (1976).

65. See, e.g., *Atlas Roofing Co. v. Occupational Safety & Health Comm'n*, 430 U.S. 442, 460-61 (1977) (rejecting challenge based on right to jury trial); *Waukegan v. Pollution Control Bd.*, 311 N.E.2d 146, 152 (Ill. 1974) (rejecting separation of powers challenge).

66. 1984 Cal. Stat. ch. 1541.

state agencies with environmental or natural resource enforcement responsibilities to impose civil liability or civil penalties administratively.⁶⁷ In the water quality area, the State has made substantially greater use of its administrative civil liability authority than its authority to issue cease and desist orders.⁶⁸

The SWRCB now has authority to impose administrative civil liability for several different types of water right violations.⁶⁹ Ironically, this authority was last enacted as applied to the circumstances for which it was first recommended—for violations of cease and desist orders.

Although the Governor's Commission proposed improved enforcement authority as a means of promoting efficiency, it did not propose additional authority to apply and enforce section 275 of the Water Code. The draft legislation proposed by the Governor's Commission authorized cease and desist orders for violation of any term or condition of a water right permit or license, whether or not the term had a clear connection to efficiency. Water Code section 275 specifically addresses wasteful practices, but the Governor's Commission's proposal did not authorize issuance of a cease and desist order for violation of an order issued under section 275. This omission is hard to explain. The background paper prepared for the Commission on water conservation observed, "Water Code [s]ection 275 provides the clearest administrative basis for the enforcement of the reasonable beneficial use requirement."⁷⁰

Water Code section 275 provides, "[t]he department [of water resources] and [state water resources control] board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state."⁷¹ This includes authority for the SWRCB to issue an administrative order requiring the correction or a halt of activities resulting in "waste, unreasonable use, unreasonable method of use, or unreasonable method of

67. CAL. FISH & GAME CODE § 2584 (West 1998) (allowing the Department of Fish and Game to impose and collect civil penalties); CAL. GOV'T CODE § 8670.68 (West Supp. 2004) (allowing the administrator for oil spill response in the Department of Fish and Game to impose and collect civil penalties); *id.* § 66641.6 (West 1992) (allowing the Bay Conservation and Development Commission to impose and collect civil penalties); *id.* § 25534 (allowing the California Coastal Commission to impose and collect civil penalties); CAL. HEALTH & SAFETY CODE § 25189.3 (West Supp. 2004) (allowing the Department of Toxic Substances Control to impose and collect civil penalties); *id.* § 43105.5 (allowing the Air Resources Board to impose and collect civil penalties); CAL. PUB. UTIL. CODE § 13575.5 (West 2004) (enabling municipality enforcement of pre-treatment requirements).

68. In 2003, the SWRCB and the nine regional water quality control boards issued 102 administrative civil liability orders, imposing a total \$11,434,392 in liability. Over the same period the boards issued twenty-eight cease and desist orders.

69. CAL. WATER CODE § 1052(b) (West Supp. 2004) (authorizing enforcement for unauthorized diversion or use); *id.* § 1845(a)(3) (authorizing enforcement for violation of cease and desist order); *id.* § 5107(c) (authorizing enforcement for material misstatement, if statement of diversion for use).

70. CLIFFORD T. LEE, GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, LEGAL ASPECTS OF WATER CONSERVATION IN CALIFORNIA 32 (Staff Paper No. 3, Aug. 1977) [hereinafter LEGAL ASPECTS OF WATER CONSERVATION IN CALIFORNIA].

71. CAL. WATER CODE § 275 (West Supp. 2004).

diversion of water.”⁷² The SWRCB’s authority to issue administrative orders pursuant to Water Code section 275 is not limited to diversion or use under a water right permit or license. It extends to diversion or use under all water rights, and even to diversions not requiring a water right.⁷³

As the background paper on conservation observed, the remedies available for violation of an order issued under Water Code section 275 were revocation of the applicable permit or license, or a request for the Attorney General to file an action in court.⁷⁴ As the Governor’s Commission recognized in making its proposal for authority to issue cease and desist orders, these remedies are inadequate. Revocation may be seen as an overly harsh remedy for a violation. The effectiveness of actions for injunctive relief would be limited because the remedy is prospective and the SWRCB and the Office of the Attorney General need to devote substantial resources into preparing the action.⁷⁵

The Governor’s Commission concluded that the SWRCB should not have authority to impose civil penalties for violation of Water Code section 275, stating:

The Commission does not support granting the Board additional authority to prevent waste and unreasonable use under Water Code [s]ection 275. The Commission believes it would be unfair to impose civil penalties against water users for violation of the reasonable beneficial use requirement given the requirement’s vague and variable character.⁷⁶

This conclusion may explain why the Governor’s Commission did not authorize civil penalties upon a finding of waste or unreasonable use, but it does not explain why the Governor’s Commission did not propose authority to issue a cease and desist order for violation of orders issued under section 275. Uncertainty as to what may be required may make it unfair to directly impose penalties without first specifying what the violation is, but an administrative order under section 275 provides that specification. Once an administrative order

72. *Imperial Irrigation Dist. v. State Water Res. Control Bd.*, 231 Cal. Rptr. 283, 288 (Ct. App. 1986). The SWRCB’s authority under Water Code section 275 is the result of a 1971 amendment. 1971 Cal. Stat. ch. 794, sec. 2, at 1545.

73. See, e.g., *In re Water of Hallett Creek Stream Sys.*, 749 P.2d 324, 338 n.16 (Cal. 1988) (recognizing SWRCB authority over diversions based on riparian rights); *Imperial Irrigation Dist.*, 231 Cal. Rptr. at 283 (upholding SWRCB authority over use under pre-1914 rights); S.W.R.C.B. Decision 1460 (1976) (applying SWRCB authority to diversions for flood control); S.W.R.C.B. Decision 1463 (1977) (applying SWRCB authority to water delivered under contract); S.W.R.C.B. Decision 1474 (1977) (recognizing SWRCB authority over percolating groundwater).

74. LEE, *supra* note 70, at 35. As the paper further recognized, some of the orders the SWRCB had issued under Water Code section 275 did not involve a permittee or licensee, making an action in court the only available remedy. *Id.*

75. FINAL REPORT, *supra* note 1, at 58.

76. *Id.* at 59.

is issued, and a subsequent violation of that order occurs, it should not make a difference that before the order was issued it was not clear what was required. There is no reason not to allow enforcement at that point. Moreover, if the enforcement authorized is issuance of a cease and desist order, imposition of penalties is still one step away. Only after a cease and desist order is issued, and there is a violation of the cease and desist order, is the SWRCB authorized to seek civil penalties. Nevertheless, the Governor's Commission's proposal to authorize issuance of water right cease and desist orders did not authorize cease and desist orders in response to violation of an order issued under section 275, or for violation of any other SWRCB decision or order, except for a violation of a water right permit or license.

The 2002 amendments to the SWRCB water right cease and desist order authority included authority to issue a cease and desist order for violation of an SWRCB order issued under Water Code section 275.⁷⁷

The Governor's Commission's failure to recommend any administrative remedy for violation of an order issued under Water Code section 275 may be seen as a minor oversight, given the relative infrequency with which the SWRCB issues orders under section 275 that cannot be enforced under the SWRCB's permitting and licensing authority.⁷⁸ The Governor's Commission's failure to make any recommendation on administrative civil liability is a much more serious oversight. Nevertheless, the failure to address enforceability of section 275 orders is indicative of a lack of attention to, or lack of interest in, enforcement.

A staff paper to the Governor's Commission identified a variety of enforcement issues and enforcement options. These included lack of enforcement staff in the Division of Water Rights, the absence of effective sanctions for failure to comply with reporting requirements, and the possibility of enacting civil and criminal penalties.⁷⁹ The Governor's Commission's limited recommendations on enforcement left most of these issues untouched, and as a consequence, offered only a minor step towards improving water right enforcement.⁸⁰ On the other hand, it is difficult to fault the Governor's Commission for failure to address issues like staff levels, budgeting, and organizational priorities that may have a larger impact on enforcement than the legal remedies available. The Governor had directed the

77. CAL. WATER CODE § 1831(d)(3) (West Supp. 2004).

78. The most recent SWRCB decisions or orders applying Water Code section 275, not including orders issued on review of applications or petitions or orders establishing or enforcing terms and conditions of water right permits or licenses, were issued in 1995 and 2001. S.W.R.C.B. Decision 1644 (2001); S.W.R.C.B. Order No. WR 95-17 (Oct. 26, 1995). Even in those cases, the decision or order was directed primarily at diversions under permit or license, and set appropriate terms and conditions for those permits or licenses, although the decision or order also set requirements applicable to diverters who claim riparian or pre-1914 rights.

79. See ARCHIBALD, *supra* note 32.

80. In addition to the recommendation on cease and desist orders, the Governor's Commission recommended additional authority for failure to comply with reporting requirements as part of its recommendations on improving certainty. FINAL REPORT, *supra* note 1, at 31.

commission to examine water rights law.⁸¹ Moreover, while cease and desist order authority may represent only an incremental improvement in the SWRCB's enforcement powers, an incremental approach may have been all that was politically feasible. The Governor's Commission's recommendation offered only a limited improvement in enforcement, but unlike the broader recommendations in other fields, the recommendation was enacted.

B. Forfeiture Period

Appropriative rights are subject to forfeiture for non-use.⁸² At the time that the Governor's Commission reviewed this issue, the forfeiture period was three years for permitted and licensed rights, and five years for pre-1914 rights.⁸³ The Governor's Commission recommended a uniform forfeiture period of five years for all appropriations.⁸⁴

The Governor's Commission also recommended that the forfeiture occur automatically upon the lapse of the forfeiture period.⁸⁵ The Governor's Commission did not specify what it meant by "automatically." A staff paper prepared for the Commission concluded that forfeiture of pre-1914 water rights appears to occur automatically upon lapse of the forfeiture period,⁸⁶ but it was unclear whether the same principle applied to permitted and licensed rights.⁸⁷ In particular, the staff paper observed that the Water Code included notice and hearing procedures for revocation of permits and licenses, and stated that these procedures would have been unnecessary if the right automatically forfeited after lapse of the forfeiture period.⁸⁸

81. Governor's Exec. Order No. B-26-77 (May 11, 1977).

82. CAL. WATER CODE §§ 1240-1241 (West Supp. 2004); *Smith v. Hawkins*, 42 P. 453, 454 (Cal. 1895) (interpreting former Civil Code section 1411, later recodified as Water Code section 1240).

83. *Erickson v. Queen Valley Ranch Co.*, 99 Cal. Rptr. 446, 448 (Ct. App. 1971). The three-year forfeiture period in the Water Commission Act, 1917 Cal. Stat. ch. 554, at 748, and codified as California Water Code section 1241 may have been intended to apply to both pre-1914 rights and permitted and licensed rights, but was interpreted to apply only to permitted and licensed rights. Code Commission Notes, CAL. WATER CODE § 1241 (West 1972).

84. FINAL REPORT, *supra* note 1, at 71. The Governor's Commission included this suggestion as part of a recommendation that also suggested that the forfeiture doctrine be modified to avoid forfeiture when non-use is due to conservation efforts, a suggestion discussed *infra* notes 184-210 and accompanying text.

85. *Id.*

86. LEE, *supra* note 70, at 62 n.230.

87. *Id.* at 62-63.

88. *Id.* at 62. The notice and comment procedures apply to revocation for failure to exercise due diligence in putting water to beneficial use or for violation of permit or license terms, as well as for non-use after the right has been perfected. CAL. WATER CODE §§ 1410-1410.2, 1672-1675.2 (West Supp. 2004).

Because permitted and licensed rights are administered by the SWRCB, while pre-1914 rights are not,⁸⁹ the manner in which forfeiture is established will differ even if the substantive rules governing forfeiture are the same. In the case of a pre-1914 water right, the right to divert ceases when there has been a period of non-use that extends for five years.⁹⁰ There is no administrative mechanism for registering the forfeiture, however.⁹¹ If the appropriator or its successor later asserts that it still has that right, it is not precluded from making that claim. The alleged forfeiture may have occurred years earlier, but where the issue of forfeiture is disputed in the context of a later proceeding, the parties have an opportunity to put on evidence as to whether the alleged non-use in fact occurred. The burden of proof is on the party claiming forfeiture.⁹² The forfeiture of a pre-1914 right is automatic only in the sense that no administrative action is required for forfeiture to occur. Because there is no mechanism to record forfeitures as they occur, and the appropriator may contest the issue when forfeiture is alleged in a later proceeding, the forfeiture of pre-1914 rights is not truly automatic.

In the case of permitted or licensed rights, there is an administrative mechanism for recording forfeiture. If forfeiture occurred automatically, as the Governor's Commission recommended, the SWRCB could revoke the permit or license administratively, without any prior notification to the permit or license holder. But the factual basis for revocation may legitimately be subject to

89. The SWRCB has authority regarding pre-1914 rights under the public trust doctrine and Water Code section 275. S.W.R.C.B. Order No. WR 95-04, at 14 (Feb. 16, 1995). See generally *In re* Water of Hallett Creek Stream Sys., 749 P.2d 324, 338 n.16 (Cal. 1988). This continuing authority does not amount to regulatory authority over proprietary right issues to the same extent as for permitted and licensed rights. Rather, the SWRCB may review and make findings on issues concerning claimed pre-1914 rights to the extent reasonably necessary to carry out the SWRCB's other responsibilities. E.g., CAL. WATER CODE §§ 1051, 1052, 1202 (West 1971 & Supp. 2004).

90. CAL. WATER CODE § 1240 (West 1971). See *Smith v. Hawkins*, 42 P. 453, 454 (Cal. 1895) (holding that "a continuous nonuser for five years will forfeit the right [and] [t]he right to use the water ceasing at that time [other incidental rights are also lost]").

91. Some parties contend that the right, once lost, can be reinitiated if no forfeiture proceedings have been initiated before the new use is initiated. See generally SCOTT S. SLATER, 1 CALIFORNIA WATER LAW AND POLICY § 2.31, at 2-99 to 2-30 (2002). There is no administrative mechanism available for the SWRCB to revoke pre-1914 rights, however. The courts have interpreted Water Code section 1241 to be inapplicable to pre-1914 rights. See *supra* note 83. *But cf.* CAL. WATER CODE § 1831 (West Supp. 2004) (authorizing issuance of a cease and desist order based on the threat of an unauthorized diversion). Forfeiture may be an issue in private litigation, but it is unclear whether a private party would have standing to impose a forfeiture for non-use after the lapse of the forfeiture period unless and until the appropriator threatens to reinitiate the right. If pre-1914 rights could be reinitiated after they are lost for non-use, vast amounts of water could be developed based on reinitiation of diversions that ceased with the discontinuation of hydraulic mining, undermining the security of all other water rights. The Water Code declares water that has previously been appropriated but which has ceased to be put to beneficial use to be unappropriated water, and specifies that no right to appropriate unappropriated water can be initiated except in accordance with the statutory provisions for approval of post-1914 appropriations. CAL. WATER CODE §§ 1202(b), 1225 (West 1971 & Supp. 2004). Allowing forfeited water rights to be reinitiated would be inconsistent with these provisions. See *People v. Shirokow*, 605 P.2d 859, 866 (Cal. 1980) (stating that the Water Code should be interpreted to make waters available for allocation by the SWRCB to the fullest extent possible).

92. *Lema v. Ferrari*, 80 P.2d 157, 161 (Cal. 1938).

dispute. There may be an issue as to whether water was in fact put to use or whether forfeiture has occurred.⁹³ Erroneous revocations based on factual errors would be inevitable. Inspections might overlook evidence of use, or reports of use by the permittee or licensee might be lost, misinterpreted, or found unreliable. As a practical matter, many revocations would occur not because the permit or license holder failed to put any water to beneficial use, but simply because the permit or license holder failed to report that use.⁹⁴

The Legislature modified the Governor's Commission's proposal to require notice and an opportunity for a hearing if requested.⁹⁵ This modification came in response to concerns that it would be unfair for revocation to occur without these procedures.⁹⁶ With this modification, forfeiture of permitted and licensed rights is more like forfeiture of pre-1914 rights than would have been the case if the Governor's Commission's recommendation for automatic forfeiture had been enacted. Under the enacted provision, forfeiture occurs as a result of non-use over the forfeiture period, but not without an opportunity for a hearing before the appropriator is found to have forfeited the right.

The test for forfeiture remains the same as it was before Assembly Bill 1147 was enacted.⁹⁷ In particular, the Legislature did not make Water Code section 1241 applicable to pre-1914 rights, although that may have been the intent of that section when it was originally enacted.⁹⁸ The language of Water Code section

93. Non-use is not a basis for forfeiture if it occurred because no water was available for diversion under the appropriator's priority of right. *Huffner v. Sawday*, 94 P. 424, 426 (Cal. 1908). The SWRCB has also recognized that other circumstances beyond the reasonable control of an appropriator may excuse a failure to put water to beneficial use. S.W.R.C.B. Decision 1247, at 5-6 (1966).

94. A substantial percentage of permittees and licensees fail to file required reports. *See* S.W.R.C.B. Order No. WR 2004-10, at 14 (Apr. 6, 2004) (nonprecedential order). Forfeiture for failure to report might be appropriate if the Water Code might be appropriate if the Water Code provided clear warning that failure to report is grounds for forfeiture, but the Water Code does not. *Cf.* CAL. WATER CODE § 5003 (West 1971) (providing that for specified groundwater extraction, it shall be deemed that no right was claimed and no water was extracted during any period for which the extraction was not properly reported).

95. CAL. WATER CODE § 1241 (West Supp. 2004). This section requires notice to the "permittee." The SWRCB has interpreted this section to apply to both permits and licenses. S.W.R.C.B. Order No. WR 88-25, at 2 (Dec. 15, 1988); *see* CAL. WATER CODE § 1675 (West 1971 & Supp. 2004) (providing for revocation of licenses for non-use). *See also* CAL. WATER CODE §§ 1226.4, 1228.4(b)(2) (West Supp. 2004) (providing for forfeiture for non-use under stockpond certificates and registrations of small domestic or livestock stockpond use).

96. *See* ACWA Letter, *supra* note 24, at 1 (calling for notice and an opportunity for a hearing); A.B. 1147, at 8 (Cal. 1979) (as amended in Assembly on May 7, 1979) (adding requirement for notice and an opportunity for a hearing).

97. There is no indication in either the language or legislative history of Assembly Bill 1147 that the amendments to Water Code section 1241 were intended to modify the circumstances under which non-use is excused. *See supra* note 93. Section 1241 now specifies that the water "may" revert, but also specifies that the reversion "shall" occur upon a finding of the SWRCB. Thus, the use of the word "may" merely reflects that the forfeiture is contingent upon an SWRCB finding, made after notice and an opportunity for a hearing. The basis for the finding, that the water has not been used for the purpose for which it was appropriated over the specified number of years is the same basis as Water Code section 1241 previously specified for forfeiture to occur. *See* CAL. WATER CODE § 1241 (West Supp. 2004).

98. *See supra* note 83.

1241 highlights the inapplicability of section 1241 to rights not subject to the permit system, requiring notice to the “permittee.” In addition, the Legislature did not make any changes in the substantive rules governing forfeiture. For example, the Legislature left intact the language of Water Code section 1241 specifying that forfeiture may occur based on non-use “for a period of” five years, indicating that non-use over any five year period, not just the period immediately before the initiation of forfeiture proceedings, may establish a forfeiture.⁹⁹

The Governor’s Commission’s recommendation for forfeiture without any procedure for notice and an opportunity for a hearing is puzzling. In the context of permit violations, the Governor’s Commission concluded that revocation often is “overly harsh” and an extreme remedy that is rarely used.¹⁰⁰ In the context of non-use, however, the Governor’s Commission would have imposed the same remedy without even providing an opportunity to contest the factual basis for the forfeiture. One possible explanation for this view is that the Governor’s Commission sought to reduce the administrative burden of revocation proceedings. In some cases, the factual basis for revocation is clear, but the permit or license holder would still like to hold on to the right and requests a hearing for that reason.¹⁰¹

As a practical matter, the SWRCB has not kept up with the need to process forfeitures where the permittee or licensee has ceased putting the water to beneficial use. Both the lack of resources for inspections and the costs of going to hearing if a hearing is requested have contributed to this problem. The SWRCB has made progress recently, but for reasons unrelated to the revocation procedures. Under new water right fee legislation, all permits and licenses are subject to annual fees.¹⁰² In response, over one hundred permit and license holders have requested revocation of their permits or licenses, apparently having concluded that the benefit of holding onto the water right in case they might need it later is outweighed by the cost of paying annual fees. This relatively modest economic incentive appears to have had a substantial effect.

C. *Rights to Reclaimed Water*¹⁰³

The Governor’s Commission considered three issues with respect to rights to reclaimed water: (1) rights as between the water supplier and the owner of the waste treatment plant; (2) rights as between the discharger of treated wastewater

99. SLATER, *supra* note 91, at § 2.31 p. 2-100.

100. FINAL REPORT, *supra* note 1, at 58.

101. See, e.g., S.W.R.C.B. Order No. WR 79-02, at 2 (Mar. 15, 1979) (involving licensees who conceded non-use, but stated they would like to reserve the water for future use).

102. CAL. WATER CODE § 1525(a) (West Supp. 2004); CAL. CODE REGS. tit 23, § 1066 (2004).

103. Most of the Water Code references to reclaimed water have been changed to refer to recycled water. See A.B. 1247, 1995 Cal. Stat. ch. 28 (amending Water Code sections to make the change). The terms reclaimed water and recycled water are interchangeable.

and downstream water right holders; and (3) protection of water dedicated to instream beneficial uses from future appropriations.

1. Rights as Between the Water Supplier and Treatment Plant Owner

The Governor's Commission recognized the potential for water rights issues arising out of the sale of reclaimed water, stating that, as between the water supplier and the owner of a waste treatment facility, it was unclear who has the right to use the treated effluent.¹⁰⁴ A staff report prepared for the Governor's Commission found no authority on this issue.¹⁰⁵ The Governor's Commission concluded that concentrating ownership in the treatment plant owner, rather than in multiple suppliers of the wastewater, would encourage the sale and distribution of reclaimed water.¹⁰⁶ The Governor's Commission's recommendation, enacted as section 1210 of the Water Code, specifies that the owner of the waste treatment plant has the right, unless otherwise provided by agreement.¹⁰⁷

2. Rights of Downstream Users

On the issue of rights as between the discharger of treated wastewater and downstream water users, the Governor's Commission recommended no change in the law governing who has ownership of the right to use that water. In contrast to the issue of ownership as between the water supplier and the treatment plant owner, where there was little authority and a need for clarification, the Governor's Commission recognized that there was case law addressing the issue of ownership as between the discharger and downstream users. The Governor's Commission observed:

The subsequent reuse of reclaimed water raises a different set of ownership issues. Commonly, downstream users will have obtained rights to the return flow that upstream users have discharged into the stream. Generally, upstream dischargers must respect the rights of downstream users to the return flow. . . . Given the substantial judicial consideration of downstream rights to return flow, the Commission concludes that no additional action is necessarily [sic] to modify existing law.¹⁰⁸

The Governor's Commission proposed language, enacted as part of section 1210 of the Water Code, specifying that, "[n]othing in this article shall affect the

104. FINAL REPORT, *supra* note 1, at 63.

105. LEE, *supra* note 70, at 60.

106. FINAL REPORT, *supra* note 1, at 63-64.

107. CAL. WATER CODE § 1210 (West Supp. 2004).

108. FINAL REPORT, *supra* note 1, at 64-65.

treatment plant owner's obligations to any legal user of the discharged treated waste water."¹⁰⁹

Although it did not recommend any modification in the legal standards that apply to changes, the Governor's Commission recommended a petition process to apply that law when there were changes in point of discharge or place or purpose of use.¹¹⁰ The Commission proposed a section that would allow the owner of a wastewater treatment plant to petition for change under the same rules for protection of other legal users of water as apply to changes in point of diversion, place of use, or purpose of use under a permitted or licensed water right.¹¹¹ As the Assembly Water, Parks and Wildlife Committee analysis of the bill explained in its summary of this section, "[t]his bill would require the discharging party to obtain permission from the Board [to change the place of use, point of discharge or purpose of use of treated wastewater]. The purpose of this requirement is to protect existing downstream users who have depended upon the return flow."¹¹² The petition process proposed by the Governor's Commission, and enacted by the Legislature as Water Code section 1211, provides for review of changes involving treated wastewater under the same standards for protection of other water right holders as apply to changes in point of diversion, place of use, or purpose of use.¹¹³

In proceedings applying section 1211, the SWRCB has protected legal users of water in accordance with the law of return flows in the same manner as the SWRCB would apply the law if the proceeding involved a proposed change in purpose or place of use that could affect return flows.¹¹⁴ Ordinarily, this means that downstream water right holders who depend on return flows must be protected, but there is an important exception for the return flows of foreign water.¹¹⁵

Foreign water is water that would not be present in a given body of water under natural conditions. This includes water that has been imported from outside the watershed, water that has been released from long-term storage, and

109. CAL. WATER CODE § 1210 (West Supp. 2004).

110. FINAL REPORT, *supra* note 1, at 86.

111. *Id.* (proposing section 1205 of the Water Code).

112. ASSEMBLY WATER PARKS AND WILDLIFE COMMITTEE, COMMITTEE ANALYSIS OF AB 1147, at 2 (Apr. 25, 1979) (emphasis in original).

113. *See* FINAL REPORT, *supra* note 1, at 86 (providing for review in accordance with the Water Code chapter governing change petitions); CAL. WATER CODE § 1211(a) (West Supp. 2004).

114. *See* S.W.R.C.B. Order No. WR 95-09, at 10 (June 22, 1995). Under the procedures for wastewater change petitions, "the right to treated waste water is to be reviewed by the SWRCB in the same manner as a permit or license." The order states that it is not precedential "[i]nsofar as this order addresses the evidence received . . . and contains findings of fact." *Id.* at 14. The portions of the order discussed in this article involve explanation of background legal principles, and thus are precedential. *See generally* S.W.R.C.B. Order No. 96-01, at 17 n.11 (Jan. 18, 1996) (stating that SWRCB decisions or orders are precedential "except to the extent a decision or order indicates otherwise").

115. FINAL REPORT, *supra* note 1, at 64; S.W.R.C.B. Order No. WR 95-09, at 18-19 (June 22, 1995).

groundwater that is not in hydrologic continuity with the surface water body.¹¹⁶ A right can be perfected to appropriate return flows of foreign water,¹¹⁷ but the right is contingent on the continued importation of the foreign water and release of return flows. The holder of an appropriative right to divert and use return flows from foreign waters can neither compel the continued importation of foreign water nor claim legal injury if the importer recaptures or reclaims the return flow or sells it to another user.¹¹⁸ Because most wastewater reclamation occurs in areas of the state that rely heavily on imported water, this exception has been very important in applying the rules for protection of other water right holders in the review of wastewater change petitions.

An article written by Stuart L. Somach contends that the rules for protection of other water holders should be disregarded, offering no protection even when return flows of native water are involved, based on the theory that traditional water right concepts do not apply to return flows of treated wastewater.¹¹⁹ Somach's conclusions cannot be reconciled with the language and legislative history of Water Code sections 1210 and 1211.¹²⁰

Somach acknowledges that section 1210 is intended to preserve the rights of downstream users, but emphasizes that it does not define those rights.¹²¹ He concedes that, under traditional water rights law, downstream users may have rights to return flows of treated wastewaters.¹²² He seeks to avoid this consequence by contending that all treated wastewater should be treated as foreign water based on the claim that the water has been changed, presumably because the use may add pollutants that are not removed through treatment.¹²³ But municipal wastewater is no different than industrial discharges or irrigation return flows in this respect.¹²⁴

116. See S.W.R.C.B. Order No. WR 95-09, at 18, 22 (June 22, 1995) (characterizing both imported water and nontributary groundwater as foreign water).

117. See CAL. WATER CODE § 1202(d) (West 1971 & Supp. 2004). Riparian right holders have no right to use return flow from foreign water because riparian rights extend only to the natural flow of the stream. *Bloss v. Rahilly*, 104 P.2d 1049, 1051-52 (Cal. 1940).

118. *City of Los Angeles v. City of San Fernando*, 537 P.2d 1250, 1295 (Cal. 1975); *Haun v. De Vaurs*, 218 P.2d 996, 998 (Cal. 1950); *Stevens v. Oakdale Irrigation Dist.*, 90 P.2d 58, 62 (Cal. 1939). The summary of the common law contained in the Final Report states that a second exception to the ordinary rule that changes cannot reduce return flows relied on by other water right holders exists where an upstream user releases return flow with the prior intent of recapturing the return flow. FINAL REPORT, *supra* note 1, at 64; see LEE, *supra* note 70, at 56. All of the cases cited for this proposition involved the right of an upstream user to recapture return flow from foreign water, however, and it does not appear to provide an independent basis for an exception to the no injury rule.

119. Stuart L. Somach, *Who Owns Reclaimed Wastewater?*, 25 PAC. L.J. 1087, 1097 (1994).

120. The article simply ignores the relevant legislative history, including the specific discussion of this issue in the Governor's Commission's Final Report and legislative committee reports, baldly asserting that there is no legislative history. *Id.* at 1091.

121. *Id.* at 1091-92. Of course, one would not expect the Legislature to seek to define those rights where it recognizes that those rights have been defined by case law, and does not intend to redefine those rights.

122. *Id.* at 1094-95.

123. *Id.* at 1096-97.

124. The article also argues that traditional concepts of water law should not be applied to treated wastewater, however, which the article contends should instead be characterized as personal property, not

The enactment of Water Code section 1211 supports the conclusion that traditional water rights law of return flows applies in the context of changes involving treated wastewater. The Legislature would not have set up a procedure for protection of downstream rights to return flows of treated wastewater if it believed downstream water right holders were not entitled to any protection. In fact, as clearly indicated in the legislative history of section 1211, the Governor's Commission and the Legislature concluded that the law of return flows applies in the same way that it applies to other sources, such as irrigation return flows. Indeed, Somach's article concedes that section 1211 is generally consistent with traditional water rights concepts, and that SWRCB approval of changes ordinarily is required, but contends without explanation that section 1211 is limited to cases where a natural stream channel is used to convey the treated wastewater before it is rediverted for use.¹²⁵ This attempt at limiting the applicability of section 1211 is flatly inconsistent with its language, which expressly applies to "any change in the point of discharge, place of use, or purpose of use," and makes no express reference to use of natural channels for conveyance.¹²⁶

The applicability of section 1211 and the application of water rights principles protecting other water right holders are consistent with the State's policy of promoting wastewater reuse.¹²⁷ Encouraging the reuse of wastewater is based on the fundamental policy that the water resources of the State should be put to beneficial use to the fullest extent feasible.¹²⁸ Where section 1211 limits reuse or sale by the waste treatment plant owner, other water right holders are making use of the return flows from the treatment plant. If they were not making use of those waters, they would not be injured by reductions in return flows, and the rules against changes that injure other legal users of water would not bar the change.¹²⁹ To allow a waste treatment plant owner to use or sell treated wastewater to the detriment of water right holders, whose use is protected under the law of return flows, would not increase wastewater reuse; it would simply result in use by one party instead of another.

subject to the law of water rights. *Id.* at 1101-03. Because the water is delivered to customers, who make use of the water before discharging it into sewer systems, the article claims, traditional water right concepts do not apply. *Id.* at 1103. *But see* *City of Los Angeles v. City of San Fernando*, 537 P.2d 1250, 1294 (Cal. 1975) (rejecting the argument that the law of return flows does not allow the recapture of foreign water once it has percolated into the groundwater because the water had become the personal property of the importer's customers once it had been delivered for their use). Once again, the facts cited in the article do not distinguish treated wastewater from irrigation return flows, which may involve water delivered to individual farmers by an irrigation district or water company, who use the water and discharge it to drainage ditches, where it may combine with flows from other users before returning to the stream.

125. Somach, *supra* note 119, at 1105.

126. CAL. WATER CODE § 1211 (West Supp. 2004).

127. *See generally* CAL. WATER CODE §§ 13550-13556, 13575-13583 (West Supp. 2004).

128. CAL. CONST. art. X, § 2; CAL. WATER CODE § 100 (West 1971 & Supp. 2004).

129. *See* CAL. WATER CODE §§ 1702, 1725, 1736 (West 1971 & Supp. 2004) (setting requirements to prevent injury to other users of the water involved).

In addition to protecting water right holders, the procedures for review of water right changes, which are incorporated into the wastewater change petition requirements of section 1211, also protect instream beneficial uses.¹³⁰ The SWRCB is not required to condition or deny proposed wastewater changes simply because there will be some adverse effect on instream beneficial uses. Only if the effects on instream beneficial uses are unreasonable must they be avoided.¹³¹ Moreover, instream uses are recognized as beneficial uses of water.¹³² Requiring that a discharge to the stream be continued to support those instream uses instead of allowing it to be put to other uses or sold by the waste treatment plant owner, where reasonable under the circumstances of the case, is consistent with the policy of maximizing use of the State's water resources.

Logically and practically, discharges of treated wastewater are no different from other return flows, such as irrigation return flows or discharges from powerplant cooling. It is not surprising that section 1211 would make changes involving treated wastewater subject to the same basic standards that apply to changes in point of diversion, place of use, or purpose of use under water right permits and licenses. What is remarkable is the breadth of the changes that are subject to section 1211. As proposed by the Governor's Commission, the wastewater change petition process would have provided that the waste treatment plant owner "may" petition for SWRCB approval of the change, and the change petition process would have applied only to the extent that the source of the water being discharged is water diverted under permit or license.¹³³ The Legislature strengthened and expanded this process. Water Code section 1211 specifies that the owner of a waste treatment plan "shall obtain approval of the board" before making any change in "point of discharge, place of use, or purpose of use of treated wastewater."¹³⁴

The legislative history does not clearly indicate why the Legislature modified the wastewater change petition process.¹³⁵ In any event, there were good reasons

130. *See id.* §§ 1725, 1736 (setting a requirement that the change not unreasonably affect instream beneficial uses). Water Code section 1702 does not expressly provide for protection of instream beneficial uses, but the SWRCB may review proposed changes under Section 1702 to protect instream beneficial uses, consistent with the SWRCB's public trust responsibilities. S.W.R.C.B. Order No. WR 95-09, at 29 n.10 (June 22, 1995).

131. In appropriate cases, instream beneficial uses may be protected even if the water supply contributing to the discharge is foreign water, but the source of the discharge and the extent to which there would be any instream flows under natural conditions are factors that may be considered in determining whether an impact on instream beneficial uses of a change in discharge is unreasonable.

132. CAL. WATER CODE § 1243 (West Supp. 2004).

133. FINAL REPORT, *supra* note 1, at 86.

134. CAL. WATER CODE § 1211 (West Supp. 2004).

135. The amendments to the bill were made in connection with consideration by the Senate Committee on Agriculture and Water Resources. A.B. 1147, at 6 (as amended Feb. 11, 1980). The bill analysis prepared for the committee makes no mention of section 1211. SENATE COMMITTEE ON AGRICULTURE AND WATER RESOURCES, COMMITTEE ANALYSIS OF AB 1147 (Feb. 5, 1980). Nor is it entirely clear why the Governor's Commission drafted its recommendation the way that it did. A staff report raised the issue of whether the permittee or licensee might be required to process a water right change petition where the wastewater change

for the modification. Without the modifications, the Governor's Commission's proposal would have allowed the treatment plant owner, the proponent of the change, to decide whether the SWRCB would review the change for injury to water right holders or instream beneficial uses. By making the change approval process mandatory, the Legislature provided far better assurance that other water right holders who were entitled to protection would in fact get that protection.¹³⁶ The process adopted by the Legislature is also more efficient. Under the Governor's Commission's approach, the change petition process would involve the filing of multiple petitions, in the names of different permit and license holders, where a petition is filed by the owner of a regional waste treatment plant that serves many users who receive water deliveries from different water suppliers. That approach would tend to undermine the objective of concentrating the right of use in the treatment plant owner, instead of the suppliers of the wastewater, in order to encourage the sale and distribution of reclaimed water.¹³⁷

The change petition process adopted in section 1211 does not merely consolidate matters to allow a single change petition in the name of the treatment plant owner instead of multiple petitions on behalf of various permit and license holders. The process applies without regard to the source of the water contributing to the discharge. Even if the source of the water contributing to the discharge is water diverted under a pre-1914 right or groundwater not subject to the water right permit and license system, the change petition process applies.¹³⁸

results in use outside the water right holder's authorized place of use. LEE, *supra* note 70, at 60. Consistent with that concern, the Governor's Commission would have authorized the treatment plant owner to petition for the change in the name of the holder of the permit or license. FINAL REPORT, *supra* note 1, at 86. It does not explain why the proposed petition process would have been optional. If the only intent was to clarify whether a change petition was required, the proposal should either have specified the circumstances under which a petition was required, or declared that a change in point of diversion, place of use or purpose of use was not required. *Id.*

136. By prohibiting the change without SWRCB approval, Water Code section 1211 also assures that there is an enforcement mechanism available. Water Code section 1052 prohibits the diversion or use of water subject to Division 2 of the Water Code except as authorized by Division 2 of the Water Code. Any diversion or use for which a wastewater change petition is required is a diversion or use subject to Division 2 of the Water Code, meaning that if the diversion or use occurs without SWRCB approval or in violation of any conditions of approval the SWRCB may compel enforcement under Water Code section 1052. CAL. WATER CODE § 1052 (West Supp. 2004); *see also id.* § 1831(d) (authorizing issuance of a cease and desist order for SWRCB decisions and orders, including orders approving wastewater change petitions).

137. *See* FINAL REPORT, *supra* note 1, at 63-64; *see also supra* text accompanying note 106. In addition, having the petition filed in the name of the permittee or licensee implies that any conditions of approval would be imposed on the permittee or licensee. As the treatment owner is proponent of the change and the party with control over how the treated wastewater will be used, it is more appropriate for any conditions of approval to be imposed on the treatment plant owner.

138. Most of the Water Code sections governing water right applications and petitions apply only to surface water and subterranean streams in known and definite channels. Water Code section 1200 provides that: "[w]henver the terms stream, lake or other body of water, or water occurs in relation to applications to appropriate water or permits or licenses issued pursuant to such applications, such term refers only to surface water, and to subterranean streams flowing through known and definite channels." Water Code section 1211 makes no reference to water bodies, applications or appropriations, however, and Water Code section 1200 does not limit its applicability.

There are sound practical and policy reasons for this broad applicability of the requirement for SWRCB approval of changes in point of discharge, place of use, or purpose of use.¹³⁹ Basing the applicability of the change petition requirement on the type of water rights held by the water suppliers who deliver supplies that contribute to the discharge, when the treatment plant owner may not know who all the water suppliers are, let alone what rights they may have, would result in violations.¹⁴⁰ Where SWRCB review is required, as would be the case for most changes even if the change petition process only applied where at least some of the source water has been used under permit or license, it makes sense for the SWRCB to review the entire project instead of just the portion of the discharge attributable to permitted or licensed rights.¹⁴¹ In addition, the Legislature may have concluded that, given the public health concerns and the SWRCB's other statutory responsibilities with respect to wastewater reclamation, it would be best for the SWRCB to review all proposed changes in point of discharge, place of use, and purpose of use of treated wastewater, not just those involving water diverted under a permit and license.¹⁴²

Whatever the reason may have been for the Legislature's decision to broaden the applicability of the SWRCB review process of wastewater change petitions, it provided for an efficient process that will more effectively protect downstream water right holders and the environment than would the process proposed by the Governor's Commission.

In 2001, the Legislature amended section 1211, making it inapplicable to certain changes. Section 1211 now applies only where the change would result in

139. Water Code section 1211 is unusual, but by no means unique, in its authorization of SWRCB authority over water that is not diverted or proposed to be diverted under permit or license. *See, e.g.*, CAL. WATER CODE §§ 275, 1051, 1707, 13550 (West 1971 & Supp. 2004) (establishing regulatory or investigatory authority without regard to whether the diversion or use is subject to the permit and license system administered by the SWRCB).

140. In addition, an issue concerning the need for SWRCB approval arises not only where the source of the discharge is water used under permitted or licensed rights, *see supra* note 135, but also for riparian and pre-1914 rights. To the extent the supplies contributing to the treatment plant derive from diversions under riparian right and any reuse of the treated discharge occurs on nonriparian land, that reuse would be unauthorized without a process for SWRCB approval. *See generally* SLATER, *supra* note 91, at § 3.09 p. 3-32. Similarly, while Water Code section 1706 allows a pre-1914 water right holder to make changes without SWRCB approval, a wastewater change is made by the treatment plant owner, not the water right holder, and would be unauthorized without a process for SWRCB approval.

141. Indeed, the SWRCB probably would have reviewed the entire project even if the language approved by the Governor's Commission had been enacted. *See* S.W.R.C.B. Decision 1641, at 117, 122, 124 (Mar. 15, 2000) (concluding that SWRCB may review and condition approval of change petitions in the public interest).

142. In *Environmental Defense Fund, Inc. v. East Bay Municipal Utility District*, 572 P.2d 1128, 1135-37 (Cal. 1977), *vacated on other grounds*, 439 U.S. 811 (1978), *reinstated on remand*, 605 P.2d 1, 9-10 (Cal. 1980), the California Supreme Court concluded that courts should not exercise concurrent jurisdiction over proceedings to compel water agencies to reclaim waste water, but should defer in the first instance to the expertise of the appropriate administrative agencies. The court based its decision on the complexity of the issues, public health concerns, issues concerning the feasibility of wastewater reclamation, and the statutory framework for regulation of wastewater reclamation by state agencies including the SWRCB. *Id.*

a decrease in flow in any portion of a watercourse.¹⁴³ This amendment eliminated the need for SWRCB review of changes, such as a change from an ocean discharge to use for landscape irrigation, with little potential for adverse impacts on downstream water right holders or instream beneficial uses. The amendment underscores the point that it is the potential impact on other water users, rather than the types of water rights held by the water suppliers, that is the key issue in determining whether a wastewater change should be reviewed by the SWRCB.

The SWRCB has processed relatively few wastewater change petitions, and most have been relatively uncontroversial, with approval at the staff level and no petition for reconsideration by the board. The number of petitions filed appears to be substantially smaller than the number of wastewater reclamation projects being undertaken that involve changes subject to section 1211, indicating a need to inform waste treatment plant operators of the requirement. Aside from this apparent shortcoming, the experience with section 1211 indicates that the Legislature created a workable procedure that successfully integrates changes involving wastewater reclamation into the state's program for administration of water rights.

3. *Instream Dedications*

Water Code section 1212 provides, in language virtually identical to that proposed by the Governor's Commission, that where the producer of treated wastewater introduces water into a stream with the prior stated intention of protecting or enhancing instream beneficial uses, that water cannot be appropriated, claimed, or used by other water right holders or permit applicants.¹⁴⁴ This section provides a mechanism to ensure that if the treatment owner decides the flow from the treatment plant should be dedicated to the protection or enhancement of beneficial uses, and introduces the flow to the stream with that intent, the water will in fact be available for that purpose and not just provide a source of water for appropriators.

These dedications may be used either as part of voluntary efforts to enhance instream beneficial uses, or as a means of meeting otherwise applicable requirements.¹⁴⁵ For example, in SWRCB Decision 1638, the SWRCB considered a water right application, a wastewater change petition, and a proposed instream dedication in the same proceeding.¹⁴⁶ The applicant proposed to use the dedication to satisfy any requirements for protection of instream flows as a condition of approval of the appropriation. The SWRCB determined that the bypass requirements for the permit should be higher than proposed by the

143. CAL. WATER CODE § 1211(d) (West Supp. 2004).

144. *Id.* § 1212.

145. *See id.* § 1707(c) (stating that water right change petition to transfer or dedicate water to instream beneficial uses may be used to satisfy applicable requirements or provide flow in addition to applicable requirements).

146. S.W.R.C.B. Decision 1638, at 1 (Sept. 1997).

applicant, but approved the dedication and credited it towards meeting the bypass requirements.¹⁴⁷

Section 1212 does not establish any procedure for registration of dedications. Unless the dedications are reported to the SWRCB, however, there is no mechanism to ensure that the SWRCB will deny water right applications that would appropriate water that has been dedicated, or recognize the dedication in other water right proceedings. Some instream dedications have been specifically approved as part of other SWRCB decisions and orders.¹⁴⁸ Where a dedication is made independent of any other SWRCB proceedings, the treatment plant operator should notify the SWRCB so that the SWRCB can make a record of the dedication.

D. Minor Diversions

1. Field Investigations

The Governor's Commission proposed procedures for field investigations of applications and petitions involving small amounts of water.¹⁴⁹ Assembly Bill 1147 enacted these recommendations.¹⁵⁰ The procedures were based on the idea that, if the SWRCB met with the parties as part of a field investigation, "there would exist a much higher probability that the protestants and the applicants would settle their differences without resorting to a time-consuming administrative hearing."¹⁵¹

In fact, these procedures helped reduce the number of hearings required. But a hearing was still required upon the request of any party.¹⁵² This meant that the time spent conducting the field investigation and seeking to obtain a resolution among the parties could be wasted, simply because one of the parties insisted on an evidentiary hearing. Due process does not require an evidentiary hearing, so long as all parties have a fair opportunity to present their cases as part of the field investigation.¹⁵³ Yet the procedures allowed project opponents to drag out the process without showing the need for an evidentiary hearing. To address this problem, the procedures for minor protested provisions were modified by

147. *See id.* at 35, 60-61, 65-71, 78-80.

148. *See id.*; S.W.R.C.B. Order No. WR 2000-07, at 5 (May 8, 2000) (nonprecedential order) (recognizing dedication of flow to instream beneficial uses as part of order approving wastewater change petition).

149. FINAL REPORT, *supra* note 1, at 72. The procedures apply to applications and petitions involving direct diversions of not more than three cubic feet per second and diversion to storage of not more than two hundred acre-feet per year. CAL. WATER CODE §§ 1348, 1704.4 (West Supp. 2004).

150. 1980 Cal. Stat. 2, ch. 933, sec. 7-11, at 2955-56.

151. FINAL REPORT, *supra* note 1, at 70.

152. CAL. WATER CODE §§ 1346, 1704.2 (West 1971 & Supp. 2004) as added by A.B. 1147, 1980 Cal. Stat. 2, ch. 933, sec. 7, 9 at 2956.

153. S.W.R.C.B. Order No. WR 97-02, at 6-7 (May 14, 1997).

legislation enacted in 1997.¹⁵⁴ Instead of preparing a staff analysis, as provided for under the originally enacted process,¹⁵⁵ the Division of Water Rights prepares a water right decision.¹⁵⁶ A party that is dissatisfied with the Division's decision may petition for reconsideration.¹⁵⁷ The petition for reconsideration may include a request for an evidentiary hearing, but the request must include documentation of the need for a hearing.¹⁵⁸

These procedures allow for expedited processing, in appropriate cases, of applications and petitions involving small amounts of water, but many minor applications and petitions are still subject to substantial delays. The process does not include an exemption from the California Environmental Quality Act (CEQA).¹⁵⁹ CEQA compliance may be required, despite the relatively small amounts of water involved, due to the potential impacts of the specific diversions or uses, cumulative impacts in combination with other existing or proposed diversions, or impacts unrelated to water resources.¹⁶⁰ Other environmental laws, including the state and federal endangered species acts,¹⁶¹ may also apply to the diversion or use.

The procedures for field investigations have provided for more efficient processing of applications and petitions for minor quantities of water, but there is a limit on how much can be accomplished through this kind of change in procedures. As competition for scarce water resources increases, and impacts on instream beneficial uses become matters of increasing concern, it will be increasingly difficult to process applications and petitions so long as the State continues to use a case-by-case approach to address water availability and instream flow issues.

2. Registrations

The Governor's Commission considered a proposal for certification of small, unauthorized diversions.¹⁶² The certification would have been non-discretionary, thereby making CEQA inapplicable.¹⁶³ The Governor's Commission ultimately rejected the proposal because it would have rewarded illegal diverters and could have also harmed other water right holders.

154. S.B. 849, 1997 Cal. Stat. ch. 323, sec. 11-15, at 17-21.

155. CAL. WATER CODE §§ 1345, 1704.1 (West 1971 & Supp. 2004), as added by A.B. 1147, 1980 Cal. Stat. 2, ch. 933, sec. 7-8, at 2956.

156. *Id.* §§ 1347, 1704.3.

157. *Id.* § 1122.

158. *See generally* CAL. CODE REGS. tit. 23, §§ 768-769 (2002).

159. CAL. PUB. RES. CODE §§ 21000-21006 (West 1996).

160. *See generally* CAL. CODE REGS. tit. 14, § 15300.2(b)-(c) (2001) (providing exceptions to otherwise applicable categorical exemptions where there are significant cumulative impacts or significant effects exist due to unusual circumstances).

161. *See* CAL. FISH & GAME CODE §§ 2050-2115.5 (West 1998); 16 U.S.C.A. §§ 1531-1544 (West 2000).

162. FINAL REPORT, *supra* note 1, at 69-70.

163. *Id.*; *see* CAL. PUB. RES. CODE § 20180(b)(1) (West 1996).

In 1988, the Legislature enacted legislation for registration of small diversions for domestic use that substantially addressed both of these concerns.¹⁶⁴ In 2000, the Legislature expanded the process to include livestock stockpond uses.¹⁶⁵ The process does not reward illegal diverters because it applies equally to unauthorized diversions and diversions that are proposed but have not been initiated. Other water right holders are protected because the registration process does not apply to streams the SWRCB has declared to be fully appropriated.¹⁶⁶

Under legislation enacted in 1987, the SWRCB adopts and updates a declaration of fully appropriated streams.¹⁶⁷ Relying on the declaration does not completely avoid impacts on prior right holders, because the declaration only lists streams that prior decisions or orders of the SWRCB or the courts have determined to be fully appropriated.¹⁶⁸ The registration process does not include any procedure for protest by other water right holders claiming injury to prior rights. The extent of any potential injury is relatively minor, however, because registration is available only for diversions that do not exceed 4,500 gallons per day, or diversions to storage that do not exceed ten acre-feet.¹⁶⁹ The water right priority system still applies, with the priority date of registered uses based on the date of completed registration.¹⁷⁰ The statute also directs the SWRCB's Division of Water Rights to identify stream systems that may become fully appropriated and directs the SWRCB to consider adding those streams to the declaration of fully appropriated streams.¹⁷¹

As with the certification process considered by the Governor's Commission, the SWRCB's review of individual registration is non-discretionary. Instead, the SWRCB sets general conditions that apply to all registrations.¹⁷² In addition, the statute provides a process for review by the Department of Fish and Game, and for certification that the registrant has agreed to the Department's conditions.¹⁷³ In practical effect, this process makes the Department of Fish and Game, instead of the SWRCB, responsible for establishing bypass requirements or other conditions that are needed on a case-by-case basis for the protection of fish and wildlife. If the registrant does not want to agree to either the general conditions set by the

164. CAL. WATER CODE §§ 1228-1229.1 (West Supp. 2004) (added by S.B. 1839, 1988 Cal. Stat. ch. 1040).

165. *Id.* §§ 1228.1-1229.1 (amended by S.B. 1775, 2000 Cal. Stat. ch. 306).

166. *Id.* § 1228.2(b).

167. *Id.* §§ 1205-1207 (added by S.B. 1485, 1987 Cal. Stat. ch. 788). The most recent update is S.W.R.C.B. Order No. WR 2002-06 (July 2, 2002).

168. *Id.* § 1205(b).

169. *Id.* § 1228.1(b)-(c).

170. *Id.* § 1228.4(a).

171. *Id.* § 1228.2(c)-(d). It is unclear how this process would work where the Division of Water Rights reports that no water remains available for appropriation from a stream, but there is no decision or order of the SWRCB or the courts determining that the stream is fully appropriated. *See id.* § 1205(b) (providing for declaration that a stream is fully appropriated if a "previous" decision has determined that no water remains available for appropriation).

172. *Id.* § 1228.6(a).

173. *Id.* § 1228.3(a)(7); *see id.* § 1228.6(a)(1) (requiring compliance as a condition of maintaining the license).

SWRCB or the specific conditions set by the Department of Fish and Game, he or she has the option of filing an ordinary water right application instead.

The process for registration of small domestic use and livestock stockpond uses has provided for the efficient processing of a large number of appropriations that might otherwise be subject to substantial delays and require a commitment of staff resources out of proportion to the amount of water at stake. For the process to work efficiently, however, it is necessary to avoid the procedures for protests by water right holders and other interested persons and exempt the process from CEQA or any other discretionary environmental review by the SWRCB. The process therefore would not be appropriate for larger diversions. The risk of harm to third party water right holders and the environment would be too great.

III. INCENTIVES FOR CONSERVATION

In addition to reforms directed primarily at improving the efficiency of water rights administration, the Governor's Commission made several recommendations that were more directly focused on avoiding waste and encouraging more efficient water use. One of these recommendations, concerning the definition of waste, was based on a regulatory approach. The others focused on incentives, including removing disincentives to water conservation and relying on economic incentives, with particular emphasis on water transfers.¹⁷⁴

A. *Defining Waste*

California law prohibits the waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water,¹⁷⁵ but provides little in the way of generally applicable standards that define waste or unreasonable use.¹⁷⁶ Instead, determinations of reasonableness depend largely upon the facts of the particular case, and that determination may change as conditions change.¹⁷⁷

This approach provides the flexibility to deal with the specific circumstances of individual cases, and to adapt to changing conditions. This flexibility comes at considerable costs, however, both in terms of the time that must be spent to apply the reasonableness doctrine in any particular case and in terms of the uncertainty as to how it may be applied in future cases.¹⁷⁸ Regulating to improve water use

174. These recommendations included a proposal to encourage development of salvage water. FINAL REPORT, *supra* note 1, at 60-61, 71. These provisions were amended out of the bill, apparently in response to concerns about environmental impacts. See A.B. 1147, as amended in Assembly May 7, 1979, at 7 (deleting salvage water provisions); ASSEMBLY WATER PARKS AND WILDLIFE COMMITTEE, COMMITTEE ANALYSIS OF AB 1147, at 6 (Apr. 25, 1979) (expressing concerns about environmental impacts of vegetation removal).

175. CAL. CONST. art. X, § 2; CAL. WATER CODE §§ 100-101 (West 1971).

176. *But see id.* § 301 (defining as waste permitting water to flow from an artesian well without putting the water to use); *id.* §§ 520-523 (finding that unmetered water service connections cause waste).

177. See *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 45 P.2d 972, 1007 (Cal. 1975).

178. See FINAL REPORT, *supra* note 1, at 21 (discussing uncertainty created by a case-by-case approach).

efficiency through proceedings that apply the reasonableness doctrine is like regulating to protect water quality by applying public nuisance law. It may serve to address a few major problems or establish a few key precedents, but it is not an efficient way to apply requirements broadly and consistently to a large class of persons or entities that are subject to a regulatory agency's jurisdiction.¹⁷⁹

The Governor's Commission considered the potential for comprehensively defining reasonable beneficial use, which would serve to set regulatory standards, but rejected this approach as impracticable and inflexible, and instead recommended a continuation of the case-by-case approach.¹⁸⁰ The Commission did recommend one minor clarification: that local custom should not be determinative, but should be only one factor considered, in determining reasonable beneficial use.¹⁸¹ The Legislature enacted this recommendation as Water Code section 100.5.

The Governor's Commission's recommendation in this area has not resulted in any significant change. It simply codified the law as explained by the most recent case on the subject.¹⁸² Section 100.5 has not been cited in any published opinions of the California courts. It has only been cited once in an SWRCB decision or order, and it does not appear that the SWRCB's decision would have been any different if the section had not been proposed or enacted.¹⁸³

The Governor's Commission's recommendation in this area is most noteworthy for what it does not do. It does not recommend any significant change from the case-by-case approach by which the SWRCB and the courts apply the reasonableness doctrine.

B. Retention of Rights to Conserved Water

The Governor's Commission concluded that forfeiture for non-use discourages water conservation, because the water right holder may lose the right to the extent of the non-use.¹⁸⁴ The Governor's Commission recommended modification of the forfeiture doctrine to allow an appropriator to retain the right to the extent that water is not used due to water conservation efforts.¹⁸⁵ The Legislature enacted this recommendation as Water Code section 1011.¹⁸⁶

179. *See id.* at 57 (discussing how regulatory agencies typically rely on adopting and enforcing generally applicable standards).

180. *Id.*

181. *Id.* at 57-58.

182. *Erickson v. Queen Valley Ranch Co.*, 99 Cal. Rptr. 446, 449-50 (Ct. App. 1971)

183. S.W.R.C.B. Decision 1600, at 27-28 (June 1984).

184. FINAL REPORT, *supra* note 1, at 60. Of course, no forfeiture occurs if the water right holder puts the saved water to beneficial use, either within the appropriator's preexisting purpose or place of use or pursuant to a water right change or transfer allowing the water to be used for other purposes or in other areas.

185. *Id.* at 60, 80-81.

186. CAL. WATER CODE § 1011 (West Supp. 2004) (added by S.B. 1042, 1979 Cal. Stat. 3, ch. 1112, sec. 2, at 4046-4047).

Section 1011 is similar to Water Code section 1010, which had been enacted a few years earlier and prevents loss of a water right when water is not used due to substitution of reclaimed water.¹⁸⁷ In 1982, the Legislature amended sections 1010 and 1011 to specify that waters to which the right is retained may be transferred.¹⁸⁸ Both sections provide that the SWRCB may require a user who wants to make use of those sections to file periodic reports documenting the reduction in use.¹⁸⁹ The SWRCB requires permittees and licensees to document their conservation efforts as part of reports of permittee or licensee.¹⁹⁰ Documentation of water conservation efforts is also required as part of the statements of diversion and use filed by pre-1914 and riparian right holders.¹⁹¹

Section 1011 defines “water conservation” broadly, to mean use of less water for the same purpose of use under the appropriative water right.¹⁹² The mere demonstration that less water is being used is insufficient to protect the right from forfeiture, however. The reduction in use must be due to “water conservation efforts.”¹⁹³ As the SWRCB explained in rejecting an argument that section 1011 applies to any reduction in water use regardless of the reason:

[S]ection 1011, subdivision (a) protects a right to use water to the extent of a reduction in use “because of water conservation efforts.” Section 1011, subdivision (b) provides for the transfer of a right to the extent of a reduction in use “as the result of water conservation efforts.” The express language of these provisions requires that a deliberate effort be made or program implemented that results in a water savings.¹⁹⁴

If section 1011 were interpreted to protect any reduction in use from forfeiture, without requiring that the reduction result from some effort or program to conserve water, it would effectively nullify the provisions of the Water Code providing for forfeiture for non-use.¹⁹⁵

Water Code section 1011 allows for transfer of the retained water in accordance with the law governing water transfers, including provisions of the Water Code governing changes in point of diversion, place of use, or purpose of

187. *Id.* § 1010(b). *See also id.* § 1005.4 (detailing the reduction in use of groundwater, in specified areas, when nontributary supplies are substituted); *id.* § 1011.5 (detailing the reduction in use due to conjunctive use of surface and groundwater supplies).

188. *Id.* §§ 1010(b), 1011(b) (amended by AB 3491, 1982 Cal. Stat. 3, ch. 867, sec. 3-4, at 3223-3224).

189. *Id.* §§ 1010(a)(5), 1011(a) (West Supp. 2004).

190. SWRCB, *Statement of Diversion and Water Use Form*, at <http://www.waterrights.ca.gov/forms/statement.pdf> (last visited Mar. 17, 2005) (copy on file with the *McGeorge Law Review*). *See generally* CAL. WATER CODE §§ 5100-5108 (West Supp. 2004).

191. *See generally* CAL. WATER CODE §§ 5100-5108 (West Supp. 2004).

192. CAL. WATER CODE § 1011(a) (West Supp. 2004).

193. *Id.*

194. S.W.R.C.B. Order No. 2000-01, at 4 (Mar. 15, 2000).

195. *Id.* at 4-5 n.1.

use.¹⁹⁶ This means that all of the legal requirements for water transfers apply, including compliance with the requirement that where the transfer involves a change in point of diversion, place of use, or purpose of use, the change must not result in injury to any legal user of water.¹⁹⁷

Transfers involving water the right to which is retained under section 1011 differ from other transfers in one respect. Section 1011 is intended to assure that appropriators who conserve water are treated the same as those who continue to put the water to beneficial use.¹⁹⁸ Where the cessation or reduction in use occurs before a water transfer is proposed, the impact of the transfer should be evaluated taking into account what the use would be in the absence of both the transfer and the cessation or reduction in use that resulted from the water conservation efforts.¹⁹⁹ This means that water may be transferred even though that water has been available to downstream users since the conservation efforts were initiated, and might continue to be available if the water conservation efforts would continue in the absence of the transfer. The law does not require that the conservation efforts continue, however, and no water right holder could claim injury if the appropriator reinstated use of the water.²⁰⁰

Because the rules governing water transfers apply, the rights retained under section 1011 may be greater than the amounts that can be transferred. In SWRCB Order WR 99-12, the SWRCB considered a proposed transfer of water that had been saved as a result of water conservation efforts.²⁰¹ The most significant conservation measure was recirculation, involving capture and reuse of irrigation tailwater.²⁰² This substantially reduced the amount diverted for use from the river, but also reduced the discharges back into the river.²⁰³ The proponents of the transfer failed to demonstrate that recirculation had resulted in any reductions in consumptive use.²⁰⁴ The SWRCB recognized that these measures constitute conservation efforts, and that the water right had been preserved, allowing the water right holder to increase its diversions later if needed.²⁰⁵ In the absence of any reduction in consumptive use, however, the SWRCB did not allow transfer

196. CAL. WATER CODE § 1011(b) (West Supp. 2004).

197. S.W.R.C.B. Order No. WR 99-12, at 11-13 (Dec. 28, 1999).

198. *Id.* at 13. See CAL. WATER CODE § 1011(a) (West Supp. 2004) (requiring that a cessation or reduction in use due to conservation efforts "shall be deemed equivalent to a reasonable beneficial use of water to the extent of the cessation or reduction in use").

199. S.W.R.C.B. Order No. WR 99-12, at 15-16 (Dec. 28, 1999). See CAL. WATER CODE § 1726(e) (West Supp. 2004) (requiring SWRCB determination that water subject to short term transfer would have been consumptively used or stored in the absence of the transfer, or conserved pursuant to Water Code section 1011).

200. S.W.R.C.B. Order No. WR 99-12, at 15-16 (Dec. 28, 1999). In this respect the conserved water is treated the same way as foreign water for purposes of the rule that a change must not cause injury to any other legal user of water. See *supra* notes 115-18 and accompanying text.

201. S.W.R.C.B. Order No. WR 99-12 (Dec. 28, 1999).

202. *Id.* at 22.

203. *Id.*

204. *Id.* at 23.

205. *Id.* at 23, 28.

of any of the water as a result of the recirculation program.²⁰⁶ The transfer was proposed under Water Code section 1725, which allows transfer of water that would be consumptively used or stored in the absence of the transfer.²⁰⁷ Water conservation efforts that reduce diversions for beneficial use but do not reduce consumptive use, such as measures that reduce diversions and return flows by equal amounts, do not make water available for transfer under section 1725.²⁰⁸

It is unclear to what extent Water Code section 1011 has resulted in additional water conservation. Most of the water transfers approved by the SWRCB that rely on section 1011 involve conservation efforts that apparently would have occurred for other reasons.²⁰⁹ Section 1011 probably has served to reduce resistance to water conservation. As the SWRCB observed in a proceeding involving a complaint alleging waste or unreasonable use, section 1011 complements the principle that a water right cannot be perfected or maintained by using water wastefully:

In circumstances where the constitutional standard of reasonable use leads to the conclusion that additional water conservation measures should be employed, a water user cannot maintain a right to divert and use a quantity of water which is needed only if unreasonable practices are followed. . . . Stated differently, a water user cannot “bank” the availability of a future water supply by failing to implement water conservation measures needed to comply with Article X, Section 2 of the California Constitution. To the contrary, under present California law, in a situation where practical water conservation measures are available, an established water right can be protected most effectively by reducing the quantity of water used through implementing water conservation measures.²¹⁰

C. Transfers

The Governor’s Commission made several recommendations relating to water transfers.²¹¹ These recommendations were intended to facilitate a market approach to increasing efficiency.

206. *Id.* at 32-33.

207. CAL. WATER CODE § 1725 (West Supp. 2004).

208. S.W.R.C.B. Order No. WR 99-12, at 1 (Dec. 28, 1999). Other sections governing transfers involving a change in point of diversion, place of use, or purpose of use, do not necessarily require a reduction in consumptive use. *E.g.*, CAL. WATER CODE § 1736 (West Supp. 2004). But it ordinarily would be very difficult to demonstrate that a conserved water transfer would avoid injury to downstream water right holders to the extent that the amounts proposed to be transferred exceed the reduction in consumptive use.

209. *See, e.g.*, S.W.R.C.B. Order No. WR 2001-11, at 5 (June 20, 2001) (nonprecedential order) (involving a weed abatement program that was the basis for reductions in consumptive use, which was carried out for the purpose of preventing weed migration into neighboring farmland); S.W.R.C.B. Order No. 99-12, at 28 (Dec. 28, 1999) (involving a tailwater recirculation program that helped a water right holder comply with applicable water quality requirements).

210. S.W.R.C.B. Order No. WR 88-20, at 34-35 (Sept. 7, 1988) (citing Water Code section 1011).

211. FINAL REPORT, *supra* note 1, at 72.

A property rights system in water which permits voluntary transfers encourages the shift in resources from lower-value uses to higher-value uses. Where the transferring parties protect the interest of the third parties, such as users of return flow, by restricting the exchanged amounts to the seller's consumptive use or by providing compensation, water transfers may increase the productivity of the resource.²¹²

The Governor's Commission's recommendations were designed to promote voluntary transfers by removing obstacles to transfers and modifying transfer approval procedures.

1. Transfer Is Not Evidence of Waste

The Governor's Commission recommended language, enacted in Water Code section 1244, that the transfer of water does not constitute evidence of waste or unreasonable use, or result in forfeiture for non-use.²¹³ The Governor's Commission recommended this language in response to fears that transfers might lead to forfeiture of the right.²¹⁴ The Governor's Commission concluded that although there was no legal basis for these concerns, an affirmative statement clarifying existing law was desirable to respond to the perception that there was a problem.²¹⁵

It is questionable whether the enactment of section 1244 has had much, if any, effect. Section 1244 has not been relied upon by any published appellate court opinion or SWRCB decision or order. It was enacted to respond to an erroneous perception, not to clarify any legal issue. To the extent that perception is a problem, enactment of legislation does not appear to be a very fruitful way of addressing the problem. Parties that are serious enough about transferring water to research applicable law do not need the clarification. Others who are not seriously interested in transferring water may continue to cite the potential for revocation as a concern, but adding a new section to the Water Code does not appear to be well calculated to get their attention. Nevertheless, the Legislature has continued to follow the same approach as the Governor's Commission, adding several more sections to the Water Code intended to reinforce the point that transferring water does not result in loss of the water right.²¹⁶

Of potentially greater effect is Water Code section 109. Although not specifically identified as a recommendation in the Final Report, section 109 was included in the draft legislation,²¹⁷ declaring legislative policy encouraging the

212. *Id.* at 62.

213. *Id.* at 87.

214. *Id.* at 66.

215. *Id.*

216. CAL. WATER CODE §§ 1014, 1017, 1731, 1737, 1745.07 (West Supp. 2004).

217. FINAL REPORT, *supra* note 1, at 85.

voluntary transfer of water and water rights.²¹⁸ This section may guide interpretation of other Water Code sections to help promote transfers.²¹⁹

2. Procedures for Approval of Water Right Changes

Where a transfer involves a change in point of diversion, place of use, or purpose of use from that authorized under the permit or license for that right, the transfer requires SWRCB approval.²²⁰ This approval includes review to ensure that the change will not injure any other legal user of water.²²¹ To facilitate voluntary transfers, the Governor's Commission recommended enactment of procedures for the approval of short-term transfers, trial transfers, and transfers of adjudicated rights.²²² Assembly Bill 1147 enacted these changes.²²³

a. Short-Term Transfers

Assembly Bill 1147 established expedited procedures for transfers for periods of one year or less.²²⁴ These procedures allow changes in point of diversion, place of use, or purpose of use of permitted or licensed rights, provided the changes do not injure any other legal user of water or unreasonably affect instream beneficial uses.²²⁵ Water right changes take effect under these procedures without the necessity of a hearing before the SWRCB, if the SWRCB does not object during a short review period, and the process is exempt from CEQA.²²⁶ Assembly Bill 1147 made this process available only for transfers involving water that would have been consumptively used in the absence of the transfer,²²⁷ thereby limiting the expedited review process to changes that are not likely to harm third party water right holders or instream beneficial uses.

The statutory procedures for approval of short-term changes involving water transfers have been replaced, but these procedures still follow the same process for expedited review, including approval without the necessity of a hearing and an exemption from CEQA.²²⁸ The current procedures include more detailed provisions for administrative review, but still follow the same basic concept of

218. CAL. WATER CODE § 109 (West Supp. 2004).

219. See S.W.R.C.B. Order No. WR 88-20, at 39 (Sept. 7, 1988) (citing Water Code section 109, as part of an order that interpreted section 275 to take into account the potential for conserving water as part of voluntary transfers).

220. CAL. WATER CODE §§ 1700-1701 (West Supp. 2004).

221. *Id.* § 1702 (West 1971).

222. FINAL REPORT, *supra* note 1, at 67, 72, 88-91.

223. A.B. 1147, 1980 Cal. Stat. 2, ch. 933, sec. 12, at 2956-2958.

224. *Id.* at 2957 (former CAL. WATER CODE § 1729).

225. *Id.* at 2956-2957 (former CAL. WATER CODE § 1725).

226. *Id.* at 2957 (former CAL. WATER CODE §§ 1727, 1730).

227. *Id.* at 2956 (former CAL. WATER CODE § 1725).

228. CAL. WATER CODE §§ 1725-1731 (West Supp. 2004).

relying on a staff review by the SWRCB, instead of a hearing process and CEQA review to assure protection of third party water right holders and instream beneficial uses.²²⁹ Perhaps the most significant difference is that these procedures have been extended to waters that would be stored in the absence of the transfer.²³⁰ This extension complicates the process of determining whether there will be any injury to third party water right holders because transferring water that would otherwise be stored may allow additional diversions to storage in later seasons, which may adversely affect other storage projects.²³¹ Even with this extension, the process is consistent with the original concept of expedited procedures for review of short-term changes. As the SWRCB has observed, "this expedited review procedure is justified because the transfer of water that otherwise would be consumptively used or stored is unlikely to injure other legal users of the water, or unreasonably affect fish, wildlife, or other instream beneficial uses."²³²

The SWRCB places a high priority on review of proposed short-term transfers, with an average approval time of less than two months.²³³ The expedited review procedures have made transfers possible that would not have been approved on a timely basis if reviewed under the procedures for approval of ordinary changes. The SWRCB has stated that:

[M]any short-term transfers need rapid approval because they take advantage of specific water supply or water needs that develop in a given year and can be transient in nature. Compliance with the regular environmental review process under the California Environmental Quality Act (CEQA) would not be practical for many short-term transfers.²³⁴

Consistent with the need for expedited review, the SWRCB has rejected arguments that it should not approve proposed transfers without first determining that the uses that would occur in the absence of the transfers are consistent with public trust requirements. The SWRCB reviews short-term changes to evaluate the effect of the changes, not to reevaluate the impact of diversions pursuant to the underlying water right.²³⁵

229. *Id.*

230. *Id.* § 1725.

231. See SWRCB, SWRCB GUIDE TO WATER TRANSFERS 6-7 to 6-11 (July 1999), available at <http://www.waterrights.ca.gov/watertransferguide.pdf> (last visited Mar. 17, 2005) [hereinafter SWRCB GUIDE TO WATER TRANSFERS] (copy on file with the *McGeorge Law Review*) (discussing refill criteria).

232. S.W.R.C.B. Order No. WR 99-12, at 15 (Dec. 28, 1999).

233. SWRCB GUIDE TO WATER TRANSFERS, *supra* note 231, at 6-1.

234. *Id.*

235. S.W.R.C.B. Order No. WR 91-05, at 8 (July 18, 1991).

The enactment of procedures for SWRCB approval of short-term transfers has been a successful reform, making possible the expedited approval of a significant number of transfers.²³⁶ Proposals to further expedite the process, or to expand its applicability, should be evaluated carefully, however. Further limitations on the time for administrative review or the scope of the administrative process would significantly undermine the effectiveness of the process in protecting third party water rights or instream beneficial uses. Similar problems would occur if the applicability of the process was expanded to apply to other types of changes with greater potential to affect third party water right holders or instream beneficial uses.

b. Trial Transfers

Assembly Bill 1147 established procedures for trial transfers, allowing the water right holder to obtain approval for a change to transfer water on a trial basis, for a period of one year or less, after which the water right holder could petition for approval of a long-term transfer.²³⁷ The process was rarely used.²³⁸ The statutory procedures for trial transfers have been replaced by procedures for long-term transfers,²³⁹ defined as transfers for more than one year.²⁴⁰

The SWRCB has received relatively few petitions for review of long-term transfers.²⁴¹ Some of these changes involve substantial amounts of water.²⁴² It is unclear, however, whether the availability of the statutory procedures for long-term changes either helped to promote these transfers or had any effect on the transfer approvals. These changes could have been reviewed under the statutes for approval of ordinary change petitions.²⁴³

236. Between 1997 and 2001, the SWRCB reviewed forty petitions for short-term changes and approved thirty-seven. WATER TRANSFER WORKGROUP, WATER TRANSFER ISSUES IN CALIFORNIA: FINAL REPORT TO THE SWRCB 10 (June 2002), available at <http://www.waterrights.ca.gov/watertransfer/Final%20Report%20-%20Water%20Transfer%20Group.pdf> [hereinafter WATER TRANSFER WORKGROUP] (copy on file with the *McGeorge Law Review*).

237. A.B. 1147, 1980 Cal. Stat. 2, ch 933, at 2957-2958 (former CAL. WATER CODE §§ 1735-1739).

238. The SWRCB approved a trial transfer in S.W.R.C.B. Order No. WR 88-12 (July 6, 1988). The transfer involved use of stored water, and thus could not be approved under the procedures for approval of short-term transfers enacted under Assembly Bill 1147.

239. CAL. WATER CODE §§ 1735-1737 (West Supp. 2004).

240. *Id.* § 1735.

241. Between 1997 and 2001, the SWRCB reviewed seven petitions for long-term changes. WATER TRANSFER WORKGROUP, *supra* note 236, at 11.

242. *See id.* (approving changes related to the Vernalis Adaptive Management Plan); S.W.R.C.B. Order No. WR 2002-13 (Oct. 28, 2002) (nonprecedential order) (approving changes involving transfer of conserved water from the Imperial Irrigation District to the San Diego Water Authority).

243. CAL. WATER CODE §§ 1702-1705 (West 1971 & Supp. 2004).

c. *Transfer of Adjudicated Rights*

Assembly Bill 1147 added a provision to the Water Code specifying that rights determined under a statutory adjudication may be changed pursuant to the statutory provisions for SWRCB approval of water right changes.²⁴⁴ The effect of this provision was to allow changes to adjudicated rights based on riparian, pre-1914, or other claims, to the same extent that the Water Code authorizes changes to adjudicated rights based on water right permits or licenses. The Water Code recognizes the SWRCB's authority to approve changes in permitted and licensed rights that are the subject of a statutory adjudication.²⁴⁵ Upon motion of the SWRCB, the court enters a supplemental decree confirming the change.²⁴⁶ The new section added by Assembly Bill 1147 followed the same process.²⁴⁷

As part of later legislation replacing the transfer procedures enacted in Assembly Bill 1147, the provision added by Assembly Bill 1147 addressing changes to adjudicated rights was repealed and reenacted.²⁴⁸ In the process, the language originally enacted in Assembly Bill 1147 was modified to make that section, now codified in Water Code section 1740, applicable only to adjudications where the decree was entered after January 1, 1981.²⁴⁹ The reason for making section 1740 applicable only to more recent decrees is unclear. The benefits of voluntary transfers, and the safeguards provided for third party water right holders, apply equally to rights adjudicated before and after January 1, 1981.

As a result of the limitation to decrees entered after January 1, 1981, section 1740 accomplishes very little. Nearly all statutory adjudications involve decrees entered before January 1, 1981.²⁵⁰ Those entered after January 1, 1981 include provisions for review of proposed transfers,²⁵¹ and thus are less in need of the authority made available under section 1740 than earlier decrees.

3. *Sale of Water Outside District Boundaries*

The Governor's Commission identified general and special district acts that restrict sale of water outside of district boundaries to "surplus" water as a significant barrier to

244. A.B. 1147, 1980 Cal. Stat. 2, ch. 933, at 2958 (former CAL. WATER CODE § 1745).

245. CAL. WATER CODE § 2819 (West Supp. 2004).

246. *Id.*

247. A.B. 1147, 1980 Cal. Stat. 2, ch. 933, at 2958 (former CAL. WATER CODE § 1745).

248. A.B. 892, 1988 Cal. Stat. ch. 1145, sec. 2-3.

249. CAL. WATER CODE § 1740 (West Supp. 2004). The provisions for SWRCB approval of changes involving adjudicated rights based on water right permits and licenses were not affected. CAL. WATER CODE § 2519 (West Supp. 2004).

250. See SWRCB, Hearings Program-Water Rights Determinations, at <http://www.waterrights.ca.gov/hearings/ADJUDICATIONS.htm> (last visited Mar. 17, 2005) (copy on file with the *McGeorge Law Review*) (listing adjudications and including copies of adjudication decrees).

251. See, e.g., In the Matter of the Determination of the Rights of the Various Claimants to the Water of San Gregorio Creek Stream System in San Mateo County, California, No. 355792, at 26-31 (Super. Ct. San Mateo County, decree entered Jan. 29, 1993) (establishing procedures for transfers).

water transfers, especially transfers based on land fallowing.²⁵² The Governor's Commission recommended repeal of these provisions.²⁵³ This recommendation was not included in Assembly Bill 1147.²⁵⁴

A few years later, the Legislature accomplished the same result as the Governor's Commission's proposal by authorizing the sale of water outside of district boundaries, "[n]otwithstanding any other provision of law."²⁵⁵ This authorization applies to water that any user within the district voluntarily agrees to forgo using during the period of a transfer.²⁵⁶ It effectively removes any legal impediment to transfers based on water conservation or land fallowing agreed to by users within a district, even if other district users claim that they can make use of the water that is made available. Removing these legal barriers was a significant step towards making more transfers possible. It should be recognized, however, that water district policies and practices may continue to impose significant obstacles to transfers, even after the legal barriers have been removed.²⁵⁷

4. Repeal of Water Code Sections 1392 and 1629

The Water Code establishes, as a condition of all permits and licenses, that the permittee or licensee shall not claim any value for the permit or license in excess of the amount paid to the State for the permit or license, for purposes of rate regulation, or sale to or condemnation by the State or a local agency or district.²⁵⁸ This requirement, now codified in Water Code sections 1392 and 1629, was part of the original Water Commission Act.²⁵⁹ These provisions embody the Progressive Era sentiment that the waters of the State are a public resource, and that rights to water should not be assigned without reserving for the public the right to claim the water for public needs if needed later.²⁶⁰ They are a standard condition of every permit and license.²⁶¹

252. FINAL REPORT, *supra* note 1, at 68.

253. *Id.* at 72, 91-94.

254. A.B. 1147, 1979-1980 Reg. Sess. (Cal. 1979). The provisions implementing this recommendation were the only sections from the text of proposed legislation proposed in the Final Report to implement the recommendations on improving efficiency that were not included in the bill as introduced.

255. CAL. WATER CODE § 382 (West Supp. 2004).

256. *Id.* §§ 382(a)(2), 383(b).

257. See generally Barton H. Thompson, Jr., *Institutional Perspectives on Water Policy and Markets*, 81 CAL. L. REV. 671 (1993).

258. CAL. WATER CODE §§ 1392, 1629 (West 1971).

259. 1913 Cal. Stat. ch. 586, sec. 20.

260. See William R. Attwater & James Markle, *Overview of California Water Right and Water Quality Law*, 19 PAC. L.J. 957, 971 (1988) (discussing the Water Commission Act); CAL. WATER CODE § 102 (West 1971) ("All water within the State is the property of the people of the State, but the right to the use of water may be acquired by appropriation in the manner provided by law.").

261. CAL. WATER CODE §§ 1392, 1629 (West 1971). See generally CAL. CODE REGS. tit. 23, § 780 (1990).

The Governor's Commission concluded that these sections could undermine the economic incentive to transfer water by preventing the transferor from charging fair market value, and recommended their repeal.²⁶² The Legislature did not accept this recommendation.²⁶³

The Governor's Commission's recommendation to repeal sections 1392 and 1629 was not clearly thought out. These sections were not identified as an impediment to transfers in the staff paper on water transfer issues prepared for the Governor's Commission.²⁶⁴ Nor do they appear to limit the price that water may be sold under a transfer. Outside the context of rate setting by the Public Utilities Commission, these sections apply only to the sale of water rights, not to the sale of water. In an ordinary water transfer, the water right remains in the hands of the transferor, who transfers the water pursuant to its water right.²⁶⁵ Where the water will be diverted at a different point of diversion or will be used outside the transferor's place of use, or for different purposes, than authorized under the transferor's permit or license, a change petition is processed to modify the transferor's water right during the term of the transfer.²⁶⁶ In view of the state policy encouraging transfers,²⁶⁷ sections 1392 and 1629 should not be interpreted to extend to voluntary water transfers that do not involve the sale of the underlying water right. The argument that these sections restrict voluntary transfers has only recently been raised in proceedings before the SWRCB for review of proposed transfers, and the SWRCB has rejected the argument.²⁶⁸

The Court of Appeal has rejected an argument that Water Code section 1392 precludes the SWRCB from approving a permit where the applicant has the express purpose of marketing the water to be appropriated under the permit.²⁶⁹ The court reasoned:

The plain language of the statute indicates that a permittee may not demand an amount in excess of the actual amount paid for the permit in any sale of the rights and property of the permittee. Appellants claim [the applicant's] intent to sell its water to public entities at a profit violates

262. FINAL REPORT, *supra* note 1, at 69.

263. See A.B. 1147, as amended in Assembly May 7, 1979, at 9 (amending the bill to delete those portions that would have repealed Water Code sections 1392 and 1629).

264. CLIFFORD T. LEE, GOVERNOR'S COMMISSION TO REVIEW CALIFORNIA WATER RIGHTS LAW, THE TRANSFER OF WATER RIGHTS IN CALIFORNIA 71 (Staff Paper No. 5, Dec. 1977) [hereinafter TRANSFER OF WATER RIGHTS IN CALIFORNIA].

265. See SWRCB GUIDE TO WATER TRANSFERS, *supra* note 231, at 3-5 ("Water right changes to accommodate a transfer are processed by the SWRCB to allow the water right holder to serve another place or purpose of use or use another point of diversion. No water rights are granted to the party receiving the water. All the water rights are held by the original water right holder. Water use within the new place of use is considered water use under the original permit or license.").

266. CAL. WATER CODE §§ 1725-1732, 1735-1739 (West Supp. 2004).

267. *Id.* §§ 109, 475.

268. S.W.R.C.B. Order No. WR 2000-16, at 3 (Dec. 8, 2000) (nonprecedential order).

269. Cent. Delta Water Agency v. State Water Res. Control Bd., 20 Cal. Rptr. 3d 898, 917 (Ct. App. 2004).

section 1392. However, section 1392 applies to the sale of water rights, not to the sale of the water itself.²⁷⁰

Following this reasoning, Water Code sections 1392 and 1629 will not pose an obstacle to voluntary water transfers, because transfers involve the sale of water, not the sale of the water right.

The Governor's Commission recommended repealing sections 1392 and 1629, not just clarifying that they do not affect voluntary water transfers, without considering what purposes they might serve outside the context of voluntary transfers. In particular, these sections may have applicability in takings claims against the State or local governments. As conditions of the permit or license, they inhere in the title of the water right holder, and limit recovery for condemnation of a water right through eminent domain or inverse condemnation.²⁷¹ The SWRCB has cited section 1392 in support of its conclusion that modification of a permit to apply public trust requirements does not constitute a taking.²⁷²

There is also the potential that sections 1392 and 1629 may be invoked, for what appears to have been the primary purpose of their enactment, to facilitate public acquisition of water rights needed for future public needs. Like many water right doctrines, including the constitutional prohibition against waste and unreasonable use, that potential is a source of uncertainty,²⁷³ but it is not necessary to eliminate that uncertainty to promote transfers. Before abandoning any rights the State reserved to itself when it enacted these sections, the Legislature should carefully consider what rights the State should continue to reserve, and craft any amendment to these sections accordingly. Sections 1392 and 1629 have not imposed any impediment to transfers up to this point, and if that ever occurs, they should be amended to deal with that issue, not repealed in their entirety.

5. Overall Perspective on Transfers

The Governor's Commission viewed market incentives in general, and voluntary transfers in particular, as important to improving efficiency.²⁷⁴ But the Governor's Commission proposed only a few "modest revisions" to the law in order to encourage transfers.²⁷⁵

270. *Id.*

271. Andrew H. Sawyer, *Changing Landscapes and Evolving Law: Lessons from Mono Lake on Takings and the Public Trust*, 50 OKLA. L. REV. 311, 329-30 (1997).

272. S.W.R.C.B. Decision Revised 1644, at 142 (July 16, 2003).

273. See FINAL REPORT, *supra* note 1, at 17-25 (discussing sources of uncertainty, with particular emphasis on Article 10, Section 2 of the California Constitution).

274. *Id.* at 53, 59, 62.

275. *Id.*

The Governor's Commission could have addressed a broader range of issues. A background paper prepared for the Governor's Commission identified several issues, including the potential for allowing transfer of riparian rights, the effect of area of origin laws, and the effect of local ordinances restricting groundwater exports.²⁷⁶ The Final Report did not give any reasons why the Governor's Commission did not pursue these issues. The Governor's Commission apparently focused on measures that were simpler, less controversial, and more likely to be implemented.²⁷⁷

The Governor's Commission paid substantial attention to the procedures for SWRCB approval of transfers. In so doing, the Governor's Commission recognized the difficulty in determining impacts on third party water right holders.²⁷⁸ At the same time, the Governor's Commission emphasized the importance of avoiding these impacts. If these impacts are not avoided, there is no assurance that transfers will improve efficiency, instead of merely benefiting the parties to the transfer at the expense of third party water right holders.²⁷⁹ In view of these considerations, modest revisions like those proposed by the Governor's Commission might have been all that was realistically possible. As one commenter has observed:

The degree to which the statutory review process can be eased or streamlined is limited. The principal impediment to statutory transfers in most states lies not in overly restrictive laws or poorly designed procedures but in the rational legal decision to protect other appropriators. Both to ensure that transfers are efficient and to provide junior appropriators with a modicum of security, the law must protect juniors from injurious transfers. Yet so long as the law does, the sheer hydrologic uncertainty involved in determining whether a transfer will affect downstream appropriators will inevitably produce sizable administrative costs.²⁸⁰

It also bears emphasis that changes to the procedures for SWRCB review and approval of transfers affect only a small percentage of transfers. "Most water transfers do not require SWRCB approval."²⁸¹ These include transfers involving

276. TRANSFER OF WATER RIGHTS IN CALIFORNIA, *supra* note 264, at 71-72.

277. In practical effect, and under limited circumstances, the Water Code now allows what appears to be one of the staff paper's more ambitious suggestions for encouraging transfers, allowing riparian right holders to transfer for use on non-riparian land. Water Code section 1707 allows changes under all water rights, including riparian rights, for the protection of instream beneficial use. These changes may be used to meet otherwise applicable water quality or instream beneficial use requirements. CAL. WATER CODE § 1707(d) (West Supp. 2004). When an appropriator uses a transfer of water from a riparian right holder for that purpose, the appropriator can hold more water in storage or divert more water for beneficial use.

278. FINAL REPORT, *supra* note 1, at 67.

279. *See id.* at 62; TRANSFER OF WATER RIGHTS IN CALIFORNIA, *supra* note 264, at 9-10.

280. Thompson, *supra* note 257, at 706-07 (footnote omitted).

281. SWRCB GUIDE TO WATER TRANSFERS, *supra* note 231, at 2-1.

pre-1914 rights,²⁸² and transfers between users or districts served under the same water right, where the change will not require any change in point of diversion, place of use, purpose of use, or other permit conditions.²⁸³

To its credit, the Governor's Commission took a broad view of transfer related issues, instead of focusing narrowly on transfer approval procedures. Grouped together under its recommendations on water transfers, the Governor's Commission addressed the statutory adjudication process,²⁸⁴ rights to treated wastewater,²⁸⁵ concerns about potential forfeiture,²⁸⁶ transfer approval procedures,²⁸⁷ restrictions on sales of district water,²⁸⁸ and restrictions on sales of water rights to public agencies.²⁸⁹

Despite the breadth of issues addressed, the impact of the recommendations has been relatively minor. The specific recommendations do not amount to major changes in the law, and two of them appear to have been unnecessary.²⁹⁰ The modest scope of these recommendations stems in large part from the Governor's Commission's focus on legal issues. Legal impediments to transfers are not very significant.²⁹¹ Practical obstacles, including the complexity of determining impacts on third party water right holders²⁹² and institutional resistance to transfers,²⁹³ pose much greater challenges.

It is noteworthy that in connection with a long-term transfer of water from the Imperial Irrigation District to the San Diego County Water Authority, the parties jointly petitioned for SWRCB approval of a long-term change.²⁹⁴ The Imperial Irrigation District holds pre-1914 rights,²⁹⁵ and could have undertaken the transfer based on those rights without the necessity of SWRCB approval.²⁹⁶

282. See CAL. WATER CODE § 1706 (West 1971) (allowing pre-1914 appropriator to make changes in point of diversion, place or use, or purpose of use without SWRCB approval if the appropriator determines that there will be no injury to third party water right holders).

283. See generally *id.* §§ 1701-1702 (West 1971 & Supp. 2004).

284. FINAL REPORT, *supra* note 1, at 62-63. This recommendation was the focus of a different chapter of the Final Report, on improving certainty, and is not discussed in this article. See generally *id.* at 27-30, 33-41.

285. *Id.* at 63-66. These recommendations were aimed at promoting transfers by clarifying who holds the right, and what procedures apply to changes. They relate as much or more to direct delivery of reclaimed water by the treatment plant owner as they do to transfer to another entity, and are reviewed in this article as measures to improve water right administration. See *supra* notes 103-48 and accompanying text.

286. FINAL REPORT, *supra* note 1, at 66.

287. *Id.* at 66-68.

288. *Id.* at 68.

289. *Id.* at 69.

290. See *supra* notes 213-16, 258-72 and accompanying text.

291. See George A. Gould, *Water Rights Transfers and Third-Party Effects*, 23 LAND & WATER L. REV. 1, 4-5 (1988).

292. See *id.* at 5.

293. See generally Thompson, *supra* note 257, at 677.

294. S.W.R.C.B. Order No. WR 2002-13, at 1 (Oct. 28, 2002) (nonprecedential order).

295. S.W.R.C.B. Revised Order No. WR 2002-13, at 3-4 (Dec. 20, 2002) (nonprecedential order); *Arizona v. California*, 439 U.S. 419, 428-29 (1979).

296. CAL. WATER CODE § 1706 (West 1971). See S.W.R.C.B. Revised Order No. WR 2002-13, at 50

The transfer raised substantial environmental and economic concerns that posed major challenges to completing the transfer.²⁹⁷ The parties' decision to go through the process of obtaining SWRCB approval, when they could easily have avoided it, indicates that the basic requirements of water right law, including the statutory procedures for review of transfers, do not pose a major obstacle to transfers.

IV. CONCLUSION

The Governor's Commission's approach to improving water rights law to improve efficiency in water use parallels its approach to water supplies. The answer to the increasing demands on the State's limited water supplies lies not in developing new projects to expand those supplies, but in making more efficient use of the supplies that have already been developed. Similarly, the Governor's Commission's approach to changes in water rights law to promote greater efficiency does not involve major changes in water right law or the development of significant new regulatory programs. The focus is to make the existing legal system and regulatory program work more efficiently.

Instead of major changes, the Governor's Commission proposed clarifications and minor improvements in water right law, especially changes intended to improve water right administration by the SWRCB, as a means of promoting efficiency. The Governor's Commission avoided other approaches, such as changes to water pricing, that might have had a greater impact but would also have been more difficult to develop and implement.²⁹⁸ In contrast, the Governor's Commission's recommendations were so limited that some of them have had little if any effect, and others required further development in later legislation to provide effective tools.

The Governor's Commission's cautious and incremental approach to improving efficiency ruled out dramatic changes, but it also made it possible for those recommendations to get enacted by the Legislature and be implemented by the SWRCB. Ironically, the area of improving efficiency in water use, where the Governor's Commission's recommendations were least ambitious, is the area where the Governor's Commission's recommendations have achieved the most progress.

(Dec. 20, 2002) (nonprecedential order) (discussing whether SWRCB approval would be required to change use for environmental mitigation, depending on whether pre-1914 or permitted rights were used).

297. See generally S.W.R.C.B. Revised Order No. WR 2002-13, at 23-78 (Dec. 20, 2002) (nonprecedential order).

298. See FINAL REPORT, *supra* note 1, at 61-62 (explaining the Governor's Commission's decision not to recommend user charges on water rights). More recently, the Legislature has devoted greater attention to water pricing, particularly with respect to residential use. See, e.g., A.B. 2572, 2003-2004 Reg. Sess. (Cal. 2004) (requiring urban water suppliers to charge customers based on the volume of water delivered as measured by a water meter).