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Decision 99-07-004 July 7, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into whether existing standards and policies of the Commission regarding drinking water quality adequately protect the public health and safety with respect to contaminants such as Volatile Organic Compounds, Perchlorate, MTBEs, and whether those standards and policies are being uniformly complied with by Commission regulated utilities.	Investigation 98-03-013 (Filed March 12, 1998)

ORDER CORRECTING ERRORS

The Commission has noted the following nonsubstantive errors in Decision (D.) 99-06-054, which was signed June 10, 1999. This order is necessary to correct these errors.

Therefore, pursuant to the authority granted in Resolution A-4661, **IT IS ORDERED** that the following corrections are made to D.99-06-054:

1. Change the term "Argument" at line 2 of the text on page 6 to lower case.

2. Move the phrase "c. Testing of Water" at the end of subparagraph (c) on page 25 to create a new subheading preceding subparagraph (1) immediately below.

3. At line 1 on page 26, replace "Ibid.," with "Id.,".

4. In the last two lines of the third paragraph on page 43, replace with question marks the semi-colon and the period which respectively follow the words "contaminant" and "excursions".

5. To accurately reflect the statute, change Finding of Fact 11 on page 51 to read as follows: "Public Utilities Code Section 2106 states that civil actions to recover damages for any loss, damage or injury caused by any regulated public utility may be pursued in any court of competent jurisdiction by any corporation or person."

6. Delete the term "Commission's" in Conclusion of Law 1 on page 51 and replace it with the phrase "Commission has" so that the Conclusion reads as follows: "Pursuant to provisions of the California Public Utilities Code, including but not limited to Sections 451, 761, and 768, the Public Utilities Commission has jurisdiction to regulate the service of water utilities with respect to the health and safety of that service."

This order is effective today.

Dated July 7, 1999, at San Francisco, California.

/s/ WESLEY M. FRANKLIN

Wesley M. Franklin
Executive Director

ATTACHMENT

As Corrected by Decision 99-07-004

COM/HMD/max** **Mailed 6/11/99**

Decision 99-06-054 June 10, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission's own motion into whether existing standards and policies of the Commission regarding drinking water quality adequately protect the public health and safety with respect to contaminants such as Volatile Organic Compounds, Perchlorate, MTBEs, and whether those standards and policies are being uniformly complied with by Commission regulated utilities.	Investigation 98-03-013 (Filed March 12, 1998)

INTERIM OPINION DENYING MOTIONS CHALLENGING JURISDICTION TO CONDUCT INVESTIGATION 98-03-013

Introduction

Today, we deny motions challenging the jurisdiction of the California Public Utilities Commission (Commission) to conduct Investigation (I.) 98-03-013, an inquiry into the safety of drinking water service provided by public utilities.[1] This investigation was instituted March 12, 1998 after complaints were filed in the superior courts of California by numerous plaintiffs for negligence, wrongful

[1] *Investigation on the Commission's own motion into whether existing standards and policies of the Commission regarding drinking water quality adequately protect the public health and safety with respect to contaminants etc.* (OII or Drinking Water Investigation) (1998) I.98-03-013 __CPUC2d__). A copy of the OII is attached as Appendix A.

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death, strict liability, trespass, public nuisance, private nuisance and injunctive relief. The complaints allege that utilities subject to our regulatory jurisdiction have delivered and continue to deliver contaminated water detrimental to the health of utility customers.[2] Impressed by the gravity of the claims and the number of plaintiffs in these complaints filed in the southern California and Sacramento areas, this Commission determined that the allegations raised about the safety of the drinking water provided by regulated utilities are matters of statewide concern and that an investigation should be conducted into the operations of the major utilities which provide water service to twenty percent of Californians.

In this proceeding, we pursue our expressed intent to investigate the compliance of regulated water utilities with existing safe drinking water laws and related Commission orders and decisions, and further, to determine whether new standards or rules should be developed for the operation of these utilities to better ensure the health and safety of the consumer public. The state agency primarily responsible for administration of safe drinking water laws, the Department of Health Services (DHS), is participating in this proceeding. DHS has previously participated in Commission proceedings where the quality of drinking water was at issue. As in the past, the participation of DHS in this proceeding is of singular importance.

In the Order Instituting Investigation (OII), we posed the following questions to be addressed in this proceeding:

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[2] Other defendants named in these lawsuits include water systems not subject to Commission jurisdiction and industrial corporations referred to as "potentially responsible parties" or "PRPs."

"Are the prevailing drinking water standards safe, including those relating to VOCs and Perchlorate and any other known contaminants?

"Are water utilities complying with prevailing safe drinking water standards, including those relating to VOCs and Perchlorate and any other known contaminants?

"Are water quality standards adequate and safe, including, without limitation, whether the maximum contaminant levels (MCLs), Action Levels, and other Safe Drinking Water Act requirements relating to substances such as VOCs and Perchlorate and any other contaminants, such that these standards adequately protect the public health and safety?

"What appropriate remedies should apply for non-compliance with safe drinking water standards?

"The extent to which the occurrence of temporary excursions of contaminant levels above regulatory thresholds, such as MCLs and action levels, may be acceptable in light of economic, technological, public health and safety issues, and compliance with Public Utilities Code Section 770?" (Drinking Water Investigation (1998) I.98-03-013, slip opinion, pp. 10-11.)

Summary of Decision

On December 4, 1998 two motions were filed challenging the Commission's jurisdiction to conduct this proceeding. One motion was filed by the following three law firms participating jointly as one party in this proceeding: Engstrom, Lipscomb and Lack, Girardi and Keese, and Dewitt, Algorri and Algorri (EL&L). The other motion was filed by Rose, Klein and Marias (RK&M). Both parties filed replies to the responses to their motions. These law firms (moving parties) represent plaintiffs in the above mentioned civil lawsuits, now pending in the state courts.

The moving parties allege that this Commission has no subject matter jurisdiction to pursue the inquiries it ordered in this proceeding regarding safe drinking water distributed by regulated Class A and B water utilities. EL&L requests that the Commission limit this investigation to rates related to the cost of utility improvements required to comply with state and federal drinking water quality standards. RK&M requests that this investigation be abandoned in its entirety. Seven parties in this proceeding oppose the two motions (opponents or opposing parties).[3] They contend that the Commission has subject matter jurisdiction over the issues in this proceeding as well as concurrent jurisdiction with DHS over the quality of drinking water provided by regulated utilities.

We have carefully reviewed the motions challenging jurisdiction, the responses and the replies thereto as well as the OII. We conclude that the jurisdictional challenges are without merit and we explain our basis for this determination below.

These motions are premised on a fundamental misconception of the duties of the Commission, including its continuing obligation to insure that utilities provide healthy and safe services to customers, and of its legal and practical relationship with DHS. Such misconceptions are further exacerbated by the moving parties' confusion about the role of the courts with respect to matters within the regulatory authority of the Commission. As discussed more fully below, we conclude that this Commission has independent authority to protect the public health and safety and it has concurrent jurisdiction with DHS over

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[3] California Water Association, San Gabriel Valley Water Company, California-American Water Company, Suburban Water Systems, Southern California Water Company, Citizens Utilities Company of California and joint intervenors Aerojet-General Corporation/McDonnell Douglas Corporation.

water quality issues arising from water service provided by public utilities. Due to our jurisdiction under state law, this Commission has authority to conduct this investigation notwithstanding certain limitations imposed on state authority by the federal government's 1974 preemption of the regulation of public water systems. As explained below, federal law neither divests this Commission of the authority to conduct this investigation nor does it prevent the Commission from developing new rules in the interest of public health and safety for the operation of public water utilities as long as those rules are "just," "reasonable," "adequate," "serviceable" and are "not inconsistent" with federal and state law as required by Pub. Util. Code § 770.

Our decision today is confined to the question of whether this Commission has jurisdiction to conduct this investigation. It does not address extraneous issues, such as the impact of this OII on pending civil lawsuits. Our decision to remain silent on these issues should not be misunderstood. While those lawsuits brought to our attention the serious water quality concerns which prompted our institution of this investigation, we decline to render an advisory opinion on matters not directly germane to our jurisdiction to conduct the investigation. However, to the extent that the arguments of moving parties state, suggest or imply that the viability of this investigation is, or should be, affected by pending lawsuits, we conclude that our authority to conduct this investigation cannot be precluded or impaired by the mere existence of pending civil suits on subjects related to the investigation.

Comments On Draft Interim Decision

The draft interim decision of the assigned Commissioner as presiding officer in this quasi-legislative proceeding was mailed to the parties on April 27, 1999 in accordance with Rules 77.1 - 77.5 of the Rules of Practice and Procedure. One party, the California Water Association, filed timely comments on May 17,

1999. These comments merely endorse the draft interim decision as written alleging that it contains no legal or factual error. These comments do not require any separate discussion or changes to the draft interim decision.

Oral Argument On Motions Challenging Jurisdiction

The presiding officer granted the moving parties' requests for oral argument before the Commission. Oral argument was held on May 10, 1999 before the Commission en banc. One moving party, EL&L, chose not to participate in the oral argument.

Contentions of Moving Parties

Moving parties contend that the Commission lacks the jurisdiction and the ability to investigate the questions ordered to be addressed in this proceeding. Moving parties allege that because the federal Environmental Protection Agency (EPA) and the DHS have primary authority to set all drinking water quality standards in California pursuant to the federal Safe Drinking Water Act (SDWA) (42 USCA 300-g *et. seq.*) and the California SDWA (Health & Saf. Code § 116270 *et. seq.*), the Commission has no authority to set or weaken such standards. They also argue that the Commission lacks jurisdiction to enforce SDWA laws or to establish remedies for non-compliance with drinking water regulation while EPA and DHS have specific enforcement authority.

Moving parties assert that the Commission has no power to award damages and it has no authority to employ this proceeding to immunize regulated utilities from civil suits.[4] To support this claim, moving parties cite

[4] Moving parties incorrectly allege that the OII states that the Commission has exclusive authority over drinking water quality issues. (RK&M Memo of Points & Authorities, page 4).

federal and state statutes authorizing citizens' suits as enforcement actions relating to water quality violations, and Pub. Util. Code § 2106, which authorizes courts to award damages for injuries caused by unlawful acts of a public utility.

EL&L contends that civil courts may entertain disputes involving matters under Commission jurisdiction where the Commission has failed to act. Because EL&L interprets Pub. Util. Code § 770(b) as prohibiting the Commission from making any findings contrary to established DHS standards, it concludes that the Commission may not investigate whether drinking water standards are safe or adequate, or whether a utility's temporary excursions above maximum contaminant levels set by DHS are acceptable.

EL&L contends that this Commission has no water policy, and that Commission staff lack the expertise to accomplish this investigation. According to its interpretation of Commission decisions and correspondence from Commission staff, the Commission continually defers to DHS for the purpose of setting water quality standards and policy.[5] RK&M cites case law in support of its position that the OII exceeds Commission jurisdiction.[6] In their replies, moving parties seek to distinguish case law cited by opposing parties as support for their position that because the Commission has jurisdiction to conduct this proceeding, pending civil suits should be barred as impermissible interference with the Commission's regulatory authority.

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[5] *Bevel et al. v. Sterkin and Leen (Campbell Water System)* (1966) 66 CPUC 286; *City of San Jose v. San Jose Water Works (San Jose)* (1966) 66 CPUC 694; and *Washington Water & Light Company* (1972) 73 CPUC 284.

[6] *Orange County Air Pollution Control v. Public Utilities Commission, (1971)* 4 Cal.3d *945 (Orange County); Stepak v. American Tel. & Tel. Co.,* (1986) 186 Cal.App.3d 633 *(Stepak); Cellular Plus v. Superior Court, (1993)* 14 Cal.App.4th 1224 *(Cellular Plus); and Vernon Village, Inc. v. George van Ostrand* (D. Conn. 1990) 755 F. Supp. 1142.

EL&L contends that under prevailing law, this Commission must confine its inquiry in this proceeding to the investigation of public utility rates established to remedy drinking water contamination, whereas RK&M asserts the Commission must declare this entire proceeding beyond its jurisdiction. In addition, moving parties request that the Commission find that it has no regulatory jurisdiction over alleged corporate polluters which are parties in this proceeding[7] and that official notice be taken of the undisputed documents which they filed in support of their motions.

Opposing Parties' Responses

The California Water Association (CWA), four respondent water utilities, and two corporate entities oppose the motions. Opposing parties contend that the Commission is an independent regulatory agency of constitutional origin with the power to set water quality standards, provide for adequate water supply, and set reasonable rates for reliable service. They cite numerous Commission decisions to demonstrate that the Commission has exercised comprehensive jurisdiction over water quality for between forty and eighty years.

San Gabriel Valley Water Company (San Gabriel) points out that because the OII specifically orders an investigation of the Commission's water quality standards, the Commission cannot be denied the authority to address its own policies and regulations. CWA alleges that the two jurisdiction motions not only

[7] Aerojet-General Corporation and McDonnell Douglas Corporation, defendants named in numerous pending civil suits regarding personal injury allegedly caused by contaminated drinking water, are participating as a joint interested party in this proceeding.

affect present contamination, but challenge the Commission's authority to act in the future if new contamination is discovered.

Opponents argue that Commission reliance on DHS to execute water quality policies is not an abdication of the Commission's jurisdiction, as evidenced by the two agencies' "coordination of a statewide effort to deliver safe drinking water" in the Memorandums of Understanding (MOU) executed in 1986 and 1996, respectively.[8]

Suburban Water System (Suburban) argues that DHS' primary authority over monitoring and enforcing drinking water standards does not divest the Commission of the authority to determine the adequacy of a utility's water supply or the viability of its service, which are the critical prerequisites to the delivery of safe drinking water. Southern California Water Company (SoCal) does not believe DHS' standard setting and enforcement authority is germane to the issue of this Commission's jurisdiction.

SoCal believes that the moving parties have confused jurisdiction and the Commission's relationship with the superior courts with the respective relationship and authority of the Commission, DHS and other state agencies. California-American Water Company (Cal-Am) argues that when considering the authority of the Commission compared to that of the superior courts, the Commission has exclusive jurisdiction over matters at issue in this proceeding.

SoCal argues that the Commission's collaboration with DHS does not diminish the Commission's jurisdiction and neither do federal or state statutes authorizing citizens' suits to enforce water quality regulation. Suburban argues that this proceeding does not seek to investigate ongoing EPA or DHS

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[8] Appendix B.

enforcement or drinking water standards. In response to the argument of moving parties that the Commission cannot halt any EPA enforcement action regarding water quality, Suburban points out that plaintiffs' lawyers have filed no federal EPA complaints to enforce water quality regulation. Suburban further contends that utilities are immune from civil suits, based upon Proposition 65, Health & Saf. Code § 25249.11(b) and a recent federal case, *Communications Tele-Systems International vs. California Public Utilities Commission* (N. D. Cal. 1998) 14 F.Supp.2d 1165.

Aerojet/McDonnell contends that Pub. Util. Code § 770(b) prohibits the Commission from setting any standards in this proceeding inconsistent with those of DHS. They also contend that if the Commission makes a finding that drinking water is safe, that determination cannot be challenged by plaintiffs in lawsuits.

Cal Am and CWA contend that the concurrent jurisdiction of the Commission and DHS in the regulation of water quality issues is reflected in the Legislature's actions repealing Health & Saf. Code § 4029.5 in 1978 and the subsequent enactment in 1996 of Health & Saf. Code § 116465 which expressly returns to the Commission the authority over system improvements to comply with safe drinking water standards.

Suburban asserts that because Pub. Util. Code § 1759 prohibits review of Commission decisions issued in this proceeding by any court other than the California Supreme Court, it assures that the Commission has adequate jurisdiction to achieve its objectives in I.98-03-013. Suburban further cites Pub. Util. Code §§ 2701 and 2707 as evidence of Commission control over the regulation of water utilities.

SoCal argues that the Commission's ratemaking authority, acknowledged by moving parties, is the "outer limit" of the Commission's jurisdiction to

provide safe and healthful water at an affordable cost. Opposing parties contend that although the Commission relies on the expertise of DHS, the Commission alone is charged with the role of managing information from EPA and DHS in performing the necessary cost/benefit analysis that will ensure that water utilities deliver healthy drinking water at a reasonable profit to the utility and affordable rates to customers. This Commission is the only state agency responsible for balancing the conflicting interests of investors and customers in profits and reasonable rates.

In response to the moving parties' assertion that the Commission cannot award damages for personal injury, opponents contend that the presence or absence of tort remedies is irrelevant and is not an appropriate issue for this proceeding. They claim that California Supreme Court decisions in *San Diego Gas & Electric v. Superior Court* (1996) 13 Cal. 4th 893 (*Covalt*), *Waters v. Pacific Telephone Co.* (1974) 12 Cal. 3d 1 (*Waters*) and the Court of Appeal decision in *Ford v. Pacific Gas & Electric Co.* (1997) 60 Cal. App. 4th 696 (*Ford*) demonstrate that civil litigants do not have an absolute right to damages or to a jury trial. Opposing parties contend that Pub. Util. Code § 2106, which dictates that damages be awarded by a court of competent jurisdiction, must yield to the controlling case law of *Covalt*, *Waters* and *Ford*, which interpret Pub. Util. Code § 1759 as prohibiting lower courts from interfering with the Commission's supervision of public utilities.

Opposing parties insist that because the following three crucial factors identified by the California Supreme Court in *Covalt*[9] are present here, the

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[9] See *Covalt*, 13 Cal. 4th at 923, 926 and 935.

Commission should proceed with this investigation and pending civil actions against regulated utilities must be dismissed:

1. The Commission has jurisdiction over drinking water quality matters;
2. The Commission has exercised this jurisdiction; and,
3. Numerous conflicting and widely varying judgments or verdicts in pending civil actions will conflict with and frustrate this Commission's supervision and regulation regarding drinking water quality.

CWA alleges that Pub. Util. Code § 1759 bars the award of damages by a civil court if the award contravenes any Commission order. CWA believes that *Covalt, Waters* and *Ford* support the proposition that monopoly public utilities are provided the trade-off of low rates for a limitation of liability in civil actions. This limit of liability, CWA argues, prohibits random, inconsistent verdicts in civil suits. Finally, CWA points out that Commission water utility quasi-legislative proceedings, such as this case, were exempted from the recent amendment of Pub. Util. Code § 759, which makes Commission decisions subject to review by the Court of Appeal. Judicial review of the Commission's water utility decisions remains with the California Supreme Court, CWA emphasizes.

Cal-Am points out that any party interested in this investigation may participate. Therefore, Cal-Am contends that moving parties' argument that the Commission has no jurisdiction over alleged corporate polluters is irrelevant. However, Cal-Am requests that the Commission not allow potential responsible parties[10] to unreasonably expand this proceeding.

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[10] See Footnote 2 above.

Commission's Jurisdiction Over Water Operations - The History

To provide a context for our later discussion of the jurisdiction arguments presented by the parties, we will review the history of the Commission's jurisdiction, its unique relationship with the courts, its relationship with the health agencies concerned with water pollution or contamination, its role in the enforcement and implementation of water quality standards and, finally, the Commission's development of policy for the operation of public water utilities.

Early Commission Authority

The Railroad Commission of California (RCC) was created by the Constitution of 1879. For more than thirty years, the Commission's jurisdiction was limited to railroad and other transportation companies. In March, 1911, the Legislature submitted to the people of the state three constitutional amendments designed, in part, to authorize the Legislature to confer upon the Commission broad powers of regulation and control over the other public utilities, including every water corporation or person that owned, controlled, operated or managed any water system for compensation within the state. The amendments passed and subsequently the Legislature voted, with only one dissent, to enact the Public Utilities Act (the Act or the 1911 Act).[11]

The 1911 Act became effective March 23, 1912 and investor-owned water systems became regulated public utilities. As a result, water utilities would be different from other water service providers in the state. Their business enterprises would be uniquely subject to the regulatory scrutiny and control of the Commission. An investor-owned water company could no longer, on its

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[11] The Act was reenacted in 1915 following the adoption of other constitutional amendments in 1914. (Stats., c. 91, p. 115)

own, set charges for its service (rates), decide the quality of its service or the area that it would serve, control its own profit margin (rate of return), incur debt, or construct, expand, modify or retire any portion of the water plant that was necessary and useful to the utility's service. All of these aspects of a public water utility's business, and more, henceforth would require authorization or approval of the Commission.

The 1911 Act vested broad authority in the Commission to supervise and regulate every public utility in the State, giving it both specific powers for the purpose and the expansive authority to "do all things...necessary and convenient" in the exercise of its jurisdiction. Section 31 of the Act provided:

> "The railroad commission is hereby vested with power and jurisdiction to supervise and regulate every public utility in the state and to do all things, whether herein specifically designated or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."[12]

At the outset, the Commission was vested with the authority to determine whether the service or equipment of any public utility posed any danger to the health or safety of the public and to order implementation of prescribed corrective or preventative measures, if any were needed. Section 42 of the 1911 Act provided:

> "The commission shall have power, after a hearing had upon its own motion or upon complaint, by general or special orders, rules, or regulations, or otherwise, to require every public utility to maintain and operate its line, plant, system, equipment, apparatus, tracks and premises in such manner as to promote and safeguard the health and safety of its employees, passengers, customers, and the public,

[12] A review of Pub. Util. Code § 701, the successor to Section 31, reveals that today, the Commission has the same authority as originally provided in the 1911 Act.

> and to this end to prescribe, among other things, the installation, use, maintenance and operation of appropriate safety or other devices or appliances, . . .and to require the performance of any other act which the health and safety of its employees, passengers, customers or the public may demand."[13]

In the 1911 Act, the Legislature gave the Commission judicial powers and limited the traditional jurisdiction of courts in dealing with Commission decisions. Section 67 of the Act provided in relevant part:

> "No court of this state (except the supreme court to the extent herein specified) shall have jurisdiction to review, reverse, correct or annul any order or decisions of the commission or to suspend or delay the execution or operation, thereof, or to enjoin, restrain or interfere with the commission in the performance of its official duties; *provided*, that the writ of mandamus shall lie from the supreme court to the commission in all proper cases."[14]

Pacific Telephone & Telegraph Co. v. Eshleman (1913) 166 Cal.640, presented the California Supreme Court its first opportunity to review a Commission decision. The Court expressly concluded the following:

> "The constitution has, in the railroad commission, created both a court and an administrative tribunal.
>
> "The constitution has authorized the legislature to confer additional and different powers upon this commission touching public utilities

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[13] The language of the current applicable statute provides the Commission with virtually the same authority and obligation to protect the health and safety. (See Pub. Util. Code § 761.)

[14] Today, the statutes applicable to Section 67 of the Act are found in Pub. Util. Code §§ 1756, 1757 and 1759. In addition, Section 73 of the Act provided for suit in a "court of competent jurisdiction" seeking damages for the unlawful acts of public utilities. That provision is virtually the same as the currently applicable statute, Pub. Util. Code § 2601.

unrestrained by other constitutional provisions.

> "The legality of such powers as the legislature has or may thus confer upon the commission, if cognate and germane to the subject of public utilities, may not be questioned under the state constitution.
>
> "That therefore the deprivation of jurisdiction of the courts of the state may not be questioned." (*Id.* at 689.)

With respect to water utilities, the Commission's authority vested by the Legislature in 1911, as today, requires that it act to protect the health and safety of the public. In other words, the Commission was, and continues to be, authorized to regulate utilities so that the water delivered is not contaminated or polluted in any way that would constitute a danger to the health of those who use it.

Relationship of the Commission and DHS

In pursuing its public health and safety authority, the Commission historically has maintained an active partnership with the state health agency charged with the responsibility of assessing the public health risk inherent in contaminated or polluted water.

Section 50 of the 1911 Act required water corporations to obtain from the Commission a certificate of public convenience and necessity before operating a public utility. At the same time, public utilities supplying water for domestic purposes were required to obtain a permit from the State Board of Health (a predecessor of the State Department of Public Health and thereafter, the Department of Health Services), which was the state agency primarily vested with the responsibility of enforcing the statutory prohibition against the delivery of water for domestic use that is "polluted or dangerous to health." (See "An act to prevent the supply of water dangerous to health for domestic purposes and to provide for the installation of sanitary water systems." Statutes, 1913, page 793,

Act 4348b approved June 13, 1913.)

The earliest Commission decisions on water quality reflect the cooperative relationship which developed between the Commission and the State Board of Health as these agencies mutually endeavored to insure the safety of water delivered for domestic use. The obligations of each agency for water safety were complementary and carefully implemented.

In a 1914 decision about how water purity should be achieved, the Commission exercised its jurisdiction to ensure the public health by ordering the provision of safe water service at reasonable rates:

> "Held. That though it is the desire of the Commission to encourage utilities to safeguard the purity of water used for domestic purposes, if more than one method may be pursued with equal effectiveness, it is only reasonable to require that the more economical one be followed." (*Thomas Monahan vs. San Jose Water Company* (1914) 4 RCC 1101.)

On the other hand, when the Commission received an informal complaint alleging "improper care to prevent contamination of water in Grass Valley," the matter appropriately was referred to the health agency for a decision on whether contamination of the water used for domestic purposes was likely or, in fact, had occurred. "The matter being one which is without the jurisdiction of the Commission, complainant's letter was referred to the State Board of Health for investigation." (*Reports of the Railroad Commission of California,* July 1, 1913 to June 30, 1914, I. C. 3450, p.579.)

From the beginning, the Commission acknowledged and relied upon state and local health departments which primarily were responsible for the determination of whether water was contaminated and the scientific assessment of how said contamination affected health. At the same time, as discussed *infra,* the Commission consistently exercised its concurrent jurisdiction over the public

health and safety of the services delivered by public utilities.

Despite the passage of time and the various amendments to the 1911 Act, the Commission's powers and responsibilities for regulation of water utilities and the safety of their service remains remarkably unchanged. As reflected in current statutes, which update provisions of the 1911 Act, it is clear that the California Legislature has preserved the broad authority of the Commission to regulate water utilities, including the authority, independent of the DHS, to protect the public health and safety.[15] At the same time, the early partnership developed between the Commission and the state's primary health agency to address water quality and the standards for delivery of safe drinking water has flourished.[16]

While continuing to rely on the state and local health departments[17] to identify polluted or contaminated water and to provide the scientific assessment of the health risks associated with those problems, the Commission employed its expertise in implementing and enforcing good water quality practices among regulated utilities, evaluating available remedies for water quality problems and specifying the most appropriate remedy, technically and financially.

Implementation and Enforcement of Water Quality Standards

The Commission has regularly pursued its public health and safety

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[15] See Pub. Util. Code §§ 451, 739.8, 761, 768, and 770(b), all of which expressly require that the Commission protect public health and safety in regulating drinking water.

[16] In 1986, the cooperative relationship between the Commission and DHS was reduced to writing in a Memorandum of Understanding (MOU) which identified the respective roles of each agency. The MOU was updated in 1996. See Appendix B.

[17] Prior to 1993, as required by Health & Saf. Code § 116325 (former Section 4010.55), DHS was responsible for directly enforcing the Health and Safety Code and related regulations for all public water systems with 200 or more service connections. Local county health departments performed these functions for smaller public water systems.

authority by ordering utilities to implement prescribed water quality corrective actions and by authorizing rate recovery for the associated costs.[18] In response to concerns raised by the public, government agencies, or the preliminary investigations of Commission staff, the Commission has, on its own motion, instituted investigations into designated issues of an individual water utility or of the entire water utility industry. Sometimes formal complaints alleging water quality problems are filed, causing Commission scrutiny of these issues. Where appropriate, the Commission orders a utility to implement prescribed corrective actions. In addition, utilities apply to the Commission to implement needed but previously unanticipated water quality remedies.

Most often, authorization for corrective or preventative water quality measures occurs in a rate case. The prevention or correction of water quality problems generally requires a monetary investment, often a very costly one. Unless contamination remedial costs are factored into the authorized rates for service, investor-owned water utilities have a strong compliance disincentive. Despite the threat of fines for non-compliance, the absence of rate recovery would promote utility resistance to making the reasonable and necessary investment to correct water quality problems. On the other hand, when water

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[18] Commission decisions that reflect exercise of this authority are too numerous to cite. However, the following decisions were accurately identified by opponents to the jurisdiction motions as examples of the Commission's exercise of water quality jurisdiction and Commission-established water policy: Decision (D.) 89-05-054 and D. 86-03-011 (considered capital investment for water filtration plant to treat contaminated water); D. 5444 (ordered fluoridation to promote public health); D. 85-12-086 and D. 89-04-005(remedies for higher levels of VOCs and excess nitrates determined); D. 88128, D. 90153, and I. 91-03-046 (found water quality inadequate); D. 92719 and D. 92666 (found water quality satisfactory); D. 89-09-048, D. 93-09-036, D. 98-08-034 and Resolution W-3996 (costs considered for plant improvements for water treatment).

treatment facilities require heavy capital investment, they offer a utility a strong profit opportunity and create incentives to "gold plate" the treatment technology. Thus, in considering rate increase authorization, the Commission must guard against a utility's possible under or over investment.

Because utilities regularly seek rate increase authorization, Commission review of a utility's service and business enterprise during rate case proceedings provides a consistent opportunity for regular review of the utility's compliance with its public health obligations. In the course of investigating a utility's rate increase application, Commission staff routinely review the utility's service practices during the period since its last rate review and report findings to the Commission. The staff's review includes assessment of the utility's compliance with health department regulations, its implementation of previous Commission decisions and its compliance with General Orders 96 and 103, the Commission rules particularly applicable to the operation of regulated water utilities. Rate case hearings frequently include the receipt of testimony from state or local health officials about water quality, water supply and water service issues.

Because of the legal proscription against retroactive ratemaking (See *Pacific Tel. & Tel. Co. v Public Util. Com.* (1965) 62 Cal 2d 634, 650-652; *Southern Cal. Edison Co. v Public Utilities Commission* (1978) 20 Cal 3d 813, 816), the Commission has authorized the establishment of memorandum accounts in which utilities may record unanticipated costs associated with certain water quality and health requirements.[19] This measure is designed to ensure that, during the periods

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[19] See for example, Resolutions E-3238, July 24, 1991 (costs arising from catastrophe); W-3784, June 23, 1993, (expenses resulting from EPA's new primary drinking water regulations and DHS mandated fees, water testing cost and authority to file advice letters for recovery of such expenses) and W-4013,December 20, 1996 (updates W-3784

Footnote continued on next page

between rate case proceedings, utilities do not delay or ignore remediation of water quality problems. Utilities may seek recovery of reasonable costs recorded in memorandum accounts in subsequent rate case proceedings.

As an arbiter of various aspects of a public utility's business enterprise, the Commission can enforce its decision mandating a utility to correct water quality problems in various ways, including use of the remedies provided in Pub. Util. Code § 2101 *et seq.* Even before the MOU between the Commission and the DHS was executed in 1986, health departments reported water quality problems and recalcitrant water utilities to the Commission for enforcement assistance.[20] The case of *San Martin Water Works* demonstrates this point.

In 1977, after receiving complaints from the County Environmental Health Services Department, utility customers, and the Santa Clara County Fire Marshal about San Martin Water Works (SMWW), the Commission instituted an investigation into all aspects of the utility's operations. Complaints included allegations of severe service deficiencies, lack of pressure, no chlorination, frequent outages, and the refusal of the utility to comply with the order of the Morgan Hill Justice Court to chlorinate water from a contaminated spring source.

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which expired January 1, 1997 by extending application of the resolution to January 1, 2002).

[20] Prior to 1986, the enforcement tools of DHS were limited for the most part to measures which were severe or required time consuming court actions (i.e. permit revocation or suspension, administrative orders and fines). In response to concerns expressed by DHS, the Legislature passed Assembly Bill 1241, authored in 1985, to be effective in 1986 and included its provisions in Chapter 7 of Part 1 of Division 5 of the Health and Safety Code (presently, Health & Saf. Code §§ 116650 and 116655). These statutes, for the first time, gave DHS the authority to issue citations and compliance orders for violations of the code or department regulations. It appears that these tools have proved to be effective enforcement remedies regularly employed by the DHS.

After a hearing, the Commission ordered Earl Powell, the owner of SMWW, to formulate and file a rehabilitation plan for the utility, including new sources of supply, distribution system development, chlorination plans and financing arrangements. (*In re: Earl L. and Louise L. Powell* (*San Martin Water Works*) (1977) 82 CPUC 595.)

At the SMWW hearing, the Environmental Health Sanitarian for the County testified to the contamination repeatedly found in the spring water, and of his department's repeated but unsuccessful efforts, including recourse to the courts, to get the spring water chlorinated. In view of the utility's previous intractable position, the Commission decision made it very clear that other business remedies would be employed if its orders were ignored:

> "Defendant must keep in mind that it is the primary concern of this Commission to assure that the convenience and needs of the public are reasonably served. Certificates are not granted merely to meet the desire of an operator, and while it is not generally the policy of the Commission to authorize invasion of the territory of one public utility by another, this Commission has the power and right to grant authorization for such an invasion where the presently certificated utility willfully, negligently, or otherwise fails to provide the service required by law [citations omitted]. In circumstances as those which are developing here, if a utility is unwilling to make the necessary investment of money to improve its water works and distribution system so that its consumers will receive reasonably dependable water service at satisfactory pressure, forcing consumers to take other steps to acquire a satisfactory service, this Commission will no longer prevent competition from any other water utility that might undertake to furnish a supply of water. [citation omitted] Accordingly, it will be ordered that unless defendant has a satisfactory rehabilitation plan approved by the Commission staff and financing arrangements under way within a six-month period following the date of this order, the Commission will entertain and look with favor upon applications of others to invade defendant's territory." (Id., at 602)

On December 21, 1978, West San Martin Water Works, Inc., a public utility adjacent to SMWW, applied to the Commission for authorization to encroach into SMWW's service territory. After hearing, the authorization was granted by the Commission in *Re SMWW* (1980) 3CPUC2d 435.[21] While the *San Martin Water Works* case presents an unusual set of events, it demonstrates the unequivocal intent of the Commission to pursue its public health and safety authority and its partnership with health departments in the implementation and enforcement of that authority.

DHS has recognized the Commission's effectiveness as a partner in enforcement of water quality and water service requirements. Without abandoning its oversight responsibilities, DHS has relied on the Commission to enforce its own orders.

Commission's Water Quality Policy

In their challenge to the Commission's jurisdiction, moving parties question whether the Commission, prior to the instant investigation, has exercised its public health and safety authority with respect to public utility water service. For over forty years, from 1912 to 1956, the Commission exercised the foregoing authority on a case by case basis by specifically scrutinizing and, where needed, prescribing and ordering how an individual utility must perform its obligation to provide safe drinking water. In 1955, however, the Commission, on its own motion, initiated a comprehensive investigation "for the purpose of adopting and prescribing, by general order, uniform service standards and

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[21] By this decision, West San Martin Water Works Inc. commenced serving some, although not all, of SMWW's customers. Subsequently, the balance of SMWW was sold by the Powell estate to a newly formed county water district. In *Re SMWW* (1993) 50 CPUC2d 638 (unpublished), the Commission authorized the sale and transfer.

service rules applicable to all privately owned public utility water companies in the State of California" (Case No. 5663, filed July 18, 1955). This proceeding concluded with the adoption of General Order 103 as a statement of the Commission's policy and rules mandating the minimum requirements for good water utility practices, including a clear statement of the standards for water quality and service. (*Re Adoption of Service Standards and Service Rules for Water Utilities* (1956) 55 CPUC 56.)[22]

The long-term, cooperative water health and safety practices of the Commission and the State Department of Public Health were codified in General Order 103 which provides, in relevant part:

> "II. Standards of Service
>
> "1. Quality of Water.
>
> "a. General. Any utility serving water for human consumption or for domestic uses shall provide water that is wholesome, potable, in no way harmful or dangerous to health and, insofar as practicable, free from objectionable odors, taste, color and turbidity. Any utility supplying water for human consumption shall hold or make application for a permit as provided by the Health and Safety Code of the State of California, and shall comply with the laws and regulations of the state or local Department of Public Health. It is not intended that any rule contained in this paragraph II 1 shall supersede or conflict with an applicable regulation of the State Department of Public Health. A compliance by a utility with the regulations of the State Department of Public Health on a particular subject matter shall constitute a compliance with such of these rules

[22] We note that moving parties failed to comment on the several references to Commission established policies and guidelines listed at pages 4 and 5 of the OII which are specifically cited as measures taken in furtherance of the policies and requirements contained in the Commission's General Order 103.

as relate to the same subject matter except as otherwise ordered by the Commission.

"b. Water Supply. In the absence of comparable requirements of the State Department of Public Health, the following general rules shall apply:

"(1) Source. Water supplied by any utility shall be:

"(a) Obtained from a source free from pollution; or obtained from a source adequately purified by natural agencies; or adequately protected by artificial treatment.

"(b) From a source reasonably adequate to provide a continuous supply of water.

"(c) Of such quality as to meet the United States Public Health Service Drinking Water Standards of 1946".

"(2) Operation of Supply System.

"(a) The water supply system, including wells, reservoirs, pumping equipment, treatment and filtration works, mains, meters and service pipes shall be free from sanitary defects.

"(b) No physical connection between the distribution system of a public potable water supply and that of any other water supply shall be permitted except in compliance with the Regulations Relating to Cross-Connections of the State Department of Public Health contained in Title 17 of the California Administrative Code.

"(c) The presence of algae, crenothrix and other growths in the water shall be controlled by proper treatment. "

"c. Testing of Water.

"(1) Test. Each utility shall have representative samples of the water supplied by it examined by the state or local Department of Public Health or by an approved water laboratory as defined in Title 17 of the California Administrative Code, at intervals specified by the

> state or local Department of Public Health, in accordance, with the United States Public Health Service Drinking Water Standards of 1946.
>
> "(2) Reports of Tests. The Commission shall be promptly notified in writing by the utility and supplied with a preliminary report describing the situation when matters of water quality are under review by the state or local Health Department as a result of not meeting the United States Public Health Service Drinking Water Standards of 1946. A final report shall be submitted to the Commission within a reasonable time after final disposition of the matter." (*Id.*, Appendix A, pp. 5-6, unpublished.)

Thus, in General Order 103, the Commission exercised its public health and safety authority by formally articulating a policy on water quality and water service standards applicable to water supplied for human consumption. That policy was to adopt as its own, the United States Public Health Service Drinking Water Standards of 1946 and the existing regulations of the State Department of Public Health, "except as otherwise ordered by the Commission." There should be no doubt that the Commission's decision to adopt these federal and state standards as minimum standards for water quality and service was well-considered and independently made. In the area of water quality, there was no need for the Commission to duplicate the expertise and resources of government agencies primarily charged with the responsibility of identifying drinking water quality problems and setting protective drinking water quality standards. Rather, it was appropriate and reasonable for the Commission to continue to rely on its partners in public health protection to ensure that water served for domestic use would be safe. By exercising its judgment in General Order 103 to rely on the health experts, the Commission was not abdicating or abandoning its

health and safety jurisdiction; rather, the Commission was exercising its authority.[23]

In 1956, the Commission's authority to establish standards for drinking water service was not limited by federal law. It would be another eighteen years before the federal government began to displace state jurisdiction in the regulation of public water systems.[24] Until 1974 the only limit on the Commission's authority to determine the appropriate standards for water quality and the water service of public utility water systems was the statutory requirement that such standards be "just and reasonable" and "adequate and serviceable" as mandated by Section 770 of the Public Utilities Code.[25] At the time that General Order 103 was adopted, Section 770 provided in relevant part:

"770. The Commission may after hearing:

(a) Ascertain and fix just and reasonable standards, classifications, regulations, practices, measurements, or service to be furnished, imposed, observed, and followed

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[23] *Re G.O. 103* (1982) 8 CPUC2d 687, the Commission decision amending the water standards of service in General Order 103, simply changed the names of the relevant state and federal agencies. For example, the Department of Public Health was changed to Department of Health Services, and Public Health Service became the Environmental Protection Agency.

[24] Although the federal government encouraged nation-wide application of previous federal drinking water standards established by the United States Public Health Service, not until the federal Safe Drinking Water Act (SDWA) (42 USCA300-*g et.seq.)* was enacted by Congress in 1974 were the states preempted in the regulation of public water systems. By that law, states could not enact drinking water laws less stringent than those established by the Environmental Protection Agency of the federal government. The federal SDWA was later amended in 1986 and in 1996.

[25] This provision was Section 46(a) of the 1911 Act. The original statute remained substantively unchanged when, in 1951, it became Pub. Util. Code § 770.

by all electrical, gas, water and heat corporations.

(b) Ascertain and fix adequate and serviceable standards for the measurement of quantity, quality, pressure, initial voltage, or other condition pertaining to the supply of the product, commodity, or service furnished or rendered by any such public utility.

(c) Prescribe reasonable rules, specifications, and standards to secure the accuracy of all meters and appliances for measurements." (Public Utilities Code, Section 770, Stats. 1951, c.764, p.2056.)

In 1974, when Congress passed the federal SDWA, the Legislature amended Section 770 of the Public Utilities Code to include this proscription:

"No standard of the commission relating to water quality, however, shall be applicable to any water corporation which is required to comply with the regulations and standards of the State Department of Health pursuant to Chapter 7 (commencing with Section 4010 of Part 1 of Division 5 of the Health and Safety Code."

Although the amendment of Section 770 limited the Commission's authority to adopt "water quality" standards, it had little practical impact. By adopting General Order 103 in 1956, the Commission already had adopted DHS standards on a broader scale, whereas the Section 770 amendment required only that DHS water quality standards be the law for most, although not all, of the Commission regulated public utility water systems.[26] In 1976, the Legislature again amended Section 770 and altered the formerly limiting provision to

[26] Former Health & Saf. Code §4010 recodified as Health & Saf. Code § 116275(h) defines a public water system which is subject to DHS regulation. While that definition covers most regulated water utilities, it does not include all water utilities regulated by this Commission. Water utilities which are not defined as public water systems are not subject to DHS requirements except by virtue of the provisions of General Order 103.

provide:

> "...No standard of the commission applicable to any water corporation shall be inconsistent with the regulations and standards of the State Department of Health pursuant to Chapter 4 (commencing with Section 116275) of the Health and Safety Code."

The 1976 amendment expanded the authority of DHS. It made all DHS regulations and standards applicable to all public utility water systems and, consistent with the Commission's General Order 103, established those DHS provisions as minimum standards for public utility water service.[27] At the same time, the amendment removed the limitation on the Commission's authority by allowing it to set standards for those systems in all areas, including water quality, as long as they are not inconsistent with those of the DHS.[28]

In instituting this investigation, we have announced our intent, among other things, to consider whether it is reasonable to adopt stricter rules or standards in the area of water quality. As explained more fully below, this investigation is merely a continuation of our historical authority to protect the public health and safety by ensuring the provision of healthy drinking water. There is no legal prohibition to our consideration of these issues and no jurisdictional bar to the instant investigation.

Discussion Of Moving Parties' Allegations

The historical review of the Commission's role in the realm of water quality demonstrates that the Commission traditionally has exercised concurrent

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[27] DHS regulations are contained in Titles 17 and 22 of the California Code of Regulations.

[28] To date, the Commission has imposed standards stricter than those of DHS in the area of water pressure. (See discussion in footnote 39 *infra*.)

jurisdiction with state and local health departments in the regulation of private water companies. The ensuing discussion of the allegations challenging our jurisdiction will further demonstrate that the Commission's concurrent authority with DHS over water quality issues remains intact. Before addressing the allegations, we wish to clarify the nature of this proceeding.

This investigation is an inquiry into the safety of the drinking water supplied by Commission regulated water utilities. This is an information gathering process. This is not a rulemaking proceeding, although the information gathered here may result in our instituting a rulemaking proceeding to develop new operating practices for regulated water utilities to better ensure the health and safety of water service. This is also not an enforcement proceeding, although the information accumulated here regarding the compliance of regulated water utilities with the safe drinking water laws may result in our instituting formal enforcement investigations of individual water utilities where justified.[29]

In their motions, moving parties allege that this proceeding should be dismissed or limited for lack of subject matter jurisdiction because: (1) the Commission has no authority to investigate the adequacy of safe drinking water laws or the compliance of regulated water utilities with those laws; (2) the Commission has no authority to set or enforce safe drinking water laws; (3) the Commission's authority with respect to water quality issues is limited to

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[29] See Assigned Commissioner's Ruling Setting Prehearing Conference and Requiring Prehearing Conference Statements dated October 30, 1998. In the discussion of the category and scope of this proceeding at page 3, Commissioner Henry M. Duque explained that a rulemaking or adjudicatory enforcement proceeding would be separately instituted if evidence produced in this investigation indicated that either was warranted.

ratemaking; (4) this proceeding is an unwarranted interference or hindrance to duly instituted court actions seeking damages for water quality injuries; and (5) the Commission has no water policy, no expertise to conduct this proceeding and consistently has deferred to DHS on water quality issues.

Investigation Authority[30]

Moving parties, having alleged in pending lawsuits that drinking water served by water utilities regulated by this Commission is killing and harming utility customers, now argue that this Commission has no authority to investigate the issues related to the quality of that water service. To the contrary, our clear authority to conduct this investigation is beyond serious debate, based on the general and specific powers vested in the Commission by the Legislature pursuant to the California Constitution.

As a regulatory body designed "to protect the people of the state from the consequences of destructive competition and monopoly in the public service industries" (*Sale v. Railroad Comm.* (1940) 15 Cal.2d 612, 617), the Legislature has extended to this Commission broad, general powers to regulate public utilities as well as specific authority to act to promote the health and safety of the public. In pursuing this investigation, the Commission is acting well within its constitutional and statutory jurisdiction: "Private corporations and persons that

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[30] Cases cited by moving parties in their challenges to our jurisdiction to conduct this investigation do not support their claims and are not discussed. None of these cases relate to the Commission's jurisdiction to investigate matters which are clearly within the Commission's public health and safety authority, as is the quality of water provided by regulated water utilities. Commission cases cited by moving parties which address water quality issues do not dispute our jurisdiction in this proceeding. Instead they verify our discussion in this Opinion about the relationship between the Commission and state and local health departments.

own, operate, control, or manage a . . . system for the . . . furnishing of . . . water . . . are public utilities subject to control by the Legislature." (Cal. Const., Article XII, § 3.) Pursuant to the grant of authority found in Article XII, Section 2 of the California Constitution, the Commission may, "[s]ubject to statute and due process . . . establish its own procedures." And, Article XII, Section 5, provides: "[t]he Legislature has plenary power, unlimited by the other provisions of this constitution, but consistent with this article, to confer additional authority and jurisdiction upon the commission. . . ."

In the exercise of its plenary power the Legislature has specifically provided that the service the utility provides shall be "adequate, efficient, just, and reasonable . . . as . . . necessary to promote the safety [and] health . . . of its patrons, employees, and the public . . ."and that all charges by a public utility for services rendered shall be just and reasonable. (Pub. Util. Code § 451.) The Legislature has given the Commission the power and obligation not only to determine that the utility service is adequate, safe and healthy and that any rate is just and reasonable (Pub. Util. Code §§ 454, 761, 768), but also the authority to "supervise and regulate every public utility in the State and [to] do all things which are necessary and convenient in the exercise of such power and jurisdiction." (Pub. Util. Code § 701.)

Standard Setting And Enforcement[31] Authority

Moving parties claim that we have no jurisdiction to conduct this proceeding because DHS and EPA are responsible for the setting of standards

[31] Because a further detailed discussion of the Commission's enforcement authority is presented, *infra*, in our discussion of compliance issues in this proceeding, we shall not repeat that discussion here.

and enforcement of laws related to the Safe Drinking Water Acts. Moving parties are correct that the Legislature has vested in DHS primary responsibility for the administration of the safe drinking water laws (Health & Saf. Code § 116325). At the same time, the Legislature has seen fit to preserve the Commission's broad regulatory powers and obligations to protect the health and safety of Californians. While the potability and purity of a public utility's water supply fall within the primary jurisdiction of DHS, this Commission shares the obligation to see that the utility operation and its service are safe. This shared responsibility has been maintained, with limited exceptions, even after the passage of the federal SDWA in 1974.

Moving parties claim that the questions posed in the instant investigation are outside our jurisdiction because federal preemption and the adoption of the federal and state Safe Drinking Water Acts eliminate any authority, save ratemaking, that the Commission has to impact water quality issues. This allegation is faulty because it ignores the pivotal interaction between the federal and state safe drinking water laws and the effect of that interaction on the Legislature's prerogatives.

As explained on page 1 of the "DHS Response To Questions Posed In The Public Utilities Commission Order Instituting Investigation Of Drinking Water Quality," March 12, 1998 (DHS OII Response), when the Legislature enacted the California Safe Drinking Water Act (Chapter 4 of the Health & Saf. Code § 116275 *et. seq.*), it assumed the authority known as "primacy" to administer the federal act. Pursuant to the federal SDWA, a state could exercise "primacy" authority if it enacted laws consistent with the federal act and adopted regulations at least as stringent as those of the federal EPA. The Legislature incorporated the federal mandates in California's SDWA and expressed its intent to establish requirements stricter than the regulations established by the federal EPA. (See

Legislative Findings, Health & Saf. Code § 116270.) The Legislature designated DHS as its "primacy" agency and authorized it to administer the water supply and water quality laws applicable to all California public water systems, including those which are governmental units, mutual or cooperative organizations as well as those which are privately owned by shareholders. (Health & Saf. Code § 116325)

As long as the state observes its primacy obligation to meet or exceed federal drinking water laws and regulations, it is the Legislature's prerogative, unimpeded by federal law, to maintain this Commission's authority to exercise its health and safety jurisdiction in consonance with DHS. Legislative action to perpetuate this dual agency jurisdiction is reflected in the Legislature's retraction in 1976 of a 1974 amendment to Pub. Util. Code § 770 which expressly prohibited the Commission from applying water quality standards to public utilities.[32] The Legislature changed this prohibitive amendment to allow the Commission to develop and apply standards to regulated utilities which are not "inconsistent with the regulations and standards" of DHS. In this manner, the Legislature renewed the Commission's concurrent jurisdiction to apply water quality standards within the limits of: (1) the state's "primacy" obligation under federal law to maintain regulations as stringent as those of the EPA; and (2) the state's adoption of standards developed by DHS more stringent than the minimum requirements of the EPA.[33]

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[32] As discussed earlier, prior to 1974, Pub. Util. Code § 770 contained no restriction on the Commission's authority to require regulated utilities to observe Commission prescribed standards and practices regarding service and quality as long as such standards and practices were "just and reasonable," and "adequate and serviceable".

[33] EL&L's argument regarding Pub. Util. Code § 770 is misplaced. It interprets the

Footnote continued on next page

The Legislature's intent to preserve the shared responsibilities of DHS and the Commission over health matters is again reflected in the 1995 addition of Health & Saf. Code § 116465 to the California Safe Drinking Water Act.[34] It clearly expresses the Commission's authority, subject only to Supreme Court review, to determine the need for additional public utility facilities to address

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statute as prohibiting the Commission from making findings contrary to established DHS standards and concludes, therefore, that the Commission cannot investigate whether drinking water standards are safe or adequate. Neither Section 770 nor the standards established by DHS stand for the proposition that established drinking water standards protect against all health risks or that such standards cannot be improved upon. DHS drinking water standards are the minimum legal requirements imposed on all public water systems in California. The legislative findings underlying the establishment of the state's safe drinking water laws refer to the establishment of "a program. . . that is more protective of public health than the minimum federal requirements" and states "[i]t is the policy of the state to reduce to the lowest level feasible all concentrations of toxic chemicals that when present in drinking water may cause cancer, birth defects, and other chronic diseases." (See Health & Saf. Code § 116270 (e) and (f).)

[34] This provision was formerly Health & Saf. Code § 4029.5, added by statute in 1976, amended in 1978 and reenacted as Health & Saf. Code § 116465 without the amended provisions. It provides:

> "Upon formal complaint by the [DHS] director alleging that additional facilities are necessary to provide the users of a public water system operated by a public utility under the jurisdiction of the Public Utilities Commission with a continuous and adequate supply of water or to bring the water system into conformity with secondary drinking water standards, the commission may, after hearing, direct the public utility to make the changes in its procedures or addition to its facilities as the commission shall determine are necessary to provide a continuous and adequate supply of water to the users thereof or to bring the system into conformity with secondary drinking water standards. Any proceeding of the commission pursuant to this article shall be conducted as provided in Chapter 9 (commencing with Section 1701) of Part 1 of Division 1 of the Public Utilities Code, and any order issued by the commission pursuant to his action shall be subject to judicial review as provided in Chapter 9."

problems of inadequate water supply or violation of secondary drinking water standards. In this provision, the Legislature acknowledges the Commission's special expertise in regulating public utilities and underscores the concurrent jurisdiction of the Commission and DHS over these safe drinking water issues.

A jurisdictional structure that preserves the authority of both DHS and the Commission over the quality of water provided to residents and businesses by private water companies is consistent with the original intent of the 1911 Act and is crucial to the effective regulation of public utilities. The expertise of the Commission has always centered in the creation of financial and regulatory incentives that foster and support socially desired behavior from firms that operate in a marketplace characterized by limited competition. Thus, it is clearly reasonable that the Legislature continues to marshal the expertise of the Commission as well as the health science expertise of DHS to support a public interest as critical as the quality of drinking water.

Ratemaking Authority

Moving parties allege that the Commission's authority with respect to water quality issues is limited to ratemaking. EL&L claims this proceeding should be confined to ratemaking issues. RK&M acknowledges the Commission's ratemaking authority but does not accept ratemaking as sufficient justification for this investigation. The ratemaking-only argument warrants little comment as moving parties cite no law in support of this restrictive view of the Commission's health and safety authority.

In exercising its authority to administer the safe drinking water laws, DHS deals directly with the subject public water systems. With limited exceptions, DHS enforces the law without regard for how the system finances its compliance with DHS orders. DHS has no ratemaking authority. It cannot require a regulated water utility to include the cost of safe drinking water compliance in

rates; nor can it require this Commission to do so. Moreover, unlike other California public water systems, a regulated water utility cannot, on its own, institute rate relief for compliance expenses. Commission authorization is a prerequisite.

Just and reasonable ratemaking, as required by Pub. Util. Code § 451, is a distinct power and obligation of the Commission, one which coexists with the Commission's power and obligation to exercise health and safety authority over water utilities as mandated by Pub. Util. Code §§ 451, 739.8, 761, 768, and 770(b). Rates are not developed in a vacuum. They are tied to identifiable purposes and must incorporate consideration of the varied aspects of the utility enterprise. The ratemaking process is complex and it cannot be limited to one aspect, no matter how important, of utility service.

The Commission's responsibility to ensure the delivery of safe drinking water at just and reasonable rates does not mean that there is, or should be, a blank check available for the correction or prevention of safe drinking water violations. The requirement that a utility provide certain water quality improvements does not automatically make the cost of those improvements a just and reasonable financial liability for ratepayers[35].

As noted in the historical review *supra*, ratemaking authority has been, and continues to be, an effective regulatory tool used by the Commission to promote

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[35] See for example, *Re Southern California Water Company* (1993) 49 Cal.P.U.C.2d 511, 517, 534 - exclusion from rate base $1,600,000 of the total cost of Sonoma Treatment Plant; also see Rehearing Order in *Duffy v. Larkfield* [D.98-11-070, page (slip opin.)] (1998) ___Cal.P.U.C.2d___ - Utility's ambiguous tariff relieves the individual customer of the expense of the backflow device ordered by DHS. The question of whether ratepayers or shareholders should pay that expense depends on the reasonableness of utility's actions and will be decided in a ratemaking proceeding.

implementation and enforcement of safe drinking water laws and to prevent violations of those laws. However, Pub. Util. Code § 451's requirement that water utility service be "adequate, efficient, just and reasonable" to promote the public's health and safety creates in the Commission a distinct power and obligation, separate and apart from its ratemaking authority. If the cost of correcting or preventing water quality problems cannot justly and reasonably be recovered in a utility's rates, the Commission still must act to insure that water utility service is healthy and safe. In such instances, shareholders have to absorb the expenses and the Commission has the authority to require it.

Interference with Court Actions

The motions and responses devote considerable discussion to the relationship between the courts and the Commission. Apparently, moving parties believe that the fact of pending civil litigation on matters related to this investigation should affect our jurisdiction decision. They claim: (1) the investigation should not be a way of immunizing utilities from civil lawsuits seeking damages for injuries caused by contamination (RK&M Motion, page 22); (2) the Commission is not a court of law and it is not equipped to handle complex litigation (EL&L Motion, pp. 12-13); (3) the Commission must defer to the judiciary when it comes to water quality remedies (RK&M Motion, page 19); (4) the Commission has no authority to hinder consumers' rights under federal and state environmental statutes wherein the right to sue is a critical component of the federal and state regulatory scheme (RK&M Motion page 14); (5) the Commission has no authority to address damages or remedies for noncompliance with safe drinking water standards and doing so is a denial of the individual's constitutional right to a jury trial (EL&L Motion, page 11); and, (6) Pub. Util. Code § 2106 gives courts the jurisdiction to award compensatory and exemplary damages and further permits a court to take jurisdiction of a

dispute arising under a Commission regulation acting in aid of the Commission's jurisdiction or giving relief where the Commission failed to act (EL&L Motion, page 12).

It is apparent from these arguments that moving parties labor under basic misconceptions about the fundamental nature of this Commission and the functions which it performs. The California Supreme Court's discussion of the varied roles of the Commission is instructive:

> "Created by the Constitution in 1911, the commission was designed to protect the people of the state from the consequences of destructive competition and monopoly in the public service industries. [citations omitted] Although it has been termed a 'quasi-judicial' tribunal in some of its functions its powers and duties go beyond those exercised by the judicial arm of government. [citations omitted] A court is a passive forum for adjusting disputes, and has no power either to investigate facts or to initiate proceedings. Litigants themselves largely determine the scope of the inquiry and the data upon which the judicial judgment is based.
>
> "The powers and functions of the Railroad Commission are vastly different in character. It is an active instrument of government charged with the duty of supervising and regulating public utility services and rates. (citations omitted) The Constitution gives the legislature full authority to implement the commission's powers with legislation germane to public utility regulation, and under this authority the legislature has departed from traditional techniques of judicial procedure. The commission has the right and duty to make its own investigations of fact, to initiate its own proceedings and in a large measure to control the scope and method of its inquiries. [citation omitted] All hearings, investigations and proceedings are governed by the provisions of the act and by rules of practice and procedure adopted by the commission. . . . Hence, unless the act requires the commission to proceed in a certain way, the only limitation upon its procedural powers is its duty to provide a fair hearing to any party whose constitutional rights may be affected by a proposed order." (*Sale v. Railroad Commission* (1940) 15 Cal.2d 613, 617-618.)

To the extent that moving parties believe that the statutory promise of Pub. Util. Code § 2106[36] or the existence of civil lawsuits on issues related to this investigation should preclude or otherwise impair this investigation, they are mistaken. The Legislature has preserved the Commission's historic authority to conduct its proceedings without interference from the courts. As argued by opponents to the motions, the case law established by the California Supreme Court decisions in *Covalt* and *Waters*, cited *supra*, uphold that authority. Those cases stand for the proposition that civil lawsuits cannot proceed if they constitute an interference with the Commission's regulatory authority. We are aware of no case law that supports the contrary position - that a suit under Section 2106, or any other statute, bars or impairs the ability of this Commission to pursue an investigation into matters subject to its jurisdiction.[37]

Water Policy, Expertise and Deference to DHS

Moving parties claim that the Commission has no water policy and no expertise to conduct the instant investigation. As noted in the Commission's jurisdictional history, *supra*, the Commission formally adopted its water policy, General Order 103, in 1956. The General Order, an order of this Commission,

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[36] Moving parties are correct that the Commission cannot award exemplary or punitive damages for personal injury or wrongful death. However, they err in their assertion that the Commission has no authority to redress violations by water utilities. As discussed by the California Supreme Court in *Covalt* (*ibid.* at 916), the Public Utilities Code contains remedies available to the Commission including actions for mandamus or injunction, actions to recover penalties, imposition of fines with interest, criminal prosecution and contempt proceedings. (See Pub. Util. Code § 2101 et seq.)

[37] To resolve the motions challenging our jurisdiction to conduct this investigation, we need not, and do not, decide the impact this investigation should have on pending lawsuits. As noted above, we do conclude, however, that the existence of those lawsuits cannot impact our authority to conduct this investigation.

enforceable against regulated water utilities, has been updated and augmented with Guideline documents for water utility operations.[38] In addition, the MOUs between DHS and the Commission are further clarifications of the agencies' roles within the context of that water policy. Furthermore, we note with considerable pride the existence of expert staff members with the Commission's Water Division, and their long public service in providing advocacy and advisory service on behalf of California's water customers.

Characterizations of Commission deference to DHS do not support moving parties' assertion of no jurisdiction any more than do arguments that the Commission lacks expertise to conduct this investigation. Our jurisdiction to conduct this investigation is grounded in the California Constitution, the statutes and case law. Arguments about how well or poorly we might handle that jurisdiction do not constitute valid challenges to the existence of that jurisdiction.

Issues to Be Addressed In This Proceeding

Issues targeted for investigation in this proceeding fall into two categories: regulated water utilities' compliance with the law and the adequacy of drinking water standards. To establish clear and reasonable parameters for this investigation, the questions posed in the OII are framed in terminology consistent with SDWA laws and regulations. However, neither the terminology nor the questions are intended to limit this information gathering process. As evidence is introduced, other more specific, relevant questions may emerge and they may be considered so long as they do not unreasonably expand this inquiry.

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[38] See Appendix A – Drinking Water Investigation, at pp. 4-5.

Utility Compliance with Safe Drinking Water Requirements

With respect to compliance issues, the Commission is exercising its authority to investigate whether utilities have complied with state SDWA laws and regulations promulgated by DHS that have a direct bearing on the safety of water service provided to the public. As previously discussed, this Commission repeatedly has issued decisions directing or authorizing water utilities to build plant or to implement activities related directly to the prevention or correction of SDWA law violations, and authorizing rates to pay for those items. As the enforcement of orders, decisions and rules administered by the Commission is lodged primarily in the Commission, we also shall investigate utility compliance with Commission decisions that have a direct bearing on the safety of utility water quality service. The compliance questions posed in the OII are as follows:

> Are water utilities complying with prevailing safe drinking water standards, including those relating to VOCs and Perchlorate and any other known contaminants?
>
> What appropriate remedies should apply for non-compliance with safe drinking water standards?
>
> The extent to which the occurrence of temporary excursions of contaminant levels above regulatory thresholds, such as MCLs and action levels, may be acceptable in light of economic, technological, public health and safety issues, and compliance with Public Utilities Code Section 770?

The standard for measuring utility compliance is expressed under the standards of service related to water quality in General Order 103. It provides:

> "A compliance by a utility with the regulations of the State Department of Health Services, on a particular subject matter shall constitute a compliance with such of these rules as relate to the subject matter except as otherwise ordered by the Commission."(General Order 103, pp. 11-12.)

This is the appropriate compliance standard to which utilities shall be held because it aptly encompasses SDWA laws and regulations as well as Commission orders.

In this proceeding, we have ordered utilities to provide 25 years of records denoting compliance, or the lack thereof, with safe drinking water standards for each of their separate districts. This data requirement far exceeds the DHS regulation governing record retention, which mandates the preservation of "[r]ecords of bacteriological analyses for at least the 5 most recent years and chemical analyses for at least the most recent 10 years." (California Code of Regulations, Title 22, Section 64453(b)(1).) We intend to obtain a thorough overview of utility compliance with safe drinking water standards. Commission staff has provided an initial report and parties have commented on the utility compliance filings.

General Order 103 provides that utility compliance may differ from DHS regulation "as ordered by the Commission." We will ask utilities to identify, over the past 25 years, each Commission order, decision or rate authorization related to safe drinking water standards or regulations and denote compliance therewith for each of its separate districts. We note that, pursuant to Pub. Util. Code § 770, such Commission orders or decisions may not be inconsistent with DHS standards or regulations. Therefore, these Commission decisions will provide a compliance requirement that is the same as or stricter than that of DHS. Many of these decisions will reflect Commission requirements designed to prevent rather than correct compliance violation.

We are aware that there is not always an easy or clear answer to the question of whether the utility has complied with the law. Even more complex is the inquiry whether an incident of non-compliance constitutes a danger to public health. It will be useful to have DHS comment on questions where the

compliance answer is unclear. The question raised in the OII with respect to temporary excursions falls into this murky category. We shall also seek the assessment of DHS on two questions: (1) Whether temporary excursions, under all circumstances, constitute non-compliance with the established maximum contaminant level (MCL) for a contaminant? and, (2) What danger to health, if any, is caused by such temporary excursions?

As we scrutinize the utility compliance filings and parties' comments, we shall attempt to discern whether there are identifiable trends or patterns of non-compliance among individual utilities, individual districts, or within the industry at-large. Where there have been identifiable instances of non-compliance, we shall attempt to determine: (1) Why did the non-compliance occur? (2) Was it preventable? (3) If so, how could it have been prevented? (4) What mitigation measures, if any, were taken to reduce adverse health affects of the non-compliance?

We shall evaluate the lessons to be learned from instances of non-compliance and decide whether the establishment of new rules, operational standards, or a different approach to rate relief will serve to correct or avoid recurrence of non-compliance problems.

As indicated in Assigned Commissioner Henry M. Duque's Ruling of October 30, 1998, (cited *supra* at footnote 29), should a water utility's non-compliance with water quality laws warrant further investigation, the Commission will consider instituting a separate adjudicatory proceeding for that purpose.

The Adequacy of Safe Drinking Water Standards

The OII poses these questions regarding safe drinking water standards:

> Are the prevailing drinking water standards safe, including those relating to VOCs and Perchlorate and any other known contaminants?
>
> Are water quality standards adequate and safe, including, without limitation, whether the maximum contaminant levels (MCLs), Action Levels, and other Safe Drinking Water Act requirements relating to substances such as VOCs and Perchlorate and any other contaminants, such that these standards adequately protect the public health and safety?

Moving parties apparently are confused by these questions. They claim that the Commission has neither the authority nor the ability to set, weaken or to evaluate water quality standards because such actions are the special province of EPA and DHS. First of all, we do not intend to reduce MCLs, Action Levels or similar standards which are terms of art in the lexicon of SDWA law and regulation. Drinking water standards, including established MCLs, are minimum water quality requirements and we cannot and shall not tamper with those requirements. We do not intend to duplicate the processes employed by DHS and EPA to develop those standards. We do intend to employ the knowledge of these agencies as we pursue this investigation. The evidence adduced in this proceeding may support the development of additional operating practices for regulated utilities. If so, we would expect that such new rules either will fill an identifiable void, if any there is, in the DHS regulatory scheme or will be practices stricter than those of DHS[39] and/or they will be

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[39] We have already developed water quality operating requirements which are stricter than those of DHS. Note that the DHS water pressure requirement of "20 pounds per square inch gauge (psig)" provided in Title 22, Section 64566 of the California Code of Regulations, is less than the Commission's water pressure requirement of 40 p.s.i.g. as provided at page 13 of General Order 103. These water pressure requirements are safe drinking water rules designed to protect systems from pollution arising from the

Footnote continued on next page

practices particularly suited to the regulation of investor-owned water utilities. In any event, before we can determine what actions, if any, might better promote safe drinking water service by regulated water utilities, we must have a clear understanding of the safety status of existing regulation. Therefore, we need to receive evidence on the questions posed in the OII.

It will be useful to obtain clarification of what precisely is the health risk assessment associated with the established standards, such as the MCL for Tri Chloro Ethylene. In view of the contemporary concerns about increased contamination in our state and the corresponding scarcity of water, we should inquire whether EPA or DHS is now, or anticipates, reconsidering the health risks associated with MCLs which have already been established for certain contaminants.

All water is not equal and the remedies employed to address water quality problems are not equally effective. There is a strong legal presumption that the SDWA laws and regulations administered by DHS adequately protect the public health. However, there is no legal bar to our inquiry or to our consideration of contrary evidence. In response to our question, "Is the present regulatory situation adequate to protect public health?" DHS makes it clear that water quality problems are moving targets:

> "Though the present regulatory situation is adequate, we continue to be faced with drinking water quality issues that could affect public health. For example, there are new or previously unrecognized (sic) chemical contaminants that have impacted drinking water sources. Contaminants such as the gasoline additive methyl tertiary butyl ether, (MTBE), have been found to contaminate groundwater through leaking underground storage tanks and surface water

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problem of back siphonage in the pipes of water distribution systems.

through the use of personal water pleasure craft; and the solid rocket fuel component, perchlorate, which as the result of improved analytical procedures has been found in groundwater near manufacturing sites. There also has been recent health effects research that has identified contaminants such as certain disinfection by-products (e.g., bromodichloromethane) that may cause reproductive effects.

"In addition, the increase in population growth and demand for drinking water throughout the state has diminished the options utilities have to reserve and select high quality sources of drinking water. The impact of groundwater contamination from industrial and agricultural practices has been significant in some areas of the state. Public water systems are no longer able to forego the use of contaminated drinking water sources, including those associated with Superfund sites, since that water may be needed to meet increased demand. This has heightened the need to know the type and concentration of contaminants in these contaminated sources to ensure that the level of treatment and monitoring applied to these sources is adequate to protect public health." (DHS OII Response, page 14.)

The carefully developed process by which EPA and DHS promulgate water quality standards as regulations takes time. We will consider whether there are interim safety practices, beyond those already suggested by DHS, that regulated water utilities should observe as prophylactic measures pending final determinations by EPA or DHS.

According to DHS, there are contaminants in drinking water for which there are no currently enforceable standards:

"There are some contaminants that were known to exist in drinking water sources but were never regulated. These contaminants were generally found in only a very few water sources and did not have the potential for statewide impact. Therefore, the setting of a drinking water standard could not be justified. For those chemicals DHS has established Action Levels to provide utilities with guidance if the contaminant is detected. Many of these contaminants were

> also made part of the list of chemicals for which monitoring was required as part of the State and Federal unregulated chemical monitoring regulations. [Emphasis added.]
>
> "There are a few contaminants such as perchlorate and methyl tertiary butyl ether (MTBE) for which an MCL will eventually be established once sufficient health effects and treatment technology information upon which to base an MCL becomes available. Until that time the Action Level will remain in effect." (DHS OII Response, pp. 12-13.)

Unregulated contaminants provide an easily identifiable subject for possible rule development. DHS has identified 50 unregulated chemicals that are or may be required to be monitored depending on the vulnerability of drinking water systems to those contaminants. Of those unregulated chemicals, DHS has set Action Levels (ALs) for 32 of those contaminants. Excepting lead and copper, ALs are advisory levels that are not enforceable standards. (DHS OII Response, page 16.) DHS recommends that utilities monitor those contaminants and provide public notification if the ALs are exceeded. We note that perchlorate, a contaminant about which parties in this proceeding have expressed concern, is on the AL, not the MCL, standard list. It is appropriate for us to consider whether we should develop rules that require all regulated water utilities to treat ALs for all, or certain contaminants, as mandatory levels requiring monitoring and public notification or removal of the source from service if the ALs are exceeded.

We expect this investigation will contribute to our ongoing ability to better regulate the health and safety protection provided in the service of drinking water by regulated utilities. Although the questions posed in this OII regarding the adequacy of drinking water standards seek information on the safety of current standards, any regulations or rules established by this Commission will be future oriented. Therefore, we will consider parties' proposals of prospective safety measures that relate to: (1) existing contaminants for which there are standards; (2) known contaminants for which there are no standards; (3) future contaminants, yet to be determined, that could endanger health; and (4) established or new approaches designed to rehabilitate or mitigate the adverse health affects of inferior water sources and to explore cost effective uses of new sources (i.e. increased contaminant testing, water blending, desalination).

It may be time for us to revisit and further augment the practices required in General Order 103. If the information gathered here so indicates, we will consider instituting a rulemaking proceeding for that purpose.

Conclusion

For the reasons explained above, we find the motions challenging our jurisdiction to conduct this investigation to be without merit. The motions of EL&L and RK&M requesting that I.98-03-013 be limited or abandoned are denied.

Moving and opposing parties' arguments are discussed above. Those that are not discussed have been reviewed. Moving and opposing parties request that official notice be taken of supporting documents attached to the motions and responses. These documents were duly served on all parties. No party opposes these requests for official notice. The documents provide case law and copies of Commission rules and regulations referenced in the motions and responses and

do not include any disputed facts. Therefore, they are useful to an analysis of each party's arguments. The request for official notice will be granted.

The ex parte rule in this proceeding was set in the Assigned Commissioner's ruling of December 23, 1998. He determined that Rule 7(d), which states that ex parte communications in quasi-legislative proceedings are allowed without restriction or reporting, may be waived upon the agreement of all parties. At the PHC of November 12, 1998, all parties agreed that the circumstances surrounding this proceeding, namely the participation of litigants in civil lawsuits, mandates that all parties have equal access to Commissioners. Therefore, the parties agreed to waive Rule 7(d), upon the condition that the filing requirement be no more stringent than that outlined in Rule 7.1. Accordingly, the filing requirement of Rule 7.1 was established for all ex parte communications in this proceeding.

Since this is the first such interpretation of a new rule of procedure, which was effective January 1, 1998, the Assigned Commissioner seeks to inform the full Commission of his ruling and asks for the full Commission's affirmation of his interpretation. We agree that where parties waive Rule 7(d), we may require the reporting of ex parte contacts under Rule 7.1.

Findings of Fact

1. I.98-03-013 was instituted March 12, 1998 as an investigation into the safety of drinking water service provided by water utilities subject to our jurisdiction.

2. On December 4, 1998, two motions were filed in this proceeding challenging the Commission's jurisdiction to proceed with this investigation. A joint motion was filed by the law firms of Engstrom, Lipscomb and Lack; Girardi and Keese; and Dewitt, Algorri and Algorri; participating as a joint interested party in this proceeding (EL&L). The second motion was filed by the law firm of Rose, Klein and Marias, an interested party in this proceeding.

3. Seven other parties in this proceeding filed timely responses opposing the moving parties' motions.

4. Both moving and opposing parties request that official notice be taken of documents attached to the motions and responses which were duly served on all parties. No party opposed these requests.

5. Moving parties allege the Commission has no regulatory jurisdiction over Aerojet-General, Huffy and McDonnell Douglas Corporations, parties in this proceeding which also have been named defendants in pending civil actions. Opposing parties respond that this argument is irrelevant.

6. At the Second Prehearing Conference on January 26, 1999, moving parties requested oral argument before the Commission en banc on the jurisdiction motions. The Assigned Commissioner acting as Presiding Officer subsequently granted this request and oral argument was held on May 10, 1999.

7. The Proposed Interim Decision of the Assigned Commissioner acting as Presiding Officer in this proceeding was mailed to all parties for written comments in accordance with Rules 77.2 - 77.5 of the Commission's Rules of Practice and Procedure. CWA filed timely comments which alleged the decision contained no legal or factual error.

8. Parties in this proceeding waived Rule 7(d), which allows ex parte contacts in quasi-legislative proceedings without restriction or reporting, and agree to report such contacts under the procedure contained in Rule 7.1.

9. The Commission adopted General Order 103 in 1956 and has maintained it as its policy on water supply and water quality issues.

10. Memorandums of Understanding signed by the Commission and the Department of Health Services in 1986 and 1996 respectively identify the roles of each party and their mutual, cooperative relationship in addressing water quality issues that involve the delivery of water by public water utilities.

11. Public Utilities Code Section 2106 states that civil actions to recover damages for any loss, damage or injury caused by any regulated public utility may be pursued in any court of competent jurisdiction by any corporation or person.

Conclusions of Law

1. Pursuant to provisions of the California Public Utilities Code, including but not limited to Sections 451, 761, and 768, the Public Utilities Commission has jurisdiction to regulate the service of water utilities with respect to the health and safety of that service.

2. Pursuant to provisions of the California Public Utilities Code and the California Health and Safety Code, including but not limited to Pub. Util. Code § 770 and Health & Saf. Code § 116465, the Public Utilities Commission has concurrent jurisdiction with the State Department of Health Services over the quality of drinking water provided by regulated water utilities.

3. The Commission may employ, but is not restricted to, the remedies provided in the California Public Utilities Code, Section 2101 *et. seq.* when regulated public utilities violate Commission orders.

4. The existence of pending civil suits on subjects related to matters being considered in I.98-03-013 does not prevent the Commission from exercising its jurisdiction to pursue this investigation.

5. The Public Utilities Commission has subject matter jurisdiction to pursue the issues in this proceeding specified in the order instituting investigation issued March 12, 1998.

6. This Commission has regulatory jurisdiction over public utilities as defined in the California Public Utilities Code. The following corporations which are parties in this proceeding, Aerojet-General, Huffy and McDonnell Douglas, are

not public utilities and are therefore, not subject to this Commission's regulatory jurisdiction.

7. The motions challenging this Commission's subject matter jurisdiction to pursue the issues in this proceeding should be denied.

8. The investigation in this proceeding should be completed.

9. The request for official notice of supporting documents attached to the motions and responses of parties should be granted.

10. The Presiding Officer's interpretation of Rule 7(d) should be affirmed.

INTERIM ORDER

IT IS ORDERED that:

1. This Interim Order constitutes the Commission's final decision with respect to the allegations raised on the disputed issue of the Commission's subject matter jurisdiction to conduct this proceeding.

2. The motions challenging the Commission's jurisdiction to conduct Investigation 98-03-013 are denied.

3. The requests of moving and responding parties to take official notice of documents attached to their pleadings, which do not include disputed facts, is granted.

4. The parties' agreement to waive Rule 7(d) and report ex parte contacts under the requirements of Rule 7.1 is approved.

This order is effective today.

Dated June 10, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
LORETTA M. LYNCH
JOEL Z. HYATT
Commissioners

L/bjk

APPENDIX A

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Investigation on the Commission' own motion into whether existing standards and policies of the Commission regarding drinking water quality adequately protect the public health and safety with respect to contaminants such as Volatile Organic Compounds, Perchlorate, MTBEs, and whether those standards and policies are being uniformly complied with by Commission regulated utilities.	**FILED** **PUBLIC UTILITIES COMMISSION** **MARCH 12, 1998** **SAN FRANCISCO OFFICE** **I.98-03-013**

ORDER INSTITUTING INVESTIGATION

I. Preliminary Statement

The Commission and the California Department of Health Services (DHS) have worked together for many years to ensure that the drinking water that customers of California's public utilities receive is safe. The ongoing regulatory role of the Commission and the DHS is pervasive, and they have worked together to assure the delivery of safe drinking water at reasonable rates to California's private water utility customers.

Within the last 8 months, complaints by numerous plaintiffs for negligence, wrongful death, strict liability, trespass, public nuisance, private nuisance and injunctive relief, have been filed in the Superior Courts of California against Southern California Water Company (SCWC), San Gabriel Valley Water Company (SGVWC), Citizens

Water Company of California and its parent Citizens Utilities Company (Citizens) and Suburban Water Company (Suburban). The plaintiffs allege that they are, and at all relevant times have been, customers of these water companies; that for a period of many years SCWC, SGVWC, and Suburban have delivered and continue to deliver to them contaminated water from wells. If the plaintiffs in these law suits ultimately prevail and are awarded the relief they are seeking, the financial, operational, and safety implications are potentially enormous for these water utilities and their customers, for regulatory agencies and for the Commission's jurisdiction over water supply, water services, treatment standards, and Commission regulated water rates in California.[1] These complaints raise public concerns over the safety of the drinking water supplies of these utilities.

Thus, public concerns over the safety of drinking water require a full-scale investigation by the Commission into whether the standards and policies of the Commission regarding drinking water quality adequately protects the public health and safety with respect to certain substances, such as volatile organic compounds (VOCs) and Perchlorate, and whether these standards and policies have been uniformly complied with by the Commission-regulated utilities.

On January 21, 1998, the Commission adopted Resolution No. W-4089 authorizing SCWC to establish a memorandum account related to the lawsuits filed against it, and in that resolution we also authorized Suburban and SGVWC to file advice letters to activate similar memorandum accounts because of similar multi-party lawsuits filed against them.

These Superior Court cases allege that water provided by the water utilities is harmful or dangerous to health because the water contains substances such as VOCs

[1] These law suits are Adler, et al., v. Southern California Water Company; Kristin Santamarie, et al., v. Suburban Water Systems, et al., including San Gabriel Valley Water Company and Southern California Water Company, filed in Los Angeles County; Boswell v. Suburban Water Systems, et al., and Allen, et al., v. Southern California Water Company, Arden-Cordova Water Service, Citizens Utilities Company, filed in Sacramento County.

and Perchlorate. Because of the claims in the Superior Court cases relating to water quality, public health and safety, and the operations and practices of the public utilities subject to this Commission's jurisdiction, the Commission intends to pursue its jurisdiction by investigating the operations and practices of the named defendant public utilities and all other Class A and B public utility water companies, their compliance with this Commission's standards and policies regarding water quality, and whether those standards and policies regarding water quality continue to be adequate to protect the public health and safety with respect to substances such as VOCs and Perchlorate. We are limiting this investigation to our Class A and Class B utilities because they have the financial ability to respond to this investigation and because they serve over 90% of all public utility water customers in this state.

II. The Commission's Jurisdiction and Authority

Under Article XII, Section 6, of the State Constitution, this Commission is empowered to establish rules for the utilities, including water utilities, subject to its jurisdiction. Section 451 of the Public Utilities Code requires public utilities to furnish and maintain such adequate, efficient, and reasonable service, equipment, and facilities as necessary to promote the health and safety of its patrons, employees, and the public. The Legislature has vested the Commission with both general and specific powers to ensure that public utilities comply with that mandate. (Public Utilities Code Sections 701, 761, 762, 768)

By Decision No. 53204 dated June 12, 1956, this Commission adopted General Order No. 103, Rules Governing Water Service, Including Minimum Standards for Design and Construction. By Commission decision or resolution, General Order No. 103 has been amended and updated on a number of occasions, most recently by Resolution No. W-3770 dated May 7, 1993. General Order No. 103 provides in Section II. Standards of Service as follows:

1. Quality of Water

a. General. Any utility serving water for human consumption or for domestic uses shall provide water that is wholesome, potable, in no way harmful or dangerous to health and, insofar as practicable, free from objectionable odors, taste, color and turbidity. Any utility supplying water for human consumption shall hold or make application for a permit as provided by the Health and Safety Code of the State of California, and shall comply with the laws and regulations of the state or local Department of Health Services. It is not intended that any rule contained in this paragraph II 1 shall supersede or conflict with an applicable regulation of the State Department of Health Services. A compliance by a utility with the regulations of the State Department of Health Services on a particular subject matter shall constitute a compliance with such of these rules as relate to the same subject matters, except as otherwise ordered by the Commission." (Emphasis added.)

In furtherance of the Commission's policies and requirements embodied in General Order No. 103, the Commission has established additional policies, requirements, and water quality and water treatment standards, and guidelines governing the operations and practices of water utilities subject to this Commission's jurisdiction, including, but not limited to the following:

a. The Commission adopted Guidelines for Water Quality Improvement projects on December 8, 1986. The guidelines govern the procedures water utilities will follow to identify necessary facilities for water quality improvement projects to assure that such projects are designed and constructed to comply with the Commission's policies, requirements, and standards and are constructed in a cost-effective manner.

b. The Commission adopted a Service Improvement Policy on June 15, 1983 that requires water utilities to identify the most cost-effective alternatives for dealing

with water service problems, including contamination. The Service Improvement Policy was incorporated into the Guidelines for Water Quality Improvement Projects referred above.

c. The Commission entered into a Memorandum of Understanding with DHS, effective February 1987 and updated in November 1996, setting joint goals to assure that water utilities regulated by the Commission are maintaining safe and reliable water supplies and doing so through cost-effective procedures for monitoring, testing, and treating water supplies to assure compliance with drinking water standards.

d. The Commission's Risk and Return Report in 1990 addresses the development of drinking water quality standards, new testing procedures, and the application of drinking water standards to large and small water utilities.

e. In D. 94-06-033, the Commission concluded that drinking water quality standards would require water utilities to invest between $50-200 million over the "next several years" for water treatment facilities to continue to meet drinking water standards.

f. In Resolution No. W-4013 in 1996, the Commission authorized water utilities to establish memorandum accounts to record and recover expenses incurred in complying with the United States Environmental Protection Agency's (EPA) drinking water regulations and the DHS' testing and regulatory fees.

g. The Commission, in a series of individual utility rate decisions dating back several decades, has ordered both the method and the actual dollar costs of water treatment which then are translated into specific rate recovery formulae. These decisions and orders are based upon the Commission regulatory policy of equating the relative cost of treatment to the ability of

communities to absorb the cost of varying treatment levels, consistent with public health and safety and drinking water quality standards set by this Commission.

III. The Purpose of the Commission's Investigation

Pursuant to our constitutional and statutory mandate, the Commission is obligated to ensure that regulated water utilities furnish and maintain service as necessary to "promote the safety, health. comfort, and convenience of its patrons, employees, and the public." We have sought to achieve these public health and safety objectives by requiring water utilities to comply with the laws, regulations, and drinking water standards of the DHS and the EPA and the requirements of the federal and state Safe Drinking Water Acts. Generally, we have deemed the compliance by water utilities with those standards to be compliance with the Commission's rules relating to water quality and public health and safety.

With this Order Instituting Investigation (OII) the Commission continues its ongoing jurisdiction and commences an investigation to review the policies, requirements, standards, and guidelines the Commission applies to Class A and Class B water utilities regarding water supply and water quality. In particular, the Commission will examine the operations and practices of the Class A and B water utilities and determine whether they are and have been in compliance with the Commission's polices, requirements, standards, and guidelines which require that the water provided by the water utilities be wholesome, potable, and in no way harmful or dangerous to health. In this investigation we will review our policies regarding drinking water standards and consider whether that policy needs to be amended or augmented. We will review the extent to which occasional excursions of contaminant levels above regulatory thresholds occur and whether our policies and standards should be amended to account for those incidents, taking into consideration economic, technological, and public health and safety issues, and compliance with Public Utilities Code Section 770.

We also intend to examine the methods, extent, and cost of a utility's proposed water quality improvement projects. We undertake this examination to determine whether water quality projects are designed in a cost effective manner so as to not unduly burden ratepayers with costs in excess of the amount necessary to comply with our standards. We are very cognizant that in addition to establishing standards for the design, construction, and operation of water systems, including safe drinking water standards, we must also set the rates these water utilities charge their customers for service. In setting those rates, we must account for the reasonable costs incurred by water utilities in complying with applicable drinking water standards and approve proposed expenditures for water quality improvements that are designed to comply with our water quality standards.

In conjunction with DHS, we apply drinking water standards on a statewide basis to assure uniformity of compliance among almost 200 water utilities we regulate. Without our existing authority to set and enforce uniform standards, we could not effectively implement uniform statewide water rate-setting policies, and water utilities would be uncertain about required design standards and whether we would approve water rates to cover the costs of necessary water quality improvement projects. This uncertainty would result in chaotic and inconsistent practices among water utilities and the potential that needed water quality improvement projects would be deferred indefinitely, or not built at all. In certain areas, scarce water supply resources would be severely jeopardized. Such a result is not acceptable. As a consequence, the constitution and laws of California confer on this Commission (in coordination with DHS) the jurisdiction and authority, unhindered by local agencies, authorities, or courts, (other than the Supreme Court in appropriate circumstances), to set and enforce standards to assure that water utilities provide water that is wholesome, potable, and in no way harmful or dangerous to health but still at an affordable cost to consumers.

Given DHS's current role in setting water quality standards and the Memorandum of Understanding between the two agencies, we are also inviting DHS to

participate in this investigation. Their input would be invaluable as we examine compliance with safe drinking water standards. We are asking that they provide us with information as to the safe drinking water standards that they set and the reasons for these standards. In addition, it would be useful for us to know how they go about setting these standards, and once they are set, how they are enforced. Finally, we would like to hear from them how our cooperative efforts can enhance our joint responsibilities of assuring the delivery of safe, potable drinking water to the customers of our public utility water utilities.

IV. Actions to be Taken

By issuing this OII, we require all Class A and Class B water utilities to prepare and file a compliance filing regarding their past and present operations and practices with respect to the safe drinking water standards, the quality and safety of water distributed to their customers, and compliance with the Commission's policies requirements, standards, and guidelines governing water quality and safety. The information we are seeking is set forth in Appendix A.

The compliance filings will be reviewed by the Commission's Water Division staff and as necessary, by the Legal Division staff, to evaluate the water utilities' compliance with this Commission's policies, requirements, standards, and guidelines. We also expect Water Division staff to schedule onsite inspections of the water utilities' plants to gather information about the availability of continuing water supply, and concerning water system operations and compliance with the Commission's policies, requirements, standards, and guidelines relating to the quality of drinking water provided by Class A and B water utilities. In conducting their review of the water utilities' compliance filings, the Water Division staff may request additional information from the water utilities as may be necessary.

We expect the Water Division to prepare a report of their initial findings and conclusions, and recommendations by the middle of November, 1998. This report

may also recommend that the water utilities prepare and file additional reports regarding their compliance with this Commission's policies, requirements, standards, and guidelines regarding water quality, safety and supply. This report will be mailed to all participants in this proceedings.

We will evaluate this report and determine what further action, if any is necessary in order to assure California ratepayers that they are receiving safe drinking water supplies from their water utilities. It is our express intent to determine whether our drinking water standards adopted in concert with the safe drinking water standards established by the EPA, the DHS and the federal and state Safe Drinking water Acts are adequate and sufficient with respect to substances such as VOCs, Perchlorate, and any other and any other contaminants such that the water utilities' compliance with those standards has fulfilled our mandate to ensure the provision of water that is wholesome, potable, and in no way harmful or dangerous to health. We will also determine whether additional or different drinking water quality standards should be adopted by the Commission to protect the health and safety of the public served by the water utilities, consistent with Public Utilities Code Section 770.

V. Categorization and Preliminary Scoping Memo

In 1996, Governor Wilson signed into law SB 960, which establishes new procedures (effective January 1, 1998) for the Commission in handling formal proceedings that go to hearing. We have adopted rules implementing SB 960, and this part of the OII addresses SB 960 procedures as applied to this proceeding. These procedures are found in Article 2.5 of our Rules of Practice and Procedures.

We do not anticipate any need for hearings to receive either "adjudicative facts" or "legislative facts" as defined in Rules 8(f)(1) and 8(f)(2), but we will make our final determination on whether to hold hearings in this proceeding after reviewing the filings by the respondents due July 15. 1998, and the issuance of the Water Division report due November 16. 1998. If any party to this proceeding believes that an

evidentiary hearing is required in this proceeding, that party must state that belief in its comments. The comments must expressly request an evidentiary hearing and justify the request by (1) identifying the material disputed facts, and (2) explaining why a hearing must be held. Also, the comments must describe the general nature of the evidence the party proposes to introduce at the requested hearing. Any right a party may otherwise have to an evidentiary hearing will be waived if the party does not follow the above procedures for requesting one.

We preliminarily determine this to be a quasi-legislative proceeding, as defined in Rule 5(d). Commissioner Henry M. Duque and ALJ Patricia Bennett are the Assigned Commissioner and Administrative Law Judge, respectively.

The scope of issues to be considered in this proceeding is as described in previous portions of the OII. (See Sections III and IV above.) SB 960 states the legislative policy that the Commission complete proceedings in the quasi-legislative category within 18 months. After issuance of the Water Division report on November 16, 1998, our goal is to make our final determination in this proceeding within 6 months thereafter, i.e., by May 16, 1999.

The actual schedule of events, and whether we can achieve our goal for completing the proceeding, depends in significant part on the adequacy of the information submitted by the participants and any hearings are held. We therefore ask the parties to propose schedules in comments with their responses to Appendices A and B. A final schedule will be developed after issuance of the Water Division's report.

IT IS HEREBY ORDERED that:

1. An investigation on the Commission's own motion is instituted to consider the following issues of regulatory policy and action:

   a. Are the prevailing drinking water standards safe, including those relating to VOCs and Perchlorate and any other known contaminants?

b. Are water utilities complying with prevailing safe drinking water standards, including those relating to VOCs and Perchlorate and any other known contaminants?

c. Are water quality standards adequate and safe, including, without limitation, whether the maximum contaminant levels (MCLs), Action Levels, and other Safe Drinking Water Act requirements relating to substances such as VOCs and Perchlorate, and any other contaminants, such that these standards adequately protect the public health and safety?

d. What appropriate remedies should apply for non-compliance with safe drinking water standards?

e. The extent to which the occurrence of temporary excursions of contaminant levels above regulatory thresholds, such as MCLs and action levels, may be acceptable in light of economic, technological, public health and safety issues, and compliance with Public Utilities Code Section 770.

2. Within 120 days of the effective date of this order, the Commission regulated Class A and Class B water utilities are to make initial compliance filings as set forth in Appendix A.

3. The Commission's Water Division shall review the initial compliance filings provided on Ordering Paragraph 2 above, and not later than 120 days after the period specified in Ordering Paragraph 2 above, make an initial report to the Commission on:

a. The status of their review of the initial compliance filings and whether additional compliance filings will be required;

b. A proposed schedule for the additional compliance filing;

c. Additional issues, questions and recommendations to be considered in this proceeding.

4. All Class A and Class B water companies are hereby made respondents to this OII. (See Appendix C.)

5. The California Water Association is made a respondent to this OII.

6. The Executive Director of the Commission serve a copy of this order on all Class A and Class B water utilities.

7. The Executive Director of the Commission shall extend an invitation to the Director of the Department of Health Services to participate in this investigation as set forth in Appendix B and serve copies of this order to attorneys representing the complainants in the pending lawsuits cited in footnote 1.

This order is effective today.

Dated March 12, 1998, at San Francisco, California.

RICHARD A. BILAS
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

I will file a written concurrence.
/s/ JOSIAH L. NEEPER
Commissioner

Certified as a True Copy of the Original

ASST. EXECUTIVE DIRECTOR, PUBLIC UTILITIES COMMISSION
STATE OF CALIFORNIA

APPENDIX A
Questions for the Utilities

For each of your separate districts, over the last twenty-five years:

1. What contaminants did you test for and when?
2. How did you know what to test for?
3. What were the standards (MCLs) for each contaminant?
4. What entity/company performs sample taking?
5. What entity/company performs your required testing?
6. How did you test for each of these contaminants?
7. What reports did you (or a contractor) create and who were they sent to?
8. What tests, if any, indicated failure to meet standards in effect at the time of the tests? List each failure by type of test, date of test, district and location, standard applicable at the time, results of the test, and corrective action taken.
9. What reports (if any) indicating you did not meet standards were not filed correctly or in a timely manner (list reports)?
10. What did you do if the levels exceeded standards?
11. What information did you provide the customers, and when?
12. Did you take any actions that were not specifically required by DHS in testing or treating the water or notifying the public?

End of Appendix A

APPENDIX B
Questions for the California Department of Health Services

Procedural Questions

1. What responsibilities did the various agencies (EPA, DHS, CPUC, Utilities, Congress, the California Legislature, public, etc.) have with respect to contaminants, testing and treatment?
2. What contaminants are regulated (SDWA)?
3. What contaminants are the water companies required to test for?
4. How have you informed the utilities what to test for and how to test?
5. Since 1974, what does the "state-of-the-art" allow for in testing contaminants? (What can be detected and at what levels?)
6. What contaminants exist in the water of Commission-regulated companies?
7. How do the utilities report the existence of these contaminants?
8. How do the utilities know what to do when contaminants were discovered?
9. How do you know when the water was contaminated?
10. How do you know the utilities reacted properly when contaminants were discovered?
11. If you know a utility has not reacted properly, what do you do about it?
12. What actions are required of the utilities in addressing various contaminants in addition to testing and treatment?
13. What actions, if any, should the utilities have taken independently in addressing various contaminants?
14. What impediments exist, if any, limiting the utilities' actions?

Scientific Questions

1. What is known about the health effects of VOCs and Perchlorate contaminants in drinking water supplies?
2. What was the expected danger to the various sectors of the public of these contaminants at various contaminant levels?
3. What treatment technologies existed to treat for these contaminants?
4. How effective are these technologies?
5. What was the interaction, if any, between various contaminants that increased or decreased health risks compared to a contaminant in isolation?
6. What are the health impacts, if any, of various treatment technologies themselves?
7. For the various health impacts that these contaminants or various treatment technologies could cause, what are other causes of these health impacts?
8. How prevalent are the other causes?
9. How effective are these other causes in causing health impacts compared to the effectiveness of the contaminants?

10. Presently, what are the responsibilities of utilities to the public in the area of contaminated water?
11. Are those responsibilities adequately defined and imposed? Are their adequate resources and penalties to make sure the responsibilities are carried through?
12. If utilities were deficient in any of their responsibilities, what action should be taken?
13. What contaminants were known to exist in water but weren't regulated? Why weren't they regulated?
14. Should the utilities have any additional responsibilities in this area?
15. If so, what action should be taken, and by whom, to define those responsibilities?

Policy Questions

1. Is the present regulatory situation adequate to protect public health?
2. What improvements or actions, if any, should be taken in the future to increase public health protection?
3. What, if any, impediments exist to prevent these actions from being taken should be done about those impediments?
4. What actions can be taken to remove these impediments?
5. Who should take the action?

End of Appendix B

Commissioner Josiah L. Neeper, Concurring:

I concur with the proposed OII.

This investigation is primarily and directly caused by a series of complaints filed at the Superior Court of the State of California for the City of Los Angeles. The gravamen of the complaints in these cases alleges that certain named water companies under our jurisdiction and other named defendants that are not regulated by this Commission caused the supply and delivery of contaminated water so as to cause harm to the plaintiffs; and that plaintiffs were exposed and continued to be exposed to toxins that are harmful to humans.

We open this OII and assert that the Commission's statutory jurisdiction require this agency to investigate whether the regulated water companies are in compliance with our current water quality standards which are routinely and normally derived from the work of the Environmental Protection Agency and the California Department of Health Services. EPA and DHS have important jurisdiction in this field. However, this Commission does have a fundamental duty to require the safety and reliability of water service as well as to ensure the economic viability of the water companies. It is in this sense, the Commission's regulatory jurisdiction may be viewed as an umbrella responsibility for the regulated water utilities ensuring safe and reliable water for the public at reasonable prices.

My support of the OII is based on the understanding and expectation that the scoping of the issues in this OII will specifically focus on investigating whether the water supplied to the public by (Class A and B) investor owned water utilities contains toxins and other substances at levels exceeding the California regulatory limits as set by us through the work of the EPA, the DHS or any other governmental agency. The cooperation of these two sister agencies is in my view critical to the successful completion of this investigation as the necessary technical skills for the endeavor we are undertaking in this

investigation resides in the two agencies. The results of this investigation should lead us to conclude whether the utilities are in compliance with the current water quality standards and also whether the standards should be changed or augmented; and if we find that they are out of compliance, we shall consider what actions the Commission should take to enforce the standards, and order other remedies for an immediate correction of deficiencies in their operation. The paramount concern has to be about the protection of the public health.

Because the allegations stem in part from the complaints filed at the Superior Court in Los Angeles, the investigation will benefit from the participation of all concerned who wish to participate.

Our duties in this OII are therefore (1) to determine compliance by utilities with current water quality standards to the extent that these standards cover all known and alleged contaminants; and (2) to consider ameliorative actions as warranted by the findings of the investigation including any appropriate changes to those standards as applied by us.

I would like to thank Commissioner Duque, his advisor Tim Sullivan, and the Water Division for the work they have done in bringing this OII to the Commission.

/s/ JOSIAH L. NEEPER
Josiah L. Neeper
Commissioner

San Francisco, California
March 12, 1998

(END OF APPENDIX A)

APPENDIX B

MEMORANDUM OF UNDERSTANDING

DEPARTMENT OF HEALTH SERVICES
and
PUBLIC UTILITIES COMMISSION

ON MAINTAINING SAFE AND RELIABLE WATER SUPPLIES
FOR REGULATED WATER COMPANIES IN CALIFORNIA

The Department of Health Services (DHS) and the Public Utilities Commission (PUC) recognize that it is their joint goal to ensure that California water companies regulated by PUC are economically maintaining safe and reliable water supplies. This Memorandum of Understanding (MOU) sets forth those policies and procedures to which DHS and PUC commit themselves towards achievement of that goal.

OBJECTIVES

The common objectives of the program, as they relate to public water systems subject to regulation by PUC and DHS, are as follows:

1. To monitor the systems to assure that safe and reliable water supplies are being maintained in accordance with applicable drinking water standards.

2. To identify contaminants and determine system improvements, including alternatives, necessary to provide safe and reliable water supplies.

3. To assure that system improvement projects, necessary to upgrade supplies to meet standards, are selected on the basis of priority and only after reasonable alternatives have been defined and and cost-effective analyses performed to arrive at a cost-effective solution.

4. To establish mutually agreed upon priorities for necessary system improvements.

PRINCIPLES OF AGREEMENT

For the purpose of this agreement, DHS and PUC agree that their staffs shall abide by the following principles:

1. To the extent its resources permit, DHS shall be responsible for evaluating and determining all technical aspects of monitoring water quality and identifying contaminants, and for identifying the various potential improvements necessary to provide safe and reliabl water supplies. DHS will also recommend its preferred solution. PUC shall be responsible for evaluating fire flow requirements and for making recommendations on the financial and rate making aspects associated with implementing the improvements identified by DHS to provide safe and reliable water supplies.

2. The staffs of the two agencies shall endeavor to keep each other fully informed of their respective activities and to assist each agency in carrying out its responsibilities.

3. Both agencies shall exchange all information available regarding water companies that are experiencing water quality and/or water availability problems. The information about the problems should include, but is not limited to:

   a. All communications with utilities;
   b. Orders;
   c. Decisions;
   d. Regulations and Policies;
   e. Proposed new water systems;
   f. Permits; and
   g. Reports, investigations, etc.

4. The PUC will notify DHS of all requests for rate increases from public water systems and shall routinely provide DHS with schedules of hearings. DHS will provide technical input to PUC as necessary and appropriate in PUC proceedings. This may include testimony before the PUC.

5. Identified system improvements necessary to provide safe and reliable water supplies should consider:

   a. Protection of public health;
   b. Short and long term benefits;

c. Cost effectiveness;

d. Cost to customers; and

e. Ability of customers to pay.

6. Each agency shall endeavor to provide appropriate assistance in necessary enforcement actions taken against individual water systems.

AGENCY RESPONSIBILITIES

The intent of this MOU is to identify the separate and distinct responsibilities of DHS and PUC. The following represents a general description of the roles and responsibilities of each of the respective agencies relating to water companies under PUC jurisdiction. Each agency agrees to adopt and implement policies and procedures necessary to administer its respective duties. These policies and procedures shall be coordinated between the agencies.

1. DHS shall be responsible for the following:

   a. Evaluation of public water systems to identify public health deficiencies and determine compliance with the Safe Drinking Water Act.

   b. Identification of alternative cost effective corrective actions necessary to upgrade water supplies to meet standards, and recommendation of its preferred solution.

c. Review and approval of plans and specifications and issuance of domestic water supply permits for improvements.

d. Inspection of water quality improvement projects both during and after construction, and sharing project status reports with PUC.

e. Participation at appropriate PUC public meetings with customers and/or evidentiary hearings where water quality matters raised by DHS or any other person are to be discussed.

2. PUC shall be responsible for the following:

a. Determination of the type of rate relief needed to finance necessary system improvement projects for other than Safe Drinking Water Bond Act loan projects, which by existing policy are required to be paid off by a surcharge on customer bills.

b. Arrange public meetings with customers and/or evidentiary hearings to ensure that customers are made aware of the need for system improvement projects and the impacts the projects will have on rates.

c. Promptly inform DHS of PUC public meetings with customers and/or evidentiary hearings where water quality problems will be discussed so that DHS may prepare and participate.

d. Provide analyses of the financial impacts, if any, of

system improvement projects on both customers and water companies.

PROJECT COORDINATION

1. DHS and PUC will designate project managers for their respective agencies when water quality and/or water availability problems exist and an improvement project is necessary. The project managers will be the principal contact persons for their agencies on a particular project.

2. Whenever a potential conflict regarding a specific project is identified, each agency will examine the alternative solutions available for upgrading water supplies and then meet to thoroughly discuss the issues involved and attempt to come to an agreement before announcing a position. If an agreement can not be reached after consultation between the Chief of the Sanitary Engineering Branch of DHS and the Chief of the Water Utilities Branch of PUC, DHS and PUC staff may advocate separate positions. Notwithstanding such disagreements, this MOU shall remain in effect.

3. There should be a complete exchange of information between DHS and PUC through the project managers. Each agency will set forth where and to whom material shall be sent. Copies of all correspondence between an agency and other parties concerning a water system improvement project shall be sent to the project manager of each agency until project completion.

4. The Chief of the Sanitary Engineering Branch of DHS and the Chief of the Water Utilities Branch of PUC, with designated members of their staff, shall meet as necessary but at least semi-annually to review progress of the water quality improvement effort in California and resolve any issues which have been identified by staff.

AMENDMENTS

This MOU may be amended by mutual agreement of DHS and PUC. It shall remain in effect until DHS and/or PUC decide otherwise.

Approved:

Director
Department of Health Services

Date: February 9, 1987

Approved:

Executive Director
Public Utilities Commission

Date: December 9, 1986

MEMORANDUM OF UNDERSTANDING

DEPARTMENT OF HEALTH SERVICES

AND

PUBLIC UTILITIES COMMISSION

ON MAINTAINING SAFE AND RELIABLE WATER SUPPLIES

FOR REGULATED WATER COMPANIES IN CALIFORNIA

The Department of Health Services (DHS) and the Public Utilities Commission (PUC) agree that it is their joint goal and responsibility to ensure that California water companies regulated by the PUC are economically maintaining safe and reliable water supplies. This Memorandum of Understanding (MOU) sets forth those policies and procedures which DHS and PUC shall follow to achieve this mutual goal.

OBJECTIVES

The common objectives of the program, as they relate to public water systems (PWS) subject to regulation by DHS and PUC, are as follows:

1. To monitor the systems to assure that safe and reliable water supplies are being maintained in accordance with applicable Drinking Water Standards and regulations established under the Safe Drinking Water Act (SDWA).

2. To identify system deficiencies, noncompliance with the SDWA, and determine needed improvements, including alternatives, necessary to provide safe and reliable water supplies.

3. To assure that system improvement projects necessary to upgrade system facilities to meet standards are selected on the basis of public health priority and only after reasonable alternatives have been defined and cost-effective analyses are performed to arrive at a cost-effective solution.

4. To establish mutually agreed-upon priorities for necessary system improvements.

AGENCY RESPONSIBILITIES

The intent of this MOU is to identify the separate and joint responsibilities of DHS and PUC. The following represents a general description of the roles and responsibilities of each of the respective agencies relating to water companies under PUC jurisdiction.

1. DHS shall be responsible for the following:

   a. To the extent its resources permit, DHS shall be responsible for evaluating and determining all technical aspects of monitoring water quality and identifying SDWA contaminants and for identifying the improvements necessary to provide safe and reliable water supplies. DHS will advise the PUC of its recommendations.

   b. Evaluation of PWS to identify public health deficiencies and determine compliance with the SDWA and all rules and regulations adopted thereunder.

   c. Initiation of enforcement actions pursuant to Sections 116650 and 116655 of the California Health and Safety Code to ensure compliance with the SDWA and all rules and regulations adopted thereunder.

   d. Evaluation of alternative cost-effective corrective actions necessary to upgrade water supplies to meet standards.

   e. Review and approval of plans and specifications and issuance of domestic water supply permits as required by law.

   f. Inspection of water quality improvement projects both during and after construction, and sharing of project status reports with PUC.

   g. Participation at appropriate PUC public meetings and/or evidentiary hearings where water quality matters raised by DHS or any other person are to be discussed.

2. PUC shall be responsible for the following:

   a. Approving rate changes needed to finance necessary system improvement projects.

   b. Arranging public meetings with customers and/or evidentiary hearings to ensure that customers are made aware of the need for system improvement projects and the impacts the projects will have on rates.

   c. Promptly informing DHS of PUC scheduled public meetings with customers and/or evidentiary hearings where water quality problems will be discussed.

d. Making recommendations on the financial and rate-setting aspects associated with implementing the necessary improvements identified by DHS to provide safe and reliable water supplies.

e. Evaluating non-SDWA water quality and fire flow requirements.

f. Providing analyses of the financial impacts, if any, of system improvement projects on both customers and water companies.

3. Joint Responsibilities

a. The staffs of the two agencies shall keep each other informed of their respective activities and assist each agency in carrying out its responsibilities.

b. Each agency shall provide appropriate assistance in implementing necessary enforcement actions taken against individual water systems. Directives and provisions (e.g., building permit bans/limitations, water conservation restrictions) in Compliance Orders, Citations, and permits issued by DHS shall be supported by PUC without unnecessary delay.

c. The PUC will notify DHS of all requests for rate increases from PWS and shall routinely provide DHS with all schedules of PUC hearings. DHS will provide technical input to PUC as necessary and appropriate in PUC proceedings. This may include testimony before the PUC.

d. Both agencies shall exchange all information available regarding water companies that are experiencing water quality, water availability, or pressure problems. The information about the problems may include, but is not limited to:

i. All communications with utilities,

ii. Citations and Compliance Orders issued,

iii. Decisions rendered,

iv. Regulations and policies,

v. Proposed new water systems,

vi. Permits issued and amended,

vii. Reports, investigations, etc.

PROJECT COORDINATION

1. Whenever a potential conflict regarding a specific project is identified, each agency will examine the alternative solutions available for upgrading water supplies. They shall then meet to thoroughly discuss the issues involved and attempt to come to an agreement before announcing a position. The protection of public health shall receive the highest priority. If an agreement cannot be reached after consultation between the Chief of the Field Operations Branch of DHS and the Head of Water Regulation at the PUC, DHS and PUC staff may advocate separate positions. Notwithstanding such disagreements, this MOU shall remain in effect.

2. There should be an open exchange of information between DHS and PUC. Each agency will set forth where to and whom material shall be sent. Copies of all correspondence between an agency and other parties concerning a water system improvement project shall be sent to the appropriate District Office of DHS and the appropriate office of PUC up and until the project is completed.

AMENDMENTS

This MOU may be amended by mutual agreement of DHS and PUC. It shall remain in effect until DHS and/or PUC decide otherwise.

Approved:

James Barton

Deputy Director
Prevention Services

Department of Health Services

Date: 10-25-96

Approved:

Wesley M. Franklin

Executive Director

Public Utilities Commission

Date: 11/21/96

(END OF APPENDIX B)